STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Kenneth Ray Collins,
Petitioner Below, Petitioner

vs) No. 101346 (Mingo County 08-C-148)

Teresa Waid, Warden
Respondent Below, Respondent

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the circuit court's denial of an omnibus petition for habeas corpus relief filed by petitioner, Kenneth Ray Collins. This appeal was timely filed with the entire record designated for purposes of the appeal. A timely summary response was filed by Respondent Teresa Waid, Warden. Petitioner seeks a reversal of the circuit court's decision, a vacation of his conviction, and a remand to the circuit court for a new trial.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On January 12, 2005, a jury returned a verdict against petitioner finding him guilty of sexual abuse by a parent, guardian, or custodian and third degree sexual abuse. A sentencing hearing was held on February 14, 2005, wherein petitioner was sentenced to ten to twenty years in prison on the sexual abuse by a parent, guardian or custodian conviction, and ninety days in jail for the third degree sexual abuse conviction, those sentences to run concurrently. Petitioner's motion for reconsideration of sentence was denied. Thereafter, he filed a direct criminal appeal to this Court where his convictions were affirmed in *State v. Collins*, 221 W.Va. 229, 654 S.E.2d 115 (2007) (per curiam).

On May 29, 2008, petitioner filed a pro se petition for habeas corpus relief in the circuit court. He was appointed counsel and an amended petition for habeas relief was filed. An omnibus hearing was held before the circuit court on September 21, 2009. On November 20, 2009, the circuit court entered a thirty-five page "Final Order Denying Petitioner, Kenneth Ray Collins' Omnibus Petition for Writ of *Habeas Corpus*." Petitioner appeals from that order and raises multiple issues, including ineffective assistance of trial counsel, the admissibility of his confession, and pretrial delay.

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal, and it has reviewed the record designated on appeal. Finding no error in the denial of habeas corpus relief, the Court affirms the decision of the circuit court and fully incorporates and adopts, herein, the lower court's detailed and well-reasoned order. The Clerk of Court is directed to attach a copy of the same hereto.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

CIVIL ORDER BOOK 31 425 301

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

KENNETH RAY COLLINS,

Petitioner,

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

v.

Civil Action No.: 08-C-148
Chief Judge Michael Thornsbury

TERESA WAID, Warden
Huttonsville Correctional Center,

Respondent.

FINAL ORDER DENYING PETITIONER, KENNETH RAY COLLINS', OMNIBUS PETITION FOR WRIT OF *HABEAS CORPUS*

This matter comes before the Court pursuant to the Petitioner, Kenneth Ray Collins', Motion for Habeas Corpus relief pursuant to the West Virginia Post Conviction Habeas Corpus Act, West Virginia Code § 53-4A-1, et seq. (1994). Previously the Court ordered this matter to be an Omnibus Habeas Corpus action and directed counsel to address all Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981). The parties appeared as follows the Petitioner, Kenneth Ray Collins, via video teleconferencing, and through counsel, Kathryn Cisco Sturgell; and the Respondent Teresa Waid, through counsel, Teresa Maynard, Assistant Prosecuting Attorney. The Court now makes the following Findings of Fact, Conclusions of Law, and Judgment, to-wit:

Findings of Fact

1. On February 14, 2005, the Petitioner, Kenneth Collins was sentenced to an indefinite term of not less than ten (10) years nor more than twenty (20) years for One Count Sexual Abuse by a Parent, Guardian, or Custodian; confinement for a period of ninety (90) days in the Southwestern Regional Jail for One Count Third Degree Sexual Abuse

with the sentences to run concurrently pursuant to the Mingo County Petit Jury verdict returned on January 12, 2005 finding Mr. Collins guilty of Sexual Abuse by a Parent, Guardian, or Custodian and Third Degree Sexual Abuse.

2. Mr. Nelson, thereafter, appealed this verdict to the West Virginia Supreme Court of Appeals asserting that the Court's denial of his Motion for Reconsideration under Rule 35(b) of the West Virginia Rules of Criminal Procedure. The West Virginia Supreme Court of Appeals accepted Mr. Collins' appeal and affirmed the Court's Sentencing Order in State v. Collins, 221 W.Va. 229, 654 S.E.2d 115 (2007). Mr. Collins did not raise any other errors in his appeal to the West Virginia Supreme Court of Appeals.

3. On May 29, 2008, Mr. Collins filed a pro se petition for Habeas Corpus relief with this Court. The Court appointed Kathryn Cisco Sturgell to represent Mr. Colins in this matter and allowed Ms. Sturgell to file an amended Petition for Habeas Corpus relief.

4. Mr. Collins testified at the Omnibus Hearing that he was provided with a Losh checklist. The Court also explained to the Petitioner that a decision on the grounds raised in the instant proceeding would be a final decision, and that subsequent habeas corpus petitions would be summarily denied unless they advanced one of the narrow Losh exceptions

5. The instant Petition for Habeas Corpus relief asserts that Mr. Collins' Constitutional rights were violated by prejudicial pre-trial publicity; denial of right to speedy trial; language barrier to understanding proceedings; denial of counsel; failure of counsel to take appeal; coerced confession; suppression of helpful evidence by prosecutor; State's knowing use of perjured testimony; ineffective assistance of counsel; irregularities in arrest; failure to provide copy of indictment to defendant; pre-trial delay; refusal of

Appendix to Memorandum Decision
Supreme Court of Appeals Case No. 101346

continuance; refusal to subpoena witnesses; non-disclosure of Grand Jury minutes; constitutional errors in evidence rulings; and sufficiency of evidence.

6. Mr. Collins also asserted the additional grounds of failure to electronically record Miranda waiver and interrogation, actual innocence based upon new evidence, Brady violations, prosecutor conflict of interest with victim, and investigating officer fabricating a false confession.

