IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

2011 APR 29 AM 8: 23

STATE OF WEST VIRGINIA,
ex rel JOSEPH H. LAVIGNE., JR.

FILE
PUTNAM CO. CIRCUIT COURT

Petitioner,

v.

Civil Action No. 99-C-223
(Judge Spaulding)

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL
COMPLEX,

Respondent.

ORDER VACATING JUDGMENT AND GRANTING A NEW TRIAL

This matter came before the Court this day, pursuant to *Counsel's Post-Evidentiary Hearing Memorandum of Law in Support of Second Amended Habeas Petition* ("*Counsel's Habeas Petition*")(dkt. no. 162) filed on February 22, 2010 by Counsel, Gregory A. Ayers ("Mr. Ayers"), and *Petitioner's Post-Evidentiary Hearing Memorandum of Law in Support of Second Amended Habeas Corpus Petition* ("*Petitioner's Habeas Petition*")(dkt. no. 164) filed on February 23, 2010 by Joseph H. Lavigne, Jr. ("Mr. Lavigne"). These two *habeas petitions* were filed pursuant to W. Va. Const. Art. III § 4 and W.Va. Code § 53-4A-1 et seq. The Respondent filed through Counsel, Mark A. Sorsaia, Putnam County Prosecuting Attorney, on March 24, 2010, *Respondent's Post-Evidentiary Hearing Proposed Findings of Fact and*

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Rec'd 4/29/11 2:15pm

Conclusions of Law in Opposition to the Second Amended Habeas Petition ("*Response to Counsel's Petition*") (dkt. no. 167) and *Respondent's Post-Evidentiary Reply to the Petitioner's Pro Se Memorandum* ("*Response to Pro Se Petition*") (dkt. no. 166).

TABLE OF CONTENTS

I. BACKGROUND 3
1. Procedural Background 3
2. Factual Background 8
3. Evidence at Trial 14
a. State's Arguments 15
b. Defense Arguments 16
II. ARGUMENTS 17
1. Counsel's Habeas Petition 17
a. Insufficient Evidence for Conviction 18
i. Inconsistent Hearsay Statements 18
ii. Circumstances Surrounding the Crime 19
iii. Deficiencies in the Police Investigation 20
b. Erroneous Jury Instruction 21
c. Permitting KLL, an Incompetent Witness, to Testify 22
d. State's Use of False Testimony 23
e. Limitation of Defense to Four Character Witnesses 24
2. Mr. Lavigne's Habeas Petition 25
III. STANDARD OF REVIEW 26
IV. DISCUSSION 27
1. Jury Instructions 27
a. First Part of the Jury Instruction 29
b. Second Part of the Jury Instruction 38
2. Limitation of Defense to Four Character Witnesses 39
3. Sufficiency of the Evidence 43
a. Standard of Review for a *Habeas* Petition 43
b. Evidence Presented 45
i. KLL 47
ii. Mr. Franklin Stover, EMT 48
iii. Mr. Franklin Lee Humphreys, EMT 49
iv. Dr. Joan Phillips 50
v. Dr. Kimberly Martin 51
vi. Officer Ronald Lee Smith 52
vii. Trooper Donna Ashcraft 55
viii. Mrs. Jamie Loughner-Lavigne 57
ix. Mr. Joseph Lavigne 59
c. Analysis 59
i. KLL's Trial Testimony Alone is not Sufficient Evidence From Which a Rational Trier of Fact Could Have Found Proof of Guilt Beyond a Reasonable Doubt Because KLL Affirmatively Answered That She Did Not Know the Identity of Her Assailant 59
ii. As a Matter of Law, Contradictory, Out-of-Court, Hearsay Statements by the Accuser, Standing Alone, are Insufficient to Uphold a Conviction 61
V. CONCLUSION 73

I. BACKGROUND

On November 20, 1996, Mr. Lavigne was convicted of sexual assault in the first degree, child abuse resulting in serious bodily injury, and incest of his daughter, KLL.[1] Mr. Lavigne brings this *Habeas* to challenge his convictions. In this section, the Court will first review the procedural background of this *Habeas*. Second, the Court will examine the factual background of this case. In this section, the Court will detail the basic story that underlies this *Habeas* and the individuals involved in the underlying criminal trial. Finally, the Court will outline the evidence that was adduced at trial and generally describe the State's and Defense Counsel's theories of the case.

1. Procedural Background[2]

An extensive recitation of the procedural background is necessary to fully understand the nature of this *Habeas*. The procedural background to this case is convoluted and filled with missed deadlines. Currently, this *Habeas* has malingered in the court system for over a decade, has seen three Circuit Court Judges, five petitioner's counsel, many supplemental petitions, and separate independent DNA testing. This *Habeas* originated on July 11, 1999, when Mr. Lavigne filed his *pro se Petition for Writ of Habeas Corpus*. On November 17, 1999, Circuit Court Judge,

[1] Do to the sensitive nature of this case this Court will only refer to the victim and her infant siblings by their initials.
[2] The majority of the information contained in this section was collected from *Respondent's Response to Petitioner's Motion for Discovery* (dkt. no. 109).

Clarence L. Watt appointed Craig Patterson, Esq., to represent Mr. Lavigne in his *Habeas*. Mr. Lavigne, however, asked for new counsel and on September 8, 2000, the Kanawha County Public Defender's Office ("Public Defender") was appointed by Judge Watt to represent him. On November 9, 2000, Mr. Lavigne sent a letter stating that no action was being taken on his *Habeas*. Circuit Court Judge, N. Edward Eagloski transferred this case to this Court on January 25, 2001.

A *Scheduling Order* was entered on May 31, 2001. The *Order* stated that a petition should be filed by October 1, 2001, and the response should be filed sixty days later. On October 1, 2001, the Public Defender, through counsel, Richard L. Hollicker, Esq., filed an *Amended Petition for Writ of Habeas Corpus* along with a motion. After being granted a thirty day extension, the Respondent filed, on December 27, 2001 a *Response to Petitioner's Amended Petition for Writ of Habeas Corpus*. On February 11, 2002, the Court held a status conference where it was ordered that a completed Losh[3] checklist be filed.

On March 7, 2002, Mr. Lavigne filed a *pro se* response to the Respondent's Response. Five days later, on March 12, 2002, Mr. Lavigne's Counsel filed the required Losh checklist. On March 15, 2002, the Court granted the Petitioner's discovery motion for DNA testing and entered an *Order* which provided that evidentiary slides could be sent to Orchid Cellmark for DNA testing. On

[3] This refers to the potential *habeas* grounds described in *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

December 16, 2002, Mr. Lavigne and his Counsel were allowed to examine the evidence entered at his criminal trial, which was held by the Putnam County Circuit Clerk. At a September 8, 2003, hearing, J. Craig, Esq., was announced as new counsel for Mr. Lavigne.[4] Also at this hearing, J. Craig, Esq., stated that Mr. Lavigne did not want to do further DNA testing. In response, an omnibus hearing was set for April 22, 2004.

On April 22, 2004, the parties signed an agreed *Order* st ating that the omnibus hearing would be continued. Further, at the future omnibus hearing, no witnesses would be required, and that an additional amended petition could be filed. Subsequently, this Court sent a letter on December 15, 2004, stating its concern with the lack of action on the case. On January 5, 2005, Mr. Lavigne's Counsel filed a motion to extend the time to file an amended petition. On February 28, 2005, Mr. Lavigne sent a *pro se* letter to this Court to express his frustration with the lack of action taken on his case.

On March 15, 2005, Mr. Lavigne's Counsel filed a request with this Court to again extend the deadline for filing a new petition. On March 29, 2005, the Court sent a letter to the parties again expressing its concern over the lack of action taken in this case and set a status conference for April 22, 2005. On that date, Mr.

[4] Richard Hollicker Esq., was no longer able to represent Mr. Lavigne, due to Mr. Hollicker's appointment as a Kanawha County Magistrate.

Lavigne's Counsel filed a *Second Amended Petition*. The Court ordered that a memo in support of this *Petition* be filed by May 12, 2005. Furthermore, the Court allowed Mr. Lavigne to file a separate *pro se* petition because of his concerns that his Counsel was not arguing certain issues. On May 16, 2005, Mr. Lavigne filed an *Amended Pro Se Petition*. On June 27, 2005, it came to this Court's attention that J. Craig, Esq., was no longer with the Public Defender's Office. On August 12, 2005, the Respondent filed a *Response to the Amended Pro Se Petition*.

On August 30, 2005, Wendy Campbell, Esq., from the Public Defender's Office became Mr. Lavigne's Counsel. On September 2, 2005, this Court sent a letter stating that Mr. Lavigne could file a *pro se* response to the Respondent's *Response* and that Ms. Campbell could file a memorandum in support of the amended petition. On October 3, 2005, Ms. Campbell filed a memorandum of law. On December 7, 2005, the Respondent filed a memorandum of law. On January 5, 2006, Ms. Campbell filed a reply. At some point after the filing of this reply, Ms. Campbell left the Public Defender's Office and Greg L. Ayers, Esq., became Mr. Lavigne's fifth and final attorney.

On August 7, 2006, Mr. Lavigne sent a letter again expressing concerns about the status of his case. In response to this letter, this Court sent a letter outlining Mr. Lavigne's complaints. On September 7, 2006, Mr. Ayers sent a letter

stating that he disagreed with prior Counsel's decision to abandon additional DNA testing and brought up the issue of alleged missing evidence. On January 11, 2007, this Court held a hearing about forensic evidence and further DNA testing. In a May 30, 2007, *Order*, this Court allowed Mr. Lavigne and his Counsel access to the *guardian ad litem* documents relating to the victim, KLL.

On March 13, 2008,[5] this Court entered an *Order* for further DNA testing of physical evidence that was entered into Mr. Lavigne's criminal trial. On March 13, 2009, Mr. Lavigne's Counsel filed a *Motion for Further Discovery*. In this *Motion*, Mr. Lavigne's Counsel sought to obtain notes and reports that related to allegedly missing evidence, reports and notes that pertained to an interview with KLL, reports and notes that related to investigating other individuals, and a reminder to the Court about alleged false testimony. On April 17, 2009, Respondent filed a *Response* to this *Motion*. The Court held a hearing as to these issues on April 30, 2009. On May 11, 2009, the Court entered an *Order* granting the *Motion for Further Discovery* and further ordering that a hearing be held after the discovery was exchanged.

On June 12, 2009, this Court held a status hearing wherein an omnibus hearing was scheduled for February 6 and 7, 2010. At the omnibus hearing, eight

[5] Between May 30, 2007, to March 13, 2008, there were multiple inquires and orders in reference to DNA evidence. Ultimately, the Court permitted the petitioner to examine for DNA any evidence collected in this case.

witnesses testified and fourteen exhibits were entered into evidence. At the conclusion of the hearing, the Court set a deadline for filing of final *habeas* petitions and responses.

2. Factual Background

On February 11, 1996, when the brutal sexual assault that underlies this *Habeas* took place, the Lavigne family had five members: Mr. Lavigne, his wife Jamie Loughner-Lavigne ("Mrs. Lavigne"), and three children, ILL, a male child who was seven, CLL, a male child who was one, and KLL, a female child who was five. By all accounts, this was a loving family and there were no signs of abuse.[6] Trial Tr. Vol. 1, 201.

The Lavignes lived at 3426 Teays Valley Road in Hurricane, West Virginia. Due south of the Lavigne household is a Dominoes Pizza, which abuts Route 34. Due east from the Lavigne household are two churches, which are separated by a large parking lot.[7] The Lavigne household and the church parking lots are separated by Hickory Mills Drive.

On Saturday, February 10, 1996, the evening before the sexual assault, the Lavignes had Todd Ferguson and Janice Mullins visit in their home. The four adults spent a quiet night at the Lavigne household playing a board game called

[6] KLL has stated multiple times to different people that nobody had every sexually molested her before.
[7] The northernmost church is a Catholic church and the southernmost church is an Episcopalian church.

