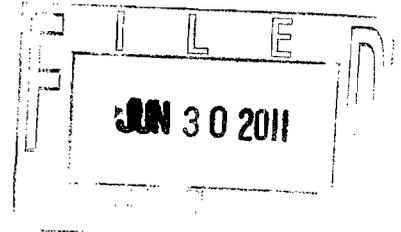


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON**



**STATE OF WEST VIRGINIA, EX REL.
MICHAEL J. GLEASON,**

Petitioner,

v.

**GEORGE JANICE, Warden.
Stevens Correctional Center,**

Respondent.

**FROM THE CIRCUIT COURT OF MARION COUNTY
CASE NO. 10-C-60**

**MICHAEL J. GLEASON'S PETITION
FOR APPEAL AND NOTE OF ARGUMENT**


Frances C. Whiteman (State Bar No. 6098)
Whiteman Burdette, PLLC
229 Jefferson Street
Fairmont, WV 26554
304-366-2116

Counsel for Petitioner Michael J. Gleason

TABLE OF CONTENTS

Table of Contents 2

Table of Authorities 3

Assignments of Error 4

Petitioner’s Request for Rule 19 Argument 5

Procedural History and Statement of Facts 6

Summary of Argument 7

Standard of Review 8

ARGUMENT 9

I. The Court Below Erred By Not Ruling That The Petitioner’s Trial Counsel
Provided Ineffective Assistance Of Counsel 9

II. The Court below erred by not ruling that the Petitioner’s conviction for Abduction
with the Intent to Defile should have been reversed inasmuch as the charge was
entirely incidental and ancillary to Attempted Second Degree Sexual Assault;
and therefore the conviction for Abduction with the Intent to Defile violated the
prohibition against double jeopardy and was constitutionally impermissible . . . 16

III. The Court below erred by not ruling that the Court’s late Thursday after noon
action in telling the jury that the Judge would not be available on Friday coerced
a divided jury to a verdict of convenience 25

IV. The Court below erred by not ruling that the State’s action on showing projected
graphic and bloody photographs of the alleged victim to a courtroom full of
possible jurors, prior to impaneling the jury, was grounds for declaring
a mistrial. 27

V. The Court below erred by not finding that the charge of Unlawful Assault should
have been dismissed because that charge and the charge of Attempted Second
Degree Sexual Assault were within one transaction and one continuing offense,
sharing the same elements, and thus constituted double jeopardy. 29

Conclusion 32

Certificate of Service 33

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Blockburger v. United States, 284 U.S. 299 (1932) 21, 30

Lockhart v. Fretwell, 506 U.S. 364 (1993) 10

Strickland v. Washington, 466 U.S. 668 (1984) 9 - 11

United States v. Cronin, 466 U.S. 648 (1984) 9

WEST VIRGINIA SUPREME COURT CASES:

Accord v. Hedrick, 342 S.E.2d 120 (1986) 9

State v. Baker, 287 S.E.2d 497 (1982) 9

State v. Davis, 376 S.E.2d 563, 566 (1988) 17 - 20

State v. Miller, 175 W. Va. 616 (1985) 23 - 24

State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995) 10, 12

State v. Trail, 174 W. Va. 656 (1985) 21 - 22

State v. Weaver, 181 W. Va. 274 (1989) 22 - 25

State v. Zaccagnini, 308 S.E.2d 131, 141 (1983) 21

VIRGINIA SUPREME COURT CASE:

Brown v. Commonwealth, 230 Va. 310, 337 S.E.2d 711 (1985) 23

ASSIGNMENTS OF ERROR

- I. The Court below erred by not ruling that the Petitioner's trial counsel provided ineffective assistance of counsel.
See "Petitioner's Proposed Findings of Fact and Conclusions of Law" Nos. 9 - 38; AR 124 - AR 133
See "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus' Conclusions of Law: Nos. 5 - 7; AR 182 - AR 185.

- II. The Court below erred by not ruling that the Petitioner's conviction for Abduction with the Intent to Defile should have been reversed inasmuch as the charge was entirely incidental and ancillary to Attempted Second Degree Sexual Assault; and therefore the conviction for Abduction with the Intent to Defile violated the prohibition against double jeopardy and was constitutionally impermissible.
See "Petitioner's Proposed Findings of Fact and Conclusions of Law" Nos. 39-60; AR 133 - AR 143.
See "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus' Conclusions of Law: No. 8; AR 185.

- III. The Court below erred by not ruling that the Court's late Thursday after noon action in telling the jury that the Judge would not be available on Friday coerced a divided jury to a verdict of convenience.
See "Petitioner's Proposed Findings of Fact and Conclusions of Law" Nos. 61 - 65; AR 143 - AR 145.
See "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus' Conclusions of Law: Nos. 9 - 10; AR 185 - AR 186.

- IV. The Court below erred by not ruling that the State's action on showing projected graphic and bloody photographs of the alleged victim to a courtroom full of possible jurors, prior to impaneling the jury, was grounds for declaring a mistrial.
See "Petitioner's Proposed Findings of Fact and Conclusions of Law" Nos. 66 - 73; AR 144 - AR 146.
See "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus' Conclusions of Law: No. 11; AR 186 - AR 187.

- V. The Court below erred by not finding that the charge of Unlawful Assault should have been dismissed because that charge and the charge of Attempted Second Degree Sexual Assault were within one transaction and one continuing offense, sharing the same elements, and thus constituted double jeopardy.
See "Petitioner's Proposed Findings of Fact and Conclusions of Law" Nos. 74 - 82; AR 146 - AR 149.
See "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus' Conclusions of Law: No. 12; AR 187 - AR 188.