7. Mr. Collins was first indicted during the September 2002 Term of the Grand Jury, in Indictment Number S02-F-35, the Prosecuting Attorney petitioned and was granted a nolle prosequi and indicted in Indictment Number S02-F-63. Indictment Number S02-F-63 was also dismissed pursuant to a nolle prosequi. The Defendant was then indicted in Indictment Number J03-F-6 during the January 2003 Grand Jury Term. On June 10, 2003, the Court granted the Prosecuting Attorney's Motion for Nolle due to the investigating officer being recalled on active duty in Iraq and being unavailable for Court. Thereafter, Mr. Collins was indicted via Indictment Number S04-F-53. On March 3, 2003, Mr. Collins, through counsel, filed a Motion to Dismiss with the Court in Indictment Number J03-F-6 regarding Trooper Muncy's deployment to Iraq and the absence of a material witness in the development of Mr. Collins' case. On March 17, 2003, the Prosecuting Attorney and Mr. Collins' attorney filed a Joint Motion to Continue Mr. Collins' trial based upon Trooper Muncy's deployment to Iraq. The Court later granted a motion to dismiss without prejudice based upon Trooper Muncy's unavailability to testify at trial and the necessity of his testimony for the prosecution and defense.

8. At the Omnibus Evidentiary Hearing the Petitioner, Kenneth Collins, testified as follows, to-wit:

a. That there was prejudicial pre-trial publicity because his case was on the front page of the paper and was too much publicity;

b. That he was denied the right to a speedy trial because he was arrested in 2002, when he found out about the warrants for his arrest and turned himself in;

c. That he was indicted and the cases dismissed approximately five (5) times;

d. That on January 11, 2005 his case proceeded to jury trial and the jury returned a guilty verdict;

e. That he was then sentenced on February 14, 2005;

f. That his denial of the right to a speedy trial was oppressive as he was working in the coal mines during that time;

g. That he suffered anxiety and impaired ability to defend his case due to the delay;

h. That there was a denial of the right to counsel and ineffective assistance of counsel;

i. That his attorney, Ernie Skaggs only spoke to him seven (7) times before the day the trial occurred;

j. That Ernie Skaggs informed him that he did not need to call witnesses at the trial;

k. That his appeal was filed in August 2006, the appeal was granted by the West Virginia Supreme Court of Appeals, and the West Virginia Supreme Court of Appeals affirmed his conviction;

l. That his attorney sent him a letter after the appeal indicating that he was withdrawing from further representation;

m. Mr. Collins asserted that he never gave a confession to the police during his interrogation;

n. That he signed blank papers during the interrogation;

o. Mr. Collins further asserted that he has a low intelligence and did not have the ability to understand the questioning during the interrogation;

p. That he would have requested counsel but was never instructed of his right to have counsel present during the interrogation;

q. That the State suppressed a video tape which his counsel requested but was never given the video tape prior to his trial;

r. That the State knowingly used perjured testimony and his counsel made a deal with the State not to show the video tape and not to call witnesses;

s. That there were irregularities in his arrest because he had to turn himself in and then was taken to the police station;

t. That his counsel only gave him copies of three (3) indictments and no others were given;

u. That there were excessive pre-trial delay due to the nolles and superseding indictments;

v. That he received some Grand Jury minutes but not all the minutes were produced:

w. That there was error in the evidentiary rulings and most of the information was not received during the trial;

x. That he was convicted under insufficient evidence;

y. That the police failed to electronically record his Miranda rights and interrogation;

z. That he has a defense of actual innocence based upon newly discovered evidence;

aa. That the prosecutor had a conflict of interest with the victim because the victim's mother rented from the prosecutor's family;

bb. That the arresting officer fabricated his confession;

cc. That he received three (3) different indictments;

dd. That he was aware of one (1) of two (2) video tapes;

ee. That the police officer stated that the video tape had been made but never produced;

ff. That his case was ultimately tried in the same term he was indicted;

gg. That his rights were violated by the late filing of his appeal because he could have been released earlier;

hh. That his girlfriend at the time was not allowed to come back while he was being questioned by the police officers.

Conclusions of Law

1. West Virginia Code § 53-4A-1(a) provides, in relevant part:

> Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without

paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

2. West Virginia Code §53-4A-3, directs that a writ of habeas corpus be granted if it appears to the court that there is probable cause to believe that the petitioner may be entitled to some relief, and the contentions or grounds advanced have not been previously and finally adjudicated or waived.

A. Pre-Trial Publicity

3. The Petitioner first asserts that the pre-trial publicity violated his rights and prevented him from having a fair and impartial jury.

4. "To warrant a change of venue in a criminal case, there muse be a showing of good cause therefore, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Syllabus Point 2, State v. Wooldridge, 129 W.Va. 448, 40 S.E.2d 899 (1946).

5. "A present hostile sentiment against an accused, extending throughout the entire county in which he brought to trial, is good cause for removing the case to another county." Syllabus Point 1, State v. Siers, 103 W.Va. 30, 136 S.E. 503 (1927).

6. The Court **FINDS** that the pretrial publicity did not substantially prejudice Mr. Collins' and affect the ability of the Jury to consider his case. The Petitioner has introduced absolutely no evidence of adverse pre-trial publicity other than his bald assertions.

7. Accordingly, Petitioner's asserted ground for relief regarding the pretrial publicity is without merit and the instant Petition is **DENIED**.

B. Denial of Right to Speedy Trial

8. Mr. Collins asserts that he was denied his right to a speedy trial in this matter based upon the several indictments and *nolle prosequi* on at least three separate occasions.

9. West Virginia Code § 62-3-21 provides that:

> Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him, if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment.

10. "Pursuant to W.Va. Code § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute." Syllabus,

State v. Carter, 204 W.Va. 491, 513 S.E.2d 718 (1998); Syllabus Point 1, State v. Damron, 213 W.Va. 8, 576 S.E.2d 253 (2002).

