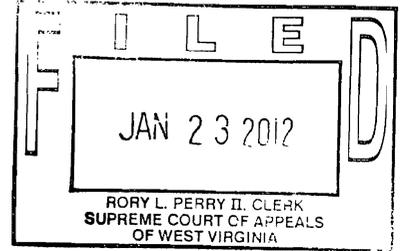

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. ~~11-11456~~

11-1456



THOMAS McBRIDE, WARDEN,

*Respondent Below,
Petitioner,*

v.

STEVE LEE DILWORTH,

*Petitioner Below,
Respondent.*

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

Comes now the State of West Virginia, and files this appeal of the judgment of the Gilmer County Circuit Court in granting habeas corpus relief to Steve Lee Dilworth, Respondent.

I.

ASSIGNMENT OF ERROR

Whether the state habeas court's finding that the indictment in this case violated due process and double jeopardy because it did not include the dates the crimes occurred, was clearly erroneous as a matter of state and federal law.

II.

STATEMENT OF CASE

During the July 2006 term of court, the Grand Jury in Gilmer County, West Virginia, returned an indictment charging Steve Lee Dilworth (hereinafter "Respondent") with ten counts of Sexual Abuse by a Guardian in violation of West Virginia Code § 61-8D-5a. (Appendix

¹Thomas McBride is no longer the Warden at Mount Olive Correctional Complex. Under Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, the proper party is David Ballard, the current warden.

[hereinafter "App.,"] iv.) Each count in the indictment was identically worded and listed the crimes as occurring during the year 2001, with no other distinguishing month or date.

Following a jury trial conducted on January 30 and 31, 2007, Respondent was found guilty of all charges as contained in the indictment. (App. 433.)

By order entered April 17, 2007, the trial court sentenced Respondent to the penitentiary for ten (10) to twenty (20) years on each conviction with the sentences on Counts I and II to run consecutively. The court further suspended the sentences on Counts III through X and imposed five years' probation. (App. 437.)

Respondent appealed his conviction to this Court on August 22, 2007 (the claim the habeas court relied on in granting relief being among the claims raised therein). This Court refused that petition on January 10, 2008.

On November 12, 2008, Respondent, by counsel, filed a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254 claiming several grounds for relief. On September 2, 2009, the Honorable James E. Seibert, Magistrate Judge, entered Proposed Findings and Recommendations concluding that Petitioner was entitled to relief based on the fact that the absence of dates in the indictment amounted to a due process violation. (App. 511.) The Honorable Irene Keeley, District Court Judge, declined to adopt the findings of the magistrate judge because Respondent had failed to exhaust his available state court remedies as required under 28 U.S.C. § 2254(b) before proceeding to federal court. Judge Keeley did not, find, hold, opine or set forth in dicta that Respondent had presented a meritorious claim or that the findings of the magistrate judge were correct as a matter of federal law. Rather Judge Keeley found only that before she could consider or rule on the merits of the claim that formed the basis of the magistrate judge's recommendation, Respondent must first properly exhaust that claim in state court. The District Judge further dismissed all remaining grounds as lacking merit in accordance with the recommendation of the magistrate judge. (App. 512.)

Respondent then returned to Gilmer County Circuit Court and filed a petition for writ of habeas corpus on July 20, 2010. (App. 448.) Respondent set forth the sole remaining claim pending in federal court as grounds for relief; i.e., that the indictment was a violation of due process because it lacked dates specific enough to protect against double jeopardy.

The Gilmer County habeas court concurred with the findings of the federal magistrate and entered an order on September 21, 2011, granting in part and denying in part Respondent's petition. As relief, the court vacated all convictions in the indictment except Count I. (App. 509.)

The State now appeals the order of the Gilmer County habeas court.

III.

SUMMARY OF ARGUMENT

The Petitioner, in this case, will argue that the findings of the state habeas court in granting relief in this case are wrong as a matter of state and federal law.

