

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Jason Browning,
Petitioner Below, Petitioner**

vs) No. 13-0558 (Mingo County 10-C-248)

**Evelyn Seifert, Warden,
Respondent Below, Respondent**

FILED

February 18, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jason Browning, by counsel Susan J. Van Zant, appeals an order of the Circuit Court of Mingo County entered April 26, 2013, which denied his motion for reconsideration of a previous circuit court order denying his petition for a writ of habeas corpus. Respondent Evelyn Seifert, Warden, by counsel Laura Young, filed a response.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In April of 2005, petitioner was indicted by a Mingo County Grand Jury on sixteen counts of sexual abuse by a parent, guardian, or custodian, and sixteen counts of third degree sexual assault involving two twelve-year old sisters. Petitioner, who was then twenty-four years old, was the boyfriend of the victims' mother. Both victims contracted a sexually-transmitted disease from petitioner and one of the victims became pregnant. The sexual acts at issue occurred from March to October of 2004.

On December 1, 2005, petitioner entered into a plea agreement¹ in which he agreed to plead guilty to two counts of sexual abuse by a parent, guardian, or custodian, and two counts of sexual assault in the third degree. In exchange for the guilty plea, the State agreed to dismiss the remaining counts of the indictment. The plea agreement also provided that the State would recommend the statutory sentence of not less than ten nor more than twenty years of incarceration for each count, and would further recommend the statutory sentence of not less than one nor more than five years of incarceration for each count of sexual assault in the third degree. Additionally, the plea agreement provided that the State would recommend that the

¹The plea agreement was not made a part of the appellate record. The relevant facts recounted herein regarding the terms of the plea agreement are derived from the Final Order Denying Omnibus Petition for Writ of Habeas Corpus, entered January 18, 2013.

sentences for sexual abuse by a parent, guardian, or custodian run concurrently to each other and that the sentences for third degree sexual assault would run consecutively to each other and consecutively to the sentences for sexual abuse by a parent, guardian, or custodian.

Following the January 9, 2006 sentencing hearing, the circuit court ordered petitioner sentenced to not less than ten nor more than twenty years of incarceration for each count of sexual abuse by a parent, guardian, or custodian, and not less than one nor more than five years of incarceration for each count of sexual assault in the third degree.² The sentences were ordered to run consecutively. Petitioner's request for probation and alternative sentencing was denied.

On August 6, 2010, petitioner filed a petition for writ of habeas corpus alleging multiple grounds as set forth on the Checklist of Grounds for Post Conviction Habeas Corpus Relief. *See Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). Petitioner filed an amended habeas petition on August 22, 2012, alleging, in relevant part, claims of ineffective assistance of counsel and lack of mental competency at the time of the crime due to heavy drug use.

Following an omnibus hearing, the circuit court denied petitioner's petition for writ of habeas corpus by final order entered January 18, 2013. Petitioner's motion for reconsideration was denied by order entered April 26, 2013. This appeal followed.

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, 377, 701 S.E.2d 97, 99 (2009).

On appeal, petitioner argues that he was denied effective assistance of counsel during the plea proceedings because his previous counsel failed to properly advise him that the circuit court was not bound to sentence him strictly according to the terms of the plea agreement; failed to effectively communicate the options available to petitioner with regard to trial and entering a plea; and failed to communicate the possibility of negotiating the plea to a lesser included offense. Petitioner argues that had he been completely informed, he would have chosen a jury trial and that, in effect, his guilty plea was entered into involuntarily.

With regard to claims of ineffective assistance of counsel, this Court has previously held as follows:

²The circuit court also imposed monetary fines.

“In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged 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).

Syl. Pt. 3, *Ballard v. Ferguson*, __ W.Va. __, __, 751 S.E.2d 716, 717 (2013). This Court further held that

“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.” Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 6, *State v. Meadows*, 231 W.Va. 10, __, 743 S.E.2d 318, 321 (2013). Finally, courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *State v. Miller*, 194 W.Va. at 15, 459 S.E.2d at 126 (quoting *Strickland v. Washington*, 466 U.S. at 689).

In his second and final assignment of error, petitioner argues that, due to heavy drug use, he lacked mental competency with respect to his sexual contact with one of the victims.³ Petitioner contends that although he believes he had sexual contact with the victim, he claims he was intoxicated and on drugs at the time and does not remember what occurred. He also argues that, when he entered into the plea agreement, he had only been sober for a brief period of time.

In its forty-five page order denying petitioner’s petition for writ of habeas corpus entered January 18, 2013, the circuit court specifically addressed the assignments of error raised in the present appeal.⁴ Our review of the circuit court’s order and the record before us reflects no clear

³In contrast, with respect to the victim who became pregnant, petitioner does not claim lack of mental competency with regard to his sexual contact with her.

⁴In addition to the assignments of error raised in the instant appeal, the circuit court’s order also addressed the following issues: double jeopardy; improper venue; pretrial delay; faulty indictment; the State’s knowing use of perjured testimony; claims concerning the use of informers to convict; constitutional errors in evidentiary rulings; petitioner’s absence from part of the proceedings; improper communications between prosecutor or witness and jury; refusal to turn over witness notes after witness had testified; excessive sentence; consecutive sentences for the same transaction; severer sentence than expected; unfilled plea bargain; sufficiency of the evidence; erroneous information in the presentence report; conflict of interest with the

error or abuse of discretion. Accordingly, 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 January 18, 2013, Final Order Denying Omnibus Petition for Writ of Habeas Corpus to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 18, 2014

CONCURRED IN BY:

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

prosecuting attorney's office; language barrier to understanding the proceedings; mistaken advice of counsel as to parole or probation eligibility; involuntary guilty plea, coerced confession, and question of actual guilt upon an acceptable plea; and suppression of helpful evidence by the prosecutor.

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

JASON BROWNING,

Petitioner,

v.

EVELYN SEIFERT, Warden,

Defendant.

ADMITTED
2013 JAN 18
MINGO COUNTY
CIRCUIT COURT
Civil Action No. 10-C-248
Underlying Felony Case No. A05-F-50
Honorable Michael Thornsby

FINAL ORDER DENYING OMNIBUS PETITION FOR WRIT OF HABEAS CORPUS

This matter comes before the Court pursuant to the Petitioner, Jason Browning's, 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 treated as an Omnibus Habeas Corpus action and directed counsel to address all Losh v. McKenzie, 166 W.Va. 762 (1981) factors. The parties appeared as follows the Petitioner, Jason Browning, via video teleconference, and through counsel, Susan Van Zant; and the Respondent Warden, Evelyn Seifert, through counsel, Michael Sparks, Prosecuting Attorney. The Court now makes the following Findings of Fact and Conclusions of Law and Judgment, to-wit:

I. Findings of Fact

1. On August 6, 2010, the Petitioner, Jason Browning, filed the instant, pro se, Motion for Writ of Habeas Corpus Relief with this Court asserting that the trial court denied Due Process and Equal Protection of the Law by violating the plea agreement entered between the Petitioner and the State of West Virginia; and Motion for Correction or Reduction of sentence because the Petitioner stated that he was declared mentally incompetent in 1995 and re-evaluated

in 1999 and sent to St. Mary's Hospital for treatment. Also the Petitioner also stated that he was attending G.E.D. classes and sexual offender treatment classes and is employed at the prison.

2. The Petitioner, Mr. Browning, also completed a Losh checklist in which he asserts that the statute under which conviction obtained was unconstitutional; indictment shows on its face no offense was committed; involuntary guilty plea; mental competency at the time of trial; mental competency at the time of trial cognizable even if not asserted at proper time or if resolution not adequate; incapacity to stand trial due to drug use; language barrier to understand the proceedings; consecutive sentence for same transaction; coerced confessions; suppression of helpful evidence by prosecutor; state's knowing use of perjured testimony; unfulfilled plea bargains; information in pre-sentence report erroneous; ineffective assistance of counsel; double jeopardy; defects in indictment; improper venue; pretrial delay; prejudicial joinder of defendants; refusal to turn over witness notes after witness has testified; claim of incompetence at time of offense, as opposed to time of trial; claims concerning use of informers to convict; constitutional errors in evidentiary rulings; sufficiency of evidence; defendant's absence from part of proceedings; improper communications between the prosecutor or witness and jury; question of actual guilt upon an acceptable guilty plea; severer sentence than expected; excessive sentence; and mistaken advice of counsel as to parole or probation eligibility. Each of the remaining claims under the Losh checklist were waived by the Petitioner.