11. "Under W.Va. Code, 62-3-1 [1959], which provides a personal right to criminal defendants to be tried more expeditiously than the Constitution requires, the burden is on the party seeking this statutory protection to show that the trial was continued without good cause." Syllabus Point 2, Pitsenbarger v. Nuzum, 172 W.Va. 27, 303 S.E.2d 255 (1983); Syllabus Point 2, Good v. Handlan, 176 W.Va. 145, 342 S.E.2d 111 (1986).

12. "Under the three-term rule, W.Va. Code, 62-3-21, it is the duty of the State to provide a trial without unreasonable delay and an accused is not required to demand a prompt trial as a prerequisite to invoking the benefit of this rule." Syllabus Point 3, Good.

13. In State ex rel. Workman v. Fury, 168 W.Va. 218, 222, 283 S.E.2d 851, 853 (1981), the Supreme Court of Appeals held that "[w]hile illness of the judge, the unavoidable absence of witnesses, or other difficulties beyond the court of litigants' control may, indeed, constitute good cause for a continuance."

14. "To maintain a claim that preindictment delay violates the Due Process Clause of the Fifty Amendment to the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, the defendant must show actual prejudice." Syllabus Point 2, in pertinent part, State ex rel. Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009).

15. In making a showing that the Due Process Clause of the Fifth Amendment of the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, "the initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay. In balancing these competing interests,

the core inquiry is whether the government's decision to prosecute after substantial delay violates fundamental notions of justice or the community's sense of fair play." Syllabus Point 3, in pertinent part, Id.

16. Here, the Defendant first notified the Court that Trooper Muncy would be absent for the scheduled trial and moved the Court for Dismissal of his indictment on this basis, stating that the presence of Trooper Muncy was essential to his defense at trial.

17. Based upon the joint motion of the Prosecuting Attorney and Mr. Collins the Court granted the motion to continue based on Trooper Muncy's absence for trial and later dismissed the indictment without prejudice.

18. W.Va. Code § 62-3-21 provides that the failure to try a defendant within three terms of Court may be abrogated in certain limited circumstances. These include instances where the defendant is declared insane, witnesses for the State being enticed or kept away or prevented from attending because of accident or sickness.

19. While W.Va. Code § 62-3-21 does not specifically address the issue of a witness being unavailable due to being recalled to active military service it is not an unreasonable application of the meaning of the statute.

20. The Court **FINDS** that Workman indicated that the absence of witnesses may be considered as appropriate grounds for continuance in a defendant's case and is not violative of a defendants constitutional rights. Certainly, the understandable absence of Trooper Muncy while on recall to active duty with the military and active duty deployment to Iraq is an appropriate ground for continuance in Mr. Collins' case.

21. Mr. Collins' right to a speedy trial was not violated by the absence of Trooper Muncy for trial and subsequent jury trial outside the original three terms set forth in W.Va. Code § 62-3-21.

22. Mr. Collins has presented absolutely no evidence showing that he suffered any prejudice and certainly failed to meet his burden of showing actual substantial prejudice so as to demonstrate how the dismissal due to Trooper Muncy's active duty military deployment in Iraq violated the Due Process Clause of the U.S. Constitution or Article III, Section 10 of the West Virginia Constitution.

23. In Indictment No. S02-F-35 Mr. Collins was indicted and later the Prosecuting Attorney presented the Court with a Motion to Nolle the indictment due to errors and Mr. Collins made no objection to the Motion to Nolle at that time. Mr. Collins was then indicted in S02-F-63 and the Prosecutor again moved for a Motion of Nolle, which Mr. Collins did not object to at that time. In Indictment J03-F-6 Mr. Collins brought to the Court's attention that the investigating officer was recalled to active duty military service and was currently in Iraq and presented a Motion to Continue the trial and the Prosecuting Attorney joined this motion. The Prosecuting Attorney then filed a Motion to Nolle with the Court and Mr. Collins did not object to the Motion at that time. Mr. Collins was indicted for a final time in S04-F-53 and Mr. Collins moved for one continuance after indictment for a competency evaluation.

24. The Court **FINDS** that more than three terms did not expire prior to Mr. Collins being tried in S04-F-53 and there was no prejudice to Mr. Collins.

25. Therefore, the Court **DENIES** Mr. Collins' claims for postindictment delay.

C. Language Barrier to Understanding Proceedings

26. Mr. Collins asserts that there was a language barrier to understanding the proceedings against him and that he did not understand the charges against him during his trial based upon his IQ 74 and special education during school.

27. Essentially, Mr. Collins is asserting that at the time he was indicted and during his trial he was incompetent to stand trail and the Court should not have tried him based upon his IQ and special education throughout his education.

28. West Virginia Code § 27-6A-2(a) provides, in pertinent part:

> "Whenever a court of record has reasonable cause to believe that a defendant in which an indictment has been returned, or a warrant or summons issued, may be incompetent to stand trial it shall, sua sponte, or upon motion filed by the state or by or on behalf of the defendant, at any stage of the proceedings order a forensic evaluation of the defendant's competency to stand trial to be conducted by one or more qualified forensic psychiatrists, or one or more qualified forensic psychologists. If a court of record or other judicial officer orders both a competency evaluation and a criminal responsibility or diminished capacity evaluation, the competency evaluation shall be performed first, and if a qualified forensic evaluator is of the opinion that a defendant is not competent to stand trial, no criminal responsibility or diminished capacity evaluation may be conducted without further order of the court."

29. "To be competent to stand trial, a defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him." Syllabus Point 2, State v. Arnold, 159 W.Va. 158, 219 S.E.2d 922 (1975).

30. During the pendency of Indictment No. J03-F-6 Mr. Collins requested two (2) separate competency evaluations and both were granted by the Court and the proceedings suspended while these competency evaluations were pending. In Indictment No. S04-F-53 Mr. Collins again filed a Competency Motion with the Court and was granted the same. The evaluation was performed and the evaluator found that Mr. Collins had a

proper understanding of the proceedings, of the nature of the charges against him, could provide assistance to his counsel, and was competent to stand trial.

