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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0307

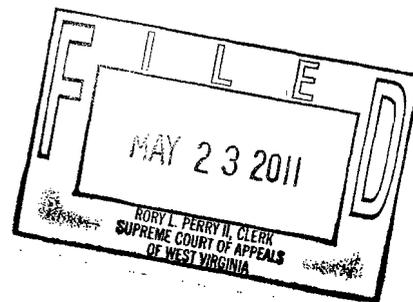
STATE OF WEST VIRGINIA ex rel.  
CHARLES WESLEY THOMPSON,

*Petitioner,*

v.

DAVID BALLARD, Warden, MOUNT  
OLIVE CORRECTIONAL CENTER,

*Respondent.*



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BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

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I.

STATEMENT OF THE CASE

Charles Wesley “Wes” Thompson (hereinafter “Petitioner”) appeals the February 9, 2011, order of the Mercer County State Habeas Court (Swope., J.), denying his petition for post-conviction relief under West Virginia Code §§ 53-4A-1 *et. seq.*, challenging the constitutionality of his incarceration upon a conviction by a Mercer County Petit Jury on six counts of First Degree Sexual Assault<sup>1</sup> (Counts 1, 3, 5, 7, 9, 11); ten counts of Sexual Abuse by a Parent, Guardian, Custodian or

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<sup>1</sup>See W. Va. Code § 61-8B-3(a)(2).

Person in Trust to a Child<sup>2</sup> (Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20); and, three counts of Third Degree Sexual Assault<sup>3</sup> (Counts 15, 17, 19).

On October 16, 2003, a Mercer County Grand Jury returned a 20-count indictment charging the Petitioner with seven counts of First Degree Sexual Assault (Counts 1, 3, 5, 7, 9, 11, 13), ten counts of Sexual Abuse by a Parent, Guardian, Custodian or Person in Position of Trust to a Child (Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20), and three counts of Third Degree Sexual Assault (Counts 15, 17, 19). App. 5. (Case No. 03-F-302-S.)

The victim (hereinafter “T.H.,<sup>4</sup>” “victim” or “the victim.”) was the Petitioner’s ten-year old stepdaughter.<sup>5</sup> (Trial Tr. vol. I, 30, Sept. 28, 2004.) The incidents began in 2000 and continued through 2002.<sup>6</sup> App. 4-5. The victim was ten when the abuse began. She was fourteen by the time of the Petitioner’s trial. (Trial Tr. vol. I, 22.)

The Petitioner’s trial began on September 28, 2004, and ended on September 30, 2004. As stated above, a petit jury convicted the Petitioner on six counts of First Degree Sexual Assault, ten counts of Sexual Abuse by a Parent, Guardian, Custodian or Person in Position of Trust to a Child, and three counts of Third Degree Sexual Assault. App. 7. The trial court sentenced the Petitioner on December 6, 2004.

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<sup>2</sup>See W. Va. Code § 61-8D-5.

<sup>3</sup>See W. Va. Code § 61-8B-5(2).

<sup>4</sup>Counsel for the Respondent follows this Court’s past practice in juvenile and domestic relations cases which involve sensitive facts and does not utilize the last names of the parties. *State ex. rel. West Virginia Dep’t of Human Services v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

<sup>5</sup>She was born on January 22, 1990. (Trial Tr. vol. II, 183, Sept. 29, 2004.)

<sup>6</sup>By that time the victim was 12. (Trial Tr. vol. I, 30, Sept. 28, 2004.)

The trial court, (Swope., J.), sentenced the Petitioner to 15 to 35 years for each count of First Degree Sexual Assault; 10 to 20 years for each count of Sexual Abuse by a Parent, Guardian or Custodian; and 1 to 5 years on each count of Third Degree Sexual Assault.

The court ordered that Counts 1, 2 , and 3 be served consecutively; that Counts 4, 6, 8, 10, 12, 14, 16, 18, and 20 be served concurrently; and that Counts 15, 17, and 19 also be served concurrently. The court further ordered that Counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20 be served consecutively to Counts 1, 2, and 3; and that the First Degree Sexual Assault counts (5, 7, 9, and 11), the Sexual Abuse by a Parent, Guardian or Custodian counts (2, 4, 6, 8, 10, 12, 14, 16, 18, and 20), and the Third Degree Sexual Assault counts (15, 17 and 19<sup>7</sup>) be served consecutively to each other. The court than suspended the imposition of the sentences on Counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20 and ruled that upon serving his sentence on Counts 1, 2, and 3 the Petitioner was to be discharged and placed on probation for five years. Somehow, this order resulted in a sentence of 26 to 60 years of incarceration followed by five years of probation. App. 87-88.

On October 12, 2004, the Petitioner, by counsel, filed a Motion for a New Trial raising, *inter alia*, issues on the sufficiency of the evidence and the admissibility of the State's expert testimony. App. 9. The trial denied Petitioner's motion on November 9, 2004. *Id.*

On January 17, 2006, the Petitioner, by counsel, filed a direct appeal with this Court claiming the following assignments of error:

1. 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

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<sup>7</sup>The trial court dismissed one count of First Degree Sexual Assault—Count 13—at trial. App. 2-3, 7.

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.

2. 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.
3. The circuit court committed reversible and prejudicial error in allowing the expert opinion of Dr. Wallace as it relates to “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.
4. 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 pre-trial Motion *In Limine*.
5. The cumulative effects of the errors committed by th circuit court in denying the Petitioner’s other motions and objections requires relief.

App. 9-10.

By order entered September 8, 2006, this Court summarily denied Petitioner’s petition for appeal.

The Petitioner, proceeding *pro se*, filed a petition for post-conviction state habeas relief, and *Losh* checklist on May 8, 2009, alleging the following assignments of error:

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 testimony by Dr. Wallace.
4. Exists other grounds which will be assigned upon hearing.

App. 10.

The Petitioner also asserted the following grounds for relief in his *Losh* checklist:

1. Statute under which conviction obtained unconstitutional.
2. Indictment shows on face no offense was committed.
3. Consecutive sentences for the same transaction.
4. Suppression of helpful evidence by the prosecutor.
5. State's knowing use of perjured testimony.
6. Ineffective assistance of counsel.
7. Double jeopardy.
8. Failure to provide copy of indictment to defendant.
9. Defects in indictment.
10. State's knowing use of perjured testimony.
11. Constitutional errors in evidentiary rulings.
12. Claims of prejudicial statements by the prosecutor.
13. Sufficiency of the evidence.
14. Excessive sentence.

App. 13-14.

Petitioner, by counsel, David Smith, filed a second state habeas petition and *Losh* checklist on November 6, 2009. Petitioner's second petition alleged the following grounds for relief:

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 Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

3. Ineffective Assistance of Counsel.

App. 11.

The Petitioner, by counsel, re-asserted the following grounds for relief in his second *Losh* checklist:

1. Statute under which conviction obtained unconstitutional.
2. Indictment shows on face no offense was committed.
3. Suppression of helpful evidence by the prosecutor.
4. Ineffective assistance of counsel.
5. Defects in indictment.
6. Constitutional errors in evidentiary rulings.
7. Claims of prejudicial statements by the prosecutor.
8. Sufficiency of the Evidence.

App. 16-17.<sup>8</sup>

The state habeas court convened its first omnibus habeas corpus hearing on November 9, 2009. App. 11, 22. The Petitioner appeared along with state habeas counsel, Mr. Smith. App. 22. The Petitioner called trial counsel Derrick Lefler, and William Akers. The Petitioner also testified in his own behalf. The Respondent called no witnesses. App. 22. On June 24, 2010, the state habeas court convened a hearing during which it discovered that both Petitioner's counsel and counsel for the State had previously represented the Petitioner. App. 79 - 80. The court scheduled

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<sup>8</sup>The state habeas court found that the Petitioner had waived any grounds asserted in his first *Losh* checklist which were not asserted in his second *Losh* checklist. App. 17.

a second hearing and appointed new defense counsel, Natalie Hagar. The court also removed counsel for the State. App. 23. Mercer County prosecuting attorney Scott Ash assumed the duties of counsel for the State.

