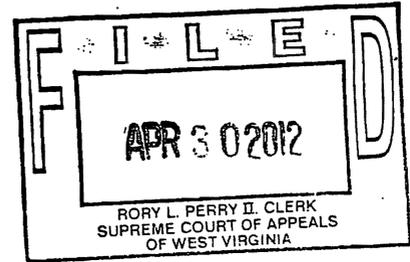


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1504



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

JACK JONES,

*Defendant Below,
Petitioner.*

BRIEF OF THE STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1504

STATE OF WEST VIRGINIA,

Plaintiff Below,
Respondent,

v.

JACK JONES,

Defendant Below,
Petitioner.

BRIEF OF THE STATE OF WEST VIRGINIA

I.

ASSIGNMENTS OF ERROR

The Assignments of Error are set forth in the Petitioner's Brief and will not be restated here.

II.

STATEMENT OF THE CASE

The Petitioner was tried before a jury on six First Degree Sexual Assault counts App. vol. I at 447-50, seven Custodian Sexual Abuse counts, *id.* at 450-54, and one count of Conspiracy. *Id.* at 454. The jury found the Petitioner guilty on all counts. *Id.* at 447. The facts are as follows.¹

¹"The facts are summarized in the traditional post-conviction fashion, taking the evidence in light most favorable to the government." *United States v. v. Gonzalez-Torres*, 980 F.2d 788, (continued...)

R.M. was born December 27, 1998. App. vol. II at 637.² R.M. and her siblings were placed in the foster care of Sally Keefer in August 2006. *Id.* at 219. A month after the children moved into the Keefer house, Sally saw R.M. “french kissing” R.M.’s 18 month-old brother. *Id.* at 222. Ms. Keefer also observed R.M. engaging in seductive or sexually suggestive behaviors Ms. Keefer thought abnormal for a seven year old. *Id.* at 220.³ On November 22, 2006, R.M. told Ms. Keefer, “Sally, Jack did touch my privates.” *Id.* at 235. Upon Ms. Keefer inquiring further, R.M. told her the Petitioner put his penis into her “coochie” and “bottom,” (which Ms. Keefer took to mean vagina and her “butt,” *id.* at 236), that R.M. fellatiated the Petitioner, *id.* at 237-38, that the Petitioner performed cunnilingus on R.M., *id.* at 238, that the Petitioner had a “stick” that made noise and that “may have had spikes on it” that the Petitioner put in R.M.’s bottom. *Id.* The first time this occurred R.M.’s biological mother, Jessica Jane M., held her down. *Id.*⁴ R.M. also reported these sexual abuse allegations to Child Protective Services worker Michelle Hogan, who handled R.M.’s case. *Id.* at 355-56. R.M. spontaneously, told Ms. Hogan that R.M. would have to perform oral sex on both the Petitioner and Jessica Jane M., that the two forced her into

1(...continued)

789 (1st Cir. 1992). *See also United States v. Levy*, 335 Fed. Appx. 324, 325 (4th Cir. 2009) (“Viewing the evidence in the light most favorable to the Government, *see Glasser v. United States*, 315 U.S. 60, 80 [] (1942), the facts can be summarized as follows[.]”).

2The victim is identified herein by her initials. Rev. R.A.P. 40(e)(1).

3Ms. Keefer testified R.M. would want to wear tank tops and shorts that “had to be showing her rear-end” even if it was cold.. App. vol. II at 221. R.M. would try to “isolate” Ms. Keefer’s brother-in-law from his wife when the couple visited the Keefer home and that R.M. “had no boundaries with older men whatsoever.” *Id.*

4R.M.’s biological mother was convicted of sexual misconduct against R.M. in a separate trial, *State v. Jessica Jane M.*, 226 W. Va. 242, 246 n.3, 700 S.E.2d 302, 306 n.3 (2010) (per curiam), which conviction this Court has affirmed. *Id.* at 256, 700 S.E.2d at 316.

watching the couple having sex, and then was forced by the couple into sexual encounters with them. *Id.* at 357, 359.

Medical Social Worker Maureen Runyon, *id.* at 513, a Charleston's Women's and Children's Hospital's Child Advocacy Center employee, *id.* at 511, interviewed R.M. *Id.* at 514. While R.M. denied the sexual abuse allegations during this interview, *id.* at 523, 524, 505, Ms. Runyon concluded that based on the "totality . . . of all the circumstances[,]" Dr. Phillips' physical examination of R.M. and Ms. Keefer's information related to her that R.M. had been sexually abused. *Id.* at 632, 634.

R.M. saw a psychologist, Sara Wyre approximately twenty times beginning in the fall of 2006 and continuing through 2007. *Id.* at 274. Wyre testified that R.M. told her that R.M. saw "mommy and Jack in bed together, naked on top of each other like Jack would get on top of me[;]" how R.M. had to put her hand and mouth on the Petitioner's member, about the Petitioner putting his member into her, how she would kick and scream while her mother held her down, coupled with sensory and environmental details, *id.* at 277-78, which Ms. Wyre found significant because "people remember events if there's a strong emotion attached to it or a sensory detail[.]" *Id.* at 307.

The State called Licensed Professional Clinical Counselor Connie Roy, a therapist at Pomegranate Health Systems (PHS), a residential treatment facility where R.M. received therapy. *Id.* at 416, 419, 424. Ms. Roy acted as R.M.'s primary therapist while R.M. was at PHS. *Id.* at 424. A PHS physician diagnosed R.M. with "post-traumatic stress disorder, and sexual abuse of a child focused on victim." *Id.* 423. R.M. talked to Ms. Roy during therapy about how R.M. was abused. *Id.* at 427.

R.M. testified the Petitioner put his penis into her vagina, *id.* at 662, that he made R.M. “[k]iss his private, lick it” and put his “private into” R.M.’s mouth. *Id.* at 663. She testified the Petitioner put a “stick in [her] back private[,]” *id.*, that he put his fingers into her vagina, *id.* at 666, and that she thought “there was a time whenever he made me touch his private with [her] hands.” *Id.* at 667. Petitioner was convicted of six First Degree Sexual Assault counts App. vol. I at 447-50, seven Custodian Sexual Abuse counts, *id.* at 450-54, and one count of Conspiracy. *Id.* at 454. The Petitioner timely appealed to this Court.

III.

SUMMARY OF ARGUMENT

1. The Petitioner claims he was denied his rights to present a defense or to confront witnesses because the circuit court misread and misapplied precedent from this Court and the Fourth Circuit Federal Court of Appeals. This is not correct. Merely because the Petitioner showed two instances (and the record shows at best only two instances) of false allegations, false allegations are not, as assumed by the Petition, automatically admissible, they must otherwise survive all the otherwise applicable rules of evidence—which the allegations in this case did not do.

2. The Petitioner’s claim that the State failed in its duty to disclose exculpatory evidence in failing to turn over the name of the author of a Child Protective Services report. Because the claim here is that prejudice inured to him because he could not use the report to show falsity, and this is no longer an issue, there is no prejudice—an essential attribute of reversible error. Q.E.D., there is no reversible error.

3. The Petitioner cannot prevail on his claim that a curative instruction was insufficient to dissipate any prejudice from a State’s witness expressing an opinion as to the

Petitioner's guilt. Curative instructions are presumptively effective, and the one given here was particularly strong, advising the jury that the opinion "was completely inappropriate and is not a proper opinion" that "[n]o witness is permitted to express a belief or an opinion that a defendant committed any charged offense" that "guilt or innocence is solely a matter to be decided upon by the jury" that "[t]he jury is instructed that the Court has stricken the matter from the record and the jury may draw no inference from that testimony and may not consider that testimony in any way in arriving at a conclusion of guilt or innocence" and that "[a]s a matter of law that testimony does not exist.

4. The Petitioner complains about the State's closing argument. Failure to object to closing fore closes appeal of the issue unless plain error applies. However, the Petitioner admits in his brief that his counsel chose not to object. The Petitioner's counsel made a knowing decision (a tactical or strategic decision in the parlance of the realm) not to object. This decision not to object is, therefore, a true waiver, and a true waiver forecloses plain error for a waiver means there is no error *vel non*.

5. The Petitioner raises under the heading "Conclusion" a claim of cumulative error. Cumulative error requires more than a single harmless error. Here, as there is no error, the cumulative error doctrine does not apply.

IV.

STATEMENT REGARDING ORAL ARGUMENT

The law and facts in this case are set forth in the Petitioner's brief. Oral argument will add nothing to the decisional process. This case is suitable for memorandum decision.

V.

ARGUMENT

A. The Petitioner was denied no constitutional right to mount a defense.

The Petitioner contends the circuit court denied him his due process rights at trial by interpreting West Virginia's Rape Shield Statute unconstitutionally in his case.

