

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

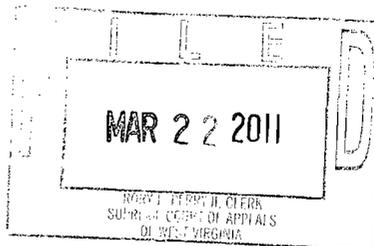
DOCKET NO. 11-0307

**STATE OF WEST VIRGINIA EX REL.,
CHARLES WESLEY THOMPSON**
Petitioner

V.)

Appeal from a final order
of the Circuit Court of Mercer
County (09-C-214-DS)

**DAVID BALLARD, Warden,
MT. CORECTIONAL COMPLEX,**
Respondent.



Petitioner's Brief

Counsel for Petitioner, Charles Wesley Thompson

Natalie N. Hager, Esq. (WV Bar # 9971)

Counsel of Record

Harvey & Janutolo Law Offices

1605 Honaker Avenue

Princeton, West Virginia 24740

Phone: 304-487-3788

alexjerr@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

ARGUMENT 6

I. THE PETITIONER WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III SECTION TEN OF THE WEST VIRGINIA STATE CONSTITUTION WHERE THE STATE UTILIZED LEGAL FRAMEWORK THAT PERMITS CONVICTION WITHOUT PROOF OF CRIMINAL ACT..... 6

II. THE PETITIONER’S CONVICTION WAS BASED ON EXPERT OPINIONS OF DR.GREGORY WALLACE THAT DID NOT PASS MUSTER PURSUANT TO DAUBERT V. MERRELL DOWELL PHARMACEUTICALS, 509 U.S. 579, 113 S. CT. 278 (1979).....8

III. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE THREE SECTION FOURTEEN OF THE WEST VIRGINIA STATE CONSTITUTION.....14

CONCLUSION AND PRAYER FOR RELIEF 26

VERIFICATION27

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S.C.A. Const. Amend. VI ii, 1, 5, 14
U.S.C.A. Const. Amend. XIV ii, 1, 3, 5, 6, 14

WEST VIRGINIA STATE CONSTITUTION

W. Va. Const. Art. III § 10 ii, 1
W. Va. Const. Art. III § 14 ii, 1, 3, 5, 6, 14
W. Va. Const. Art. III § 17 3

WEST VIRGINIA RULES OF EVIDENCE

W. Va. R. Evid. 104 9
W. Va. R. Evid. 702 9, 10

WEST VIRGINIA RULES OF REVISED APPELLATE PROCEDURE

W. Va. R. Rev. App. P. 16 3
W. Va. R. Rev. App. P. 19 6
W. Va. R. Rev. App. P. 20 6

UNITES STATES SUPREME COURT CASES

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) 15
Daubert v. Merrell Dowell Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 278 (1979) passim
Sandstrom v. Montana, 442 U.S. 510, 998 S.Ct. 2450 (1979) 4, 6
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1985) 5, 14, 15
Strickler v. Green, 527 U.S. 283, 119 S.Ct. 1936 (1999) 4, 6

WEST VIRGINIA SUPREME COURT OF APPEALS CASES

State v. Braham, 211 W. Va. 614, 567 S.E.2d 624 (2002) 7

State v. Guthrie, 194 W. Va. 657, 547 S.E.2d 910 (1995) 7

State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1988) (per curiam) 7

State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995) 5, 15

State v. Reed, 204 W. Va. 520, 514 S.E.2d 171 (1999) (per curiam) 8

Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993) 9

QUESTIONS PRESENTED

- I. WHETHER THE PETITIONER WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III SECTION TEN OF THE WEST VIRGINIA STATE CONSTITUTION WHERE THE STATE UTILIZED LEGAL FRAMEWORK THAT PERMITS CONVICTION WITHOUT PROOF OF CRIMINAL ACT.
- II. WHETHER THE PETITIONER'S CONVICTION WAS BASED ON EXPERT OPINIONS OF DR.GREGORY WALLACE THAT DID NOT PASS MUSTER PURSUANT TO DAUBERT V. MERRELL DOWELL PHARMACEUTICALS, 509 U. S. 579, 113 S. CT. 278 (1979).
- III. WHETHER THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE THREE SECTION FOURTEEN OF THE WEST VIRGINIA STATE CONSTITUTION.

STATEMENT OF THE CASE

This case is an appeal from the denial of the Petitioner's Petition for Writ of Habeas Corpus by the Mercer County Circuit Court on February 9, 2011. (A.R. 1-47). The Petitioner's Petition for Habeas Corpus followed the denial of his appeal by the West Virginia Supreme Court from his conviction of six counts of Sexual Assault in the First Degree, ten counts of Sexual Abuse by a Custodian, and three counts of Sexual Assault in the Third Degree. (A.R. 2-3; 294). In this case, the Petitioner respectfully requests that this Honorable Court reverse his conviction of the above-stated counts and grant any other relief that may be appropriate herein.