The Petitioner filed a third *Losh* checklist on July 13, 2010, asserting the following grounds for relief:

1. Indictment shows on face no offense was committed.
2. Suppression of helpful evidence by the prosecutor.
3. State's knowing use of perjured testimony.
4. Ineffective Assistance of counsel.
5. Double Jeopardy.
6. Defects in indictment.
7. Constitutional errors in evidentiary rulings.
8. Sufficiency of the evidence.

App. 19-20.

Counsel did not file an amended Petition, resting on the grounds asserted in Petitioner's second state habeas petition. App. 80.

The state habeas court convened a second omnibus evidentiary hearing on October 18, 2010. App. 26. The Petitioner called trial counsel Derrick Lefler, William Akers, David Smith, and Margaret Thompson. The Petitioner also testified on his own behalf. By a 48-page order entered February 11, 2011, the state habeas court denied all the Petitioner's grounds for relief. App. 48.

The Petitioner now appeals the state habeas court's final order denying post-conviction relief.

## II.

### SUMMARY OF ARGUMENT

The Petitioner presents this Court with three grounds for relief on appeal:

1. The Petitioner was denied due process and a fair trial under the Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia State Constitution where the State utilized legal framework that permits conviction without proof of a criminal act.
2. The Petitioner's conviction was based on expert opinions of Dr. Gregory Wallace that did not pass muster pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 278 (1993).
3. 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.

Petitioner's assignments of error are simply restatements of the grounds for relief he asserted in his second state habeas petition. Therefore, any other grounds set forth in any of his state habeas petitions or argued in the state habeas court which have not been presented in this appeal are waived.

Petitioner first argues that his conviction is not supported by constitutionally sufficient evidence. His claim is not cognizable in state habeas corpus. *See Cannellas v. McKenzie*, 160 W. Va. 431, 236 S.E.2d 327 (1977) ("Except in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of the evidence. That question is an appropriate one for review on appeal."). The Petitioner has not set forth any extraordinary circumstances; therefore, Petitioner's ground for relief is not properly before this Court.<sup>9</sup>

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<sup>9</sup>The *Cannellas* Court found that appellate counsel's failure to raise a sufficiency of the evidence argument on direct appeal constituted ineffective assistance of appellate counsel and granted the writ. *Cannellas*, 160 W. Va. at 437, 236 S.E.2d at 332. The Court has long since held that the uncorroborated testimony of a victim constitutes sufficient evidence of sexual assault. *See* Syl. pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). Given its holding in *Beck*, this Court's decision to grant the writ in *Cannellas* is suspect.

Petitioner's next argues that Dr. Gregory Wallace's testimony was not reliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Both the trial court and the state habeas court reviewed and rejected this same claim below. Petitioner also asserted this claim in his petition for appeal. Although this Court's decision to summarily deny Petitioner's appeal has no precedential value, it is the Respondent's position that this claim was more suitable for review on direct appeal. This Court's decision to summarily deny Petitioner's appeal should be afforded some weight in this case.

"A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. pt. 4, *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). Thus, a habeas appeal does not authorize this Court to redetermine credibility of witnesses whose demeanor has been observed by the jury in the first instance. *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983) ("fairly supported by the record" standard in federal habeas does not authorize a broader review of state court credibility determinations than are authorized in direct appeals within the federal system); Syl. pt. 2, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967) ("The jury is the trier of facts and in performing that duty is the sole judge as to the weight of the evidence and the credibility of the witnesses.").

The jury heard Dr. Gregory's testimony and found it to be credible. The trial court afforded counsel for the defense every opportunity to subject the witness to cross examination. Although he couches his argument in terms of *Daubert*, the Petitioner supports his claim with allegedly inconsistent testimony from Dr. Gregory offered at different proceedings; thus, changing the focus of his argument from reliability to credibility. The Petitioner is asking this Court substitute its own credibility findings for the jury's. *Daubert* does not license this Court to do so.

Additionally, Petitioner's *Daubert* claim is not cognizable. The admissibility of expert testimony is committed to the sound discretion of the trial court. *Gentry v. Mangum*, 195 W. Va. 512, 524 n.17, 466 S.E.2d 171, 183 n.17 (1995). Even if there was error, which there was not, ordinary trial court error is not reviewable in habeas corpus. Syl. pt. 4, *McMannis v. Mohn*, *supra*; *State ex. rel. Phillips v. Legursky*, 187 W. Va. 607, 608, 420 S.E.2d 743, 744 (1992). "*Daubert* did not set a constitutional standard for the admissibility of expert testimony; the case simply examined the standard for the admissibility of scientific evidence in federal trials conducted in federal courts under the federal rules of evidence."<sup>10</sup> *Schmidt v. Hubert*, No. 05-2168, 2008 WL 4491467, at \* 13 (W.D. La. Oct. 6, 2008) and cases cited therein.

The Petitioner finally claims that he received constitutionally ineffective assistance of counsel.

### III.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

It is Respondent's position that, pursuant to Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure, this matter should not be scheduled for oral argument. Petitioner's petition does not present a unique set of facts, or a legal question of first impression.

### IV.

#### **STANDARD OF REVIEW**

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-pronged deferential standard of review. We review the final order

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<sup>10</sup>West Virginia follows Federal Rule of Evidence 702. *See* W. Va. R. Evid. 702. West Virginia also follows *Daubert* in analyzing scientific evidence. *Wilt v. Buracker*, 191 W. Va. 39, 43, 443 S.E.2d 196, 200 (1993).

and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 418, 633 S.E.2d 771, 772 (2006).

V.

**ARGUMENT**

**A. THE PETITIONER’S CONVICTION IS SUPPORTED BY CONSTITUTIONALLY SUFFICIENT EVIDENCE.**

The Petitioner first argues that the State did not produce legally sufficient evidence to convict him. Petitioner claims the victim’s use of the term “probably” when describing the frequency of the Petitioner’s sexual assaults renders the State’s case legally insufficient. In Syllabus point 1 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court held:

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.*

(Emphasis added.)

[T]he reasonable doubt standard is a probabilistic one in that the fact finder cannot acquire unassailably accurate knowledge of what happened, but can acquire a belief in what probably happened. The level of probability is very high, or, near certitude, which is fulfilled by an abiding conviction following a careful examination and comparison of all the evidence.

*People v. Moore*, 121 Cal. Rptr. 3d 894, 904 (Cal. App. 2011) (citing *Victor v. Nebraska*, 511 U.S. 1, 14 (1994)).

The Petitioner does not argue that the trial court’s instructions created a reasonable likelihood that the jury applied the “beyond a reasonable doubt” standard in an unconstitutional

manner. Instead he argues that the State, because of T.H.'s use of the term "probably," rendered the State's evidence insufficient as a matter of law. In effect, he is asking this Court to reweigh T.H.'s testimony and to substitute its judgment for that of the jury. Shamelessly cherry-picking facts from the record,<sup>11</sup> Petitioner offers a single snippet; indeed, a single word--from the victim's testimony, taken completely out of context, as the only support for his claim. He then asks this Court to ignore the rest of the State's evidence and throw his conviction out.

Even if this Court were to ignore the balance of the State's evidence, which it should not, T.H.'s uncorroborated testimony, unless inherently incredible, constitutes legally sufficient evidence.

For the trial judge hearing a sexual offense case, the standard for assessing a motion for acquittal is stated in syllabus point 5 of *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234, 31 A.L.R.4th 103 (1981): 'A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is ordinarily a question for the jury.'

*State v. McPherson*, 179 W. Va. 612, 371 S.E.2d 333 (1988) (footnote omitted.)

