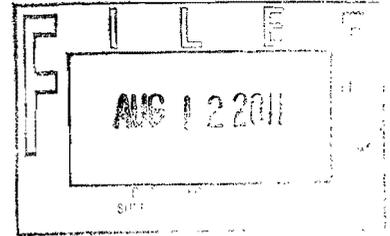


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0544



MICHAEL J. GLEASON,

Petitioner,

v.

GEORGE JANICE, WARDEN,
STEVENS CORRECTIONAL CENTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION
FOR APPEAL AND NOTE OF ARGUMENT

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Comes now the Respondent, the State of West Virginia, by Laura Young, Assistant Attorney General, pursuant to the West Virginia Revised Rules of Appellate Procedure 10(d) and according to an Order of this Honorable Court, dated March 29, 2011, and responds to the petition for appeal and note of argument as follows.

I.

STATEMENT OF THE CASE

On March 1, 2005, the victim, R. W., traveled from the DMV in Clarksburg back to her home in Fairmont. (App. at 279.) She noticed that she was being followed by a white Pontiac Sunfire. (*Id.* at 282.) She returned to her apartment, where she lived alone. There was a knock on her door, but when she answered, no one was present. (*Id.* at 286.) Again, there was a knock at the door. When she opened the door the second time, there was a stranger. When she tried to shut the

door, he pushed it open and forced his way in. He immediately grabbed her with both arms, pinning her arms. She screamed. (*Id.* at 288-289.) The stranger told her to be quiet and when he covered her mouth, she bit him. He then shoved her to the floor, hitting her head very hard. (*Id.* at 290.) The man told her to pull down her pants. During her struggle, the victim noticed duct tape, which the stranger had brought to the apartment with him. Further, the stranger had relocked her apartment door. She struggled to get out, but the stranger grabbed her again. She fell, and hit her eye. After a lengthy struggle, the person left. (*Id.* at 289-291.)

R. W. called the police and was able to give them a description of the individual who had attacked her. (*Id.* at 293-294.) The attack left her with a permanent scar near her eye. (*Id.* at 295.) She identified the petitioner, Michael Gleason as her attacker at trial. (*Id.* at 296.) She was vigorously cross examined by trial counsel. (*Id.* at 297-306.) R. W. further testified that she believed the petitioner's motivation behind the attack was to rape her. (*Id.* at 316.)

Neal Minarik lived in the same apartment complex as R. W. and noticed on the day of the attack that there was a Pontiac Sunfire parked blocking his parking space. Mr. Minarik noted the license plate number because he believed he might need to have the vehicle towed. (*Id.* at 313.) Further, he noticed the driver get into the Sunfire, and identified the petitioner as that person. (*Id.* at 125-126.)

Further testimony indicated that the petitioner quit his steady job, without picking up his last paycheck. He gave no notice to his employer. (*Id.* at 360.) The petitioner's girlfriend testified the petitioner had visited her in Virginia and left to return to his home in Pennsylvania driving a white Sunfire on March 1, 2005. (*Id.* at 383.) The petitioner later phoned her and told her that he had been involved in an altercation at a rest stop. Further, the petitioner came to visit her by driving to

Cambridge, Ohio, from his home in Pennsylvania and took the bus to Tennessee, where she picked him up. The stated reason for the bus trip was that the petitioner wanted to avoid the State of West Virginia because the police were looking for him. (*Id.* at 396-397.) Later, the petitioner admitted to her that he had lied about the rest stop incident, that he had actually followed a girl home on the interstate, gone into her apartment, when she became hysterical for no reason. (*Id.* at 406-407.)

Sergeant Moran of the Fairmont police department testified that pictures were taken of the apartment which showed an obvious struggle, and that no fingerprints linking the petitioner to the crime were found in the apartment. (*Id.* at 426.)

The petitioner testified at trial and admitted that, although his primary purpose in exiting the interstate was to use the restroom, he circled around, saw the victim's car and thought he could get a date with her. (*Id.* at 455.) The petitioner testified that the victim opened the door for him, and that she said she had a boyfriend and started throwing things at him. (*Id.* at 456.) The petitioner admitted physical contact with the victim, struggling, and falling to the floor. (*Id.* at 457.)