On October 16, 2003, the Mercer County Grand Jury indicted with Petitioner with Seven Counts of Sexual Assault in the First Degree, Ten Counts of Sexual Abuse by a Custodian, and Three Counts of Sexual Assault in the Third Degree. (A.R. 295). On September 28-30, 2004, the Petitioner, represented by his trial counsel, Derek Lefler, was tried and convicted of Six Counts of Sexual Assault in the First Degree, Ten Counts of Sexual Abuse by a Custodian, and Three Counts of Sexual Assault in the Third Degree. Count Thirteen Sexual Assault in the First

Degree was dismissed by the circuit court during trial. (A.R. 2-3, 7). On December 6, 2004, the Petitioner was sentenced to 26 to 60 years in a penitentiary. However, the Order dated December 6, 2004, erroneously reflected his sentence to be 40 to 90 years in prison. The Petitioner's sentence was corrected by the Amended Order dated October 22, 2007 pursuant to the Motion for Correction of Sentence filed by David Smith on October 5, 2007. (A.R. 87-88).

On November 14, 2005, the Petitioner was resentenced for appeal purposes, and on January 17, 2006, Gregory S. Hurley filed an appeal on behalf of the Petitioner. On September 6, 2006, the West Virginia Supreme Court refused the Petitioner's Petition for Appeal by Order, *State of West Virginia, Plaintiff Below, Respondent v. Charles Wesley Thompson, Defendant Below, Petitioner*, No. 060175. (A.R. 9-10; 294).

On November 6, 2009, the Petitioner, by and through his counsel at the time, David Smith, filed his Amended Petition for Writ of Habeas Corpus. (A.R. 279-293). An Omnibus Hearing was held on November 9, 2009, wherein George Sitler, Assistant Prosecuting Attorney for Mercer County, West Virginia, represented the Respondent, and Mr. Smith represented the Petitioner. At the Omnibus Hearing, William Akers and the Petitioner testified about the existence of a letter from the Department of Health and Human Resources (hereinafter referred to as "the DHHR") that purportedly exonerated the Petitioner. (A.R. 212-216; 250-252). At the conclusion of the hearing, Mr. Smith argued that Derek Lefler's failure to introduce that letter into evidence at trial constituted ineffective assistance of counsel. (A.R. 274-275). On March 22, 2010, the Honorable Derek Swope ordered Mr. Smith and Mr. Sitler to search the DHHR records for said letter, which was not found by counsel. (A. R. 193-194). On May 4, 2010, Mr. Sitler filed his response to the Petitioner's Amended Petition for Writ of Habeas Corpus, and on June 4, 2010, Mr. Smith filed the Petitioner's reply to the State's response. (A.R.184-192). However,

on June 24, 2010, at the hearing on the potential conflict of interest, the Honorable Derek Swope relieved Mr. Smith as counsel for the Petitioner, and appointed the undersigned counsel to represent the Petitioner in his habeas corpus proceeding. Judge Swope also relieved Mr. Sitler from representing the Respondent, and ordered that a different prosecuting attorney represented David Ballard, Warden, Mt. Olive Correctional Complex.

The undersigned counsel filed the Petitioner's *Losh List* on July 13, 2010. (A.R. 179-183). The Petitioner was fully satisfied with the Petition for Writ of Habeas Corpus filed by Mr. Smith, so a Second Amended Petition was not filed. A second Omnibus Hearing was held on October 18, 2010, with the undersigned counsel as representative for the Petitioner, and Scott A. Ash as representative for the Respondent. (A. R. 77-178). At the omnibus hearing, William Akers, David Smith, Margaret Thompson, and the Petitioner testified to the existence of the letter from the DHHR that purportedly exonerated the Petitioner. On October 19, 2010, Judge Swope ordered counsel of record to inspect the DHHR records for the said letter, and then on January 3, 2011, Judge Swope ordered that the medical records pertaining to the alleged victim at the Princeton Community Hospital and the Robert C. Byrd Clinic in Lewisburg, West Virginia, as well as the records of his trial and appellate counsel, be searched for said letter. The undersigned counsel reported to the circuit court that the letter was not found. (A.R. 49-66).

The Mercer County Circuit Court denied the Petitioner's Petition for Writ of Habeas Corpus on February 9, 2011, from which the Petitioner now appeals pursuant to Rule 16 of the West Virginia Revised Rules of Appellate Procedure. (A.R. 1-47).

SUMMARY OF ARGUMENT

Every individual charged with a criminal offense deserves a fair trial, pursuant to the Fourteenth Amendment of the United States Constitution, Article Three Sections Fourteen and

Seventeen of the West Virginia State Constitution, and Strickler v. Green, 527 U.S. 263, 119 S.Ct. 1936 (1999). Moreover, the Fourteenth Amendment of the United States Constitution and Article Three Section Fourteen of the West Virginia State Constitution ensure that the State prove each and every element of the offense charged beyond a reasonable doubt. *See also*, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

The Petitioner asserts that the alleged victim's testimony that the sexual act "probably" happened once a month does not meet the beyond a reasonable doubt standard of proof of twenty counts of criminal offenses. Moreover, the indictment itself that places seasons of the year as times of the alleged offenses, fails to withstand constitutional scrutiny.