The Petitioner filed a "Barbe Notice and/or Quinn notice." App. vol. I at 402. In Syl. Pt. 1 of *State v. Quinn*, 200 W. Va. 432, 490 S.E.2d 34 (1997), this Court explained that a victim's allegations that others, other than the defendant, abused her is not admissible under the Rape Shield law "unless the defendant establishes to the satisfaction of the trial judge outside of the presence of the jury that there is a strong probability that the alleged victim's other statements are false." This requirement of "strong and substantial proof of the actual falsity of an alleged victim's other statements is necessary to reasonably minimize the possibility that evidence which is within the scope of our rape shield law . . . is not erroneously considered outside of its scope." *Id.* at 438, 490 S.E.2d at 40. A defendant seeking cross-examination of the alleged victim must notice the state of his or her intention and must in camera "initially present evidence regarding the statements . . . which presentation may in the court's discretion be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim and effectuates the purpose of our rape shield law[.]" *Id.*, 490 S.E.2d at 40.

In this Notice, the Petitioner indicated he was going to offer the following at trial:⁵

⁵The Petitioner's Brief reasserts these grounds and allegedly supporting documentation. Pet'r's Br. at 22-24. The citation to the Appendix, in his brief though, simply refers back to the notice and does not provide pinpoint citations to the Appendix where these allegations and (continued...)

1. The child, R.M., falsely reported that she was subjected to inappropriate sexual contact by Calip Morris, III and Calip Morris IV. The child has admitted to a mental health professional that the reports were false claiming that she made the reports because she was confused by her mother. [D.H.H.R. Assessment dated 3/23/03 at p. 2]. An investigation was conducted by the Ohio County Sheriff's office and by the D.H.H.R. and found these reports to be unsubstantiated.

- A. February 26, 2006 report by Kristin Showalter at p. 000024
- B. Voluntary Report dated March 5, 2003 at pp. 1-2.
- C. OCSO Incident Report p. 1
- D. Lt. Cuchta's 3/6/03 Report⁶

2. The child, R.M., falsely reported that she was subjected to inappropriate sexual contact by both Sally Keefer and her husband, Patrick Keefer, or that she dreamed of inappropriate sexual contact with Sally Keefer and her husband, Patrick Keefer. The child has admitted to a mental health professional that the reports were false. An investigation by D.H.H.R. found the reports to be unsubstantiated. There are numerous reports by Jessica M[.] of dream sexual assaults including early reports by R.M. that the sexual assaults by Jack Jones were dreams. Moreover, the child has reported to Jessica M[.] that she dreamed that she was sexually assaulted by Lt. Cuchta during his interview of the child. [Taped interview of Jack Jones by Lt. Cuchta, interviews of Jessica M[.], Melody M[.], and Melanie M[.].]⁷

5(...continued)

supporting documents can be found. *See id.* The purpose of the Appendix is to provide for precise citation to the record. Rev. R.A.P. 7, Clerk's comment; *see also* Rev. R.A.P. 10(4), (7). Neither counsel nor judges are ""like pigs, hunting for truffles buried in . . . the record."" *United States v. Laureys*, 653 F.3d 27, 32 (D.C. Cir. 2011) (quoting *Potter v. District of Columbia*, 558 F.3d 542, 553 (D.C. Cir.2009) (Williams, J., concurring) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)). While the undersigned counsel and his legal assistant has gone through and tried to locate the specific points in the Appendix for the documents the Petitioner cites (included as footnotes to the above); counsel does not provide guarantees for this effort.

⁶The Showalter report is at App. vol. I at 19; the DHHR Assessment is located at App. vol. I at 66; the March 5, 2003 Voluntary Statement (not Report) taken from Jessica Jane M. is at App. vol. I. at 45-48; Lieutenant Cuchta's 3/6/03 report in at App. vol. I at 62.

⁷Lieutenant Cuchta's interview with Jack Jones is at App. vol. I at 62. At App. vol. I, 222, there is a report from PHS that R.M. was starting to "confuse her history with her present family." According to App. vol. I at 66, Jessica Jane M. stated that "[R.M.] then said she [apparently R.M.] had a dream" and then Jessica Jane M. Stated she, "talked to her about dreams." *Id.* There are not any transcripts of any interviews by anyone of Jessica M[.], Melody M[.], or Melanie M[.].

A. The Child and Adolescent Needs and Strengths and Comprehensive Multisystem Assessment dated 2/28/07 contains the following language:

“This placement was disrupted when [R.M.] began to fantasize that her foster parents were going to have sexual intercourse in front of her and then involved her in the act. [R.M.] also began to have sexual dreams where her foster mother was having sex with numerous men.” (P.3)

B. “Clear evidence of antisocial behavior including but not limited to lying, stealing, manipulating others, sexual aggression, violence towards people, property or animals.” [P.11]

C. “[R.M.] has fantasized that her former foster parents were going to sexually abuse her. She most recently was having dreams that her foster mother was having sex with other men (like she witnessed her mother doing) and was going to also include [R.M.] in the act.” [P. 18]

D. “Since [R.M.] has been in placement at Pomegrante, she disclosed that while living in the home of her biological mother, she sexually assaulted an infant, male cousin by inserting a coat hanger in his penis. This happened in her bedroom. When she couldn’t get the hanger out, the baby began crying and she yanked it out, put his diaper back on, and went downstairs.” [P.18]⁸

3. The Section II, Designated Individual Case Reviewer report dated 8/7/2007 contains the following language:

A. “[R.M.] has fantasizes that her former foster parents were going to sexually abuse her. She most recently was having dreams that her foster mother was having sex with other men (like she witnessed her mother doing) and was going to also include [R.M.] in the act.” [P.13]

B. The child reports sexually oriented nightmares at the Keefer residence on pp 18-19.

C. “According to information obtained through this reviewer’s interview with Sally Keefer, [R.M.] had been having some bizarre dreams, thoughts, and behaviors about two weeks prior to her removal from the Keefer home. [R.M.]’s bizarre behaviors allegedly started when Mr. and Mrs. Keefer were sitting next to each other on the couch in the living room with [R.M.] also being in the room with them. [R.M.] reportedly began to get very nervous and anxious that the Keefers were going to have sex and make her watch/participate. Around the same time, [R.M.] began to report having

⁸Page 3 of the Assessment is at App. vol. I, 282, page 11 is at App. vol. I, 290, page 18 is at App. vol. I, 297.

dreams that involved Sally Keefer having sex with numerous men. [R.M.] went to school one day and told school personnel that she had seen Mr. Keefer in his underwear. The school called Sally regard to this. Sally adamantly denied that this could have happened as her husband is a long-distance truck driver and is only home on weekends. She was positive [R.M.] had never seen him dressed inappropriately.” (p.21).⁹

4. The child [R.M.], has reported that her cousin, Sasha, inserted a hair brush into her vagina. The report is memorialized in the medical records of Dr. Romano for 7/18/01 with a report of “no obvious evidence of genital trauma.” Further details of the report provided by Jessica M[.], Melody M[.] and Melanie M[.]; report mentioned in D.H.H.R. Assessment dated 3/23/03 at p. 2.¹⁰

5. The child R.M., has falsely reported that she was sexually abused by John Graham. R.M. has admitted that the report was false. [D.H.H.R. report of September 14, 2009 at pages 1 & 5].¹¹

6. The child, R.M., has falsely reported that she was sexually abused by various men on at least three occasions. [D.H.H.R. report of Sept 14, 2009 at page 3 &5].¹² . . .

⁹Page 13 of the Case Reviewer Report is at App. vol. I, 262, pages 18-19 are *Id.* at 267-68, and page 21 is *Id.* at 270.

¹⁰Dr. Romano’s notes are at App. vol. I at 9, although the note does not refer to a hairbrush and the note says that [R.M.] reported that she was “touched in private area by 4 year old and its hurts when she urinates.” *Id.* The note continues “Mother states Sasha touched her, 4 year old aunt.” *Id.* The DHHR Assessment is at App. vol. I, 65, but no hair brush incident is located on that page.

¹¹The DHHR Report is at App. vol. I, 65. While the Petitioner’s Brief. states that it recites “[v]erbatim” the evidence in the *Quinn/Barbe* notice, in the following language in his brief is not included in the notice, “An initial recorded interview at Harmony House resulted in [R.M.] stating that the report was false. In a later unrecorded interview by Linda Reeves, the child reportedly claimed that the report was true. John Graham and an eyewitness both deny that the report was true. In an agreed upon in camera interview by the Court, R.M. stated that the report was true while the eyewitness denied the truth of the report.” *Compare* Pet’r’s Br. at 23 *with* App. vol. I at 405.

¹²The DHHR September 14 Report is at App. vol. I, 376, 378.

7. The child, R.M., has falsely reported that she was sexually abused by Patrick Keefer, a grandfather and a principal. [D.H.H.R. report of Sept 14, 2009 at page 4].¹³

8. The child has reported that she saw her former foster sibling “Wesley” naked. The child later denied that she saw Wesley naked or that she made that report. [February 9, 2009 report of Solutions Outpatient Services].¹⁴

9. [R.M.] has reported that she saw David Birch naked. [Sally Keefer’s notes on page 1.] [R.M.] has also reported that David Birch had intercourse her her. [Sally Keefer’s notes for Nov. 22, 2006; Pomegrante Report p. 9/33]. The report that William LNU and David Birch had sex with Remiss [sic] touched upon in the interview by Linda Reeves. [R.M.] denied that David Birch did anything to her except spanking her in that interview. [Hogan interview at pp. 10&12.].¹⁵

10. R.M. has reported that she has had sex with her cousin Cole Vogelien and was caught in the act. [Pomegrante Report p. 27/33].¹⁶

Pet’r’s Br. 22-24.