This Court has long recognized that gathering specific evidence, such as specific dates, from victims of childhood sexual assault is problematic. In *State v. Edward Charles L.*, 183 W. Va. 641, 650-51, 398 S.E.2d 123, 132-33 (1990), the Court explained,

In addition, children often have greater difficulty than adults in establishing precise dates of incidents of sexual abuse, not only because small children don't possess the same grasp of time as adults, but because they obviously may not report acts of

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<sup>11</sup>This excerpt from T.H.'s testimony was taken from Petitioner's brief for appeal. In fact, Petitioner's entire ground for relief is taken, almost verbatim, from his direct appeal. App. 284. Neither side saw the need to include the trial transcript in the appendix. His claim, and effort to hide evidence from this Court by manipulating the revised rules of appellate procedure is taken in bad faith. In the future, when an Appellant argues sufficiency of the evidence, ineffective assistance of counsel, or plain error, the entire record should be designated. These claims depend upon the totality of the record.

sexual abuse promptly, either because they are abused as a primary care-taker and authority figure and are therefore unaware such conduct is wrong, or because of threats of physical harm by one in almost total control of their life.

The evidence proves that the Petitioner began sexually assaulting his stepdaughter in the summer of 2000, when she was ten years old, and continued through the fall of 2002. App. 67. In her opening statement counsel for the State explained that she chose to charge the Petitioner with two counts for each season; thus, in 2000 the Petitioner was charged with one count of First Degree Sexual Abuse, and one count of Sexual Abuse by a Parent, Guardian or Custodian in the summer (Counts 1 and 2), the fall (Counts 3 & 4), and the winter (Counts 5 & 6.) (Trial Tr. vol. I, 145; App. 295-98.) In 2001, the Petitioner was charged with one count of First Degree Sexual Assault and one count of Sexual Abuse by a Parent, Guardian or Custodian in the spring (Counts 7 and 8), summer (Counts 9 and 10), fall (Counts 11 and 12), and winter (Counts 13 and 14). (*Id.*) By 2002, the victim had turned twelve so the State charged the Petitioner with one count of Third Degree Sexual Assault, and one count of Sexual Abuse by a Parent Guardian or Custodian in the spring (Counts 15 and 16), summer (Counts 17 and 18), and fall (Counts 19 and 20.) (*Id.*)

Each count of the indictment begins with the phrase, “[T]hat during the [] of [], *the exact date to the Grand Jury Unknown . . .*” (App. 295-98; emphasis added.) *Cf.* W. Va. Code § 62-2-10 (“No indictment or other accusation shall be quashed or deemed invalid . . . for omitting to state, or stating imperfectly, the time at which the offense was committed, when time is not of the essence of the offense[.]”).<sup>12</sup> *See also State v. Miller*, 195 W. Va. 656, 663, 466 S.E.2d 507, 514 (1995) (*per curiam*) (where a particular date of a crime charged is not an element of the offense strict

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<sup>12</sup>The Respondent concedes that an indictment is based upon probable cause, while the Petitioner claims that the State failed to shoulder the far greater burden of beyond a reasonable doubt, but the statute is persuasive.

chronological specificity or accuracy is not required) (quoting *United States v. Morris*, 700 F.2d 427, 429 (1st Cir. 1983)). In resolving this issue the state habeas court quoted Syl. pt. 4, *State v. Chaffin*, 156 W. Va. 264, 192 S.E.2d 728, 729 (1972):

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.

The State's first witness was Victoria Weisiger, a licensed counselor specializing in trauma. (Trial Tr. vol. I, 162, 166, Sept. 28, 2004.) Ms. Weisiger testified that she had treated approximately 500 sexually abused children. (*Id.* at 174-75, 184.) The Department of Health and Human Resources referred T.H. to her in March of 2003. (*Id.* at 204.) During this treatment T.H. identified the Petitioner as the person who had sexually assaulted her. (*Id.* at 183, 198.) According to Ms. Weisiger, children who have been sexually abused often exhibit elevated levels of anxiety, poor school performance, experience relationship disturbances with their peers, or act out with their teachers. (*Id.* at 192-93.) Ms. Weisiger noted that T.H. had been diagnosed as hyperactive, and was having nightmares about the Petitioner. (*Id.* at 194-95.) T.H. displayed feelings of guilt and shame (*Id.* at 196.) She was also more sexually sophisticated than her age would suggest. (*Id.* at 224.)

The Petitioner began to groom T.H. when he first moved in with her mother. (*Id.* at 198-99.) T.H. told her counselor that she slept with her mother and stepfather, and that they were often sexual. At one point the Petitioner asked his wife if she would mind if he became sexually active with T.H. (*Id.*) The Petitioner asked T.H. if she knew about the "birds and the bees." (*Id.* at 199.) The "birds" were the girls with the vaginas, and the "bees" were the men with penises. (Trial Tr. vol. II, 202, Sept. 29, 2004.) During the summer of 2000, the Petitioner attempted to disrobe T.H., and got on top of her. Sometime after that the Petitioner began to have sexual intercourse with T.H.

(Trial Tr. vol. I, 199, Sept. 28, 2004), according to Ms. Weisiger, T.H. told her that this occurred a couple of times a week, sometimes every other week. (*Id.* at 200.) After that, the Petitioner would pull T.H. into the bathroom and ask her to massage his penis. (*Id.*) T.H. described instances of forced oral copulation, and anal sex. (*Id.* at 200.) The forced anal sex, which T.H. recalled because of the sound of the Vaseline in her anus, occurred nine to ten times. (*Id.*)

To start the second day, the court convened a suppression hearing. The State called State Trooper Melissa Clemmons. (Trial Tr. vol. II, 3, Sept. 29, 2004.) Trooper Clemmons testified that she approached the Petitioner at work on a Thursday and asked him to come to the detachment to discuss the charges. The Petitioner agreed to come by Monday afternoon.<sup>13</sup> (Trial Tr. vol. II, 5.) Trooper Clemmons told the Petitioner that he had not been charged, and was free to leave at any time. The Petitioner said he wanted to “clear this matter up.”<sup>14</sup> (Trial Tr. vol. II, 6.) On one occasion the Petitioner’s wife came home unexpectedly, and found T.H. leaving the bathroom with the top of her bib overalls down, and her shirt up.<sup>15</sup> The Petitioner explained that he was checking T.H. for poison oak.

The State then called Doctor Charles Wallace. (Trial Tr. vol. II, 58.) Dr. Wallace testified that he is a physician who specializes in abused children. (Trial Tr. vol. II, 60.) In 2002 he examined T.H. (*Id.*) Dr. Wallace testified that T.H.’s hymen was normal, but that her vaginal wall was lax. Laxity in a child’s vaginal wall suggests penetration. According to Dr. Wallace, 85 to 95

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<sup>13</sup>This interview occurred in early January 2003. (Trial Tr. vol. II, 13, Sept.29, 2004.)

<sup>14</sup>The Petitioner testified that Trooper Clemmons called him at work and threatened to arrest him if he did not come to the detachment. (Trial Tr. vol. II, 22.) The Petitioner also tried to claim that he had been indicted before he spoke to Trooper Clemmons. In fact, the Petitioner was not indicted for another eight months. (*Id.* at 30.)

<sup>15</sup>T.H. also recounted this story to Ms. Weisiger.

percent of sexually abused children have no physical symptoms of abuse. (Trial Tr. vol. II, 62, 71.) The only objective physical evidence that Dr. Wallace noticed was the laxity of T.H.'s vaginal wall.<sup>16</sup> (*Id.* at 64.)

The State next called Patty Flanagan, a Child and Adolescent Therapist at Southern Highlands Community Hospital. (Trial Tr. vol. II, 83.) She began to treat T.H. in October 2002. (Trial Tr. vol. II, 84.<sup>17</sup>) She saw T.H. for two counseling sessions. (Trial Tr. vol. II, 85.) T.H. was diagnosed with adjustment disorder, a condition that occurs when a child suffers a traumatic experience and reacts in a manner that inhibits their ability to function. (Trial Tr. vol. II, 87.) Ms. Flanagan testified that T.H. was agitated, had difficulty trusting her peers, and experienced guilt, fear, embarrassment, and shame. (Trial Tr. vol. II, 99-100.)

