STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Jerome M. Blaney,
Petitioner Below, Petitioner

vs) **No. 11-1450** (Wood County 07-P-157)

David Ballard, Warden,
Respondent Below, Respondent

FILED
February 11, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jerome M. Blaney, by counsel Joseph T. Santer, appeals the Circuit Court of Wood County's order entered on September 20, 2011, denying his petition for writ of habeas corpus. Respondent Warden Ballard, by counsel Michele Duncan Bishop, filed a response in support of the circuit court's decision. Petitioner has filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 Rules of Appellate Procedure.

Petitioner was indicted on nine counts of sexual abuse in the third degree, nine counts of sexual abuse by a custodian, and one count of attempted sexual abuse in the third degree after he was accused of inappropriately touching two minor females in the course of his employment as a teacher's aide. Prior to the verdict, six counts of sexual abuse in the third degree were dismissed. Petitioner was found guilty by jury on five counts of sexual abuse by a custodian, two counts of sexual abuse in the third degree, and one count of attempted sexual abuse in the third degree. Petitioner appealed, and his petition for appeal was refused by this Court. He then filed a petition for writ of habeas corpus, arguing ineffective assistance of counsel in several areas and error in finding that he was a custodian of the minors in question.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

> "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." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

On appeal, petitioner first argues that his trial counsel was ineffective in several ways, including failing to fully voir dire prospective jurors on racial biases, failing to disclose that counsel was in a relationship with the therapist of one of the victims, and not aggressively questioning the witnesses. Petitioner also argues that counsel was ineffective in challenging the State's contention that he was a custodian of the victims pursuant to West Virginia Code § 61-8D-1, as he was on a school bus with the minors and therefore the bus driver was the custodian.

In response, the State argues that there was no ineffective assistance of counsel, as the evidence did not show racial prejudice in the jury pool and did not show that counsel's relationship affected the trial in any manner. Moreover, counsel properly cross-examined witnesses. Finally, the State argues that sufficient evidence was presented to the jury to show that he was a custodian of the children in question.

Our review of the record reflects no clear error or abuse of discretion by the circuit court. Having reviewed the circuit court's "Opinion and Order" entered on September 20, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

ISSUED: February 11, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

JEROME M. BLANEY,
Petitioner

vs. **Case No: 07-P-157**

DAVID BALLARD, Warden
Mount Olive Correctional Complex
JAMES RUBENSTEIN, Commissioner
West Virginia Division of Corrections
Respondents

OPINION AND ORDER

Presently pending before the Court this 19th day of September, 2011 are certain post-conviction habeas corpus petitions and amended petitions that have been filed by, or on behalf of, the Petitioner, Jerome Blaney.

UNDERLYING CRIMINAL CASE:

The Petitioner was initially indicted by a Wood County Grand Jury on May 16, 2003. The Grand Jury returned a 6 count indictment, designated Case No.: 03-F-99. The Petitioner was charged with 2 counts of Sexual Abuse in the Third Degree (Counts 1 & 3); 2 counts of Sexual Abuse by a Custodian (Counts 2 & 4); 1 count of Sexual Abuse in the First Degree (Count 5); and, 1 count of Abduction (Count 6). On July 22, 2003 this Court dismissed Counts 1, 2, 3, 4 and 5 based on *State ex rel. Day v. Silver*, 210 W.Va. 175, 556 S.E.2d 820 (2001) since the Indictment did not specify the type of sexual behavior that was alleged to have occurred. Thereafter, the State informed the Court that it was not going to pursue Count 6 and that the State would present this case to another Grand Jury.

On August 25, 2003, the Petitioner was again indicted by a Wood County Grand

Jury. This time the Grand Jury indicted the Petitioner on 19 counts, designated Case No.: 03-F-161. This indictment charged the Petitioner with 9 counts of Sexual Abuse in the Third Degree (Counts 1, 3, 5, 7, 10, 12, 14, 16 & 18); 9 counts of Sexual Abuse by a Custodian (Counts 2, 4, 6, 8, 11, 13, 15, 17 & 19); and, 1 count of Attempted Sexual Abuse in the Third Degree (Count 9). The trial of this case was held from April 12, 2005 through April 15, 2005. Prior to verdict, Counts 1, 3 and 5 were dismissed at the State's request and Counts 14, 16 and 18 were dismissed due to the statute of limitations. Of the charges that were submitted to the jury, the Petitioner was found not guilty on counts 12, 13, 15, 17 and 19. The Petitioner was found guilty on counts 2, 4, 6, 7, 8, 9, 10 and 11.

Sentencing was held on June 24, 2005. The Petitioner was sentenced to 90 days each, consecutive, on the three misdemeanor charges (Counts 7, 9 and 10). Consecutive to the misdemeanor charges were three sentences of not less than 10 nor more than 20 years for the felony offenses of Sexual Abuse by a Custodian as contained in Counts 2, 4 and 6. Sentences for Counts 8 and 11 (2 additional charges of Sexual Abuse by a Custodian) were run concurrent with the sentences on Counts 2, 4 and 6. The Petitioner was further Ordered to pay costs, restitution and register as a sex offender.

The Petitioner was re-sentenced for purposes of appeal on January 26, 2006. The Petition for Appeal was refused by the West Virginia Supreme Court of Appeals by Order entered October 4, 2006.

HABEAS CORPUS PROCEEDINGS:

It appears that several documents have been filed by, or on behalf of, the Petitioner. It is this Court's opinion that all grounds that have been raised in any of the various petitions or amended petitions should be addressed in this OPINION AND ORDER. Therefore, the following documents are being considered:

Petition Under W.Va. Code 53-4A-1 for Writ of Habeas Corpus filed October 15, 2007;
Amended Petition for Writ of Habeas Corpus filed June 10, 2008;
Second Amended Petition for Post Conviction Habeas Corpus filed June 24, 2008;
Memorandum in Support of Petition for Post Conviction Relief filed September 23, 2008, and;
Third Amended Petition for Writ of Habeas Corpus ad Subjiciendum filed August 11, 2010.

Below is a list of the grounds raised in the various documents listed above and a notation as to which of the grounds were raised in which document:

1. Did prosecution "abuse its discretion" during Grand Jury indictment proceedings, where, after deliberations began, prosecution brought in state's witness to add elements & testimony in direct violation of West Virginia Constitution, Article III, § 4, § 10, & §14 creating fundamental structural error and permitting a trial on a faulty indictment and procurement process mandating reversal and release of defendant? (Petition, Amended Petition)

2. Did trial Court "abuse its discretion" by permitting the clerk to exclude one potential juror from the jury pool (Anthony Rhodes) from sitting on the jury in derogation of West Virginia Constitution, Article III, § 10 & § 14 which denied defendant a sitting jury of his peers by due process of law in a manner consistent with due process mandating reversal? (Petition, Amended Petition)

3. Did the trial court "abuse its discretion" by letting the jury decide legislative intent of statute, (a matter of law) in direct violation of West Virginia Constitution, Article III, § 10 & §17 resulting in the denial of a fair trial with reliable results mandating vacation of sentence and reversal of conviction? (Petition, Amended Petition)

4. Did the trial court "abuse its discretion" by the creation of legislative intent and by excessive application to a statute in order to convict in derogation of West Virginia Constitution, Article III, §10 & §17 resulting in the denial of a fair trial with reliable results mandating reversal of conviction and a new trial? (Petition, Amended Petition)

5. Does West Virginia Constitution, Article III, § 4 and 10 mandate dismissal of Counts Two, Four and Six, when West Virginia Code §61-8D-5 is phrased and added as an enhancement statute, and reliant upon Counts One, Three and Five and where the underlying counts were ultimately dismissed and impermissibly tired separately, which

denied the defendant a fair trial with reliable results? (Petition, Amended Petition)