3. On August 22, 2012, the Petitioner filed an amended Petition for Habeas Corpus in which the Petitioner asserted the following claims: ineffective assistance of counsel; mental competency at the time of the crime due to heavy drug use; severer sentence than expected; conflict of interest with the Prosecuting Attorney's Office; and coerced confession.

4. The Petitioner was indicted by the April 2005 Mingo County Grand Jury on sixteen (16) counts of sexual abuse by parent, guardian, and/or custodian; and sixteen (16) counts of third degree assault. The two victims were twelve years old, both contracted a sexually transmitted disease and one became pregnant. It was alleged that the Petitioner would make the victims perform sexual acts with him and this occurred from March, 2004, to October, 2004.

5. On December 1, 2005, the Petitioner entered into a plea agreement wherein that the Petitioner would plead guilty to "Sexual Abuse by a Parent, Guardian, or Custodian as charged in Count I and Count II of the Indictment and Sexual Assault in the Third Degree as charges in Count XVII and Count XVIII." In exchange for a guilty plea in the above four counts, the State dismissed all other counts against the Petitioner. The State of West Virginia, in the plea agreement, recommended the "statutory sentence of not less than ten (10) no more than (20) years with regards to each count of sexual abuse by a parent, guardian, or custodian and will further recommend the statutory sentence of not less than one (1) nor more than five (5) years with regards to each count of sexual assault in the third degree. The State will recommend that the sentences for Sexual assault in the Third Degree run consecutively ... will further recommend that the respective sentences for sexual abuse by a parent, guardian, or custodian run concurrently with to each other but consecutively to the sentences for Sexual Assault in the Third Degree." Furthermore, for an exchange of a guilty plea the State agreed that it would not initiate a proceeding to establish the Petitioner as a "sexually violent predator."

6. On January 9, 2006, a sentencing hearing was held. This Court sentenced the Petitioner/Defendant to: Count I Sexual Abuse by Parent, Guardian or Custodian – to an indefinite term of not less than (10) years no more than twenty (20) years and a fine of Five Thousand Dollars (\$5,000); Count II Sexual Abuse by Parent, Guardian or Custodian – to an

indefinite term of not less than (10) years no more than twenty (20) years and a fine of Five Thousand Dollars (\$5,000; Count XVII Sexual Assault in the Third Degree – to an indefinite term of not less than one (1) year nor more than five (5) years and a fine of Ten Thousand Dollars (\$10,000.00); Count XVIII of Sexual Assault in the Third Degree - to an indefinite term of not less than one (1) year nor more than five (5) years and a fine of Ten Thousand Dollars (\$10,000.00). The Court ordered that the sentences should run consecutively that that the Petitioner should serve the sentence for Count I, then the sentence for Count II, then the sentence for Count XVII, and then the sentence for Count XVIII. The Defendants request for probation and alternative sentencing was denied.

7. At the Plea Hearing on December 1, 2005, in the underlying matter, the following colloquy occurred:

Court: Do you understand that I was not there when the parties talked? I wasn't a party to those conversations, discussions or negotiations. There is no agreement as to punishment or probation and the decision as to sentencing, as to sentencing, as to punishment in this case based upon the crime or crimes that you plea to is entirely in the sound discretion of the Court. Do you understand that?

Petitioner: Yes.

Court: As if, for any reason, the Court would not follow any recommendation made by the state or any recommendation made by your attorney and you would not like the sentence that would be imposed you would not then be allowed to withdraw or revoke your plea agreement. Do you understand that?

Petitioner: Yes.

Court: The plea agreement that has been provided to the Court reads as follows:

"Now come the State of West Virginia, by Assistant Prosecuting Attorney, Teresa D. Maynard, and the Defendant, Jason Browning, by counsel, Cecil Varney, and tend the following plea agreement:

(1) The Defendant will plead guilty to sexual abuse by a parent, guardian or custodian as charged in Count I and Count II of the Indictment A05-F-50 and sexual

assault in the third degree as charged in Count XVII and Count XVIII of the Indictment A05-F-50.

(2) The penalty for said sexual abuse by a parent, guardian or custodian is imprisonment in the penitentiary for not less than ten (10) nor more than twenty (20) years, or fined not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00) and imprisonment in the penitentiary for not less than ten (10) nor more than twenty (20) years.

(3) The penalty for said sexual assault in the third degree is imprisonment in the penitentiary for not less than one (1) year nor more than five (5) years, or fined not more than ten thousand dollars (\$10,000.00) and imprisonment in the penitentiary for not less than one (1) years nor more than five (5) years.

(4) The State will recommend the statutory sentence of not less than ten (10) nor more than twenty (20) years with respect to each count of sexual abuse by a parent, guardian, or custodian and will further recommend the statutory sentence of not less than one (1) nor more than five (5) years with regard to each count of sexual assault in the third degree.

(5) The State will recommend that the sentences for sexual assault in the third degree run consecutively.

(6) The State will further recommend that the respective sentence for sexual abuse by a parent, guardian, or custodian run concurrently to each other but consecutively to the sentences for sexual assault in the third degree.

(7) The State will dismiss the remaining charges contained in A05-F-50.

(8) The State of West Virginia will recommend that the Defendant be required to serve a period of supervised release of fifty (50) years upon the expiration of the respective sentences pursuant to West Virginia Code 61-12-26 (a), et seq.

(9) The Defendant understand that by entering his plea, he will be subject to the provisions of the sexual offender registration act, as set forth in 15-21-1, et seq. of the West Virginia Code.

(10) The State will not initiate proceeding to establish that the Defendant is a "sexually violent predator," as defined in 15-12-2 (k).

(11) That the Defendant will voluntarily submit to a DNA testing to establish the paternity of the newly born child of Brittany Noe.

(12) That the Defendant will receive credit for all time served with respect to the above captioned charges.

(13) *The State reserves the right to comment on an post-trial matters.*

(14) *The Defendant will be required to give a factual basis for the within plea.*

(15) *There have been no promised or representations made to the Defendant by the State of West Virginia or any agent thereof as to the final disposition of this case. The State of West Virginia's sentencing recommendation is not binding upon the Court. That within plea is not conditioned upon the Court follow the State of West Virginia's sentencing recommendation.*

(16) *The Defendant knowingly, voluntarily and intelligently signed this plea agreement after consulting with counsel and fully understanding the consequences thereof.*

(17) *The foregoing terms and conditions constitute the entire plea agreement between the State of West Virginia and the Defendant.*

Wherefore, the State of West Virginia and the Defendant respectfully move this Honorable Court to approve the foregoing plea agreement."

Court: This plea agreement is purportedly signed by you, by Mr. Varney and by Ms. Maynard. Mr. Browning, did you sign this plea agreement that I just read to you word for word?

Petitioner: Yes.

Court: Mr. Varney, did you sign it on behalf of the Defendant?

Mr. Varney: I did, Your Honor.

Court: And, Ms. Maynard, did you sign it on behalf of the State of West Virginia?

State: I did, Your Honor.

Court: Mr. Browning, not that I've read the plea agreement to you word for word, is it, in fact, the entire agreement that you have with the State of West Virginia?

Petitioner: Yes

Court: Is there anything whatsoever that you think has been promised to you or that's part of your plea agreement that's not written down in black and white in this pleas agreement that I just read to you?

Petitioner: No.

...

Court: Do you understand that no one can promise you probation and that all matters of sentencing lie in the discretion of the Court? Do you understand that?

Petitioner: Yes.

...

Court: Have you understood all matter I've explained to you today?

