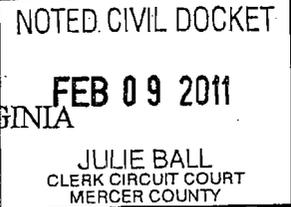


11-0307



IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*
CHARLES WESLEY THOMPSON,

PETITIONER,

V.

CIVIL ACTION NO. 09-C-214-DS

DAVID BALLARD, Warden,
MT. OLIVE CORRECTIONAL COMPLEX,

RESPONDENT.

ORDER *DENYING* THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS AND
REMOVING IT FROM THE COURT'S ACTIVE DOCKET

On November 9, 2009, this matter came before the Court, the Honorable Derek C.

Swope presiding, for a hearing on the Petitioner's *Petition for Post-Conviction Habeas Corpus Relief*, brought pursuant to the provisions of Chapter 53, Article 4A, of the *West Virginia Code*, as amended, which was filed on his behalf by and through his Court-Appointed Counsel, David C. Smith, Esq., on November 6, 2009, and on the Petitioner's Petition for a Writ of Habeas Corpus filed on May 8, 2009. The Petitioner and his counsel appeared. George Sitler, Esq., Assistant Prosecuting Attorney, appeared on behalf of the State of West Virginia. On March 22, 2010, a status review was held to determine if any possible exculpatory evidence existed in the custody of the Department of Health and Human Resources,¹ particularly a letter which the Petitioner claims he received from the DHHR exonerating him of any wrong doing concerning the alleged victim. The court ordered the following schedule for the parties to respond to the possible exculpatory evidence:

The parties were ordered to inspect relevant records at the office of the West Virginia Department of Health and Human Resources by March 29, 2010, and the Respondent was ordered to file a Response by April 9, 2010, and the Petitioner was ordered to file a Reply by

¹David Smith, Esq., was the Petitioner's counsel at this status hearing.

April 23, 2010. The parties reviewed the file on April 23, 2010 in an attempt to locate this document. The Respondent filed its response on May 4, 2010. The Petitioner filed a Reply on June 4, 2010.²

Upon further review of the record, the Court noticed that Mr. Smith and Mr. Sitler had a conflict of interest with the Petitioner. Thereupon, the Court held a status hearing on June 24, 2010 to inquire of counsel's conflict. Upon hearing that Mr. Smith and Mr. Sitler had previous conflicts with the Petitioner, the Court relieved Mr. Smith and appointed Natalie N. Hager, Esq., as Habeas Counsel on June 24, 2010. The Court further relieved Mr. Sitler from prosecuting the case and ordered that a different prosecuting attorney be assigned. On July 13, 2010, a third and final *Losh* List was filed by Ms. Hager.

On October 18, 2010 a second Omnibus Hearing was held with Natalie N. Hager, Esq., as counsel for the Petitioner and Scott Ash, Esq., as counsel for the Respondent. On January 3, 2011, a status hearing was held regarding an alleged exculpatory letter and the Court provided counsel until January 21, 2011 to submit a letter detailing counsel's investigation. Ms. Hager filed the letter with the Court on January 19, 2011. On October 25, 2010, the Court Ordered counsel to inspect DHHR records for the letter that allegedly exonerated the Petitioner. On January 3, 2011, the Court held a status hearing regarding the results of Ms. Hager's search. During the hearing, Ms. Hager reported that no letter was found. The Petitioner requested that his counsel search additional medical records at the Princeton Community Hospital in Princeton, WV and the Robert C. Byrd Clinic in Lewisburg, WV. The Petitioner further requested that his

²The Court notes that due to scheduling issues of counsel regarding the visit to the West Virginia Department of Health and Human Services, the Court held a status conference on March 22, 2010 to inquire of as to the location of the letter and to give counsel a briefing schedule.

counsel search his trial and appellate counsel's client files³. The Petitioner's counsel filed a letter with the Court describing her search results which were to no avail.

The Petitioner is seeking post-conviction habeas corpus relief from his sentences of not less than fifteen (15) nor more than thirty-five (35) years each as provided by law for the each offense of "Sexual Assault-First Degree" as the State in Counts 1, 3, 5, 7, 9 and 11 of its indictment herein alleged and by a jury had been found guilty, not less than ten (10) nor more than twenty (20) years each as provided by law for each offense of "Sexual Abuse by a Custodian" as the State in Counts 2, 4, 6, 8, 10, 12, 14, 16, 18 and 20 of its indictment herein hath alleged and by a jury hath been found guilty and not less than one (1) nor more five (5) years each as provided by law for each offense of "Sexual Assault-Third Degree" as the State in Counts 15, 17 and 19 of its indictment herein hath alleged and by a jury hath been found guilty.

These sentences were imposed to run consecutively by the Honorable Derek C. Swope: for Counts 1, 2 and 15, that his sentences with regard to Counts 3, 5, 7, 9 and 11 run concurrently with one another; that his sentences with regard to Counts 4, 6, 8, 10, 12, 14, 16, 18 and 20 run concurrently with one another. However, the Petitioner's sentences imposed with regard to Counts 3, 5, 7, 9, 11, 4, 6, 8, 10, 12, 14, 16, 17, 18, 19 and 20 would run consecutively with his sentences imposed with regards to Counts 1, 2 and 15, and that his sentences imposed with regard to the offenses of "Sexual Assault-First Degree" (Counts 3, 5, 7, 9 and 11), the offenses of "Sexual Abuse by a Custodian" (Counts 4, 6, 8, 10, 12, 14, 16, 18 and 20) and the offenses of "Sexual Assault-Third Degree" (Counts 17 and 19) would run consecutively with one another.

³During the hearing, the Petitioner waived any attorney-client privilege he had with Derrick Lefler, Esq., and Gregory Hurley, Esq.

Furthermore, the Court suspended the Petitioner's sentences in Counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19 and 20 and ordered that when the Petitioner is discharged from the penitentiary with regard to his remaining sentences imposed as to Counts 1, 2 and 15 of the Indictment, he shall be placed on probation for five (5) years. The effect of the Court's sentence in this case is that the Petitioner must serve a sentence of 26 to 60 years in the penitentiary. He faces a possible maximum of 60 years before he is eligible for release, absent a showing that he is unlawfully detained due to prejudicial constitutional error(s) in the underlying criminal proceedings.

Whereupon the Court, having reviewed and considered the Petitions, the court files, the transcripts, the arguments of counsel, and the pertinent legal authorities, does hereby **DENY** the Petitioner's Petition for Habeas Corpus relief. In support of the aforementioned denial, the Court makes the following **GENERAL FINDINGS OF FACT and CONCLUSIONS of LAW:**

I. FACTUAL/PROCEDURAL HISTORY

Case No. 03-F-302: The Indictment/Counts Specific to Each Offense

A. The Indictment

By a True Bill returned by the October 2003 Term of the Mercer County Grand Jury, the Petitioner, Charles Wesley Thompson, was indicted in a twenty (20) count indictment for the offenses of Sexual Assault-First Degree; Sexual Abuse by a Custodian; and Sexual Abuse-Third Degree. The victim, T.H⁴ (a female child) was the step-daughter of the Petitioner.

⁴Due to the sensitive matters in this case, the Court adheres to the common practice of using initials instead of the names of the young victim.

B. Counts Specific to Each Offense

Out of the twenty (20) count indictment, seven (7) of the counts were for Sexual Assault-First Degree, namely, Counts 1, 3, 5, 7, 9, 11, 13; ten (10) of the counts were for Sexual Abuse by a Custodian, namely, Counts 2, 4, 6, 8,10, 12,14,16,18,20; and three (3) of the counts were for Sexual Assault-Third Degree, namely, Counts 15, 17, 19. All Counts contained in the indictment stemmed from incidents allegedly occurring in 2000, 2001 and 2002.

C. Pre-Trial Proceedings

Upon the return of the above-referenced indictment, the Circuit Clerk of Mercer County sent a written notice to the Petitioner to appear for arraignment on November 3, 2003 at 9:30 a.m. The Petitioner appeared and George V. Sitler, Esq., was appointed as his counsel. The matter was set for trial on January 27, 2004 and the Petitioner was released on a \$10,000.00 personal recognizance bond.

On November 18, 2003, George V. Sitler, Esq., was relieved as counsel due to a conflict and David C. Smith, Esq., was appointed the Petitioner's new counsel. Mr. Smith filed a Motion for Discovery and Inspection on November 20, 2003. On December 1, 2003, David C. Smith, Esq., was relieved as counsel due to a conflict and Jerome J. McFadden, Esq., was appointed to represent the Petitioner⁵. Jerome J. McFadden, Esq., filed a Motion for Discovery, Motion to Continue pre-trial and a Motion to Withdraw as counsel due to conflict on January 9, 2004. The Court permitted Jerome McFadden, Esq., to withdraw as counsel and appointed William Flanigan, Esq., on January 12, 2004. William Flanigan, Esq., filed a Motion for Discovery and Notice of Hearing on January 21, 2004, and filed a Motion for a Bill of Particulars and Notice of

⁵ The Petitioner waived any potential conflict with Mr. McFadden.