6. Is Count Four an impermissible breach of Double Jeopardy, where the language fails to differ elementially from Counts Two in derogation of West Virginia Constitution, Article, III, § 5 and United States Constitution, Amendment 5 and 14 which resulted in the denial of a fair trial with reliable results, mandating reversal of conviction and vacation of sentence? (Petition, Amended Petition)

7. Are Counts Two, Four and Six in contravention of West Virginia Constitution, Article III, § 4 and 10 and United States Constitution, Amendment 5 and 14 where these indictments are elementially insufficient to afford the defendant the nature and cause of the offense, overly vague, which denied the defendant a fair trial with reliable results and the ability to defend mandating reversal of conviction and vacation of sentence? (Petition, Amended Petition)

8. Are the Convictions on Counts two, four and six invalid where clearly the legislature has defined by code, that a teacher riding on a school bus, is not the custodian of the children which denied the defendant due process of law and a properly instructed jury in direct violation of West Virginia Constitution, Article III, 4, 10 and 14 and United States Constitution, Amendment 5, 6 and 14 which resulted in the denial of a fair trial with reliable results mandating reversal of conviction and vacation of sentence? (Petition, Amended Petition)

9. Are Counts Two, Four and Six in contravention of West Virginia Constitution, Article III, § 5 and United States Constitution, Amendments 8, and 14 where West Virginia Code, §61-8D-5, an enhancement statute or standing alone, makes a (90) ninety day misdemeanor, a Felony of (10-20) ten to twenty years which is disparative and disproportionate mandating remedy? (Petition, Amended Petition)

10. Is the language of West Virginia Code, §61-8D-5 overly vague by its failure to define with any specific definition the meaning of custodian in contravention of legislative powers West Virginia Constitution, Article VI which denies the defendant his rights embodied in West Virginia Constitution, Article II, § 10, and 14 mandating reversal of conviction and vacation of sentence? (Petition, Amended Petition)

11. Are counts Ten and Twelve in contravention of the principles of Double Jeopardy, and multiplication, where the exact charge is made in prior Count Seven in direct violation of West Virginia Constitution, Article III, § 5 and 10 and United States Constitution, Amendment 5 and 14 mandating reversal of conviction and vacation of sentence in Count Ten and Count Twelve? (Petition, Amended Petition)

12. Are Counts Eight, Eleven, and Thirteen, incumbent upon Counts Seven, Ten and Twelve, and if so, by virtue of the above error raised as Double Jeopardy and multiplicity of indictment, are also these three reliant charges in violation of the principles of Double Jeopardy in direct violation of West Virginia Constitution, Article III, §5 and 10 and United States Constitution, Amendment 5 and 14 requiring their reversal of conviction and vacation of sentence? (Petition, Amended Petition)

13. Are Counts Fourteen, Sixteen and Eighteen in violation of Double Jeopardy, overly vague by lack of information to form a valid separate indictment, and impermissibly muliplicitious in derogation of West Virginia Constitution, Article III, 4,5, 10 and 14 and United States Constitution, Amendment 5, 6, and 14 mandating reversal of conviction and vacation of sentence and indictment declared void? (Petition, Amended Petition)

14. Did the Prosecution abuse its discretion by submitting to the Grand Jury a form of indictment that contained one of the elements, thus relieving the State of the duty to prove every element of the offense, in derogation of West Virginia Constitution, Article III, § 10 and 14 and United States Constitution, Amendments 5, 6 and 14 mandating reversal of conviction and vacation of sentence and a new trial awarded? (Petition)

15. Was trial counsel ineffective pre-trial, rial and post-trial, where he made numerous errors that were so incompetent as to violate West Virginia Constitution, Article III, § 14 and United States Constitution, Amendments 6 and 14 mandating reversal of conviction and vacation of sentence? (Petition)

1. Counsel failed to hire experts to refudiate testimony by the state's experts.
2. Counsel failed to conduct proper investigation
3. Counsel failed to obtain coraboratative evidence
4. Counsel failed to interview witnesses
5. Counsel never formed a defense strategy
6. Counsel failed to obtain hall passes that could have proven that the crimes did not take place
7. Counsel failed to object to jury instructions
8. Counsel failed to strike jurors for cause
9. Counsel failed to raise the issue of prosecuting getting multiple indictments.
10. Counsel failed to object to a biased juror. (Second Amended Petition)
11. Counsel failed to voir dire prospective jurors on bias or prejudice toward minorities. (Third Amended Petition)
12. Counsel failed to disclose that he was dating the therapist/counselor of the victim C.R.W. (Third Amended Petition)
13. Counsel failed to fully view the videotape showing Petitioner briefly stopping by C.R.W.'s home. (Third Amended Petition)

16. A Teacher's aid is not a custodian within the definition of West Virginia Code, § 61-8D-1. The Court erred in denying the petitioner's motion to Dismiss the Counts in the indictment charging the Petitioner with sexual abuse by a Custodian. (Petition)

17. The Court erred in giving the jury the Allen charge. The Allen charge given to the jury was improper in that it indicated there would be a retrial of the defendant and therefore was coercive. (Petition)

18. The Verdict of the jury was against the manifest weight of the evidence. The court erred in denying the petitioner's Motion for Judgement of Acquittal on Counts 7, 9, 10, 11, 15, 17 and 19 of the indictment returned against the petitioner. (Petition)

19. The court is asked to reconsider its ruling in State of West Virginia ex rel., Jerome Blaney v. Reed, 215 W.Va.220, 559 S.E.2d 643 (2005) denying the Petitioner's Petition for Writ of Mandamus. (Petition)

20. Petitioner's constitutional right to due process and his Sixth Amendment right to an impartial jury trial and to a unanimous verdict were violated when the trial court gave an Allen instruction to jury over defense counsel's objection without consider viable alternatives to the dynamite charge. (Similar to # 17 above) (Amended Petition)

21. Petitioner was denied due process of law as secured by the 5th and 14th Amendments to the U.S. Constitution and Article III, §5, 10 when the indictment returned by the Grand Jury of Wood County, WV, in State v. Blaney, did not specify a specific date or distinguish between conduct on any given date. (Amended Petition)

22. Petitioner was denied his constitutional right to a fair and impartial jury as secured by the Sixth and Fourteenth Amendments to the Constitution of the U.S.A. and Article III, §§ 10 and 14 of the Constitution of West Virginia when the Court failed to give an instruction of "abuse" and gave an overinclusive definition of "custodian." (Amended Petition)

23. Petitioner was denied a fair and impartial jury trial as secured by the Sixth and Fourteen Amendments to the Constitution of the U.S.A. and Article II, §§ 10 and 14 of the Constitution of West Virginia by the inclusion of alleged misdemeanors that were alleged to have occurred prior to August 30, 2002. (Amended Petition)

24. Petitioner was denied a fair and impartial jury by the inclusion of a biased juror on the jury panel and seated on the petit juror in violation of the Sixth Amendment to the Constitution of the U.S.A. and Article III, § 5, 10 and 14 of the Constitution of West

Virginia. (Second Amended Petition)

25. Petitioner was denied effective and meaningful assistance of counsel as secured by the 1st, 6th and 14th Amendment to the Constitution of the U.S.A. due the errors of commission and omission of petitioner's trial counsel and appellate counsel? (Amended Petition)

GROUNDS FOR RELIEF DEEMED WAIVED

As set forth above, the Petitioner has raised several grounds for relief in this habeas corpus proceeding. However, evidence was not presented on all of these allegations and in the Petitioner's Brief In Support of Writ of Habeas Corpus and the Memorandum in Support of Petition for Post-Conviction Relief, the Petitioner does not offer arguments in support of all of these grounds for relief.