Petitioner: Yes, sir.

Court: And is each and every answer you've given me been a truthful answer?

Petitioner: Yes.

Court: Do you have any questions at all about your guilty pleas or any of the right I've explained to you?

Petitioner: No.

Court: Do you freely and voluntarily tender these four pleas of guilty to the Court?

Petitioner: Yes.

Court: This is your last opportunity before the Court makes findings. Do you still want to enter these pleas?

Petitioner: Yes.

Transcript from Plea Hearing, pgs 6-11, 29, 45 (Attached as Exhibit 1.)

II. Conclusions of Law

1. W.VA. CODE § 53-4A-1(a) provides, in relevant part:

Any person convicted of a crime and incarcerated under sentence of imprisonment therefore 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. W.VA. 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.

3. A habeas corpus claim requires the petitioner to allege a denial of a constitutional right. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, State ex rel. McMannis v. Mohn, 163 W.Va. 129, 130, 254 S.E.2d 805, 806 (1979). Once the petitioner has established the asserted ground involves a constitutional issue, W.VA. CODE § 53-4A-1 (b) and (c) requires a determination of whether the claim has been previously and finally adjudicated or waived.

4. To prevail in a habeas corpus action, the "petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. Pt. 1, in part, State ex rel. Scott v. Boles, 150 W.Va. 453, 453, 147 S.E.2d 486, 487 (1966)

5. The Court next considers the instant Petition and Amended Petition and all grounds for relief asserted therein. Due to the interrelated nature of the asserted grounds, several issues will be examined collectively.

A. Double jeopardy.

6. “The Double Jeopardy Clause to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” State v. Minigh, 224 W.Va. 112, 120 (2009) (citing State v. Gill, 187 W.Va. 136, 138 (1992)).

7. ““The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.” Minigh, 224 W.Va. at 120 (citing Syllabus Point 1, Conner v. Griffith, 160 W.Va. 680 (1977)).

8. “In order to establish a double jeopardy claim, the defendant must first present a prima facie claim that double jeopardy principles have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant.” Syllabus point 2, State v. Sears, 196 W.Va. 71 (1996).

9. The Petitioner alleges that he received two charges for one crime. However, the Petitioner acknowledged that there were two separate victims.

10. The Court **FINDS** that the Petitioner has not been punished for the same crime twice. Count I and Count XVII were in regard to victim Brittany N. Count II and Count XVIII were in regard to victim Bridgett N.

11. Accordingly, in light of the foregoing discussion, the Court **FINDS** that the Petitioner's Double Jeopardy rights were not violated. Petitioner asserted ground for relief to double jeopardy is without merit and the same is hereby **DENIED**.

B. Improper venue.

12. Petitioner in his Losh checklist, claims that venue was improper in the underlying case.

13. The Court **FINDS** that the Petitioner bears the burden of proving the allegation in his petition.

14. Accordingly, the Petitioner, failed to introduce any evidence at the omnibus hearing or in the amended petition in regard to the fact that venue was improper. Petitioner asserted ground for relief that venue was improper is without merit and the same is hereby **DENIED**.

C. Pre-trial delay.

15. Petitioner in his Losh checklist, challenges his conviction by alleging pre-trial delay.

16. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

17. The Court **FINDS** that the Petitioner at the Omnibus hearing denied that there was any form of pre-trial delay in the underlying case.

18. Accordingly, the Court **FINDS** that there was no pre-trial delay in the underlying case. As such, the Petition will be **DENIED** as to this ground.

D. Statute under which conviction obtained was unconstitutional.

19. Petitioner in his Losh checklist, challenges his conviction by alleging that the statute under which conviction was obtained was unconstitutional.

20. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

21. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact the statute under which conviction was obtained was unconstitutional. Petitioner asserted ground for relief due to statute under which conviction was obtained was unconstitutional is without merit and the same is hereby **DENIED**.

E. Indictment shows on face no offense was committed and the indictment was defective.

22. The Petitioner in his Losh checklist and at the omnibus hearing alleges that the indictment on its face shows that no offense was committed. Specifically, the Defendant alleges that he admitted guilt for the crimes committed against Brittany N. but not Bridget N. Furthermore, he alleges that the indictment was defective because "it had a bunch of charges on it." Syl. Pt. 3, State v. Hall, 172 W.Va. 138, 304 S.E.2d 43 (1983).

23. "An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based."

24. The Court **FINDS** that the following plea colloquy with the Petitioner on the issue of factual basis for each of the victims during the plea hearing:

Court: Do you want to make your factual basis and disclosure at the privacy of the Bench?

Petitioner: Yes.

Court: You may approach. Mr. Browning, Count 1 is a sexual abuse by a custodian of Brittany N., which indictment states it occurred on or about March, 2004. Tell me in your own words what happened between you and Brittany N. on or about March, 2004.

Petitioner: I left and came back to the house and she was there and she was listening to this rap song and she wanted to show me a dance and one thing led to the next and the next thing you know, boom, it happened.

Court: when you say boom it happened, what happened?

Petitioner: Intercourse.

Court: You did have sexual intercourse with Brittany?

Petitioner: Yes

Court: How old were you at the time?

Petitioner: Twenty-three.

Court: That's really for another offense, but we'll get it established now. How old was Brittany N.?

Petitioner: Twelve.

Court: Was there any other adults there other than you when that occurred?

Petitioner: Now.

Court: In other words, was she under your care, custody and control?

Petitioner: Not exactly, but she was there at the house.

Court: Was her mother there?

Petitioner: No. She was at work.

Court: Was she your responsibility? Were you supposed to be watching her?

Petitioner: No. She was big enough to watch herself. I mean I came there. I guess -- I mean, I don't know, but, no, I wasn't living there at the time. I was the only adult there.

Court: When her mother left, did you --

Petitioner: -- Mother didn't know I was coming around. I was just stopping by.

Court: The law requires that the child had to be under – that you had to be a custodian and that the child had to be under your care and custody. Do you understand that?

Petitioner: I understand that.

Court: Is that true or not true in this case?

Petitioner: Well, I mean, I don't know. You tell me.

Court: I don't know. I wasn't there.

Petitioner: I was the only adult there, so, yes, I'm guilty.

Court: Do you believe that your role was such that you were acting as a custodian?

Petitioner: Yes.

Court: And do you believe your role is such that she was under your care, custody and control when you were there?

Petitioner: Yes

Court: With regard to Count 2, this is the same offense as far as the crime, that is to sexual abuse by a custodian, only the victim is said to be Bridgett N., and was said to have occurred on March, 2004, and before we proceed to that one let's go back to Count 1. Where did Brittany N., live at the time the act of sexual intercourse occurred?

Petitioner: Taylorsville.

Court: Is that in Mingo County, West Virginia?

Petitioner: Yes.

Court: I believe I was asking you about ages before and your told me you were twenty-three. How old was she?

Petitioner: Twelve.

Court: Now, with regard to Court 2, that's the criminal statute and that alleges the child Bridget N. Tell me in your own words what occurred between you and Bridgett N. around the same time period of March, 2004.

Petitioner: I don't know, I don't remember. I was on drugs. I was high.

Court: You understand I don't take guilty pleas if there is no admission of guilt. If you tell me you didn't do anything you don't have to plead guilty. You know that, and we can take this matter to trial.

Petitioner: I am saying I'm guilty to the plea. Can we do it that way?

Court: No.

Petitioner: I can't say something I don't know for sure.

Court: Are you saying you don't know because it didn't happen or that you were intoxicated and don't remember what you did?

Petitioner: Yes. I was intoxicated and don't remember.

Court: Do you believe you had sexual contact with that child?

Petitioner: Sexual contact, yes;

Court: The indictment actually charges you with sexual intercourse. The offense itself can be with sexual exploitation of or sexual intercourse or sexual intrusion or sexual contact. Did any of those things occur between your and Bridgett N.?

Petitioner: I don't remember. I'll just plead guilty of it. Brittany, I can explain, but I can't explain Bridgett.