Hearing on January 22, 2004. The Court relieved William Flanigan, Esq., as counsel for good cause shown, and appointed Thomas L. Fuda, Esq., on January 23, 2004. The Court continued the trial until April 7, 2004 at 9:30 a.m. and the pre-trial hearing on April 2, 2004 at 2:15 p.m., by its Order entered on February 17, 2004. The Court relieved Thomas L. Fuda, Esq., as counsel due to an irreconcilable conflict, and appointed Derrick W. Lefler, Esq., on March 29, 2004.

Mr. Lefler filed a Motion to Continue the trial on April 2, 2004 and the Court continued the trial until August 31, 2004 at 9:30 a.m. and a pre-trial hearing until August 23, 2004, at 1:30 p.m. On August 5, 2004, Mr. Lefler filed Motions *in Limine* to Exclude Testimony of Victoria Weisiger, Testimony of Paula Rumberg and Expert Testimony. On August 17, 2004, Petitioner's trial counsel filed a Motion for Subpoena Duces Tecum for an Order directing the Mercer County Board of Education to provide any and all of T.H.'s school records. The court entered an Order on August 20, 2004, directing the Mercer County Board of Education to provide such records. The Petitioner's trial counsel filed a Motion to Dismiss and Request for Individual Voir Dire on September 1, 2004. On September 2, 2004, the Court entered an Order that re-scheduled the trial for September 29, 2004 and for a pre-trial hearing on September 27, 2004.

D. Plea Agreement Negotiations

During the afternoon session of the trial on September 28, 2004, Deborah Garton, Esq., Assistant Prosecuting Attorney, placed on the record that during lunch a plea bargain was discussed and that the Petitioner rejected it. The State did not place on the record the details of the plea offer. (*See* Trial Transcript September 28, 2004, at p.120).

On September 30, 2004, the record reflects that a discussion occurred while waiting for the Petitioner to consider a plea offer. The details of the plea offer was not placed on the record.

(See Trial Transcript September 30, 2004, at p. 3).

On September 30, 2004, the record reflects that further discussions were held regarding a plea agreement however, the details of the plea offer were not placed on the record. (See Trial Transcript September 30, 2004, at pp. 38-41.)

E. The Trial Verdict/Sentencing-Guilty/ 26-60 Years of Imprisonment

The Trial Verdict

The Petitioner's trial in the underlying criminal matter was held on September 28, 2004 through September 30, 2004. The Court dismissed Count 13 of the Indictment during the trial. The jury returned the following verdict:

“Guilty” of Sexual Assault-First Degree in Counts 1, 3, 5, 7, 9 and 11.

“Guilty” of Sexual Abuse by a Custodian in Counts 2, 4, 6, 8, 10, 12, 14, 16, 18 and 20.

“Guilty” of Sexual Assault-Third Degree in Counts 15, 17, and 19.

Sentencing

Pursuant to the penalties prescribed by the West Virginia Code for the above offenses, on December 6, 2004, Judge Derek C. Swope sentenced the Petitioner as follows:

It is the **ORDER** and **DECREE** of this Court that the defendant, Charles Wesley Thompson, be taken from the bar of this Court to the Southern Regional Jail and therein confined until such time as the warden of the penitentiary can conveniently send a guard for him, and that he be taken from the Southern Regional Jail to the penitentiary of this State and therein confined for the indeterminate terms of not less than fifteen (15) nor more than thirty-five (35) years each as provided by law for each offense of “Sexual Assault-First Degree” as the State in Counts 1, 3, 5, 7, 9 and 11 of its Indictment Herein hath alleged and by a jury hath been found guilty; not less than ten (10) nor more than twenty (20) years each as provided by

law for each offense of "Sexual Abuse by a Custodian" as the State in Counts 2, 4, 6, 8, 10, 12, 14, 16, 18 and 20 of its Indictment herein hath alleged and by a jury hath been found guilty; and not less than one (1) nor more than five (5) years each offense of "Sexual Assault-Third Degree" as the State in Counts 15, 17 and 19 of its Indictment herein hath alleged and by a jury hath been found guilty; that the defendant by given credit for 37 days on his sentence, this being the time he has served on said charge; and that he be dealt with in accordance with the rules and regulations of that institution and the laws of the State of West Virginia.

It is the ORDER and DEGREE of this Court that the defendant's sentences with regard to Counts 1, 2 and 3 run consecutively with one another; that his sentences with regard to Counts 4, 6, 8, 10, 12, 14, 16, 18 and 20 run concurrently with one another; and that his sentences with regard to Counts 15, 17 and 19 run concurrently with one another. However, the defendant's sentences imposed with regard to Counts 5, 7, 9, 11, 4, 6, 8, 10, 12, 14, 16, 18, 20, 15, 17, 19 shall run consecutively with his sentences imposed with regard to Counts 1, 2 and 3, and that his sentences imposed with regard to the offenses of "Sexual Assault-First Degree (Counts 5, 7, 9 and 11), the offenses of "Sexual Abuse by a Custodian" (Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, and 20), and the offenses of "Sexual Assault-Third Degree" (Counts 15, 17, and 19) run consecutively with one another.

The Court recommends that the recommendations of William C. Steinhoff, Jr., MA, Licensed Psychologist, be incorporated which includes that the defendant participate in substance abuse treatment, random alcohol/drug screenings, and participation in a sex offender treatment program. The defendant is directed to pay all court costs within one (1) year of his release from incarceration.

After due consideration, it is further ORDER and DEGREE of this Court that imposition of the defendant's sentences as to Counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20 of the Indictment *only* be suspended, and that when the defendant is discharged from the penitentiary with regard to his remaining sentences imposed as to Counts 1, 2, and 3 of the Indictment, he shall be placed on probation for a period of five (5) years.

(See Disposition Order, December 6, 2004.)

The trial court placed its sentencing rationale on the record at the sentencing hearing.

(See Dispositional Hearing Transcript December 6, 2004, at pp. 14-19.)

F. Post Trial Matters

On October 12, 2004, Petitioner's counsel filed a Motion for New Trial and on November 1, 2004, filed a Memorandum of Law in Support of the New Trial. The key elements in the motion included permitting Victoria Weisiger's testimony beyond the scope of *State v. Pettrey*, 549 S.E.2d 323 (2001) and Rule 803(4) of the West Virginia Rules of Evidence, insufficient evidence offered by the State, and improper opinion testimony from Dr. Gregory Wallace. On November 3, 2004, the trial court heard and denied the Petitioner's Motion for New Trial in finding as follows:

Victoria Weisiger's testimony was that which was discovered in the course of treatment; that she was not seeing the child for evaluation, but for treatment; that she could give expert opinion based on the McCoy case; that time was not of the essence, and therefore, the evidence was sufficient. The Court further FINDS that Dr. Wallace's testimony was properly admitted; that questions of opinions goes toward credibility and could be tested through cross-examination. Therefore, it is the ORDER and DECREE of this Court that the defendant's Motion for New Trial be and is hereby DENIED.

G. Appeal to the West Virginia Supreme Court of Appeals--Refused

Grounds for Appeal

On January 17, 2006, the Petitioner, by counsel, Gregory Hurley, Esq., presented the West Virginia Supreme Court of Appeals with Petitioner's Petition praying for an appeal from the judgment and sentence rendered against him on the 17th day of November, 2005, in the Circuit Court of Mercer County. The Petitioner's Petition for Appeal was based upon the followings grounds:

- I. The circuit court committed reversible and prejudicial error in allowing 6 counts of First Degree Sexual Assault to go to the jury when there was no

factual basis presented to the jury to support the element of the offense that T.H. was under eleven years of age at the time of the offense and thus incapable of consent.

- ii. The circuit court committed reversible and prejudicial error in allowing the testimony of one Ms. Weisiger to be viewed by the jury as expert testimony and to allow her to give expert opinions when she was not academically or otherwise qualified to give such testimony.
- iii. The circuit court committed reversible and prejudicial error in allowing the expert opinion of Dr. Wallace as it relates to his "bi-manual exam," as it was not disclosed in discovery and by the witnesses (sic) own admission, has no validation within the medical community at large.
- iv. The circuit court committed plain error when the Court did not *sua sponte* grant a new trial after one Ms. Snuffer testified to a hearsay identification of the defendant, which had been indirectly the subject of a pretrial Motion *In Limine*.
- v. The cumulative effects of the errors committed by the circuit court in denying the Petitioner's other motions and objections requires relief.

The Petition for Appeal was refused on September 6, 2006.

II. The Petitioner's Petition for Writ of Habeas Corpus Ad Subjiciendum Under W.Va. Code § 53-4A-1/Petition/Losh Checklist/The Respondent's Answer

The Petition

On May 8, 2009, the Petitioner filed his Petition for Writ of Habeas Corpus in the Circuit Court of Mercer County. The Petitioner raised the following grounds in his Petitioner:

- 1) Ineffective Assistance of Counsel.
- 2) Petitioner was denied his right to Jury Trial and Due Process of Law.
- 3) Petitioner was denied a fair trial by the admission without objection of bogus expert expert testimony by Dr. Wallace.
- 4) Exists other grounds which will be assigned upon hearing.