PETITIONER'S REQUEST FOR RULE 19 ARGUMENT

Now comes your Petitioner, Michael J. Gleason, and hereby requests oral argument under Rule 19, and the Petitioner further states that this case is appropriate for a memorandum decision.

This case involves assignments of error in the application of settled law; as well as a case claiming an unsustainable exercise of discretion where the law governing that discretion is settled; it is a case decided against the weight of the evidence; and it is a case involving a narrow issue of law.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In March 2005, Michael J. Gleason was arrested on the charges of Burglary and Attempted Sexual Assault. Subsequently, he was indicted by the June 2005 Grand Jury for the offenses of Abduction with the Intent to Defile, Burglary, Attempted Second Degree Sexual Assault and Unlawful Wounding.

Mr. Gleason retained the legal representation of Gerald Jones, an attorney from Clarksburg, West Virginia. On Wednesday, July 12, 2006, and Thursday, July 13, 2006, Mr. Gleason's case proceeded to trial in the Circuit Court of Marion County, West Virginia, with the Honorable Judge Fred L. Fox, II, presiding. Mr. Gleason was found guilty on all four counts of the indictment.

After a hearing on post-trial motions, on October 12, 2006, the Court entered an Order Granting, In Part, and Denying, In part, Defendant's Motion for Judgment of Acquittal and Motion for New Trial. This Order reversed the convictions for Attempted Second Degree Sexual Assault while affirming the other three convictions.

By Order entered February 27, 2007, Mr. Gleason was sentenced as follows: For the offense of Abduction with the Intent to Defile, he was sentenced to not less than three (3) years and not more than ten (10) years; for the offense of Burglary, he was sentenced to not less than one (1) year nor more than ten (10) years; and on the offense of Unlawful Wounding, he was sentenced to not less than one (1) year nor more than five (5) years. Each of the sentences was Ordered to run consecutively with each other. By Order entered November 6, 2007, a final Agreed Amended Sentencing Order was entered.

Mr. Gleason, by his counsel, Jeffrey Freeman, filed a timely appeal, which was

refused by the West Virginia Supreme Court of Appeals.

Thereafter, Mr. Gleason retained Frances C. Whiteman to prepare a Petition for Writ of Habeas Corpus which was filed on February 24, 2011. Evidentiary hearings were held before the Circuit Court of Marion County, West Virginia, on August 2, 2011, and November 30, 2010. The Circuit Court of Marion County issued its "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus'" on March 1, 2011.

SUMMARY OF ARGUMENT

Petitioner's Trial Counsel provided ineffective assistance of counsel to the Petitioner. Trial Counsel instructed the Petitioner to lie during his testimony. Trial Counsel had to be reminded a number of times to speak up during trial. Trial Counsel failed to properly cross-examine a State's witness. Trial counsel failed to move the Court for a mistrial when a photograph of the victim's face was displayed by the State via projector to a full courtroom of potential jurors, prior to jury selection. Finally, Trial counsel failed to properly attach the victim's credibility.

Petitioner further argues that the Court below should have reversed the conviction for Abduction with the Intent to Defile. The conviction for Abduction with the Intent to Defile violated double jeopardy prohibitions and was constitutionally impermissible. This charge was entirely incidental and ancillary to Attempted Second Degree Sexual Assault. The Circuit Court engaged in an improper evaluation or comparison of the seriousness of the offenses.

Next, the Court's action to tell the juror's that if they did not reach a verdict that afternoon, that they would have to come back three days later to continue deliberations.

The jury indicated that they were divided at 4:23 p.m. After the Court gave them the information about coming back in three days, the jury came back with a verdict at 5:31 p.m. The Court's improper action influenced the jury and caused them to reach a verdict of convenience. Prejudice was done to the Petitioner by the Court's actions.

Fourth, the State improperly projected a photograph of the victim's bloodied face on a courtroom wall, while the jury panel was seated, and prior to voir dire. The Court should have excused the entire panel and a mistrial should have been declared because the panel was exposed to evidence that they had an opportunity to consider prior to the trial even starting. The photograph would have not permitted the Petitioner to be thought of as innocent prior to trial.

Finally, the charge of unlawful assault should have been dismissed because that charge and the charge of Attempted Second Degree Sexual Assault were within one transaction and one continuing offense, and the two charges share the same elements, in violation of double jeopardy.

STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of the circuit court, the West Virginia Supreme Court of Appeals applies a two-prong deferential standard of review. The Court will review the final order and the ultimate disposition under an abuse of discretion standard, and the Court will review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

ARGUMENT

I. The Court Below Erred By Not Ruling That The Petitioner's Trial Counsel Provided Ineffective Assistance Of Counsel.

The Sixth Amendment to the United States Constitution and Article III, § 14 of the West Virginia Constitution provides that a criminal defendant shall not only have the right to counsel, but the right to competent and effective assistance of counsel. As stated in United States v. Cronin, 466 U.S. 648 (1984), "the right to effective assistance of counsel is recognized not only for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."

The charge of ineffectiveness of counsel is quite serious, and should not be raised except after proper investigation and careful consideration. As the West Virginia Supreme Court cautioned: "A charge of ineffective assistance is not one to be made lightly. It is a serious charge which calls into question the integrity, ability and competence of a member of the bar. We suggest that counsel consider carefully the facts of a case before raising this issue, keeping in mind the Code of Professional Responsibility readily in mind." State v. Baker, 287 S.E.2d 497 (1982).