31. The Court **FINDS** that the competency evaluation in Indictment No. S04-F-53 indicated that Mr. Collins was competent to stand trial and that he understood the proceedings enough to assist his counsel in his defense.

32. The Court **FINDS** that after Mr. Collins received his competency evaluation the Court held a Competency Hearing wherein the findings from the competency evaluation were reviewed and the Court made additional findings regarding Mr. Collins' competency to stand trial at that time.

33. The Court **FINDS** that there is no evidence that Mr. Collins had a language barrier to understanding the proceedings against him.

34. Accordingly, Petitioner's asserted grounds for relief regarding language barrier to understanding the proceedings is without merit and the instant Petition is **DENIED**.

D. Denial of Right to Counsel/ Failure of Counsel to Take Appeal/ Ineffective assistance of counsel

35. Mr. Collins asserted that his trial counsel failed to interview any potential defense witness, failed to subpoena witnesses to be present for trial, failed to prepare an adequate defense, was not prepared for trial, failed to meet with Mr. Collins to prepare a trail strategy until the day before trial, failed to obtain *Brady* material, failed to introduce a proper motion to the Court, and failed to file a timely appeal.

36. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

37. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id., p. 687 *see also*, Syllabuse Point 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995); State ex rel. Shelton v. Painter, 221, W.Va. 578, 655 S.E.2d 794 (2007).

38. "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syllabus Point 6, Miller.

39. "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case will

be regarded as harmless error." Syllabus Point 19, State v. Thomas, 203 S.E.2d 445 (1974).

40. Mr. Collins specifically asserts that trial counsel failed to properly investigated the allegations against him, that he failed to petition the court for a private investigator, that trial counsel failed to obtain a video tape from the victim, and trial counsel denied Mr. Collins to have witnesses in his defense. Mr. Collins further asserts that trial counsel failed to present a proper motion before the Court related to preindictment delay when the motion should have been violation of right to speedy trial.

41. During the underlying trial proceedings trial counsel submitted to the Court a witness list which included all witnesses included on the State's witness list as well as Elizabeth Collins, Anna Bias, and Melissa Baker. Trial counsel ultimately called as witnesses Mr. Collins and Melissa Baker. Mr. Collins has not listed specific individuals who had relevant information related to potential alibis or other defenses related to the charges during his trial. Instead, Mr. Collins focuses on witnesses to attack the credibility of the victim and witnesses who would testify to his good character.

42. Mr. Collins acknowledged that his attorney met with him a total of seven times prior to the jury trial commencing in this action. Mr. Collins was represented by the same counsel throughout all of these proceedings and trial counsel filed motions, argued motions, and conducted discovery requests during the pendency of all the indictments. Mr. Collins' trial counsel also zealously represented Mr. Collins at trial through cross-examination of the State's witnesses and through testimony of Mr. Collins and Ms. Baker.

43. The Court **FINDS** that trial counsel properly exercised his authority regarding which witnesses to call at trial and what evidence to present before the Jury.

44. The Court **FINDS** that under the first standard of Strickland trial counsel's actions were not deficient under an objective standard of reasonableness.

45. The Court **FINDS** that there is no reasonable likelihood that the Jury Verdict would have been different had trial counsel presented the additional witnesses at trial pursuant to the second standard of Strickland.

46. Accordingly, Petitioner's asserted grounds for relief regarding ineffective assistance of counsel is without merit and the instant Petition is **DENIED**.

E. Coerced Confession

47. Mr. Collins asserts that he has an IQ of 74 and was unable to comprehend the Miranda warnings when given by the police officers during the investigation. Further, Mr. Collins asserts that the secrecy of the interrogation, that he was held incommunicado, lack of procedural following, and the actions of Trooper Muncy are suspect and untrustworthy.

48. The Fifth Amendment of the United States Constitution provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

49. In Miranda v. Arizona, 384 U.S. 436, 468 (1966), the United States Supreme Court held that:

> "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make

them aware of it-the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."

50. The West Virginia Supreme Court of Appeals has previously held that "[c]onfessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible." Syllabus Point 1, State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

51. "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amounts to admissions on part or all of an offense were voluntary before such may be admitted into evidence of a criminal case." Syllabus Point 5, State v. Starr, 158 W.Va. 905, 216 S.E.2d 242 (1975).

52. "[W]here a person of less than normal intelligence does not have the capacity to understand the meaning and effect of his confession, and such lack of capacity is shown by evidence at the suppression hearing, it is error for the trial judge not to suppress the confession. However, where the defendant's lower than normal intelligence is not shown clearly to be such as would impair his capacity to understand the meaning and effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weighing the totality of the circumstances surrounding the challenged confession." State v. Adkins 170 W.Va. 46, 54, 289 S.E.2d 720, 727 (1982).

53. "The fact that a citizen may be below average in intelligence or have received inadequate schooling means only that a law enforcement officer arresting him must be sensitive to that person's special needs before he allows him to waive the right to have a lawyer present during questioning." State v. Nicholson, 174 W.Va. 573, 574, 328 S.E.2d 180, 182 (1985).

54. "A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary) signed by the accused and admitted by him to be correct." Syllabus Point 2, Nicholson.

55. The Court conducted a Suppression Hearing in Indictment Number S04-F-53 Trooper Muncy and Mr. Collins both testified regarding the questioning and subsequent statement taken at the state police barracks.

56. Trooper Muncy asserted during the hearing that he asked Mr. Collins whether he was able to read English and Mr. Collins informed him that he was unable to read, however, Mr. Collins acknowledged that he understood spoken English. Thereafter, Trooper Muncy testified that he informed Mr. Collins that he was being investigated in regard to a sexual assault, that he was not under arrest and was free to leave at any time and then informed Mr. Collins of his *Miranda* rights. Trooper Muncy asserts that as he informed Mr. Collins of each specific *Miranda* right that he had Mr. Collins initial the *Miranda* Rights Form acknowledging that he had been informed of his rights. Trial Transcript, Volume One, pp. 13-16.