The Petitioner also requested that counsel be appointed for him. The Court appointed

David C. Smith, Esq., to represent him in this proceeding.

On November 6, 2009, the Petitioner filed a second Petition for Writ of Habeas Corpus in the Circuit Court of Mercer County. The Petitioner raised the following grounds:

- 1) Petitioner was denied his rights to trial by jury and his right to due process of law by a State legal framework that permits conviction without proof of the act.
- 2) The expert opinions of Dr. Gregory Wallace do not pass muster pursuant to *Daubert v. Merrell Dowell* (sic) *Pharmaceuticals*, 113 S.Ct. 278 (sic) (1993).
- 3) Ineffective Assistance of Counsel⁶

At the habeas hearing held on November 9, 2009, in addition to the above grounds, the Court determined the particular grounds raised by the Petitioner according to his *Losh* checklist, by going through each and every entry on the checklist on the record. Each ground is further discussed in the appropriate section below.

Requested Relief. The Petition seeks the issuance of a Writ of Habeas Corpus and, subsequently, a fair trial.

The *Losh* Checklist filed May 8, 2009 by David C. Smith, Esq.

Waived Grounds. In his *Losh* checklist filed the Petitioner waived the following grounds for relief:

- (1) Trial Court Lacked Jurisdiction
- (2) Prejudicial pretrial publicity
- (3) Denial of right to speedy trial

⁶The Court notes that two Petitions for Habeas Corpus were filed by the Petitioner. The first Petition for Writ of Habeas Corpus was filed on May 8, 2009 and the second Petition for Writ of Habeas Corpus was filed on November 6, 2009. The Petitioner also filed a *Losh* checklist with each respective Petition for Writ of Habeas Corpus.

- (4) Involuntary guilty plea
- (5) Mental competency at time of crime
- (6) Mental competency at time of trial
- (7) Incapacity to stand trial due to drug use
- (8) Language barrier to understanding the proceeding
- (9) Coerced Confessions
- (10) Falsification of a transcript by prosecutor
- (11) Unfulfilled plea bargains
- (12) Information in pre-sentence report erroneous
- (13) Irregularities in arrest
- (14) Excessiveness or detail of bail
- (15) No preliminary hearing
- (16) Illegal detention prior to arraignment
- (17) Irregularities or errors in arraignment
- (18) Challenges to the composition of grand jury or its procedures
- (19) Improper venue
- (20) Pre-indictment delay
- (21) Refusal of continuance
- (22) Refusal to subpoena witness
- (23) Prejudicial joinder of defendants
- (24) Lack of full public hearing
- (25) Refusal to turn over witness notes after witness has testified

- (26) Claim of incompetence at time of offense, as opposed to time of trial
- (27) Claims concerning use of informers to convict
- (28) Instructions to jury
- (29) Claims of prejudicial statements by trial judge
- (30) Acquittal of co-defendant on same charge
- (31) Defendant's absence from part of the proceedings
- (32) Improper communications between prosecutor or witness and jury
- (33) Question of actual guilt upon an acceptable guilty plea
- (34) Severer sentence than expected
- (35) Mistaken advice of counsel as to parole or probation eligibility
- (36) Amount of time service on sentence, credit for time served⁷

Asserted Grounds. The Petitioner asserted the following *Losh* grounds:

- (1) Statute under which conviction was obtained was unconstitutional (*Losh* Grounds # 2)
- (2) Indictment shows on face no offense was committed (*Losh* Grounds #3)
- (3) Consecutive sentences for same transaction (*Losh* Grounds #13)
- (4) Suppression of helpful evidence by prosecutor (*Losh* Grounds #15)
- (5) State's knowing use of perjured testimony (*Losh* Grounds #16)
- (6) Ineffective assistance of counsel (*Losh* Grounds #20)
- (7) Double jeopardy (*Losh* Grounds #21)
- (8) Failure to provide copy of indictment to defendant (*Losh* Grounds #28)

⁷The Court notes that the Petitioner did not waive or assert denial of counsel or failure of counsel to take appeal in the May 8, 2009 *Losh* checklist. The Petitioner did waive these claims in his November 9, 2009 and July 13, 2010 *Losh* checklists.

- (9) Defects in indictment (*Losh* Grounds #29)
- (10) Nondisclosure of Grand Jury minutes (*Losh* Grounds #36)
- (11) Constitutional errors in evidentiary rulings (*Losh* Grounds #40)
- (12) Claims of prejudicial statements by prosecutor (*Losh* Grounds #43)
- (13) Sufficiency of evidence (*Losh* Grounds #44)
- (14) Excessive sentence (*Losh* Grounds #50)

The Second *Losh* Checklist filed November 9, 2009 by David C. Smith, Esq.

Waived Grounds. In his *Losh* checklist filed the Petitioner waived the following grounds for relief:

- (1) Trial Court Lacked Jurisdiction
- (2) Prejudicial Pretrial Publicity
- (3) Denial of Right to Speedy Trial
- (4) Involuntary Guilty Plea
- (5) Mental Competency at Time of Crime
- (6) Mental Competency at Time of Trial Cognizable Even if Not Asserted at Proper Time or if Resolution Not Adequate
- (7) Incapacity to Stand Trial Due to Drug Use
- (8) Language Barrier to Understanding the Proceedings
- (9) Denial of Counsel
- (10) Unintelligent Waiver of Counsel
- (11) Failure of Counsel to Take an Appeal
- (12) Consecutive Sentences for Same Transaction

- (13) Coerced Confessions
- (14) State's Knowing Use of Perjured Testimony
- (15) Falsification of Transcript by Prosecutor
- (16) Unfulfilled Plea Bargains
- (17) Information in Presentence Report Erroneous
- (18) Double Jeopardy
- (19) Irregularities in Arrest
- (20) Excessiveness or Denial of Bail
- (21) No Preliminary Hearing
- (22) Illegal Detention Prior to Arraignment
- (23) Irregularities or Errors in Arraignment
- (24) Challenges to the Composition of the Grand Jury or its Procedures
- (25) Failure to Provide Copy of Indictment to Defendant
- (26) Improper Venue
- (27) Pre-Indictment Delay
- (28) Refusal of Continuance
- (29) Refusal to Subpoena Witnesses
- (30) Prejudicial Joinder of Defendants
- (31) Lack of Full Public Hearing
- (32) Nondisclosure of Grand Jury Minutes
- (33) Refusal to Turn Over Witness Notes After Witness has Testified
- (34) Claim of Incompetence at Time of Offense, As Opposed to Time of Trial

- (35) Claims Concerning Use of Informers to Convict
- (36) Instructions to the Jury
- (37) Claims of Prejudicial Statements by Trial Judge
- (38) Acquittal of Co-Defendant on Same Charges
- (39) Defendant's Absence From Part of Proceedings
- (40) Improper Communications Between Prosecutor or Witnesses and Jury
- (41) Question of Actual Guilt Upon an Acceptable Guilty Plea
- (42) Severer Sentence than Expected
- (43) Excessive Sentence
- (43) Mistaken Advise of Counsel as to Parole or Probation Eligibility
- (44) Amount of Time Served on Sentence, Credit for Time Served

Asserted Grounds. The Petitioner asserted the following *Losh* Grounds:

- (1) Statute Under Which Conviction Obtained Unconstitutional⁸ (*Losh* Grounds # 2)
- (2) Indictment Shows on Face No Offense was Committed (*Losh* Grounds # 3)
- (3) Suppression of Helpful Evidence by Prosecutor (*Losh* Grounds #16)
- (4) Ineffective Assistance of Counsel (*Losh* Grounds # 21)
- (5) Defects in Indictment (*Losh* Grounds #30)
- (6) Constitutional Errors in Evidentiary Rulings (*Losh* Grounds # 41)
- (7) Claims of Prejudicial Statements by Prosecutor (*Losh* Grounds # 44)
- (8) Sufficiency of Evidence (*Losh* Grounds # 45)

⁸The Court notes that the claims of statute under which conviction obtained unconstitutional and claims of prejudicial statements by prosecutor were abandoned by Ms. Hager in the July 13, 2010 *Losh* checklist

The Court FINDS that upon comparison of both *Losh* checklists the following claims from the May 8, 2009 *Losh* checklist were not pursued in the November 9, 2009 *Losh* checklist:

- (1) Consecutive sentences for same transaction
- (2) State's knowing use of perjured testimony
- (3) Double jeopardy
- (4) Failure to provide copy of indictment to defendant
- (5) Nondisclosure of Grand Jury minutes
- (6) Excessive sentence

Accordingly, the Court FINDS that the above-referenced grounds have been waived by the Petitioner and are forever barred from consideration as a ground for habeas corpus relief.

The Third and Final *Losh* Checklist filed on July 13, 2010 by Natalie N. Hager, Esq.