The State then called Child Protective Services Worker Cynthia Snuffer. (Trial Tr. vol. II, 110, Sept. 29, 2004.) On September 30, 2002, she responded to a request from T.H.'s school. (*Id.* at 111.) T.H. had told her school counselor that she had been sexually assaulted by her stepfather.<sup>18</sup> (Tr. vol. II, 203, Sept. 29, 2004.) Upon her arrival, Ms. Snuffer met with T.H.'s mother, K.T. Initially, K.T. did not believe her daughter, but she accompanied Ms. Snuffer to magistrate court to obtain an order barring the Petitioner from any contact with T.H., and mandating that he move out of the family home. (Tr. vol. II, 116, Sept. 29, 2004.) The Department then referred T.H. to Ms.

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<sup>16</sup>Dr. Wallace conducted a bimanual pelvic examination. By moving two fingers around insider T.H.'s vagina, he, based on his experience, came to the conclusion that her vaginal walls were lax. (Tr. vol. II, 71-72, Sept. 29, 2004.) This was consistent with sexual activity.

<sup>17</sup>By the time of trial, T.H. was only coming in to receive medication. (Trial Tr. vol. II, 84, Sept. 29, 2004.)

<sup>18</sup>The trial court instructed the jury that they were not to take Ms. Snuffer's testimony as proof of the truth of the matter asserted, but as an explanation of the school employee's decision to call Ms. Snuffer. (Trial Tr. vol. II, 126, Sept. 29, 2004.)

Weisiger. (Trial Tr. vol. II, 134, Sept. 29, 2004.) Ms. Snuffer also interviewed T.H. The interview was taped; but, because of its poor quality, the State did not produce the tape at trial. (*Id.* at 135.)

Ms. Snuffer interviewed the Petitioner on October 15, 2002. (*Id.* at 119.) During the interview, Ms. Snuffer told the Petitioner that she had scheduled a physical examination for T.H. Several days later, the Petitioner called Ms. Snuffer attributing any unusual physical findings to an automobile accident T.H. had suffered a few years before. He made a point of telling Ms. Snuffer that T.H. began menstruating a short time after the accident. (*Id.* at 128.)

The State next called T.H.'s mother, K.T. (Trial Tr. vol. II, 140, Sept. 29, 2004.) She and the Petitioner were married in early 2000,<sup>19</sup> and divorced in the summer of 2003. (*Id.* at 141.) T.H. was ten when they were first married. (*Id.*) K.T. recounted the same "bib overalls" incident recounted by Ms. Weisiger, and Trooper Clemmons. (*Id.* at 145.) The Petitioner also asked K.T. two or three times if he could have sex with T.H. (*Id.* at 146.) K.T. also testified that her daughter's nightmares began when she married the Petitioner, and that T.H. began experiencing vaginal discharges around the same time. (*Id.* at 148.) Because K.T. did not comply with the stay-away order, the Department of Health and Human Resources removed T.H. from the family home for a year. (*Id.* at 150-51.) K.T. was reunited with her daughter on January 21, 2004. (*Id.* at 154.)

The State next called T.H. (Trial Tr. vol. II, 182, Sept. 29, 2004.) She testified that the Petitioner began interacting sexually with her after he married her mother. At first, he bounced her on his knee, and told her that was the way she was supposed to feel when she had sex. (*Id.* at 190.) T.H. recalled the Petitioner kissing her, and placing his tongue in her mouth. (*Id.* at 191.) On one occasion, T.H.'s mother left T.H. in the Petitioner's care. The Petitioner called T.H. into the

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<sup>19</sup>K.T. and the Petitioner cohabitated for six months before the marriage.

bedroom, and began to take her bib overalls off when his wife came home unexpectedly. (Trial Tr. vol. II, 192, Sept. 29, 2004.) On another occasion, T.H. was lying in bed playing a video game when the Petitioner closed the bedroom door, locked, took off T.H.'s clothes, placed his hands on her stomach, and put his penis inside her vagina. (*Id.* at 193-94.)

T.H. testified that the Petitioner assaulted her approximately ten other times. (Trial Tr. vol. II, 194, Sept. 29, 2004.) According to T.H. the Petitioner never placed his mouth on her vagina, but he did place his penis inside of her mouth. T.H. was able to recall this incident, because it occurred the same summer she went to Christian Acres Camp.<sup>20</sup> (*Id.* at 195.) T.H. recalled this happening twice. (*Id.* at 196.) The Petitioner became violent when T.H. resisted his advances. (*Id.* at 197.) He also threatened to kill both her and her mother if she ever revealed what was happening. (*Id.* at 198.) The Petitioner also forcibly sodomized T.H. When asked to describe the first time this happened, T.H. testified:

A: I was—he told me to roll over and I laid on the bed and that's when he first put it in my but.

Q: Okay. If I had to ask and you had to guess, after that, did it happen less than five times or more than five times?

A: Less.

Q: Less. Okay. Can you tell me on an average when it started, go back when it first started, on an 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: Overrule.

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<sup>20</sup>T.H. went to camp in 2002. The sexual assaults continued after she returned. (Trial Tr. vol. II, 199, Sept. 29, 2004.)

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.

(Trial Tr. vol. II, 200-01, Sept. 29, 2004.)

The first person T.H. told was her school counselor. (Trial Tr. vol. II, 204, Sept. 29, 2004.)

The State's last witness was Trooper Melissa Clemmons. (Trial Tr. vol. III, 7, Sept. 30, 2004.) On cross-examination, counsel for the defense effectively explored the differences between T.H.'s trial testimony and the information contained in her initial statement to Trooper Clemmons. (Trial Tr. vol. III, 16-18.)

At the close of the State's case, the defense moved for a judgment of acquittal based, in part, on the State's failure to prove the specific dates and times the Petitioner sexually abused T.H. (Trial Tr. vol. III, 26, Sept. 30, 2004.) The trial court granted the defense's motion as to Count 13, and denied the balance. (Trial Tr. vol. III, 35-36, Sept. 30, 2004.)

The Petitioner testified in his own defense. (*Id.* at 76.) He denied having a sexual relationship with his stepdaughter. (*Id.* at 83.) He attributed T.H.'s allegations to his marital infidelity, and his decision to take a trampoline with him when he moved out of the marital home. He explained that T.H. had asked him to take her bib overalls off in order to rub lotion on the poison

oak she could not reach. (Trial Tr. vol. III, 90-91, 94, Sept. 30, 2004.) It was the Petitioner's belief that the charges were a result of a conspiracy between his ex-wife and T.H. (Trial Tr. vol. III, 99.)

The jury heard and weighed all of the testimony, observed the witnesses' demeanor, and sifted through the tangible evidence. The trial court instructed them that they could not convict the Petitioner unless the State proved every element of every offense beyond a reasonable doubt. Viewing *all of the evidence* in a light most favorable to the State, it is clear that it proved its case against the Petitioner beyond a reasonable doubt.