Cosmic Encounters. While the four adults were playing board games, KLL and her older brother, ILL, watched movies in the recreation room of the house. Around midnight, the board game ended and Todd and Janice left. At some point, Mr. and Mrs. Lavigne came into the recreation room and put a blanket on the two children. They both slept in that room that night.

In the early morning hours[8] of Sunday, February 11, 1996, KLL was carried from the recreation room[9] on the bottom floor of her house, across Hickory Mills Drive, to the church parking lot. Once across the street KLL's assailant told her to take off her clothes[10] and brutally sexually assaulted her. The sexual assault literally ripped KLL's vaginal area. The damage was so extensive that it tore through her sphincter muscles. KLL was left bloody and as many have put it, gaping wide open. After this horrendous act, KLL's assailant picked up her clothes[11] and ran away from the road, behind the church. KLL ran back into her house. KLL stated that everyone in her family, including her father, the petitioner, were inside the house when she returned to the residence. Once inside, KLL returned to the playroom and laid down where she was initially sleeping. But eventually, KLL went upstairs

[8] While the exact time of day is uncertain, KLL has stated that it was starting to become light outside.
[9] KLL's older brother, ILL, was still in the playroom when KLL was taken.
[10] There is some indication in the record that KLL stated that her assailant told her to take off her clothes or he would spank her. Trial Tr. Vol. 1, 289. Officer Smith testified that KLL stated that her assailant told her that if she told anyone that she would be spanked. Trial Tr. Vol. 2, 680.
[11] After an extensive search, KLL's clothes were never found.

to grab a nightgown and a towel and went back downstairs to clean herself.[12] This sequence of events was described by KLL.

At trial, it was asserted by the petitioner that he found KLL in the bathroom with a washcloth cleaning herself. Mr. Lavigne woke his wife. Mrs. Lavigne testified that her husband had been asleep with her throughout the night.[13] Trial Tr. Vol. 1, 280. According to Mr. Lavigne, KLL stated that she had injured herself pooping. Trial Tr. Vol. 1, 186. When Mrs. Lavigne came into the bathroom, she drew a bath for KLL and briefly put her in the bath. Trial Tr. Vol. 2, 681. At some point, however, the parents realized that KLL had been sexually assaulted. After KLL stopped saying that she pooped herself, KLL started to say that she had been sexually assaulted. KLL alleged to her parents that her father was her assailant and also that a man that resembled her father was her assailant. Trial Tr. Vol. 1, 189; Trial Tr. Vol. 2, 321, 346-347; Trial Tr. Vol. 3, 815-816. Given that the child was sexually assaulted and was saying that her assailant was her father and also that he looked like her father, Mr. Lavigne called 911.

[12] On the second floor of the house are, *inter alia*, KLL's room and a second bathroom. Presumably, KLL went upstairs to her room to retrieve a nightgown, went to the bathroom upstairs to obtain towels, and went back downstairs to the first floor bathroom to clean herself.

[13] Robert Franklin Stover, a paramedic who was one of the first people on the scene testified that Mrs. Lavigne stated to him that she found KLL and that she went and woke Mr. Lavigne. Trial Tr. Vol. 2, 422-423. Mrs. Lavigne, however, testified at trial that she was woken by Mr. Lavigne. Trial Tr. Vol. 1, 281. Furthermore, Mrs. Lavigne testified that she did not remember being asked by Mr. Stover about whether her husband was in bed asleep when she found KLL. *Id.* 306.

At 7:56 a.m., Mr. Lavigne called 911 and informed them that KLL had been sexually assaulted. Mr. Lavigne told the 911 dispatcher that KLL was stating that her assailant was him and looked like him. Shortly thereafter, two Putnam County Emergency Medical Services personnel, Robert Franklin Stover ("Mr. Stover") and Franklin Lee Humphreys ("Mr. Humphreys"), arrived at the home. Shortly after the paramedics arrived, Hurricane Police Officer Ronald Lee Smith ("Officer Smith") arrived at the house. After attending to KLL, Officer Smith and Mr. Stover went to the church parking lot, [14] but no evidence was found.[15] Trial Tr. Vol. 2, 520-521.

Officer Smith decided not to cordon off the parking lot but instead asked the Father of the Catholic Church[16] to ask his parishioners to look out for anything that did not look right, such as a little girl's clothes.[17] Furthermore, Officer Smith decided not to dust for fingerprints the front and back doors of the house. Officer Smith initially thought that the front door could not be printed because it was

[14] Officer Smith admitted during the omnibus hearing that this search was not a thorough search. Omnibus Hearing Tr. 180.
[15] At some point after this initial search, Officer Smith ordered two deputies to do another search. Trial Tr. Vol. 2, 521. It is unclear whether this search happened before church patrons arrived for Sunday school.
[16] The Father of the church lived in an apartment inside the church.
[17] There is no indication in the record whether the Father actually spoke with the parishioners as they were driving into the parking lot.

wrought iron.[18] Officer Smith chose not to dust the back door because he felt that too many people had been through the door.[19]

Ultimately, the Police collected several pieces of evidence from the house including five towels, four washcloths, and a pair of green pants.[20] Two of the towels and two of the washcloths were collected by the paramedics and subsequently delivered to the hospital. Omnibus Hearing, January 6, 2010, Pet. Exh. 3. The hospital records indicated that Officer Smith collected this evidence. *Id.* Pet. Exh. 7. Officer Smith claims that he never received the two towels or two washcloths. These two towels and two washcloths have never been found. Furthermore, the other two washcloths were not properly packaged for delivery to the testing laboratory.

Mr. Lavigne stayed with Officer Smith while KLL and Mrs. Lavigne were transported to the hospital. Once at the hospital, it was determined that KLL would need extensive surgery to repair the damage that was caused during the sexually assault. However, before KLL went to surgery, Doctor Joan Phillips ("Dr. Phillips") and Doctor Kimberly Martin ("Dr. Martin") interviewed KLL outside the

[18] However, during cross-examination, Officer Smith admitted that the door handle was smooth. Trial Tr. Vol. 2, 594-596. Furthermore, "[t]he paramedics even noted in their report that the front door could be dusted for fingerprints." *Counsel's Habeas Petition*, (dkt. no. 162), 5 (citing to Pet. Exh. 3).

[19] Mr. Lavigne's counsel argues that Officer Smith "admitted there [were] only a small number of people that had touched the door that day and therefore those people could be excluded." *Counsel's Habeas Petition*, (dkt. no. 162), 5 (citing to Trial Tr. Vol. 2, 591). Furthermore, Counsel argues that the door had been painted the previous evening. Therefore, that door would have been a good place to search for fingerprints. *Counsel's Habeas Petition*, (dkt. no. 162), 5. In any event, for whatever reason the police made no attempt to lift fingerprints from either door.

[20] Another pair of green pants was subsequently brought to the police by Mrs. Lavigne.

presence of her mother. After this interview, Dr. Martin interviewed KLL and Mrs. Lavigne together.

After her surgery, KLL gave multiple interviews. On February 13, 1996, she participated in an interview, which was tape recorded, with Trooper Donna Ashcraft ("Trooper Ashcraft"). On April 14, 1996, she participated in interviews, which were tape recorded, with Officer Smith and a social worker.[21] At some point,[22] Officer Smith and Officer Richard Gillespie ("Officer Gillespie") conducted an interview with KLL where she gave a detailed physical description of her assailant, which was turned into a police sketch. Trial Tr. Vol. 2, 631, Defendant's Exhibit 2.

After KLL and Mrs. Lavigne were transported to the hospital, Mr. Lavigne stayed with Officer Smith. Officer Smith readily admits that Mr. Lavigne cooperated with him in every way that he was asked. Mr. Lavigne gave the police permission to search his house multiple times, he gave the police the clothes that he was wearing, he gave samples of his blood and pubic hair, and he gave a statement to the police. *Id.* Later in the day, Mr. Lavigne was officially arrested based on the statements of KLL.

[21] Each person had a separate interview with KLL.
[22] The record is inconclusive as to when this interview took place.

The Grand Jury returned a three count indictment against Mr. Lavigne: count one was sexual assault in the first degree; count two was child abuse resulting in bodily injury; and count three was incest. On November 20, 1996, Mr. Lavigne was found guilty on all three counts. On January 23, 1997, Judge Clarence L. Watt sentenced Mr. Lavigne to not less than fifteen nor more than thirty-five years for count one; not less than one nor more than five years for count two; not less than five nor more than fifteen years for count three; and a $1,000 fine. Counts one and three were to run consecutively with each other. Count 2 was to run concurrently with counts one and three. To date, Mr. Lavigne has been incarcerated in prison for over fifteen years.

3. Evidence at Trial

The contested issue in the trial was the identity of KLL's assailant. There were many items introduced at trial, but none directly connected Mr. Lavigne as KLL's assailant. The evidence that was sent for testing included "a sex crime kit, three towels, two washcloths,[23] a pair of pants, paper towel, two samples of known blood of Mr. Lavigne, underwear, shirt, sweatpants, t-shirt, and a pair of socks and shoes[,]" as well as an "afghan and another pair of pants." Trial Tr. Vol. 2, 467. Furthermore, a carpet sample and four hairs found on KLL's body[24] were also sent.

[23] As stated *supra*, these washcloths were inappropriately packaged and could not be tested.
[24] This hair was from her vagina, right labia, perineum, and from her mouth.

Of these items, the four towels, floor samples, vaginal swabs, vaginal slides, anal swabs, paper towels, and the carpet fibers had blood on them. *Id.* at 480. Of these, only two were tested for DNA. *Id.* When the DNA tests were done on these items, it was determined that "Mr. Lavigne was excluded as having deposited any genetic material on those items." *Id.* at 475.

It is important to note that none of Mr. Lavigne's clothing contained any traces of blood evidence. Furthermore, his clothing contained no trace evidence that would have warranted further testing. *Id.* at 483. This includes no hairs or vegetation. As to the hairs that were found, these could not be tested. Therefore, they could not exculpate or inculpate Mr. Lavigne. Furthermore, there was no semen found on anything.[25] Finally, KLL had debris taken from her body. These were determined to be plant material or not to be of human biological origin. No testing was done on these pieces. *Id.* at 477.

In summary, despite the brutality of the attack, there was no physical and/or forensic evidence obtained that linked anyone to the sexual assault.

a. State's Arguments

The State could not argue at trial that the physical evidence linked Mr. Lavigne to the crime because it simply did not. The only evidence that directly

[25] The hospital report indicates that dried seminal deposits were collected in the O.R. in specimen cups. Omnibus Hearing, January 6, 2010, Pet. Exh. 7. However, it was stated at trial that no semen was identified on the submitted items. Trial Tr. Vol. 2, 475.

linked Mr. Lavigne to this crime was KLL's statements. These statements, however, were contradictory. The State framed its closing argument on whether one believed or doubted KLL's inculpatory statements. To deal with KLL's exculpatory statements the State argued that the child was repeatedly berated into changing her story. Beyond these statements, however, the State put on no other evidence that directly linked Mr. Lavigne to the crime. The only other evidence that was admitted by the State was to show opportunity and the improbability of someone else committing the crime.

b. Defense Arguments

Basically, the Defense argued at trial that the State did not have enough proof based on KLL's statements. Mr. Lavigne's defense was that KLL's own statements, which included that her assailant had fled in a direction away from her home, but her father was inside when she returned home and KLL's multiple statements that she did not know the identity of her assailant, actually showed that the State could not prove that he was KLL's assailant. Mr. Lavigne also argued his own good character, which showed that he loved his children and was a law abiding citizen. Also, Mr. Lavigne countered the State's assertion that Katie was being pressured to change her story by pointing out that family members were not present when KLL gave statements that exculpated her father. In addition, Mr.

Lavigne argued that KLL was not being pressured to change her in-court testimony because at the time of trial she was living with disinterested family outside of West Virginia.