Apparently, a hearing was held on the Petitioner’s *Quinn/Barbe* notice on December 3, 2009. *See* App. vol. I at 429. The Appendix does not contain a copy of the transcript of this hearing. According to the circuit court’s order on the *Quinn/Barbe* motion, the court did not accept the proffer of evidence and required the Petitioner to present live witnesses. *Id.* The court granted a roughly five minute recess of the hearing so that the Petitioner could secure witnesses, which the Petitioner was unable to do, *id.*, even though the circuit court would have allowed the witnesses to testify via telephone. *Id.* n.5.

¹³The DHHR Report of September 14 is located at App. vol. I, 377.

¹⁴The Outpatient Services Report is at App. vol. I, 185.

¹⁵The Keefer notes are at App. vol. I, 118, 152. The PHS report is at App. vol. I, 225. The Hogan interview is at App. vol. I, 179, 181.

¹⁶The PHS report is at App. vol. I, 243.

In order to get false allegation testimony into evidence (to take such allegations outside the Rape Shield law) a petitioner must make a showing by strong and substantial proof that the allegations are actually false. Admittedly, the circuit court did initially rule that the Petitioner could present evidence that the Petitioner admitted in the September 2009 report that she falsely accused John Graham of sexual misconduct towards R.M. App. vol. I at 430. When, however, the Court was presented with information that R.M. recanted this recantation, the circuit court held an in camera hearing with R.M. and another child in the Graham house at the time. R.M. testified that the abuse occurred, App. vol. II at 594, but the other child denied it. *Id.* at 605. The circuit court found that there was not a strong or substantial showing of actual falsity inasmuch as the evidence appeared to be in equipoise. *Id.* at 620-21.

The Petitioner lodges three primary instances of false allegations that R.M. allegedly made: (1) the claim that R.M. originally accused two other men of molesting her rather than the Petitioner, when she told Jessica Jane M. of the abuse; (2) that R.M. told Ms. Keefer that David Burch¹⁷ abused her, but than R.M. told Michelle Hogan that he did not; and, (3) that R.M. admitted to lying when she accused a John Graham of touching her.

First, the claim that R.M. accused other men (specifically Calip III and Calip IV) must be addressed in context. R.M. apparently stated that her mother (who had also been abusing R.M. and was a conspirator with the Petitioner in sexually abusing R.M.) was confusing her. App. vol. I at 66. The issue with Calip III and Calip IV and the Petitioner was not that no abuse occurred (that is, R.M. was lying about everything), but who actually committed the abuse. Falsity in a *Quinn* situation implies intentionally and knowingly

¹⁷Burch is sometimes referred to as Birch.

stating a fact that the victim knows is not true, that is, the utterant knows she is lying, not that the victim is confused about what happened, *cf. United States v. Joseph*, 156 Fed. Appx. 180, 184 (11th Cir. 2005) (“The district court observed that it was not clear Sampsel ‘intentionally made a false statement or whether he was mistaken.’”), especially due to extraneous influences by interested parties such as a defendant or co-defendant. *See Commonwealth v. Haynes*, 696 N.E.2d 555, 560-61 (Mass. App. Ct. 1998). In a situation where the victim is being confused due to manipulation the value of the false accusations is fairly nil, *id.*, and if nil is of no value to the trier of fact—it is irrelevant, and there is no right to cross-examine on irrelevancies. *State v. Guthrie*, 194 W. Va. 657, 682 n.35, 461 S.E.2d 163, 188 n.35 (1995) (“no party has a right on cross-examination to offer irrelevant and incompetent evidence.”). The circuit court did not err.

Second, as to David Burch, in Michelle Hogan’s interview with R.M., R.M. stated that David Burch never did anything to her “private parts” but would smack her “butt.” App. vol. I at 181. Sally Keefer, though, asked R.M. if anyone other than the Petitioner ever touched her “privates.” *Id.* at 152. In response, Ms. Keefer reported that R.M. said, “Yes, David Birch did, but Jack did it a lot more.” *Id.*¹⁸ The State concedes for this appeal that

¹⁸In footnote 14 of *Jessica Jane M.* 226 W. Va. at 253, 700 S.E.2d at 313, this Court wrote:

R.M. did discuss David Burch and William (no last name given), men her mother had previously dated. R.M. told her CPS worker that David Burch and William would “whoop my butt.” When asked if these men did anything else to her, she replied no, “they would smack my butt though.” [R.M.]’s foster mother asked her if anyone else ever touched her “privates,” and she replied “Yes, David Burch did.” R.M. does not elaborate on this answer and it is unclear from this exchange whether R.M. meant that Burch had done anything more than spanking her buttocks. R.M. told her psychologist, Sara Wyer, that Burch and William were boyfriends of her mother, but did not report that she had been sexually abused by either of them.

(continued...)

this is strong and substantial proof of actual falsity.¹⁹ *Quinn*, 200 W. Va. at 439-40, 490 S.E.2d at 41-42 (citing *United States v. Stamper*, 766 F. Supp. 1396, 1401 (W.D.N.C.1991)), *aff'd* 959 F.2d 231 (4th Cir.1992)) (alleged victim's admission of falsity of her prior statements were "substantial proof" of the falsity); *id.* at 445, 490 S.E.2d at 47 (Workman, C.J., concurring)(citing *Covington v. State*, 703 P.2d 436, 442 (Alaska Ct. App.1985) (defendant must out of the presence of the jury demonstrate falsity by showing either the disproof of the charges or the witness' admission of falsity)).²⁰ But, simply because the evidence is outside the Rape Shield law does not make it automatically admissible.²¹

A determination of the probable falsity of other statements of being the victim of sexual misconduct made by an alleged victim of a sexual offense is not a determination of the admissibility of evidence regarding the statements, nor is it a determination that cross-examination on the other statements must

18(...continued)

It is not clear if footnote 14 was relying in the Keefer notes at App. vol. I, 152, but it appears it might have. See Appellant's Br. at 23, *State v. Jessica Jane M.*, 226 W. Va.242, 700S.E.2d 302 (2010) (per curiam) (available at <http://www.courtsww.gov/supreme-court/calendar/2010/briefs/sept10/35441Appellant.pdf>).

¹⁹Since the State concedes this is a false allegation, *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008) would not apply since *Barbe* dealt with allegedly true allegations. *Id.* at 455.

²⁰It is important to emphasize that this case does not present a situation where there are contradictions in particular details of a prior alleged act of sexual misconduct—this would not be evidence of falsity. See *Commonwealth v. Costa*, 872 N.E.2d 750, 757 (Mass. App. Ct. 2007) ("The detective assigned to investigate the victim's allegation against the bus driver concluded merely that the victim's statements were 'inconsistent.' This conclusion, and the detective's decision not to file charges, does not establish that the accusation was false.").

²¹While not a ground raised or relied on below, "[t]he correctness of its final action is the only material consideration, not the stated reasons for taking such action[.]" *State ex rel. Dandy v. Thompson*, 148 W. Va. 263, 274, 134 S.E.2d 730, 737 (1964), so "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965). This rule has been applied in a "myriad of contexts," *State v. Payne*, 225 W. Va. 602, 611, 694 S.E.2d 935, 944 (2010), including criminal cases. See *State v. Boggess*, 204 W. Va. 267, 276, 512 S.E.2d 189, 198 (1998) (per curiam).

be permitted. A falsity determination means only that evidence regarding the other statements is not to be considered as evidence of an alleged victim's "sexual conduct" within the meaning of our rape shield law[.] The evidence remains subject to all other applicable evidentiary requirements and considerations.

Id. at 438, 490 S.E.2d at 40.

"There is a distinction between general attacks on credibility . . . and specific explorations of biases and motivations of a witness." *Bushard v. Yukins*, 87 Fed. Appx. 505, 508 (6th Cir. 2004). A general credibility attack "intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). A specific credibility attack is a "more particular attack on the witness' credibility . . . effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* *Quinn* questioning relates to general credibility. *Quinn v. Haynes*, 234 F.3d 387 at 840-41 (4th Circuit 2000) ("Quinn sought to impeach the minor victim's general credibility by attacking the victim's allegations of sexual abuse by others through cross-examination of the victim as to each alleged specific act and by presenting the testimony of each alleged perpetrator denying his alleged conduct"); *id.* at 841 ("Quinn's proffered line of questioning required the introduction of extrinsic evidence as part of his impeachment of T.M.'s general credibility."):

The distinction between impeachment evidence proving bias and impeachment of general credibility is important because generally applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, but no such limit applies to credibility attacks based upon motive or bias."