In Accord v. Hedrick, 342 S.E.2d 120 (1986), the Court discusses the difficulty of establishing ineffective assistance of counsel. The Court stated, "[i]neffectiveness of counsel is not a charge easily shown. Proof requires more than second guessing of counsel trial conduct." The Court relied on and implicitly adopted the standard articulated in Strickland v. Washington, 466 U.S. 668 (1984), which is that of reasonably effective assistance of counsel. The Strickland Court stated that to succeed on an ineffective assistance claim, a criminal defendant must show that, considering all

the circumstances, the attorney's performance fell below an objective standard of reasonableness and so prejudiced him so as to result in the denial of a fair trial.

Specifically, the Court stated:

A convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires a 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 a showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Thus, the test formulated in Strickland for determining ineffective assistance of counsel has two components: (1) deficient performance and (2) prejudice. See Lockhart v. Fretwell, 506 U.S. 364 (1993). In Syllabus Point 5 of State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995), the West Virginia Supreme Court explained that, "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, [citations omitted]: (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."

Accordingly, a convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The Strickland Court indicated:

The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

In the case at bar, the Petitioner, Mr. Gleason, will specifically set forth reasons why he believes that his trial counsel ineffectively represented him and how that ineffective representation prejudiced the defendant at trial, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

At trial, Mr. Gleason was represented by Gerald Jones. Most stunning of trial counsel's errors was that Counsel advised Mr. Gleason to lie during his testimony at trial. Mr. Jones concocted a story for Mr. Gleason such that he exited Interstate 79N to find some place to use the restroom. (Tr. 262; AR 455). Mr. Gleason agreed to go along with that story, even though he had no such thought. This concoction invited the State to severely pierce through it to show that Mr. Gleason's testimony could not be believed. Mr. Gleason had gotten off the Interstate at the South Fairmont exit. Of course there were numerous places that he could have pulled into to use the restroom, such as the Go-Mart, the Exxon station, as was directly pointed out by Assistant Prosecutor Christina Mulligan. (Tr. 275- 276; AR 468-469) Further, anyone remotely familiar with the area would have know that in addition to the Go-Mart and the Exxon station, the defendant could have stopped in restaurants on his way into town such as

McDonalds which is three blocks before 7th Street, where Mr. Gleason ultimately turned. Mr. Gleason testified at the Habeas hearing that on the day of trial, Mr. Jones told him to say that he had pulled off the Interstate to go to find a restroom, and that advice turned out to put the nail in the credibility coffin for Mr. Gleason. (AR 76 - 79)

This type of advice severely prejudiced Mr. Gleason at trial. Certainly the result of trial could have been a lot different if the jury had believed him. Once Mr. Gleason's dishonesty was illuminated, the jury could believe nothing that Mr. Gleason said. The jury could have believed that he had no intent to defile the victim. Mr. Gleason's testimony could have been believable in that regard, until the jury determined that he was obviously lying about his intent in getting off the Interstate.

As stated in State v. Miller, "[i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue."

The identified act of telling a defendant to lie during his testimony is clearly outside of the broad range of professionally competent assistant. A lawyer cannot ask his client to lie. Further, once a lawyer knows that his client is lying during his testimony, he has an obligation to immediately inform the Court that he must withdraw his representation of the defendant. To do anything else would be unethical.

Trial counsel also failed to advise Mr. Gleason of the nature and consequences

of the trial decision to have the Petitioner lie during his testimony. Although certain actions of trial counsel can be taken as a matter of trial strategy, the pursuit of the “lie” strategy must certainly not rise to the level of “trial” strategy which does not have to be approved by a defendant.

The Habeas Court, below, indicated in its Order that “The testimony of Mr. Jones was credible and was the most logical explanation of the Petitioner’s embellishment. At no point during the evidentiary hearing were the explanations given by the Petitioner and his mother remotely believable. This opinion was clearly wrong. The transcript of the August 2 hearing provides clear evidence from the Petitioner’s mother of what transpired during a break in the trial and that the Trial Counsel told her, just prior to Petitioner’s testimony that “Mr. Jones told me that he and Michael agreed that Michael would testify that he was going to get off the exit anyway. And I just gave him a strange look because he told me that we would never discuss – he would never discuss anything with us.” (AR. 48) Trial Counsel had just been speaking with the Petitioner before he came out of that discussion and made this statement to Petitioner’s mother. Furthermore, and importantly, Trial Counsel specifically asked the Petitioner, during trial **“Had [you] planned to get off the next exit anyway?”** (Tr. 262; AR 455)

During the time of Trial Counsel, Mr. Jones’ testimony, at the Habeas evidentiary hearing, he testified that the Petitioner’s testimony was different than they had discussed, Trial Counsel said that he did not think he had any obligation to go to the Bench, and tell the Court that it was his ethical obligation to ask to be relieved of representing the Petitioner, inasmuch as he knew his client was lying under oath.

Other identifiable acts or omissions on the part of trial counsel occurred as a

result of Mr. Jones not speaking loud enough for the court-reporter or the jury to hear. Numerous times during Mr. Jones jury voir dire, he had to be reminded to speak up. (Tr. 54, AR 243; Tr.57, AR 246; Tr. 58, AR 247; Tr 82, AR 272; Tr. 83, AR 273) A jury would tend to get irritated by the constant reminder that defense counsel must speak up. Failure to remember to speak up results in very poor representation. Also during closing argument, again the Court Reporter had to remind Mr. Jones to speak up so that the court reporter and jury could hear him. (Tr. 346, AR 539; Tr. 347, AR 540). The Habeas Court below, the Court opined that even though Mr. Jones was asked to speak louder at times, “he conveyed his message well and it is doubtful that the Jury convicted the Petitioner out of spite, as opposed to overwhelming evidence.” The Court was just plainly wrong about this. The Jury would have been ticked off at the conduct of Mr. Jones, despite repeated warnings from the Jury — as well as the Court Reporter.