The jury returned verdicts finding the petitioner guilty of abduction with intent to defile, burglary, attempted second degree sexual assault, and unlawful assault. The trial court determined that the offense of attempted second degree sexual assault was ancillary to the offense of abduction with intent to defile, and reversed the petitioner's conviction as to that count. (*Id.* at 574.)

The petitioner was sentenced to terms of three years to ten years for the offense of abduction with intent to defile; one year to ten years for burglary; and one to five years for unlawful assault. (*Id.* at 580-581.) The petitioner's brief indicates that a direct appeal of this conviction was refused by this Honorable Court.

Mr. Gleason, by counsel, filed a petition for writ of habeas corpus alleging ineffective assistance of counsel, error in the trial court's failure to dismiss the charge of abduction with intent to defile, error in the trial court's coercion of a jury verdict, and failure to grant a judgment of acquittal for unlawful assault. (*Id.* at 8-28.) Following a hearing on the petition for writ, the court entered an order denying the petition. (*Id.* at 173-188.) The petition for appeal ensued. Additional facts from the appendix, particularly from the transcript of the trial and habeas hearing will be developed in conjunction with the argument, as necessary.

II.

SUMMARY OF THE ARGUMENT

Trial counsel was not ineffective for any of the reasons proffered by the petitioner. The petitioner alleges that trial counsel instructed him to lie at trial. After listening to testimony from Mr. Gleason, his mother, and Mr. Jones, the habeas court determined that Mr. Gleason and his mother were not remotely credible as to that issue. Mr. Jones was asked by the court reporter on approximately three occasions to speak up. Each of those occasions was before the jury was sworn. There is no indication in the record that any juror could not hear Mr. Jones during trial, and a review of the transcript indicates that witnesses could hear and respond to Mr. Jones, despite the poor acoustics. Mr. Jones explained that he did not ask the victim's neighbor whether he heard screaming because that witness refused to speak to his investigator. That clearly is a matter of trial strategy, and not subject to an ineffective assistance analysis. Although a photograph of the victim was displayed in the courtroom before jury selection, it was briefly displayed. Only one person who served on the jury saw the photograph, and that individual stated that she paid no attention to the photograph and that it would not influence her decision. Clearly, the jury was qualified to serve, and

a mistrial was unwarranted. Further, the photograph in question was admitted into evidence during trial, and habeas counsel does not argue that it was inadmissible. Mr. Jones did emphasize that the petitioner's fingerprints were not found at the scene. The decision not to question the victim about her clothing in the photographs—assuming that the petitioner made his counsel aware that she had changed clothing was clearly trial strategy. Additionally, there is nothing to support the contention that the result at trial would have been different but for counsel's alleged errors. Therefore, the claim of ineffective assistance of counsel is without merit.

The trial court determined that the charge of second degree sexual assault was ancillary to the offense of abduction with intent to defile. The evidence at trial demonstrated that the petitioner forced himself into the victim's residence, locked the door and had duct tape, thereby both restraining the victim in her apartment and demonstrating a willingness to further restrain her. He ordered her to take her pants off. The court determined that the abduction charge and the attempted sexual assault were duplicitous. The offense of abduction with intent to defile was completed when the defendant held her against her will with the intention of sexually assaulting her. The court determined that the principal offense was the abduction with intent to defile and that the less serious offense was ancillary, which is consistent with West Virginia law.

The trial court at the beginning of the trial informed the jurors that although he believed the trial would conclude in two days, that if it did not, the trial would not be held on Friday, as the judge would be absent. He requested that the jurors let him know if that caused any problems, and that any juror who could not return on Monday would be excused. (App. at 221.) Therefore, since the jurors knew before jury selection that returning on Monday was a possibility, the judge's neutral reminder of the court's schedule could in no way have influenced a verdict. Further, the judge carefully

explained that it was the option of the jurors to stay and deliberate—as late as they chose—or to return on Monday. (*Id.* at 551.) Therefore, the verdict was in no way coerced.