Waived Grounds. In his *Losh* checklist filed the Petitioner waived the following grounds for relief:

- (1) Trial Court Lacked Jurisdiction (*Losh* Grounds # 1)
- (2) Unconstitutional of Statute Under Which Conviction Obtained (*Losh* Grounds # 2)
- (3) Prejudicial Pretrial Publicity (*Losh* Grounds # 4)
- (4) Denial of Right to Speedy Trial (*Losh* Grounds # 5)
- (5) Involuntary Guilty Plea (*Losh* Grounds # 6)
- (6) Mental Competency at Time of Crime (*Losh* Grounds # 7)
- (7) Mental Competency at Time of Trial Cognizable Even if Not Asserted at Proper Time or if Resolution Not Adequate (*Losh* Grounds # 8)
- (8) Incapacity to Stand Trial Due to Drug Use (*Losh* Grounds # 9)

- (9) Language Barrier to Understanding the Proceedings (*Losh* Grounds # 10)
- (10) Denial of Counsel (*Losh* Grounds # 11)
- (11) Unintelligent Waiver of Counsel (*Losh* Grounds # 12)
- (12) Failure of Counsel to Take an Appeal (*Losh* Grounds # 13)
- (13) Consecutive Sentences for Same Transaction (*Losh* Grounds #14)
- (14) Coerced Confessions (*Losh* Grounds # 15)
- (15) Falsification of Transcript by Prosecutor (*Losh* Grounds # 18)
- (16) Unfulfilled Plea Bargains (*Losh* Grounds # 19)
- (17) Information in Presentence Report Erroneous (*Losh* Grounds # 20)
- (18) Irregularities in Arrest (*Losh* Grounds # 23)
- (19) Excessiveness or Denial of Bail (*Losh* Grounds # 24)
- (20) No Preliminary Hearing (*Losh* Grounds # 25)
- (21) Illegal Detention Prior to Arraignment (*Losh* Grounds # 26)
- (22) Irregularities or Errors in Arraignment (*Losh* Grounds # 27)
- (23) Challenges to the Composition of the Grand Jury, or its Procedures (*Losh* Grounds # 28)
- (24) Failure to Provide Copy of Indictment to Defendant (*Losh* Grounds # 29)
- (25) Improper Venue (*Losh* Grounds # 31)
- (26) Pre-Trial Delay (*Losh* Grounds # 32)
- (27) Refusal of Continuance (*Losh* Grounds # 33)
- (28) Refusal to Subpoena Witnesses (*Losh* Grounds # 34)
- (29) Prejudicial Joinder of Defendants (*Losh* Grounds # 35)

- (30) Lack of Full Public Hearing (*Losh* Grounds # 36)
- (31) Nondisclosure of Grand Jury Minutes (*Losh* Grounds # 37)
- (32) Refusal to Turn Over Witness Notes After Witness has Testified (*Losh* Grounds # 38)
- (33) Claim of Incompetence at Time of Offense, As Opposed to Time of Trial (*Losh* Grounds # 39)
- (34) Claims Concerning Use of Informers to Convict (*Losh* Grounds # 40)
- (35) Instructions to the Jury (*Losh* Grounds # 42)
- (36) Claims of Prejudicial Statements by Trial Judge (*Losh* Grounds # 43)
- (37) Claims of Prejudicial Statements by Prosecutor (*Losh* Grounds # 44)
- (38) Acquittal of Co-Defendant on Same Charge (*Losh* Grounds # 46)
- (39) Defendant's Absence From Part of Proceedings (*Losh* Grounds # 47)
- (40) Improper Communications Between Prosecutor or Witnesses and Jury (*Losh* Grounds # 48)
- (41) Question of Actual Guilt Upon an Acceptable Guilty Plea (*Losh* Grounds # 49)
- (42) Severer Sentence than Expected (*Losh* Grounds # 50)
- (43) Excessive Sentence (*Losh* Grounds # 51)⁹
- (44) Mistaken Advise of Counsel as to Parole or Probation Eligibility (*Losh* Grounds # 52)
- (45) Amount of Time Served on Sentence, to be Served, or for which Credit Applies (*Losh* Grounds # 53)

Asserted Grounds. The Petitioner asserted the following *Losh* Grounds:

- (1) Indictment Shows on Face No Offense was Committed (*Losh* Grounds # 3)

⁹The Court notes that the claims of the states knowing use of perjured testimony and double jeopardy were added by Ms. Hager in her July 13, 2010 *Losh* checklist.

- (2) Suppression of Helpful Evidence by Prosecutor (*Losh* Grounds #16)
- (3) States Knowing Use of Perjured Testimony (*Losh* Grounds #17)
- (4) Ineffective Assistance of Counsel (*Losh* Grounds # 21)
- (5) Double Jeopardy (*Losh* Grounds #22)
- (6) Defects in Indictment (*Losh* Grounds #30)
- (7) Constitutional Errors in Evidentiary Rulings (*Losh* Grounds # 41)
- (8) Sufficiency of Evidence (*Losh* Grounds # 45)

The Respondent's Answer

The Answer. The Respondent, by and through the Prosecuting Attorney, filed an Answer on May 4, 2010 addressing the Petitioner's *Petition for Writ of Habeas Corpus* and the Petitioner's *Amended Writ of Habeas Corpus*.

The Respondent denies that the evidence was insufficient to support the verdicts of guilty returned by the jury in this matter. The Petitioner argues that the verdicts were not supported by the sufficient evidence to convict him. Specifically, the Petitioner argues that the verdict was based solely upon the testimony of the victim, who was obviously biased against the Petitioner. The Petitioner cites to Syllabus Point 3 in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) and states that the jury found the victim more credible than the Petitioner. The Respondent further states that the testimony of the victim, when viewed in the light most favorable to the prosecution, was more than sufficient to support the verdicts of guilty returned against the Petitioner. *Id.* at Syllabus Point 1.

The Respondent denies that the Petitioner was not afforded effective assistance of counsel. The Respondent cites to Syllabus Points 5 and 6 in *State v. Miller*, 194 W.Va. 3, 459

S.E.2d 114 (1995) and states that the Petition had a competent and experienced defense counsel whose actions were reasonable. The Respondent further argues that the Petitioner could not show, but for these alleged errors, he would have been found not guilty.

The Respondent affirmatively asserts that the Petitioner waived his right to challenge his convictions on any grounds not raised in his Petition for Appeal. The Respondent further asserts that any issues that could have been raised on direct appeal, but were not, is deemed waived in a subsequent habeas corpus review pursuant to W.Va. Code § 53-4A-1, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

The Respondent denies that the testimony of witness William J. Akers (Petitioner's divorce attorney) was accurate regarding the contents of records maintained by the WV Department of Health and Human Resources. The Respondent and the Petitioner's counsel reviewed the entire DHHR filed on April 23, 2010 in an attempt to locate this document. The Respondent alleges that no such document exists but that a letter from 2002 indicates that an unrelated domestic violence-based CPS investigation involving the mother of victim and the petitioner would be closed. The Respondent quotes from the letter the following "(t)he Department does not believe that what goes on in the home is reason to cause concern for the safety of your child." The Respondent attached a copy of the above-referenced letter to his response.¹⁰

The Respondent's Request. The Respondent requests that this matter be dismissed and

¹⁰The Respondent does not directly address the issue of the expert opinions of Dr. Gregory Wallace not passing muster pursuant to Daubert v. Merrell Dowell Pharmaceuticals, (sic) 113 S.Ct. 278 (sic) (1993). However, the Respondent denies that the evidence in this matter was insufficient to support the verdicts of guilty by the jury.

the Petition and the Amended Petition filed in this matter be held for naught, and for such other relief as the Court deems just and appropriate. The Court notes that the Omnibus Hearing that was set for August 17, 2009 was rescheduled at the Petitioner's request until November 9, 2009.

The First Omnibus Habeas Corpus Hearing

The first Omnibus Habeas Corpus hearing in this matter was held on November 9, 2009. The Petitioner appeared in person and by counsel, David Smith, Esq., and the Respondent appeared by George Sitler, Esq., Assistant Prosecuting Attorney for Mercer County, West Virginia.

The Petitioner was sworn by the Court, was informed about the finality of this omnibus hearing, and of the necessity that he assert all issues at the time or be forever barred from raising them. The Court reviewed the *Losh* checklist with him (Habeas Corpus Hearing Transcript pp. 7-12), and confirmed that it was the same as had been filed on November 9, 2009. The Petitioner testified and called William Akers and Derrick Lefler in his case in chief. These witnesses were called on the issues of an alleged exculpatory letter from the West Virginia Department of Health and Human Resources, Dr. Wallace's testimony, and the defense counsel's representation of the Petitioner. The Respondent did not offer any witnesses. The Petitioner confirmed the grounds which were abandoned from his first *Losh* list filed on May 8, 2009.

On March 22, 2010, the Court held a status hearing regarding the alleged exculpatory letter from the West Virginia Department of Health and Human Resources. The Court ordered Mr. Smith and Mr. Sitler to inspect the DHHR files to locate the letter at issue. On May 4, 2010, the Respondent filed its Response to the Petitioner's Amended Petition or Writ of Habeas Corpus. On June 4, 2010, the Petitioner filed his Reply to the Respondent's Response.