During the trial, a witness by the name of Neale Patrick Minarik testified. He lived above the victim in an apartment. This witness had testified that he noticed a car (driven by Mr. Gleason) being parked in a place where it should not have been parked. Because of this circumstance, Mr. Minarik wrote down the license plate number in case he needed to call to have it towed. Mr. Minarik also testified that he heard a couple of loud bangs downstairs (presumably from the victim’s apartment). However, during Mr. Jones cross examination of this witness, he failed to inquire about the noises, or loud bangs, that he had heard. He failed to ask if the witness heard no sounds of struggle, or heard no sounds of a female screaming, yelling, or crying. Mr. Jones even failed to highlight the absence of those noises during his Closing Argument. These failures are not just mere strategy decisions. They are failures to present critical evidence showing

that there was no abduction going on in the apartment below and there surely was no intent to defile the victim. They are failures to present critical evidence showing that there was no second degree sexual assault or attempted second degree sexual assault going on in the apartment below. They are failures to present critical evidence that there was no unlawful wounding going on in the apartment below.

Trial Counsel, Mr. Jones, also failed to object to the going forward with trial after the prejudicial photograph of the victim was displayed on a projector for about 30 seconds prior to voir dire and jury selection. Mr. Jones did raise the issue to the Trial Court, but did failed to move he Court for a mistrial. (Tr. 31 - 32; AR 220 - 221) The photograph of the victim's bloody face were projected by the State in the courtroom while the jury panel was assembling in the courtroom. Importantly, the State never did present the photographs to the Court to lay an appropriate pre-trial foundation for them and for the determination of admissibility at trial. The State did not give notice of its intention to use a projection device to publish the photographs, or obtain a ruling from the Court. Mr. Jones failed to object to the use of the photographs as they had not previously been ruled upon, and Mr. Jones failed to object to the use of a projection device at trial, as no device was approved by the Court.

Graphic photographs of a bloodied victim, enlarged and exhibited by a projection device, are inherently prejudicial. Presenting them to all potential jurors, who have yet to be qualified or instructed, without an evaluation of the probative value by the Court, is grounds for mistrial. To avoid the potential for extreme prejudice, Mr. Jones should have moved for a mistrial, but all he said to the Court, on the record, was "I'm not sure what we can do about it. I think this is not a good way to get this thing started." (Tr. 31

- 32; AR 220 - 221. Obviously, a motion for a mistrial was in order.

Trial Counsel failed to raise the issue of Mr. Gleason's fingerprints not being found on the deadbolt in the alleged victim's home. The alleged victim indicated that Mr. Gleason had locked the deadbolt once inside her residence. If that was true, Mr. Gleason's fingerprints should have been found on that deadbolt. No fingerprints were found however. Trial Counsel failed to point out this important fact during the testimony of Officer Hayhurst and Officer Campbell which would have had a damaging affect on the alleged victim's credibility.

Further, during Mr. Gleason's direct testimony, Trial Counsel should have shown him the photographs of the victim and then questioned him regarding the change in clothing. This issue could also have been damaging to the alleged victim's credibility, however, it was not even raised.

- II. The Court below erred by not ruling that the Petitioner's conviction for Abduction with the Intent to Defile should have been reversed inasmuch as the charge was entirely incidental and ancillary to Attempted Second Degree Sexual Assault; and therefore the conviction for Abduction with the Intent to Defile violated the prohibition against double jeopardy and was constitutionally impermissible.

In the trial of the felony case, Defense Counsel properly raised a motion to dismiss the charge of Abduction with the Intent to Defile and the Second Degree Sexual Assault during the Rule 29 motions at the close of the State's evidence. Mr. Jones indicated to the Court that there was no evidence that would indicate that there was an assault that was sexual in nature. The Trial Court took the matter regarding the Abduction charge under advisement, but refused to grant the dismissal on Counts II, III and IV.

After the felony trial, the Trial Court improperly concluded that the Attempted Second Degree Sexual Assault (Count III) must be dismissed instead of the charge of Abduction with the Intent to Defile. The Trial Court reasoned that the charge of Abduction with the Intent to Defile and the Attempted Second Degree Sexual Assault were duplicitous and constituted a single act which cannot result in multiple convictions. This Court further stated “The act of Abduction with the Intent to Defile was clearly completed by the Defendant, who held the Victim against her will with the clear intention of sexually assaulting her. Accordingly, the conviction of for Attempted Sexual Assault in the Second Degree (Count III) must be dismissed.” The Trial Court then stated that the State v. Davis was distinguishable from the instant case. The Trial Court indicated that in Davis the defendant was convicted of First Degree Sexual Assault and that the offense of abduction with the intent to defile was merely ancillary to the first degree sexual assault – “the more serious offense.” “In the instant case, clearly the principle offense was Abduction With the Intent to Defile, and the Attempted Sexual Assault in the Second Degree (emphasis supplied) was an ancillary or subordinate offense.”

The Petitioner had requested in his Habeas brief that the Habeas Court re-visit the Trial Court’s decision in regard to the non-dismissal of Abduction with the Intent to Defile and the Davis case. The Habeas Court ruled that “no new argument [had been] presented that would alter the reasoning behind the prior order.” To the contrary, however, the Petitioner clearly presented entirely new arguments in his Habeas petition which should have been very persuasive in reversing the rulings of the Trial Court.