Quinn, 234 F.3d at 845 (citations omitted).²²

[R]ecent decisions limiting the effect of the Confrontation Clause call into question whether prior false rape allegations are constitutionally required to be admitted. If they are used to demonstrate the bias or prejudice of the witness, then they would most likely be admissible under *Davis*. If false rape allegations are used to attack the general credibility of a witness, then the state interest in prohibiting the proof of prior false rape accusations by extrinsic evidence may trump the defendant's right to confront the witness. Although the distinction between proving bias or prejudice and proving general credibility is often unclear, such distinctions make the difference in determining whether the evidence of false rape allegations is admitted.

Christopher Bopst, Comment, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 4 J. Legis. 125, 141 (1998) (footnotes omitted).

The evidence here related to David Burch is a general credibility attack, that is, R.M. lied before and, therefore the jury can conclude she is lying now. The Burch allegations are not geared (nor has the Petitioner asserted) to showing a specific credibility attack attendant to the Burch allegations. There is no allegation that R.M. was seeking to gain anything or benefit by accusing the Petitioner of sexual misconduct nor any particular dislike for the Petitioner or adoration for the state, that is, the Petitioner has shown no motive for R.M. to lie.

²² “[T]he United States Supreme Court has not decided a case in which the Confrontation Clause has overridden a states rule barring evidence introduced for the sole purpose of attacking general credibility.” *State v. Guenther*, 854 A.2d 308, 320 (N.J. 2004). Several courts have reached a similar conclusion, that “the Confrontation Clause does not encompass the right to impeach the general credibility of a witness.” *People v. Joplin*, No. 279069, 2008 WL 5273511, at *2 (Mich. Ct. App. Dec. 18, 2008). Thus, “[s]everal federal courts of appeals have concluded that there is no constitutional error in prohibiting cross-examination of a witness regarding an alleged false accusation against someone other than the defendant.” *Pantoja v. State*, 59 So.3d 1092, 1099 (Fla. 2011). See also *State v. Raines*, 118 S.W.3d 205, 213 (Mo. Ct. App. 2003) (noting that the United States Supreme Court “never held that there is a right to cross-examine witnesses to prove that they have lied in the past and thus have a propensity to lie.”).

A general character attack's probative value is low. Specific credibility attacks relate to the here and now, but general credibility attacks look to the past and require the jury to build a chain of inferences, i.e., lying then means lying now. As general credibility evidence is not case specific, it generally has low probative worth. Janeen Kerper & Bruce E. MacDonald, *Federal Rule of Evidence 608(b): A Proposed Revision*, 22 Akron L. Rev. 283, 290–91 (1989). See also *Redmond v. Kingston*, 240 F.3d 590, 593 (7th Cir. 2001) (citations omitted) (“The use of evidence that a person has lied in the past to show that she is lying now is questionable, quite apart from rape-shield laws, since very few people, other than the occasional saint, go through life without ever lying, unless they are under oath.”); Hon. Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus*, 7 Yale J.L. & Feminism 243, 264 (1995) (footnote omitted) (“attempts to prove prior false accusations of rape will generally be seen to be proffers of evidence of character for untruthfulness, which is an attack on general credibility. Such evidence is of low probative value . . .”). Further, “[t]he probative value of such evidence when used for such a purpose is small and may be outweighed by the prejudicial effect of revealing that the witness had made such a serious charge falsely.” *Redmond*, 240 F.3d at 593 (citations omitted). See also Kerper & MacDonald, *Federal Rule of Evidence 608(b)*, 22 Akron L. Rev. at 291 (“When the weak probative value of such evidence is weighed in light of the concomitant dangers of distracting or confusing the trier of fact as well as causing the undue consumption of judicial time, it becomes clearer why Congress and the courts have chosen to limit [character evidence].”). Indeed, it should be kept in mind in this regard that “even the fabled ‘boy who cried wolf’ did, eventually, see an actual wolf.” *Pham v. United States*, 317 F.3d 178, 187 n.2 (2d Cir. 2003) (Sotomayor, J.). Given the weak probative

value of the proposed cross-examination and the substantial risk of prejudice to the State, cross-examination on the Burch issue was properly (albeit for the wrong reason) prohibited. *United States v. Bartlett*, 856 F.2d 1071, 1089 (8th Cir. 1988) (“we find that the evidence of the alleged prior false accusation of rape was offered solely to attack the general credibility of Janis. In addition, we agree with the district court that its probity in that regard is very weak. Accordingly, we hold that the district court properly refused to admit the evidence.”); *Wheeler v. State*, 79 S.W.3d 78, 88 (Tex. App. 2002) (emphasis in original) (“in the instant case, the trial court could have reasonably concluded that the general attack on S.E.’s credibility, without more, was unfairly prejudicial, and outweighed any probative value.”).

The Petitioner lastly raises the issue of John Graham. On or about September 14, 2009, CPS prepared a report, within which was reported that R.M. had accused John Graham of touching her while she was sleeping over at the Graham household. App. vol. I at 374, 380. According to the report, R.M. “Has admitted to falsely accusing Mr. Graham of sexual abuse. She indicated that she made this claim because she missed her foster mother and wanted to go home.” *Id.* at 374, 378. Even if untrue, this is not fodder for cross-examination.

For all the reasons cited in reference to Burch, the evidence relating to Mr. Graham is inadmissible. And there are additional reasons to exclude the Graham matter.

In determining admissibility of prior false allegations, the Court must first examine if the prior false allegations against third-parties are similar to those charged against the defendant. “To be considered probative, there must be evidence that the prior accusations were similar to the accusations in the instant case[.]” *Lempar v. State*, 191 S.W.3d 230, 239

(Tex. App.2005). See also *State v. Boiter*, 396 S.E.2d 364, 365 (S.C.1990) (“the trial court shall consider the factual similarity between prior and present allegations to determine relevancy”); *People v. Kataja*, No. 282953, 2009 WL 3837181, at * 5 (Mich. Ct. App. Nov. 17, 2009) (“defendant may cross-examine the victim about a prior false accusation of a similar nature”); *Kelley v. State*, 566 N.E.2d 591, 593 (Ind. Ct. App. 1991) (“Evidence of false allegations of similar sexual misconduct is admissible on the subject of the victim’s credibility so long as the allegations are demonstrably false.”). R.M.’s allegations here between the Petitioner and David Burch are not similar.

Here, R.M. testified that the Petitioner “touched” her “private.” App. vol. II at 660. This is consistent with what R.M. apparently told Sally Kefer that David Burch did to R.M. App. vol. I at 152. However, R.M. also testified at trial that the Petitioner not only touched her privates (apparently referring to digital penetration, App. vol. II at 666), but also “licked” and “kissed” her “private,” *id.* at 660, would put “his private” into her’s, *id.* at 660-61, (apparently referring to vaginal intercourse, *id.* at 662), would make R.M. “kiss” and “lick” his “private,” *id.* at 663, and would make R.M. manipulate his member. *Id.* at 667. The Petitioner also showed a pornographic movie to R.M. *Id.* at 665. Vaginal intercourse, fellatio, cunnilingus, female to male penile manipulation, and watching pornographic movies is very different conduct from simple digital penetration. *State v. Brum*, 923 A.2d 1068, 1074 (N.H.2007) (“Even if we assume, without deciding, that this is a proper use of extrinsic evidence under Rule 608 and that the defendant demonstrated by clear and convincing evidence that the 2005 allegations were demonstrably false, we hold that the trial court did not err by precluding extrinsic evidence of this statement because the allegations contained therein are not sufficiently similar to those against the defendant.”).

Moreover, in determining whether a false allegation is otherwise admissible, a court looks at the proximity in time of the prior allegation to the charged allegation for which the defendant is on trial. *Boiter*, 396 S.E.2d at 365; *Guenther*, 854 A.2d at 324. The Report details that the alleged abuse occurred “[w]ithin the past couple of weeks[.]” App. vol. I at 374. By that time, R.M. had been away from the Petitioner for approximately three years. App. vol. II at 218. A gap of two or three years is too long to justify cross-examination. *State v. R.E.B.*, 2010 WL 1657203, at *5 (N.J. Super. Ct. App. Div. Apr. 26, 2010) (“This two-to-three-year time differential is not in close proximity to her accusation against defendant.”); *State v. Hilkevich*, 2008 WL 932166, at *4 (N.J. Super. Ct. App. Div. Apr. 8, 2008) (“the first time M.F. reported that defendant had sexually assaulted him was in August 1997, which was more than two years after he accused the teacher of physically assaulting him. Consequently, the alleged prior false accusation against the teacher was not reasonably proximate to M.F.’s accusation against defendant”).