The question then becomes: What happens to all the other grounds for relief that have been alleged in the various documents or pleadings filed by, or on behalf of, the Petitioner? It is this Court's opinion that these various grounds for relief that have been mentioned, but either no facts have been presented in support of them, or no law or argument has been made in support of them, are waived. Certain grounds for relief were, in essence, simply mentioned in the various documents filed by the Petitioner. *State ex rel. Wensell v. Trent*, 218 W.Va. 529, 625 S.E.2d 291 (2005); *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007).

In *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995) the issue before the Supreme Court of Appeals of West Virginia was the sufficiency of information provided to a magistrate for the issuance of a search warrant. An argument apparently made by the prosecution in support of the validity of the search warrant was the "good faith" exception to the warrant requirement. However, the Supreme Court refused to consider this argument for two reasons, the second of which is relevant here:

> Second, appellate courts frequently refuse to address issues that appellants, or in this case the appellee, fail to develop in

> their brief. In fact, the issue of "good faith" was adverted to in a perfunctory manner unaccompanied by some effort at developed argumentation. Indeed, "[i]t is . . . well settled, . . . that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal." *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3rd Cir. 1993).

Lilly at footnote 16.

In *Clain-Stefanelli v. Thompson*, 199 W.Va. 590, 486 S.E.2d 330 (1997), there was an appeal concerning the use and width of a prescriptive right of way. The appellee made certain cross-assignments of error which were not considered by the Supreme Court of Appeals of West Virginia. Justice Maynard, in writing the opinion for the Court stated:

> While the appellee asserted these cross-assignments of error in her brief, she failed to elaborate, discuss, or cite any authority to support these assertions. In *State, Dept. Of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995), we stated that "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . .. Judges are not like pigs, hunting for truffles buried in briefs." (Citations omitted). We, therefore, decline to consider these cross-assignments of error.

Clain-Stefanelli at footnote 1.

Finally, in the criminal context with issues raised by a defendant, the Supreme Court of Appeals of West Virginia stated in *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996):

> In addition to the above assignments, the defendant raises some half-hearted assignments that were not fully developed and argued in the appellate brief. Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal. *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995) ("casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal"). We deem these errors abandoned because these errors were not fully briefed.

LaRock, 196 W.Va. 294, 470 S.E.2d 613, 621 (1996).

Based upon the above cited authority, it is clear that issues raised on appeal that are not fully developed, or mentioned only in passing, or are mentioned but not argued, or have no legal authority cited in support can be, and probably will be, treated as waived or abandoned and not ruled upon by an appellate court. The question then becomes - does this same standard apply to lower courts - specifically to circuit courts in a post-conviction habeas corpus proceeding? There is some authority that this Court believes provides some guidance on this issue.

State of West Virginia, Department of Health and Human Resources, Child Advocate Office v. Robert Morris N., 195 W.Va. 759, 466 S.E.2d 827 (1995) was a paternity action in which the Family Law Master established an amount of monthly child support and ordered payment of arrearages back to the date of the filing of the paternity action, but not back to the date of the birth of the child. An issue on appeal to the Supreme Court of Appeals of West Virginia was whether the affirmative defense of laches was plead or raised before the Family Law Master. In determining that the defense of laches was not properly plead or raised, the Court stated: "Further, '[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . .. Judges are not like pigs, hunting for truffles buried in briefs.'" (Citations omitted). *State DHHR v. Robert Morris N.*, 195 W.Va. 759, 466 S.E.2d 827, 833 (1995). While this same language was earlier cited when discussing an appellate court's ability to not consider issues or assertions not fully developed, it is interesting to note that in *State DHHR v. Robert Morris N.*, this language was used in discussing whether the affirmative defense of laches was properly plead or raised before the Family Law Master. The above cited language therefore stands for the proposition that a litigant must do more than simply make a skeletal argument to raise and preserve an issue before a Family Law Master.

This Court accordingly FINDS that all the grounds for relief that have been listed in the various documents filed on behalf of the Petitioner and for which no evidence was

presented, or have not been mentioned or argued in the Petitioner's Brief In Support of Writ of Habeas Corpus or the Memorandum in Support of Petition for Post-Conviction Relief, were not fully and properly raised or argued by the Petitioner and are therefore waived and will be treated as being abandoned. Specifically, this applies to Grounds for Relief 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 24 (except to the extent raised and argued in the Memorandum in Support of Petition for Post-Conviction Relief), and 25 (except to the extent raised and argued in the Petitioner's Brief In Support of Writ of Habeas Corpus or the Memorandum in Support of Petition for Post-Conviction Relief).

INEFFECTIVE ASSISTANCE OF COUNSEL

The legal standard for a claim of ineffective assistance of counsel in West Virginia is set forth below:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syllabus Point 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

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

> The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

Syllabus Point 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

"One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syllabus Point 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

"Failure to meet the burden of proof imposed by either part of the *Strickland / Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Daniel v. Legursky*, 195 W.Va. 314 at 321, 465 S.E.2d 416 at 423 (1995).

"Where counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syllabus Point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

"The method and scope of cross-examination 'is a paradigm of the type of tactical decision that [ordinarily] cannot be challenged as evidence of ineffective assistance of counsel.'" *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 328, 465 S.E.2d 416, 430 (1995).

Petitioner alleges trial counsel was ineffective for failing to speak with Petitioner's wife; for failing to interview the mat maids; and, for failing to introduce certain phone records. It is alleged by the Petitioner that his wife would have testified as to her daily

lunch time conversations with him; that the mat maids would have testified as to what they did not see with respect to the victims and the Petitioner; and, the phone records would corroborate the Petitioner's testimony that he was on the phone for much of the lunch period.

These issues are very similar to the issue decided in *State ex rel. Wensell v. Trent*, 218 W.Va. 529, 625 S.E.2d 291 (2005) (*per curiam*). In *Wensell*, the defendant, in a post conviction habeas corpus proceeding, alleged that his trial counsel was ineffective for failing to hire an investigator and a psychologist. In deciding that the defendant was not entitled to relief, the Supreme Court of Appeals of West Virginia stated:

> With regard to his trial counsel's failure to hire an investigator, this Court believes that while the retaining of an investigator could have been helpful, the appellant has not shown any actual new, exculpatory evidence which might have been discovered had an investigator been hired. The result is that the circuit court and this Court are left to speculate regarding what, if any, exculpatory evidence might have been discovered through the hiring of an investigator in the underlying criminal trial. Unfortunately, this does not carry the day in a habeas corpus proceeding and this Court is not persuaded that, but for the appellant's failure to hire an investigator in the underlying criminal trial, there is a reasonable probability that the outcome of the trial would have been any different.

State ex rel. Wensell v. Trent, W.Va. at 534, S.E.2d at 296.

A similar statement was made in *Coleman v. Painter*, 215 W.Va. 592, 600 S.E.2d 304 (2004)(*per curiam*). In *Coleman,* the defendant argued that his trial counsel was ineffective for failing to hire and have testify at trial an expert witness in the area of sexual abuse. In determining that the defendant had failed to establish that his trial counsel was ineffective, the Supreme Court of Appeals of West Virginia stated:

> At the habeas corpus hearing, the appellant failed to produce a proposed expert witness and offered only speculation on what an expert might have testified to at trial. The appellant's guesswork and speculation are no substitute for evidence. The appellant failed to prove that he suffered any prejudice because an expert witness did not testify for the

appellant at trial.

Coleman at 309.

What *State ex rel. Wensell* and *Coleman* establish, is that in West Virginia, for ineffective assistance of counsel to be established, the petitioner has to do more than just guess or speculate as to what trial counsel should have, or could have, done - there must be evidence presented to establish that had it not been for the improper act or omission, then the outcome of the trial would have been different. Neither Petitioner's wife nor any of the mat maids were called as witnesses during the habeas corpus proceeding. Therefore, the record is devoid of what those witnesses might have testified about. Further, the phone records were not introduced into evidence during the habeas corpus proceeding. Therefore, this Court is left to speculate as to what the phone records might have established.

