STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Nick R.,
Petitioner Below, Petitioner

vs) No. 17-0996 (Brooke County 14-C-26)

Ralph Terry, Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

FILED
November 16, 2018
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Nick R., by counsel Sam H. Harrold, III, appeals the Circuit Court of Brooke County's October 6, 2017, order that denied his amended petition for a writ of habeas corpus following his convictions by a jury of nineteen counts of sexual abuse by a custodian, one count of first-degree sexual abuse, and one count of second-degree sexual assault. Respondent Ralph Terry, Superintendent, Mt. Olive Correctional Complex,[1] by counsel Shannon Frederick Kiser, filed a response in support of the circuit court's order.

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.

From 1998 through 2002, petitioner was married to the mother of victims J.H., B.M., and C.M., who were all then minors. From March 1, 2009, through July 1, 2009, petitioner dated Crystal S., the mother of victim S.N., also a minor. In November of 2009, a Brooke County Grand Jury returned a twenty-seven count indictment against petitioner charging him with numerous sex offenses involving the four victims, including one count of first-degree sexual abuse, two counts of second-degree sexual assault, and twenty-four counts of sexual abuse by a custodian (Case No. 09-F-84). Thereafter, a second indictment was returned against petitioner in Brooke County charging him with three counts of sexual abuse by a custodian against a fifth

[1] Effective July 1, 2018, the positions formerly designated as "wardens" are now "superintendents." *See* W.Va. Code § 15A-5-3. At the time of the filing of this appeal, David Ballard was then warden at Mt. Olive Correctional Complex and, as such, was originally listed as the respondent below. However, the acting warden, now superintendent, is Ralph Terry. Accordingly, the Court has made the necessary substitution of parties pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure.

victim, V.N., victim S.N.'s sister (Case No. 10-F-30). It was the State's theory that petitioner intentionally preyed upon poor single mothers by initiating romantic relationships with them and inviting them to live with him so that he would be able to sexually molest their teenage daughters.

Petitioner filed a motion to sever the charges and his motion was denied. He was tried over a period of four days beginning on October 27, 2010. At the beginning of the trial, the trial court directed the State to prepare notebooks for each juror with the name of each of the five victims at the top of its own page so that the jurors could take notes. The circuit court twice explained to jurors that the purpose of the notebooks was to help them keep track, if they so choose, of the numerous counts charged as they related to each of the victims. Petitioner did not object to the distribution of the notebooks or to the circuit court's explanation of the same.

At trial, victim B.M. testified that petitioner lifted her shirt and fondled her breasts and that he acted only when he could get her or her sisters alone. Victim C.M. testified that, beginning when she was thirteen years old, petitioner digitally penetrated her and had sexual intercourse with her. On one occasion, she testified, he forcibly raped her. C.M. testified that petitioner intimidated her into concealing his conduct. Victim J.H. recounted how petitioner routinely commented on her breasts and buttocks and walked into the bathroom while she showered. According to J.H., petitioner's conduct "escalated to sex" and, in one instance, he taped her hands over her head and forcibly raped her. She testified that petitioner forced her into sexual intercourse five other times and threatened to kill her mother if she ever revealed his conduct. Victim S.N. testified that petitioner's actions began with unwanted touching and that, on one occasion, petitioner told her that she would no longer be grounded if she relented to his sexual advances. Petitioner then groped her by putting his hand down her pants and touching her vagina.

After each victim testified, the State, at the circuit court's request, identified the counts of the indictment that the particular victim's testimony was being offered to prove. At no time did petitioner object to any of the State's remarks in this regard.

Petitioner was convicted of twenty-one counts of sexual abuse by a custodian, one count of first-degree sexual abuse, and one count of second-degree sexual abuse.[2] The trial court thereafter granted petitioner's motion for judgment of acquittal on two counts of sexual abuse by a custodian (counts two and three of the indictment in Case No. 10-F-30), finding that the State failed to prove that petitioner sexually exploited victim V.N. because, although the State proved that petitioner lured the victim to show him her breasts, breasts are not defined as a sexual organ under West Virginia Code § 61-8D-1(9)(B).