Finally, the exclusion of Burch and Graham did not deny the Petitioner a defense and the ability to attack R.M.’s credibility. Ms. Runyon testified on direct and cross-examination that R.M. denied to her the Jack Jones abuse occurred. App. vol. II at 523, 524. Through Ms. Hogan, the Petitioner was able to get before the jury on cross-examination that other care providers found that R.M. “has a problem with telling the truth[.]” *id.* at 396; *see also id.* at 397, and that R.M. “continues to have problems with telling the truth.” *Id.* at 398; *see also id.* at 399. At trial, the Petitioner called Melanie M., (Jessica Jane M.’s sister, App. vol. II at 690) who was asked, “There has been some evidence that [R.M.] disclosed some inappropriate sexual contact between her and [the Petitioner] to you. Did that ever happen?” App. vol. II at 696, to which Ms. Morris answered, “[R.M.] never disclosed any

sexual activity to me. Never.” *Id.* Similarly, Melody M., was called by the Petitioner and was asked, “Now, there’s been some evidence in this case to date so far that [R.M.] disclosed to you that [the Petitioner] had had some sort of inappropriate sexual contact with her. Did that ever happen?” *id.* at 700, to which she answered, “Absolutely not.” *Id.* Melody went so far as to agree that had such a statement been made, she most likely would have killed the Petitioner. *Id.* Furthermore, the Petitioner presented expert testimony from W. Joseph Wyatt, a Doctor of Philosophy in Psychology, *id.* at 702, who testified that based upon the number of interviews that R.M. went through, “the bottom line is it makes it very difficult for that child to be able to now give valid and reliable testimony.” *Id.* at 729. Additionally, Dr. Wyatt testified that R.M. sometimes denied having had sexual contact with the Petitioner, *id.* at 751, and testified about inconsistencies in interviews that R.M. gave. *Id.* at 797-804; 813. And the Petitioner was able to get Ms. Wyre, a State witness, to concede that “[of] everything I’ve read, the younger the child, particularly preschool age and younger, the more suggestible they are.” *Id.* at 303.

Finally, the remainder of the claims are not error and cannot, perforce, entitle the Petitioner to relief.

First, the circuit court observed the Petitioner conceded at the December 3 hearing that the allegations on paragraphs 6 and 7 of the notice were inadmissible. App. vol. I at 424.²³ The issue is not before the Court. “When there has been a knowing and intentional

²³The Appendix does not contain a December 3 hearing transcript. A circuit court “speaks through its orders[.]” *State v. White*, 188 W. Va. 534, 536 n.2, 425 S.E.2d 210, 212 n.2 (1992), though, and it is presumed “written orders accurately reflect what transpired during the court’s proceedings.” *Petrosinelli v. PETA*, 643 S.E.2d 151, 156 (Va. 2007). *See also People v. Ewing*, 18 Cal. Rptr. 9, 12 (Ct. App. 1961) (“Nothing appears in the record which contradicts the minutes. Under these circumstances, it will be presumed that they correctly relate the proceedings.”).

relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” Syl. Pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). See also *O’Connor v. City and County of Denver*, 894 F.2d 1210, 1214 (10th Cir. 1990) (“we will not consider claims abandoned in the district court.”). See also *Hudson v. Shaw Environmental & Infrastructure, Inc.*, 267 Fed. Appx. 892, 893 n.1 (11th Cir. 2008) (“Because Hudson abandoned this claim in the district court, we will not address this issue.”).

Second, while the Petitioner claims that R.M. falsely accused the Keefers of sexual misconduct toward her, App. vol. I at 404, this is not accurate. R.M. apparently never accused the Keefers of sexual misconduct; rather, she “confuse[d] her history with her present family, having dreams that this family would be doing similar acts to her as her family of origin and her mother’s significant other.” *Id.* at 222. Moreover, the claims made by the Petitioner that there were “early reports by R.M. that the sexual assaults by Jack Jones were dreams.” *Id.* at 404. The early reports *id.* at 62, 65 were apparently made by the Petitioner and the Petitioner’s Codefendant, which raise serious questions as to their veracity. See *Jessica Jane M.*, 226 W. Va. at 253 n.14, 700 S.E.2d at 302 n.14. Further, as to dreams reported in the medical and psychological records, none of these medical or psychological reports indicate that R.M. is prone to delusions. Sexual fantasies are not accusations and cannot, therefore, be false accusations. Further fantasies are not probative of truthfulness and are not, therefore, relevant. *United Stats v. Rubin*, 733 F.2d 837, 841 (11th Cir. 1984). And, in any case, as the circuit court found, evidence of the dreams would not be relevant. App. vol. I at 435-36. The circuit court properly concluded that the Petitioner’s argument (that the dreams would show alternate symptomology, *id.* at 403),

puts the proverbial cart before the horse. The dreams are not causes of symptomology—they are a consequence of it. If anything, the dreams actually might have helped the State in its case.

Third, as to the claim that R.M. saw Mr. Keefer in his underwear, simple denial testimony does not satisfy *Quinn*. Here, at best, Ms. Keefer apparently simply denied that R.M. was telling the truth. And apparently, Ms. Keefer based this denial on the fact that (assertedly) this could not have happened as her husband is a long-distance truck driver and is only home on weekends and was positive R.M. had never seen him dressed inappropriately. Why Ms. Keefer thinks R.M. could not have seen Mr. Keefer in underwear on a week-end is not explained. And, there is in fact no evidence that Mr. Keefer ever denied it. Similarly, to the extent that the Petitioner claims that R.M. reported seeing “Wesley” naked, App. vol. I at 185, the Petitioner does not accurately reflect the document upon which he relies. In the Solutions Outpatient letter, *id.* at 185, Barbara Swartz wrote that “It had been reported to me that [R.M.] had made the accusation of seeing her former foster parent ‘Wesley’ naked. When I asked her about this, she responded, ‘I didn’t say that.’ ‘I never saw Wesley naked; Arianna said she saw Wesley naked, and he was hot, she should be moved.’” The letter uses the passive voice so it is left unsaid who made the report to Ms. Swartz. In light of the fact that Ms. Swartz acknowledged that R.M. denied the report, and in light of the fact that the identity of the accusing party is left out, it cannot be said that the Petitioner has made a strong and substantial showing of actual falsity as required by *Quinn*. The same goes for David Burch. And in any event, none of this evidence is relevant. Seeing someone nude, adult or child, does not prove that any particular sexual knowledge was gained thereby. “The fact that [R.M.] may have viewed the naked bodies of

other children or, indeed, adults in [her] home is not sufficient to presume that [s]he gained any more knowledge about sexual activity than he could have observed from bathing himself. We are not prepared to equate mere 'nakedness' as 'sexual experience.'" *People v. Warren*, 515 N.E.2d 467, 471 (Ill. Ct. App. 1987).

Fourth, to the extent that R.M. claims to have had "sex" with Cole and being caught by her mother, or that she had some sexual conduct with her infant male cousin, there is no assertion that these events did not in fact happen. These events fall do not fall under *Quinn*. Assuming they occurred, they do fall within the Rape Shield law which makes the acts presumptively inadmissible. See, e.g., *People v. Salazar*, 272 P.3d 1067 ¶ 19 (Colo. 2012) ("Under the rape shield statute, evidence of the prior or subsequent sexual conduct of a witness is presumptively irrelevant and therefore inadmissible."); *Socks-Brunot v. Hirschvogel Inc.*, 184 F.R.D. 113, 119 (S.D. Ohio 1999) ("evidence subject to Rule 412 [the Federal Rape Shield Rule] is presumptively inadmissible"). The Petitioner "has the burden . . . of establishing his entitlement to any exception to the prohibition[.]" *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010). He has failed to carry this burden

In Syl. Pt. 6 of *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999), this Court held:

The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion.

Here, the basis for claiming that R.M. and Cole had sex was the PHS Report. App. vol. I at 243. The claimed sex with Cole is not relevant if offered to show precocious sexuality because the “sex” is a consequence of such sexuality, not a cause of it. And, the Petitioner was able to place before the jury alternate theories of any precocious sexual knowledge including R.M. seeing the Petitioner and Jessica Jane M. having intercourse, App. vol. II at 297, and R.M. viewing pornographic movies. *Id.* at 307.

Additionally, if offered to explain away R.M.’s damaged hymen, the PHS report is not sufficient to overcome the Rape Shield bar. The PHS report places the word sex in quotations marks, i.e., “sex.” App. vol. I at 243. Thus, the report is ambiguous if there was any penetration of the vagina,²⁴ much less sufficient penetration that would have caused the deformities in the hymen. Consequently, the events are either not relevant or their probative value is outweighed by the State’s compelling interest in protecting R.M. (a 12 year at the time of trial) from harassment and embarrassment. *See, e.g., Clardy v. McKune*, 89 Fed. Appx. 665, 674 (10th Cir. 2004) (“the interests of the state in protecting child victims of sexual assault from surprise, harassment, and unnecessary invasions of privacy in cross-examination become stronger as the victim is younger.”).