As mentioned earlier, photographs of the victim, later admitted into evidence were briefly shown in open court prior to jury selection. Only three potential jurors saw the photograph, and of those the one juror selected who saw the photograph, stated that she didn't really notice it and it would not prejudice her. A mistrial was unnecessary and the defendant was not prejudiced by this harmless mistake.

Unlawful assault and attempted second degree sexual assault are criminal offenses which contain different elements, and therefore, an individual can be convicted for the completed offense of unlawful assault—the cut on the victim's face which left a scar—and attempted second degree sexual assault—which requires an attempt to engage in sexual intercourse or sexual intrusion without the consent of the victim and by forcible compulsion. Each offense requiring proof of an element which the other offense does not, destroys any argument as to double jeopardy. Further, the trial court vacated the attempted second degree sexual assault conviction based upon its ancillary nature. In terms of proof, the state proved that the petitioner engaged in a physical altercation with the victim, which he started, which resulted in an injury to her head, leaving a scar. The elements of unlawful assault are that a person by any means cause bodily injury with intent to maim or disfigure. The jury was entitled to infer that the petitioner intended the natural consequences of his action, which, since he overpowered the victim and knocked her to the floor twice, hitting her head and cutting it, ultimately leaving a scar, fulfilled the evidentiary requirements for this offense.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The respondent believes that oral argument is unnecessary in this matter as the dispositive issue or issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. In addition, this matter is appropriate for a memorandum decision.

IV.

ARGUMENT

A. THE COURT DID NOT ERR BY RULING THAT THE ASSISTANCE OF PETITIONER'S TRIAL COUNSEL WAS NOT INEFFECTIVE

The standard for determining whether or not counsel was an effective representative was enunciated in *Strickland v. Washington*, 104 S.Ct. 2052 (1984.) *Strickland* developed a two-pronged test to determine effectiveness, an objective test, and a subjective test. Objectively, there must be evidence that demonstrates that counsel's performance fell below an objective standard of reasonableness. Additionally, "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. . . ." (*Id.* at 2055.) Subjectively, those who assert that counsel was ineffective must demonstrate, from the totality of the evidence, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at 2055-56.)

West Virginia has adopted the two pronged test for determining effective representation. As stated in Syl. Pt. 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), ". . . (1) Counsel's

performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 6 of *Miller* adds that courts must refrain from "engaging in hindsight or second-guessing of trial counsel's strategic decisions."

The representation of trial counsel was not ineffective under either the objective or subjective test. The petitioner asserts that counsel was ineffective because he instructed his client to lie at trial. At the omnibus habeas hearing, Mr. Jones, an attorney of more than 50 years experience testified definitively that he did not instruct the petitioner to lie, and was surprised that the petitioner testified that he got off the exit looking for a bathroom. (App. at 107.) He added that he believed the petitioner was embellishing his testimony to make himself appear somewhat less culpable. (*Id.* at 114.) The "embellishment" of the testimony was the petitioner's and his alone. The petitioner and his mother, who obviously have motivation to fabricate testimony, testified somewhat differently at the habeas hearing. However, the judge at the habeas hearing found Mr. Jones' testimony credible, and rejected the testimony of the biased witnesses, the petitioner and his mother. As stated in the habeas order (*Id.* at 183), the testimony of the petitioner and his mother was not remotely believable. The court found that Mr. Jones did the best he could to limit the damage caused by petitioner's own failures of a witness. As there is no evidence that Mr. Jones instructed his client to lie, Mr. Jones was not ineffective as to this alleged error.

Petitioner asserts that the jury got peeved with Mr. Jones because he was somewhat soft spoken. Putting aside for the moment that there is no precedent for granting habeas relief because counsel speaks softly, the record reflects that on approximately three occasions during jury selection, the court reporter requested Mr. Jones to speak up. Following jury selection, Mr. Jones engaged in

opening statement, closing argument, cross-examination of witnesses, direct examination of witnesses and bench conferences, and was not asked to speak louder. A fair reading of the transcript indicates that Mr. Jones' questions were heard by the witnesses, and they responded appropriately. Further, no member of the jury brought to the court's attention any difficulty in hearing Mr. Jones in a courtroom described by the presiding judge as "cavernous." (*Id.* at 183.)