Second, the Petitioner asserts that his conviction was based on so-called "junk science" offered by Dr. Gregory Wallace on the witness stand at trial. The landmark case for expert testimony and its admissibility is Daubert v. Merrell Dowell Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 278 (1993). In Daubert, Justice Blackman defined the term "scientific" to imply a grounding in methods and procedure of science, and the term "knowledge" to mean "more than a belief or unsupported speculation". *Id.* at 589, 2795. Hence, Daubert bans so-called "junk science" from the expert witness stand. Dr. Wallace had given a greatly varying testimony as to the percentages of children who showed no signs of sexual abuse. At the Petitioner's trial, he stated that 85 to 95% of sexually abused children showed no signs of abuse or trauma. However, in another Mercer County case, State v. Swiger, Dr. Wallace stated that only 33% of sexually abused children did not show signs of trauma or abuse. Hence, the Petitioner argues that Dr. Wallace engaged in mere guess work, or so called junk science, which was clearly unsupported by any peer review journals and articles. The Petitioner further challenges Dr. Wallace's

testimony on the bi-manual examination, which had no support or foundation in the medical literature, scientific study, or survey.

Finally, the Petitioner asserts that he was denied his Sixth Amendment right to effective assistance of counsel. The Sixth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, and Article Three Section Fourteen of the West Virginia State Constitution guarantee a criminal defendant the right to effective counsel. U.S.C. Amend. VI; W. Va. Const. Amend. Art. III § 14. West Virginia has adopted the two-prong test announced in Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). In fact, Justice Cleckley essentially paraphrased the two components of this test in Syllabus point 5 of State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995): “(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”.

The Petitioner was denied effective assistance of counsel at the trial level, wherein his counsel, Derek Lefler, failed to purport any meaningful challenge and objection to Dr. Wallace’s testimony and the admissibility of his “junk science” into evidence, such as Dr. Wallace’s testimony on the bi-manual examination of vaginal walls. The Petitioner was further denied effective assistance of counsel wherein Mr. Lefler failed to object to the admissibility of Dr. Wallace’s testimony that 85 to 95% of abused children showed no signs of trauma or abuse. The Petitioner also argues that his trial counsel was ineffective in his failure to produce the exculpatory letter sent to the Petitioner by the DHHR. The Petitioner, his mother, William Akers, and Mr. Smith all testified to the existence of such a letter at the Omnibus Hearing held on October 18, 2010. (A.R. 129-156).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The case at bar is suitable for oral argument under Rules 19 and 20 of the West Virginia Revised Rules of Appellate Procedure because it involves assignments of error in the application of settled law, constitutional matters, as well as issues of fundamental public importance.

ARGUMENT

I. **THE PETITIONER WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III SECTION FOURTEEN OF THE WEST VIRGINIA STATE CONSTITUTION WHEREIN THE STATE UTILIZED LEGAL FRAMEWORK THAT PERMITS CONVICTION WITHOUT PROOF OF CRIMINAL ACT.**

Every individual charged with a criminal offense deserves a fair trial, pursuant to the Fourteenth Amendment of the United States Constitution, Article Three Sections Fourteen and Seventeen of the West Virginia State Constitution, and Strickler v. Green, 527 U.S. 263, 119 S.Ct. 1936 (1999). The Fourteenth Amendment of the United States Constitution and Article Three Section Fourteen of the West Virginia State Constitution ensure that the State prove each and every element of a criminal offense beyond a reasonable doubt. *See also*, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), where the United States Supreme Court held the jury instructions to be unconstitutional because that the jury could have interpreted the challenged presumption as conclusive, or as shifting the burden of persuasion, in violation of the Fourteenth Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

The standard of review for insufficiency of evidence on appeal is clearly established in West Virginia common law:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine *whether such evidence, if believed, is*

sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry 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, State v. Guthrie, 194 W. Va. 657, 547 S.E.2d 910 (1995). (Emphasis added). Hence, evidence to support a criminal conviction will be found insufficient if, after hearing it at trial, the jury could not have found the defendant guilty beyond the reasonable doubt, the highest standard of proof. At trial, the State has a burden to prove each element of a criminal offense beyond a reasonable doubt. Therefore, when an offense includes the element of criminal intent, the State must present enough evidence to prove to the trier of fact that the defendant possessed the requisite state of mind before or during the crime. See, for example, State v. Braham, 211 W. Va. 614, 567 S.E.2d 624 (2002) and State v. Houdeyshell, 174 W.Va. 688, 689, 329 S.E.2d 53, 54 (1985) (per curiam).

In the case at bar, the Petitioner was convicted of six counts of Sexual Assault in the First Degree, Ten Counts of Sexual Abuse by a Custodian, and three counts of Sexual Assault in the Third Degree. At trial, Deborah Garton, Assistant Prosecuting Attorney for Mercer County, inquired of the alleged victim:

Q. On average, how often did he have - - did he either have you put your mouth on his penis, did he put his penis in your vagina, or did he put his penis in your butt?

MR. LEFLER: I'm going to object. It's been asked.

THE COURT: Overruled.

MS. GARTON: You can answer.

THE WITNESS: What exactly do you mean?

By MS. GARTON:

Q. When it first started, how often was it? Was it like, you know, just every now and then, or did you feel like it was pretty regular?