Specifically, the state habeas court found that because the indictment in this case did not include the date each offense occurred, it was a violation of due process and double jeopardy. In so ruling, the state habeas court relied on an inapplicable, fact specific and obscure federal opinion issued outside this jurisdiction. The state court relied on non-binding, factually distinguishable case was relied upon by the state habeas court over the controlling and applicable authority of this Court..

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent would like to request an oral argument.

V.

ARGUMENT

In 2005, Christine Dilworth, Respondent's wife, summoned police to report the sexual abuse of her daughter, D.H.

D.H., seventeen at the time, told investigators that her stepfather, Steve Lee Dilworth, the Respondent, had sexually abused her from the time she was seven years old until she was

approximately thirteen. D.H. had confided in her boyfriend about the abuse and he, in turn, told D.H.'s mother who called police. Respondent was married to D.H.'s mother at the time she reported the crimes and also during the approximately five-year period during which the crimes occurred.

The sexual abuse in this case consisted of Respondent fondling and licking the child's breasts, buttocks and vagina, rubbing his penis on her buttocks and forcing her to allow him to view her vagina. No penetration, nor oral sexual interaction occurred between Respondent and D.H.

Respondent was taken into custody and *Mirandized*. Respondent admitted to the crimes and corroborated the statements of D.H. In Respondent's statement he offered that he had abused D.H. over a period of many years and with such regularity that he could not cite to specific dates and times, but he estimated that at least ten episodes of abuse had occurred during the year 2001 when he and D.H. had resided in Gilmer County. Both Respondent and D.H. stated that they had resided outside the jurisdiction of Gilmer County at various times during the five years the abuse occurred but they had lived in Gilmer County over the full year of 2001.

The State relied on the admissions of Respondent and the statements of D.H. to form the foundation of the ten-count indictment returned by the grand jury.

The evidence at trial was that Respondent's "cuddling sessions" (as he called them) with the victim occurred so regularly that neither Respondent nor his victim could even estimate the actual number of times.² D.H., a college student at the time, testified as to both charged and uncharged crimes that occurred as many as thirty, forty or fifty times in any given year over the five-year period, and probably at least thirty times in the year 2001.

With regard to the specific instances of abuse that occurred in 2001, D.H. testified in part as follows:

Q. [D.H.] before 12 strangers, these jurors, are you wanting to tell them that your memory is perfect.

A. No.

²App. 245.

- Q. I think I heard you testify that you've been seeing a counselor since the summer?
- A. Yes.
- Q. And that would have been after you gave two statements to the trooper.
- A. That's correct.
- Q. Has your memory ever been perfect?
- A. No.
- Q. So now let me ask you, we have - - one, two, three, four, five, six, seven, eight, nine, ten exact recollections - -
- A. Yes.
- Q. - - where that defendant touched you as your stepfather in your bedroom or somewhere sexually?
- A. Yes.
- Q. And I think you told this jury that in Maryland, your estimate of times that he touched you inappropriately was - - did you estimate?
- A. I said that it just happened so many times.
- Q. Didn't count them exactly, did you?
- A. That's - -
- Q. And in West Virginia, did you count those exactly?
- A. No.
- Q. No. Now, we were given a - - a little table of what grade you were in, hat years, and what age you were, and - - I'm going to make sure that we at least have - - In the year 2001, you're 12 and you turn 13 on July 9 - -
- A. That's correct.
- Q. - 2001, and you're 13, 12 in the 7th and 8th grade.
- A. Yes.
- Q. So between January 1, 2001, and when you're 12 and your last clearly recollected - - (approached chalkboard) - - out of the ten is in November 2001.

Between January 2001 and November 2001, did that defendant (indicated) early in the morning come into your bedroom and touch you sexually?

A. Yes.

Q. More than once?

A. Yes.

Q. At least ten times?

A. Yes.

Q. Can you recollect the exact date? Did you mark them on a calendar?

A. No.

Q. Was it the routine in the household for that defendant, your step dad, to come in and help you get started for school, to get dressed, or to get ready?