The West Virginia Supreme Court has ruled, in State v. Davis, 376 S.E.2d 563, 566 (1988), that a prosecution of Abduction with the Intent to Defile “requires proof of

detention or asportation of the victim” as an essential element. Upon reflection and review of the transcript, in Mr. Gleason’s case, the whole incident regarding the alleged abduction was located in the victim’s home, within the confines of a very small room at the entrance of her home, and lasted a very short amount of time - five or ten minutes. This very brief event could not possibly amount to a “detention or asportation of the victim.” The victim was not detained in her home. The victim was not taken away from her home. The victim even testified that Mr. Gleason did not grab her breasts or her genital area. (Tr. 114, AR 304) The victim further testified that Mr. Gleason did not say that he was going to have any sexual relations with her, and that he did not rip her clothing in any way, or take off any of her clothing or his clothing. Finally, the victim testified that Mr. Gleason did not try to touch her, so far as she knew, in any sexual-type manner. (Tr. 115, AR 305) There was no evidence that Mr. Gleason had any weapons nor did the alleged victim mention any weapon. Mr. Gleason did not attempt to disguise himself to hide his identity.

It appears that judgment of acquittal was warranted, both at the conclusion of the State’s case and before the case was submitted to the jury. The jury’s verdict of guilty on this charge of Abduction with the Intent to Defile should have been set aside, and the Habeas Court should have so ruled. The State’s evidence on this charge was legally insufficient and no reasonable juror could have concluded beyond a reasonable doubt that the victim had been detained in her own residence during a five or ten minute event. It could have only been by speculation that the jury concluded a guilty verdict on this count. The Trial Court’s denial of the motions for judgment of acquittal were mistaken.

In State v. Davis, 376 S.E.2d 563 (1988), the victim went to Davis' house to obtain laundry that she had left there earlier in the day. Davis followed her to the laundry room and asked the victim to come to the bedroom. The victim refused and the defendant grabbed her by the shoulders and pulled her backward toward the bedroom. The victim then was able to escape and she ran to the kitchen and then the living room where she pleaded with the defendant's father to help her. When the defendant appeared in the living room, the victim threw a glass of water at him. Then the defendant grabbed the victim by her hair, dragged her into the dining room where he proceeded to choke her and strike her. The defendant then pulled the victim to the bedroom where he raped the victim. Defendant Davis was convicted of abduction with the intent to defile, sexual abuse and sexual assault.

The West Virginia Supreme Court ruled the conviction of abduction with the intent to defile violated the prohibition against double jeopardy and was constitutionally impermissible. Davis at 361. The Court stated that the abduction was merely incidental or ancillary to the commission of the sexual abuse and sexual assault. The Court reasoned that:

[T]he detention and movement of the victim in this case was merely intended to facilitate the commission of the sexual assault. The entire transaction took no more than 15 to 30 minutes. No weapon was used to compel the detention or movement of the victim, and she was moved only a short distance inside the appellant's home. The removal of the victim to the bedroom did not appear to expose her to an increased risk of harm beyond the inherent in the sexual assault or to decrease the possibility of detection or escape.

In comparison to the case at bar, the alleged detention, if any, was merely intended to facilitate the commission of the attempted second degree sexual assault.

The second degree sexual assault would have been the target of the defendant. This entire transaction took between five and ten minutes, according to the alleged victim's testimony (Tr. 117, AR 307), which was not as long as the Davis transaction. Mr. Gleason, in the case at bar, did not use any weapon, just as Davis did not use a weapon to either detain to move the victim. In the case at bar, the victim was not moved to any other room in the residence. The victim in Mr. Gleason's case was not exposed to an increased risk of harm beyond the inherent in the attempted sexual assault.

The Davis case is only distinguishable from the case at bar in that the facts are much more disturbing. The West Virginia Supreme Court, however, thought it necessary to reverse Davis' conviction and punishment on double jeopardy principles. "Double jeopardy prohibits multiple punishment for the same offense, therefore under our criminal sexual conduct statute, W. Va. Code, 61-8B-1 et seq. [1976], a single sexual act cannot result in multiple criminal convictions." Syl Pt. 2, Davis.

The Trial Court did dismiss the conviction for Mr. Gleason on the Count of Attempted Second Degree Sexual Assault. In reality, upon due consideration and reflection, the Court should have dismissed the Abduction count but did not. The Court should have dismissed the Abduction [with the Intent to Defile] count because it was *that* charge which was incidental or ancillary to the intended Second Degree Sexual Assault. The Court heard the testimony of the victim such that Mr. Gleason wanted her to remove her pants. The Defendant did struggle with the victim while standing and on the floor. The State's alleged main object of the offense was the second degree sexual assault. Accordingly, the Abduction with the Intent to Defile *had* to clearly be ancillary

to the sexual assault. A person does not commit a sexual assault in order to then commit an abduction. The sexual assault charge was not merely ancillary to the abduction. The sexual assault was the very object of transaction. Accordingly the Abduction had to be ancillary to the charged Attempted Second Degree Sexual Assault.

The Trial Court erred by mistakenly evaluating the seriousness of the offenses and compared the seriousness of the Abduction charge with the seriousness of the Attempted Second Degree Sexual Assault. The Davis Court did not approve this kind of evaluation or balancing. The Trial Court had concluded that the Abduction charge was the more serious charge and therefore the Attempted Second Degree Sexual Assault charge should be the charge that is dismissed. Now, this Court indicates it mistakenly reasons that the Attempted Second Degree Sexual Assault was less serious and that equated with ancillary.