Finally, the Defense contended, given the violent nature of the sexual assault and where it took place, for Mr. Lavigne to be guilty, there would have been some physical inculpatory evidence found. There was no evidence found on Mr. Lavigne; there were no scratches, bruises, scrapes, blood, or semen found on him. There was no evidence found on KLL that linked her father to the assault. Also, her clothes worn at the time of the assault were never recovered. In short, there was no physical evidence found that directly connected Mr. Lavigne to this crime and the victim's inconsistent statements were insufficient to convict.

II. ARGUMENTS

While this Court will not directly address each issue raised by Counsel and Mr. Lavigne, a brief summary is appropriate.

1. Counsel's Habeas Petition

Counsel for Mr. Lavigne raises five issues in *Counsel's Habeas Petition*: "(1) insufficient evidence for conviction; (2) erroneous jury instruction regarding uncorroborated testimony of the victim which denied Mr. Lavigne due process under the State and Federal Constitutions; (3) trial court permitting KLL, an

incompetent witness, to testify; (4) State's use of false testimony of Donna Ashcraft (McNeely) to obtain conviction; and (5) trial court's limitation of defense to four character witnesses." *Counsel's Habeas Petition*, (dkt. no. 162), 1.

a. Insufficient Evidence for Conviction

Counsel's contention on this issue revolves around three arguments: Mr. Lavigne's convictions rest upon prior inconsistent hearsay statements which are insufficient evidence to uphold a conviction as a matter of law; circumstances surrounding the crime exonerate Mr. Lavigne; and deficiencies in the police investigation.

i. Inconsistent Hearsay Statements

Counsel suggests that the conviction in this case is based on "the out-of-court hearsay statements of his five-year-old daughter which were neither reliable nor an accurate identification of him as her assailant." *Counsel's Habeas Petition*, (dkt. no. 162), 7. Counsel cites several cases in the *Petition* that he suggests stand for the proposition that prior inconsistent hearsay statements alone are insufficient as a matter of law to uphold a conviction. *Id.* at 7-9(citing Ellison v. Sachs, 769 F.2d 955 (4th Cir. 1985); Beber v. Florida, 887 So.2d 1248 (Fla. 2004); United States v. Bahe, 40 F.Supp.2d 1302, 1305 (D.N.M. 1998)(stating that "[i]n cases in which an inconsistent out-of-court statement was admitted as substantive evidence

of the charged sexual acts and no other evidence was presented, state and federal courts have nearly uniformly concluded that there was insufficient evidence to support the conviction.")).

First, counsel avers that significant discrepancies exist in KLL's description of her assailant, both in court and out of court. For instance, KLL has indicated to some that her assailant looked like her father while telling others that her assailant was her father. *Id.* at 2 (citations omitted). In her in-court testimony, KLL could not identify who her assailant was and furthermore, stated that her father was inside when she returned home after the attack notwithstanding her statement that her assailant left in a south-easterly direction away from her home. *Id.* (citations omitted). Additionally, counsel states that KLL's physical description of her assailant does not match her father: specifically that the assailant had black longer hair, "black peach skin, and a little black hair on [his] chin." *Id.* (citations omitted). Finally, there were significant discrepancies between what the assailant was wearing and what Mr. Lavigne was wearing the day of the crime. *Id.*

ii. Circumstances Surrounding the Crime

Counsel suggests that Mr. Lavigne's actions after the crime show that he is innocent. *Counsel's Habeas Petition*, (dkt. no. 162), 4 (citations omitted). For instance, Mr. Lavigne was the one who wanted to call 911. *Id.* He was forthright

with the police that his daughter thought that he perpetrated the crime. *Id.* Mr. Lavigne also fully cooperated with the police by giving them his clothes as well as providing them blood and pubic hair samples. *Id.* Furthermore, he helped in the search for KLL's clothes.

iii. Deficiencies in the Police Investigation

Counsel avers that because of poor police work, the police did not find the real perpetrator. *Counsel's Habeas Petition*, (dkt. no. 162), 5. First, the police did not try to lift finger prints from the Lavigne's front or back doors. *Id.* At the time of the crime, Officer Ron Smith stated that taking finger prints would be pointless. However, Officer Smith admitted at the omnibus hearing that finger prints could have been lifted. Furthermore, a composite photo that was prepared from KLL's description of her assailant was never used to try and find someone else.

Counsel also claims that the police lost evidence that could have exculpated Mr. Lavigne. *Id.* at 6. Specifically, the two towels and two washcloths that were used by KLL after the attack were never recovered. These pieces of evidence could have contained DNA evidence from the perpetrator. The hospital personnel who took care of KLL collected the towels and washcloths and released them to Officer Smith. Officer Smith stated that he never received them. Regardless, the items, if they were collected at the hospital, were not extant at the time of the trial nor now.

Counsel also points out that the police did not investigate any of the registered sex offenders in Putnam County. *Id.* Furthermore, Mrs. Lavigne gave the police a list of names of people who she thought should be contacted. The police only contacted three people from the list of 15-20 persons. Importantly, the police also did not adequately investigate Mark Berry. Both Mr. Lavigne and Mrs. Lavigne were scheduled to testify against Mr. Berry in a murder trial in Lincoln County. For what ever reason, Trooper Donna Ashcraft wrongly communicated that he was on home confinement with electronic monitoring on the morning of the assault. Therefore, he was not investigated.

b. Erroneous Jury Instruction

Petitioner is challenging the following instruction which he claims denied him his due process rights:

> The Court instructs the jury that a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible.
>
> Thus, if you believe the testimony of [KLL] beyond a reasonable doubt you may return a verdict of guilty under the indictment.

Trial Tr. Vol. 2, 1032.

Petitioner avers that this instruction "is not a correct statement of the law because it [is] not supported by the evidence." *Counsel's Habeas Petition*, (dkt. no.

162), 11. Counsel suggests that KLL never testified as to who her assailant was. Because she never testified as such, it was inappropriate to give an instruction that basically states that you can find the defendant guilty based upon the uncorroborated testimony of the victim. Consequently, this instruction "misled the jury into believing KLL's testimony was sufficient to establish the elements of the offenses, and thus for conviction . . . ." *Id.*, 10-11. This error "unconstitutionally relieved the State of its burden to prove the elements of the offenses beyond a reasonable doubt." *Id.*, 13.

c. Permitting KLL, an Incompetent Witness, to Testify

Counsel avers that Mr. Lavigne was "denied the right of confrontation, due process and the effective assistance of counsel when the trial court permitted the testimony of KLL, an incompetent witness, at trial." *Id.* at 13. Specifically, Counsel states that the trial court found her competent and allowed her to testify "despite clear evidence presented by Attorney Harvey Peyton, [KLL's] *guardian ad litem*, Dr. William Fremouw, the psychologist who evaluated [KLL], and her *in camera testimony* . . ." which showed that she was not competent. *Id.* at 14. Furthermore, while KLL was testifying at trial she shut down on cross examination, which denied Mr. Lavigne his "constitutional rights to due process and confrontation." *Id.* (citations omitted). But even assuming that KLL was competent and answered

questions, Mr. Lavigne's trial counsel was ineffective because she "failed to question [KLL] and elicit answers that could have persuaded the jury her father was not her assailant." *Id.*

d. State's Use of False Testimony

Counsel claims that the "state presented false testimony that Mark Berry was on electronically monitored home confinement to show he could not have committed the crime in this case which reasonably affected the jury's decision to convict Mr. Lavigne, and thereby denied him due process of law." *Counsel's Habeas Petition*, (dkt. no. 162), 22. Both Mr. Lavigne and Mrs. Lavigne were scheduled to testify on behalf of the State in Mr. Berry's murder trial in Lincoln County. This gave Mr. Berry a motive to "retaliate against Joe and his wife or try to eliminate them as witnesses." *Id.* at 24.

However, Trooper Ashcraft testified that Mr. Berry was on electronically monitored home confinement and could not have left his house without detection on the day in question. She had confirmed Mr. Berry's status with the Lincoln County Prosecutor's Office. However, after trial, it was learned during the *Habeas* discovery process, that Trooper Ashcraft was wrong and that Mr. Berry was not on electronically monitored home confinement. Furthermore, the Petitioner claims

this false testimony had a material effect on the jury verdict because Trooper Ashcraft's testimony completely eliminated Mr. Berry as a suspect.

e. Limitation of Defense to Four Character Witnesses

Counsel argues that the "[t]rial court's ruling allowing only four character witnesses to testify in Joe Lavigne's defense denied him his right to compulsory process and due process as Joe's character and credibility were key, important issues and this limitation likely affected the jury's verdict." *Counsel's Habeas Petition*, (dkt. no. 162), 25. Counsel acknowledges that typically, one cannot have cumulative evidence.

However, he states that "there is an exception [to this general rule] 'in a few cases where the character of a party to a civil action, or of an accused in a criminal prosecution, was in issue or one of the material and important facts in the cause." *Id.* at 28 (quoting B.H. Glenn, *Propriety and Prejudicial Effect of Trial Court's Limiting Number of Character or Reputation Witnesses*, 17 A.L.R.3d 327, §3a (1965-1978). As an example of this proposition, counsel cites *State v. Padgett*, 93 W.Va. 623, 628, 117 S.E. 493, 495 (1923)(holding that it was reversible error to limit the number of character witnesses to two in a criminal trial when the crime charged is so contrary to the way one has lived his or her life). Furthermore, Counsel argues that the presentation of his character witnesses "consumed 30 pages of a trial

transcript of over 1,000 pages, less than 3% of the total trial. This stingy restriction of Joe's character evidence which was so critical to his defense was arbitrary, unreasonable and an abuse of discretion." *Id.* at 30.

2. Mr. Lavigne's Habeas Petition

Mr. Lavigne's *pro se* petition has a total of twenty five issues. Five of these issues have been covered by *Counsel's Post-Evidentiary Hearing Memorandum of Law in Support of Second Amended Habeas Petition.* Therefore, these will not be considered separately by this Court. Mr. Lavigne raises the following issues, which are presented in his order of importance: #4 – ineffective assistance of counsel; #2 – right to confront witnesses; #24 – inadequate investigation and unprofessional police behavior; #11 – prejudicial statements and acts by the trial judge; #20 – burden of proof shifted to the defense; #16 – evidence of a purely prejudicial nature allowed to be displayed to the jury; #12 – prejudicial statements by prosecutor; #10 – suppression of helpful evidence by prosecutor; #19 – improper communications between prosecution witnesses; #1 challenge to grand jury; #21 – unreasonable standard of proof; #8 – constitutional errors in evidentiary hearings; #13 – irregularities in the arrest; #14 – illegal detention prior to trial; #3 – denial of counsel; #17 nondisclosure of grand jury minutes; #18 – refusal to turn over witness notes after witness has testified; #22 – lack of a fair trial due to prejudice

caused by the nature of the crime; #23 – selective prosecution; #9 – prejudicial pretrial publicity; #25 – inadequate resources to prepare a legal defense at Mount Olive Correctional Complex. *Petitioner's Habeas Petition*, (dkt. no. 164) 1-2.

III. STANDARD OF REVIEW

"Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that [1] there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, . . . or [2] that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State, may, . . . file a petition for a writ of habeas corpus . . .." W.Va. Code § 53-4A-1(a). In discussing clause number two above, it has been suggested that "errors short of constitutional dimension can be raised but only if they are of a fundamental nature. A habeas corpus proceeding is not a substitute for an appeal in that ordinary trial errors not involving constitutional violations will not be reviewed." Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure, Volume 2, pg. II-571 (citing *Edwards v. Leverette*, 163 W.Va. 571, 258 S.E.2d 436 (1979).