A. He would wake me up.

....

Q. In the year 2001, did that defendant wake you up ten times sexually?

A. Yes.

(App. iv-xii.)

Although Respondent did not testify, the confession he gave to investigators was admitted at trial and stated in part:

Q: Where did you touch her?

A: I touch (sic) her ass, and then touch her boobs about five years ago. It started by cuddling, then I touched her boobs, I knew I was wrong.

....

Q: Approximately, how many time (sic) would you say you touch her breast or butt.

A: I do not know.

Q: Where would this take place in the house.

A: Usually her room.

Q: How would it started (sic)?

A: It didn't start out sexually. I wasn't trying to get f—ed, it was loving. I f—ed up years ago. I love them both. I've been trying to take care of them. You can't take back what you did.

....

Q: Can you recall the first incident?

A: No.

Q: Did you know the year?

A: No.

Q: How about the season?

A: No.

Q: Would you say you touched her breast or butt more than ten times.

A: Yes.

Q: How about twenty time (sic)?

A: I don't know. Once is bad enough.

Q: Did the touching happen often?

A: I don't remember.

Q: Over how many years did this occur?

A: Many year (sic). I do not remember individual times, if I could I could count them.

(App. ii-iii.)

At the conclusion of the State's case-in-chief, counsel for Respondent moved the court for a judgment of acquittal claiming that the evidence did not establish that Respondent was D.H.'s guardian within the meaning of the language of the indictment. The court denied the motion and Respondent was convicted of all counts as charged.

1. The Court's Findings Were Wrong as a Matter of Law.

There is only one issue before this Court: Whether the indictment in this case violated due process (when viewed in light of the evidence offered trial) because it did not include the dates on which the crimes occurred in each count charged. The habeas court found that it did.

The court further found that the evidence presented at trial did not establish a time frame for the crimes sufficient to protect Respondent from double jeopardy in that both future charges could be brought and the jury was able to convict on multiple counts but without the factual foundation for each separate incident.

In so finding, the habeas court rejected on-point, state court authority, *State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003) (a fact based analysis holding that the absence of dates in multiple count indictments on child sexual abuse charges did not violate double jeopardy) in favor of an obscure, fact specific *en banc* Sixth Circuit opinion; *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005).

The state court in rejecting *David D.W.*, also cited *Russell v. United States*, 369 U.S. 749 (1982), which lists a three-prong sufficiency of indictment test, listing the third sufficiency requirement as the nexus of its decision to grant relief – the indictment must be sufficient to protect against double jeopardy. The habeas court did distinguish *David D.W.*, but as a similar case in which the West Virginia Supreme Court of Appeals did not directly address the issue of identical charging language in multiple counts of an indictment with regard to due process rights. The habeas court further clarified that even though *Valentine* was not controlling, it was nonetheless persuasive.

Nowhere in the habeas court's order did it explain how a Sixth Circuit federal case decided on not only substantially distinguishable -- indeed polar opposite -- facts from those in this case, would merit relief in spite of controlling state court authority rejecting Respondent's exact same claim.

Petitioner will now discuss the cases cited by the state court within the context of why its findings were wrong as a matter of state and federal law, and should be reversed.

2. *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005).

As previously noted, the habeas court followed the recommendations of the federal magistrate and granted relief in this case based nearly exclusively on the Sixth Circuit federal case, *Valentine v. Konteh*, 395 F.3d at 632.³

In *Valentine*, the victim was approximately eight years old at the time of trial, and she was the only witness who testified to the number of assaults that occurred. Also, the defendant in *Valentine* was convicted of forty counts as charged in the indictment, and was sentenced to consecutive life sentences on each charge. In *Valentine* the defendant implored the court through numerous motions and pre-trial proceedings to provide a bill of particulars with specific dates so that he could advance an alibi defense. No specific dates were ever provided to the defense in *Valentine*.