Petitioner was sentenced to cumulative sentences of not less than 201 nor more than 410 years in prison. Petitioner subsequently appealed his convictions to this Court. This Court affirmed petitioner's convictions. *See State v. Nick R.*, No. 11-0341, 2012 WL 3030811 (W.Va. June 22, 2012) (memorandum decision).

[2] Following the presentation of the State's case-in-chief, five counts were dismissed based upon insufficient evidence.

On February 4, 2014, petitioner filed a petition for a writ of habeas corpus in which he alleged that the circuit court invaded the province of the jury by directing the prosecuting attorney to summarize the relevant evidence as testified to by each alleged victim, by providing copies of the verdict form to the jury, and by providing notebooks to the jurors and allowing them to take notes; that the State failed to disclose exculpatory evidence; that the jury failed to consider all the evidence or was misled by the State because it returned a verdict in one hour and thirty-five minutes; and that trial counsel was ineffective in failing to advise petitioner of a proposed plea agreement, failing to assure the proper use of the juror notebooks, failing to recall one of the alleged victims after learning that she had been untruthful in her testimony, failing to object to the State's summary of the victims' testimony, failing to interview or prepare defense witnesses, failing to interview the State's witnesses, failing to present an expert regarding petitioner's medical problems as they relate to his inability to perform sexual acts, failing to have a sex evaluation perform and to argue mitigating factors at sentencing, and refusing to subpoena two specific witnesses. Petitioner also alleged that the prosecuting attorney had improper contact with jurors during deliberation; that the State failed to advise the Court that two of the alleged victims perjured themselves; that there was prejudicial pre-trial publicity; and that petitioner's sentence was unconstitutionally excessive.

Petitioner filed an amended habeas petition on July 22, 2016, that included some, but not all, of the claims alleged in his original petition. Following an omnibus evidentiary hearing, the circuit court proceeded to address all of petitioner's original claims. In a detailed thirty-four page order entered on October 10, 2017, the circuit court denied petitioner's request for habeas relief. This appeal followed.

Our review of the circuit court's order denying respondent's petition for a writ of habeas corpus is governed by 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 raises the same assignments of error as he did in his amended habeas petition, all of which were considered and fully addressed by the circuit court in its October 6, 2017, order denying relief. We find no error or abuse of discretion by the circuit court in denying petitioner's petition for a writ of habeas corpus based on these alleged errors. Indeed, the circuit court's order includes well-reasoned findings and conclusions as to the assignments of error raised on appeal.

Given our conclusion that the circuit court's order and the record before us reflect no clear error or abuse of discretion, we hereby adopt and incorporate the court's findings and conclusions as they relate to the assignments of error raised herein and direct the Clerk to attach a copy of the circuit court's October 10, 2017, order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 16, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice Paul T. Farrell sitting by temporary assignment

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

FILED

NICK R[redacted]
Petitioner,

2017 OCT 10 A 9 15

v.

CLERK CIRCUIT COURT
BROOKE COUNTY

CASE NO. 14-C-26
Underlying Action Nos:
09-F-84; 10-F-30

DAVID BALLARD,
Warden, Mt. Olive Correctional Complex

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On February 4, 2014, the Petitioner, Nick R[redacted] presently incarcerated at the Mount Olive Correctional Complex, filed through his counsel, Thomas G. Dyer, Esq., a Petition for a Writ of Habeas Corpus alleging that he is incarcerated in violation of his constitutional rights. The Court entered an Order requiring the Respondent to file a response to the Petition no later than May 1, 2014. On April 30, 2014, the Respondent filed his Answer. The Petitioner, on May 8, 2014, requested permission to proceed with discovery including the taking of certain depositions and on July 11, 2014, the Court granted that motion. On July 22, 2016, the Petitioner filed his Amended Writ of Habeas Corpus. The Court directed that a response to the Amended Petition be filed by October 10, 2016. On September 20, 2016, the State filed its Response to the Amended Petition. An evidentiary hearing was held by the Court on June 7, 2017. The Petitioner, represented by his counsel Thomas Dyer, testified on his own behalf and additionally presented expert testimony of James Michael Benninger. The testimony presented by the Petitioner

only addressed the issue of ineffective assistance of counsel. The State of West Virginia, through Assistant Prosecuting Attorney David F. Cross, cross-examined the Petitioner's witnesses but offered no witnesses.