On June 24, 2010, a hearing was held regarding a potential conflict with counsel for the Petitioner. Upon review of the record, George Sitler, Esq., and David Smith, Esq., had both briefly represented the Petitioner. The Petitioner requested that new counsel be appointed and that a different prosecuting attorney be assigned to this matter. The Court disclosed to the Petitioner that William Flanigan, Esq., had previously presented the Petitioner however, the Petitioner asserted no conflict of interest¹¹. The Court scheduled an Omnibus hearing wherein his new counsel, Natalie Hager, Esq, would represent him on his Petition for Writ of Habeas Corpus. Ms. Hager filed a *Losh* list on July 13, 2010 which indicated the following grounds as waived:

WAIVED:

Lack of trial court jurisdiction (*Losh* ground #1)

Unconstitutionality of statute under which conviction obtained (*Losh* ground #2)

Prejudicial pretrial publicity (*Losh* ground #4)

Denial of speedy trial right (*Losh* ground #5)

Involuntary guilty plea (*Losh* ground #6)

Mental competency at time of crime (*Losh* ground #7)

Mental competency at time of trial/plea, cognizable even if not asserted at proper time, or if resolution not adequate (*Losh* ground #8)

Incapacity to stand trial/enter into plea due to drug use (*Losh* ground #9)

Language barrier to understanding the proceedings (*Losh* ground #10)

¹¹The Court informed the Petitioner that his Law Clerk was related by marriage to Mr. Flanigan.

Denial of counsel (*Losh* ground #11)

Unintelligent waiver of counsel (*Losh* ground #12)

Failure of counsel to take an appeal (*Losh* ground #13)

Consecutive sentence for same transaction (*Losh* ground #14)

Coerced confessions (*Losh* ground #15)

Falsification of a transcript by prosecutor (*Losh* ground #18)

Unfulfilled plea bargains (*Losh* ground #19)

Information in pre-sentence report erroneous (*Losh* ground #20)

Irregularities in arrest (*Losh* ground #23)

Excessiveness or denial of bail (*Losh* ground #24)

No Preliminary Hearing (*Losh* ground #25)

Illegal detention prior to arraignment (*Losh* ground #26)

Irregularities or errors in arraignment (*Losh* ground #27)

Challenges to the Composition of the Grand Jury, or its Procedures (*Losh* ground #28)

Failure to Provide Copy of Indictment to Defendant (*Losh* ground #29)

Improper Venue (*Losh* ground #31)

Pre-Trial Delay (*Losh* ground #32)

Refusal of Continuance (*Losh* ground #33)

Refusal to Subpoena Witnesses (*Losh* ground #34)

Prejudicial Joinder of Defendants (*Losh* ground #35)

Lack of Full Public Hearing (*Losh* ground #36)

Nondisclosure of Grand Jury Minutes (*Losh* ground #37)

Refusal to Turn Over Witness Notes After Witness has Testified (*Losh* ground #38)

Claim of Incompetence at Time of Offense, As Opposed to Time of Trial (*Losh* ground #39)

Claims Concerning Use of Informers to Convict (*Losh* ground #40)

Instructions to the Jury (*Losh* ground #42)

Claims of Prejudicial Statements by Trial Judge (*Losh* ground #43)

Claims of Prejudicial Statements by Prosecutor (*Losh* ground #44)

Acquittal of Co-Defendant on Same Charges (*Losh* ground #46)

Defendant's Absence From Part of Proceedings (*Losh* ground #47)

Improper Communications Between Prosecutor or Witnesses and Jury (*Losh* ground #48)

Question of Actual Guilt Upon an Acceptable Guilty Plea (*Losh* ground #49)

Severer Sentence than Expected (*Losh* ground #50)

Excessive Sentence (*Losh* ground #51)

Mistaken Advise of Counsel as to Parole or Probation Eligibility (*Losh* ground #52)

Amount of Time Served on Sentence, to be Served, or for which Credit Applied (*Losh* ground #53)

ASSERTED:

Indictment showing on its face that no offense was committed (*Losh* ground #3)

Suppression of helpful evidence of prosecutor (*Losh* ground #16)

State's knowing use of perjured testimony (*Losh* ground #17)

Ineffective assistance of counsel (*Losh* ground #21)

Double Jeopardy (*Losh* ground #22)

Defects in Indictment (*Losh* ground # 30)

Sufficiency of Evidence (*Losh* ground #45)

The Second Omnibus Corpus Hearing

On October 18, 2010, an Omnibus Hearing was held with Ms. Hager representing the Petitioner as new habeas counsel. Ms. Hager filed the above-referenced *Losh* checklist on July 13, 2010, along with a new disclosure of witnesses. The Petitioner was satisfied with Mr. Smith's Petition for Writ of Habeas Corpus and therefore, Ms. Hager did not file an amended habeas. The State did not file a renewed reply. The Petitioner's witnesses included Derrick Lefler, Esq., William J. Akers, Esq., David Smith, Esq., Margaret Thompson, and himself. During the hearing, the Petitioner's counsel requested to review the DHHR's records for the alleged exculpatory letter. On October 25, 2010, the Court ordered counsel to search DHHR's records for the letter at issue. On January 3, 2011, the Court held a status hearing and the Petitioner's counsel reported that she did not locate the letter at DHHR. During that hearing, the Petitioner requested the Court to allow his counsel to search medical records at Princeton Community Hospital in Princeton, WV and the Robert C. Byrd Clinic in Lewisburg, WV for the letter. The Petitioner also requested that his counsel review his trial and appellate counsel's client files for the letter. The Court granted the Petitioner's counsel additional time to further search for the letter and to report her results to Court by January 21, 2011. On January 19, 2011, the Petitioner's counsel filed a letter stating that no exculpatory letter was found.

III. Discussion

Habeas Corpus Defined

Habeas Corpus is "a suit wherein probable cause therefore being shown, a writ is issued which challenges the right of one to hold another in custody or restraint." Syl. Pt. 1, *State ex rel.*

Crupe v. Yardley, 213 W.Va. 335, 582 SE2d 782 (2003).¹² “The sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by the due process of law.” *Id.* at Syl. Pt. 2. “A habeas corpus petition is not a substitute for a writ of error¹³ in that ordinary trial error not involving constitutional violations will not be reviewed.” *Id.* at Syl.Pt.3.

The Availability of Habeas Corpus Relief

In *State ex rel. McCabe v. Seifert*, the West Virginia Supreme Court of Appeals delineated the circumstances under which a post-conviction habeas corpus hearing is available, as follows:

[1]Any person convicted of a crime and [2] incarcerated under sentence of imprisonment therefore who contends [3] that 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 [4] that the court was without jurisdiction to impose the sentence, or [5] that the sentence exceeds the maximum authorized by law, or [6] 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, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or relief[.]

220 W.Va. 79, 640 S.E.2d 142 (2006); W.Va. Code § 53-4A-1(a)(1967)

Our post-conviction habeas corpus statute, W.Va. Code §53-4A-1(a) *et seq.*, “clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of

¹² See also Syl. Pt. 4, *Click v. Click*, 98 W.Va. 419, 127 S.E.2d 194 (1925).

¹³ A writ of error is a writ issued by an appellate court to the court of record where a case is tried, requiring that the record of the trial be sent to the appellate court for examination alleged errors. Writ of error. Dictionary. com. Random House, Inc. [www.http://dictionary.reference.com/browse/writ of error.](http://dictionary.reference.com/browse/writ%20of%20error)

right, to only one post-conviction habeas corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with reasonable diligence, discover.” Syl. Pt. 1, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).¹⁴

“A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: (1) ineffective assistance of counsel at the omnibus habeas corpus hearing; (2) newly discovered evidence; (3) or, a change in the law, favorable to the applicant, which may be applied retroactively.” Syl. Pt. 4, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).¹⁵

A habeas corpus proceeding is civil in nature. “The general standard of proof in civil cases is preponderance of the evidence.” *Sharon B.W.V. George B.W.*, 203 W.Va. 300, 303, 507 S.E.2d 401, 404 (1998).

In *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984), the West Virginia Supreme Court of Appeals held that:

(a) habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary

¹⁴See also *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

¹⁵On June 16, 2006, the West Virginia Supreme Court of Appeals held that a fourth (4th) ground for habeas relief may exist in cases involving testimony regarding serology evidence. Summarizing, the Court held as follows:

A prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime serologist, other than a serologist previously found to have engaged in intentional misconduct, offered evidence may bring a petition for a writ of habeas corpus based on the serology evidence even if the prisoner brought a prior habeas corpus challenge to the same serology evidence and the challenge was finally adjudicated. *In re Renewed Investigation of State Police Crime Laboratory, Serology Div.*, 633 S.E.2d 762, 219 W.Va. 408 (2006).

to afford the Petitioner an adequate opportunity to demonstrate his entitlement to relief. Syl. Pt. 5.

“Whether denying or granting a petition for relief for writ of habeas corpus, the circuit court must make adequate findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined.”

Coleman v. Painter, 215 W.Va. 592, 600 S.E.2d 304 (2004).