Coleman and *Wensell* stand for the proposition that if a petitioner, in a post conviction habeas corpus, alleges that a witness should have been called during the trial, or that certain evidence should have been presented during the trial, then the petitioner in the habeas corpus proceeding needs to call the witness or present the evidence in the habeas corpus proceeding. This is the only way for a reviewing court to determine if the testimony or other evidence fits into both prongs of the *Strickland* standard. Anything short of this would cause the reviewing court to use guesswork or speculation. Without the witness testifying, and being subjected to cross-examination, or the phone records being produced, one can only speculate or guess as to the effect of this evidence.

Petitioner also alleges that trial counsel was ineffective for failing to voir dire the potential jurors on the issue of race. It should be noted that the Petitioner and one of the victims is African American. No case has been cited by counsel, or found by the Court, where it has been decided that failing to question jurors about race is *per se* ineffective assistance of counsel. This Court must therefore apply the same standard, and the same

presumptions, to this ground for relief as to all other grounds for relief in habeas corpus.

"[T]he level of participation employed by trial counsel during voir dire is also subject to the presumption that such decisions were motivated by sound trial strategy." *State v. Frye*, 221 W.Va. 154 at 157, 650 S.E.2d 574 at 577 (2006). "[T]he strong presumption that counsel's actions were the result of sound trial strategy . . . can be rebutted only by clear record evidence that the strategy adopted by counsel was unreasonable." *Coleman v. Painter*, 215 W.Va. 592 at 596, 600 S.E.2d 304 at 308 (2004)(*per curiam*).

This issue was somewhat discussed in *State ex rel. Bailey v. Legursky*, 200 W.Va. 769, 490 S.E.2d 858 (1997). In *Bailey*, the petitioner alleged that trial counsel was ineffective for failing to adequately voir dire two prospective jurors. In denying relief in habeas corpus, the Supreme Court of Appeals of West Virginia stated that the petitioner failed to adequately develop this issue during the habeas corpus proceeding. This language of *State ex rel. Bailey v. Legursky* should be considered in conjunction with the holdings of *Coleman v. Painter*, 215 W.Va. 592, 600 S.E.2d 304 (2004)(*per curiam*) and *State ex rel. Wensell v. Trent*, 218 W.Va. 529, 625 S.E.2d 291 (2005) (*per curiam*) discussed above relating to the hiring of an investigator, a psychologist and an expert witness. Further, it must be remembered, that the petitioner bears the burden of establishing both prongs of the *Strickland* standard and if the petitioner fails to establish either prong, the petitioner has failed to establish that trial counsel was ineffective. Further, to establish either prong, there must be evidence to establish the claim, and that a finding of ineffective assistance cannot be found on mere speculation or conjecture. In this case there was no evidence presented to establish that any of the prospective jurors were biased or prejudiced against the Petitioner due to his race.

This Court is aware of the difficulty one may have to establish that some of the prospective jurors were biased or prejudiced against the Petitioner due to his race, but there is no law to support a conclusion that the standards to warrant relief in habeas

corpus are somewhat relaxed based upon the difficulty of proof. Given the presumptions, the deference to trial counsel, and the standard to establish that trial counsel was ineffective, there can be no other result other than a finding that the Petitioner has failed to establish grounds for relief in habeas corpus.

Petitioner alleges that trial counsel was ineffective because trial counsel was dating the therapist of one of the victims named in the Indictment (CW) and he did not disclose this relationship. As a result, alleges the Petitioner, trial counsel failed to vigorously cross examine the victim (CW).

Trial counsel testified during the habeas corpus proceeding that he and the therapist (Brenda Tebay) did date at one time, and were actually dating during his representation of the Petitioner. However, trial counsel was not sure that he and Ms. Tebay were dating at the time of the trial in this matter. The record in this case does not reveal that trial counsel disclosed this relationship. Absent any citation to the record, this Court FINDS that this relationship was not disclosed - to either the Petitioner or the Court.

The record of the trial does reveal that trial counsel did cross examine CW about certain inconsistent statements that she made to both a Department of Health and Human Resource worker (Bridgett Cox) and the investigating officer. CW admitted that she told the DHHR worker that she was not attracted to the Petitioner, however, she testified at trial during direct examination that she had romantic feelings toward the Petitioner. (Trial Transcript at 196-197). Trial counsel also brought out that when CW was questioned by the DHHR worker that she denied that the Petitioner had touched her in any inappropriate way. (Trial Transcript at 200). Trial counsel also brought to the jury's attention that CW gave a statement to both the investigating officer and the DHHR worker denying that the Petitioner did anything inappropriate and that she kept denying this for 3 months, but that people just kept asking her questions. (Trial Transcript at 201). CW was also questioned about an instant message she sent to a friend that said nothing happened of an

inappropriate manner between herself and the Petitioner. (Trial Transcript at 214).

Failing to adequately cross examine CW was the only prejudice alleged against trial counsel in this regard. In other words, there are no other allegations of prejudice to the Petitioner (the second prong of the *Strickland* standard) due to the fact that trial counsel was dating the therapist of one of the victims. It appears to this Court that even if trial counsel failed to disclose to anyone that he was in a relationship with the therapist of CW, that he did adequately cross examine CW by bring out prior inconsistent statements, and that CW had stated on prior occasions that the Petitioner had not touched her inappropriately. These issues were also argued by trial counsel in his closing argument. Therefore, even if the first prong of the *Strickland* standard is satisfied by failing to disclose this relationship, the second prong has not been satisfied in that there has been no showing that but for trial counsel's behavior, there would have been a different result.

It is also of note that other than the general allegation of failing to adequately or vigorously cross examine the victim, there are no other allegations of specific issues that should have been raised that were not raised, no allegation of specific questions that should have been asked that were not asked, or anything else that should have been done that was not done to warrant relief in habeas corpus with regard to the cross examination of CW.

On Pages 17 through 21 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, Petitioner argues that counsel ineffectively cross-examined Williamstown High School principal, George Wells. Specifically, Petitioner argues that trial counsel failed to question Mr. Wells on whether the Petitioner would be a classified as a custodian especially in light of the school law statutes. Petitioner argues that trial counsel should have asked the following questions: 1) if the petitioner had agreed to stand in the place of a parent or guardian and exercise such authority and control over pupils as is required of a teacher; 2) if the petitioner had been designated by the Principal of Williamstown High School as one of the aides who had 'agreed to exercise' the authority

of a teacher, or if the principal had enumerated the instances when petitioner might exercise the authority of a teacher; 3) if petitioner's salary had been increased to reflect an agreement to exercise such authority; and, 4) if the Petitioner was cognizant of the state law that limits a professional educator's authority and specifies that the driver of the school bus is the pupil's custodian during their transit from the school to their homes. (*See* Memorandum in Support of Petition for Post-Conviction Relief at Page 20).

First, this allegation of ineffective assistance can be decided based upon the analysis above from *Coleman v. Painter*, 215 W.Va. 592, 600 S.E.2d 304 (2004)(*per curiam*) and *State ex rel Wensell v. Trent*, 218 W.Va. 529, 625 S.E.2d 291 (2005)(*per curiam*). Mr. Wells was not called as a witness in the habeas corpus proceeding. How he would have answered these questions calls for speculation and guesswork. Second, this issue is also decided on the analysis of school law discussed below. School law, and how it defines a teacher's aide's duties, cannot be used as an excuse to commit a crime. The jury was provided with the appropriate definition of "custodian" as set out in the criminal statute. The jury determined, based upon all the facts of this case, that the Petitioner was a "custodian" as that term is defined under the criminal laws of this State.