Counsel attacks the decision of Mr. Jones not to cross-examine Neal Minarik. Mr. Minarik testified that he heard loud bangs from the downstairs apartment, had noticed a vehicle parked where it should not be and noted its license plate, which was ultimately traced to the petitioner. Mr. Minarik further testified that he did not speak to Mr. Jones' investigator. Therefore, as Mr. Jones could not reasonably know what Mr. Minarik might state on cross examination, and that Mr. Minarik had been an effective witness in placing the petitioner at the scene of the crime and hearing unusual noises, it was a strategic decision to again, limit the damage caused by an effective prosecution witness.

The assertion that Mr. Jones was ineffective because he failed to raise the issue of the petitioner's fingerprints not being found at the scene, specifically on the deadbolt, is not supported by the trial transcript. Mr. Jones questioned Sergeant Moran about a fingerprint found in the apartment, and forced her to say not once, but twice, that the fingerprint was not the petitioner's. (*Id.* at 426-27.) Mr. Jones also emphasized in closing arguments that none of the petitioner's fingerprints were found on the door. (*Id.* at 537.) Additionally, Mr. Jones is deemed ineffective because he did not challenge the victim as to whether she had or had not changed her clothing before pictures were taken of her at the hospital. There is no evidence in the record of the habeas hearing to demonstrate that the victim had or had not changed clothing, and that if she had, that the petitioner

made Mr. Jones aware of that fact. Further, whether or not she changed her clothing was not germane to any issue at trial, and to emphasize the victim's bloody face in the pictures while asking her if the clothes she had on in the picture were the ones she wore during the attack was a strategic decision.

A picture of the victim's face showing her injuries was briefly displayed in the courtroom prior to jury selection, and one juror who saw the picture ended up serving on the jury. That juror at jury selection testified that "I saw it, but I didn't pay any attention to it." In response to a question from the judge, she denied that the brief glimpse of the picture would affect her decision in any way. (*Id.* at 239.) Mr. Jones is criticized for not moving for a mistrial because of the fleeting glimpse of a photograph, which was later admitted into evidence. However, the law in West Virginia is clear that a mistrial should be granted only where there is "manifest necessity." *State v. Williams*, 172 W. Va. 295 at 304, 305 S.E.2d 251 at 260 (1983). Mr. Jones testified that he did not move for a mistrial, because he thought such motion would be futile. The judge confirmed that belief in the order denying habeas relief. The only juror selected to serve who acknowledged seeing the picture stated it would not affect her decision. The picture was properly admitted into evidence. The jury which convicted the petitioner was a fair and impartial jury, and the petitioner has pointed to no evidence indicating that the jury was not impartial save for speculation.

Habeas counsel cites as ineffective Mr. Jones' failure to object to the admission of photographs of the victim and their publication to the jury via an in court projection device. However, counsel states no law nor evidence which would render accurate photographs of the victim inadmissible at trial. The record does reflect that Mr. Jones did object to the use of the projection device to publish the photographs of the victim as inflammatory. That objection was overruled.

(App. at 342.) The treating physician testified that the photographs of the victim reflected her facial contusions, abrasions, and a laceration. (*Id.* at 351.) Those photographs were probative as to whether or not the offenses of attempted second degree sexual assault and unlawful wounding had occurred, and as they were accurate depictions of the victim—and habeas counsel does not assert they were inaccurate—they were admissible. Therefore, any motion to exclude them was futile, and no reasonably competent defense counsel would have attempted their exclusion.