Court: Is the reason you can't explain it because you don't believe it happened or because you were intoxicated on drugs and don't know what you did? Which one is it?

Petitioner: I was on drugs and didn't remember.

Court: Now, with regard to these two offenses, let me ask you, too, with regard to Bridgett N., did that occur also in Taylorsville, Mingo County?

Petitioner: Yes.

Court: Do you believe yourself guilty of both those charges?

Petitioner: Yes.

Court: Now, the next one is sexual assault, that's Counts 17 and 18, and you already told me the ages of both you - well, these girls are twins. Is that correct?

Petitioner: Yes.

Court: Both are the same age, twelve years old?

Petitioner: Yes.

Court: And you were twenty three?

Petitioner: Yes.

Court: You were twenty three in March 2004?

Petitioner: Yes.

Court: And I believe both indictments charge the same thing?

Petitioner: Yes.

Court: Count 17 indicates you had sexual intercourse with Brittany N. Count 18 states you has sexual intercourse with Bridgett N. The same things you told me previously, do they apply to these two counts as well? In other words, do you specifically remember an act of sexual intercourse between you and Brittany N. that occurred in March, 2004, after what you disclosed earlier?

Petitioner: Yes.

Court: And with regard to the other event that occurred in the same month, is your factual basis the same – you were on drugs and don't remember the specific facts with Bridgett?

Petitioner: I'll just plead guilty to Bridgett.

Court: Are you pleading because you believe yourself to be guilty of all these events?

Petitioner: No.

Court: Okay. Well, you understand I can't take guilty pleas from people that aren't guilty.

Petitioner: I'm telling you I'm guilty.

Court: Your just told me your weren't.

Petitioner: I misunderstood the question,

Court: Is that true? Did you misunderstood the question?

Petitioner: Yes.

Court: Do you believe yourself to be guilty of all four of these crimes?

Petitioner: Yes.

Court: And did all four of these incidents occur in Mingo County?

Petitioner: Yes.

...

Court: Mr. Browning, are you pleading guilty to these crimes because you believe yourself to be guilty of these crimes?

Petitioner: Yes.

Court: If that's what you're telling me then I'm willing to accept your factual basis, but let me explain one more time I don't want you to plead guilty to anything you're not guilty of, but you're saying you were on drugs and you did things you don't remember the exact details. If you believe yourself to be guilty to be guilty of these offenses, I'll take the plea. Do you understand?

Petitioner: Yes.

Court: I just want to make sure you understand nobody is twisting your arm to do this. You can go to jury trial and you can explain the facts as it relates to Bridgett and you can explain the facts as they relate to Brittany in whatever fashion you want to use at trial. Do you understand me?

Petitioner: Yes.

...

Court: And do you want the Court to accept your guilty pleas with regard to all four crimes?

Petitioner: Yes.

Transcript from Plea Hearing, pgs 36-43.

25. The Court **FINDS** that all thirty-two indictments in the Criminal Action No. A 05-F-50, correctly follows the language in respect to the two statutory offenses. Furthermore, the indictments do not cover one specific instance in time; however events that occur from March 2004 to October 2004.

26. Accordingly, Petitioner asserted ground for relief to that the indictments on face show no offense and that the indictments were defective, are without merit and the same is hereby **DENIED**.

F. The State knowing use of perjured testimony.

27. The Petitioner in his Losh checklist alleges that the State knowingly used perjured testimony.

28. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

29. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact that the State knowingly used perjured testimony. Petitioner asserted ground for relief to the State knowingly used perjured testimony is without merit and the same is hereby **DENIED**.

G. Claims concerning use of informers to convict.

30. The Petitioner in his Losh checklist alleges that the informers were used in his conviction.

31. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

32. The Court **FINDS** that the Petitioner never went to trial and that he entered a guilty plea pursuant to a plea agreement with the State.

33. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to claims concerning use of informers to convict. Petitioner asserted ground for relief to claims concerning use of informers to convict is without merit and the same is hereby **DENIED**.

H. Constitutional errors in evidentiary rulings.

34. The Petitioner in his Losh checklist alleges that the Court made constitutional errors in its evidentiary rulings.

35. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

36. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to constitutional errors in evidentiary rulings. Petitioner asserted ground for relief to due to constitutional errors in evidentiary rulings is without merit and the same is hereby **DENIED**.

I. Defendant's absence from part of the proceeding.

37. The Petitioner in his Losh checklist alleges that he was absent from part of the proceedings.

38. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

39. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to any moment during the underlying case that the Petitioner was absent from any court proceedings. Petitioner asserted ground for relief due to absence from part of the proceedings is without merit and the same is hereby **DENIED**.

J. Improper communications between prosecutor or witness and jury.

40. The Petitioner in his Losh checklist alleges that the informers were used in his conviction.

41. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

42. The Court **FINDS** that the Petitioner never went to trial and that he entered a guilty plea pursuant to a plea agreement with the State. That no jury was ever empaneled.

43. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to claims of improper communication between the prosecutor or witness and jury. Petitioner asserted ground for relief to claims concerning improper communication between the prosecutor or witness and jury, is without merit and the same is hereby **DENIED**.

K. Refusal to turn over witness notes after witness had testified.

44. The Petitioner in his Losh checklist alleges that a witness or witnesses refused to turn over notes after testimony was given.

45. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

46. The Court **FINDS** that the Petitioner never went to trial and that he entered a guilty plea pursuant to a plea agreement with the State.

47. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to any particular witness that refused to turn over witness notes after the witness had testified. Petitioner asserted ground for relief to claims concerning refusal to turn over witness notes is without merit and the same is hereby **DENIED**.

L. Excessive Sentence.

48. The Petitioner in his Losh checklist alleges that he received an excessive sentence.

49. “Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (W.Va. 1982); Syllabus point 9, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614 (1991).

50. The Court **FINDS** that the Petitioner’s sentence was within statutory limits and not based on impermissible factors. Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (W.Va. 1982); Syllabus point 9, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614 (1991).

51. The Court **FINDS** that sentences which are within the statutory limits are not entitled to statutory review. State v. Koon, 190 W.Va. 632, 440 S.E.2d 442 (1993).

52. The Court **FINDS** that the sentence was not based on unpermissible factors.

53. The Court **FINDS**, furthermore, that the sentences are not disproportionate to the character and degree of the offense pursuant to the West Virginia Constitution Article III, Section 5.

54. Accordingly, in light of the foregoing discussion, the Court **FINDS** that the Petitioner’s did not receive an excessive sentence. Petitioner asserted ground for relief due to receiving excessive sentence is without merit and the same is hereby **DENIED**.

M. Consecutive sentence for the same transaction.

55. The Petitioner in his Losh checklist alleges that he received consecutive sentence for the same transaction.

56. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

57. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact that he received consecutive

sentences for the same transaction. Petitioner asserted ground for relief to claims concerning consecutive sentences for the same transaction is without merit and the same is hereby **DENIED**.

N. Severer sentence than expected.

58. The Petitioner in his Losh checklist and Amended Petition allege that the Petition received a severer sentence than expected because the Petitioner was under the assumption that the two sentences for Sexual Abuse by a parent, guardian, or custodian would run concurrently, not consecutively as set forth in the plea agreement. That he was unaware the State's recommendation on sentencing in the plea agreement was not binding to the Court and that his counsel failed to inform him that sentencing would be at the discretion of the Court.

59. Syl. Pt. 2, State v. Cabell, 176 W.Va. 272, 342 S.E.2d 240 (1986), provides that:

A trial court has two options to comply with the mandatory requirements of Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure. **It may initially advise the defendant at the time the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea.** As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea.

(Emphasis added.)

60. The Court **FINDS** the following colloquy occurred between the Court, State, Counsel for Petitioner, and the Petitioner:

Court: Madam Prosecutor, is the entire plea agreement that the State with the Defendant embodied in the plea agreement that has been provided to the Court?

State: Yes, Your Honor.

Court: Is the plea agreement – Has it been discussed with the investigation officer or officers and with the alleged victims and/or their guardian as litems?