In granting relief, the court in *Valentine*, applied the precedential case on the sufficiency of indictments, *Russell v. United States*, 369 U.S. 749 (1982), and held that a 40-count carbon-copy indictment was a violation of due process within the context of the affirmative defense of alibi. “As the forty criminal counts were not anchored to forty distinguishable criminal offenses, Valentine had little ability to defend himself.” *Valentine*, 395 F.3d at 633.

The *Valentine* court further held that the generic pattern of abuse, rather than specific instances of the crime testified to by the child victim (who was eight years old at the time of trial, and five when the crimes occurred) was a violation of the constitutional prohibition against double jeopardy. In so finding the court held that the indictment in light of the child’s testimony, allowed the jury to return a conviction of 40 counts based on a description of a typical instance of abuse. Other than the estimates of an eight year old child as to how many instances of abuse occurred when

³The federal magistrate judge’s reliance on *Valentine* has since been held to be error by the Supreme Court of the United State’s decision in *Renico v. Lett*, ___ U.S. ___, ___, 130 S. Ct. 1855, 1866, 176 L. Ed. 2d 678 (2010), where the Court held that it is error for federal circuit courts to rely on any decisions other than Supreme Court precedent when analyzing a state court’s application of “controlling” federal precedent for purposes of granting relief in 28 U.S.C. 2254 cases. This alone is fatal to the findings of the federal magistrate within the context of federal habeas corpus relief for state prisoners.

she was five, there was absolutely no additional evidence presented by the prosecution in *Valentine* to establish the number of crimes that occurred.

In the present case, Respondent's own confession corroborated the testimony of the adult witness and child victim, D.H. In the case *sub judice*, trial counsel made absolutely no effort to raise any issues challenging the indictment on any grounds whatsoever, prior to trial. In fact, the record in this case shows an almost complete absence of substantive pre-trial motions filed by the defense. That was because trial counsel chose to wait until the close of the state's case in chief to challenge the wording of the indictment on insufficiency of the evidence grounds - not for lack of dates.

When the state rested, trial counsel moved for a judgement of acquittal arguing the evidence presented had not established that Respondent was D.H.'s guardian within the meaning of the language set forth in the indictment. Trial counsel argued that because the evidence at trial did not establish a legal guardianship, the State had failed to prove an essential element of the crime. The trial court denied the motion.⁴

The difference between these two cases is glaring yet the state court chose to utterly disregard the fact specific nature of the *Valentine* case and extended its holdings to the factually distinguishable case at bar. The end result, from a legal standpoint, is that the habeas court's reasoning used *Valentine* to extend and vastly expand *Russell* to West Virginia state court indictments. If taken to its logical conclusion, the reasoning of the habeas court creates a constitutional right to dates in multiple count indictments on child sexual abuse charges, and this flies in the face of both state and federal authority.⁵

⁴In Respondent's federal habeas petition, he argued that because Respondent did not meet the legal definition of a "guardian" under West Virginia Code §§ 61-8D-1 and 61-8D-5, he was convicted of crimes not charged by the grand jury or was convicted of the crimes charged without any evidence sufficient to prove an essential element of the crime.

⁵The Supreme Court has concluded that neither the Grand Jury Clause of the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment requires the state to afford the accused the right to grand jury review before trial. *Hurtado v. California*, 110 U.S. 516, 534-35 (1884).

Even *Valentine* warned against such an overweening application of its findings by clarifying that its holdings in this regard were particular to the facts at hand.

This Court and numerous others have found that fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements. See *Isaac v. Grider*, 2000 WL 571959 at *5 (four months); *Madden v. Tate*, 1987 WL 44909, at *1-*3 (6th Cir.1987) (six months); see also *Fawcett v. Bablitch*, 962 F.2d 617, 618-19 (7th Cir.1992) (six months); *Hunter v. New Mexico*, 916 F.2d 595, 600 (10th Cir.1990) (three years); *Parks v. Hargett*, 1999 WL 157431, at *4 (10th Cir.1999) (seventeen months). Certainly, prosecutors should be as specific as possible in delineating the dates and times of abuse offenses, but we must acknowledge the reality of situations where young child victims are involved. The Ohio Court of Appeals found that there was no evidence the state had more specific information regarding the time period of the abuse. *Valentine's* claims regarding the lack of time- and date-specific counts therefore fail.