Further, not only were none of these alleged errors objectively ineffective, there is no reasonable probability that anything counsel did would have affected the outcome of the trial. The victim testified that a car followed her on the interstate, and that a stranger later knocked on her door, forced his way in, physically accosted her and demanded that she remove her pants. She was knocked twice to the floor, and received a permanent injury in the form of a scar on her face. Her upstairs neighbor heard loud noises, identified the petitioner's car and further identified the petitioner as the individual he saw leaving the apartment on the day of the crime. Photographs were taken of the room in which the struggle took place. Photographs were taken of the victim's injuries. Testimony was adduced about the petitioner's failure to return to his steady job and his assiduous avoidance of the state of West Virginia when he left his home in Pennsylvania, without warning, to join his girlfriend in Virginia. Further the petitioner testified and admitted following the victim on the interstate and going to her home, merely because she smiled at him. He admitted going into her apartment. He further admitted that there was a physical altercation, started, incredibly enough according to his testimony, for no reason by the victim herself.

Accordingly, performance of Mr. Jones at trial was not ineffective under the two-pronged test.

B. THE COURT DID NOT ERR IN DETERMINING THAT THE OFFENSE OF ATTEMPTED SECOND DEGREE SEXUAL ASSAULT WAS ANCILLARY TO THE OFFENSE OF ABDUCTION WITH INTENT TO DEFILE.

The trial court determined that the offense of attempted second degree sexual assault was ancillary to the offense of abduction with intent to defile and determined that it would violate the principles of double jeopardy to impose sentences on both those counts, even though the jury had convicted the petitioner of both offenses. The court noted that the petitioner completed the offense of abduction with intent to defile. Factually, the court found that while the victim had opened her door in response to a knock, the petitioner had forced his way into her apartment, and he locked the deadbolt after forcing his way in, thereby preventing the victim from escaping. Further, the petitioner, after locking the victim's door produced a roll of duct tape. The clear inference is that the petitioner intended to further restrain the victim by binding her with the tape. (App. at 627-28.)

The court found that the act of abduction was completed when the petitioner held the victim against her will with the intention of sexually assaulting her. (*Id.* at 632.) Therefore, the petitioner actually completed the commission of that offense. His attempt to have forcible sexual intercourse with the victim was overcome by her earnest resistance. Therefore, he did not complete that offense. The principal criminal offense, therefore, was the completed offense. Under the dictates of *State v. Davis*, 180 W. Va. 357, 376 S.E.2d 563 (1988), the court determined that the petitioner could not be punished for both offenses, and determined that the offense which was actually completed was the principal offense, and the offense which was only attempted was the ancillary offense. The holding in *Davis* does not require the dismissal of the abduction with intent to defile charge. Again, the act of abduction with intent to defile was completed by the petitioner. *Davis* does not suggest

that the offense which was actually completed is the incidental or ancillary offense to the one that was merely attempted.

Therefore, the analysis performed by the Court in determining that the completed offense was the principal offense, and the attempted offense was ancillary was correct both factually and legally. The conclusion of the trial court, as affirmed in the habeas hearing was correct.

C. THE TRIAL COURT DID NOT COERCE THE JURY INTO RETURNING A VERDICT.

Prior to any question on voir dire, the trial judge informed the jury that he believed the case would take two days to try. However, he further informed the jury that if the matter was not concluded in two days, that court would not be in session on Friday, as the judge had a prior commitment, and that the trial would go over to the following Monday. He informed the jury that if the possibility that the case might go to Monday caused any individual problems, that person would be excused. (App. at 221.) The record does not reflect that any juror who was selected to serve on the jury indicated that returning on Monday was a problem. The jury deliberated for approximately three hours, and asked a question. The court noted that it was approximately 4:25 p.m., and instructed the jury that it should determine its own schedule. The judge informed the jury, that they could quit and return on Monday, as he had informed the jury at the beginning of voir dire he was not available on Friday. Alternatively, the judge indicated that he would stay as late as the jury wished, and that the decision was “basically a decision you should make.” (*Id.* at 551.) The jury returned verdicts later that day.