State: I've had numerous contacts with the guardian ad litem, Your Honor, as well as the arresting Officer.

Court: And are they in agreement?

State: Yes, Your Honor.

Court: Mr. Browning, did you give permission to Mr. Varney to talk to Ms. Maynard, the Prosecuting Attorney, to try to work out a plea agreement in this case? In other words, did he have your authority, your permission to talk to her?

Petitioner: Yes.

Court: Do you understand that I was not there when the parties talked? I wasn't a party to those conversations, discussions or negotiations. There is no agreement as to punishment or probation and the decision as to sentencing, as to sentencing, as to punishment in this case based upon the crime or crimes that you plea to is entirely in the sound discretion of the Court. Do you understand that?

Petitioner: Yes.

Court: As if, for any reason, the Court would not follow any recommendation made by the state or any recommendation made by your attorney and you would not like the sentence that would be imposed you would not then be allowed to withdraw or revoke your plea agreement. Do you understand that?

Petitioner: Yes.

Court: The plea agreement that has been provided to the Court reads as follows:

"Now come the State of West Virginia, by Assistant Prosecuting Attorney, Teresa D. Maynard, and the Defendant, Jason Browning, by counsel, Cecil Varney, and tend the following plea agreement:

(18) The Defendant will plead guilty to sexual abuse by a parent, guardian or custodian as charged in Count I and Count II of the Indictment A05-F-50 and sexual assault in the third degree as charged in Count XVII and Count XVIII of the Indictment A05-F-50.

(19) The penalty for said sexual abuse by a parent, guardian or custodian is imprisonment in the penitentiary for not less than ten (10) nor more than twenty (20) years, or fined not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00) and imprisonment in the penitentiary for not less than ten (10) nor more than twenty (20) years.

(20) The penalty for said sexual assault in the third degree is imprisonment in the penitentiary for not less than one (1) year nor more than five (5) years, or fined not more than ten thousand dollars (\$10,000.00) and imprisonment in the penitentiary for not less than one (1) years nor more than five (5) years.

(21) The State will recommend the statutory sentence of not less than ten (10) nor more than twenty (20) years with respect to each count of sexual abuse by a parent, guardian, or custodian and will further recommend the statutory sentence of not less than one (1) nor more than five (5) years with regard to each count of sexual assault in the third degree.

(22) The State will recommend that the sentences for sexual assault in the third degree run consecutively.

(23) The State will further recommend that the respective sentence for sexual abuse by a parent, guardian, or custodian run concurrently to each other but consecutively to the sentences for sexual assault in the third degree.

(24) The State will dismiss the remaining charges contained in A05-F-50.

(25) The State of West Virginia will recommend that the Defendant be required to serve a period of supervised release of fifty (50) years upon the expiration of the respective sentences pursuant to West Virginia Code 61-12-26 (a), et seq.

(26) The Defendant understand that by entering his plea, he will be subject to the provisions of the sexual offender registration act, as set forth in 15-21-1, et seq. of the West Virginia Code.

(27) The State will not initiate proceeding to establish that the Defendant is a "sexually violent predator," as defined in 15-12-2 (k).

(28) That the Defendant will voluntarily submit to a DNA testing to establish the paternity of the newly born child of Brittany Noe.

(29) That the Defendant will receive credit for all time served with respect to the above captioned charges.

(30) The State reserves the right to comment on an post-trial matters.

(31) The Defendant will be required to give a factual basis for the within plea.

(32) There have been no promised or representations made to the Defendant by the State of West Virginia or any agent thereof as to the final disposition of this case. The State of West Virginia's sentencing recommendation is not binding upon the Court. That within plea is not conditioned upon the Court follow the State of West Virginia's sentencing recommendation.

(33) *The Defendant knowingly, voluntarily and intelligently signed this plea agreement after consulting with counsel and fully understanding the consequences thereof.*

(34) *The foregoing terms and conditions constitute the entire plea agreement between the State of West Virginia and the Defendant.*

Wherefore, the State of West Virginia and the Defendant respectfully move this Honorable Court to approve the foregoing plea agreement."

Court: This plea agreement is purportedly signed by you, by Mr. Varney and by Ms. Maynard. Mr. Browning, did you sign this plea agreement that I just read to you word for word?

Petitioner: Yes.

Court: Mr. Varney, did you sign it on behalf of the Defendant?

Mr. Varney: I did, Your Honor.

Court: And, Ms. Maynard, did you sign it on behalf of the State of West Virginia?

State: I did, Your Honor.

Court: Mr. Browning, not that I've read the plea agreement to you word for word, is it, in fact, the entire agreement that you have with the State of West Virginia?

Petitioner: Yes

Court: Is there anything whatsoever that you think has been promised to you or that's part of your plea agreement that's not written down in black and white in this plea agreement that I just read to you?

Petitioner: No.

...

Court: Do you understand that no one can promise you probation and that all matters of sentencing lie in the discretion of the Court? Do you understand that?

Petitioner: Yes.

...

Court: Have you understood all matter I've explained to you today?

Petitioner: Yes, sir.

Court: And is each and every answer you've given me been a truthful answer?

Petitioner: Yes.

Court: Do you have any questions at all about your guilty pleas or any of the right I've explained to you?

Petitioner: No.

Court: Do you freely and voluntarily tender these four pleas of guilty to the Court?

Petitioner: Yes.

Court: This is your last opportunity before the Court makes findings. Do you still want to enter these pleas?

Petitioner: Yes.

Transcript from Plea Hearing, pgs 5-11, 29, 45

61. The Court **FINDS** that the plea hearing conformed to all requirements of Rule 11 of the West Virginia Rules of Criminal Procedure.

62. Accordingly, in light of the foregoing discussion, the Court **FINDS** that the Petitioner's did not receive a severer sentence than expected because the Petitioner was aware that sentencing laid in the sound discretion of the Court. Petitioner asserted ground for relief due to severer sentence than expected is without merit and the same is hereby **DENIED**.

O. Unfilled plea bargains.

63. The Petitioner in his Losh checklist alleges that he received an unfilled plea bargain.

64. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

65. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact that he received unfilled plea

bargain. In fact, in review of the plea bargain the State of West Virginia upheld there agreement completely. Petitioner asserted ground for relief to unfilled plea bargain is without merit and the same is hereby **DENIED**.

P. Sufficiency of Evidence.

66. The Petitioner in his Losh checklist questioning the sufficiency of evidence.

67. Syl. Pt. 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), provides that:

[W]hen reviewing the sufficiency of evidence to support a criminal conviction [it is necessary] to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of defendant's guilt 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.

68. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

69. The Court **FINDS** that at the Grand Jury Proceedings that Mingo County Sheriff's Deputy testified that both victims stated that the Petitioner, once a month, would force them to engage in sexual activity.

70. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to that the evidence was insufficient. Furthermore the Court is of the opinion the evidence on the record was substantial in nature and sufficient to warrant the plea agreement that the Petitioner entered into. Petitioner asserted ground for relief to insufficient evidence is without merit and the same is hereby **DENIED**.

Q. Information in presentence report erroneous.

71. The Petitioner in his Losh checklist alleges that he received an unfilled plea bargain.

72. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

73. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact information in the presentence report was erroneous. Petitioner asserted ground for relief to unfilled plea bargain is without merit and the same is hereby **DENIED**.

R. Conflict of interest with the Prosecuting Attorney's Office.

74. The Petitioner in his Amended Petition, alleges that prior Counsel, Jeff Simpkins, joined the Prosecuting Attorney's Office and thus created a conflict of interest. That prior Counsel had negotiated a plea agreement on Petitioner's behalf.

75. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

76. The Court **FINDS** that the Petitioner did not waive attorney client privilege nor subpoena Jeff Simpkins to testified at the omnibus proceedings.

77. Accordingly, the Petitioner, failed to introduce any evidence at the Omnibus Hearing, to establish that there was a conflict of interest. Petitioner asserted ground for relief to conflict of interest with the Prosecuting Attorney's Office is without merit and the same is hereby **DENIED**.