Valentine v. Konteh, 395 F.3d at 632.

Although the state court ostensibly cites to the due process and double jeopardy requirements in Supreme Court precedent as grounds for relief, it nonetheless cites to the findings in *Valentine* as applicable to the instant case and that is wrong as a matter of law sufficient to merit the reversal of the court's order.

3. *State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003).

In the case of *State v. David D.W.*, the defendant was charged and convicted on a multiple count indictment for numerous charges of child sexual abuse. As in the instant case, the indictment did not include months or dates but was returned, *inter alia*, on incriminating statements made by the accused himself. "In his recorded statement which was presented to the jury, the appellant told the police that 'sometimes it[']s once a month, sometime twice, sometimes we go, sometimes two months and nothing [.]' Also, the appellant indicated that the last offense occurred a week and half before he gave his statement to the police." *Id.* at 176, 588 S.E.2d at 165.

On appeal, the defendant in *David D.W.* claimed that the indictment exposed him to double jeopardy and hindered his ability to mount a defense.

The appellant next argues that the indictment returned by the Jackson County grand jury was insufficient. He contends that the indictment was not plain, concise, or

definite. In addition, he asserts that the number of charges was determined arbitrarily. The appellant says that as a result, he was not able to adequately prepare a defense.

Id. at 172, 588 S.E.2d at 161.

When considering the defendant's argument of insufficiency of the evidence in *David D.W.*, this Court found: "Obviously, the jury found the victim's testimony in this case to be credible. Also, it is likely that the jury found that the appellant's recorded statement corroborated the victim's testimony." . . . While actual dates and times were never established, as we explained above, such evidence is not required." *Id.*

In rejecting the defendant's argument challenging the indictment on double jeopardy grounds, this Court found:

The appellant acknowledges that he was informed of the statutes he allegedly violated, but claims he simply could not defend himself against the sheer number of charges without any particulars. He complains about the lack of specificity concerning when the alleged offenses occurred. He also asserts that it would be impossible for him to plead his convictions as a bar to a later prosecution, since the State could draft a new indictment alleging that the same offenses occurred on one of the days of the month not alleged in the previous indictment. We disagree.

W.Va. Code § 62-2-10 (1923) provides that, "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[.]" Clearly, time is not an element of the offenses with which the appellant was charged. See *State ex rel. State v. Reed*, 204 W.Va. 520, 523, 514 S.E.2d 171, 174 (1999). Thus, there was no requirement that the indictment in this case specify exactly when the alleged offenses occurred. Moreover, this Court has explained that "[a] conviction under an indictment charged, though the proof was at variance regarding immaterial dates, precludes a subsequent indictment on the exact same material facts contained in the original indictment." *Id.*, 204 W.Va. at 524, 514 S.E.2d at 175. Accordingly, we find no merit to this assignment of error.

State v. David D. W., 214 W. Va. at 167, 588 S.E.2d at 173.

As in *David D.W.* Respondent admitted to the crimes and both he and his victim estimated them within a time period. The victim echoed the same facts before the jury at trial. In contrast, the defendant in *Valentine* requested a bill of particulars in order to advance an alibi defense, he denied all charges and there was no evidence to corroborate the victim's testimony.

In spite of the similar, and nearly identical facts present in the instant case and *David D.W.* the habeas court rejected its reasoning and findings and applied *Valentine* instead. This alone merits reversal of the habeas court's order.

Therefore, this Court should reverse the order of the habeas court for rejecting proper state authority in favor of inapplicable non-binding federal authority from another jurisdiction.