In *Losh v. McKenzie*, 166 W.Va. 762, 768-769, 277 S.E.2d 606, 611 (1981), the West Virginia Supreme Court of Appeals listed fifty-three potential grounds for relief in a habeas corpus action. Some of these that were listed include "State's knowing use of perjured testimony; . . . instructions to the jury; . . . [and] sufficiency of evidence." *Id.* The Court also stated that "[s]everal of these grounds have never risen to the requisite constitutional dimension to be sufficient for habeas corpus relief in our Court; however, we have been over-inclusive and listed all grounds which might be considered sufficient." *Id.*

IV. DISCUSSION

This Court finds that Mr. Lavigne's constitutional rights were violated because a jury instruction relieved the State of its burden of proof, because the trial court inappropriately limited him to only four character witnesses, and because no rational trier of fact could have found proof of guilt beyond a reasonable doubt

1. Jury Instructions

This Court finds that the complained of jury instruction violated Mr. Lavigne's constitutional and fundamental rights. The complained of jury instruction states:

> The Court instructs the jury that a conviction for any sexual offense may be obtained on the *uncorroborated testimony* of the victim, unless such testimony is inherently incredible.

> Thus, if you believe the testimony of [KLL] beyond a reasonable doubt you may return a verdict of guilty under the indictment.

Trial Tr. Vol. 3, 1032 (emphasis added).

When challenging jury instructions in a habeas petition, the reviewing court must "examine all of the instructions as a whole to determine whether the jury would have been misled." *State ex. rel. Hall v. Liller*, 207 W.Va. 696, 702, 536 S.E.2d 120, 126 (2000). Furthermore, the West Virginia Supreme Court of Appeals has "stated that '[i]n general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law [.]'" *Id.* 207 W.Va. at 701-702, 476 S.E.2d at 125-126 (quoting *State v. Miller,* 197 W.Va. 588, 607, 476 S.E.2d 535, 554 (1996)).

"'In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged . . . .' Syl. Pt. 4, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976)[.]" Syl. Pt. 7, in part, *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994). A constitutional error has occurred if a jury instruction "supplies by presumption any material element of the crime charged." Syl. Pt. 1, *State v. O'Connell*, 163 W.Va. 366, 256 S.E.2d 429 (1979); *See also* 39 C.J.S. Habeas Corpus § 122 (2010)(stating that "errors with respect to instructions may be grounds for relief where they result

in a deprivation of constitutional rights, such as where the burden of proof of alibi is placed on the accused; [or] an instruction impermissibly relieves the State of its burden to prove the accused's mental state . . . .").

a. First Part of the Jury Instruction

The first part of this jury instruction is, in fact a correct statement of the law. Syl. Pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E2d 234 (1981). Basically, the first part of the instruction informs a jury that testimony of a victim by itself is sufficient to support a guilty verdict for a sex crime if (i) the testimony addresses each element of the crime and (ii) is not inherently incredible. In the case at bar, this jury instruction was not appropriate because KLL's *trial* testimony did not identify her assailant. In fact, KLL *testified* that she did not know the identity of her assailant.

KLL never testified that her father sexually assaulted her. In fact, the only basis for giving this instruction were the two following passages from the State's direct and redirect examination.

> Q. [KLL], remember you told the Judge and Ms. Allen and everybody that you were going to tell us what happened. And we need to know, really, who did this to you? Do you remember?
> A. *I don't know.*
> Q. You don't know? Have you ever seen him before?
> A. [(]Whereupon, the witness turned slightly in chair and looked at the Defendant.)

Trial Tr. Vol. 1, 253 (emphasis added).

> Q. . . . Do you remember who that person that hurt you looked like? . . .
> A. (Whereupon, witness looked over her right shoulder and pointed to the Defendant.)
> Q. Like your daddy?
> A. (No response.)

Id. 263.

First and foremost, as explained *supra*, to give the challenged jury instruction, KLL's testimony must have addressed each element of the crimes charged. In this case, the most important element of the crimes charged is the identity of her assailant. KLL's trial testimony, however, does not identify her father as her assailant. KLL's testimony can be summarized into three parts: her assailant resembled her father; a supposed glance at Mr. Lavigne when re-asked if she knew her assailant; and an affirmative answer that she did not know the identity of her assailant.

This Court must first discuss KLL's supposed glance as noted in a parenthetical remark or notation by the court reporter. For the following reasons, this Court will not consider this as evidence in this *Habeas*. First, it is inappropriate for a court reporter to place a significant, non-verbal movement into the record unless he or she is directed too note it into the record. If a court reporter takes such

an action, an appellate court should not consider that part of the transcript as evidence. In the case at bar, no one asked and the trial court did not direct the court reporter to put this parenthetical remark into the record.

As a brief explanation, parenthetical remarks or notations within a transcript are contained within parentheses and are basically the court reporter's own words. Parentheticals are a court reporter's way to communicate what is happening in the courtroom. For instance, the Texas Court Reporter Certification Board's *Uniform Format Manual*[26] lists several examples of the most common parentheticals:

> (Call to order of the court), (Jury not present), (Jury present), (The witness was sworn), (Interpreter sworn), (Recess from ^ to ^), (Lunch recess from ^ to ^), (At the Bench, on the record), (At the Bench, off the record), (Discussion off the record), (Moving head up and down), (Moving head side to side), (Indicating), (Descriptive sound), (Snapping fingers), (Writing), (Weeping), (No verbal response), (Interruption), (Witness complies), (Sotto voce discussion between ^ and ^) or (^ and ^ whispering), (Sotto voce discussion), (Sotto voce discussion off the record), (The jury was sworn) or (The jury panel was sworn), (The witness was affirmed), (Discussion between interpreter and witness), (Pointing), (Drawing), (Pausing), (Exhibit ^ marked), (Proceedings concluded / recessed at ^), (Requested portion was read)

Uniform Format Manual, 3.16(a) (2010).

[26] This can be obtained at the following website: http://www.crcb.state.tx.us/ufm.asp#3.16

Indiana's *Court Reporter Handbook*[27] also lists several examples.

> (a) [motions in limine filed, heard and granted], (b) [judge administers oath to petit juror panel], (c) [voir dire examination occurs], (d) [jury selected and sworn], (e) [jury separates; admonishment given], (f) [argument heard and objections made regarding preliminary instructions], (g) [judge reads preliminary instructions 1, 2, 3, 4], (h) [counsel make and conclude opening statements], (I) [motion for a separation of witnesses made and granted], (j) [(name of counsel) made his opening statement to the jury.], (k) [(name of counsel) made his opening statement to the jury, in the course of which the following occurred:], (l) [(name of counsel) read to the jury from Plaintiff's Exhibit 1.], (m) [(name of counsel) read to the jury from Plaintiff's Exhibit 1 as follows:], (n) [The jury left the courtroom at 10:30 p.m.], (o) [The jury returned to the courtroom at 10:45 p.m.], (p) [A recess was taken at 12:00 noon], (q) [There was a discussion off the record.], (r) [There was a discussion off the record at the bench among the Court and (name of counsel). (Name of counsel) was silent.], (s) [The witness was excused.], (t) [An adjournment was taken to 10 a.m.], (u) [Witness fainted.], (v) [The witness gestured toward door.], (w) [The witness nodded.].

The Indiana Judicial Center, *Court Reporter's Handbook*, pg. 90-91 (2009).

The *Form Book for Official Court Reporters of Illinois* also provides a list of standard parentheticals.

> 5:1 Exhibits Marked for Identification, 5:2 Exhibits Received in Evidence, 5:3 Exhibits Marked by Counsel Beforehand, 5:4 Proceedings Held out of Presence of Jury in Courtroom, 5:5 Proceedings Held Out of the Presence

[27] This can be obtained at the following website: http://www.in.gov/judiciary/center/pubs/benchbooks/court-reporter/court-reporter-handbook.pdf

> of Jury in Chambers, 5:6 Proceedings Held at the Bench with Jury in the Box, 5:6A Proceedings at Conclusion of Bench Conference, 5:7 Proceedings Held in the Presence of Jury, 5:8 Witness Sworn, 5:9 Witness Excused, 5:10 Recess Taken, 5:11 Off the Record, 5:12 Record Read Back, 5:13 Physical Indication by Witness, 5:14 Portion of Proceedings Reported but not Transcribed, 5:15 Portion of Proceedings not Reported and not Transcribed, 5:16 Proceedings Held in Other Cases not Transcribed, 5:17 Excerpts of Proceedings, 5:18 Continuance to Certain Date, 5:19 Adjournment at end of Day's Proceedings, 5:20 Conclusion of Entire Proceedings

Form Book for Official Court Reporters of Illinois, §5, (2008).

Therefore, it is clear that a court reporter can translate basic, affirmative or negative, non-verbal gestures such as a point, or a head nod. A parenthetical, however, is not for interpreting complex, subtle, non-verbal motions that are not affirmative or negative. This point appears to be universal based upon the court reporter's manuals that this Court has examined. For instance, In the *South Dakota Court Reporter's Manual*,[28] it states that,

> *It is the responsibility of the attorneys to note for the record any significant nonverbal behavior*; i.e., physical gestures and lengthy pauses on the part of the witness. If counsel refers to the witness's affirmative or negative gesture, parenthetical phrases may be used to indicate physical gestures. Examples [taken from the Federal manual]: (Nods head up and down) (Shakes head from side to side) (Indicating).

[28] As of the date of the signing of this *Order*, this manual can be obtained at the following website: http://ujs.sd.gov/Uploads/PublicDocuments/CourtReporter_Final_Manual_2008.pdf

South Dakota Court Reporter's Manual, §9, pg. 26, (2008)(emphasis added).

In dealing with non-verbal gestures, the *Uniform Transcript Format Manual* for Massachusetts seems to suggest that a court reporter should not put significant non-verbal gestures into the record unless directed to do as such. *Uniform Transcript Format Manual* §3.6 (2008)(stating that "[w]hen attorneys and judges note for the record any significant nonverbal gestures on the part of a witness, the transcript shall include parenthetical phrases to indicate such nonverbal gestures.").

It has also been stated in the Judicial Conference of the United States that "[i]t is the responsibility of the attorneys, as well as the judge in some instances, to note for the record any significant non-verbal behavior, i.e., physical gestures, and lengthy pauses on the part of a witness." Rochelle L. Shoretz, *Let the Record Show: Modifying Appellate Review Procedures for Errors of Prejudicial Nonverbal Communication by Trial Judges*, 95 Colum. L. Rev. 1273, 1278 (1995)(quoting J. Michael Greenwood *et al.*, *A Comparative Evaluation of Stenographic and Audio-tape Methods for United States District Court Reporting* 135, 147 (1983)).

The purpose of a parenthetical notation or remark is to communicate only the most basic and uncontroverted happenings in the courtroom. It is used to communicate to the reader, the stage of the trial, who is present, that someone was

sworn, or that a break or recesses was taken. This is also true for non-verbal communication; a parenthetical remark should be used to express only the most basic non-verbal gestures such as crying, a nod, a point, or that the witness is drawing.

A parenthetical remark is not a court reporter's chance to insert her literary interpretation as to whether a witness "turned slightly in [her] chair and looked at the Defendant." As expressed above, a court reporter should wait until he or she is directed by the trial court to note for the record any significant non-verbal behavior. It was inappropriate for the court reporter in this case to take it upon herself to put this into the record. This Court will not consider her literary interpretation of an ambiguous, non-affirmative, non-verbal motion, if in fact, that motion actually occurred.

The second reason this Court will not consider these parenthetical notations is because logically, it is not likely that the event occurred. The defining moment in many criminal trials is when the victim identifies the defendant as the perpetrator. This is especially true when, as in the case at bar, the prosecution is built solely upon the identification by the victim of the accused. Apparently, in this case, the only person who observed this defining moment was the court reporter. Neither counsel nor the trial judge indicated for the record or for the juries benefit that

they had observed the trial's defining moment. Also, there is no reference in closing argument by either party to the look as evidence of Mr. Lavigne's guilt. If the look occurred, one would think that the State would have argued that it showed that Mr. Lavigne was the assailant. However, the record is devoid of any such argument. It simply defies logic that such a defining moment would have happened and no one would have referenced it to the jury or the court reporter. Logically speaking, this Court is left with nothing more than to conclude that the look, in fact, did not happen.