S. Language Barrier to Understanding the Proceedings.

78. The Petitioner in his Losh checklist alleges that he there was language barrier to the plea proceeding and because of such he was unable to understand what was occurring.

79. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

80. The Court **FINDS** that there is nothing in the record to indicate Petitioner did not understand what was occurring. During the Petitioner's Plea Hearing the trial court questioned the Petitioner to his comprehension of the proceedings and Petitioner confirmed he understood what was occurring.

81. The Court **FINDS** that the Petitioner was given the opportunity to meet with his trial counsel to discuss what his rights were.

82. The Court **FINDS** that the Court explained all rights to the Petitioner and the Petitioner acknowledged that he understood what was occurring. Furthermore, at the Omnibus hearing the Petitioner acknowledge he understood what he was signing, when he entered into a plea agreement with the State of West Virginia.

83. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact that there was a language barrier to understanding the proceedings. Petitioner asserted ground for relief to language barrier to understanding the pleadings is without merit and the same is hereby **DENIED**.

T. Ineffective Assistance of Counsel.

84. The Petitioner in his Losh checklist and Amended Petition, allege that his counsel, Cecil Varney, did not advise him that the Sentencing Judge was not bound by the plea agreement in regard to sentencing. Petitioner contends that he was ineffectively represented in this matter. That Petitioner's trial counsel was ineffective in that he failed to effectively communicate the options available to the Petitioner with regard to trial, entering a plea and the possibility of negotiating the plea to a lesser included offense.

85. "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).

86. 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 to 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 unreliable. 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. at 687; see also, syllabus point 5, State v. Miller, 194 W.Va. 3 (1995); State ex rel. Shelton v. Painter, 221 W.Va. 578 (2007).

87. “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.

88. “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.” Syl. Pt. 19, State v. Thomas, 203 S.E.2d 445 (1974).

89. Under Strickland there must first be a showing that trial counsel’s performance was deficient and the errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.

90. The Court **FINDS** that to succeed under a claim for ineffective assistance of counsel, Petitioner must make a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment of the United States Constitution. See *Miller*.

91. The Court **FINDS** that the Petitioner did not waive attorney client privilege and Mr. Varney was not called to testify at the Omnibus Hearing. The Court **FINDS** that no evidence was presented by the Petitioner showing beyond a preponderance of the evidence that he received ineffective assistance of counsel.

92. The Court **FINDS** that the Petitioner was informed on multiple occasions by the Court that the Court was not bound by the recommendations in regards to sentencing. Furthermore the Court informed Petitioner of all his constitutional rights during the proceeding and on multiple occasions inquired if it was the Petitioner’s decision to enter into a plea.

93. The Court **FINDS** that the record evidences that Mr. Varney did in fact inform the Petitioner of all his constitutional rights. See Petition to Enter Guilty Plea (attached as Exhibit 2). See Defendant’s Statement Support of Plea of Guilty (attached as Exhibit 3).

94. The Court **FINDS** that Mr. Varney has tried numerous criminal matters in the State of West Virginia and has an adequate understanding of criminal trials.

95. The Court **FINDS** that Mr. Varney's performance during the underlying cause of action was not deficient.

96. The Court **FINDS** that Mr. Varney's representation was adequate under the first prong of *Miller*, and the Petitioner has not made a showing that Mr. Varney's performance prejudiced his Plea Hearing.

97. The Court **FINDS** that the Petitioner did not express any concerns or problems with Mr. Varney's representation.

98. The Court **FINDS** that the following plea colloquy with the Petitioner on the issue of trial counsel's performance occurred during the plea hearing:

Court: Are you satisfied with the manner in which Mr. Varney has represented you in this case?

Petitioner: Yes.

Court: Do you have any complaints to any degree about Mr. Varney and his legal representation?

Petitioner: No

Court: Have you understood all my questions?

Petitioner: Yes.

Transcript from Plea Hearing, pg. 45.

99. Accordingly, Petitioner's asserted grounds for relief regarding ineffective assistance of counsel is without merit and the same is hereby **DENIED**.

U. Mistaken advise of counsel as to parole or probation eligibility.

100. The Petitioner in his Losh checklist alleges that he received mistake advise of counsel as to parole or probation eligibility.

101. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

102. The Court **FINDS** that the Petitioner failed to waive attorney client privilege and Mr. Varney was not called to testify at the Omnibus Hearing.

103. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact that he received mistake advise of counsel as to parole or probation eligibility. Petitioner asserted ground for relief to mistaken advise of counsel as to parole or probation eligibility is without merit and the same is hereby **DENIED**

V. Involuntary guilty plea, coerced confession, and question of actual guilt upon an acceptable plea.

104. The Petitioner alleges that he was coerced into pleading guilty and that his plea to the offense against Bridgett N. was involuntary. Petitioner states that he did not remember committing the crime but he was he was guilty to the plea and not the offense.

105. The Court **FINDS** the following colloquy occurred between the Court, State, Counsel for Petitioner, and the Petitioner:

Court: Is your Offer to enter this plea your own free and voluntary act and are you entering these pleas today of your own free will?

Petitioner: Yes.

Court: Do you have any questions at all about your proposed plea, your rights or about anything else that you want to ask the Court?

Petitioner: No.

Court: Do you understand that these guilty pleas are more than an admission of criminal conduct? They are a conviction, four felony convictions, and that no evidence would have to be introduced against you. There would not be a jury trial and all the Court has to do is accept your pleas of guilty and you would stand convicted of those four crimes. Do you understand that?

Petitioner: Yes/

Court: Knowing all this, do you still wish to enter a plea of guilty?

Petitioner: Yes.

Court: In that regard, the Court has been provided a document a Petition to Enter Guilty Plea, which purports to have your signature on each and every page. Di you sign each and every page of the Petition to Enter Guilty Plea?

Petitioner: Yes.

Court: Did you read and understand each and every paragraph, sentence, line and word of the Petition to Enter Guilty Plea before you signed the pages?

Petitioner: Yes.

Court: Did Mr. Varney go over this form with you and fully and completely explain to you the Petition to Enter Guilty Plea before you signed the pages?

Petitioner: Yes.

Court: I also have a Defendant's Statement in Support of Plea of Guilty, which consists of several pages and asks your forty-four (44) questions and also purports to have your signature on each and every page. Did you sign each and every page of the Defendant's Statement in Support of Plea of Guilty?

Petitioner: Yes.

Court: Did you read and understand each and every instruction, paragraph, sentence, line, questions and word of the Defendant's Statement in Support of Plea of Guilty before you signed the pages?

Petitioner: Yes.

Court: Did you answer all forty four (44) questions contained on this form truthfully?

Petitioner: Yes.

Court: And I have an Attorney's Statement in Support of Plea of Guilty. Mr. Varney did you complete that form?

Mr. Varney: I did, Your Honor.

Court: Mr. Browning are you ready to enter your plea now?

Petitioner: Yes.

Court: Do you need more time to talk to Mr. Varney before I call upon you to enter your plea?

Petitioner: No.

Court: Then if you'll please stand I'm going to read to your Counts One (1), Two (2), Seventeen (17), and Eighteen (18) only of the indictment.

"State of West Virginia,

County of Mingo, To-Wit:

In the Circuit Court of Mingo County:

The Grand Jurors of the State of West Virginia, on a vote of at least twelve (12), in and for the body of Mingo County, now attending the Circuit Court of Mingo County, upon their oaths present:

Count 1

Jason Browning, who at all times material to this charge was eighteen (18) years old or more and a custodian of Brittany N., who at all times material to this charge was less than eighteen (18) years old, on or about March 2004, in Mingo County, West Virginia, while Brittany N. was under his care, custody and control, did unlawfully, knowingly, intentionally and feloniously engage in sexual intercourse with Brittany N., against the peace and dignity of the State of West Virginia and in violation of West Virginia Code, 61-8D-5 (a)."

With regard to sexual abuse by a custodian of Brittany N., as charge in Count 1, how do you plea?