The petitioner engages in rampant speculation that the trial judge’s gentle reminder to the jury about his schedule, and his willingness to abide by the jury’s decision as to how late they wished

to stay and deliberate must have coerced a verdict. There is absolutely no evidence in the record to support such speculation. Syllabus Point 1 of *State v. Pannell*, 225 W. Va. 743, 696 S.E.2d 45 (2010), notes that whether instructions coerce a verdict depends upon the facts of each case and is not determined by any hard and fast rule. The fact pattern of *Pannell* indicates that the jury began deliberation at about 1:00 p.m., broke for lunch, and informed the judge at 4:49 p.m. that they were not making progress. The jury inquired as to how long they could deliberate on Friday, and whether they could return on Monday. The judge informed the jury that they could deliberate as long as they wished on Friday, but that returning on Monday was an impossibility as both the judge and one of the jurors were leaving on vacation. The *Pannell* court noted that the fact that the jury deliberated for a number of hours and requested to see items of evidence indicated that it was engaged in the process contemplated by jurisprudence. (*Id.* at 750, 696 S.E.2d at 57.) Similarly, in the case at bar, the jury engaged in deliberations for a number of hours and asked for clarification of the word “intent.” In *Pannell*, there was no indication from the judge that he would not let the jurors leave if they were hopelessly deadlocked. Similarly, there was no indication that the judge in the case at bar was going to force the jury to deliberate until it reached a verdict. A trial judge “has an inherent need to address both time constraints and the potential for scheduling issues. . . . The mere discussion of scheduling issues, . . . does not give rise to a presumption that the verdict was improperly coerced.” (*Id.* at 750, 696 S.E.2d at 52, citations omitted.)

There being no evidence that the judge in any way coerced a verdict, the habeas court was clearly correct in refusing to grant relief on this issue

D. THE TRIAL COURT DID NOT ERR IN FAILING TO DECLARE A MISTRIAL UPON SOME POTENTIAL JURORS ACCIDENTALLY VIEWING A PHOTOGRAPH OF THE VICTIM.

A photograph of the victim, which was later admitted into evidence at trial and published to the jury was briefly shown in the courtroom prior to voir dire. Potential jurors were present in the courtroom at the time. Clearly, showing such photograph constituted error, but such error was harmless beyond a reasonable doubt.

Syllabus Point 6 of *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009), states that “The object of the law is, in all cases in which juries are impaneled to try the issue, to secure [persons] for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused.”

Again, the petitioner engages in rampant speculation that because the photograph was briefly shown before jury selection, the jurors must have been biased against the petitioner. There is absolutely no evidence in the record to indicate that the jurors selected to try the matter were not free from bias for or against the petitioner, and no evidence to show that the photograph in any way would, or did, influence the jury’s decision.

The matter of the photograph was brought to the court’s attention by petitioner’s trial counsel. (App. at 220.) The potential jurors were asked if they had any knowledge of the case whatsoever. Three potential jurors indicated that they had seen or heard news reports about the incident. One juror who indicated that she could not necessarily disregard the news coverage was excused by the judge. (*Id.* at 225-26.) The other two individuals indicated definitively that they would not be affected by what they had read or seen in media coverage. (*Id.* at 227-29.) The jurors were asked if they had any preconceived opinion as to the petitioner’s guilt, and there was a negative response. (*Id.* at 231-32.) The jurors were asked if there was any reason they could not sit on the jury and render a fair and impartial verdict, and the only prospective juror who responded stated that

medication made him drowsy, and was excused. The question about there being any reason why a potential juror could not be fair and impartial was repeated. (*Id.* 232-233.) The standard questions regarding whether the potential jurors knew any of the parties, attorneys, or witnesses were asked. Each potential juror who indicated some knowledge of or relationship to a party, attorney, or witness indicated unequivocally that he would be a fair and impartial juror despite such affinity. (*Id.* at 234-38.)

The potential jurors were asked specifically about the incident with the photograph. Three potential jurors acknowledged seeing the photograph. Each stated that the incident would not influence them in any way, and that it would not affect them in any manner. Further, the Court specifically instructed the potential jurors to disregard the photograph, that it was not evidence, and that it was shown inappropriately. (*Id.* 238-39.) All the jurors agreed that the petitioner was entitled to a fair trial, and again, were asked by the assistant prosecuting attorney whether any potential juror felt that he could not sit on the panel. There was no response from any prospective juror. (*Id.* at 243.) Therefore, it is clear that the jury panel was free from bias against the petitioner, whatever the source, including but not limited to the inadvertent showing of the victim's photograph. As the jury was free from exception, the speculative contention that the jury "must" have been negatively influenced by the photograph (later admitted into evidence) is without merit.