The Petitioner also argues that the "legal framework" set forth in *State ex. rel. State v. Reed*, 204 W. Va. 520, 514 S.E.2d 171 (1999) (*per curiam*), violates a criminal defendant's right to due process.<sup>21</sup> The Petitioner is wrong. Under the due process clause of both the Federal and State Constitutions, the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *State v. Joseph*, 214 W. Va. 525, 529, 590 S.E.2d 718, 722-23 (2003). But where time is not a material element of the offense an indictment need only furnish the defendant with a sufficient description of the charges against him to prepare his defense, to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, to enable him to plead jeopardy against a later prosecution, and to inform the court of the facts alleged so that it can determine the sufficiency of the charge. *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979). *See also Berg v. United States*, 176 F.2d 122 (9th Cir. 1949) ("Even if it be true that the date alleged for the commission of a crime is not a true one or even a possible one, this does not invalidate the

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<sup>21</sup>Initially, it should be stated that *Reed* is a *per curiam* opinion. Therefore, its syllabus points were well established precepts of West Virginia law. It should also be noted that the case was decided under a different standard of review. The State had filed a petition for a writ of prohibition. Syl. pt. 4, *State ex. rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

indictment. The change of a date of an indictment is not a material allegation which must be proved as laid.”); *Ledbetter v. United States*, 170 U.S. 606, 612 (1898) (it is not necessary to prove that an offense was committed on date alleged in indictment unless particular day be made material by statute creating offense).

In *Reed* the defendant was indicted on nine counts of sexual assault. The victim was an adolescent. The indictment stated that the crimes occurred sometime between July and September 1990. Although the defense asked for more specific dates, the State did not provide them. *Reed*, 204 W. Va. at 521-22, 514 S.E.2d at 172-73. At trial the State proved that the sexual assaults occurred between June 1991 and November 1991. Because of the variance, the trial court granted the defendant’s motion to dismiss. Counsel for the State filed a petition for a writ of prohibition with this Court. *Reed*, 204 W. Va. at 522, 514 S.E.2d at 173. (quoting Syl. pt. 4, *State ex. rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

This Court reversed the trial court’s ruling. Quoting *State v. Pennington*, 41 W. Va. 599, 23 S.E. 918 (1896), the Court found:

[W]here no statute of limitation bars [an offense], you may wholly omit the date of the offense from the indictment, unless it be one of the rare offenses where time enters into its essence; but, where there is a limitation, you must state [the] date, so it appear the offense is not barred. *Where you do state the date, a variance between that date and the proof is immaterial, in any case, at common-law, so you prove it to be at such a date as brings it within the period of the statute, if any applies.* Where, in any class of cases, whether a bar applies or not, there is an attempt to state [the] date, but its statement is imperfect, it is immaterial, unless the statement shows the offense barred. This is a case of imperfect statement, and is cured by the statute.

*Reed*, 204 W. Va. at 523, 514 S.E.2d at 174, quoting *Pennington*, 41 W. Va. at 601, 23 S.E. at 919 (emphasis supplied).

In this case the victim testified that the Petitioner assaulted her, “probably once a month.” (Trial Tr. vol. II, 200-01, Sept. 29, 2004.) There is no variance between the date of the acts charged in the indictment and the acts proven by the State. Therefore, there was no due process violation.

**B. THE STATE’S EXPERT, DOCTOR GREGORY WALLACE, TESTIMONY SATISFIED *DAUBERT*.**

**1. The Petitioner’s Claim Is Not Cognizable.**

The Petitioner next claims that the trial court incorrectly admitted expert testimony from Doctor Gregory Wallace which did not “pass muster” under *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra*. The Petitioner’s claim is based upon a discretionary decision by the trial court with no constitutional or jurisdictional underpinnings; therefore, it is not cognizable in habeas corpus. Under West Virginia law state post-conviction relief is only available when: (1) there is a denial or infringement upon a person’s constitutional rights; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the legal maximum; or (4) the conviction would have been subject to collateral attack by statute or at common-law prior to the adoption of W. Va. Code § W. Va. Code 53-4A-1.” *Pethtel v. McBride*, 219 W. Va. 578, 589, 638 S.E.2d 727, 738 (2006). *See also* Syl. pt. 4, *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979)(“[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial court error not involving constitutional violations will not be reviewed.”).

Decisions regarding the admissibility of evidence, including expert testimony, are entrusted to the sound discretion of the trial court. Even if the trial court’s decision is erroneous, such a claim is not cognizable in habeas corpus. “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. pt. 6, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412

(1983). See also Syl. pt. 6, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991) (“The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court’s decision will not be reversed unless it is clearly wrong.”).

*Daubert* has no constitutional underpinnings. “However, *Daubert* did not set a constitutional standard for the admissibility of expert testimony; the case simply examined the standard for the admissibility of scientific evidence in federal trials conducted in federal courts under the federal rules of evidence.” *Schmidt v. Hubert*, No. 05-2168, 2008 WL 4491467, at \* 13 (W.D. La. Oct. 6, 2008). The Petitioner’s brief does not raise a single constitutional argument in support of his position in this subpart. His position is based upon the *Daubert* case, state law interpreting the *Daubert* case, and the West Virginia Rules of Evidence. “Dr. Wallace’s testimony . . . was clearly inadmissible *under the West Virginia Rules of Evidence* because its probative value was nil and its prejudicial effects enormous.” (Petitioner’s brief at 12; emphasis added.) “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.” (Petitioner’s brief at 14.) Under *Pethel* and *McMannis* the Petitioner’s claim is not cognizable in habeas corpus and is not properly before this Court.

The Petitioner’s means of supporting his claim is also suspect. None of the alleged quotations from other circuit court proceedings come from certified portions of an official trial court transcript<sup>22</sup>; they are merely quotes from the Petitioner’s petition for direct appeal.<sup>23</sup> None of them

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<sup>22</sup>Petitioner’s state habeas counsel told the court that she could not obtain a certified copy of these transcripts. App. 104.

<sup>23</sup>A petitioner this Court summarily rejected.

carry the requisite guarantees of accuracy. *Cf.* W. Va. R. Civ. P. 80(g) (testimony of a witness at a hearing which was stenographically recorded may be proved by transcript duly certified by the official court reporter or any other authorized person). None were utilized by defense counsel at trial. Dr. Stewart's alleged quotations are, once again, snippets taken from other proceedings offered to this Court with no context.<sup>24</sup> These lower court proceedings have no persuasive heft with this Court. The issue before this Court is whether Dr. Wallace's testimony *in this trial* was reliable under *Daubert*.

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<sup>24</sup>The Petitioner's quotes are taken wholly out of context. He does not prove that the conditions in each of these studies were the same. The worst that can be said is that Dr. Wallace quoted from different studies in different cases. That does not undermine the scientific methodologies employed in these studies.

In the *Swiger* case, Dr. Wallace quoted from a study in which the victims of 31 confessed perpetrators were examined. The study revealed that 33 percent of sexually assaulted children showed no physical signs of sexual abuse. This study was based, in part, on the truth of the perpetrator's statements. Thus, there was no telling if there had been penetration or not. Nor does the study specify when these children were examined, or what the examiner's definition of "physical signs of abuse" was. There is no information comparing the methodology of this study to Dr. Stewart's criteria in the case-at-bar.

In *Wert* Dr. Stewart testified that 70 percent of the literature stated that there were no physical findings of sexual abuse after six months. This appears to be consistent with his testimony in this trial.

In *White* Dr. Stewart testified that 31 subjects admitted that they had sexually abused a child. The study divided those subjects who claimed they had penetrated the child with those who didn't. A review of all of the victims of these 31 individuals showed that 65-70 percent showed no physical signs of sexual abuse. Obviously, there would be a lesser chance of physical injury for those victims who had not been penetrated. This would dilute the percentages. Once again, the Petitioner is quoting the doctor's testimony from a study that does not present the same facts as the case-at-bar.

The Petitioner's argument is superficial. Scientific studies may be quoted for different reasons. To compare the accuracy of Dr. Stewart's testimony in the case-at-bar with his testimony in each of these other cases, each study must be examined to determine the methodologies used by the experts. Different methodologies will result in different outcomes. This does not make the science unreliable under *Daubert*.