57. During the Suppression Hearing Mr. Collins also offered testimony regarding the questioning by Trooper Muncy. Mr. Collins testified that he graduated from high school

even though he was in the special education program and handled full-time employment responsibilities in the coal mines.

58. Mr. Collins acknowledged that Trooper Muncy informed him of his *Miranda* rights during the questioning. Id., pp. 48:23 – 49:2. Mr. Collins further acknowledged that the statement contained his signature.

59. Mr. Collins further testified that he can understand English even though he cannot read and further asserted that Trooper Muncy had not read him all his rights despite his initialing the *Miranda* rights form. Mr. Collins also acknowledged that Trooper Muncy read some of the statement back to him but that Trooper Muncy added additional information after he signed the form.

60. The Court ruled that Mr. Collins was able to understand questioning but he could not read; to-wit:

> "The defendant indicated that he could not read the English language but could understand the English language. He was sober, according to the testimony of Sgt. Muncy and according to his own testimony. There were no problems with communicating with the defendant. The defendant is able to, by virtue of his testimony today, is able to comprehend questioning but he cannot read. He was in special education. He did go all 12 years and graduated from Burch High School with a special education high school degree. He was advised by Sgt. Muncy that he was being questioned relating to the sexual assault; that he was free to leave. He was not arrested or restrained at that time. He was advised of all of his Miranda Rights, including the right to remain silent, the right to counsel and the right to stop at any time. The Miranda Rights were read verbatim, according to Sgt. Muncy. The were initialed, and although Mr. Collins doesn't believe all of them were read to him, he indicates there were readings to him. He did place his initials upon the Miranda Form. There's been no evidence or any testimony indicating any threats, offers or coercion or intimidation, other than that the defendant in this case has testified that at one point Sgt. Muncy indicated he had enough evidence to arrest him based upon the investigation thus far. There's been no indication by either party that he was arrested. Sgt. Muncy indicated he took the statement and then read it back to the defendant in this case and then Sgt. Lester came in and verified the reading back of the statement during that portion of it.

Kenneth Collins testified today that he thought "I had a right to leave," but he did not want to go to jail. He did indicate that the statement was voluntarily given, although he disputes as to whether or not the statement is accurate. At one point he acknowledge the first part of this statement and on another occasion during his testimony today he indicated he didn't remember exactly what the officer said. He did acknowledge he signed the statement and says he did so because he wanted to go home, so it's very unclear to the Court as to what portion or portions he is disputing. It certainly was not articulated in his testimony as to what he says he told Sgt. Muncy. It was not articulated as to exactly what was different about what was allegedly read back that was reported in the – as reported in the statement itself, so, and certainly these are matters the defendant can address at trial and he can advise the jury and offer testimony with regard to all these matters.

The Court, as far as an in camera review of the matter, does hereby conclude as a matter of law that Miranda was read. I think that's pretty clear. The exhibit indicates it was read. It was initialed, and even the defendant admits a good portion of it was read and that he knew he had the right to leave and he acknowledges he voluntarily gave the statement, and the test at this point in time is whether or not there's evidence that the statement was given freely, voluntarily and intelligently, knowingly, understandingly, and competently, and the Court so finds and concludes as a matter of law." pp. 62:11 – 64:24.

61. The Court **FINDS** that Trooper Muncy inquired of Mr. Collins if he was able to read and understand the English language prior to questioning him about the crime in the underlying cause of action. At that time Mr. Collins informed Trooper Muncy that he was unable to read and Trooper Muncy proceeded to individually instruct Mr. Collins of his Miranda rights. Mr. Collins acknowledged that he was given his Miranda warnings and that he signed the Miranda form and the confession.

62. The Court **FINDS** that the confession of an individual suffering from a mental illness is generally inadmissible outside a showing that the confession was voluntarily given and understood as a confession by the suspect.

63. The Court **FINDS** that Mr. Collins has a school history of special education classes and has a low IQ but is not mentally incompetent.

64. The Court **FINDS** that Mr. Collins testified during the suppression hearing that Trooper Muncy informed him of his Miranda rights and that he initialed the form indicating that he had received his Miranda warnings.

65. The Court **FINDS** that in Adkins, the West Virginia Supreme Court of Appeals held that a confession should not be excluded where the defendant's lower than normal intelligence is not shown clearly to be such as would impair his capacity to understand the meaning and effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weighing the totality of the circumstances surrounding the challenged confession.

66. The Court **FINDS** that the evidence in this matter does not indicate that Mr. Collins was incapable of understanding and voluntarily waiving his Miranda rights at the time of questioning.

67. The Court **FINDS** that Mr. Collins acknowledged during his testimony during the suppression hearing that he understood what Miranda rights he had and that he was informed of those rights prior to giving a statement to Trooper Muncy.

68. The Court **FINDS** that Mr. Collins was read back the contents of his statement and then signed the statement.

69. The Court **FINDS** that Mr. Collins' Fifth Amendment privilege against self-incrimination was not violated by Trooper Muncy during the interrogation and that Mr. Collins' mental capacity did not prevent Mr. Collins from understanding the proceedings and his rights pursuant to Miranda.

70. Accordingly, Petitioner's asserted ground for relief regarding coerced confession is without merit and the instant Petition is **DENIED**.

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F. Suppression of Helpful Evidence by the Prosecutor

71. Mr. Collins asserts that the State willfully failed to disclose physical evidence of a VHS Video Tape interview of the victim conducted by Ms. Rhonda Pack, Child Protective Services, West Virginia Department of Health and Human Resources.

72. Brady v. Maryland, 373 U.S. 83, 87 (1963), holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

73. "There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syllabus Point 2, State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).

74. During Mr. Collins' suppression hearing his trial attorney questioned Trooper Muncy extensively about the videotape of the victim's interview to Child Protective Services.