The Petitioner's Petition for Writ of Habeas Corpus and Amended Writ of Habeas Corpus raised eight grounds for the Court to consider:

1. The Circuit Court invaded the province of the jury in violation of the United States and West Virginia Constitutions by:
    a. Directing the Prosecuting Attorney to summarize for the jury the relevant evidence testified to by each alleged victim;
    b. Permitting the jurors to take notes in notebooks prepared by the prosecuting attorney during trial in violation of the Petitioner's rights under the United States and West Virginia Constitutions;
    c. Providing copies of the verdict form to the jury during the Court's instructions in violation of the Petitioner's constitutional rights under the United States and West Virginia Constitutions;
2. The State failed to disclose exculpatory evidence in violation of the United State and West Virginia Constitutions;
3. The jury failed to consider all of the evidence in their deliberations and/or were misled as to the evidence by the acts of the Court and the prosecuting attorney in summarizing the evidence as to each indictment and by using a notebook prepared by the prosecuting attorney to take notes, by returning a verdict in one hour and thirty-five minutes in violation of the Petitioner's rights under the United States and West Virginia Constitutions;
4. The Petitioner was denied the effective assistance of trial counsel in violation of the United States and West Virginia Constitutions;
5. There was improper and prohibited contact between the prosecuting attorney and the jury during their deliberations in violation of the Petitioner's rights under the United States and West Virginia Constitutions;

6. The State failed to advise the Court of perjured testimony by C.M. and V.N. in violation of the Petitioner's constitutional rights;

7. Prejudicial pre-trial publicity;

8. The Petitioner's sentence was unconstitutionally excessive.

The Respondent has filed a Response to the Petitioner's Amended Petition for Writ of Habeas Corpus asserting that the Petitioner's constitutional rights were not violated and providing argument in opposition of each of the grounds listed by the Petitioner.

FACTUAL AND PROCEDURAL HISTORY

On the 2nd day of November, 2009, the Brooke County Grand Jury returned a twenty-seven count indictment in 09-F-84 against the Petitioner for one count of sexual abuse in the first degree, two counts of sexual assault in the second degree and twenty-four counts of sexual abuse by a custodian for crimes committed on J.H, B.M., C.M., who are sisters and S.N., over different periods of time. Mr. R[redacted] was the current boyfriend of Crystal S[redacted], the mother of S.N. and had been previously married to the mother of J.H., B.M. and C.M. The State alleged that at the time he resided with the mothers' of these children he committed acts of sexual abuse and sexual assault against the children. The incidents for J.H., B.M. and C.M. are alleged to have occurred from 1998 until 2002 and for S.N. from March 1, 2009 through July 1, 2009.

Mr. R[redacted] filed a motion to sever asking that counts 1 through 4 be severed from counts 5 through 27 of indictment 09-F-84. The State responded to

the motion arguing that there were several uncharged acts committed by the Petitioner relevant to proving the allegations in the indictment that should be classified as intrinsic evidence, or in the alternative, could be classified as 404(b) evidence to show intent to commit the crime, common scheme or plan, and to show that the Petitioner has a lustful disposition toward children.

On May 10, 2010, the Court granted the Petitioner's Motion to Sever, and ordered the State to file an additional Notice of Intent to Present 404(b) Evidence that specifically described each act or conduct and how the evidence would be used to satisfy the purpose requirement of 404(b). However, on June 7, 2010, prior to the Court ruling on that Motion, Nick R[redacted] was indicted in 10-F-30 with three counts of sexual abuse by a custodian for crimes committed against V.N, the sister of S.N.