## 2. Dr. Wallace's Testimony Is Not "Junk Science."

Dr. Wallace is a pediatric specialist with extensive training and professional experience in the assessment of childhood victims of sexual abuse. He graduated from the Lewisburg Osteopathic School 20 years ago, did four years of post-graduate work with pediatric patients, three months at Women's and Children's Hospital working with children who had been physically and sexually abused, ran a child abuse clinic in Lewisburg for seven or eight years, and received a pediatric forensic fellowship specializing in physically and sexually abused children at Cincinnati Children's Hospital. (Trial Tr. vol. II, 58, Sept. 29, 2004.) He is licensed to practice medicine in both West Virginia and Ohio where he specializes in sexually abused and maltreated children. (Trial Tr. vol. II, 59-60.) He has examined approximately 500 to 600 children during his career. (*Id.* at 65.)

Dr. Wallace examined T.H. in 2002. He conducted his examination in two parts: first, he interviews the child, then he conducts a physical examination. (Trial Tr. vol. II, 60, Sept. 29, 2004.) See Nancy Kellogg, MD, *The Evaluation of Sexual Abuse in Children*, Pediatrics, Vol. 116, No. 2, 506-12 (Aug. 2005)<sup>25</sup> ("The pediatrician should try to obtain an appropriate history in all cases before performing a medical exam."). (Attachment 1.) He examined T.H.'s vagina; finding her

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<sup>25</sup>There are six articles attached: (1) Nancy Kellogg, MD, *The Evaluation of Sexual Abuse in Children*, Pediatrics, Vol. 116, No. 2 (Aug. 2005); (2) Astrid Herger, *et al.*, *Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children*, Child Abuse Negl., Vol. 26 (June 2002); (3) Allan R. De Jong, MD & Mimi Rose, JD, *Legal Proof of Child Sexual Abuse in the Absence of Physical Evidence*, Pediatrics, Vol. 88, No. 3 (Sept. 1991); (4) Joyce A. Adams, MD, Katherine Harper, PA-C, Sandra Knudson, PNP, and Juliette Revilla, FNP, *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal*, Pediatrics, Vol. 94, No. 3 (Sept. 1994); (5) Nancy D. Kellogg, MD, Shirley Menard, RN, PhD, CPNP, FAAN, Anette Santos, RN, SANE, *Genital Anatomy in Pregnant Adolescents: "Normal" does not mean "Nothing Happened,"* Pediatrics, Vol. 113, No. 1 (Jan. 2004); (6) Paula Braverman, MD, Lesley Breech, MD, *Clinical Report - Gynecologic Examination for Adolescents in the Pediatrics Office Setting*, Pediatrics, Vol. 126, No. 3 (Sept. 2010).

vaginal wall was lax. (Trial Tr., vol. II, 62, Sept. 29, 2004.) T.H.'s hymen was intact. Kellogg, *supra* at 508. ("Because many factors can influence the size of the hymenal orifice, measurements of the orifice alone are not helpful in assessing the likelihood of abuse."). The doctor opined that 85 to 95 percent of sexually abused children have no physical symptoms such as vaginal or anal trauma or tearing. (Trial Tr. vol. II, 62, 66, Sept. 29, 2004.) Dr. Wallace's opinion is consistent with the medical research: it is not "junk science."

It has long been accepted that medical, social and legal professions rely far too heavily on medical examinations when diagnosing childhood sexual abuse. History from the child remains the single most important diagnostic feature in coming to the conclusion that a child has been sexually abused. In a study conducted by the Pediatrics Department of the Keck School of Medicine of the University of Southern California, Center for the Vulnerable Child, 2,384 children were examined. The children were divided into groups: (1) 69.2 percent had disclosed sexual abuse (68.6 percent of the 69.2 percent had disclosed vaginal or anal penetration); (2) 30.8 percent had not disclosed abuse but were referred because of behavioral changes or exposure to an abusive environment, or because of anatomical variations or medical conditions. A total of 96.3 percent of all children referred for evaluation had a normal medical examination; 95.6% of those children reporting abuse were normal; 99.8 percent referred for behavioral changes or exposure to an abusive environment were normal. Of those who reported penetration, the girls had abnormal examinations in 6 percent of children, as compared with 1 percent of the boys. Astrid Herger, Lynne Ticson, Oralia Velasquez, Raphael Bernier, *Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children*, *Child Abuse Negl.*, Vol. 26, 645-59 (June 2002). (Attachment 2.)

The examiners concluded, “Decades of research into medical diagnosis of child sexual abuse indicate that most children remain free of any medical findings diagnostic of penetrating trauma.” Astrid Herger, *et al.*, at 653.

In 1990, Dr. Allen DeJong from the Department of Pediatrics of Jefferson Medical College of Thomas Jefferson University in Philadelphia, and Mimi Rose, of the Philadelphia District Attorney’s Office, conducted a study on the relationship between physical evidence of sexual abuse and the rate of conviction. Allan R. De Jong, MD & Mimi Rose, JD, *Legal Proof of Child Sexual Abuse in the Absence of Physical Evidence*, Pediatrics, Vol. 88, No. 3, 506-11 (Sept. 1991). (Attachment 3.) The study revealed that “physical evidence was frequently absent in a sample of felony child abuse cases, but conviction of the perpetrator was common despite the lack of physical evidence.” *Id.* at 506. The study examined all 115 cases of felony child sexual abuse prosecuted by the Child Abuse Prosecution Unit of the Philadelphia District Attorney’s Office beginning in November 1987 and ending in October 1988.<sup>26</sup> *Id.* at 507. The study found, “Most of the cases had no physical evidence of injury, sexually transmitted diseases, or seminal fluid. Only 26% of the 115 cases had physical evidence. Twenty-One cases had physical injuries (10 acute lesions, 11 chronic lesions) . . . .” *Id.* at 508. Interestingly, the study found no correlation between the presence of physical evidence and the rate of conviction. Of those cases without physical evidence of sexual abuse 79 percent resulted in convictions. Of those with physical evidence, only 67 percent resulted in convictions. *Id.* at 509. “Expert testimony [was] often used to explain how the lack of physical evidence is not inconsistent with sexual penetration. Physical findings may be absent or nonspecific

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<sup>26</sup>The mean age of the child victim was 10.1 years; the median age 10.5 years. The ages ranged from 1.5 to 16 years old. The 115 cases involved 137 children. There were 113 girls and 24 boys. Allan R. De Jong, MD & Mimi Rose, JD, *supra* at 507.

in nature, superficial injury may be expected to heal rapidly and without scarring, sexually transmitted diseases are often not present, and detection of seminal fluid is very time dependent.” *Id.* at 510. In fact, expert testimony was more frequently used in cases where there was physical evidence than when there was none. *Id.* The felony conviction rate was similar whether the expert was used to support the presence of physical evidence or explain the lack of physical evidence. (71 percent and 81 percent, respectively). *Id.*

In certain instances it is difficult to determine abnormal results of physical examinations of sexually abused children because of the changing definition of “abnormal” and the lack of a true “gold standard” for proven abuse. Joyce A. Adams, MD, Katherine Harper, PA-C, Sandra Knudson, PNP, and Juliette Revilla, FNP, *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal*, Pediatrics, Vol. 94, No. 3, 310-17 (Sept. 1994). (Attachment 4.) Two studies reported a frequency of abnormal findings in 45 percent and 23 percent. *Id.* at 310 nn.8 & 9. “The mean size of the horizontal diameter of the hymenal opening, using labial traction, was compared between 19 Tanner State I girls, age 8 years to 10 years, 11 months, who had described penile-vaginal contact/penetration (7.7 plus/minus 2.6 mm), and published data on nonabused children of the same age (6.9 plus/minus 2.2 mm). There was no significant difference in these measurements.” *Id.* at 313. “The frequency of normal or nonspecific genital findings in our study is the same as that reported by DeJong and Rose, who reported that 77 percent of the 115 subjects whose charts they reviewed had no physical evidence of sexual abuse. *Id.* at 315. “This study provides additional data that the majority of children with legally confirmed sexual abuse will have normal or nonspecific genital findings. Abnormal anal findings are very rarely found.” *Id.* at 316.