A. Every now and then.

Q. Okay. And what does every now and then mean? Would that be once a week? Once a month? Once a year?

A. Well, probably once a month.

(A.R. 284). The Petitioner first must note that “probably” does not meet, by any stretch of imagination the beyond a reasonable doubt standard of proof. Not only that, but the simple statement that the offenses “probably” occurred once a month does not support the conviction of nineteen sex offenses. The Petitioner avers that the legal framework set forth in State v. Reed, 204 W. Va. 520, 514 S.E.2d 171 (1999) (per curiam) and its progeny violates right rights to due process and a fair trial because it inevitably requires the jury to speculate on the evidence presented to them, and it results in a conviction without the criminal act being proven or supported with evidence. Indeed, the indictment itself does not prove basic double jeopardy protections because there is absolutely nothing given the method in charging to protect the Petitioner from being charged with a new twenty count indictment or the exact same proof by the State using the artifice of “Oh, it happened more than we thought”. Accordingly, the legal framework used by the State in conviction of the Petitioner violated his due process rights as well as his right to a fair trial under the United States Constitution and West Virginia State Constitution.

II. THE PETITIONER’S CONVICTION WAS BASED ON EXPERT OPINIONS OF DR. GREGORY WALLACE THAT DID NOT PASS MUSTER PURSUANT TO DAUBERT V. MERRELL DOWELL PHARMACEUTICALS, 509 U.S. 579, 113 S. CT. 278 (1993).

The Petitioner asserts that most, if not all, of Dr. Gregory Wallace’s testimony should have been excluded at trial pursuant to Daubert v. Merrell Dowell Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 278 (1993). The Daubert case is the landmark case in the admissibility of expert

testimony. Daubert dictates that expert testimony must not only be relevant, but it must also be reliable:

c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. Pp. 2796-98

Daubert at Syl. (c). Justice Blackmun defined "scientific" to imply a "grounding of methods and procedures of science", and the term "knowledge" to mean "more than a belief or unsupported speculation". *Id.* at 590, 2795. Indeed, Justice Blackmun stated that "[p]roposed testimony must be supported by appropriate validation, *i.e.* "good grounds", based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability". *Id.* "[S]ubmission to the scrutiny of the scientific community is a component of 'good science' in part because it increases the likelihood that substantive flaws in methodology will be detected". *Id.* at 593, 2797. Accordingly, "the fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised". *Id.* Simply put, Daubert bans "junk science and quasi scientific voodoo from the courtroom of America". *Id.* *See also, Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993)¹.

¹ "Thus, we believe that *Daubert* is directed at situations where the scientific or technical basis for the expert testimony cannot be judicially noticed and a hearing must be held to determine its reliability. We conclude that *Daubert's* analysis of Federal Rule 702 should be followed in analyzing the admissibility of

The Petitioner claims that Dr. Wallace's opinions constitute "junk science" in two aspects. First, the Petitioner states that Dr. Wallace's opinion that 85 to 95% of sexually abused children show no signs of sexual abuse should have been excluded as unsupported by medical literature, peer review articles, or surveys. At page 62 of the trial transcript, Dr. Wallace opined that "approximately 85 to 95% of children who have been sexually abused have absolutely no external findings whatsoever in illness or any trauma." (A.R. 285-286). However, Dr. Wallace's testimony on the same subject was quite different in several other criminal cases that arose out of Mercer County. For example, in State v. Swiger, Dr. Wallace opined that only 33% of sexually abused children showed no signs of sexual abuse:

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 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 perfectly normal examination, meaning that they may have a yeast infection which is sometimes suggestive of - - of abuse, or 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 category and only 33% showed definite signs of abuse. The – main problem with that study was that if the perpetrators said they penetrated or if 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.

expert testimony under Rule 702 of the West Virginia Rules of Evidence. The trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community". Wilt v. Buracker, 191 W. Va. at 46, 443 S.E.2d at 203 .

(A.R. 285-286). Yet in another Mercer County case, State v. Wert, Dr. Wallace offered another opinion as to the percentages of sexually abused children who did not exhibit signs of abuse or trauma:

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 examination, the average is six months. So, we don't expect to find a whole lot.

Q. What literature. Site 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.

(A.R. 286-287). In State v. White, Dr. Wallace testified at page 197 of the record that 65-70% of sexually abused children show no signs of sexual abuse – a number completely different than that offered in the Petitioner's case and in Swiger:

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% comes from, about 65-70% of those children had no symptoms whatsoever with the perpetrators admitting that they had sexually abused the child.

(A.R. 287) . Clearly, by offering these greatly varying statistics on the percentages of sexually abused children who exhibited no signs of abuse or trauma, Dr. Wallace engaged in “junk science” warned against and explicitly banned from admission into evidence in Daubert. In his testimony, Dr. Wallace essentially grossly exaggerated a study that he could not even name or produce, especially since the study had no application to the Petitioner’s case since the issue of penetration had not been explored. Dr. Wallace’s testimony on these statistics was clearly inadmissible under the West Virginia Rules of Evidence because its probative value was nil and its prejudicial effects enormous.

The Petitioner further asserts that Dr. Wallace’s testimony on his bi-manual examination of vaginal walls was inadmissible pursuant to Daubert. Specifically, Dr. Wallace had come up with an evaluation of vaginal walls that, according to him, would show or fail to show signs of sexual assault:

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 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 trial 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 examination would be compatible with sexual abuse."