Petitioner: Guilty.

Court:

"Count 2

Jason Browning, who at all times material to this charge was eighteen (18) years old or more and a custodian of Bridgett N., who at all times material to this charge was less than eighteen (18) years old, on or about March 2004, in Mingo County, West Virginia, while Bridgett N. was under his care, custody and control, did unlawfully, knowingly, intentionally and feloniously engage in sexual intercourse with Bridgett N., against the peace and dignity of the State of West Virginia and in violation of West Virginia Code, 61-8D-5 (a)."

To the charge of sexual abuse by a custodian of Bridgett N., what is your plea?

Petitioner: Not Guilty – Guilty.

Court: Do you plead guilty or not guilty?

Petitioner: Guilty

...

Court: All Right. With regard to a factual basis, start with Count 1. Count 1

Mr. Varney: Your Honor, in view of the nature of these offenses could he do that at the Bench?

Court: If he so desires of his own free will and accord.

Mr. Varney: There's people here in the courtroom and everything.

Court: Do you want to make your factual basis and disclosure at the privacy of the Bench?

Petitioner: Yes.

Court: You may approach. Mr. Browning, Count 1 is a sexual abuse by a custodian of Brittany N., which indictment states it occurred on or about March, 2004. Tell me in your own words what happened between you and Brittany N. on or about March, 2004.

Petitioner: I left and came back to the house and she was there and she was listening to this rap song and she wanted to show me a dance and one thing led to the next and the next thing you know, boom, it happened.

Court: when you say boom it happened, what happened?

Petitioner: Intercourse.

Court: You did have sexual intercourse with Brittany?

Petitioner: Yes

Court: How old were you at the time?

Petitioner: Twenty-three.

Court: That's really for another offense, but we'll get it established now. How old was Brittany N.?

Petitioner: Twelve.

Court: Was there any other adults there other than you when that occurred?

Petitioner: Now.

Court: In other words, was she under your care, custody and control?

Petitioner: Not exactly, but she was there at the house.

Court: Was her mother there?

Petitioner: No. She was at work.

Court: Was she your responsibility? Were you supposed to be watching her?

Petitioner: No. She was big enough to watch herself. I mean I came there. I guess -- I mean, I don't know, but, no, I wasn't living there at the time. I was the only adult there.

Court: When her mother left, did you --

Petitioner: -- Mother didn't know I was coming around. I was just stopping by.

Court: The law requires that the child had to be under -- that you had to be a custodian and that the child had to be under your care and custody. Do you understand that?

Petitioner: I understand that.

Court: Is that true or not true in this case?

Petitioner: Well, I mean, I don't know. You tell me.

Court: I don't know. I wasn't there.

Petitioner: I was the only adult there, so, yes, I'm guilty.

Court: Do you believe that your role was such that you were acting as a custodian?

Petitioner: Yes.

Court: And do you believe your role is such that she was under your care, custody and control when you were there?

Petitioner: Yes

Court: With regard to Count 2, this is the same offense as far as the crime, that is to sexual abuse by a custodian, only the victim is said to be Bridgett N., and was said to have occurred on March, 2004, and before we proceed to that one let's go back to Count 1. Where did Brittany N., live at the time the act of sexual intercourse occurred?

Petitioner: Taylorsville.

Court: Is that in Mingo County, West Virginia?

Petitioner: Yes.

Court: I believe I was asking you about ages before and your told me you were twenty-three. How old was she?

Petitioner: Twelve.

Court: Now, with regard to Court 2, that's the criminal statute and that alleges the child Bridgett N. Tell me in your own words what occurred between you and Bridgett N. around the same time period of March, 2004.

Petitioner: I don't know, I don't remember. I was on drugs. I was high.

Court: You understand I don't take guilty pleas if there is no admission of guilt. If you tell me you didn't do anything you don't have to plead guilty. You know that, and we can take this matter to trial.

Petitioner: I am saying I'm guilty to the plea. Can we do it that way?

Court: No.

Petitioner: I can't say something I don't know for sure.

Court: Are you saying you don't know because it didn't happen or that you were intoxicated and don't remember what you did?

Petitioner: Yes. I was intoxicated and don't remember.

Court: Do you believe you had sexual contact with that child?

Petitioner: Sexual contact, yes;

Court: The indictment actually charges you with sexual intercourse. The offense itself can be with sexual exploitation of or sexual intercourse or sexual intrusion or sexual contact. Did any of those things occur between your and Bridgett N.?

Petitioner: I don't remember. I'll just plead guilty of it. Brittany, I can explain, but I can't explain Bridgett.

Court: Is the reason you can't explain it because you don't believe it happened or because you were intoxicated on drugs and don't know what you did? Which one is it?

Petitioner: I was on drugs and didn't remember.

Court: Now, with regard to these two offenses, let me ask you, too, with regard to Bridgett N., did that occur also in Taylorsville, Mingo County?

Petitioner: Yes.

Court: Do you believe yourself guilty of both those charges?

Petitioner: Yes.

Court: Now, the next one is sexual assault, that's Counts 17 and 18, and you already told me the ages of both you - well, these girls are twins. Is that correct?

Petitioner: Yes.

Court: Both are the same age, twelve years old?

Petitioner: Yes.

Court: And you were twenty three?

Petitioner: Yes.

Court: You were twenty three in March 2004?

Petitioner: Yes.

Court: And I believe both indictments charge the same thing?

Petitioner: Yes.

Court: Count 17 indicates you had sexual intercourse with Brittany N. Count 18 states you has sexual intercourse with Bridgett N. The same things you told me previously, do they apply to these two counts as well? In other words, do you specifically remember an act of sexual intercourse between you and Brittany N. that occurred in March, 2004, after what you disclosed earlier?

Petitioner: Yes.

Court: And with regard to the other event that occurred in the same month, is your factual basis the same - you were on drugs and don't remember the specific facts with Bridgett?

Petitioner: I'll just plead guilty to Bridgett.

Court: Are you pleading because you believe yourself to be guilty of all these events?

Petitioner: No.

Court: Okay. Well, you understand I can't take guilty pleas from people that aren't guilty.

Petitioner: I'm telling you I'm guilty.

Court: Your just told me your weren't.

Petitioner: I misunderstood the question,

Court: Is that true? Did you misunderstood the question?

Petitioner: Yes.

Court: Do you believe yourself to be guilty of all four of these crimes?

Petitioner: Yes.

Court: And did all four of these incidents occur in Mingo County?

Petitioner: Yes.

...

Court: Mr. Browning, are you pleading gulty to these crimes because you believe yourself to be guilty of these crimes?

Petitioner: Yes.

Court: If that's what you're telling me then I'm willing to accept your factual basis, but let me explain one more time I don't want you to plead guilty to anything you're not guilty of, but you're saying you were on drugs and you did things you don't remember the exact details. If you believe yourself to be guilty to be guilty of these offenses, I'll take the plea. Do you understand?

Petitioner: Yes.

Court: I just want to make sure you understand nobody is twisting your arm to do this. You can go to jury trial and you can explain the facts as it relates to Bridgett and you can explain the facts as they relate to Brittany in whatever fashion you want to use at trial. Do you understand me?

Petitioner: Yes.

...

Court: And do you want the Court to accept your guilty pleas with regard to all four crimes?

Petitioner: Yes.

Transcript from Plea Hearing, pgs 30-43.

106. The Court **FINDS** that the Petitioner plea was voluntarily give and was not coerced.

107. The Court **FINDS** the Petitioner was not required to take this plea and was in fact advised of such during on multiple occasions during the Plea Hearing.

108. The Court **FINDS** that the Court questions Petitioner's trial counsel as to whether he thought that this agreement was in the Petitioner's best interest and the trial counsel stated he thought it was.

109. Additionally, it should be noted that it is not the Court's decision as to whether or not a defendant accept a plea agreement. Accordingly, this Court **FINDS** Petitioner's arugment to be without merit as Petitioner voluntarily chose to enter into a plea agreement with the State of West Virginia after the trial court fully informed Petitioner of his right to trial. Petitioner asserted ground for is without merit and the same is hereby **DENIED**.