In State v. Trail, 174 W. Va. 656 (1985), the petitioner was convicted of abduction, malicious assault, and second degree sexual assault. The petitioner argued that punishment for both abduction and sexual assault based on the same transaction violated the double jeopardy clause. The Court reasoned that "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." State v. Zaccagnini, 308 S.E.2d 131, 141 (1983)(fn3) quoting Blockburger v. United States, 284 U.S. 299, 304 (1932). Using the Blockburger test, the Court had to make a determination whether appellant's convictions for abduction and sexual assault each required proof of a separate fact and the Court found that they did. "Abduction of a

female with intent to defile, W. Va. Code § 61-2-14 (1977)(fn4) required an asportation or taking away that is not an element of sexual assault; sexual assault in the second degree, W. Va. Code § 61-8B-4 (1977),(fn5) required sexual intercourse or penetration that was not an element of abduction.” Defendant Trail’s asportation of Lisa Chambers was in fact a separate act is shown by the fact that he led her far into the woods for about three miles, and this increased the risk of harm to the victim and diminished the possibility of rescue. Accordingly, the Trail court ruled that the “abduction thus was more than incidental to the rape. Therefore, although the defendant’s convictions for abduction and sexual assault may arguably have arisen from the “same transaction,” they do not constitute the same offense for purposes of the double jeopardy clause.” So the convictions for abduction and sexual assault were both affirmed.

Importantly, there was no evaluation in Trail about the seriousness of the offenses. Rather, the Court engaged in a discussion about whether it could separate out the offenses from each other and whether each constituted two separate transactions.

In the case of State v. Weaver, 181 W. Va. 274 (1989), the Court ruled that “A defendant cannot be convicted of abduction under W. Va. Code, 61-2-14(b), if the movement or detention of the victim is merely incidental to the commission of another crime. The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.” Syl. Pt. 2. Weaver, was convicted of first degree sexual assault, attempt to kill or injure

by poison or other destructive thing, and abduction of a minor child for immoral purposes. Of the three assignments of error, the petitioner argued that the abduction was merely incidental to the assault and was not, therefore, separately punishable under the principles of State v. Miller, 175 W. Va. 616 (1985). The Court started with a discussion of Miller, where the kidnaping statute was considered. The Court in Miller ruled that "The general rule is that a kidnaping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnaping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Id. at 278-79.

In Weaver, the West Virginia Supreme Court discussed and approved the Virginia Supreme Court decision in Brown v. Commonwealth, 230 Va. 310, 337 S.E.2d 711 (1985). The Miller Court stated that the primary issue was the construction of the Virginia abduction statute. Brown, was convicted of rape, forcible sodomy, and abduction. The Brown Court ruled that the Virginia Legislature "did not intend to make the kind of restraint which is an intrinsic element of crimes such as rape, robbery, and assault a criminal act, punishable as a separate offense." 230 Va. at 314, 337 S.E.2d at 713. For this reason, abduction was punishable "only when the detention committed in the act of abduction is separate and apart from, and not merely incidental to, the restraint employed in the commission of the other crime." 230 Va. at 314, 337 S.E.2d at 714.

The Weaver Court concluded that where the abduction is separate enough and

severe enough, that there can be a separate conviction for the abduction itself. Again, there was no evaluation of the seriousness of the offenses, but rather an affirmation of the factors enunciated in Syllabus Point 2: “The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.”

Accordingly, the Trial Court should have *only* considered the Miller factors in determining whether an offense like abduction is ancillary to a sexual assault. There has been no approval or discussion in West Virginia jurisprudence for the evaluation or comparison of the seriousness of offenses. After a review of the Miller factors, the Trial Court and Habeas Court should have found that the Abduction offense was indeed ancillary to the Attempted Second Degree Sexual Assault.

In addition, the Abduction offense carries the words “With the Intent to Defile.” Accordingly, there must be some intent on the part of the defendant to have sexual contact with the victim. The sexual contact with the victim, as pointed out by the State time after time, was the very object of Mr. Gleason’s behavior. If the Attempted Second Degree Sexual Assault was dismissed by this Court, post-verdict, then there clearly was no intent, on the Petitioner’s part to defile the victim. With this Court’s ruling that the attempted second degree sexual assault was an ancillary or secondary offense, the intent to defile cannot now become the primary offense. Since this Court dismissed the sex-related intent offense, it cannot then make another sex-related intent offense conviction stick. The State’s theory of the whole case was that Mr. Gleason abducted

the victim so that he could sexually assault her. That is why the State indicted Mr. Gleason both for abduction and for sexual assault. The State argued that any detention at all was for the sole purpose of getting to the sexual assault. The sexual assault was the end game...not the abduction. The alleged abduction was clearly and factually “merely incidental to the commission of another crime.” See Syl. Pt. 2, Weaver, supra.

Therefore, it is impossible to convict and punish Mr. Gleason for the charge of Abduction With the Intent to Defile. The State should have chosen which offense to pursue at trial, and when the State did not choose, the impossibility of a conviction of both the offense of Abduction and Attempted Second Degree Sexual Assault put the Court in a difficult position. The Trial Court should have chosen to dismiss the Abduction with the Intent to Defile count of the indictment, which count was ancillary to the object of the Defendant: the Attempted Second Degree Sexual Assault. The Habeas Court should have recognized this error and should have dismissed Abduction with the Intent to Defile.

- III. The Court below erred by not ruling that the Trial Court’s late Thursday after noon action in telling the jury that the Judge would not be available on Friday coerced a divided jury to a verdict of convenience.