Q: Officer, I believe you previously testified to this Court that basically Human Services had interviewed Samantha and that's how you obtained the information. Is that not correct?
A: Yes, sir.
Q: And is it true that there was a videotape interview of Samantha?
A: Yes, sir.
Q: And isn't it true that you, in fact, had reviewed that tape prior to calling this gentleman into your office?
A: I had started reviewing it, yes sir.
Q: Okay; is it was in your office, right?
A: Yes.
Q: When you say you'd started, what do you mean by that?

A: When he showed up at the office he was early.
Q: Okay; but you had reviewed a portion of it?
A: I don't recall how much of the tape I'd reviewed, sir.
Q: So, its fair to say – This wasn't brought out and you didn't volunteer it, but, the bottom line is, thru this video you didn't mention and maybe the question wasn't asked, but thru this video the Department of Human Services had you knew what her version was prior to calling my client in?
A: Yes, sir.
Q: And isn't it true that - Where is that video now?
A: Right here, sir.
Q: So you did bring it, right?
A: Yes, sir.
Q: So, in 2002 you all had a video and a VCR but you did not have a tape recorder?
A: Our office didn't; Child Protective Services did?
Q: Better funded; So, the bottom line is you knew what she had said, correct?
A: That's correct.
Q: And you had personally not talked to her?
A: No, sir.
Q: But you knew by the video a good portion of what she was saying prior to the interview?
A: Yes, sir.
Q: So, when we go thru this statement about the four wheeler and everything else, she'd already said that to Child Protective Services?
A: She had said there was an incident that occurred on a four wheeler. She didn't go into detail, if I remember correctly and I'm not going to say I remember it correctly. I haven't reviewed the tape in almost three years now. Trial Transcript, pp. 59:1 – 61:5.

75. During the trial Trooper Muncy was called to the witness stand and testified regarding the videotape from Child Protective Services. At that time Mr. Collins attorney objected to the evidence regarding the videotape being testified about before the jury.

"MR. SKAGGS: Your Honor, not only am I going to object. I'm going to make a motion for a mistrial. We had in camera hearings and that's what these hearings are for. The tape wasn't presented. It keeps referring to a hearsay document that he had every opportunity to bring before the Court and present before this jury, and nobody has even seen this thing. I make a motion for a mistrial.
THE COURT: Was it given in discovery?"
MR. SPARKS: Yes. Id., Volume 2, p. 43:6-15.

76. Mr. Collins further testified in the Omnibus hearing that his believed his attorney and the prosecuting attorney made a deal not to show the videotape and not to call witnesses during the trial.

77. There is no indication in the trial transcript that Mr. Collins' attorney had not received the videotape prior to the commencement of the jury trial in the underlying matter.

78. There are three considerations the Court must make in determining whether the requested materials and the subsequent suppression is material under Brady.

79. First, there must be a showing that the material was requested. In this case, the material was requested and the Prosecuting Attorney filed a response indicating that the videotape was given to Mr. Collins' attorney during the discovery process. Additionally, the Court inquired at trial whether the videotape had been turned over during discovery, the Prosecutor indicated that it had and Mr. Collins' attorney made no response.

80. Second, the evidence must be exculpatory in nature. Mr. Collins asserts that the videotape given to Child Protective Services was essential to his case but fails to show any specific manner in which this material was exculpatory.

81. Third, the material must be material to the defense. Mr. Collins did not present any evidence of how the videotape was material to his case in chief and how the outcome of his trial would have been different if the videotape had been played during the jury trial.

82. The Court **FINDS** that Mr. Collins had specific knowledge of the videotape in question from the date of questioning by Trooper Muncy and that the videotape was apparently turned over to Mr. Collins' counsel during discovery.

83. The Court **FINDS** that during the suppression hearing Mr. Collins' attorney never indicated to the Court that the videotape was not turned over during discovery nor requested that the Court compel the State to turn over the videotape.

84. Accordingly, Petitioner's asserted ground for relief regarding coerced confession is without merit and the instant Petition is **DENIED**.

G. State's Knowing Use of Perjured Testimony

85. Mr. Collins further asserts that the Assistant Prosecuting Attorney, C. Michael Sparks, knowingly used perjured testimony during the trial; however, Mr. Collins did not testify with specificity about the alleged perjured testimony that was offered during the trial proceedings.

86. "In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." Syllabus Point 2, State ex rel. Franklin v. McBride, ___ W.Va. ___, ___ S.E.2d ___, 2009 WL 3255136 (W.Va. 2009).

87. "Prosecutors have a duty to the court not to knowingly encourage or present false testimony." Id. (quoting State v. Rivera, 109 P.3d 83, 89 (Ariz.2005)).

88. Under the first prong of the test Mr. Collins must make a showing that the prosecutor presented false testimony. Mr. Collins did not present any evidence during the Omnibus Hearing of evidentiary material establishing that the State's witnesses testified falsely during the trial.

89. Mr. Collins did not indicate which witnesses for the prosecutor testified falsely or what their alleged false testimony was during the trial.

90. The Court **FINDS** that Mr. Collins is unable to meet the first requirement under Franklin to make a showing that the prosecutor presented false testimony.

91. Since Mr. Collins is unable to meet the first prong of Franklin it is not necessary to further analyze the remaining two prongs of Franklin.

92. Accordingly, Petitioner's asserted ground for relief regarding State's knowing use of perjured testimony is without merit and the instant Petition is **DENIED**.

H. Irregularities in Arrest

93. Mr. Collins asserts there were irregularities in his arrest based upon his having to turn himself in and not being arrested by police officers after an indictment was returned against him by the Mingo County Grand Jury.

94. Mr. Collins has presented no evidence that his arrest was illegal or that the arresting officers subjected him to illegal procedures after he turned himself in for arrest.

95. There is no caselaw providing that an arrest is illegal when an individual turns themselves into the police after a warrant for their arrest has been issued.