On June 18, 2010, the State of West Virginia filed another Motion to Admit Evidence of Bad Acts beyond the Scope of the Indictments. The State alleged that the evidence of the assaults of all five victims were admissible under Rule 404(b). The State argued that all counts in the two Indictments should be tried together because, under 404(b), the Petitioner's bad acts involved all of the alleged victims and all the acts should be considered as evidence of a common scheme or plan by Mr. R[redacted] to find single financially poor adult females with young daughters and initiate a romantic relationship with them, invite them to live with him, thereby putting him in a position to sexually assault and abuse their teenage daughters. Additionally, the State argued that all of the charges contained in the

indictments should be tried together because the evidence charged in each count is relevant and admissible in the trial of all other counts to prove the Petitioner had a lustful disposition toward children. The State further alleged that the evidence of the other uncharged sexual acts are intertwined with the sexual acts charged in the indictments and should be admissible in one trial.

On August 20, 2010, the Court conducted an *in camera* hearing on the admissibility of the bad acts alleged by the State. After considering the testimony presented by the State, the Court determined that the State needed to produce specific acts testimony for the Court to consider, and not sweeping allegations of misconduct. The Court continued the hearing and directed that the State file an additional 404(b) motion specifically outlining their position. On August 31, 2010, the State filed another Notice of Collateral Bad Acts setting forth the specific acts committed by the Petitioner that were not charged in the Indictment. The 404(b) hearing was reconvened on September 23, 2010, and the Court heard testimony of several witnesses.

The Court determined that the motion to sever should not be granted and that all counts in both indictments 09-F-84 and 10-F-30 should be tried together. The Court permitted evidence from the victims that fall into the common scheme or plan or lustful disposition categories. The Court disallowed testimony from Virginia B[redacted] regarding two specific bad acts concerning the Petitioner's daughter and an incident involving gasoline. The Court finally ordered that limiting instructions would be given when the 404(b) evidence was introduced.

After four days of trial the Jury returned a guilty verdict on November 2nd, 2010 as follows:

A. Sexual Abuse by a Custodian as set forth in Count Twenty-Three in Case No. 09-F-84;

B. Sexual Abuse by a Custodian as set forth in Count Twenty-Four in Case No. 09-F-84;

C. Sexual Abuse by a Custodian as set forth in Count Twenty-Five in Case No. 09-F-84;

D. Sexual Abuse by a Custodian as set forth in Count Eleven in Case No. 09-F-84;

E. Sexual Abuse by a Custodian as set forth in Count Twelve in Case No. 09-F-84;

F. Sexual Abuse by a Custodian as set forth in Count Thirteen in Case No. 09-F-84;

G. Sexual Abuse by a Custodian as set forth in Count Fourteen in Case No. 09-F-84;

H. Sexual Abuse by a Custodian as set forth in Count Fifteen in Case No. 09-F-84;

I. Sexual Abuse by a Custodian as set forth in Count Sixteen in Case No. 09-F-84;

J. Sexual Abuse by a Custodian as set forth in Count Seventeen in Case No. 09-F-84;

K. Sexual Abuse by a Custodian as set forth in Count Eighteen in Case No. 09-F-84;

L. Sexual Abuse by a Custodian as set forth in Count Nineteen in Case No. 09-F-84;

M. Sexual Abuse by a Custodian as set forth in Count Twenty in Case No. 09-F-84;

N. Sexual Abuse by a Custodian as set forth in Count Six in Case No, 09-F-84;

O. Sexual Abuse by a Custodian as set forth in Count Seven in Case No. 09-F-84;

P. Sexual Abuse by a Custodian as set forth in Count Eight in Case No. 09-F-84;

Q. Sexual Abuse by a Custodian as set forth in Count Nine in Case No. 09–F-84;

R. Sexual Abuse by a Custodian as set forth in Count Ten in Case No. 09-F-84;

S. Sexual Abuse by a Custodian as set forth in Count Two in Case No. 09-F-84;

T. Sexual Abuse by a Custodian as set forth in Count Two in Case No. 10-F-30;

U. Sexual Abuse by a Custodian as set forth in Count Three in Case No. 10-F-30;

V. Sexual Abuse in the First Degree as set forth in Count One in Case No. 09-F-84;

W. Sexual Assault in the Second Degree as set forth in Count Five in Case No. 09-F-84.

The Petitioner filed a Motion for Judgment of Acquittal. On the 22nd day of November, 2010, the Court granted the Motion for Judgment of Acquittal on the two counts of Sexual Abuse by a Custodian as set forth in counts Two and Three of the Indictment in Case 10-F-30. The Court found that the State did not prove that Mr. R[redacted] sexually exploited the victim because Mr. R[redacted] was proven to have lured the child to show him her breasts and breasts are not defined as a sexual organ under 61-8D-1(9)(B).