The Petitioner, in his Habeas Petition also raised the issue that the Trial Court erred by telling the jury that this judge would have to be out of town on Friday, thereby pushing the jury to come to a verdict in a rush to judgment. At the outset of the trial, on a Wednesday morning, the Court informed the jury that the judge had a commitment in Charleston on Friday. “So if we would happen to not finish [the trial] tomorrow, I

suspect that I'm pretty sure we will, if we would not then we would basically go over to Monday." (Tr. 32, AR 221) Then on Thursday afternoon, at 4:23 p.m., after the jury had been deliberating for about three hours, the Court indicated to the jury, "Ladies and gentlemen, the Bailiff has advised me that your Foreman [has] advised her that you are not close or you are a divided jury at this point." The jury also had a question regarding the meaning of "intent." The Court declined to further instruct the jury on the meaning of "intent." The Court also asked the jury to deliberate further, and reminded the jury that he would have to be in Charleston during the next day, which may mean the jury would have to come back on Monday to deliberate. (Tr. 358 - 359; AR 551 - 552) The jury, which had not been close and was divided at 4:23 p.m., had come to a verdict on all four counts during the next hour. At 5:31 p.m., proceedings were resumed, and Mr. Gleason was found guilty of all four counts of the Indictment.

The Petitioner asserted in his Habeas brief, that it was error for the Court to inform the jury that it would have to come back to Court on Monday to deliberate in order to finish the trial. The Habeas Court should have ruled that when the Trial Court informed the jury that it could not conduct the trial on Friday, that put undue pressure on the jury to convict Mr. Gleason, as opposed to meaningfully deliberate its verdict. These jurors lives were interrupted for two days during one week, on a Wednesday and Thursday, and it was erroneous to suggest to them that their lives would have to be disrupted on another day during the *next* week to engage in meaningful deliberations.

The Habeas Court ruled that "It is common practice to inform jurors as to the Court's schedule. There was no prejudice done to the defendant by the Court's actions." Although it is common practice to inform jurors of the Court's schedule, the

timing of imparting this information was clearly wrong. The Habeas Court should have ruled that this action led to a rush to judgment on the part of the jurors with their anxiousness to wrap up the case before the weekend. The Habeas Court should have ruled that this was improper influence and pressure on the jury to get to the verdict.

- IV. The Court below erred by not ruling that the State's action on showing projected graphic and bloody photographs of the alleged victim to a courtroom full of possible jurors, prior to impaneling the jury, was grounds for declaring a mistrial.

The Petitioner also raised the issue in his Habeas Petition that the Court failed to dismiss the jury and require a new panel when the State improperly flashed photographs of the victim in the Courtroom on a big screen before the jury was impaneled. Prior to Voir Dire of the jury panel, and which the entire jury panel was in the courtroom, the State flashed a photograph up on a screen of the victim. The photograph was left on the screen for about thirty (30) seconds. The Defendant's mother and father saw this, and heard some of the jury panelists talking about it and how bad it looked. The improper conduct served to corrupt the jury panel before a jury could be selected. Although the Court and the Assistant Prosecutor questioned prospective jurors during voir dire on whether seeing that photograph would have any affect on them in any manner, and the jurors who saw the photograph indicated that it would not have any effect on them; however, the Habeas Court should have ruled that it would certainly have an unconscious effect on these jurors. The Habeas Court, however ruled that "There was no prejudice to the Petitioner, and this argument is without merit."

Seeing an injured female in a picture, before trial would cause a juror to believe that the defendant unlawfully caused those injuries. Seeing such a photograph starts the wheels turning. The Court acknowledged to the jury that "It was done then inappropriately...." The showing of a victim photograph on a big screen by the State was done inappropriately, and that was enough to corrupt and taint the jury and a new jury panel should have been brought in for jury selection.

The photograph of the victim's bloody, battered face was projected by the State in the courtroom while the jury panel was assembling in the courtroom. It is worth stating again, importantly, the State never did present the photographs to the Court to lay an appropriate pre-trial foundation for them and for the determination of admissibility at trial. The State did not give notice of its intention to use a projection device to publish the photographs, or obtain a ruling from the Court. Graphic photographs of a bloodied victim, enlarged and exhibited by a projection device are inherently prejudicial. Presenting them to all potential jurors, who have yet to be qualified or instructed, without an evaluation of the probative value by the Court, is grounds for mistrial. To avoid the potential for extreme prejudice, the Trial Court, sua sponte, should have declared a mistrial and the Habeas Court should have recognized this error.

Mr. Gleason was entitled to a fair trial, with evidence that was determined to be admissible by the Trial Court, and not upon evidence that the State put before the jury without the approval of the Trial Court. The pre-trial evidentiary hearing took place five days before trial, and even then the State failed to seek the Trial Court's permission to publish the photographs used at trial on a projector. But then, in open court, the State showed all potential jurors the unadmitted graphic photograph of the victim, enlarged by

a projection device.

The Habeas Court should have ruled that this jury panel was then corrupted by the inappropriate use (whether reckless or intentional), by the State, of a photograph of a bloody-faced female victim. This is not only inappropriate, but improper, and must point to a mistrial being declared by the Trial Court. From that point forward, Mr. Gleason started behind the 8-ball, and that is not a fair place to start at trial where the field of play is supposed to be equal.

V. The Court below erred by not finding that the charge of Unlawful Assault should have been dismissed because that charge and the charge of Attempted Second Degree Sexual Assault were within one transaction and one continuing offense, sharing the same elements, and thus constituted double jeopardy.