As stated *supra*, to warrant the complained of jury instruction, a victim must testify *inter alia*, as to the identity of her assailant. In this case, KLL did exactly the opposite; she testified that she did not know the identity of her assailant. The fact that she may have pointed to her father when asked who the assailant resembled is of little to no consequence because when her testimony is taken as a whole, KLL testified that she did not know the identity of her assailant.

Even assuming, *arguendo*, that the only testimony in the case at bar as to identity was KLL's non-verbal affirmative testimony that the assailant resembled the defendant; this would still not be enough. One has not identified their assailant by saying that they resemble the defendant; all they have said is that it looks like the defendant or that it might be the defendant. This is not identification as

required to give the above instruction. But as stated *surpa*, KLL affirmatively stated that she did not know the identity of her assailant. Therefore, giving the instruction was inappropriate.

This Court believes that the result of its analysis would be the same even if it considered KLL's supposed glance at Mr. Lavigne when re-asked if she knew her assailant. KLL's supposed glance is not a positive identification. It is nothing more than a look. The only information that KLL gives as to the critical element of identification is that her assailant resembles her father, but that she does not know the identity of her assailant. In other words, there were no inculpatory statements and only an exculpatory statement.

Therefore, even assuming that the look happened, it is still uncontradicted that KLL did not testify that her father was her assailant; indeed, when KLL's testimony is read together and taken in context, one can see that KLL did not know the identity of her assailant. All we know for sure is that her assailant resembled her father, but that KLL did not know the identity of her assailant. Simply put, this is not enough to warrant a jury instruction that tells a jury it can find the defendant guilty based upon uncorroborated identification testimony of the victim.

Furthermore, as it pertains to this case, this instruction could and most likely did mislead the jury to conclude that her contradictory, out-of-court statements could be considered testimony. In its instructions, the Court did not distinguish for the jury the difference between what KLL said in her trial testimony vis a vis what she said to other people before the trial. Therefore, the uncorroborated testimony instruction could and most likely did confuse the jury. Therefore, for these reasons, the giving of this instruction deprived Mr. Lavigne of his constitutional rights, supplying by presumption the identity of Mr. Lavigne as KLL's assailant. *See* Syl. Pt. 1, *State v. O'Connell*, 163 W.Va. 366, 256 S.E.2d 429 (1979).

b. Second Part of the Jury Instruction

The second part of the jury instruction basically tells the jury that if you believe KLL, then you may return a verdict of guilty. This instruction leaves the indelible impression that none of KLL's testimony was beneficial to Mr. Lavigne, when in fact the majority of her testimony was beneficial to him. As listed *supra*, KLL testified that (1) her father was still inside when she returned home after the attack, Trial Tr. Vol. 1, 259, (2) her assailant went away from her house when he ran away, State's Exhibit 24, and (3) that she did not know the identity of her assailant. Trial Tr. Vol. 1, 253.

When this testimony is viewed through the light of this instruction, it becomes clear that Mr. Lavigne was deprived of important inferences that would be beneficial for his defense. This testimony tends to exculpate Mr. Lavigne and is actually beneficial to his defense. However, the jury is being instructed that if they believe KLL's testimony, which includes that she did not know who her assailant was, and that Mr. Lavigne was still inside when she returned home from the sexual assault, then they could find Mr. Lavigne guilty. This instruction stripped Mr. Lavigne of any exculpatory evidence that could be gleaned from KLL's testimony.

Therefore, this Court holds that this instruction deprived Mr. Lavigne of his constitutional right to a fair trial. *See* Article III, § 14 of the West Virginia Constitution; *See also* 75 Am. Jur. 2d Trial § 130 (2010)(stating that "[t]he cornerstone of the American judicial system is the right to a fair and impartial process" and that "[p]arties have the right to a fair trial under the federal and state constitutions").

2. Limitation of Defense to Four Character Witnesses

It is axiomatic to say that both the United States Constitution and the West Virginia Constitution provide a criminal defendant the right to produce evidence in his or her defense, including the right to call witnesses. *See* Article III, § 14 of the West Virginia Constitution; *See also In re Oliver*, 333 U.S. 257, 273, 68 S.Ct.

499 507-508 (1948) (stating that a criminal defendant, *inter alia*, has a basic right to "an opportunity to be heard in his defense[,]" which includes "a right to examine the witnesses against him, [and] to offer testimony . . . ."). Specifically, a criminal defendant can call a witness to show his good character. West Virginia Rules of Evidence Rule 404(a)(1). This can be done through testimony as to either specific traits of character as it relates to the charged crime[29] or to general character traits. Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, Volume 1, § 4-4(D)(2), pg. 4-81 (4th ed.).

This constitutional right to call witness, however, is not unlimited. West Virginia Rules of Evidence Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*." (emphasis added). In commenting on the limitation of the number of character witnesses, Justice Franklin Cleckley, a pre-imminent legal scholar and jurist, has stated,

> It has been widely recognized that the trial court has the right, in the exercise of sound and reasonable judicial discretion, to limit the number of character or reputation witnesses except in a few cases where the character of a

[29] For instance, if the crime charged is a violent crime, a criminal defendant can offer a witness to testify as to his or her character for peacefulness.

> party in a civil action, or of an accused in a criminal prosecution, was in issue or one of the material and important facts in the case.

Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, Volume 1, § 4-4(D)(8), pg. 4-103 (4th ed.).

Some courts have put limits on the number of character witnesses a person can call. *United States v. Gray*, 507 F.2d 1013, 1015-1016 (5th Cir. 1975), *cert. denied,* 423 U.S. 824, 96 S.Ct. 38 (1975)(allowing only three character witnesses); *United States v. Henry*, 560 F.2d 963, 965 (9th Cir. 1977)(allowing only two character witnesses). Such a strict limit, however, is not appropriate. As the West Virginia Supreme Court of Appeals has said, "a trial judge cannot apply the rules of evidence in such a mechanistic manner so as to exclude evidence which is critical to the defense without violating the due process clause found in U.S. Const. Amend. XIV, § 1 or the right to a fair trial found in *W.Va. Const.* Art. III, § 14." *Jenkins,* 191 W.Va. at 626, 443 S.E.2d at 477. In other words,

> Although it is proper for a trial court to place reasonable limits on the number of witnesses allowed to testify with respect to the character or reputation as to a material, specific trait in both civil and criminal cases, this discretion should be exercised with caution in a criminal case and governed by the importance of the testimony. *A limit on the number of character witnesses is not authorized where character is an important fact or issue in the case.*

75 Am. Jur. 2d Trial § 259 (2010)(emphasis added).

In the case at bar, Mr. Lavigne's character as a loving father with a propensity for nonviolence were important facts for the jury to consider. The case against Mr. Lavigne was built around one piece of evidence, KLL's out-of-court, hearsay statements that her assailant was either her father or looked like her father. *See* Trial Tr. Vol. 3, 1046 (in the State's closing arguments, it commented to the jury "[r]emember why we're here. Do you doubt [KLL]? That's the whole question"). There was no physical evidence that linked Mr. Lavigne to the crime and there was no corroborating evidence that supported KLL's statements that her assailant was either her father or looked like her father. With no other evidence to argue, other than there was no evidence, Mr. Lavigne was left to argue his good character.

In limiting the number of character witnesses to only four, the trial court robbed Mr. Lavigne of an opportunity to prove his character, which was an important fact in this case; specifically, Mr. Lavigne's general character as a loving father and his propensity for nonviolence. As the West Virginia Supreme Court of Appeals has stated, "[e]vidence of good character and exemplary life may of itself create a reasonable doubt of the guilt of a person accused of crime. It is an important factor to be considered in passing upon the credibility of the evidence of the accused." *State v. McDermott*, 99 W.Va. 220, 128 S.E. 108 (1925). When the

trial court limited Mr. Lavigne to only four character witnesses, it improperly limited his ability to raise a reasonable doubt as to his guilt. Therefore, this Court finds that the trial court denied Mr. Lavigne the constitutional right to produce evidence in his defense.

3. Sufficiency of the Evidence

a. Standard of Review for a *Habeas* Petition

The West Virginia Supreme Court of Appeals has stated that a potential ground for relief in a habeas corpus action is a challenge to the sufficiency of the evidence. *Losh v. McKenzie*, 166 W.Va. 762, 768-769, 277 S.E.2d 606, 611 (1981); *But see Cannellas v. McKenzie*, 160 W.Va. 431, 437, 236 S.E.2d 327, 331 (1977) (stating that "except in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of the evidence.") (citing *Riffle v. King*, 302 F.Supp. 992 (N.D.W.Va. 1969), and *Young v. Boles*, 343 F.2d 136 (4th Cir. 1965)).

The standard of review for a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1 in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995); *See also Garcia v. Carey*, 395 F.3d 1099, 1102 (9th Cir. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781 (1979) (stating

that in a habeas petition, "[a] defendant alleging that the evidence was insufficient to support his conviction can obtain relief only if, 'upon the record evidence adduced at the trial[,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt'"). This standard is the threshold "necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. In other words, there has been a violation of a person's constitutional right to the due process of law if this standard is not met.

The West Virginia Supreme Court of Appeals has stated that

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. Furthermore, the Court has stated

> When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

In evaluating an insufficiency of the evidence claim, it is important for a court to examine the evidence presented to the jury to determine, "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond reasonable doubt." Syl. Pt. 1 in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). However, this standard does not mean that if there is any evidence whatsoever on each of the crime's elements, the reviewing court must affirm. That is, all of the evidence presented must be considered.

b. Evidence Presented

In that light it is helpful in reaching a determination in this case to examine not only the inculpatory evidence, but all of the evidence presented as to the only contested issue in this case: the identity of KLL's assailant. First, as stated *supra*, there was no physical or forensic evidence that linked Mr. Lavigne to this crime.

There was no evidence found on KLL or at the crime scene that linked Mr. Lavigne to this crime. There were no scratches, bruises, scrapes, blood, or semen found on him. As the Defense has argued, given the extreme violence of this sexual assault which left KLL bloody and gaping, and given where the sexual assault occurred, in a parking lot, the fact that there was no physical or forensic evidence whatsoever tends to exculpate Mr. Lavigne as KLL's assailant.

In other words, in the short time between the perpetration of the crime and its discovery Mr. Lavigne did not have the opportunity to commit this crime and still be completely clean of any evidence. But given the standard of review in these types of cases, the State is entitled to the inference that Mr. Lavigne had the opportunity to complete this crime.[30]

But while the State is entitled to the inference, opportunity alone is not enough to convict. With no physical evidence to establish a direct link, the State's sole evidence as to the only contested issue in this trial is KLL's contradictory, out-of-court statements. Of the twenty four witnesses who testified, only eight could testify as to what KLL stated about the identity of her assailant: Mr. Stover, Mr. Humphreys, Dr. Phillips, Dr. Martin, Officer Smith, Trooper Ashcraft, Mrs.

[30] This is unlikely given the circumstances of this case, though. For Mr. Lavigne to grab KLL's clothes, run away from the house, hide KLL's clothes in such a manner as they would never be found, return to the house before KLL [again, KLL has routinely stated that Mr. Lavigne was inside the house when she returned], and to clean himself so as to not have any physical evidence on him, is unlikely.