The Petitioner was sentenced to not less than ten (10) nor more than twenty (20) years on each of the nineteen counts of sexual abuse by a custodian; a period of not less than one (1) nor more than five (5) years on the single count of sexual abuse in the 1st degree; not less than ten (10) nor more than twenty-five (25) years on the sexual assault in the 2nd degree. All sentences were ordered to run consecutively for a cumulative sentence of not less than 201 years nor more than 410 years. The Court further recommended that the Petitioner be released upon parole when he reached the age of seventy-five (75) years.

The Petitioner appealed his conviction to the West Virginia Supreme Court. On appeal the Petitioner argued that the trial court erred by: failing to grant his motion for severance; by allowing the State to present the testimony of each victim as 404(b) evidence in the other counts of the indictment; by failing to grant post-verdict motions for judgment of acquittal on Counts One, Two, and Five for insufficient evidence; denying the motion for judgment of acquittal at the close of all evidence as to Count Two; depriving him of his due process right to present his evidence by not allowing him to cross-examine J.H. concerning whether she had a consensual sexual relationship with the Petitioner as an adult for money; failing to order a mistrial after improper remarks by the prosecutor in closing argument; and that the cumulative error doctrine should be invoked due to numerous errors at trial.

On June 22, 2012, the West Virginia Supreme Court issued a Memorandum Decision that found no error in relation to the Petitioner's assignments of error and affirmed the convictions.

The Court, after reviewing the Petitioner's grounds for relief, reviewing Petitioner's entire file, reviewing the depositions of both trial counsel and the Petitioner's expert, listening to the testimony presented by the Petitioner at the evidentiary hearing, and the Court's own independent research is of the opinion that no relief should be granted as to the Petition. Further, the Court has provided the Petitioner with an opportunity for a hearing before the Court on the allegations contained in his Habeas Petition and the evidence before the court demonstrates that the Petitioner is entitled to no relief. The Court bases its opinion on the following findings of fact and conclusions of law:

ERROR 1 THE CIRCUIT COURT INVADED THE PROVINCE OF THE JURY IN VIOLATION OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS

a. THE CIRCUIT COURT DIRECTED THE PROSECUTING ATTORNEY TO SUMMARIZE FOR THE JURY THE RELEVANT EVIDENCE TESTIFIED TO BY EACH ALLEGED VICTIM.

b. THE COURT COMMITTED ERROR BY PERMITTING THE JURORS TO TAKE NOTES IN NOTEBOOKS PREPARED BY THE PROSECUTING ATTORNEY DURING TRIAL IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

c. THE CIRCUIT COURT PROVIDED COPIES OF THE VERDICT FORM TO THE JURY DURING THE COURT'S INSTRUCTIONS TO THE JURY IN VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

ERROR 3: THE JURY FAILED TO CONSIDER ALL OF THE EVIDENCE IN THE DELIBERATIONS AND/OR WERE MISLED AS TO THE EVIDENCE BY THE ACTS OF THE COURT AND THE PROSECUTING ATTORNEY IN SUMMARIZING THE EVIDENCE AS TO EACH INDICTMENT AND BY THE USE OF A NOTEBOOK PREPARED BY THE PROSECUTING ATTORNEY, BY RETURNING A VERDICT IN ONE HOUR AND THIRTY-FIVE MINUTES IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

The Petitioner's first and third and grounds for relief are interrelated or similar claims. The Petitioner claims that his Federal and State constitutional protections were violated: 1) when the circuit court directed the prosecuting attorney to summarize for the jury the relevant evidence testified to by each victim; 2) when the jury was provided copies of the verdict form during the court's instruction to the jury; and 3) by providing to the jury notebooks prepared by the prosecuting attorney for note-taking during trial. The Petitioner fails to assert which specific constitutional provisions have been violated by these actions.