Q. That's not what you have testified here today, is it, as far as your specific findings?

A. That's what it 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 vagina wall thing is a new one to me, can you - - you're telling us that your examination revealed something to you that you felt like 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:

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 it 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?

(A.R. 287-289). Hence, Dr. Wallace essentially admitted that his bi-manual examination of vaginal wall laxity does not amount to anything more than once again "junk science" banned and condoned by Daubert. This examination has no scientific foundation, is not supported by literature or scientific studies, or a properly conducted survey by a medical doctor. Essentially, this examination amounted to gross speculation by a witness, and should not have been admitted into evidence at the Petitioner's trial, pursuant to Daubert and its progeny.

III. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III SECTION FOURTEEN OF THE WEST VIRGINIA STATE CONSTITUTION.

The Sixth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, and Article Three Section Fourteen of the West Virginia State Constitution guarantee a criminal defendant the right to effective counsel. U.S.C. Amend. VI; W. Va. Const. Amend. Art. III § 14. The threshold question in analyzing effectiveness of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result". Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). In Strickland, the United States

Supreme Court adopted a test that requires a defendant who claims ineffective assistance of counsel to prove two components. First, the defendant must demonstrate the deficiency of his counsel's performance. Defense counsel must make errors so grievous as to deprive the defendant of his Sixth Amendment right to counsel. *Id.* Second, the defendant must prove that counsel's actions prejudiced him thus denying him a fair trial. *Id.* Such prejudice is only presumed if the defendant shows that his counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance'." *Id.* at 692, 2067 (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719 (1980)).

West Virginia has adopted the two-prong test announced in Strickland. In fact, Justice Cleckley essentially paraphrased the two components of this test in Syllabus point 5 of State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995): "(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". Justice Cleckley further emphasized that in examining ineffective assistance of counsel claims, courts must "at the same time refrain [] from engaging in hindsight or second-guess[ing] trial counsel's strategic decisions". Syl. pt. 6. Instead, courts should focus on whether counsel's actions were in accord with the actions of a "reasonable lawyer . . . under the circumstances". *Id.*

The Petitioner asserts that his trial counsel, Derek Lefler, was ineffective in his representation of the Petitioner. First, Mr. Lefler was woefully inadequate in preparing for the testimony of Dr. Wallace. He knew that Dr. Wallace was going to testify about the bi-manual examination of vaginal walls. Indeed, Mr. Lefler conceded that he did not know the nature of a bi-manual examination, and yet he had failed to pick up the phone and call Dr. Wallace before trial to find out what the testimony was going to reveal:

Q. And you knew going in that he was going to be testifying about something called bi-manual?

A. I recollect that that was a phrase that was - - that appeared in his report as part of the examination.

Q. When you saw the phrase in his report, did you have a clue as to what that was?

A. No, sir, it wasn't - - it wasn't a phrase that I had seen before or was familiar with.

Q. Did you try making any contact with Dr. Wallace to see what clarification was of this phrase?

A. I don't recall that I had any - - had contact with him prior to the trial.

Q. Did you go talk to him, see him, call him?

A. Again, I don't recall that I had any contact with him prior to the trial.

Q. Did you cause anyone to go see and talk to him, like a private investigator or - -

A. No, sir. That - - that's typically where if I was going to do that (inaudible).

(A.R. 226-227). At the second Omnibus hearing, Mr. Lefler offered essentially the same testimony stating that even though he had never heard of a bi-manual examination, he did not even bother to inquire into the method and nature thereof by calling Dr. Wallace for any clarifications:

Q. Now did you know that he [Dr. Wallace] was going to testify about something called the Bi-Manual Exam?

A. I believe that was probably in the report.

Q. Now prior to seeing that had you ever seen anything about a Bi-Manual Exam?

A. I don't recall that I had.

Q. Now wouldn't it be important to followup on that before trial to see what - -

A. Possibly.

Q. -- the nature of that was?

A. Possibly. Certainly. I mean --

Q. And you did not call Dr. Wallace to clarify what the Bi-Manual was?

A. Did not. As I recall.

(A.R. 101-102). Mr. Lefler realized that Dr. Wallace's testimony about the bi-manual exam was going to be weak. Yet he had neglected to investigate it and ask Dr. Wallace some follow up questions prior to trial. Instead, Mr. Lefler proceeded to represent the Petitioner on nineteen criminal charges at trial without having the slightest idea about the nature of the testimony of the State vital witness. At the Omnibus Hearing, when asked why he did not pick up the phone to follow up on the nature of the bi-manual examination, Mr. Lefler conceded that he could not provide a valid answer to that question:

Q. Did Dr. Wallace support or back up his Bi-Manual Exam by any studies?

A. Now I felt that was certainly one area in his testimony that I -- I thought he was particularly weak. My recollection of his basis of the examination was certainly sketchy.

Q. And you had never heard of it before?

A. I don't think I was familiar with it, no. And my recollection is -- is that and I think is perhaps how I ultimately characterized it, it sounded to me like he sort of made it up on his own.

Q. Okay. And why is it that you did not pick up the phone if you saw -- if you saw that Bi-Manual Exam in your report, why didn't you pick up the phone and ask exactly what is it?