Lavigne, and Mr. Lavigne. In the following sections, this Court will summarize the relevant testimony from the eight individuals as well as KLL's trial testimony.

i. KLL

All parties to this *habeas* agree that KLL basically shut down and ceased talking while on cross examination.[31] *Response to Counsel's Petition*, dkt. no. 167, pg. 9 & 13. Therefore, KLL's trial testimony was short. While her testimony was short, she did provide some information as to the identity of her assailant; specifically that she did not know the identity of her assailant, but he resembled her father. The pertinent parts of KLL's testimony, as it relates to the identity of her assailant are as follows:

> Q. [KLL], remember you told the Judge and Ms. Allen and everybody that you were going to tell us what happened. And we need to know, really, who did this to you? Do you remember?
> A. I don't know.
> Q. You don't know? Have you ever seen him before?
> A. [(]Whereupon, the witness turned slightly in chair and looked at the Defendant.)

Trial Tr. Vol. 1, 253.

> Q. [After the assault when you ran home] . . ., [KLL], where was your mommy?
> A. She was inside.
> Q. Where was your brother, [ILL]?

[31] It even seems that the Trial Court recognized that KLL was shutting down because before beginning her cross examination of KLL, it asked Ms. Allen if she had any "quick inquiry." Trial Tr. Vol. 1, 256.

> A. He was inside sleeping.
> Q. Where was your little brother, [CLL]?
> A. Inside.
> Q. Where was your daddy?
> A. Inside.
> Q. Everybody was inside, and then you ran in the house. Did you take a minute and lie back down beside Ian?
> A. (Shaking head no.)

Id. at 259.

> Q. . . . Do you remember who that person that hurt you looked like? . . .
> A. (Whereupon, witness looked over her right shoulder and pointed to the Defendant.)
> Q. Like your daddy?
> A. (No response.)

Id. at 263.

The First and third cited paragraphs were previously discussed *supra*. The second paragraph places the defendant in the home when KLL returned there immediately following the assault.

ii. Mr. Franklin Stover, EMT

Mr. Stover, along with Mr. Humphreys, was one of the first persons to arrive at the scene and one of the first, non-family members to interview KLL. Mr. Stover testified that KLL stated that her father was the one who sexually assaulted her. Trial Tr. Vol. 2, 429, 430. Mr. Stover also testified that Mrs. Lavigne would tell KLL that her assailant could not have been her father. *Id.* at 425, 426, 429, 430,

463. However, whenever Mrs. Lavigne said this, KLL always retorted with her original statement. *Id.* at 426, 429, 430.

As to what the assailant was wearing, Mr. Stover first testified as to a conversation between KLL and Mrs. Lavigne.

> Q. What was the conversation?
> A. After she stopped her, [Mrs. L], "Honey, it couldn't have been your daddy because he was in bed with me." And the child said, "Well, he sure looked like my daddy." The mother then said, "Remember, you said the man had on green pants." And the child said, "No, mommy, they were just like daddy has on."

Id. at 426. Later, however, Mr. Stover's report, which was read into evidence, stated that,

> The father got in the ambulance with the child and said to the child, "Are you sure his pants were green because you said first they were just like daddy's." She said his pants were green. He said, "What kind of shirt did he have on?" And she said, "Just like your shirt."

Id. at 462-463. Mr. Stover admitted that he had no idea what KLL was saying about the clothes that her assailant had on, but that his job was to deal with injuries. *Id.* 454-455

iii. Mr. Franklin Lee Humphreys, EMT

Mr. Humphreys' testimony was very brief. His testimony relating to KLL's statements about the identity of her assailant can be summarized as follows:

> Q. At some point in time did you hear her use different words to describe who had done this to her?
> A Yes. When she was with her parents she would say "a man who looks like my father, or my daddy" and when she was not she referred to the person as "my daddy".

Trial Tr. Vol. 2, 505

Mr. Humphreys also testified that KLL stated that "'[t]he man that looked like my daddy come and took me outside and took me over to the' – I believe she said 'the playground . . . .'" *Id.*

iv. Dr. Joan Phillips

Dr. Phillips, along with Dr. Martin, conducted a pre-surgery interview with KLL shortly after she arrived at the hospital. The only persons present during this interview were Dr. Phillips and Dr. Martin.[32] Trial Tr. Vol. 1, 204. Dr. Phillips testified that during this interview, KLL stated that her assailant looked like her daddy. *Id.* at 205, 231. Dr. Phillips testified that "the inflection in her voice was, 'If it wasn't, he sure looked like my daddy.' It was like somebody had said maybe it wasn't." *Id.* However, Dr. Phillips also testified that KLL stated that she had never seen her assailant before; specifically, Dr. Phillips testified that she "asked if she had seen the man before, and she did have a change in her demeanor. She diverted

[32] Dr. Martin testified that there was also an emergency room nurse present during this interview. Trial Tr. Vol. 2, 677.

her eyes, and to this point she had really good eye contact. And it was just the body language. She diverted her eyes and she indicated, no." *Id.* at 207.

As to the physical description, Dr. Phillips testified that KLL said that her assailant had black hair, had black peachy skin color, and had a little hair on his chin. *Id.* at 206. As to what the assailant was wearing, Dr. Phillips testified that KLL said that he had on green pants and a shirt that looked like her father's, which she described as gray with little black dots. *Id.*

v. Dr. Kimberly Martin

Dr. Martin, who was present when KLL was being interviewed, basically echoed what Dr. Phillips said as it relates to the interview. Dr. Martin testified that KLL stated that her assailant looked like her father, had on green pants and a gray shirt with black dots on it, had dark hair, had black peach skin color, and had a little bit of hair on his chin. Trial Tr. Vol. 2, 680. As to KLL stating that she did not know her assailant, Dr. Martin testified as follows:

> Q. Let me ask you before I get into that, how was [KLL's] responses? Did you make any observations about her mental state? How was she acting as far as eye contact and those types of things when you were talking to her?
> A. When we asked her if she had -- originally when Dr. Phillips and I talked to her and we asked her if she had seen this person before, she wouldn't look at us. She just looked down and shook her head no. [KLL] was very calm and she was articulate. She verbalized well. She made sense with what she told us.

Id. at 684.

Dr. Martin, however, was present when Mrs. Lavigne was let back into the room, whereas Dr. Phillips was not. Dr. Martin testified that KLL and Mrs. Lavigne had a conversation about how Mr. Lavigne could not be her assailant. *Id.* at 685-686. Dr. Martin testified to the fact that no matter how many times that Mrs. Lavigne would tell KLL that her assailant could not be her father, KLL would retort with her original allegation. *Id.*

vi. Officer Ronald Lee Smith

It is important to note that Officer Smith had developed a rapport with KLL and she had told him that she trusted him. Trial Tr. Vol. 2, 629. With such a close relationship, one would expect KLL to be forthright with Officer Smith. Officer Smith was called to testify a total of four times at trial: once during the State's case-in-chief, once during the Defendant's case-in-chief, and twice on rebuttal by the State. He was one of the State's most important witnesses. He was present for most of the important interviews that KLL gave, including at the scene, when she helped create a police sketch rendering, and during an April 14th, interview.

Officer Smith testified that KLL told him when they first met that her assailant was her father and that he looked "just like my daddy." Trial Tr. Vol. 2, 535. In describing her assailant, Officer Smith testified that KLL stated that "he

had a little bit of hair on his chin and his hair was sticking up." *Id.* at 536. In describing what he was wearing, Officer Smith testified that KLL said that "he had on a gray sweatshirt with little black marks on it." *Id.* at 535. During cross-examination, Officer Smith was asked about the police sketch that was done.

> Q. So she came into the office and you had what, a sketch artist or a police sketch artist there?
> A. No. Sergeant Gillespie did this, as a matter of fact. We're trained. to [*sic*] do a composite like this when it's a kid that you can sit down and do it with, but I had never done it with a five-year-old before. Sergeant Gillespie had some little bit of experience with talking with children, so he did the composite.
> Q. And, in fact, this composite that you came up with was helped by [KLL]? I can't quite tell whether there's a mustache or not, possibly a faint one.
> A. If I recall, what [KLL] said that day was just kind of prickly, being a man I would think maybe like a day or two's growth possibly. Not a mustache that would be as full as mine.
> A. Is it possible she was describing the kind of mustache you have?
> A. It's possible.
> Q. And, in fact, on the picture the person has very dark hair. She apparently gave Sergeant Gillespie the information that he had a very dark goatee, didn't she?
> A. She -- I don't know whether she would have described it as a goatee. She referred to hair on the chin.
> Q. And, in fact, when Sergeant Gillespie did this composite I imagine she told him that was the kind of hair that she was talking about. Is that a fair statement?
> A. Yes.
> Q. Or else he would have made some changes to it with the identi-kit, wouldn't he?
> A. Yes.

> MS. ALLEN: If I could take this for just a second, I'm going to have the Clerk mark this for identification as Defendant's Exhibit 2.
> (WHEREUPON, Defendant's Exhibit No. 2, the composite drawing, was marked for identification.)
> BY MS. ALLEN:
> Q. When you and Sergeant Gillespie were all finished -- and you said he does have training on this identi-kit, how to do it?
> A. Yes.
> Q. Did you show the picture to [KLL]? Did she, in fact, say this is what he looked like?
> A. As much as possible. She was getting really bored with it, real fidgety, and getting tired, and Mrs. Lavigne told me she was getting tired, she wanted to go home. I think that's close to what she decided on, yes.
> Q. As part of the identi-kit workup, she put together that kind of hairdo, kind of straight across flat top like that?
> A. She described it as hair sticking up.
> Q. When you were done, she said that was pretty much what it looked like?
> A. Yes.

Id. at 629-632. This photo was introduced as Defendant's Exhibit #2.

Officer Smith also testified about the conversation that took place in the back of the ambulance. Trial Tr. Vol. 2, 537. Officer Smith testified that Mrs. Lavigne told KLL that her father could not have been her assailant. *Id.* Officer Smith testified, however, that KLL retorted that "If it wasn't my daddy, it's a man that looked just like my daddy and he's got the shirt on my daddy's got on now." *Id.*

As stated earlier, Officer Smith conducted an interview with KLL on April 14, 1996. This interview was taped and admitted into evidence as State's Exhibit

#24. Trial Tr. Vol. 3, 1007. During this interview, KLL stated emphatically and repeatedly that she did not know the identity of her assailant. When Officer Smith asked KLL if anyone told her to say something to her, she stated no. Right after this question, Officer Smith asked KLL if her father was her assailant; she stated that "I don't know." Officer Smith also testified that Mrs. Lavigne stated to him that she trusted him. *Id.* at 629. Furthermore, Officer Smith testified that Mrs. Lavigne was very cooperative with him and always gave him access to KLL. *Id.*

vii. Trooper Donna Ashcraft

Trooper Ashcraft interviewed KLL on February 13, 1996, in the hospital. This interview was taped, admitted into evidence as State's Exhibit #21, and played for the jury. Trial Tr. Vol. 2, 710. This interview was conducted with State Police Sergeant Stevenson and a nurse in the room. During this interview, KLL stated that her assailant looked like her father. She stated that her assailant was wearing a white shirt with black dots and had on green pants. Furthermore, her assailant had black hair. KLL stated that her father was the one who found her in the bathroom. She stated that he was in his underwear and not in green pants and a white shirt.

KLL was asked if anyone had spoken with her about not talking about the incident. KLL shook her head no. When asked if she was sure, KLL stated that she

was sure. After several other questions though, Sergeant Stevenson again asked KLL if someone had told her not to talk with the police. KLL shook her head yes. However, when asked by Trooper Ashcraft if anyone had told her that she would be in trouble if she talked, KLL shook her head no. Furthermore, when Trooper Ashcraft asked if anyone had told her that someone else would be in trouble if she talked, KLL shook her head no. After this, KLL was asked if she could whisper who told her not to talk; KLL stated that she did not remember.