The Court is vested with broad discretion in trial procedure and the conduct of trial. See State v. Hankish, 147 W. Va. 123, 126 S.E.2d 42 (1962); Barlow v. Hester Indus., Inc., 198 W. Va. 118, 127, 479 S.E.2d 628, 637 (1996). The Petitioner asserts that the comments by the Court and the Prosecuting Attorney invaded the province of the jury as the finder of fact. The summary of the testimony usurped the role of the jury and may have mislead the jury into believing that the testimony was true and constituted the crimes for which the Petitioner was charged.

The trial court has the right to control the orderly process of a trial and may intervene so long as it does not discriminate against or prejudice a party's case. In a criminal trial, it is error for the judge's conduct to suggest a lack of impartiality and neutrality, or for the judge to otherwise disclose that they have abandoned the role of impartiality and neutrality as imposed by the Sixth Amendment of the United States Constitution. See, State v. Burton, 163 W. Va. 40, 254 S.E.2d 129 (1979).

In this case the Petitioner was charged with twenty-nine separate counts of sexual misconduct with five separate victims. It is a monumental task to for a juror to absorb the testimony and be prepared to deliberate. The Court, recognizing the complexities in this case, requested that after a witness testified on direct examination the Prosecutor state which counts of the indictment the testimony was being offered to prove. During the trial the following exchanges occurred:

> *THE COURT: Mr. Cross, let's do the same thing. This may take you more time to do it. But there are 12 crimes charged involving this alleged victim. Briefly describe the wrongful conduct alleged as testified by this witness, and tell the Court and the Jury which counts that they should consider this on.*
>
> *MR. CROSS: Your Honor, in regard to the incidents that were involved with Mr. R* [redacted] *touching her vagina in the kitchen, that would be Counts 11, 12, 13 and 14.*
>
> *The two incidents that she described where he touched her vagina on the couch, that would be counts 15 and 16.*
>
> *And the – I can't recall the number of touchings she testified to in the bedroom. I thought it was four would be her testimony. That would be in regard to Counts 17, 18, 19 and 20.*

And then Count 21 would be the incident that occurred in the kitchen where he inserted his penis into her vagina.

THE COURT: I am sorry. I thought you that was---

MR. CROSS: I misspoke.

THE COURT: All right. What's 21.

MR. CROSS: 21 is the incident in the kitchen.

THE COURT: So—let's not confuse the Jury and the Court. You have previously said 11 was in the kitchen. You're now saying that's 21?

MR. CROSS: No, 11 he touched her vagina in the kitchen while she was doing the dishes. But he also, on the same occasion, not only touched her vagina, but inserted his penis into the vagina.

THE COURT: The State has alleged two different charges out of the one incident, but they are charges of sexual abuse by a custodian?

MR. CROSS: Correct.

THE COURT: The initial fondling is Count 11, the sexual intercourse is Count 21?

MR. CROSS: Yes, sir. And the other incident of sexual intercourse that occurred in the bedroom would be Count 22.

THE COURT: All right. Thank You.

Who is going to do the cross-examination? (TR Vol I excerpt pg. 166-168)

THE COURT: Mr. Cross, before you finish, in an effort to help the jurors follow the case, we are discussing now the charges involving Brandi Marcum.

MR. CROSS: Correct.

THE COURT: And the Indictment has five charges.

MR. CROSS: Correct.

THE COURT: The testimony that you have just elicited, what counts do you want the jurors to focus on, in deciding whether the State has proved its case beyond a reasonable doubt?

MR. CROSS: 23, 24 and 25.

THE COURT: You may cross-examine Mr. G [redacted] (TR Vol. I, excerpt, pg. 100)

THE COURT:.....Mr. Cross, you want to explain the counts in the Indictment that you --- I was really---- I didn't have any note in front of me, I didn't accomplish what I wanted the last time. But insofar as this witness is concerned, not only address the counts, but also make reference to the testimony so the jurors will know when they are considering whether the evidence has been sufficient.