A. I couldn't -- I couldn't tell you specifically.

(A.R. 110). Indeed, Mr. Lefter further shared his belief that Dr. Wallace essentially made up the bi-manual examination himself. Mr. Lefler further conceded that he could not think of a reason as to why he did not object to the admission of the bi-manual examination testimony, thus failing to preserve the issue for appeal

Q. Bi-manual is - -

A. Well, I don't - -

Q. Well what was meant by that?

A. Yeah, I mean, I - - certainly recognize the term but that was not - - where my recollection is, he said that was something he had sort of devised and - -

Q. Made up his self. So I'm - - so why didn't you object to - - okay you've already said it did mean what you thought it meant and that something he made up himself, why didn't you object to that testimony?

A. I would have to - - and again, going back several years, I believe that my - - my thoughts at the time was that it was a matter (inaudible) raised of Dr. Wallace's testimony as opposed to it's a piece of evidence.

Q. I think you know under our law scientific evidence, scientific testimony, has to have some support somewhere?

A. Yes, as a general proposition, yes.

Q. A general proposition. And that's (inaudible). Now you did cross-exam the doctor and he admitted that there were no peer reviewed studies on any of this, right?

A. I wouldn't disagree with that.

Q. And as I recollect, the good doctor also testified that there were no studies that he knew of whatsoever through literature to back up what he was saying.

A. Doesn't that - - if that what the transcript reads.

Q. I mean, can you think of a good tactical or strategic reason not to object to something like that, throwing that away?

A. Certainly I can't off the top of my head think of a straight reason to - - to not object, no.

Q. And again, before you were even in trial, why wasn't this challenge in a pretrial motions saying, "Doc, what is this thing? Where's your literature to support it?" I mean, to meet Daubert standards?

A. I don't - - I don't know. Other than to say, I was not aware at that time that this was a particular unique self-constructed test.

(A. R. 237-239). The Petitioner's counsel further conceded that he had failed to challenge the scientific validity of yet another part of "junk science" offered into evidence by Dr. Wallace's testimony. Furthermore, Mr. Lefler stated that he had not objected, nor filed Daubert motions, nor challenged the credibility of such testimony at trial, when Dr. Wallace proffered statistics of sexually abused children who do not exhibit signs of such abuse:

Q. Didn't you ever in the course of representing this gentleman consider challenging scientific validity of that testimony?

A. I don't - - I don't recall that - - that I did.

Q. Do you know where it comes from?

A. His - - his testimony?

Q. That the kids don't show any signs of this, where - - he gets that from?

A. I don't know specifically where his opinion as to - - or his statements as to that effect come - - comes from. As I say, I think it is, it's not inconsistent with text that I have reviewed regarding physical examinations of sexual abuse victims.

Q. But haven't - - aren't you at least curious what study he's using? I mean, he comes in and makes a blank statement and this guy's, I believe his statement was, 80 to 90 percent of the kids don't show anything. I'm sorry 85 to 95 five percent.

A. I don't believe that I did challenge those statistics.

Q. You don't know where they came from?

A. No, I would have to say no to that.

Q. In Swiger the case was yours, he [Dr. Wallace] testified that a Martin Finkle, some physician from New Jersey did the study. And with one from McClain says took 31 confessing perpetrators and examined the children, 33 percent had normal exams, 33 had questionable and 33 showed signs of abuse. But then it was never differentiated by his own testimony in Swiger that - - why whether or not were allegations for penetration. Did you ever at any point with this one try to get a hold of that statement or claim just to - -

A. I don't recall that I did.

Q. You going to admit that 33 percent is a bit different from 85 to 95 percent.

A. Certainly.

Q. Wouldn't - - as trial counsel, would you like to know why the difference?

A. Certainly would be a pertinent piece of information.

Q. We never asked.

A. I don't recall we did.

Q. And we did - - and you didn't file any Daubert-type motions to challenge that?

A. No, I don't believe there were.

Q. And you don't object to it at trial?

A. To that opinion, that particular piece of testimony, I don't recall that I did.

Q. Why not?

A. Certainly sitting here several years later, I don't know that I can say with specificity. The - - I - - I really - -

(A.R.228-231). Instead of challenging Dr. Wallace's so called junk science offered into evidence before the jury, Mr. Lefler proceeded to trial blindsided, without adequate preparation to effectively cross-examine Dr. Wallace, who was such a crucial witness in the State's case in chief, on the bi-manual examination. In fact, Mr. Lefler conceded that "the bi-manual

examination was a significant part of [Dr. Wallace's] conclusion, whatever it was". (A.R. 240). Clearly, a current review of the record indicates that Mr. Lefler had failed to conduct a meaningful cross-examination of Dr. Wallace's testimony simply because he was unprepared to effectively challenge the doctor.

Not only was Mr. Lefler unprepared to effectively cross-examine Dr. Wallace, but he also failed to object to the admission of Dr. Wallace's testimony on the bi-manual examination of vaginal wall laxity, or to make any attempt to exclude it from being introduced into evidence. Clearly, Dr. Wallace's testimony offered what the jury perceived to be the "medical findings" that corroborated the alleged victim's testimony, and hence, it was crucial to exclude such outcome determinative evidence. Failure to object to the admission of Dr. Wallace's testimony on the statistics of sexually abused children, who showed no signs of sexual abuse, and on the bi-manual examination, constituted ineffective assistance because Mr. Lefler failed to preserve those issues for appellate review.