Trooper Ashcraft also testified as to Mark Berry ("Mr. Berry") and whether he had the opportunity to commit this crime. Mr. and Mrs. Lavigne were both scheduled to testify for the State in Mr. Berry's pending murder trial. Thus, Mr. Lavigne claimed that Mr. Berry had a motive to commit this crime against his family. Trooper Ashcraft testified that she contacted the Lincoln County Prosecuting Attorney's Office and was informed that Mr. Berry was on electronically monitored home confinement and that Mr. Berry had not left his premises the day in question. Both parties now agree that Mr. Berry, in fact, was not on electronically monitored home confinement, but instead on non-electronically monitored home confinement. Without electronic monitoring there was no way to confirm Mr. Berry's whereabouts. In other words, Mr. Berry could have left his house without detection on the morning in question. Therefore, this

misinformation provided to the jury prevented Mr. Lavigne from effectively arguing that Mark Berry could have been KLL's assailant.

viii. Mrs. Jamie Loughner-Lavigne

Beyond Officer Smith, Mrs. Lavigne was the other person who spent the most time testifying. Mrs. Lavigne testified that KLL had stated that her assailant was her father. Trial Tr. Vol. 2, 316, 321; Trial Tr. Vol. 3, 784-785, 786-787. Mrs. Lavigne also testified that KLL stated that her assailant looked like her father. Trial Tr. Vol. 2, 321; Trial Tr. Vol. 3, 757-758, 786-787. Mrs. Lavigne also testified that KLL told her that her assailant looked like other people. Trial Tr. Vol. 3, 734-735, 757-758.

As to the physical description, Mrs. Lavigne testified that KLL stated that her assailant had skin that was darker than her father's, and that her assailant had hair on his chin. Trial Tr. Vol. 2, 321. Mrs. Lavigne also testified that KLL stated that her assailant's hair cut was the same as daddy's before he got it cut and it was longer than her daddy's hair. *Id.* 321-322. Furthermore, KLL stated that her assailant had hair on his chin and a little hair on his upper lip. *Id.* As to what he was wearing, Mrs. Lavigne testified that KLL stated that her assailant was wearing green blue-jeans. Trial Tr. Vol. 1, 299-300. Also, the assailant was wearing a gray

shirt with black dots, that was "just like daddy's." Trial Tr. Vol. 1, 299, Trial Tr. Vol. 2, 346.

Mrs. Lavigne was also specifically asked about whether she had been questioning KLL's identification. In regards to the discussion in the ambulance, Mrs. Lavigne stated that,

> Q. Do you recall what they were?
> A. I believe I said -- I was asking questions moreso than I was trying to tell [KLL] things. It was like - - but at one point I did say, "[KLL]," you know, "please try and remember exactly what this person looks like because I just don't think it's your daddy. He doesn't have any green pants. You said he had green pants."

Trial Tr. Vol. 1, 298. Mrs. Lavigne also stated that she did not approach the subject with KLL anymore and refused to let anyone else discuss the topic with her either. Trial Tr. Vol. 3, 757-758. Furthermore, the record shows that Mrs. Lavigne was encouraging KLL to talk truthfully with the police. On April 14, 1996, a DHHR social worker tried to interview KLL, but she was not talking. At some point, both Officer Smith and Mrs. Lavigne made there way into the interview room. Mrs. Lavigne told KLL repeatedly that she needed to tell them what had happened to her. In fact, Mrs. Lavigne told KLL that she could tell Officer Smith anything.

ix. Mr. Joseph Lavigne

Mr. Lavigne was the person who called 911 the morning of this horrible crime. Mr. Lavignee stated in this call that KLL said that her assailant looked like her father and that the assailant was her father. Trial Tr. Vol. 1, 189. During his testimony, Mr. Lavigne readily admitted that KLL had stated that her assailant was him. Trial Tr. Vol. 3, 815-816, 821, 877. Mr. Lavigne also testified that KLL said that her assailant looked like her father. *Id.* at 817, 877. In terms of what he was wearing, Mr. Lavigne testified that KLL stated that her assailant had on the same clothing that her father had on. *Id.* at 817. Mr. Lavigne testified that he was wearing the same clothes that he wore the day before, which were black sweats and a sweatshirt. *Id.* at 818-819. Mr. Lavigne also testified that he heard Mrs. Lavigne ask KLL if the assailant was wearing green pants. *Id.*

c. Analysis

i. KLL's Trial Testimony Alone is not Sufficient Evidence From Which a Rational Trier of Fact Could Have Found Proof of Guilt Beyond a Reasonable Doubt Because KLL Affirmatively Answered That She Did Not Know the Identity of Her Assailant

Based solely upon KLL's trial testimony and nothing else, no reasonable jury could have found Mr. Lavigne guilty beyond a reasonable doubt. KLL's trial testimony can basically be broken down into three parts: her assailant resembled her daddy; an affirmative answer that she did not know the identity of her assailant; and a supposed glance at Mr. Lavigne when re-asked if she knew her

assailant. It is clear to this Court that KLL's testimony that her assailant looked like her father is simply not enough for a conviction. No reasonable jury could find someone guilty beyond a reasonable doubt based on an assertion that the assailant resembled the defendant. This is certainly the case where, as in the case at bar, the victim also affirmatively states that she does not know the identity of her assailant.

Furthermore, as to the supposed glance, as expressed in section *IV.1.a. supra*, this Court will not consider it for two reasons. First, it was inappropriate for the court reporter to take such interpretive liberties. When there is a significant non-verbal gesture, a court reporter should not take it upon himself or herself to insert their interpretation into the record. It is for the court and the parties to direct that such a significant non-verbal gesture be placed into the record. Second, it is unlikely that such a look took place. This would have been the defining moment of the trial and, apparently, the only person to have seen it was the court reporter. No one directed the court reporter to include this into the transcript; furthermore, no one argued that the look even happened. Logically, it does not make sense for such an action to have taken place and none of the parties have seen it or commented on it. For these reasons, this Court will not consider the look as evidence of guilt.

The only other piece of testimony from KLL is her answer that she did not know the identity of her assailant; in other words, the victim affirmed that she did

not know the assailant. It is axiomatic to say that no reasonable jury could render a guilty verdict based upon a statement from the victim that she did not know her assailant. The outcome would also be the same even if the Court considered KLL's supposed non-testimonial glance. The fact is that it is insignificant because KLL affirmatively stated that she did not know the identity of her assailant.

Therefore, it is clear that KLL's trial testimony alone is not sufficient evidence from which a rational trier of fact could have found proof of guilt beyond a reasonable doubt. In fact, based upon KLL's in-court testimony alone, the only verdict that a reasonable trier of fact could have returned is not-guilty. Therefore, KLL's testimony alone was not enough to sustain a conviction beyond a reasonable doubt. Consequently, the only evidence that the State had to prove the identity of KLL's assailant is her contradictory, out-of-court hearsay statements.

ii. As a Matter of Law, Contradictory, Out-of-Court, Hearsay Statements by the Accuser, Standing Alone, are Insufficient to Uphold a Conviction

As outlined *supra*, KLL's contradictory, out-of-court statements come in three different categories; the first is that her father was the assailant, Trial Tr. Vol. 1, 187, 189, 190-191, Trial Tr. Vol. 2, 316, 321, 425, 426-427, 429, 430, 504-505, 535, 537, 546, 685-686, Trial Tr. Vol. 3, 784-785, 786, 815-816, 821, 877; the second is that the assailant looked like her father, Trial Tr. Vol. 1, 185, 187, 189,

205, 231, Trial Tr. Vol. 2, 321,346-347, 504-505, 535, 537, 679-680, 877, Trial Tr. Vol. 3 757-758, 786-787, State's Exhibit 21; and finally she stated that she did not know her assailant, State's Exhibit 21, State's Exhibit 24, Trial Tr. Vol. 1, 205-207, Trial Tr. Vol. 2, 665-666, 684.

All of KLL's out-of-court statements appear to have been admitted as exceptions to the hearsay rule. It is also apparent that some of these statements would not be admissible if the trial were held today because they are "testimonial evidence" prohibited by the United States Supreme Court's opinion of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354 (2004). Notwithstanding *Crawford,* this Court in its analysis will consider all of KLL's out-of-court statements as being properly admitted into evidence under the law existing at the time of the trial. With that being said, the crux of Mr. Lavigne's *Habeas* is that contradictory, out-of-court hearsay statements standing alone cannot be the sole basis for a conviction.

The Respondent has not argued that this interpretation of the law is incorrect; rather, it argues the law does not fit the facts of this case. That is, the Respondent does not address the legal proposition that contradictory, out-of-court, hearsay statements, standing alone, are insufficient to uphold a conviction. This

legal issue is one of first impression in West Virginia, but it has been discussed by many other courts.

> Several courts have found that an unsworn, oral prior statement of a witness that is inconsistent with the in-court testimony of the declarant, and is the only inculpatory evidence, cannot meet [*Jackson v. Virginia's*] mandate of serving as proof that a rational trier of fact could deem sufficient. The rationale is simple: the jury must guess, without adequate foundation, as to which statement is true. Albeit a rule of limited applicability, it embodies the Due Process guarantee precluding unreliable adjudications, and, in particular, convictions founded upon unsworn hearsay.

Jules Epstein, Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After the Demise of the Ohio v. Roberts "Reliability" Standard, 77 UMKC L. Rev. 119, 132 (2008)(citations omitted). In other words, no reasonable jury could convict a defendant of a crime where the only evidence that he or she committed the crime is contradictory, out-of-court hearsay statements. To sustain a conviction on this type of evidence alone would violate a person's constitutional right to due process of law.

To support his argument, Mr. Lavigne cites to the Court the cases of *Beber v. State of Florida*, 887 So.2d 1248 (2004) and *United States v. Bahe*, 40 F.Supp.2d 1302 (1998).[33] The *Beber* case involved the admission of out-of-court statements as

[33] Mr. Lavigne also cites *Ellison v. Sachs*, 769 F.2d 955 (4th Cir. 1985). This Court will not discuss this case.

substantive evidence under section 90.803(23), Florida Statutes (2001),[34] the child victim hearsay exception, after the child recanted the out-of-court statements during her in-court testimony. *Beber*, 887 So.2d at 1250-1251. The Supreme Court of Florida held that absent other corroborating evidence, prior out-of-court statements, which are contradicted in court, are insufficient by themselves to sustain a criminal conviction. *Id.* at 1253. The Court stated that "the risk of

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[34] "Section 90.803(23) provides a hearsay exception for the out-of-court statements made by a child victim when the time, content, and circumstances of the statement provide sufficient safeguards of reliability." *Beber v. State of Florida*, 887 So.2d 1248, 1249 (2004). The statute states:

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
> 2. The child either:
> a. Testifies; or
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).
> (b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.
> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

§ 90.803(23), Fla. Stat. (2002).

convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." *Id.* at 1252 (citations omitted).[35]

In the *Bahe* case, the defendant was charged with the sexual abuse of Leandra N. *Bahe*, 40 F.Supp.2d at 1303. The Government's case, in its entirety, consisted of four people. There was a doctor who testified that Leandra N. told her that the defendant sexually abused her. *Id.* This testimony was admitted pursuant to Federal Rules of Evidence Rule 803(4), statements made for medical treatment or diagnosis. *Id.* Two people testified, pursuant to Fed. R. Evid. 414, evidence of similar crimes in child molestation cases, that he had sexually abused other kids. *Id.* These acts, however, were not charged in the indictment. *Id.* Finally, one person testified as to "common characteristic of abused children, including the fact that allegations of abuse are frequently recanted." *Id.* at 1304. The defendant's case involved, *inter alia*, Leandra N., who in-court recanted her previous statements of abuse. *Id.* at 1303.