The Petitioner complains that trial counsel failed to have a video, presented by the State, in a form that the jury could take into the jury room and view. This video was available for the jury to view during their deliberations, they just had to view it in the courtroom as opposed to viewing it in the jury room. The Court does not see how the Petitioner was prejudiced by this conduct. Viewing the evidence in the courtroom or the jury room should not make any difference on the effect the evidence has on a juror. It is what the evidence shows that is the evidence, not where the evidence is viewed.

On Page 24 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, the Petitioner complains that trial counsel did not challenge, or strike, a juror who was a certified pastoral counselor and therapist. The analysis on this issue is similar to the analysis on the issue of failing to ask any juror about race - no case was cited that the

conduct complained of is *per se* ineffective assistance of counsel. The Petitioner bears the burden of proof on this issue and ineffective assistance of counsel cannot be based on mere speculation or conjecture. In this case no evidence was presented that the juror who was a certified pastoral counselor and therapist should not have been a juror in this case, or was in any manner an inappropriate juror.

On Page 27 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, the Petitioner alleges that trial counsel was ineffective for failing to call certain witnesses. The Petitioner alleges that he provided trial counsel a list of 60 to 72 names of witnesses who saw Petitioner on a regular basis between 2001 and 2003 and could testify to Petitioner's conduct during this period of time. This ground for relief can be decided on the same analysis as the allegation that trial counsel failed to call the Petitioner's wife and the mat maids (discussed more thoroughly above). In essence, since none of the list of 60 to 72 witnesses were called in this habeas corpus proceeding, this Court is unable to determine whether these witnesses would have been able to offer relevant and admissible testimony at trial. *See, State ex rel. Wensell v. Trent*, 218 W.Va. 529, 625 S.E.2d 291 (2005)(*per curiam*) and *Coleman v. Painter*, 215 W.Va. 592, 600 S.E.2d 304 (2004)(*per curiam*).

For the reasons set out above, this Court FINDS and CONCLUDES that the Petitioner has failed to establish both prongs of the *Strickland* standard for any of the grounds for relief based on a claim of ineffective assistance of counsel.

APPLICABILITY OF SCHOOL LAW

The Petitioner argues, in several different ways[1], that the jury in this criminal trial should have been instructed on certain aspects of school law, specifically as they relate to whether a teacher's aide constitutes a custodian. The Petitioner misses a very

[1] See Grounds for Relief 8, 16 and 22.

fundamental point - the Petitioner was charged with violating a criminal statute, not a school law statute. The trial in this matter was not an employment case. The Petitioner was not alleged to have acted inappropriately with regard to his duties and responsibilities as an employee of the school board, the Petitioner was alleged to have violated the criminal laws of this State.

Therefore, how the Legislature chooses to define and limit the duties and responsibilities of the various personnel who are involved in the educational system of the various counties in this state should in no way affect whether someone commits a crime. It is true that at the time the acts occurred that gave rise to this Indictment, the Petitioner was employed as a teacher's aide for the Wood County school system. However, his employment status does not give him greater protection from committing crimes, nor does it offer him less protection from committing crimes. Unless the criminal statute says otherwise, all persons are treated the same and must conform their conduct to the statute, whether they be employed as a minister, police officer, lawyer or teacher's aide.

In this Court's opinion, all the various arguments made by Petitioner that he was not a custodian under school law, is a red herring. The Petitioner was charged with violating W. Va. Code 61-8D-5. This statute makes it unlawful for any person who is a custodian of a child to engage in sexual contact with that child. For purposes of this statute, the term custodian, at the time of offense, was defined as:

> "Custodian" means a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. "Custodian" shall also include, but not be limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian.

W.Va. Code 61-8D-1(4)(1988)

This definition was the basis of the jury instructions that were given in this case and no ground for relief in this habeas corpus proceeding raises an instructional error - save not also including a definition of custodian from the school law article of the Code. This definition of "custodian" clearly says that the grant of custody does not have to occur by contract, agreement or legal proceeding. Therefore, the contract Petitioner had with his employer does not set the standard for the Petitioner's conduct as it relates to committing a crime. In essence what the Petitioner is arguing is that he is excused from committing this crime due to the school law definition of his duties. This Court does not accept this argument.

In light of the above analysis, this Court FINDS and CONCLUDES that the jury was properly instructed on the law that was applicable to the case and relief in habeas corpus should not be granted with regard to the failure to instruct the jury on issues of school law.

INSUFFICIENCY OF THE EVIDENCE

On Page Six of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, Petitioner argues that his convictions on Counts Two, Four, Six, Seven, Eight, Nine, Ten and Eleven should be overturned arguing there was insufficient evidence to convict him.

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate 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.

Syl. Pt. 3, *State v. Guthrie,* 194 W.Va. 657, 461 S.E.2d 163 (1995).

In Counts Two, Four, and Six the Petitioner was convicted of Sexual Abuse by a Custodian in violation of W.Va.Code §61-8D-5. As it relates to Count Two, the jury was instructed that before the Petitioner could be found guilty of Sexual Abuse by a Custodian the State must prove beyond a reasonable doubt that:

1. The [Petitioner], Jerome M. Blaney
2. in Wood County, West Virginia
3. between the __ day of February, 2002 and the __ day of June 2002
4. did subject C.R.W., a child to sexual contact by intentionally placing C.R.W.'s hand on his penis over his clothing while on a Wood County School Bus
5. and that at the time of said act Jerome Blaney and C.R.W. were not married to each other and Jerome Blaney was the custodian of C.R.W.
6. and that said act was done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 120)

Further, the jury was instructed that "[t]he term 'custodian', as used in these instructions, means a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. (*See* Trial Record at 119)

Here, as to the first element, the record reflects that C.R.W. identified the Petitioner during her testimony. (*See* Trial Transcript at 139-140). With regard to the second element, C.R.W. testified that during her seventh grade year she rode the school bus to and from school within Wood County. (*See* Trial Transcript at 139,142). In terms of the third element of the offense, C.R.W. testified the Petitioner began touching her at

some point between February through June 2002. (*See* Trial Transcript at 150-151).

As to the fourth element of the offense, she testified that during the second semester of her seventh grade she would have been thirteen years old and that at that time the Petitioner was thirty-eight years old. (*See* Trial Transcript at 150). Further, C.R.W. testified that while on the school bus on her way home the Petitioner took her hand and placed it on his penis and that she did not tell him to stop, but that she pulled her hand away. (*See* Trial Transcript at 151-152).

As it relates to the fifth element, Mr. Wells, the assistant principal at Williamstown High School at the time the incident took place and who has fifteen years experience in the education field, testified that he and all staff members, including teacher's aids, have control and custody of those students they are with. (*See* Trial Transcript at 317-318). Further, C.R.W. testified that at the time she rode the bus Petitioner was the only other adult other than the bus driver.(*See* Trial Transcript at 153). In addition, C.R.W. testified that she knew the Petitioner was married to someone else. (*See* Trial Transcript at 145).

As to the last element, C.R.W. testified that she had developed romantic feelings for the Petitioner and that she wanted to be sexual with him (*See* Trial Transcript at 145, 148 and 198).

It is important to note that during cross-examination the defense brought out C.R.W.'s inconsistent statements and her previous denials that the Petitioner had done anything to her. (*See* Trial Transcript at 196-197). As stated above, matters of credibility are for the jury to decide and it appears that the jury found C.R.W. credible.