4. **Russell v. United States, 369 U.S. 749 (1982).**

Within a federal due process claim and double jeopardy, the controlling case on this issue is *Russell v. United States*. This Court applied *Russell* as follows:

An indictment is bad or insufficient for purposes of analysis under W. Va.Code 58-5-30 when within the four corners of the indictment it: (1) fails to contain the elements of the offense to be charged and sufficiently apprise the defendant of what he or she must be prepared to meet; and (2) fails to contain sufficient accurate information to permit a plea of former acquittal or conviction. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240, 250-51 (1962).

State ex rel. Forbes v. Canady, 197 W. Va. 37, 41, 475 S.E.2d 37, 41 (1996).

The Fourth Circuit applied Supreme Court standards on this issue as follows:

In *Hartman*, we affirmed that “[e]lementary principles of due process require that an accused be informed of the specific charge against him,” 283 F.3d at 194 (citing *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948)), and that “[a] person’s right to reasonable notice of a charge against him ... [is] basic in our system of jurisprudence,” *id.* (quoting *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948)). Reasonable notice “sufficiently apprises the defendant of what he must be prepared to meet.” *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (internal quotation marks omitted) (evaluating indictment). It has long been “fundamental in the law of criminal procedure ... that the accused must be apprised . . . with reasonable certainty . . . of the nature of the accusation against him, to the end that he may prepare his defence.” *United States v. Simmons*, 96 U.S. 360, 362, 24 L.Ed. 819 (1878) (evaluating indictment).

Stroud v. Polk, 466 F.3d 291, 296 (4th Cir. 2006) citing *Hartman v. Lee*, 283 F.3d 190 (4th Cir. 2002). See also *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (“[A] conviction upon a charge not made . . . constitutes a denial of due process.”); *In re Oliver*, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence.”).

To meet the standard under applicable federal authority on this claim as applied by this Court, Respondent must demonstrate how he was not adequately notified of the charges and, as a result, was unable to prepare a defense and, as a further result, the verdict was adversely effected.

Respondent does not make that argument nor indeed could he since he was fully notified of the crimes he was charged with when he admitted committing them to investigators. It's ludicrous to suggest that Respondent was not adequately notified of the charges against him. Respondent further fails to argue just how his defense would have benefitted if he had been provided specific dates in the indictment since he did not claim alibi or any other defense that would have hinged on the dates the crimes occurred. Rather Respondent sought only to exploit the indictment after the conclusion of the State's case as a matter of trial strategy and that is precluded by both state and federal law. *Russell*, 369 U.S. at 763 ("Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused.").

The indictment in the underlying matter is constitutionally sufficient when applying *Russell* and *State v. David D.W.* However, the habeas court in this case instead sought to extend *Valentine* to by applying *Russell* without distinguishing the underlying facts in the two cases.

By extending *Russell* to the instant case via *Valentine*, the habeas court circumvented this Court's reasoning in *David D.W.* and that is sufficient to merit reversal of the habeas court's order in this case.

5. Petitioner Waived this Claim When He Did Not Challenge the Indictment Prior to Trial.

Respondent's trial counsel had many opportunities to challenge the indictment prior to trial but he did not say word one. Instead, trial counsel chose to challenge the indictment on sufficiency of the evidence grounds at the conclusion of the State's case, as a defense strategy. However, there are specific state statutes and rules that preclude exploiting the language of indictments as a matter of trial strategy.

Under state law, when a defendant fails to challenge the indictment prior to the trial, the presumption is that the indictment was valid:

Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. Pt.1, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

Both the above rule and West Virginia's statute of jeofails serve judicial economy, protect justice, and prevent the exploitation of otherwise non-prejudicial flaws in the indictment as a matter of trial strategy or to circumvent justice. "Our statute of jeofails, W. Va. Code, 62-2-11 (1923), cures any technical defect in an indictment when the indictment sufficiently apprises the accused of the charge which he must face."⁶ *State v. Casdorff*, 159 W. Va. 909, 912, 230 S.E.2d 476, 479 (1976). The West Virginia Supreme Court reflected on the statute of jeofails and its similarity in language and purpose to federal rules of procedure and precedent on the issue:

As was aptly noted decades ago, "[o]ne of the laudable reforms of the Federal Rules of Criminal Procedure was to eliminate the necessity for much of the cumbersome claptrap which typically encased the common law indictment." *Honea v. United States*, 344 F.2d 798, 804 (5th Cir.1965), overruled on other grounds, *United States v. Gayle*, 967 F.2d 483 (11th Cir.1992). Our adoption of a variant of these rules has had similar, if less dramatic, effect. Indictments are now considered "from the broad and enlightened standpoint of common sense and right reason rather than from the narrow standpoint of petty preciosity, pettifogging, technicality or hair splitting fault finding." *Parsons v. United States*, 189 F.2d 252, 253 (5th Cir.1951).

State v. Wallace, 205 W. Va. 155, 159, 517 S.E.2d 20, 24-25 (1999).

As a matter of state law, any challenges Respondent raises to the indictment are waived. There is no way Respondent could argue that the indictment "was so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant

⁶62-2-11. Defects cured by verdict.

Judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case.

was convicted[]” as required to show error sufficient to overcome the waiver and merit review as provided for under state law on this issue. *Miller, supra*.

As far as the jury not being able to differentiate the charges because there were no dates, the jury is only required to reach a unanimous verdict on the essential elements of the charge. “Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.” *Scchad v. Arizona*, 501 U.S. 624, 632 (1991) quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (BLACKMUN, J., concurring) (footnotes omitted); *In re Winship*, 397 U.S. 358, 90 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

This Court has rejected similar claims in the past:

Appellant contends his right to a unanimous jury verdict was violated in this case. W.Va. Const., art. III, § 14 [1872]. Specifically, appellant claims there is no way to tell if the jury was unanimous in finding each element of each count charged, beyond reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Jeffries and Stephan, “Defenses, Presumptions, and Burden of Proof in the Criminal Law,” 88 Yale L.J. 1325 (1979).

The charges in the indictment went to the jury in general form. They were not directly linked to the victim’s testimony. Counts I through VII, for example, read identically. The victims were not asked on the stand, for example, “So when he sodomized you in the back seat, after he had raped you twice, that would be Count 3 of the State's indictment?” (showing her the document). The jury had to recall the testimony of numerous violations, and itself connect the account of each assault with one of the numerous charges in the indictment. The defendant seems to argue here that the testimony had to come in the form we described hypothetically above. We find this claim without merit.

State v. Woodall, 182 W. Va. 15, 25, 385 S.E.2d 253, 263 (1989).

This Court applied the correct controlling precedent on this issue under almost the exact same argument and found it to be frivolous.

In addition to the aforementioned, there is also state statute directly on point with regard to date and times in indictments. West Virginia Code § 62-2-10 (1923) provides that, “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[.]”⁷ The statute was cited by this Court in *State v. Miller*, 195 W. Va. 656, 466 S.E.2d 507 (1995):

Because time is not an element of the crime of sexual assault, the alleged variances concerning when the assaults occurred did not alter the substance of the charges against the defendant. In *State v. Chaffin*, 156 W.Va. 264, 268, 192 S.E.2d 728, 731 (1972) (affirming a robbery conviction in which there was a variance concerning the time of the commission of the crime), we found “[t]ime is not of the essence of the crime of armed robbery. The date does not even have to be stated in the indictment.... Proof as to time is not material where no statute of limitation is involved. (Citation omitted.)” See also *U.S. v. Kimberlin*, 18 F.3d 1156, 1158-59 (4th Cir.), cert. denied, sub nom., *Cockrell v. U.S.*, 511 U.S. 1093, 114 S.Ct. 1857, 128 L.Ed.2d 480 (1994) (quoting *U.S. v. Morris*, 700 F.2d 427, 429 (1st Cir.), cert. denied, sub nom., *Graham v. U.S.*, 461 U.S. 947, 103 S.Ct. 2128, 77 L.Ed.2d 1306 (1983) (“Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.”); *Ronnie R. v. Trent*, 194 W.Va. 364, 371, 460 S.E.2d 499, 506 (1995) (per curiam); *State v. Hensler*, 187 W.Va. 81, 84 n.1, 415 S.E.2d 885, 888 n.1 (1992); W.Va. Code 62-2-10 (1923) (“No indictment or other accusation shall be quashed or deemed invalid for omitting ... the time at which the offense was committed, when time is not of the essence of the offense ...”).”