FINAL LIST OF GROUNDS ASSERTED FOR ISSUANCE OF A WRIT OF HABEAS CORPUS, AND THE COURT’S RULINGS THEREON

The Court has carefully reviewed all the pleadings filed in this action, the transcripts of the omnibus hearings, the Court file in the underlying criminal action, and substantial portions of the transcript of the pre-trial hearings and the trial, and the applicable case law. There were three *Losh* lists filed by the Petitioner in his habeas pleadings.

Before reviewing each factor, the Court FINDS that while the grounds of (1) indictment shows on face no offense was committed; (2) excessive sentence; (3) consecutive sentences for the same transaction; (4) State’s knowing use of perjured testimony; (5) double jeopardy; (6) failure to provide copy of indictment to defendant; (7) non-disclosure of grand jury minutes were listed; (8) constitutional errors in evidentiary rulings; and (9) defects in indictment on the final *Losh* checklist they were not briefed or argued by the Petitioner or his counsel¹⁶. Therefore, these grounds are forever waived.

¹⁶The Court notes that the Petitioner had asserted the claims of statute under which conviction obtained unconstitutional and prejudicial statements by prosecutor in his November 9, 2009 *Losh* checklist but abandoned those claims. The Court further notes that the Petitioner asserted consecutive sentences for same transaction and nondisclosure of grand jury minutes in his May 8, 2009 *Losh* checklist but abandoned those claims.

This Court believes that the key issues to resolve this matter are:

- 1) whether the Petitioner was denied due process of law by a State legal framework that permits conviction without proof of the criminal act;
- 2) whether the expert opinions of Dr. Gregory Wallace survive a *Daubert* challenge;
- 3) whether trial counsel was ineffective.

This Court must further determine whether the trial court made any other error in its rulings that unfairly prejudiced the Petitioner.

Accordingly, this Court now answers the following questions:

CLAIM A: The Petitioner was denied his rights to trial by jury and his right to due process of law by a State legal framework that permits conviction without proof of the criminal act.

The Petitioner's Argument. The Petitioner argues that his right to trial by jury and his right to due process of law were denied him by a State legal framework that permits conviction without proof of the act.

The Petitioner was convicted of twenty¹⁷ counts of sex offenses and argues that during trial the State best proved by direct evidence one count of oral, one count of vaginal and one count of anal sex. The testimony of T.H. that these sexual acts "probably took place once a month" does not by proof by a reasonable doubt standard support a twenty count conviction. The Petitioner further argues that the framework set forth in *State v. Reed*, 514 S.E.2d 171 (W.Va. 1997) violates his rights to Due Process and Trial by Jury because it requires the jury to speculate and results in conviction without the criminal act being proven or supported with evidence.

¹⁷The Petitioner was convicted of nineteen counts but was originally indicted on twenty counts.

It is doubtful that the indictment itself could withstand strict constitutional scrutiny. It is axiomatic that at the minimum, an indictment must prove basic double jeopardy protections. See *Russell v. U.S.*, 369 U.S. 749 (1962).

There is nothing given the method of charging, to protect Petitioner from being hauled into court on new twenty count indictment or the exact same proof by the State using the artifice of "Oh, it happened more often than we thought."

Respondent's Answer. See Section II, above.

Claim A: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim A:

- (1) The Court **FINDS** that this allegation fits with the assertion that there was a defect in the indictment, namely, a failure to state the exact date and time of the commission of the crime.
- (2) The Court **FINDS** that the dates and number of counts charged in the Petitioner's indictment were based upon the accounts of the child.
- (3) The Court **FINDS** that in Syllabus Point 4 of *State v. Chaffin*, 156 W.Va. 264, 192 S.E.2d 728 (1972), the West Virginia Supreme Court of Appeals held that "[a] variance in the pleading and the proof with regard to the time of the commission of a crime does not constitute prejudicial error where time is not of the essence of the crime charged."
- (4) The Court **FINDS** that *W.Va. Code § 62-2-10*, specifically states, in pertinent

part:

No indictment of other accusation shall be quashed or deemed invalid...for omitting to state, or stating imperfectly, the time at which the offense was committed...

(5) The Court **FINDS** that in *State ex rel. State v. Reed*, 204 W.Va. 520, 514 S.E.2d 171, (1999) the West Virginia Supreme Court of Appeals stated (while quoting *State v. Hensley*, 120 N.C. App. 313, 462 S.E.2d 550, 557 (1995)) that “[y]oung children cannot be expected to be exact regarding times and dates[;] a child’s uncertainty as to the time and date upon which the offense charged was committed goes to the weight rather than to the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State’s evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.”

(6) That Court **FINDS** that additionally, *Reed* quoted *State v. Long*, 320 Or. 361, 885 P.2d 696, 700 (1994) stating “[t]he state was not required to prove that the offense was committed on the date alleged in the indictment.”

(7) The Court **FINDS and CONCLUDES** that the variance in the dates and counts charging the Petitioner with the crimes for which he was ultimately convicted, (to wit: 6 counts of Sexual Assault in the First Degree, 10 counts of Sexual Abuse by a Custodian, and 3 counts of Sexual Assault in the Third Degree) is not prejudicial error because time is not of the essence to the crimes charged.

(8) The Court **FINDS** that, as to the Petitioner’s concerns regarding double

jeopardy, that “[a] conviction under an indictment charged, though the proof was at variance regarding immaterial dates, precludes a subsequent indictment on the exact same material facts contained in the original indictment.”

See generally State v. Sears, 196 W.Va. 71, 468 S.E.2d 324 (1996).

(9) The Court **FINDS and CONCLUDES** that the indictment at issue in this case affords sufficient Constitutional protections against double jeopardy.

(10) The Court **FINDS and CONCLUDES** that the Petitioner’s claim that he was denied his right to a trial by jury and his right to due process of law by a state legal framework that permits conviction without proof of the criminal act which the Court also construes as a claim that there was a defect in the Indictment, is without merit.

CLAIM B: The Petitioner claims that the expert opinions of Dr. Gregory Wallace do not pass muster pursuant to *Daubert v. Merrell Dowell (sic) Pharmaceuticals*, 113 S.Ct. 278 (sic) (1993).

The Petitioner’s Argument: The Petitioner next argues that much, if not all of the purported expert testimony of Dr. Gregory Wallace should have been excluded pursuant to the *Daubert* decisions.

The *Daubert* Decision, *supra*, is the controlling case over the admissibility of the expert testimony. Pursuant to *Daubert*, expert testimony must not only be relevant, it must also be reliable. Justice Blackman in *Daubert*, defined scientific to imply a grounding in the methods and procedures of science, and the term knowledge to mean more than a belief or unsupported speculation. *See Expert Witness in Child Abuse Cases* (ec:d Hembrooke, American Psychological Association 2002 at page 160.)

Simply put, *Daubert*, bans “Junk Science” and quasi scientific voodoo from the courtrooms of America.

Petitioner argues that the opinions of Dr. Wallace constitute junk science in two aspects. First, Petitioner says that the opinion of Dr. Wallace that most sexually abused children show no physical signs of abuse is bogus. At page 62 of the trial transcript Dr. Wallace opined. [sic].

Q. Okay. Dr. Wallace, if a child has an intact hymen, does that medically—I’m asking does that rule out her having been sexually assaulted?

A. No, ma’am, not at all. Lots of —lots of people have looked into that and approximately 85 to 95 percent of children that have been sexually abused have absolutely no external findings whatsoever in illness or any trauma.

Dr. Wallace is no stranger to this Court. He has testified to this point in numerous other cases. Indeed, his testimony in other cases demonstrates the utter lack of reliability of his evidence.

In *State v. Swiger*, Dr. Wallace opined at page 186 of the record:

There’s several things, Doctor Martin Finkle, a physician in Cherry Hill, New Jersey, did a study several years ago, he found—he took a child that had come to the Emergency Room, had obviously been raped and had a vaginal tear. He followed that child on a daily basis while she was in the hospital, in eight days time the vaginal tear had completely healed and there was no evidence at all that she’d ever been traumatized. There are other studies, one that I’m thinking of in-in particular, a gentleman named McClain, I can’t think of his first name, but he took thirty-one confessing perpetrators and examined the children, the thirty-one children, approximately 33% had a normal examination, approximately 33% had some questionable examination, meaning that they have a yeast infection which is sometime suggestive of—of abuse, of they could have labile adhesions, they could have several little things that might—they might be abused or they might not be abused, but 33 fell into that par—that main problem with that study was that if the perpetrators said they penetrated or if they said they didn’t penetrate their sentence was less, so we know that all thirty-one of those children were sexually abused, we don’t know for sure if they were penetrated or not.

In *State v. Wirt*, Dr. Wallace opined at page 269 of the record:

Umm...the literature supports that the average time from an abusive situation to the time that they come to a health care professional to do an abuse of examination, the average is six months. So, we don't expect to find a whole lot.