As it relates to Count Four, the jury was instructed that before the Petitioner could be found guilty of Sexual Abuse by a Custodian the State must prove beyond a reasonable doubt that:

> 1. The [Petitioner], Jerome M. Blaney
> 2. in Wood County, West Virginia
> 3. between the __ day of February, 2002 and the __ day of June 2002, but at a time separate and apart from the act alleged in Count

Two of the Indictment
4. did subject C.R.W., a child to sexual contact by intentionally placing C.R.W.'s hand on his penis over his clothing while on a Wood County School Bus
5. and that at the time of said act Jerome Blaney and C.R.W. were not married to each other and Jerome Blaney was the custodian of C.R.W.
6. and that said act was done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 122)

The same analysis as in Count Two would apply to Count Four. As to the first element, the record reflects that C.R.W. identified the Petitioner during her testimony. (*See* Trial Transcript at 139-140). With regard to the second element, C.R.W. testified that during her seventh grade year she rode the school bus to and from school within Wood County. (*See* Trial Transcript at 139,142) In terms of the third element of the offense, C.R.W. testified the Petitioner began touching her at some point between February through June 2002. (*See* Trial Transcript at 150-151).

As to the fourth element of the offense, she testified that during the second semester of her seventh grade she would have been thirteen years old and that at that time the Petitioner was thirty-eight years old. (*See* Trial Transcript at 150). Further, C.R.W. testified that while on the school bus on her way home the Petitioner took her hand and placed it on his penis on two separate occasions. (*See* Trial Transcript at 152-153).

As it relates to the fifth element, Mr. Wells, the assistant principal at Williamstown High School at the time the incident took place and who has fifteen years experience in the education field, testified that he and all staff members, including teacher's aids, have control and custody of those students they are with. (*See* Trial Transcript at 317-318). Further, C.R.W. testified that at the time she rode the bus Petitioner was the only other adult other than the bus driver.(*See* Trial Transcript at 153). In addition, C.R.W. testified that she knew the Petitioner was married to someone else. (*See* Trial Transcript at 145).

As to the last element, C.R.W. testified that she had developed romantic feelings for the Petitioner and that she wanted to be sexual with him (*See* Trial Transcript at 145, 148 and 198).

In terms of Count Six, the jury was instructed that before the Petitioner could be found guilty of Sexual Abuse by a Custodian the State must prove beyond a reasonable doubt that:

> 1. The [Petitioner], Jerome M. Blaney
> 2. in Wood County, West Virginia
> 3. between the __ day of February, 2002 and the __ day of June 2002
> 4. did subject C.R.W., a child to sexual contact by intentionally touching C.R.W.'s vagina above her clothing while on a Wood on a Wood County School Bus
> 5. and that at the time of said act Jerome Blaney and C.R.W. were not married to each other and Jerome Blaney was the custodian of C.R.W.
> 6. and that said act was done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 124)

Again, as to the first element, the record reflects that C.R.W. identified the Petitioner during her testimony. (*See* Trial Transcript at 139-140). With regard to the second element, C.R.W. testified that during her seventh grade year she rode the school bus to and from school within Wood County. (*See* Trial Transcript at 139,142) In terms of the third element of the offense, she testified that she does not know the exact date this incident occurred, but that it was around the spring of 2002. (*See* Trial Transcript at 154)

In terms of the fourth element of the offense, C.R.W. testified that while on the school bus on her way home the Petitioner would rub her leg and placed his hand between her legs and over her vagina. (*See* Trial Transcript at 154).

As it relates to the fifth element, Mr. Wells, the assistant principal at Williamstown High School at the time the incident took place, and who has fifteen years experience in

the education field, testified that he and all staff members, including teacher's aids, have control and custody of those students they are with. (*See* Trial Transcript at 317-318). Further, C.R.W. testified that at the time she rode the bus Petitioner was the only other adult other then the bus driver on the bus. (*See* Trial Transcript at 153). In addition, C.R.W. testified that she knew the Petitioner was married to someone else. (*See* Trial Transcript at 145).

As to the last element, C.R.W. testified that she had developed romantic feelings for the Petitioner and that she wanted to be sexual with him (*See* Trial Transcript at 145, 148 and 198).

In Count Seven the Petitioner was charged with Sexual Abuse in the Third Degree. The jury was instructed that before the Petitioner could be found guilty of Sexual Abuse in the Third Degree the State must prove beyond a reasonable doubt that:

> 1. The [Petitioner], Jerome M. Blaney
> 2. in Wood County, West Virginia
> 3. between the __ day of August, 2002 and the __ day of May 2003
> 4. did subject C.R.W. to sexual contact by intentionally touching C.R.W.'s vagina above her clothing while in a room at Williamstown High School
> 5. without the consent of C.R.W.
> 6. such lack of consent resulting from C.R.W. then being under sixteen (16) years of age
> 7. and the said Jerome M. Blaney then and there being more than Sixteen years of age and at least four (4) years older than C.R.W.
> 8. The said C.R.W. and Jerome M. Blaney not then and there being married to each other
> 9. and said act being done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 126-27)

As the record reflects, C.R.W. made an in court identification of the Petitioner thereby satisfying the first element. As to the second element, C.R.W. testified that this incident occurred in a room at Williamstown High School, which is located in Wood

County. (*See* Trial Transcript at 173). The third element of the offense was met by C.R.W.'s testimony that the incident in question occurred during the first semester of her eighth grade year, which began during the fall of 2002. (*See* Trial Transcript at 157 and 163).

As to the fourth element, C.R.W. testified that during her eighth grade year while in Room 113 the Petitioner would rub her leg and touch her between the legs. (*See* Trial Transcript at 173). In terms of the fifth and sixth elements, C.R.W. testified that at the end of her eight grade year, she would have been fourteen-years old. (*See* Trial Transcript at 179).

As to the seventh element of the offense, C.R.W. testified that during the second semester of her seventh grade year Petitioner would have been thirty-eight years old. (*See* Trial Transcript at 150). Therefore, it follows that the following school year the Petitioner would have been thirty-nine years old. Thereby he was more than sixteen years old and more than four years older than C.R.W at the time of the incident.

In terms of the eighth element, C.R.W. testified that she knew the Petitioner was married to someone else. (*See* Trial Transcript at 145 and 198). Finally, as to the last element, C.R.W. testified that during her eighth grade year she still had romantic feelings toward the Petitioner. (*See* Trial Transcript at 166).

In Count Eight the Petitioner was charged with Sexual Abuse by a Custodian. The jury was instructed that before the Petitioner could be found guilty of Sexual Abuse by a Custodian the State must prove beyond a reasonable doubt that:

1. the [Petitioner], Jerome M. Blaney
2. in Wood County, West Virginia
3. between the __ day of August, 2002 and the __ day of May 2003
4. did subject C.R.W., a child, to sexual contact as described in Count Seven of the Indictment
5. and that at the time of said act Jerome Blaney was the custodian of C.R.W.

The only real difference between Count Seven and Count Eight is that in Count Eight the State had to prove that the Petitioner was the custodian of the victim at the time of the offense. C.R.W. testified that when this touching occurred there were no other adults or teachers in the room other than the Petitioner. (*See* Trial Transcript at 173).

In Count Nine, the Petitioner was charged with Attempted Sexual Abuse in the Third Degree. The jury was instructed that before the Petitioner could be found guilty of Attempted Sexual Abuse in the Third Degree the State must prove beyond a reasonable doubt that:

> 1. the [Petitioner], Jerome M. Blaney
> 2. in Wood County, West Virginia
> 3. Between the __ day of August, 2002 and the __ day of December 2002
> 4. did attempt to subject C.R.W. to sexual contact by intentionally attempting to touch C.R.W.'s vagina by trying to stick his hands inside the pants of C.R.W.
> 5. without the consent of C.R.W.
> 6. such lack of consent resulting from C.R.W. then being under sixteen (16) years of age
> 7. and the said Jerome M. Blaney then and there being more than Sixteen years of age and at least four (4) years older than C.R.W.
> 8. The said C.R.W. and Jerome M. Blaney not then and there being married to each other
> 9. and said act being done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 129-30)

As previously stated, C.R.W. made an in-court identification of the Petitioner satisfying the first prong. As to the second prong, C.R.W. testified that this incident occurred in her home in Wood County (*See* Trial Transcript at 147). The third prong was met by C.R.W.'s testimony that the incident in question occurred during the first semester of her eight grade year. (*See* Trial Transcript at 163).