Fifth, the Petitioner cites to the claim that Sasha penetrated R.M. with a hairbrush. Again, assuming this is true, it falls squarely within the Rape Shield law and a review of its relevancy shows that it should not be admissible. In Dr. Romano’s report, App. vol. I at 9,

²⁴ “[S]ex’ and ‘making love’ could mean conduct other than sexual intercourse[.]” *State v. Lewis*, No. 27332-6-III, 2011 WL 383878, at *6 (Wash. Ct. App. Jan. 25, 2011), “sex’ could mean ‘oral sex’ in this context[.]” *Carolina v. State*, 302, 623 S.E.2d 151, 155 (Ga. Ct. App. 2005). *See State v. Turnpaugh*, 741 N.W.2d 488, 490 (Wis. Ct. App. 2007) (“Standing alone, Turnpaugh’s comment that he was ‘looking for sex’ is ambiguous; it could mean . . . that he was looking to have ‘sexual intercourse’ with Ferguson. It could also mean that he was seeking sexual gratification by other means—such as watching her masturbate.”).

there is no medical diagnosis that R.M.'s hymen was damaged. This contemporaneous medical diagnosis demonstrates that any hairbrush episode would not be relevant to showing previous hymen damage. Further, R.M. testified as to a number of other degrading and debauched sexual acts—including male orgasm, male to female and female to male oral sex, and female to male fondling. This kind of testimony could not be learned from penetration by an inanimate object such as a hairbrush. Thus, the evidence is not relevant, or, if relevant, is not admissible as its probative value is substantially outweighed by its prejudicial effect and the compelling interest the State has in protecting R.M.

Sixth, and finally, the CANS survey recited that R.M. exhibited clear antisocial behavior including lying and manipulation, *id.* 290, this simply shows that R.M. has lied. It does not state that she lied about having sex or not having sex. Moreover, the Petitioner attacked R.M.'s credibility before the jury.

There was no error regarding any prior false allegations or prior or subsequent sexual conduct. The conviction should be affirmed.

B. The disclosure obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny extends only to the Prosecution and the prosecution team, and the CPS here was not part of the prosecution team. Alternatively, when the defendant is in no better a position than the Prosecution to seek out and find the exculpatory or impeachment evidence, such as here, there is no violation of the *Brady* obligation.

Child Protective Services apparently generated a report on September 14, 2009, App. vol. I 373-80, and faxed to the Petitioner's counsel on September 15, 2009, stating that R.M. "admitted to falsely accusing Mr. Graham of sexual abuse." *Id.* at 378. The report is unsigned. *Id.* at 380. The Petitioner apparently sought the name of the report's author with a "Jane Doe" subpoena to the CPS. App. vol. II at 584. The Prosecution attempted

to locate the author's name and location. *Id.* at 574, 576. The name was disclosed on December 15, during trial, as Laura (Lori) Glover, *id.* at 582, who was apparently available to testify on December 16, by telephone. *Id.* at 614-15.

The Petitioner claims error because the State had the duty to disclose the name of the report's author for the *Quinn* and *Barbe* argument. Because this issue does not rise or fall with this issue, it is moot. In any event, for the *Brady* obligation to attach, (the *Brady* obligation in an imputed sense,) the non-prosecutorial agency must be functioning as "part of the prosecution[.]" *State v. Hall*, 174 W. Va. 787, 791, 329 S.E.2d 860, 863 (1985), or the "prosecution team." *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) ("As a legal matter, the Supreme Court precedent on this issue is clear. When any member of the prosecution team has information in his possession that is favorable to the defense, that information is imputable to the prosecutor."), and specifically as part of the prosecution in the prosecution at issue. *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) ("the prosecution is only obligated to disclose information known to others acting on the government's behalf in a particular case"). Indeed, extending the disclosure obligation beyond the prosecution is based on the fact that "the prosecutor has the means to discharge the government's *Brady* responsibility if he will[.]" *Kyles v. Whitley*, 514 U.S. 419 at 438 (1995). "*Brady*, then, applies only to information possessed by the prosecutor or anyone over whom he has authority." *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989).

This Court has recognized that there is no privity between the DHHR and a Prosecuting Attorney. *State v. Miller*, 194 W. Va. 3, 13, 459 S.E.2d 114, 124 (1995). Indeed, there is no evidence that the September 14, 2009 report was generated at the direction of

or for the Prosecuting Attorney in this case, *Pelullo*, 399 F.3d at 218 (“There is no indication that the prosecution and PWBA engaged in a joint investigation or otherwise shared labor and resources.”),²⁵ there is no “indication that the prosecution had any sort of control over the [CPS who prepared the report],” *id.*, and the “civil investigators who possessed the document[] at issue played no role in this criminal case.” *Id.*²⁶ And the report here had nothing to do with investigating or prosecuting the Petitioner. And, in fact, the Report itself states that it was not conducted jointly with law enforcement. App. vol. I at 379. And while due process may require a Prosecutor to search the Prosecutor’s own unrelated files, it does not require the Prosecutor “to search related files maintained by different offices or branches of the government.” *Pelullo*, 399 F.3d at 218. Since the report here “is not part of the investigation underlying the charges against [the Petitioner], and [CPS] did not gather this information as an agent of the prosecutors, it is outside of the scope of *Brady*[.]” *United States v. Weiss*, No. 05-CR-175-B, 2006 WL 1752373, at * 7 (D. Colo. June 21, 2006). See also *State v. Lavallee*, 765 A.2d 671, 673 (N.H. 2000); *Commonwealth v. Davies*, 421 A.2d 278, 280 (Pa. Super. Ct. 1980); *Commonwealth v. Delp*, 672 N.E.2d 114, 119 (Mass. App. Ct. 1996); *People v. Reddick*, 843 N.Y.S.2d 201, 202 (App. Div. 2007) (“the victim’s social services records were not within the custody or control of the People and thus

²⁵The report is to the contrary as it checked that it was not a joint law enforcement effort. App. vol. I at 379.

²⁶CPS employee Debra Runyon did testify at trial. But simply being a prosecution witness does not make that witness part of the prosecution team. See, e.g., *Davis v. State*, No. 03-99-00615-CR, 2000 WL 632588, at * 4 (Tex. Ct. App. May 18, 2000); *United States v. Anderson*, No. 03-3009-JWL, 2004 WL 624966, at *5 n.3 (D. Kan. Mar. 25, 2004). The mere fact that an employee of an agency is part of the team does not mean that the entire agency is part of the prosecution team. *United States v. Locascio*, 6 F.3d 924, 949-50 (2d Cir. 1993); *United States v. Battle*, 264 F. Supp.2d 1088, 1202 (N.D. Ga. 2003).

do not constitute . . . *Brady* material.”). Beyond that though, the Prosecution was under no duty to scour CPS’s files or to determine the report’s author, for that was something the Petitioner could do—and which again removes this case from *Brady*.²⁷

C. The circuit court’s curative instruction obviated the need for a mistrial. when a state’s witness briefly testified in a non-responsive answer to a State’s question that she believed the Petitioner sexually assaulted R.M.

The Petitioner claims that the conviction should be reversed because State’s witness Maureen Runyon testified before the jury she believed the Petitioner sexually abused R.M. Pet’r’s Br. at 34-35.

²⁷Assuming that the identity of the author was exculpatory, this still does not put it in the ambit of *Brady*. In *United States v. Bagley*, 473 U.S. 667, 675 (1985), the Supreme Court explained that *Brady* did not “displace the adversary system as the primary means by which truth is uncovered.” “The duty to disclose favorable evidence . . . does not require the government to make available all evidence in its possession or within its reach. . . . There is no *Brady* violation if the evidence is available to the defense from other sources[.]” *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011) (citations omitted). “*Brady* does not impose an affirmative obligation on the prosecution to seek out information for the defense, even if such information is more easily accessible to the prosecution than to the defense.” *Hines v. State*, 290 S.E.2d 911, 912 (Ga. 1982). “*Brady* does not require the government to gather information on a defendant’s behalf . . . the government need only disclose favorable, material evidence already within its knowledge or control.” *United States v. Thibodeaux* 19 Fed. Appx. 409, 410 (7th Cir. 2001) (citation omitted). Once the Prosecution disclosed the report, it was up to the Petitioner to take whatever further steps he felt necessary. See *State v. Noe*, 160 W. Va. 10, 17, 230 S.E.2d 826, 831 (1976), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 697, 461 S.E.2d 163 (1995) (“One of these assignments presents the contention that the prosecutor had withheld from defense counsel the strips of moulding taken from the door frame. It appears that the existence and availability of these strips of moulding were clearly revealed in an investigative report which had been disclosed to defense counsel. Thus, defense counsel had full opportunity to consider their significance, if any, and their use, if any, at trial.”). And if DHHR was unresponsive or could not locate the investigator, the Petitioner could have sought to interview Valerie Ousler a witness whose statement was in the report, App. vol. I at 375, or could have sought to talk to John and Susan Graham, who were also apparently interviewed by the report’s author. App. vol. I at 376, 377. See, e.g., *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (“where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.”).

During the State's redirect examination of Maureen Runyon, a social worker in the Child Advocacy Center at Women's and Children's Hospital in Charleston, West Virginia, App. vol. II at 511, who interviewed R.M., *id.* at 514, the following testimony occurred:

Q. [The Petitioner] was giving [R.M.] a lot of loving; wasn't he?

A. It appears so, yes.

Q. Did that, in your mind, the fact that he would buy her candy and do these nice things to her, did you bring--come to any conclusion about whether or not she was being perpetrated on?