Over the past 15 years identification and recognition of acute and healed findings of penetrating trauma to the hymen and vagina have decreased. Nancy D. Kellogg, MD, *et al.*, *Genital Anatomy in Pregnant Adolescents: "Normal" does not mean "Nothing Happened,"* Pediatrics, Vol. 113, No. 1, e67-e69 (Jan. 2004). (Attachment 5.) The authors studied pregnant adolescent females. "Despite definitive evidence of sexual contact (pregnancy), *only 2 of 36* adolescents had genital changes that were diagnostic of penetrating trauma." *Id.* at e68 (emphasis added).

For example, in an earlier study of sexually active adolescents, 74% had complete clefts in the posterior wall of the hymen, a finding of attributed to penile-vaginal penetration. However, a more recent study of 2384 children and adolescents receiving medical examinations for sexual abuse indicated that 96% of the subjects had normal or nonspecific examination findings. Similarly, findings that formally were attributed to penetrating trauma (*eg*, partial clefts in the posterior half of the hymen) have now been documented in girls selected and screened for nonabuse.

*Id.* at e67.

"At trial, the presentation and interpretation of medical findings can be problematic. When a child gives a history of vaginal penetration people generally expect physical evidence of penetration . . . ." *Id.* at e68.

Some professionals, investigators, and lay people may reason that a child who reports vaginal penetration and pain is more likely than a larger adult to have physical evidence of the reported event. A lack of physical findings or other evidence lead some to conclude that the child's history is not accurate. Medical, legal, and social professionals as well as lay jurors need to understand that, in most cases of child sexual abuse, there will be few if any clinical findings that are diagnostic of penetrating trauma.

*Id.* at e69.

Sexual abuse is rarely diagnosed on the basis of only physical examination or laboratory findings. Physical findings are often absent even when the perpetrator admits to penetration of the child's genitalia. Many types of abuse leave no physical evidence, and mucosal injuries often heal rapidly and completely.

Nancy Kellogg, MD, *The Evaluation of Sexual Abuse in Children*, Pediatrics, Vol. 116, No. 2, 509 (Aug. 2005). (Attachment 1.)

The Petitioner also claims that Dr. Wallace should not have been permitted to testify to the results of T.H.'s bimanual exam. The Petitioner claims that the doctor's testimony was wholly subjective, speculative and unsupported by any recognized medical authority. A bimanual examination is ordinarily a part of any women's annual pelvic examination. It is not a radical procedure, wholly unrecognized by the medical community at large. The test is performed when a gynecologist inserts two fingers into his patient's vagina and places the other hand on top of her lower abdomen, while feeling for any abnormalities that might have occurred since the patient's last pelvic exam. The doctor also checks the size, shape, and mobility of the patient's uterus. Changes in the ovaries, such as ovarian cysts may be detected during the bimanual exam, as well as other uterine changes including endometriosis, fibroid tumors, or other common uterine conditions. See [http://womenshealth.about.com/od/gynecologicalhealthissues/a/gyn101\\_5.htm](http://womenshealth.about.com/od/gynecologicalhealthissues/a/gyn101_5.htm). In *Stoner v. Bureau of Professional and Occupational Affairs, State Board of Medicine*, 10 A.3d 364, 370 (Pa. Commw. 2010), the Commonwealth Court of Pennsylvania described a bimanual pelvic exam:

Dr. Stoner described the pelvic examination in question. He asked MKH to place her legs on the table in a bent-knee position, and he stood on the right side of the table. He moved her underwear to one side and inserted two fingers of his gloved right hand into her vagina and placed his gloved left hand on her abdomen. With his left hand he palpated the uterus, and with his right hand he examined the cervix and vagina. Dr. Stoner explained that this type of bimanual exam will detect pregnancy or pelvic inflammatory disease, which he thought might be responsible for MKH's discharge. He asked MKH how it felt or whether the exam caused pain, because pain can indicate inflammatory disease.

"The American Academy of Pediatrics ("AAP") promotes the inclusion of a pelvic examination in the primary care setting within the medical home. The examination can be a positive

experience when conducted without pressure and approached as a normal part of routine young women's health care." Paula Braverman, MD, Lesley Breech, MD, *Clinical Report - Gynecologic Examination for Adolescents in the Pediatrics Office Setting*, Pediatrics, Vol. 126, No. 3, 583, 588 (Sept. 2010). (Attachment 6.) "Speculum or *digital* examinations should not be performed on the prepubertal child unless under anesthesia (*eg*, for suspected foreign body), and digital examinations of the rectum are not necessary." Kellogg, *supra*. *The Evaluation of Sexual Abuse in Children*, Pediatrics, at 508. (Attachment 1.) See also *State v. Eric M.P.*, No. 15547-1-III, 1997 WL430783, at \* n.1 (Wash. App. Div. 3, July 31, 1997) (unpublished) ("The written report resulting from a physical examination casts some doubt on the trustworthiness of [the victim's] allegations of frequent sexual penetration. This exam certainly could be consistent with a history of partial penile penetration or digital penetration. I would have doubts about full penile penetration *considering the tightness of the tissue during the bimanual exam.*).

**C. THE PETITIONER RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.**

Petitioner next claims that he received constitutionally ineffective assistance of counsel. Specifically, he claims that trial counsel failed to prepare for cross-examination of Dr. Wallace, and that he failed to object to Dr. Wallace's "junk science."

**1. The Strickland Standard.**

This Court has adopted the two-pronged test first articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the

deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. at 687. See also Syl. pt. 5 *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (formally adopting *Strickland*).

Recently, the Supreme Court revisited its holding in *Strickland*, expounding upon the burden of proof a federal habeas petitioner must shoulder in order to state a successful ground for relief. In *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770 (2011), the defendant and his co-defendant were charged with murder, attempted murder, burglary, and robbery. *Id.* at 781. The defendant claimed that the victim was shot in self-defense. Over the objection of defense counsel, the state introduced blood spatter and serological evidence suggesting that the victim was killed while on a couch. The defense had claimed that he was killed while standing in a doorway, and was subsequently moved to the couch. *Id.* at 782. The jury convicted the defendant on all charges.

On state habeas the defendant argued that defense counsel's failure to hire independent serologist and blood spatter experts constituted ineffective assistance of counsel. The state court denied his petition, as did the federal district court. An *en banc* panel of the United States District Court for the Ninth Circuit reversed. The Supreme Court, holding that the court of appeals *en banc* decision disregarded "sound and established principles" limiting federal habeas relief for state prisoners, reversed. *Id.* at 780.

The Court cut to the heart of the issue,

The pivotal question is whether the state court's application of *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis

would be no different that if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States District Court.

*Richter*, 131 S. Ct. at 785.

Addressing the application of the *Strickland* test, the Court held:

To establish deficient performance, a person challenging a conviction must show that “counsel’s representation fell below an objective standard of reasonableness.” 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. *Id.*, at 689. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.*, at 687.

With respect to prejudice, a challenger must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 694. It is not enough “to show that the errors has some conceivable effect on the outcome of the proceeding.” *Id.*, at 693. Counsel’s errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687.

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S. Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

*Richter*, 131 S. Ct. at 788.

This Court has held:

An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court's findings of historical fact for clear error and its legal conclusions *de novo* and the circuit court's findings of underlying predicate facts more deferentially.

Syl. pt. 1, *Mathena v. Haines*, 219 W. Va. at 418, 633 S.E.2d at 772.

**2. The Petitioner Failed to Prove Prejudice.**

If a Petitioner fails to prove one prong of the *Strickland* test, this Court need not address the other. *Id.* at 697. Because the Petitioner has failed to adduce evidence that Dr. Wallace's testimony was wrong or could have been rebutted during his trial, the Petitioner has failed to prove prejudice. *See Strickland*, 466 U.S. at 694 (petitioner must prove that, because of counsel's unprofessional errors, the outcome of the proceeding would have been different). Although he had two post-conviction omnibus hearings, he never called his own expert to rebut Dr. Wallace's testimony. There is no evidence before this Court that such an expert even exists. Nor is there evidence that the trial transcripts of the *Swiger*, *Wert*, or *White* trials were available at Petitioner's trial or that they would have been admissible.