In terms of the fourth prong, C.R.W. testified that while in her home the Petitioner came from behind her and put his arms around her and slipped his fingers into her shorts. (*See* Trial Transcript at 165). In terms of the fifth and sixth prongs, C.R.W. testified that at the end of her eight grade year, she would have been fourteen-years old. (*See* Trial Transcript at 179).

Regarding the seventh prong, C.R.W. testified that during the second semester of her seventh grade Petitioner would have been thirty-eight years old. (*See* Trial Transcript at 150). Therefore, the Petitioner was more than sixteen years old and more than four years older than C.R.W at the time of the touching. In terms of the eighth prong, C.R.W. testified that she knew the Petitioner was married to someone else. (*See* Trial Transcript at 145). Regarding the ninth element, C.R.W. testified that during her eight grade year she still had romantic feelings toward the Petitioner. (*See* Trial Transcript at 166).

In Count Ten of the Indictment the Petitioner was charged with Sexual Abuse in the Third Degree. The jury was instructed that before the Petitioner could be found guilty of Sexual Abuse in the Third Degree the State must prove beyond a reasonable doubt that:

> 1. The [Petitioner], Jerome M. Blaney
> 2. In Wood County, West Virginia
> 3. Between the __ day of August, 2002 and the __ day of May 2003
> 4. did subject C.R.W. to sexual contact by intentionally placing C.R.W.'s hand on his penis above his clothing while in a room at Williamstown High School
> 5. without the consent of C.R.W.
> 6. such lack of consent resulting from C.R.W. then being under sixteen (16) years of age
> 7. and the said Jerome M. Blaney then and there being more than Sixteen years of age and at least four (4) years older than C.R.W.
> 8. The said C.R.W. and Jerome M. Blaney not then and there being married to each other
> 9. and said act being done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 131)

Again, like in all the other counts, the first element was satisfied by C.R.W.'s in court identification of the Petitioner. As to the second element, C.R.W. testified that this incident occurred at Williamstown High School located in Wood County. (*See* Trial Transcript at 173). The third element of the offense was met by C.R.W.'s testimony that the incident in question occurred during the fall semester of her eight grade year. (*See* Trial Transcript at 157 and 163).

As to the fourth element, C.R.W. testified that while in the room Petitioner took her hands behind her back and put them between his legs. (*See* Trial Transcript at 173-174). In terms of the fifth and sixth elements, C.R.W. testified that at the end of her eighth grade year, she would have been fourteen-years old. (*See* Trial Transcript at 179).

As to the seventh element of the offense, C.R.W. testified that during the second semester of her seventh grade Petitioner would have been thirty-eight years old. (*See* Trial Transcript at 150). Therefore, the Petitioner would have been more than sixteen years old and more than four years older than C.R.W at the time of the incident in question. Regarding the eighth element, C.R.W. testified that she knew the Petitioner was married. (*See* Trial Transcript at 145). Finally, C.R.W. testified that during her eighth grade year she still had romantic feelings toward the Petitioner. (*See* Trial Transcript at 166).

In Count Eleven of the Indictment, the Petitioner was charged with Sexual Abuse by a Custodian. The jury was instructed that before the Petitioner could be found guilty of Sexual Abuse by a Custodian the State must prove beyond a reasonable doubt that:

1. The [Petitioner], Jerome M. Blaney
2. In Wood County, West Virginia
3. Between the __ day of August, 2002 and the __ day of May 2003
4. did subject C.R.W. a child, to sexual contact as described in Count Ten of the Indictment
5. and that at the time of said act Jerome Blaney was the custodian of C.R.W. (*See* Trial Record at 133)

The only real difference between Count Ten and Count Eleven is that in Count

Eleven the State had to prove that the Petitioner was the custodian of the victim at the time of the offense. C.R.W. testified that during this time there were no other adults or teachers in the room other than the Petitioner. (*See* Trial Transcript at 173).

Based upon the above analysis of the standard of review for an allegation of insufficient evidence to support a conviction, the elements of each offense for which the Petitioner was found guilty, and the evidence presented before the jury, this Court FINDS and CONCLUDES that there was sufficient evidence to support each count to which the Petitioner was convicted. Therefore, Petitioner's argument that there was insufficient evidence to sustain a conviction of Counts Two, Four, Six, Seven, Eight, Nine, Ten and Eleven is DENIED.

MISCELLANEOUS ARGUMENTS

Beginning on page 6 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, Petitioner argues that Counts 15, 17, and 19 were vague because the statute in question does not define sexual organs/vaginal area. The Petitioner further argues that the Court did not instruct the jury on this issue. The Court would FIND that this argument is moot since he was found not guilty of these counts by the jury.

Petitioner further argues that Counts 15, 17 and 19, which names S.H. as the victim, served to bolster the counts regarding victim C.W. and thus had a "spill over" effect. Petitioner further questions why these Counts were joined in the same indictment. (*See pro se* Memorandum in Support of Petition for Post-Conviction Relief at Page 9). Pursuant to Rule 8(a) (1) of the WV Rules of Criminal Procedure "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character." Here, as Petitioner admits, the allegations by both victims are similar, the victims are the same age and claim to be abused during the same time period. (*See* Memorandum in Support of Petition for Post-Conviction Relief at Page 7). Therefore,

these Counts were properly brought in the same indictment.

Further, even if defense counsel would have sought to sever the counts, it would be unlikely that the Court would have granted this request. As the Supreme Court of Appeals of West Virginia has noted: "[i]n reviewing federal authority relating to severance of multiple counts, this Court notes that it is widely recognized that prejudice is not present under the "other crimes" rule if evidence of each of the crimes charged would be admissible in a separate trial for the other." *State v. Rash,* 226 W.Va. 35 at 46, 697 S.E.2d 71, 81 (2010) (quoting State v. Penwell, 199 W.Va 111 at 118, 483 S.E.2d 240 at 247 (1996)). The Supreme Court of Appeals has further noted, "[c]ollateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition toward children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment." *State v. Rash,* 226 W.Va. 35 at 45, 697 S.E.2d 71, 81 (2010). Therefore, if evidence relating to each of the sexual offenses charged would be admissible in a separate trial, then it is likely that the counts would not have been severed. Further, the Petitioner was acquitted on the charges regarding S.H. so it does not appear that he was unfairly prejudiced by these charges being in the Indictment, or that the jury misused the information.

Beginning on Page 10 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, Petitioner argues that in Count 7 he was charged with touching the vagina of C.R.W instead of the language of the statute which uses the term "sexual organ". Count 7 states:

> That between the ___ day of August, 2002 and the ___ day of May, 2003, in Wood County, West Virginia, Jerome M. Blaney committed the offense of "Sexual Abuse in the Third Degree" by unlawfully subjecting C.R.W. to sexual contact, at a time when the said C.R.W. was unable to consent

thereto because she was under the age of sixteen (16) years, and he, the said Jerome M. Blaney, was over the age of sixteen (16) years and more than four (4) years older than C.R.W., by intentionally touching C.R.W.'s vagina above her clothing while in a room at Williamstown High School, the said Jerome M. Blaney and C.R.W. not then and there being married to each other, and said act being done for the purpose of gratifying the sexual desire of Jerome M. Blaney and or C.R.W., against the peace and dignity of the State.

Pursuant to W.Va.Code § 61-8B-9 (a), "A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent, when such lack of consent is due to the victim's incapacity to consent by reason of being less than sixteen years old." "Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party. W.Va.Code § 61-8B-1(6).