Mr. Lefler's failure to challenge the statistics offered at trial by Dr. Wallace and his failure to object to the admissibility thereof constituted ineffective assistance of counsel. Pursuant to Daubert, as discussed in section II of this Petition, admissible expert testimony must be both relevant and reliable. However, Dr. Wallace could not produce a single iota of scientific foundation for his so called "junk science". He didn't offer any articles, surveys, peer reviews, or data to corroborate and support his testimony that 85 to 95 % of sexually abused children have intact hymens. Mr. Lefler did not even request that the State produce scientific foundation for Dr. Wallace's testimony during discovery. Petitioner notes that out of the four trials he has examined involving testimony of Dr. Wallace to date, the Mercer County Circuit Court has not mandated the identification of this much twisted and purported study to even determine in

admissibility. The Petitioner further argues that given the purported study's failure to inquire as to the issue of penetration versus no penetration in 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. Finally, Mr. Lefler's failure to hire an expert to counter Dr. Wallace's testimony, too, constitutes ineffective assistance of counsel.

The second error the Petitioner assigns as ineffective assistance of counsel is the failure of trial counsel to produce and use at trial a purported letter from the DHHR written to the Petitioner that deemed the allegations baseless. The Petitioner states that the letter was exculpatory in nature, and that it should have been produced and utilized by Mr. Lefler. Even though Mr. Smith and the undersigned counsel did not find the letter in the records searched, several witnesses testified about the existence of such letter at both Omnibus hearings. On November 9, 2009, Bill Akers testified that such a letter did indeed exist:

Q. In the course of - - did he bring you some sort of letter or correspondence from DHHR?

A. Yes, he did.

Q. What was that letter or correspondence? Do you remember?

A. My memory is it was a letter from DHHR saying they found that he hadn't done anything improper.

Q. Do you remember who at DHHR wrote it?

A. No.

Q. But there was a letter?

A. During the - - divorce case, yes.

Q. And it was on DHHR letterhead?

A. Yes.

Q. That stated that this allegation has been investigated by DHHR and there's no evidence.

A. That is correct.

Q. Do you remember seeing that letter?

A. I remember seeing the letter. I don't remember word for word what it said.

Q. What happened to that letter?

A. I thought it was in the file. He asked me to let Mr. Lefler look in the file and take whatever he wanted. And he did. And some time later his mother came to see me and said they couldn't find the letter. That's all I remember.

Q. And it wasn't in your file?

A. It was no longer in my file.

Q. That was after Mr. Lefler got a copy of your file?

A. Well, I told him just take whatever he wanted. He made some copies, as I remember, but my memory's pretty faded.

Q. Did he take - -

A. I do remember the letter.

Q. You remember it being put in the file?

A. And if it was in there when Mr. Lefler looked in there or not, I really don't know, but I thought it was in there.

Q. But the - -

A. I don't remember doing anything else with the letter.

Q. So it was not in the file?

A. Yes. I even saw the letter. Mr. Thompson gave me the letter.

(A.R. 212-214).² The Petitioner testified on November 9, 2009, about the existence of the letter as well:

Q. Now what would you said that your lawyer didn't do that you think he should have at trial?

A. Represent that letter, I give him that letter. I mean, I give him that letter. I even give like I say Bill Akers asked about it, I gave him one.

Q. Now this letter, tell me about the letter. What was it, Charles?

A. It was a letter stating that no - - when she - - when the welfare department took over and said that she had been - - she was going to get checked by a doctor. They didn't say what doctor or anything, but she was supposed to be checked. And it come to - - me and my mom, we called the Department of Human Resources and the lady answered the phone and she said that she has been checked and we're sending you a letter and everything stating that there is no sign of molestation or anything.

Q. And this was from the welfare department?

A. Yes.

Q. And you gave that letter to your lawyer?

A. Yes.

Q. Did you ever see it again?

A. No.

Q. Did you ask him to use that for your defense?

A. Yes.

Q. How many times?

A. Quite a few times. I asked him in court and everything where was the letter. He said I don't have the letter now. It's not reputable.

Q. Is it your impression that he lost it?

² See also, William Akers' testimony from Omnibus Hearing held on October 18, 2010. (A.R. 129-137).

A. Yes.

Q. Did you think it would have helped you?

A. Yes, I thought that would probably prove my innocence right there.

Q. And you asked him to present that to the jury for you?

A. Yes. Even after - - even after the trial and everything, my mom asked him why didn't he present that letter. And he said, well mom and I got to Beckley Regional Jail, that he didn't know anything. My mom begged him to send that letter. I know that letter exists, I know - - I know I'm innocent.

(A.R. 250-252). At the second Omnibus Hearing, the Petitioner presented four witnesses, who testified about the letter: William Akers, Margaret Thompson, David Smith, and the Petitioner. Specifically, William Akers once again stated that he had seen the letter in question and that he did not know what happened to it. (A.R. 91-159).