A. One of the things I always say is that we have to look at children and allegations in totality, and when I do that now and I--then, yes, I am of the opinion that [R.M.] was sexually abused by [the Petitioner].

Id. at 551-52.

Petitioner's counsel objected to the answer, *id.* at 552, (which the Petitioner's counsel recognized was non-responsive to the question, *id.* at 556),²⁸ and after consulting with his client, *id.* at 552, requested a mistrial. *Id.* at 553. Apparently, the motion for a mistrial was denied because before commencing trial the next day, the circuit court read a curative instruction the Petitioner's counsel drafted, *id.* at 625, which stated:

Before we pick up with Ms. Runyon's testimony, ladies and gentlemen of the jury, let me provide you with this instruction of law: The Court instructs the jury that the testimony of Maureen Runyon in which she

²⁸Specifically the transcript reflects the following exchange:

THE COURT: Do you agree that the answer was nonresponsive to the question?

MR. HERNDON: The second half.

THE COURT: The part--the basis for the mistrial motion?

MR. HERNDON: Yes.

App. vol. II at 556.

expressed an opinion that [the Petitioner] sexually abused [R.M.] was completely inappropriate and is not a proper opinion within the area of her expertise. No witness is permitted to express a belief or an opinion that a defendant committed any charged offense. The determination of guilt or innocence is solely a matter to be decided upon by the jury. The jury is instructed that the Court has stricken the matter from the record and the jury may draw no inference from that testimony and may not consider that testimony in any way in arriving at a conclusion of guilt or innocence. As a matter of law that testimony does not exist.

Id. at 629. Further, in the jury charge at the end of the case, the jury was instructed, “You should disregard, entirely, questions and exhibits to which an objection was sustained or answers and exhibits ordered stricken out of the evidence[,]” and that “You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony.” *Id.* at 938-39.

Because the trial court in ruling on a mistrial motion must “evaluate[] the demeanor of the witness, the content of the stricken testimony, its likely impact, and the probable effect of cautionary instructions swiftly and firmly administered” and because these “are necessarily matters of degree calling for the trial court’s judgment during the often rapidly unfolding events of a trial[,]” *United States v. Burroughs*, 935 F.2d 292, 295 (D.C. Cir. 1991),²⁹ “[w]e review the circuit court’s decision to grant or deny a motion for mistrial is

²⁹The Petitioner’s brief states that “[w]hile the record articulates the actual statement, it should be noted that the testimony at issue came after a pause in Ms. Runyon’s delivery and appeared to be calculated and considered.” Pet’r’s Br. at 15 n.9. The Petitioner cites no law allowing counsel on appeal to characterize the conduct or demeanor of a witness testifying at trial that is not actually reflected in the transcript. An appellate court is limited to a “cold record[.]” *State ex rel. Moran v. Ziegler*, 161 W. Va. 609, 612, 244 S.E.2d 550, 552 (1978). A petitioner cannot warm the record up by his own statements unsupported by reference to the record. “[T]his Court will deal only with evidence taken below and brought to this Court for purposes of review[.]” *State v. Snider*, 196 W. Va. 513, 519, 474 S.E.2d 180, 186 (1996) (per curiam) (citing *Maxwell v. Maxwell*, 67 W. Va. 119, 67 S.E. 379 (1910)). “Statements made by lawyers do not constitute evidence in a case.” *West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000).

reviewed under an abuse of discretion standard[.]” *State v. Thornton*, 228 W. Va. 449, ____, 720 S.E.2d 572, 582 (2011) (per curiam), an abuse of discretion standard being a “highly deferential mode[] of review[.]” *Tennant v. Marion Health Care Found. Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995). See also *United States v. Lauderdale*, 571 F.3d 657, 660 -61 (7th Cir. 2009) (citations omitted) (“We use such a highly deferential standard of review because, ‘the trial judge is in the best position to determine the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial.’”). The Petitioner has the burden to justify a mistrial. “To prevail, the appellant must show that the circuit court abused its discretion by failing to grant the requested mistrial.” *Thornton*, 228 W. Va. at ____, 720 S.E.2d at 585. “[A]n appellate tribunal ought not to interfere with the disposition of such a motion unless the complaining party can demonstrate a manifest abuse of that discretion.” *United States v. Pierro*, 32 F.3d 611, 617 (1st Cir. 1994), *overruled on other grounds by United States v. Booker*, 543 U.S. 220 (2005). “Bearing in mind the trial judge’s superior point of vantage, this precept possesses particular force when, as now, a motion for mistrial is based on a claim that some spontaneous development at trial may have influenced the jury in an improper manner.” *Id.*

It is well settled that “an expert may not give an opinion as to whether he personally believes the child [alleged to have been sexually abused], nor an opinion as to whether the sexual assault was committed by the defendant[.]” Syl. Pt. 7, in part, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). But it is equally well settled that “[o]rdinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not

constitute reversible error[,]” Syl. Pt. 18, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966), and “[i]n general, where there is no Government misconduct and a curative instruction is given, a mistrial is not warranted.” *United States v. Tyson*, No. 06-4125, 2012 WL 287731, at * 3 (4th Cir. Feb. 1, 2012) (per curiam). It is also well established law that “in all cases, juries are presumed to follow the court’s instructions[,]” *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009); see also *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions”), including curative instructions. *Reed v. Wimmer*, 195 W. Va. 199, 208, 465 S.E.2d 199, 208 (1995) (“there is a presumption that curative instructions are effective”); *United States v. Ince*, 21 F.3d 576, 584 (4th Cir.1994) (quoting *United States v. Francisco*, 35 F.3d 116, 119 (4th Cir. 1994)) (“[W]e recognize the presumption of cure by a court’s instruction.”). The fact that the jury convicted is not proof that the jury disregarded the curative instruction. See *Hinkle v. Clarksburg*, 81 F.3d 416, 427 (4th Cir. 1996). Indeed, in a case analogous to this one this Court found no error in refusing a mistrial.

In *State v. Mahood*, 227 W. Va. 258, 708 S.E.2d 322 (2010) (per curiam), the jury heard inadmissible evidence that the defendant was having a sexual relationship with the defendant. This Court refused to find prejudice as “[t]he sexual relationship was only mentioned one time. Defense counsel immediately objected after this comment was made, the trial judge sustained the objection and gave the jury a thorough curative instruction to disregard this testimony.” *Id.* at 264, 708 S.E.2d at 328. Indeed, the instruction given here was as strong as, if not stronger than, the one in *Mahood*:

“Ladies and gentlemen of the jury, the testimony of this witness with respect to the nature and extent of her relationship with the defendant, Steven L. Mahood, that you just heard is not admissible as evidence, and you

are to disregard it entirely, give it no mind, and you are directed to—to completely ignore what in connection with your determination of whether the evidence that is presented in this trial is sufficient to prove guilt beyond a reasonable doubt.

Do you understand what I'm saying? It is not admissible, it is not relevant, and therefore the jury is to disregard it.”

Id. at 263, 708 S.E.2d at 327 (emphasis deleted). And other courts have found in circumstances even more similar to the one at bar curative instructions ameliorated any prejudice.³⁰

For example, in *State v. Degre*, 629 A.2d 818, 819 (N.H. 1993), a police officer impermissibly offered her opinion when she stated that she did not “get the feeling” the victim was lying. The New Hampshire Supreme Court held that this did not warrant a mistrial “because the trial court’s curative instructions sufficiently diminished the impact of any prejudice that might have resulted from the introduction of these statements.” *Id.*

Similarly, in *People v. Dill*, 904 P.2d 1367, 1372 (Colo. Ct. App.1995), a physician testified that it was his “impression” that the victim’s story was “believable.” *Id.* Defense counsel promptly objected to his answer and the trial court sustained her objection. *Id.* Further, immediately thereafter, the trial court ordered that that portion of the doctor’s answer be stricken from the record and instructed the jury to disregard it. *Id.* The court went on, “[a]bsent a showing to the contrary, we must presume that the jury followed the trial court’s instruction. Therefore, we conclude that the remedy provided by the trial court was an adequate alternative and that a new trial is not warranted.” *Id.* (citation omitted).

³⁰It is the fact that a curative instruction was given in this case that separates it from *State v. Martin*, 224 W. Va. 577, 687 S.E.2d 360 (2009) (per curiam), wherein the circuit court overruled the defendant’s objection to such vouching testimony. *Id.* at 582, 687 S.E.2d at 365 (“the circuit court erred in allowing the Appellee to engage in this line of questioning regarding credibility.”).