Q. What literature? Site [sic] the study, sir.

A. I don't...I can't give you a study. I can do it, umm.
..I can mail it back to you if you like.

Q. You can tell me what the literature says but you can't tell me what the literature is that says that.

A. Eh, I've never been challenged, short of my umm... statement that 70% of the literature states that there's no physical findings.

Q. Alright.

A. But, I believe I did send eh, Judge Frazier a copy of that.

In *State v. White*, Dr. Wallace testified at page 197 for the record:

Q. Is it-you mentioned earlier that, and it sounded like the majority of cases, there would be no signs?

A. 70% yes ma'am.

Q. Is that also true for anal sex, I mean-

A. Yes ma'am, it's true for any type of sexual injury. These children--there was a study done in 1990 that had thirty-one cases of people that admitted that they had sexually abused a child, the only variable in the study was that one group said they had penetrated the child and one group said they hadn't. Of all thirty-one-I can't remember the exact numbers but that's where my 70% come from, about 65-70% of those children had not symptoms whatsoever with the perpetrators admitting that they had sexually abused the child.

The Petitioner argues that Dr. Wallace engaged in junk science with his testimony herein, by exaggerated at study that has never been produced or named, and that had no application case at bar because the issue of penetration was not explored in the study. Indeed, the testimony could and should have been excluded pursuant to Rule 403 of the West Virginia Rules of Evidence as its probative value was nil and its prejudicial effect enormous.

The second area of *Daubert* challenged to Dr. Wallace's expert testimony is his bi manual

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The second area of *Daubert* challenged to Dr. Wallace's expert testimony is his bi manual

vaginal wall laxity opinions. At page 62, Dr. Wallace opined.

- Q. Okay. Can you tell me if you found any evidence of her having been sexually assaulted?
- A. There is lots of myths about hymen's [sic] and certainly her hymen was perfectly normal because it was estrogenized, or it was preparing for puberty. But when I did an internal examination the vaginal wall laxity was much more than what I would expect with a 12 year old child.
- Q. Okay. When you do an internal, I'm just--did you do that with an instrument or with your fingers?
- A. With my finger.
- Q. And you found the internal wall lax?
- A. Yes. Ma'am.
- Q. Than you--more so than you would have expected in a child that age?
- A. That's correct.

At page 66 of the record Dr. Wallace testified:

- Q. Now you told us here about the walls, the vaginal walls.
- A. Yes.
- Q. And I have your report, and I do not see that notation.
- A. It's under the physical examination.
- Q. Do you have a copy of your report?
- A. No, I don't. I can read yours.
- Q. Sure. If you would read that and tell me if what you have recounted to the jury here is, in fact, in the report.
- A. "The bimanual examination was done and the child demonstrated no discomfort with the bimanual examination." And then in the summary, "Her physical examination based on the bimanual would be comparable with sexual abuse."
- Q. That's not what you have testified her [sic] today, it is, as far as your specific findings?
- A. That's what that implies, yes.
- Q. That's not what it says though. Your report does not contain testimony that you have given us here today?
- A. That's what that--that's what that implies. It's the same as the written. It's just stated in different words.

At page 71-72, Dr. Wallace further opined:

- Q. Okay. Since this whole vaginal wall thing is a new one to me, can you--you're telling us that your examination revealed something to you that you felt might be suggestive of some sort of sexual activity?

- A. Yes, sir.
- Q. And what was that specifically?
- A. It was the laxity of the vaginal wall.
- Q. And I am assuming that is, again, a pretty subjective finding with reference to individuals, everybody, each individual is different in terms of their anatomic makeup?
- A. It's a finding that's taken me ten years to examine enough children to be able to be comfortable making that statement, yes, sir.
- Q. Is that—I've read a number of tests about examinations, and I have yet to note that as a finding or an examination point that is looked to:[sic]
- A. Because it is something that comes with experience. I don't know that anyone has ever written on it. I have heard other people speak of that, though.
- Q. So this isn't something that is a finding or a test or an examination generally recognized or received in the texts on the subject?

Thus, by the good doctors [sic] over admission this bimanual examination and his vaginal wall laxity testimony amounts to no more than a cheap song and dance which has absolutely no scientific foundation to it, nor has it been properly validated either in the literatures, by scientific study, or by properly conducted survey by the doctor. Hence, it amounts to gross speculation by the witness and should never have been admitted into testimony.

The Respondent's Answer: See Section II, above.

Claim B: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim B:

(1) The Court FINDS that the Court must conduct the following two-step inquiry when determining whether a person is an expert:

- (1) whether the proposed expert (a) meets the criminal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation c) which will assist the trier of fact; and (2) whether the expert's area of expertise covers the particular opinion as to which the

expert seeks to testify. *Sharon B.W. v. George B.W.*, 203 W.Va. 300, 304, 507 S.E.2d 401, 405 (1998).

(2) The Court **FINDS** that if an expert witness is qualified by training or education, it is an abuse of discretion for the court to refuse to qualify that individual as an expert.

(3) The Court **FINDS** that Rule 702 of the West Virginia Rules of Evidence states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(4) The Court **FINDS** that Dr. Wallace testified to his education, knowledge, training and experience and the Trial Court concluded that his qualifications were sufficient to allow both of the witnesses' opinions.

(5) The Court **FINDS** that, as for discrepancies involving Dr. Wallace's statistical testimony:

[A] jury verdict is accorded great deference, especially when it involves the weighing of conflicting evidence. *See Ware v. Howell*, 217 W.Va. 25, 614 S.E.2d 464 (2005).

(6) The Court **FINDS** West Virginia jurisprudence provides for the trial court to err on the side of admissibility of expert testimony to assist the trier of fact. The Court further **FINDS** that once an expert is permitted to testify, the opposing party may vigorously cross-examine the expert's training, education, experience,

qualifications, and methodology to rebut any unfavorable testimony. *See, Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995), Rule 702 of the West Virginia Rules of Evidence.

(7) The Court **FINDS** and **CONCLUDES** that the Petitioner has failed to prove his allegations that the expert testimony of Dr. Wallace amount to unreliable junk science banned by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), by a preponderance of the evidence.

(8) The Court **FINDS** and **CONCLUDES** that the Petitioner's claim that the expert opinions of Dr. Gregory Wallace do not pass muster pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993) is without merit.

CLAIM C: The Petitioner was denied his right to effective assistance of counsel.

The Petitioner's Argument. Petitioner Thompson next argues that his counsel, Derrick Lefler was ineffective as a matter of law. The Petitioner says that he was entitled by the Sixth Amendment to the United States Constitution and its counterpart in the West Virginia State Constitution to effective representation. *See, Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Thomas*, 203 S.E.2d 445 (W.Va. 1974). The Petitioner argues that in considering ineffective claims, the Court utilizes a two part test. First, the Court examines the objective reasonableness of the actions of trial counsel, and then looks at whether the deficiencies of trial counsel were outcome determinative.

In the case at bar, the Petitioner challenges the performance of his counsel in several respects. First, Petitioner contends that his trial counsel was woefully inadequate in challenging the expert testimony of Dr. Gregory Wallace. The Petitioner further argues that a cursory review

of the record discloses that counsel failed to mount any sort of meaningful challenge to the admissibility of the junk science the good doctor was peddling.

The Petitioner contends that the entire bimanual, vaginal wall laxity testimony was utterly without scientific foundation yet no objection was made, and no attempt was made to exclude it. The Petitioner argues that this testimony, as if offered some "medical findings" to cooperate (sic) TH's testimony in and of itself was outcome determinative.

The Petitioner further argues trial counsel's failure to object on the point, after being unfairly and wrongfully blindsided by the testimony, precluded meaningful appellate review. An important part of counsel's performance is to protect the record of appellate purpose. Trial counsel failed in these regards as well and forfeited without good cause Petitioner's right to seek appellate review of the point. *See, State v. Dudley, 358 S.E.2d 306 (W.Va. 1987); Alston v. Garrison, 720 F.2d 812 (4th Cir. 1982).*

The second area of deficient performance of counsel assigned by Petitioner involves the failure of trial counsel to object to the admissibility of Dr. Wallace's testimony that 90% percent of abuse show no physical signs of abuse, to explain T.H.'s intact hymen.

The Petitioner argues that there should be no speculation as to what the study was. This is information that should have been provided, or at least requested during discovery. Indeed, in the federal system its production is routine and mandatory. *See, Rule 26 of the Federal Rules of Civil Procedure.*

Petitioner notes that out of the four trials he has examined involving testimony of Wallace, to date, the Mercer County Court has not mandated the identification of this much twisted and purported study to even determine its admissibility. Petitioner says that this Court

cannot determine the validity of his arguments herein without it, and should order it produced by the State.

Petitioner further says that given the purported studies failure to inquire as to the issue of penetration versus no penetration that its applicability to the instant matter is questionable where the allegations are penetration. Indeed, it is doubtful that the testimony can pass the probative/prejudicial test of Rule 403 of the West Virginia Rules of Evidence, much less the *Daubert* reliability test.

Moreover, counsel's failure to object to, or explain the examine [sic] the basis of this testimony effectively precluded him from obtaining meaningful appellate review of the same.