David Smith testified that he had seen a letter from the DHHR that could have served as potentially exculpatory evidence in the Petitioner's case. (A.R. 140-141), Margaret Thompson testified that the Petitioner lived with her at the time the letter came in the mail to her home in Princeton, West Virginia. (A.R. 145-147). She happened to open a letter addressed to him by Cindy Snuffer, a DHHR worker:

Q. - - to your knowledge?

Okay. All right. Now do you remember the substance of that letter?

A. It was to inform him that they had no evidence to prosecute him.

Q. Okay. All right. And prosecute him of what?

A. Of a case of child molesting.

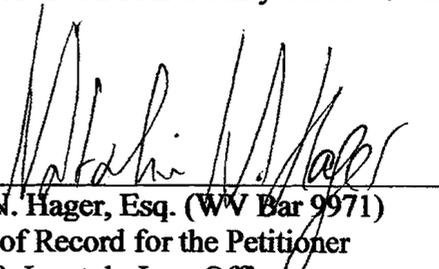
(A. R. 147). At the second omnibus hearing, the Petitioner clarified that the letter sent to him from the DHHR was sent to this mother's address and that "it stated in there, the very first line that there was no findings of molestation with the child or anything". (A.R. 151). Clearly, even

though the letter was not found in the DHHR records, and the medical records from Princeton Community Hospital and Robert C. Byrd Clinic in Lewisburg, West Virginia, multiple witnesses, including the Petitioner, had offered sworn testimony to the existence of such letter at both Omnibus hearings. Mr. Lefler had either lost or misplaced the letter, and his failure to introduce that exculpatory piece of evidence constituted ineffective assistance of counsel because his performance was deficient under an objective standard of reasonableness; and there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, such as acquittal of the Petitioner at trial.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, based on the foregoing grounds, the Petitioner respectfully requests that this Honorable Court REVERSE the decision of the Mercer County Circuit Court, and grant other relief that this Court deems fair and just.

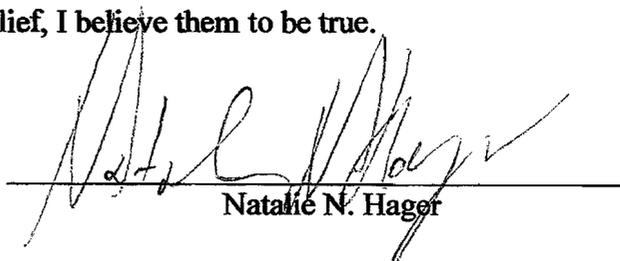
Signed:


Natalie N. Hager, Esq. (WV Bar 9971)
Counsel of Record for the Petitioner
Harvey & Janutolo Law Offices
1605 Honaker Avenue
Princeton, West Virginia 24740
Phone: 304-487-3788

VERIFICATION

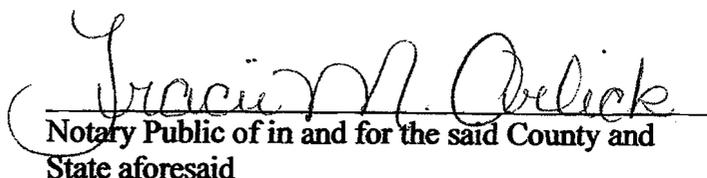
STATE OF WEST VIRGINIA
COUNTY OF MERCER, to-wit

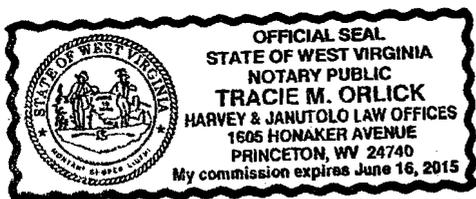
I, Natalie N. Hager, counsel for the Petitioner, Charles Wesley Thompson, in the foregoing PETITIONER'S BRIEF after being duly sworn according to law, depose and say that the facts and allegations contained in the foregoing PETITIONER'S BRIEF are true, except insofar as they are stated therein to be upon information and belief, and that so far as they therein stated to be upon information and belief, I believe them to be true.


Natalie N. Hager

Taken, sworn to and subscribed before me this 18th day of March, 2011,
by Natalie N. Hager.

My Commission Expires: June 16, 2015


Notary Public of in and for the said County and
State aforesaid

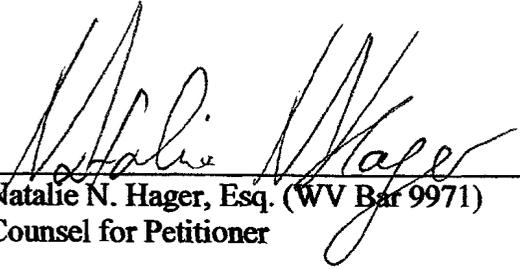


CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2011, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Michele Duncan Bishop
State of West Virginia Office of Attorney General
State Capitol, Room E-26
1900 Kanawha Blvd., East
Charleston, WV 25305

Scott A. Ash, Mercer County Prosecuting Attorney
Mercer County Courthouse
120 Scott Street
Princeton, West Virginia 24740

Signed: 
Natalie N. Hager, Esq. (WV Bar 9971)
Counsel for Petitioner