In *Commonwealth v. Carter*, 403 N.E.2d 1191 (Mass. Ct. App. 1980), *aff'd on other grounds*, 417 N.E.2d 438 (Mass. 1981), a physician testified, "It was my impression that [the victim] was telling me the truth." *Id.* at 1192. The trial court denied the motion to strike the answer, which the appellate court concluded was error. *Id.* After reconvening from lunch, the trial judge recognized the error, and clearly and forcefully instructed the jury to disregard testimony and told the jurors, *inter alia*, "(t)he doctor's opinion in that respect means absolutely nothing. It's your opinion and your assessment, or your evaluation of the witnesses' testimony that has to govern in this case, and as I say, the doctor's opinion in this case should be totally disregarded by you." *Id.* (The trial judge repeated the instructions in the charge. *Id.*). The appellate court stated, "[t]he defendant argues that these instructions were insufficient to cure the prejudice. We consider the judge's action to have been taken sufficiently close to the time the jury heard the testimony and to have been given with sufficient force and clarity to eradicate the error." *Id.*

And finally, in *State v. Ferguson*, No. 210-CA-1, 2011 WL 6920725 (Ohio Ct. App. Dec. 30, 2011), a witness who was therapist and clinical counselor testified, "[the victim] always stated she wasn't believed; and . . . I let her know that I believed her" *Id.* at *5 (emphasis deleted). The defendant objected and asked for a mistrial. *Id.* at *5-6. The next day the court denied a mistrial, but instructed the jury:

"Before we continue with the testimony, I'm going to instruct the jury that it is the function of the jury to determine the credibility and truth and veracity of the witnesses, including any alleged victim.

The Prosecutor's last question to Miss Mitchell and her response is being stricken, and you are instructed that you cannot consider it for any purpose."

Id. at *6. The appeals court found no prejudice. “Curative instructions have been recognized as an effective means of remedying errors or irregularities which occur during trial.’ ‘A trial jury is presumed to follow the instructions given to it by the judge.’ Here the trial court gave a curative instruction. Since no evidence suggests otherwise, we presume that the jury followed the instruction.” *Id.* (citations omitted).

The instruction given in the instant case, that Ms. Runyon’s opinion was “was completely inappropriate and is not a proper opinion within the area of her expertise,” that “[t]he determination of guilt or innocence is solely a matter to be decided upon by the jury[,]” that the “Court has stricken the matter from the record and the jury may draw no inference from that testimony and may not consider that testimony in any way in arriving at a conclusion of guilt or innocence[,]” and that “[a]s a matter of law that testimony does not exist[,]” were even more vigorous and cogent than those passing muster in *Mahood* and other jurisdictions. This was not a case where curative instructions were unable to vitiate prejudice. *See State v. LaBounty*, 716 A.2d 1, 8 (Vt. 1998) (“On cross-examination, defense counsel had assailed the investigator for failing to determine whether S.J. knew the difference between a truth and a lie. On redirect, the State asked the witness if she had done anything ‘to satisfy yourself that what you were getting was the.’ She replied, ‘Yes.’ Defense counsel immediately objected and moved for a mistrial. The court denied the motion but gave the jury a curative instruction. Although defendant contends otherwise, this was adequate to preclude any possible prejudice; the objectionable comment was brief, the witness’s limited experience had been thoroughly explored on cross-examination, and the court’s response was immediate and unequivocal. Hence, we cannot conclude the court abused its discretion in ruling that defendant had not been prejudiced.”); *Spruiell v. State*,

No. 05-01-01414-CR, 2003 WL 21508441, at *7-8 (Tex. App. July 2, 2003) (no error in denying mistrial where witness testified she “really believed” the victim based on the manner of her speech and the witness’s twenty-five years’ experience as a teacher when the objection was sustained and the jury told to disregard the question or answer. “After reviewing the record, we conclude the questions and answers were not calculated to inflame the minds of the jury and do not suggest it was impossible to withdraw a prejudicial impression from the minds of the jurors. The trial court’s prompt instructions to disregard were sufficient to cure any error from the questions and answers.”).

D. The Petitioner’s failure to object to the State’s closing was waived, not simply forfeited, so no review is possible.

The Petitioner asserts that the State vouched for the credibility of its witnesses in closing argument. Pet’r’s Br. at 35.³¹ However, the Petitioner admits in his brief that his counsel “chose not to object to these statements” explaining that because Maureen Runyon had already vouched for the victim’s veracity and expressed belief in the Petitioner’s guilt counsel he did not wish to object and emphasize this testimony. *Id.*³² By not objecting the

³¹Apparently, the Petitioner had a mistrial, although the Appendix does not reflect any order to this effect. Pet’r’s Br. at 12. The Petitioner included portions of Dr. Phillips first trial testimony in the Appendix. App. vol. I at 112-59 to assert that the so-called bolstering was particular harmful in the second trial because Dr. Phillip’s testimony at the second trial was a “volte-face” from the first trial. Pet’r’s Br. at 36. However, the Petitioner did not seek to impeach Dr. Phillips with the first trial testimony at the second trial. He did raise the issue, though, such as through his expert Dr. Guertin. *See, e.g.*, App. vol. II at 792.

³²The Petitioner avers that he did raise the issue in his post-trial motions. Pet’r’s Br. at 36. However, the contemporaneous objection rule requires the issue to be raised contemporaneously with the alleged error, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) (“It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.”), or at least at the earliest point at which counsel becomes aware there is an error. *State v. Varner*, 212 W. Va. 532, 536, 575 S.E.2d 142, 146 (2002) (per curiam) (challenge to juror timely made when counsel first learned of juror’s diversion agreement with state only after trial was

(continued...)

Petitioner has waived, not simply forfeited, the issue. As such there is no error, and without error this Court cannot reverse.

“If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks.” Syl. Pt. 5, in part, *State v. Grubbs*, 178 W. Va. 811, 364 S.E.2d 824 (1987). “[T]his Court ordinarily will not reverse a judgment of conviction in a criminal case because of intemperate remarks of counsel for the State made in closing arguments, unless objections have been made to such remarks in time for the trial court to instruct the jury to disregard them.” *State v. Pietranton*, 140 W. Va. 444, 458, 84 S.E.2d 774, 785 (1954). There is an escape valve in some narrow circumstances—that of plain error—but that doctrine has no application here where counsel agrees the decision not to object was a trial tactic. for “a tactical choice does not rise to the level of plain error.” *United States v. Siers*, 873 F.2d 747, 749 (4th Cir. 1989).

Under “plain error,” W. Va. R. Crim. P. 52(b), “an appellate court has the discretion to correct error despite the defendant’s failure to object.” Syl. Pt. 1, in part, *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47 (1996). Plain error requires a “forfeiture” not a “waiver.” “When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” Syl. Pt. 8, in part, *State v. Miller*,

32(...continued)
ended and was raised in posttrial motion as soon as counsel learned of the disability). *See also People v. McNeal*, 677 N.E.2d 841, 855 (Ill. 1997) (“Although defendant avers that this issue is preserved for review by virtue of his ‘very specific and lengthy post-trial motion and arguments relative to this claim,’ the State asserts correctly that defendant’s failure to raise contemporaneous objections to these remarks constitutes a waiver of the issue on appeal.”).

194 W. Va. 3, 459 S.E.2d 114 (1995). “When a right is waived, it is not reviewable even for plain error.” *State v. Crabtree*, 198 W. Va. 620, 631, 482 S.E.2d 605, 616 (1996). Plain error “is not invoked where . . . the failure to object may have been deliberate and in furtherance of legitimate trial tactics.” *Marshall v. United States*, 409 F.2d 925, 927 (9th Cir. 1969); *United States v. Castenada*, 555 F.2d 605, 610 (7th Cir. 1977) (plain error “should not be invoked where failure to object may have been deliberate and in furtherance of legitimate trial tactics.”). “If . . . the party consciously refrains from objecting as a tactical matter, then that action constitutes a true “waiver,” which will negate even plain error review.” *United States v. Frokjer*, 415 F.3d 865, 871 (8th Cir. 2005) (quoting *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir.1995)). See also *United States v. Habel*, 613 F.2d 1321, 1327 (5th Cir. 1980) (“When a lawyer, for strategic reasons, chooses to by-pass the appropriate procedures for informing the trial court of contemporaneous errors, he will not be heard to complain[.]”).

E. In the absence of error, cumulative error does not apply.

In his conclusion, the Petitioner seems to be invoking the cumulative error rule. Pet’r’s Br at 37. “[B]ecause . . . there is no error in this case, the cumulative error doctrine has no application.” *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996) (per curiam).

VI.

CONCLUSION

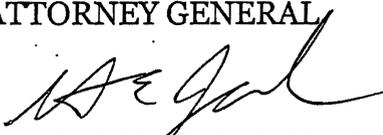
For the above reasons, the judgment of the Circuit Court of Ohio County should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



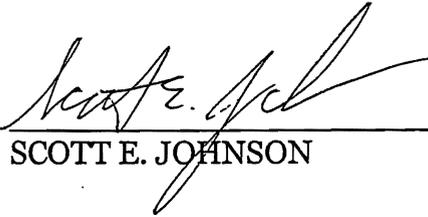
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CERTIFICATE OF SERVICE

I, SCOTT E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*BRIEF OF THE STATE OF WEST VIRGINIA*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 30 day of April, 2012, addressed as follows:

To: Stephen D. Herndon, Esq.
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Brent A. Clyburn
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SCOTT E. JOHNSON