In his Habeas Petition, Mr. Gleason also raised the issue that the Court erred by denying judgment of acquittal for unlawful assault. The Habeas Court should have ruled that the Trial Court should have also granted Mr. Gleason's motion for a judgment of acquittal on the charge of Unlawful Assault. Just like the charge of Abduction and the arguments put forth herein, any physical assault on the victim was a part of, incidental to and ancillary of the alleged Attempted Second Degree Sexual Assault. The proof of the Unlawful Assault involved the same elements necessary to prove the Attempted Second Degree Sexual Assault. The Unlawful Assault Evidence was encompassed in the same evidence presented in the alleged Attempted Second Degree Sexual Assault. Accordingly, Mr. Gleason could not be convicted of both the Unlawful Assault and the Attempted Second Degree Sexual Assault. Once the jury returned a verdict for Attempted Second Degree Sexual Assault, the Trial Court should have reversed the

conviction for Unlawful Assault. Since the Trial Court did not dismiss the Unlawful Assault charge, Mr. Gleason was unlawfully and unconstitutionally convicted of both charges which violates the prohibition against double jeopardy. Accordingly, the Trial Court erred by denying Mr. Gleason a judgment of acquittal and an ultimate dismissal of this count, post-trial. The Habeas Court erred by not recognizing this mistake.

In applying the Blockberger test which was articulated herein heretofore, Unlawful Assault and Attempted Second Degree Sexual Assault are the same elemental offenses. So Mr. Gleason cannot be convicted of both offenses. The State's evidence was that the Defendant entered the victim's residence, grabbed her, pinned her arms to her side, and after struggling briefly, they fell to the floor and the Defendant was on top of the victim. The victim landed face first on the floor, which resulted in a knot on her head, bruising and a cut to her face. The victim testified that during the struggle, Mr. Gleason told her to pull down her pants. However, the victim was able to get to her feet while the event continued, however brief, and then Mr. Gleason left the residence.

Upon a review of the record, the trial testimony is devoid of anything which proved any physical contact other than that which the State alleged as the forcible compulsion element of the Attempted Second Degree Sexual Assault. According to the State's evidence, the victim was injured by the forcible compulsion attempted by Mr. Gleason to sexually assault her. With any abduction, the State's own evidence clearly indicates that any physical assault was merely incidental to an attempted sexual assault. Therefore the Unlawful Assault and the Attempted Second Degree Sexual Assault were within one transaction and one continuing offense. The alleged Unlawful

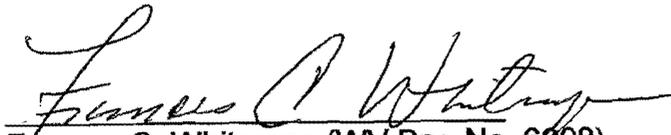
Assault was incidental and ancillary to the Attempted Second Degree Sexual Assault upon the victim. Any physical contact was the forcible compulsion element, and not a separate criminal offense. The State should have dismissed this charge and not pursued the same. Upon due consideration and reflection, the Trial Court and the Habeas Court should have dismissed the count regarding Unlawful Assault in the motion for a judgment of acquittal and should have not instructed the jury on this charge.

In addition, and importantly, the State presented absolutely no evidence that Mr. Gleason intended to maim, disfigure, disable or kill the victim. The State's theory was that Mr. Gleason intended to sexually assault the victim by forcible compulsion, but she resisted. Her injuries resulted from her fall to the floor with Mr. Gleason. (Tr. 112, AR 302) Mr. Gleason told her that he did not intend to harm her. (Tr. 100, AR 290; Tr. 101, AR 291; Tr. 111, AR 301). Mr. Gleason did not have any weapon and did not strike the victim in any way. (Tr 111-112, AR 301-302)

There was absolutely no unlawful intent shown by the State that Mr. Gleason intended to maim, disfigure, disable or kill the victim. There was no testimony adduced to show the same. The victim's injuries occurred as a result of a fall to the floor with Mr. Gleason, and he surely did not intend to injure the victim by unlawfully assaulting her. Thus, the evidence presented at trial was factually insufficient to prove an unlawful assault. Given the arguments regarding double jeopardy, as articulated above, the conviction for Unlawful Assault should have also be reversed by the Trial Court and the Habeas Court.

CONCLUSION

The Circuit Court's Order denying the Mr. Gleason's Petition for Writ of Habeas Corpus should be reversed , and this matter should be remanded for further proceedings consistent with this Honorable Court's rulings.



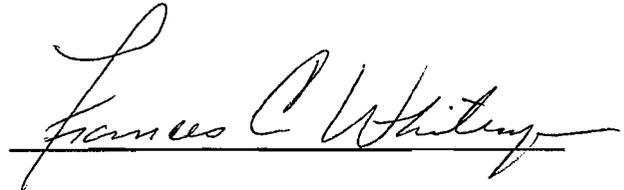
Frances C. Whiteman (WV Bar. No. 6098)
WHITEMAN BURDETTE, PLLC
229 Jefferson Street
Fairmont, WV 26554
304-366-2116
304-366-8461 (fax)
Counsel for Petitioner

MICHAEL J. GLEASON,
Petitioner by Counsel

CERTIFICATE OF SERVICE

I, Frances C. Whiteman, do hereby certify that I served the foregoing "Michael J. Gleason's Petition for Appeal and Note of Argument" this 29th day of June, 2011, upon the following counsel, by first class mail, postage pre-paid:

Laura K. Young, Esquire
West Virginia Attorney General's Office
Appellate Division
State Capitol Complex
Bldg 1, Room E-26
Charleston, WV 25305

A handwritten signature in cursive script, reading "Frances C. Whiteman", is written over a horizontal line.