96. Accordingly, Petitioner's asserted grounds for relief regarding irregularities in arrest are without merit and the instant Petition is **DENIED**.

I. Failure to Provide Copy of Indictment

97. Mr. Collins asserts that he was not provided a copy of the indictments against him in at least one of the indictments returned against him while this matter was pending for trial.

98. During the Omnibus Hearing Mr. Collins was unable to recall specifically which indictments he did not receive from his attorney.

99. The Court routinely provides defendants in criminal matters copies of indictments during arraignment and also provides a copy of the same to defense counsel at that time.

100. The Court **FINDS** that Mr. Collins assertion that he did not receive at least one of his indictments is without merit, accordingly, Petitioner's asserted grounds for relief regarding failure to provide a copy of the indictment is without merit and the instant Petition is **DENIED**.

J. Refusal of Continuance

101. Mr. Collins asserts that the Court failed to grant a requested continuance; however, Mr. Collins did not testified specifically about which Motion for Continuance was not granted by the Court during the pre-trial process.

102. Mr. Collins has also argued that there was post-indictment delay in this matter, yet seeks to also argue that the Court failed to grant him a Motion to Continue.

103. In fact, in Indictment No. J04-F-53 the Court granted Mr. Collins' Motion to Continue while a competency evaluation was pending and set the matter for trial soon after the results were returned to the Court.

104. Accordingly, Petitioner's asserted grounds for relief regarding refusal of continuance is without merit and the instant Petition is **DENIED**.

K. Non-Disclosure of Grand Jury Minutes

105. Mr. Collins asserts that the Court failed to provide him with copies of all the grand jury minutes involving the charges against him in the underlying indictments.

106. West Virginia Rules of Criminal Procedure Rule 6(e)(1) provides that:

> "All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any potion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall be filed with the clerk of the circuit court and shall not be made public except on order of the court."

107. West Virginia Rules of Criminal Procedure Rule 6(e)(3)(C)(i) – (ii) provides that:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

108. "A defendant must make a showing of particularized need, to obtain pretrial disclosure of grand jury minutes and testimony other than his own." Syllabus Point 4, State v. Louk, 171 W.Va. 639, 301 S.E.2d 596 (1983), *overruled on other grounds by*, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

109. Mr. Collins has made no showing of particularized need for the grand jury minutes, nor has Mr. Collins made a showing that he was prejudiced in any manner in the alleged failure of the Grand Jury minutes to be given to him under all the indictments.

110. Mr. Collins acknowledged that most of the grand jury minutes had been provided to him in the various indictments.

111. In Indictment No. S02-F-35 the Grand Jury minutes were filed and made available in the Circuit Clerk's Office on October 23, 2002. For Indictment No. S02-F-63 the Grand Jury Minutes were not filed as a Motion to Nolle was filed by the Prosecuting Attorney on November 25, 2002. In Indictment No. J03-F-6 the Grand Jury Minutes were filed and made available on February 7, 2003. In Indictment No. S04-F-53 the Grand Jury Minutes were filed and made available on October 14, 2004.

112. Accordingly, Petitioner's asserted grounds for relief non-disclosure of grand jury minutes are without merit and the instant Petition is **DENIED**.

L. Constitutional Errors in Evidence Rulings

113. Mr. Collins asserts that the Court erred in certain evidence rulings during his trial, however Mr. Collins did not allege any specific evidentiary rulings in his motions nor did he testify about any specific evidentiary rulings during the Omnibus Hearing.

114. Accordingly, Petitioner's asserted grounds for Constitutional errors in evidence rulings are without merit and the instant Petition is **DENIED**.

M. Sufficiency of Evidence

115. Mr. Collins asserts that there was insufficient evidence presented at trial for a jury conviction and that his conviction should have been overturned by the Court as a matter of law.

116. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilty beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

117. "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. [A] court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be

set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syllabus Point 3, in relevant part, Id.

118. Mr. Collins has made no specific allegations regarding the insufficiency of the evidence in the instant petition.

119. Under Guthrie Mr. Collins bears the burden of proof to show that the evidence presented a trial was insufficient for the jury to find in favor of the prosecution.

120. It is not necessary that the evidence presented at trial be consistent with every conclusion of guilt, only that the jury can find guilt beyond a reasonable doubt.

121. Mr. Collins' case was submitted to the jury and the jury returned a verdict on the charges against him. In fact, the jury in Mr. Collins' case felt the evidence was insufficient to convict Mr. Collins on one of the counts alleged in the indictment.

122. The Court **FINDS** that under the analysis of Guthrie the Court must consider the evidence presented during the trial in the light most favorable to the prosecution and when the evidence supports the jury's verdict it should not be set aside.

123. The Court **FINDS** that sufficient evidence was presented in Mr. Collins' case for the jury to return the guilty verdicts against Mr. Collins.

124. The Court **FINDS** that Mr. Collins has failed to make a specific showing insufficient evidence to support the jury verdict against him.

125. Accordingly, Petitioner's asserted grounds for relief regarding sufficiency of evidence are without merit and the instant Petition is **DENIED**.

N. Conflict of Interest Between Prosecuting Attorney and Alleged Victim and Victim's Mother

126. In his petition, Mr. Collins asserts that Tina Pennington, mother of the victim, and the Victim, Samantha Owens, were tenants in Sparks Trailer Park from 2000 until 2002. Further, Mr. Collins asserts that the Prosecuting Attorney had other dealings with the alleged victim and her mother prior to Mr. Collins' trial. Mr. Collins asserts that the Prosecuting Attorney should have notified the Court of his past involvement with the alleged victim and her mother and should have recused himself from the case.

127. There has been no credible evidence submitted that Mr. Sparks or any of his family members own Sparks Trailer Park.

128. Accordingly, Petitioner's asserted grounds for relief regarding conflict of interest between the Prosecuting Attorney and Alleged Victim and Victim's mother is without merit and the instant Petition is **DENIED**.