E. THE COURT DID NOT ERR IN DETERMINING THAT PETITIONER'S CONVICTIONS FOR UNLAWFUL ASSAULT AND ATTEMPTED SECOND DEGREE SEXUAL ASSAULT DID NOT CONSTITUTE DOUBLE JEOPARDY.

The petitioner assigns as error by the lower court that the charge of unlawful assault should have been dismissed as conviction and punishment for both unlawful assault and attempted second

degree sexual assault violate the principles of double jeopardy. Assuming that this ground of alleged error can be argued, as the lower court already withheld punishment on the offense of attempted second degree second assault, finding that it was ancillary to the offense of abduction with intent to defile, it is apparent that to present these two offenses to the jury does not violate the principles of double jeopardy. *Blockberger v. United States*, 52 S.Ct. 180, (1932), enunciates the traditional test of double jeopardy which is to determine whether each separate statutory provision requires proof of an additional fact which the other does not. As stated in Syl. Pt. 8 of *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d. 131 (1983), “Where 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.”

The elements of unlawful assault are set forth in W. Va. Code § 61-2-9. In order to commit that offense, an individual must shoot, stab, cut or wound any person or by any means cause him bodily injury with intent to maim, disfigure, disable or kill. Therefore, the offense of unlawful wounding requires proof of a wound. In this case, the victim had a permanent scar on her face as a result of the petitioner’s attack upon her. As to proof of his intent to maim, disfigure, disable or kill, the jury was entitled to infer that the petitioner intended the natural consequences of his act. That is the jury could infer that since the victim was wounded as a result of the petitioner’s unprovoked attack upon her and her heroic efforts to defend herself, the petitioner naturally intended her to be injured. Further, the jury was entitled to infer that the attack was designed to disable her. The offense of attempted degree sexual assault requires that an individual attempt to commit that offense, but not complete the offense. Sexual assault in the second degree is codified in W. Va. Code § 61-8B-4. The elements of that offense are that an individual engages in sexual intercourse

or sexual intrusion with another, without the other's consent, and that the lack of consent results from forcible compulsion. Therefore, to be guilty of attempted degree sexual assault, one must attempt to engage in sexual intercourse or sexual intrusion. W. Va. Code § 61-8B-1 (7) defines sexual intercourse as any act between persons involving penetration of the female sex organ by the male sex organ, or contact between the sex organs and the mouth or anus of another. Subsection (8) of that section defines sexual intrusion as any act involving penetration of the female sex organ, or the anus by an object.

Therefore, unlawful assault contains an element—the wound—not required by attempted second degree sexual assault, and attempted second degree sexual assault contains an element—attempted intercourse or intrusion—not required by unlawful assault. Therefore, submission of both offenses to the jury did not constitute a violation of the principles of double jeopardy and did not constitute error.

V.

CONCLUSION

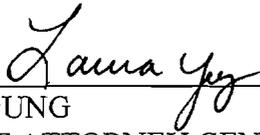
Therefore, based upon the foregoing arguments of law, and recitations of fact, the State of West Virginia, by counsel, respectfully requests that this petition for appeal be denied and that this Honorable Court affirm the order of the Circuit Court of Marion County, entered March 1, 2011, denying the petitioner a writ of habeas corpus.

Respectfully Submitted,

State of West Virginia
Respondent

By Counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



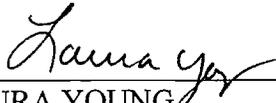
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Counsel for Respondent

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General, do hereby certify that I have served a true copy of the *Respondent's Brief in Opposition to the Petition for Appeal and Note of Argument* upon Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of August, 2011, addressed as follows:

To: Frances C. Whiteman
Whiteman Burdette PLLC
229 Jefferson Street
Fairmont, WV 26554



LAURA YOUNG