Because time is not an essential element of the charged offenses, the alleged variances did not substantially alter the offenses charged, the defense was not prejudiced by any alleged variances, and the defendant was not exposed to the danger of being put in jeopardy to the same offenses, we find that the defendant's second assignment of error is without merit. We find that the circuit court did not err in denying the defense's motion to elect and to dismiss.

Miller, 195 W. Va. at 663, 466 S.E.2d at 514.

Indeed, as previously noted, even *Valentine* ultimately held that in general, multiple count indictments in child sexual abuse cases pass constitutional muster. *Valentine*, 395 F.3d at 632.

Whether it be waiver, forfeiture or invited error, Respondent should have been estopped from prevailing on a claim he intentionally failed to raise at the proper time in hopes that he could capitalize from it later.

⁷State statutes and rules on indictments may be like legal apples and oranges in the context of a constitutional challenge on due process grounds but such statutes, nonetheless contemplate attempts by defendants to use indictments as means to escape justice given that there is actually no constitutional right to indictments for state prisoner in the first place. *Hurtado v. California*, 110 U.S. at 534-35.

Because Respondent attempted to exploit the wording of the indictment as a matter of trial strategy, any challenge to the indictment should be precluded from forming grounds for relief and the habeas court's order should be reversed as improvidently granted.

VI.

CONCLUSION

Aside from the fact that the habeas court applied a factually distinguishable federal case over controlling state court authority to grant relief in this case, were the court's decision allowed to stand, it could potentially open a floodgate of inmate litigation for every inmate convicted on similar multiple count indictments.

Under the Latin rule of law: *qui tacet consentire videtur* (one who is silent is seen to have given consent) the imprimatur of this Court's refusal to disturb the findings of the habeas court would further encourage not only challenges from inmates imprisoned on such indictments, but perhaps hinder future prosecutions of the sexual abuse of small children. Following the habeas court's reasoning to its logical conclusion, *Russell* can be extended to any carbon copy indictment via *Valentine* which would essentially invalidate every case in West Virginia where a multiple count indictment in child sexual abuse cases was handed down without specific dates

Moreover, the reality of Respondent's situation is that there is absolutely no possibility of the State bringing further charges and if it did, that would be the time to assert double jeopardy, so the habeas court's overabundance of caution in this regard is premature at best. As far as Respondent being falsely convicted of ten crimes based on the evidence of one crime, that too is ludicrous since he confessed to at "least" ten episodes of abuse if not more - just in the year 2001. Likewise, it's difficult to see a due process violation or a deprivation of a constitutional right where a defendant fully admitted to being a chronic long term child sexual predator and was convicted following a fair trial.

This decision is wrong as a matter of law; it will expose the courts to a flood of prison litigation; and it's miscarriage of justice to vacate Respondent's convictions on a supposed flaw in the indictment given Respondent's admissions and the evidence presented at trial.

Therefore, Respondent prays that this Court reverse the findings of the habeas court.

Respectfully submitted,

THOMAS McBRIDE, WARDEN,
Respondent Below, Petitioner,

By counsel

A handwritten signature in black ink, appearing to read "Gerald B. Hough", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I, GERALD B. HOUGH, Gilmer County Prosecuting Attorney, do hereby certify that I have served a true copy of the foregoing *Brief of Petitioner* upon counsel for Respondent by depositing it with United Parcel Service, overnight service prepaid, on this the 20th day of January, 2012, addressed to him as follows:

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