The United States District Court for the District of New Mexico stated that the only "substantive evidence of the sexual abuse charged in the indictment was a

[35] The constitutional basis for the Court's decision was the defendant's Sixth Amendment right to confrontation and cross-examination. *Beber*, 887 So.2d at 1252. The Court, in quoting a prior decision, stated that "[t]o allow the state to use as its sole evidence of the commission of the crime charged such prior unsworn, out of court statements which were not subject to cross-examination by the defendant [would] violate[ ] the [defendant's] sixth amendment right to confrontation and cross-examination." *Id.* at 1252 (citations omitted). While its decision is based upon due process violations, this Court still finds this case to be instructive on the issue of sufficient evidence to sustain a conviction.

prior, inconsistent out-of-court statement, recanted at trial by the complaining witness. . . . Defendant's conviction . . . is based solely on a single prior, inconsistent out-of-court statement, the fact that he had the opportunity to commit the acts alleged, uncontroverted evidence that he sexually molested another niece in the past, and testimony that children often recant allegations of abuse." *Id.*

The District Court did an extensive case search of "well over 100 cases challenging the sufficiency of the evidence for a conviction of child sexual abuse . . . ." *Id.* The District Court, however, was "unable to find a single case in which a conviction was sustained with as little evidence of the crime charged as in the case at bar." *Id.* The District Court stated that,

> In cases in which an inconsistent out-of-court statement was admitted as substantive evidence of the charged sexual acts and no other evidence was presented, state and federal courts have nearly uniformly concluded that there was insufficient evidence to support the conviction. *See United States v. Drake*, 1995 WL 935006 (Navy-Marine Corps. Crim.App.1995) (unpublished opinion); *Brower v. State*, 728 P.2d 645, 646-48 (Alaska App.1986); *Acosta v. State*, 417 A.2d 373, 375-77 (Del.1980) (conviction aff'd. for acts testified to in-court, rev'd for acts for which only out-of-court statements were presented); *Lowe v. State*, 668 So.2d 274, 275 (Fla.App.1996); *Anderson v. State*, 655 So.2d 1118, 1119-20 (Fla.1995); *State v. Green*, 667 So.2d 756, 760-61 (Fla.1995); *State v. Werneke*, 958 S.W.2d 314, 317-20 (Mo.App.1997) (judgment of acquittal entered on counts

> for which only inconsistent out-of-court statements presented, judgment aff'd. as to counts on for which complaining witness actually testified); *State v. Pierce*, 906 S.W.2d 729, 733-37 (Mo.App.1995); *State v. White Water*, 194 Mont. 85, 634 P.2d 636, 637-39 (Mont.1981); *State v. Ramsey*, 782 P.2d 480, 482-84 (Utah 1989); *see also United States v. Orrico*, 599 F.2d 113 (6th Cir.1979) (check fraud conviction based only on prior inconsistent statement rev'd); *In re Miguel*, 32 Cal.3d 100, 105-107, 185 Cal.Rptr. 120, 649 P.2d 703 (1982) (conviction for burglary rev'd where based only on recanted out-of-court statement); *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (N.M.App.1978) (conviction for physical abuse of child rev'd where only evidence presented was out-of-court statement); *State v. Robar*, 157 Vt. 387, 601 A.2d 1376 (Vt.1991) (burglary conviction based only on prior inconsistent statement rev'd); *State v. Sexton*, 115 Wis.2d 697, 339 N.W.2d 367 (Wis.App.1983) (published in table only; conviction for operating vehicle without license based solely on unsworn statement rev'd).

Bahe, 40 F.Supp.2d at 1307-08.[36] The District Court also cited multiple scholarly works that supported this overwhelming majority of case law. This Court finds particularly informative, the District Court's summarization of Stanley Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C.L.Rev. 1 (1986):

> As Professor Goldman points out, the witness' prior inconsistent statement gains credibility by being repeated in court by a more credible spokes-person, such as a doctor or law enforcement officer. *Id.* at 21. Further, the

[36] The District Court only found one case "in which a conviction for child sexual abuse based on solely an out-of-court statement, recanted at trial, was affirmed: *Ramsey v. State*, 214 Ga.App. 743, 448 S.E.2d 790, 791-92 (Ga.App. 1994)." *Bahe*, 40 F.Supp.2d at 1308.

> jury may draw negative inferences from the recanting witnesses demeanor, failing to recognize that his or her demeanor may have been just as poor when the statements were first made. *Id.* Thus, "the witness' unsatisfactory trial demeanor contrasted with the more credible demeanor of the person relating the witness' prior statement may create an illusion of unwarranted reliability associated with the earlier statement." *Id.* at 22.

Bahe, 40 F.Supp.2d at 1310.

The District Court concluded that while it was not a *per se* rule, ultimately, when a conviction is based on nothing more than out-of-court contradictory statements by the accuser, there is insufficient evidence for a conviction. *Id.* at 1310-1311. To allow a conviction based on nothing more than out-of-court contradictory statements to stand would violate the "most basic component of due process in our system of criminal justice-the requirement that the government must prove its case beyond a reasonable doubt . . . ." *Id.* at 1313. This is true "no matter how offensive the crimes alleged." *Id.*

This Court finds the *Beber* and *Bahe* cases to be persuasive and it adopts their sound reasoning. Therefore, this Court finds that, while not a *per se* rule, generally, no rational trier of fact can find proof of guilt beyond a reasonable doubt when the ***only*** evidence before it are prior, contradictory out-of-court statements of the accuser. The reason for such a rule is that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior

inconsistent statements." *Bahe*, 40 F.Supp.2d at 1310 (quoting *State v. Green*, 667 So.2d 756, 761 (Fla. 1995). The Court notes the limited application of this rule due to the unique facts required to invoke its application.

In the case at bar, the only evidence before the jury on the question of the identity of KLL's assailant were prior, contradictory out-of-court statements. These were made by a five year old child following a very traumatic event. As outlined *supra*, these statements came in three different varieties, all of which contradicted the others, and all of which came at different times. If one interacted with KLL enough, one heard all three of these statements. At trial, most of the inculpatory statements were repeated and bolstered by more credible individuals such as a police officer and medical professionals. These individuals bolstered KLL's statements that her assailant was her father or resembled her father while completely discounting and discrediting statements that she did not know the identity of her assailant.

In responding to the argument about KLL's contradictory statements, the Respondent contends that KLL was pressured into changing her story. The record, however, does not support this assertion. In fact, the only person who could be accused of such an action was Mrs. Lavigne; however, the evidence does not support the assertion that Mrs. Lavigne actually pressured KLL into changing her

story. The record shows that KLL's story changed multiple times, both in and out of the presence of her mother, and without pressure from her mother. Furthermore, there are only two instances that were discussed at trial that would even suggest that Mrs. Lavigne was pressuring KLL to change her story.

The first instance occurred when KLL was receiving treatment in the back of the ambulance after the attack. Robert Franklin Stover, a paramedic who was one of the first people to respond to the 911 call, testified that Mrs. Lavigne told KLL that her assailant could not have been her father. Trial Tr. Vol. 2, 425, 426-427, 429, 430, 462-463.[37] But despite this instance of Mrs. Lavigne telling KLL the assailant could not have been her father, KLL retorted with her original statement. *Id.* Officer Ronald Lee Smith also testified that Mrs. Lavigne told KLL that her assailant could not have been her father. *Id.* at 537. Officer Smith testified that KLL stated, "[i]f it wasn't my daddy, it's a man that looked just like my daddy and he's got the shirt on my daddy's got on now." *Id.* In both instances though, KLL reasserted her original story. So even if Mrs. Lavigne was exerting pressure on KLL to change her story, it did not supplant her original story that she was saying at that moment.

[37] To the contrary, Franklin Lee Humphreys, the other paramedic, testified that KLL never said that her assailant was her father in front of Mrs. Lavigne. Trial Tr. Vol. 2, 504-505.

A second incident occurred when Doctor Joan Phillips and Doctor Kimberly Martin interviewed KLL. Doctor Martin testified that she conducted an interview with KLL and Mrs. Lavigne, after she and Doctor Phillips conducted an interview with KLL alone. *Id.* at 685. Doctor Phillips testified that in that second interview,

> The child had turned to her mother and was very adamant. She said, "It was daddy. he [sic] was wearing green pants." And the mother said - - Mrs. Lavigne had told [KLL], "It couldn't have been your daddy. He doesn't have green pants." But [KLL] was adamant. She would not back off. She repeatedly told her mother that it was daddy. "Maybe he wore your pants" because the mother, I assume, had green pants. And the mother began to proceed to tell the child, "Well, your daddy wouldn't fit in my pants." The child continued to say that it was daddy. The mother became very frustrated. You could see she was becoming very frustrated with this argument, and Mrs. Lavigne looked over at me right at that time and insisted that I step outside of the room with her.

Id. It is important to note, though, that both Doctor Phillips and Doctor Martin testified that before this conversation took place, KLL had stated outside the presence of her mother that she did not know who her assailant was. Trial Tr. Vol. 1, 207; Trial Tr. Vol. 2, 684. This shows that KLL continually changed her story, even outside of the presence of her mother. Therefore to assert that Mrs. Lavigne was the reason that KLL changed her story is without merit. The simple fact is that

KLL changed her story in an erratic manner with no causal link to anything or anyone.

In sum, the weight of legal authority in this country holds that no reasonable jury can find proof of guilt beyond a reasonable doubt where the only evidence as to an essential element of the crime are the accuser's contradictory, out-of-court statements. The reason for such a rule is that the risk of an innocent defendant being convicted is too great. A conviction that is based upon such evidence violates a person's constitutional right to due process of law.

As noted in the *Bahe* case,

> As the Supreme Court recently stated "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eye witness. But this Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." . . . Likewise, the most basic component of due process in our system of criminal justice-the requirement that the government must prove its case beyond a reasonable doubt-cannot be disregarded, no matter how offensive the crimes alleged. This Court cannot allow a conviction to stand "based on a mere suspicion or possibility of guilt." . . . The Government has simply failed to demonstrate anything more in this case.

Bahe, 40 F.Supp.2d at 1313 (citations omitted). As in *Bahe* case, the State in Mr. Lavigne's trial failed to prove anything more than a mere suspicion or possibility of guilt. The only evidence that directly linked Mr. Lavigne to the crime were KLL's

contradictory, out-of-court statements. This Court cannot, in good conscious, uphold a conviction where the victim does not identify the defendant in court and the only other evidence of guilt are contradictory out-of-court statements by the victim. Therefore, this Court must find that Mr. Lavigne's constitutional rights have been violated.

V. CONCLUSION

In this case, the jury instructions supplied by presumption the identity of Mr. Lavigne as KLL's assailant and denied him his constitutional right to a fair trial. Also, Mr. Lavigne was denied his constitutional right to present a defense when the trial court limited him to only four character witnesses. Finally, Mr. Lavigne's basic due process rights were violated because the weight of legal authority in this country holds that no reasonable jury can find proof of guilt beyond a reasonable doubt where the only evidence as to an essential element of the crime are contradictory, out-of-court statements by the accuser. In this case, the only evidence that suggests that Mr. Lavigne was KLL's assailant, are her contradictory, out-of-court statements. A conviction that stands on this *and this alone* violates a person's basic due process rights.

For these reasons, this Court **GRANTS** the relief sought in *Counsel's Post-Evidentiary Hearing Memorandum of Law in Support of Second Amended Habeas*

Petition (dkt. no. 162) and *Petitioner's Post-Evidentiary Hearing Memorandum of Law in Support of Second Amended Habeas Corpus Petition* (dkt. no. 164) and **ORDERS** Joseph Lavigne's criminal convictions and sentences **VACATED** and **GRANTS** him a new trial. This *Order Vacating Judgment and Granting a New Trial* is a **FINAL ORDER** subject to appeal. In light of the Court's rulings herein, it finds it unnecessary to rule upon Mr. Lavigne's *pro se* petition and Mr. Lavigne's Counsel's other assignments of error.

The Circuit Clerk shall mail copies of this *Order* to the following:

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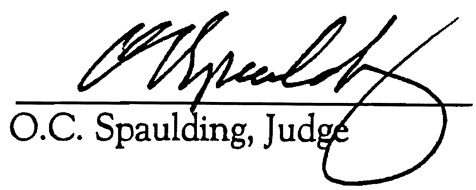
ORDERED this 29th day of April, 2011.



O.C. Spaulding, Judge