The jury was instructed that:

Sexual Abuse in the Third Degree is committed when any person who is sixteen years of age or older, subjects another person to sexual contact without the consent of such other person, such lack of consent resulting from the victim being under the age of sixteen (16) years and the accused being at least four (4) years older than the victim.

Before the Defendant can be found guilty of Sexual Abuse in the Third Degree as charged in Count Seven of the Indictment, the State must overcome the presumption that he is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that:

1. The Defendant, Jerome M. Blaney
2. In Wood County, West Virginia
3. Between the __ day of August, 2002 and the __ day of May, 2003
4. did subject C.R.W. to sexual contact by intentionally touching C.R.W.'s vagina above her clothing while in a room at Williamstown High School

5. without the consent of C.R.W.

6. such lack of consent resulting from C.R.W. then being under sixteen (16) years of age

7. and the said Jerome M. Blaney then and there being more than sixteen (16) years of age and at least four (4) years older than C.R.W.

8. the said C.R.W. and Jerome M. Blaney not then and there being married to each other

9. and said act being done for the purpose of gratifying the sexual desire of Jerome M. Blaney and/or C.R.W.

(Trial Record at 126-27)

The jury was also instructed that: "The term 'sexual contact,' as used in these instructions, means any intentional touching, either direct or through clothing, of any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party." (*See* Trial Record at 119)

It appears that although the indictment and the instructions do reference the term "vagina", the statute makes clear, and the jury was instructed, that "sexual contact" means any intentional touching **of any part of the sex organ.** C.R.W. testified that the Petitioner touched her "between the legs" during her 8th grade year when she got out of study hall and went to Room 113. (*See* Trial Transcript at 173).

The statute makes it a crime to touch the "sex organs" of another. The State, in the indictment in this case, chose to use a more narrow term "vagina" than is necessary under the statute. The jury was instructed on the broad term of the statute, but the jury was also instructed that before they could find the Petitioner guilty of the offense charge that they must find that the Petitioner touched the victim's vagina. The State chose to allege that the Petitioner's conduct was more narrowly defined than the conduct prohibited by statute - the State alleged "touching the vagina" while the law makes it a crime to "touch the sex organ". Therefore, since the State chose to charge an act more narrow than the statute

and the jury was told that the State must prove the more narrow conduct before they could convict the Petitioner, there was no error.

On Pages 13 through 15 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, Petitioner argues that his convictions of Counts 6, 7, 10 and 12 should be vacated because the jury instruction contains the word "above" instead of the statutory language "through." Petitioner was found not guilty of Count 12 so that is moot. (*See* Trial Record at 107)

In terms of Counts 6, 7 and 10, the Petitioner is correct that the instructions contain the word "above" instead of "through." (*See* Trial Record at 124-125 [Count 6], 126-127 [Count 7], 131-132 [Count 10]. However, as Petitioner points out in his Memorandum, the jury instruction also contains the definition for "sexual contact" which does contain the correct statutory language. (*See* Trial Transcript at 119).

On Page 21 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, the Petitioner argues that the prosecutor failed to establish the proper foundation to qualify Mr. George Wells, the assistant principal at Williamstown High School at the time of the events leading to the Indictment in this case, as an expert. Specifically, the Petitioner argues that Mr. Wells should have been qualified as an expert before being able to answer the following question: "And at the time that [students are] there at school whose custody are they in?" (*See* Trial Transcript at 317). After reviewing Mr. Wells's testimony, the Court notes that Mr. Wells was testifying as a fact/lay witness. (*See* Trial Transcript at 314 - 323). Under Rule 701 of the *West Virginia Rules of Evidence*, "[i]f [a] witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

In the case at bar, Mr. Wells testified that at the time of the trial he was the Principal of Pleasants County Middle School. (*See* Trial Transcript at 314). He went on to

testify that he was the Assistant Principal at Williamstown Jr./High School from 2000 to 2003. (*See* Trial Transcript at 315). He further testified that he had seven years of experience in administration and fifteen total years in the education field. (*See* Trial Transcript at 315). He testified as to his duties and responsibilities. (*See* Trial Transcript at 317). He also testified as to the Petitioner's duties and authority. Mr. Wells testified that the Petitioner's "primary responsibility was with the one student; however, he did, you know, with all employees, teachers, aids, cooks, they had responsibility of being in charge and helping with students at the school." (*See* Trial Transcript at 316-317). He further testified that Petitioner "would have the same ability as any other teacher, as far as making sure kids were - - if they were out of line, disciplining them, handling - - you know, if a student needed a pass slip to go from room to room, just like the secretary's aides, teachers, would be responsible to help with that. But again his primary responsibility was with the one particular student." (*See* Trial Transcript at 317). He further testified that when a child comes to school staff members and himself are responsible for their care. (*See* Trial Transcript at 317). He went on to testify that teachers, teacher's aides, service personnel and the professional staff are responsible for the control of the students. (*See* Trial Transcript at 317.) All this trial testimony was presented without objection by Petitioner's trial counsel. Further, the Petitioner does not complain about this testimony in this habeas corpus proceeding.

When asked by the prosecutor: "And at that time that [students are] there at school, whose custody are they in?" Mr. Wells responded: "I believe they're under my custody, as well as staff members, whoever they're with at that time." (*See* Trial Transcript at 317-318). The Court is of the opinion that Mr. Wells was qualified to express his understanding of who had the care, control and custody of students. Mr. Wells testified that he had fifteen years experience in the education field and that he had been an assistant principal and principal during those times. It's the Court's opinion that during that tenure he was able to perceive how students, teachers, staff and the administration

interacted and the duties and responsibilities owed to each other. Further his testimony on who had control, custody and care of students was helpful to have a clear understanding of a fact in issue.

It is not unreasonable that Mr. Wells would be considered an expert witness given his years of training and experience as revealed by this testimony set out above. If he would be considered an expert witness, then there would be no error with regard to his testimony.

This testimony by Mr. Wells did not go unchallenged by trial counsel. Defense counsel was able to cross-examine Mr. Wells on his understanding of the phrase "custody" as evidenced by the following interaction:

Q: "Mr. Wells, when you use that phrase 'custody,' you're not technically using it in a technical legal sense, are you?"

A: "I'm not sure I understand your question."

Q: "Well, you know, certainly you've heard phrases about parents having custody of children; right?"

A: "Correct."

Q: "Okay, And you're familiar that that arises out of a court order; right?"

A: "Correct."

Q: "You're not talking about that kind of a custody situation, are you?"

A: "No."

Q: "You don't have some court order that says that you have custody of all these children every day, do you?

A: "No."

(*See* Trial Transcript at 318 - 319)

The Court FINDS that Mr. Wells' testimony was proper.

On Page 22 of his *pro se* Memorandum in Support of Petition for Post-Conviction Relief, the Petitioner alleges that trial counsel sought to introduce evidence that one of the

victims named in the Indictment had been abused by a family member. The Petitioner fails to cite to the record where this discussion occurred. It is not the obligation of the court to review the record to find this discussion - it is the obligation of the Petitioner to cite to the record.

Further, there was no evidence presented on this issue during this habeas corpus proceeding. Therefore, there is no evidence of one of the victims being abused by a family member, when it occurred, what the abuse was, or how it would have affected the testimony of that witness. Without this evidence the Petitioner is asking this Court to speculate and guess - something this Court is not permitted to do.

For the reasons set out above, this Court FINDS and CONCLUDES that the Petitioner has not presented sufficient evidence and/or argument to warrant relief in post conviction habeas corpus. Therefore, the Petitioner's various petitions and amended petitions for relief in post-conviction habeas corpus are ORDERED Denied.

The Clerk of this Court is to provide copies of this OPINION AND ORDER to counsel of record.

ENTER: 9-20-2011

JEFFREY B. REED, JUDGE