O. Newly Discovered Evidence

129. Mr. Collins asserts that while he has been incarcerated newly discovered evidence has come to his attention proving that he is innocent of the crimes charged in the indictment. First, Mr. Collins asserts that Anna Bias was informed by Samantha Owens that she wanted the charges dropped against him. Second, Patricia Wooddell states that Samantha Owens informed her that she wanted to tell the truth but her mom and dad would not let her. Finally, Mr. Collins asserts that he has obtained numerous affidavits stating that he did not own a four-wheeler and that it was the insistence of Trooper Muncy and the Prosecuting Attorney that Mr. Collins owned a four-wheeler.

130. "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence

will be, or its absence satisfactorily explained. (2) It must appear from the facts stated in his affidavit that the [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind of the same point. (4) The evidence must be such as ought to produce the opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus Point 1, Halstead v. Horton, 38 W.Va. 727, 18 S.E. 953 (1894); Syllabus, State v. Fraizer, 162 W.Va. 935, 253 S.E.2d 534 (1979); Syllabus Point 3, In re Renewed Investigation of State Police Crime Laboratory, Serology Div., 219 W.Va. 408, 633 S.E.2d 762 (2006); Syllabus Point 4, State ex rel. Smith v. McBride, 224 W.Va. 196, 681 S.E.2d 81 (2009).

131. During the underlying trial Samantha Owens testified that she was living with Mr. Collins parents and that he came to their house to ride his four-wheeler.

Q: Where were you living at that time:
A: I was staying at his parents' house.
Q: Did he live there?
A: No.
Q: Did he ever have a reason to come over there?
A: Yes.
Q: Why?
A: His four wheeler was over there.
Q: And did he come over and ride his four wheeler?
A: Yes. Trial Transcript, Vol. 1, p. 215:17 – 216:3.

132. Samantha Owens further testified that she went with Mr. Collins on the four wheeler the day that the first incident occurred.

Q: Did he come over to the house that day?
A: Yes.
Q: Okay; what happened next?

A: We went riding on the four wheeler.
Q: Had you rode the four wheeler with him before?
A: Yes." Id., p. 216:13-20.

133. During the trial Samantha Owens further testified that the four wheeler in question belonged to Mr. Collins and his father and that it was located at Mr. Collins' parents home. Id., p. 253:6-12.

134. Mr. Collins testified during the trial that he did not own a four wheeler back in 2000 and that none of his family members owned a four wheeler during that time period. Id., Volume 2, pp. 26:5-10, 27:14-17. Mr. Collins further testified that he never took Samantha Owens four wheeling. Id., pp. 26:20-21, 27:9-13.

135. The basis for the newly discovered evidence is affidavits from individuals stating that Mr. Collins did not own a four wheeler and that his parents did not own a four wheeler at the time one of the alleged events occurred.

136. Smith sets out certain factors the Court must weigh in determining whether newly discovered evidence is sufficient to warrant the granting of a new trial.

137. First, the evidence must appear to have been discovered since the trial and from the affidavits of witnesses it must be shown what the evidence is or is absence satisfactorily explained.

138. Mr. Collins has presented affidavits from individuals regarding the question of whether he owned or his parents owned a four wheeler at the time the alleged events occurred.

139. The issue of whether Mr. Collins owned a four wheeler and whether he had ever taken Samantha Owens on a four wheeler ride were previously addressed in the underlying trial and conflicting evidence presented to the jury on the issue.

140. The Court **FINDS** that Mr. Collins had the ability to obtain the evidence regarding whether he owned a four wheeler at the time of the alleged events and could have presented evidence of the same at trial. In fact, Mr. Collins specifically testified during the trial that he did not own a four wheeler, that his parents did not own a four wheeler, and that he had never taken Samantha Owens on a four wheeler ride.

141. Second, Mr. Collins must make a showing of due diligence in ascertaining and securing the evidence in question and that it could not have been secured prior to the jury verdict.

142. Again Mr. Collins is unable to make any showing that the present affidavits could not have been provided prior to the jury verdict in his case and that he was without knowledge of the information prior to his jury trial and verdict.

143. Third, such evidence must be material and must not be merely cumulative of the same kind and to the same point as presented during the trial.

144. Mr. Collins testified during the trial that he did now own a four wheeler, that his parents did not own a four wheeler, and that he had never taken Samantha Owens on a four wheeler ride.

145. The evidence Mr. Collins seeks the Court to consider as newly discovered evidence is merely cumulative of his own testimony at trial and would add nothing to the evidence presented at trial.

146. Four, the evidence must be of such a nature that it would produce an opposite result at a second trial on the merits.

147. The evidence sought to be introduced in this Petition is not likely to change the result of the first trial in this matter.

148. Fifth, a new trial should be refused when the sole object of the new evidence is to discredit or impeach a witness on the other opposite side.

149. Here, Mr. Collins seeks to introduce evidence that Samantha Owens informed several individuals that she wanted the charges dropped against Mr. Collins and that she lied about the events because her parents were pressuring her to go forward with the allegations.

150. This evidence has no other purpose than to discredit the testimony of Samantha Owens at trial and attack her character.

151. Under Smith such evidence is inappropriate and is never grounds for the granting of a new trial under the guise of newly discovered evidence.

152. Accordingly, Petitioner's asserted grounds for relief regarding newly discovered evidence is without merit and the instant Petition is **DENIED**.

Judgment

WHEREFORE, the Court having reviewed the entire record below and in the post-conviction proceedings does hereby **DENY** the Petitioner's Omnibus Writ of Habeas Corpus for all grounds asserted and the matter is ordered **STRICKEN** from the Court's docket.

The Clerk is **DIRECTED** to send attested copies of this Order to all parties of record in this matter.

ENTERED this the 20th day of November 2009.

The Honorable Michael Thornsbury
Chief Judge, 30th Judicial Circuit

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