Petitioner argues that given the nature of this testimony that his lawyer should have hired an expert witness to counter the bad testimony of Dr. Wallace, and that this too constitute [sic] ineffective assistance of counsel.

The second error Petitioner assigns as ineffective is the failure of trial counsel to produce and use at trial a purported letter from the Department of Health and Human Resources to Petitioner which states the allegations were baseless.

Petitioner argues that this letter was exculpatory and should have been produced and utilized by counsel. The failure of trial counsel to present this exculpatory evidence should be held as ineffective.

The Respondent's Answer. See Section II, above.

Claim C: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim C:

(1) The Court **FINDS** that the West Virginia Supreme Court of Appeals stated the

test to be applied in determining whether counsel was effective in *State v. Miller*:

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), syl. pt. 5.

(2) The Court **FINDS** that the West Virginia Supreme Court of Appeals has also stated that:

Where counsel's performance, attacked as ineffective arises from occurrence involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of the accused. *State ex rel Humphries v. McBride*, 220 W.Va. 362, 645 S.E.2d 798 (2007) syl. pt. 5. In accord, Syllabus point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

(3) The Court **FINDS** that the West Virginia Supreme Court of Appeals has also held that:

[i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) syl. pt. 6.

(4) The Court finds that the Petitioner's trial counsel filed numerous motions for discovery, motions *in limine* and other motions designed to effectively defend the Petitioner. He raised issues concerning the admissibility of evidence, including all of the issues raised by the Petitioner as *Daubert* challenges.

(5) The Court finds that on the surface, an expert witness could have testified to refute Dr. Wallace. However, upon further deliberation the Petitioner's trial counsel may not have used an expert to refute Dr. Wallace's testimony as part of his trial strategy. The Petitioner's trial counsel's decision to not put forward an expert has not been proven by the Petitioner by a preponderance of the evidence to be outcome determinative. The Petitioner's counsel may not have wanted to bring forth the weaknesses in his own case by the use of an expert.

(6) The Court finds that Dr. Wallace testified about a bimanual examination that he performed on T.H., and included statistics of external findings and sexually abused children. The court finds that the Petitioner's counsel did not object to the bimanual examination and the statistics however, the Petitioner's counsel did cross-exam Dr. Wallace on the bimanual examination. The Court further finds that the Petitioner's counsel cross-examined Dr. Wallace on T.H.'s school performance, the knee-chest position physical examination, and the physical condition of T.H.'s hymen. (*See Trial Transcript Day Two pp. 64-73*)

(7) The Court finds that the Petitioner's counsel and Dr. Wallace had the following exchange during re-cross examination regarding the reliability of the

examination:

Q. . Dr. Wallace, in other words, there is simply no way to know through your examination whether or not this happened.

Is that correct?

A. No, I would disagree with that totally.

Q. Well you just told Ms. Garton that if it's happened you're not going to necessarily see a sign. So you can't know for certain, can you?

A. Well I just explained to the jury that if—if you see them acutely and you see the fresh [sic] tearing there are definite signs, yes.

Q. If you're not in that situation, though, there is simply no way to know?

A. Not physically. We have to rely on the witness.

Q. And this examination that your opinion that you have offered concerning laxity of the vaginal wall is one, again, just to be clear, that is not published or recognized in medical texts as being a test or a sign or an examination for sexual abuse?

A. That's correct.

Q. Okay. And those are the same texts used to teach doctors, to teach examiners how to do these things, aren't they?

A. Yes, but that's why there are forensic fellowships just like I did.

(See Trial Transcript, Day Two pp.79-80).

(8) The Court finds the Petitioner's counsel was effective in cross-examining Dr. Wallace on the above-referenced issues.

(9) The Court finds that the Petitioner's counsel was also effective in cross-examining the Petitioner's ex-wife, Katrina Thompson. (See Trial Transcript, Day Two pp.155-174 and pp.177-178)

(10) The Court finds that the Petitioner's counsel also elicited testimony from Patty Flanagan regarding T.H.'s truthfulness. (See Trial Transcript, Day Two pp. 96-98)

(11) The Court finds that the Petitioner's counsel elicited from Katrina Thompson, the ex-wife of the Petitioner and mother of T.H. regarding significant marital problems which revolved around another woman, Rita Bailey. (See Trial Transcript, Day Two pp.164-167)

(12) The Court finds that the letter dated June 4, 2002 from Tara Brumit of the West Virginia Department of Health and Human Resources has no bearing on the criminal case. The Court finds that the letter from the DHHR involved an investigation of domestic violence where the department substantiated the domestic violence claim but closed the case. The Court finds that this letter does not mention an investigation for sexual abuse. The Court finds, at most, the letter could have been used as an impeachment device and not for its substance.

(See Respondent's Answer to the Petition for Writ of Habeas Corpus, Exhibit A)

The Court further finds that the Petitioner's Reply does not refer to any aspect

of the DHHR letter. (*See* the Petitioner's Reply filed June 4, 2010)

(13) The Court finds that the Petitioner's trial counsel filed a Motion for New Trial on October 12, 2004 and a Memorandum of Law in Support on November 1, 2004. The Court subsequently denied the Motion during a hearing held on November 3, 2004. (*See* Motion for New Trial Transcript, p. 24)

(14) The Court finds that the Habeas Counsel has made an extensive and thorough search for the alleged letter at issue by searching the files at the following: the West Virginia's DHHR's abuse and neglect files; the medical records of Princeton Community Hospital in Princeton, WV; the medical records of the Robert C. Byrd Clinic in Lewisburg; WV; Mr. Lefler's client file for the Petitioner; the abuse and neglect file in the Circuit Clerk's office; and has contacted Gregory Hurley, Esq., Petitioner's Appellate Counsel, all to no avail.

(15) The Court **FINDS** and **CONCLUDES** that the Petitioner's claims of ineffective assistance of trial counsel are vague; that the decision as to whether to use expert testimony was a matter of trial strategy and tactics; that trial counsel ably and vigorously defended the Petitioner by any standard of performance, and that the Petitioner failed to prove his claims of ineffective assistance of counsel by a preponderance of the evidence, or that the outcome would have been different.

(16) The Court **FINDS** and **CONCLUDES** that the Petitioner's claim that he was denied his right to effective assistance of counsel is without merit.

Other Findings of Fact and Conclusions of Law. The Court makes the following additional findings of fact and conclusions of law:

(1) The Court **FINDS** that none of the other grounds marked on the *Losh* list were pursued in evidence or argument during the November 9, 2009 or the October 18, 2010 Habeas Hearings, nor were they pled: specifically, claims that the statute under which the conviction was obtained was unconstitutional; that the indictment shows on its face that no offense was committed; suppression of helpful evidence by Prosecutor; constitutional errors in evidentiary rulings; consecutive sentences for the same transaction; nondisclosure of grand jury minutes; and claims of prejudicial statements by the prosecutor.

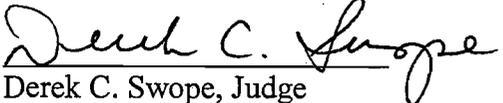
(2) The Court **FINDS** that it has thoroughly reviewed the asserted claims which were pursued during the November 9, 2009 and the October 18, 2010 Habeas Corpus hearings with the Petitioner (*See* November 9, 2009, Omnibus Habeas Corpus Hearing Transcript at pp 7-13 and 74-80 and October 18, 2010 Omnibus Habeas Corpus Transcript at pp. 7-12). The Court further **FINDS** and **CONCLUDES** that by failing to raise these claims during the hearings or in the pleadings the Petitioner is forever barred from raising them for further Habeas Corpus relief.

IV. RULING

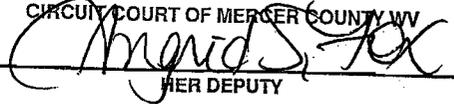
WHEREFORE, for the reasons set forth in the foregoing opinion, the Court **ORDERS** and **ADJUDGES** as follows:

1. That the Petition for Writ of Habeas Corpus sought by the Petitioner is hereby **DENIED** and this action is ordered **REMOVED** from the docket of this Court.
2. The Court appoints Natalie N. Hager, Esq., to represent the Petitioner on the appeal of this denial of his Petition for Writ of Habeas Corpus.
3. This is a final order. The Circuit Clerk is directed to distribute a certified copy of this Order to Natalie N. Hager, Esq., at 1605 Honaker Avenue, Princeton, WV 24740, and to the Petitioner at Mount Olive Correctional Complex, 1 Mountainside Way, Mt. Olive, West Virginia, 25185.
4. The Clerk is further directed to send a copy of this Order to Scott Ash, Esq., the Mercer County Prosecuting Attorney's Office located at the Mercer County Courthouse Annex, 120 Scott Street, Suite 200, Princeton, West Virginia, 24740.

ENTER: This the 9th day of February, 2011.


Derek C. Swope, Judge

THE FOREGOING IS A TRUE COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 9th DAY
OF February
DATED THIS 10th DAY OF February
20 11

JULIE BALL, CLERK OF THE
CIRCUIT COURT OF MERCER COUNTY WV
BY 
HER DEPUTY