As the lower court ruled:

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 witness 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 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.

App. 42 (emphasis added.)

The excerpts from the scientific journals quoted by the Respondent suggest that Dr. Wallace's testimony regarding the lack of physical evidence of abuse was reliable under *Daubert supra* at 26-29.

The Petitioner also claims that trial counsel failed to prepare for his cross-examination of Dr. Wallace. Prior to trial counsel did review Dr. Wallace's report which stated that T.H.'s exam did not reveal corroborating physical evidence of sexual abuse. Counsel described the doctor's findings as positive, and stated that it was his tactical decision to cross-examine the doctor on this lack of evidence. That is exactly what he did.

Regarding the bimanual pelvic exam, trial counsel readily admitted that he did not discuss this examination technique with Dr. Wallace before trial. Yet, the Petitioner based part of his *Daubert* claim on the doctor's answers to trial counsel's cross-examination. Trial counsel cross-examined the doctor on the subjective method he used to interpret the results of T.H.'s bimanual exam:

Q: Dr. Wallace, I have a few questions for you. May we agree at the outset here that there are no objective findings in your examination which are indicative or suggestive of sexual assault?

A: I mentioned in the first round of testimony that the vaginal wall laxity was unusual in the examination.

Q: And you consider that to be an objective finding?

A: It's hard to quantitate, but through my experience I have examined somewhere between 500 and 600 children, and after examining that many, yes, it was an objective finding.<sup>27</sup>

Q: Well is it based on your perception based upon your history of examinations?

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<sup>27</sup>Dr. Wallace's defensive response to counsel's question could not have gone unnoticed by the jury.

A: Yes, sir.

Q: So to that extent it is, in fact, subjective, is it not?

A: You can say that if you like, yes.

(Trial Tr. vol. II, 64-65, Sept. 29, 2004; App. 121-22.)

Trial counsel even got the doctor to concede that there were not scientific journals or peer reviewed trials substantiating his findings. (App. 122.) Therefore, there was no need to speak with the doctor before cross-examining him. *See Strickland*, 466 U.S. at 691 (counsel has a duty to conduct a reasonable investigation or make reasonable decision that no further investigation is necessary).

It is the Petitioner's position that the results of Dr. Wallace's bimanual exam were too subjective to satisfy *Daubert*. (Respondent's brief at 14.) This argument is based upon information gleaned from Dr. Wallace's cross-examination. Yet, the Petitioner also claims that trial counsel's cross-examination of Dr. Wallace was insufficient. The Petitioner never specifies what questions defense counsel should have asked, or what evidence defense counsel could have unearthed had he been more prepared for Dr. Wallace's testimony. He merely speculates that trial counsel's failure to prepare resulted in Petitioner's conviction.

The Petitioner also claims that defense counsel failed to obtain a copy of a letter exonerating him. The only letter produced at the omnibus hearing stated:

These allegations were substantiated at this time. However your case will be closed and will not be opened, – will not be opened for ongoing services. The Department does not believe that what goes on in the home is reason for cause of concern of the safety of you child. Ongoing child protective services were offered to you and your family but were declined by you at this time.

App. 98.

The state habeas court found that this letter, dated June 4, 2002, involved an investigation of domestic violence where the department substantiated the claim but closed the case. The letter had nothing to do with the Petitioner's sexual assaults on T.H. App. 44.

Trial counsel testified that this was the only letter from DHHR that he had seen. App. 98-99. Because the letter failed to exonerate the Petitioner, counsel chose not to use it, or to call the social worker who drafted it as a witness. App. 98-99. At the October 18, 2010, omnibus hearing Petitioner's divorce attorney, William Akers, testified that he recalled seeing a letter similar to the one introduced by Petitioner's counsel during direct examination of Mr. Lefler. App. 134-35.

MS. HAGAR: I'm showing the witness Exhibit Number 1.

THE WITNESS: I don't recall specifically this letter –

BY MS. HAGAR:

Q: Okay.

A: – but the contents of it *are pretty close to what I remember.*

Q: Okay.

A: And I thought it was from the Welfare to the State Police but that could have been – *the letter is similar.*

App. 133-34.

David Smith, Petitioner's former appellate and habeas counsel, testified that the Petitioner showed him a letter from DHHR prior to his arrest. App. 139. According to Mr. Smith the letter stated that "these things" had been investigated and had not been substantiated. App. 140. When shown the letter introduced at Petitioner omnibus hearing, Mr. Smith stated that the contents of the letter were similar but that this was not the letter he recalled seeing. App. 141.

The Petitioner claimed that he received a letter from DHHR while he was living with his mother in 2002 or 2003. According to the Petitioner, this letter stated that their investigation did not reveal signs of child sexual abuse. According to the Petitioner's mother the letter said that DHHR had failed to uncover any evidence, and were not going to "prosecute" the Petitioner. DHHR has no prosecutorial powers. It is highly unlikely that they would write such a letter. App. 72, 75-76. The Petitioner claimed that he gave the letter to Mr. Lefler, and never saw it again. App. 78.

At the close of the October 18 hearing the state habeas court ordered Petitioner's present counsel and counsel for the State to go DHHR and search for this phantom letter. App. 90. Prior to this, Mr. Smith and counsel for the State, George Sitler, reviewed all of DHHR's files. They found the one letter quoted above. Petitioner's present counsel, along with counsel for the State, Scott Ash, once again searched DHHR's files. They could not find this alleged letter. App. 2. Both defense counsel and counsel for the State have searched the DHHR's abuse and neglect files, T.H.'s confidential medical and counseling records from Princeton Community Hospital and the West Virginia School of Osteopathic Medicine's Robert C. Byrd Clinic, trial counsel's file, the abuse and neglect file in the Mercer County Circuit Clerk's office, and contacted appellate counsel Gregory Hurley. The state habeas court held a status hearing on this letter on January 3, 2011, and kept the record open until January 21, 2011. App. 63. The letter never appeared. App. 49, 56, 45, 65, 73-74.

Because she could not find this alleged letter, counsel for the Petitioner speculates that Mr. Lefler lost it. Apart from the his own self-serving comments, the Petitioner has not presented a scrap of credible evidence to support this allegation. Petitioner's claim is a throwaway.

VI.

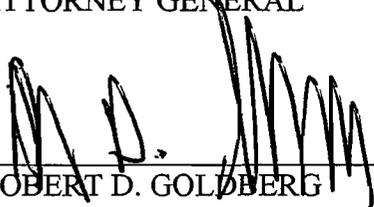
**CONCLUSION**

For the foregoing reasons, the judgment of the Circuit Court of Mercer County should be affirmed by this Honorable Court.

Respectfully submitted,  
DAVID BALLARD, Warden,  
Mount Olive Correctional Center,  
Respondent,

By counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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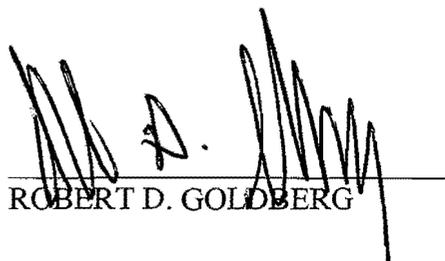
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*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "Brief of Respondent" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 23rd day of May, 2011, addressed as follows:

To: Natalie N. Hager, Esq.  
Harvey & Janutolo Law Offices  
1605 Honaker Avenue  
Princeton, West Virginia 24740

  
ROBERT D. GOLDBERG

**EXHIBITS**

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**FILE IN THE**

**CLERK'S OFFICE**