W. Suppression of helpful evidence by the Prosecutor.

110. The Petition in his Losh checklist and at the Omnibus hearing stated that the Prosecutor withheld from the Petitioner that one of the victims had an STD and he does not have an STD.

111. The Court **FINDS** that the Petitioner bears the burden of proving the allegations in his petition.

112. The Court **FINDS** that the Petitioner did not offer an evidence to prove the matter asserted. The Petitioner did not offer any evidence that shows that he is STD-free or anything that shows that the prosecution did not relay this information.

113. The Court **FINDS** that the Petitioner did not waive attorney client privilege as it pertains to Mr. Varney and Mr. Varney did not testify at the Omnibus Hearing.

114. Accordingly, the Petitioner, failed to introduce any evidence or argument at the omnibus hearing or in the amended petition in regard to the fact that Prosecuting Attorney suppressed helpful evidence. Petitioner asserted ground for relief is without merit and the same is hereby **DENIED**.

X. Mental competency at time of crime, Mental competency at time of trial is cognizable even if not asserted at proper time or if resolution not adequate, Incapacity to stand trial due to drug use, and Claim of incompetence at time of offense as opposed to time of trial.

115. The Petitioner in his Losh checklist and in his Amended Petition, alleges that he was heavily intoxicated and on drugs at the time the crime occurred. Petitioner further contends that he had only been sober for a brief period of time when he entered his Plea Agreement. Also, during the time period of the underlying crime, Petitioner was addicted to cocaine and was not clear headed.

116. The Court **FINDS** the Petitioner may have been voluntarily intoxicated through the use of narcotics during the times of criminal acts.

117. The Court **FINDS** that the Petitioner relies on a diminished capacity defense for allegations in his Amended Petition.

118. The Court **FINDS** that the West Virginia Supreme Court of Appeals recognized a diminished capacity defense in State v. Joseph, 214 W.Va. 525, 590 S.E.2d 718 (2003), Syl. Pt.

3:

The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted

ordinarily when the offense charged is a crime from which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charge, but does not preclude a conviction for a lesser included offense.

119. The Court **FINDS** that a diminished capacity defense allows “a defendant to offer evidence of his mental condition with respect with his capacity to achieve the mens rea or intent required for commission of the offense charged.” Id.

120. The Court **FINDS** that the diminished capacity defense applies when the Defendant has a mental disease or defect, such as the defendant in Joseph, who suffered from a brain injury.

121. The Court **FINDS** that West Virginia Supreme Court of Appeals has allowed evidence of voluntary intoxication to show that a defendant was incapable of forming the required mental state for specific intent crimes. See, State v. Keeton, 166 W.Va. 77, 82–83, 272 S.E.2d 817, 820 (W.Va.1980); State v. Robinson, 20 W.Va. 713 (1882); Wheatley v. U. S., 159 F.2d 599 (4th Cir. 1947). The Court **FINDS** that sexual assault is not a specific intent crime but a general intent crime.

122. The Court **FINDS** as to the burden of proof when a criminal defendant claims lack of criminal responsibility, the West Virginia Supreme Court of Appeals has held that:

“There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.”

Syl. Pt. 2, State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979).

123. The Court **FINDS** that the following plea colloquy with the Petitioner on the issue of his competency occurred during the plea hearing:

Court: Can you tell the Court how far that you were able to go in school?

Petitioner: Yes.

Court: How far did you go?

Petitioner: Eleventh.

Court: By virtue of your eleventh grade education can you read or write?

Petitioner: Yes.

Court: Did you receive a copy of the indictment, the thirty two count indictment when you were first indicted?

Petitioner: Yes.

Court: Has Mr. Varney taken the time to explain to you all the charge in the indictment and what it would take for the State to prove it's case against you?

Petitioner: Yes.

...

Court: Do you have any history of mental illness?

Petitioner: Yes.

Court: And what is the nature of your illness?

Petitioner: I mean not now, no.

Court: You don't have any problems now?

Petitioner: No.

Court: What did you have in the past?

Petitioner: I had a kidney removed.

Court: Physical?

Petitioner: Yes.

Court: Any mental problems?

Petitioner: No. I'm good.

Court: Are you addicted to either alcohol or drugs?

Petitioner: No.

Court: You've never been in a mental institution?

Petitioner: No.

Court: Okay, Have you had any drugs or alcohol in your system within forty eight hours prior to this plea?

Petitioner: No.

Court: Are you clear headed as you sit here today?

Petitioner: Yes.

Court: Have you been able to understand and comprehend the advice of your attorney?

Petitioner: Yes.

Court: Have you been able to understand everything I've explained to you.

Petitioner: Yes.

Court: Mr. Varney, do you believe your client competent and capable of proceeding with this plea?

Mr. Varney: I do, Your Honor.

Court: Mr. Browning, do you believe yourself to be competent and capable of proceeding with this plea?

Petitioner: Yes.

Court: The Court has had an opportunity to observe Mr. Browning's demeanor. Both he and his lawyer believe that he's competent. He's clear headed, he's been responsive to the Court's questions. The Court has observed his demeanor and the Court finds he's competent and capable of proceeding with the plea.

Transcript from Plea Hearing, pgs 11, 27-29.

124. The Court **FINDS** that a criminal defendant is presumed sane and that if sanity and the ability to stand is an issue then the Petitioner's counsel is required to request a hearing.

125. The Court **FINDS** that the Petitioner showed no indication to his counsel or this Court that he was not competent to stand trial, or criminally responsible for his acts.

126. The Court **FINDS** that the Petitioner was incarcerated for almost one year and finds no merit that he has only been sober for a brief period of time when he entered his Plea Agreement.

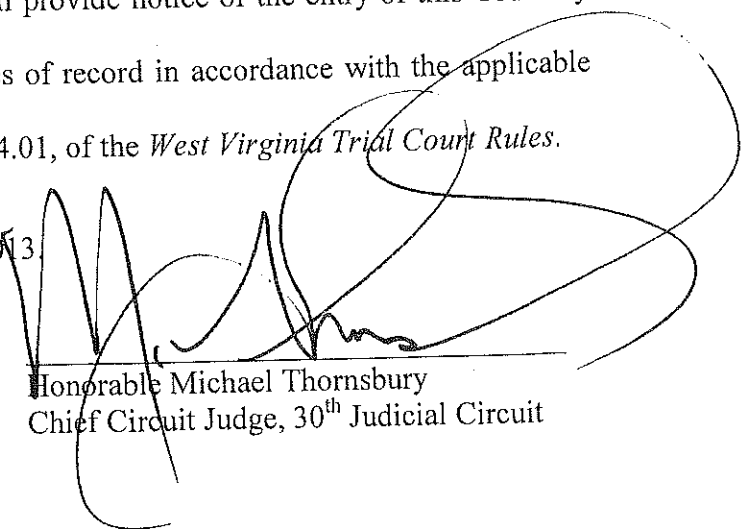
127. Therefore, the Court **FINDS** and **CONCLUDES** that the Petitioner's claim of not possessing the requisite mens rea to commit conspiracy because he was under the influence of narcotics is without merit.

III. Judgment

Wherefore, for the reasons set forth in the foregoing opinion, the Court **ORDERS**, **ADJUDGES** and **DECREES**, that the Petition for Writ of Habeas Corpus sought by the Petitioner is hereby **DENIED**.

This being a **FINAL ORDER**, which any party may appeal, in accordance with The Revised Rules of Appellate Procedure. The Clerk is hereby **ORDERED** to strike this case from the active docket of this Court, and the Clerk shall provide notice of the entry of this Order by forwarding a certified copy hereof upon all parties of record in accordance with the applicable provisions of Rules 10.01-12.06, as well as Rule 24.01, of the *West Virginia Trial Court Rules*.

ENTERED this the 18th day of January, 2013



Honorable Michael Thornsburg
Chief Circuit Judge, 30th Judicial Circuit