MR. CROSS: Your Honor, this would be in regard to the Indictment in case 10-F-30. The incident where he asked her to expose her breasts to him, that is attempted sexual exploitation, which would be considered Count Two.

THE COURT: Count Two.

MR. CROSS: Count Three of the Indictment and each time he asked her to do that, that is the reason there are two counts. And then Count one was the incident where the attempted to touch her vagina while they were on the motorcycle.

THE COURT: And I need, again to go over the same thing with J [redacted] H [redacted] and S [redacted] N [redacted] in terms of your describing the testimony that you offered on a specific count. You may not be able to in a position to do that. If you would like to do that after the break, that's fine. What you would like to do?

MR. CROSS: I believe I can do that, Your Honor.

THE COURT: All right.

MR. CROSS: I am sorry. Which one again?

THE COURT: Let's do first J [redacted] H [redacted] It's six counts and it's different in that Count Five is sexual assault in the second degree, as opposed to the other counts that are sexual abuse by a custodian. So describe the particular act that the witness testified to and what count it refers to.

MR. CROSS: Your Honor, Count Five is the different charge that the Court's referenced. That's the occasion where he put the duct tape around her arms, held her down on the bed and used force to insert his penis into her vagina. And Count Six, Seven, Eight, Nine and Ten, J[redacted] testified that they had vaginal intercourse where he inserted his penis into her vagina on other occasions.

THE COURT: Okay. Thank You.

And as to S[redacted] N[redacted], please do the same thing.

MR. CROSS: Yes. S[redacted] N[redacted] regard to Count One, Two and Four of the--

THE COURT: Let me interrupt you again.

Count One is a charge of sexual abuse in the first degree, as opposed to sexual abuse by a custodian in Counts Two and Four.

MR. CROSS: It is all from the same incident. They were three separate acts. That's why they are charged separately.

THE COURT: We need to know your theory.

MR. CROSS: Okay. Count Two is – she testified that they were laying on the couch next to one another. Mr. R[redacted] was behind her. She was in front of him. And he reached his hand around and touched her breasts.

THE COURT: All right. And Count Two?

MR. CROSS: And then Count One is after she tried to move away, he held his arm around her and held her in place while he then touched her breasts on the second occasion.

THE COURT: All right. And then Count Four?

MR. CROSS: And after he did that, he stuck his hand down her pants and touched her vagina—

THE COURT: All right. Thank you very much.

MR. CROSS: --- while he was still holding her.

THE COURT: All right. We will take a 15-minute recess. And you may be excused. Thank you very much for your testimony. (TR Vol. II pg. 78-79)

It is clear that the Court was ensuring that the jury, the Court, and counsel were aware of what specific testimony was being elicited for each and every one of the charges in the indictment. In fact, after the close of the State's case, five counts were dismissed because the State did not produce sufficient evidence for those counts to go forward to the jury. At no time did the Court express an opinion on the testimony, but only directed that the State should make clear what count of the indictment the testimony elicited was being offered to prove. Therefore, because it is permissible for the Court to intervene so long as such intervention does not operate to discriminate against or prejudice a party's case, the Petitioner's assertion that his State and Federal Constitutional rights were violated is without merit and he is not entitled to habeas relief on this claim.

The trial court's discretion likewise extends to the decision of whether to allow note-taking by the jury. See, State v. Triplett, 187 W. Va. 760, 421 S.E.2d 511 (1992). However, if note taking is permitted by the Court, the jury should be instructed: 1) to give precedence to each of their independent recollections rather than the notes; 2) that a juror should not allow himself to be influenced by another juror who had taken notes; 3) that the jury should not allow themselves to be distracted from the proceedings by note-taking; and, 4) that the jurors should only disclose the contents of their notes to another juror. Triplett, at 768–69. The Court discussed with the parties the preparation of juror notebooks on two separate occasions on the morning of trial and ultimately directed the prosecutor to prepare a notebook for each juror. The notebooks contained one page for each victim with

their name at the top and then blank area for the juror to take notes. The Petitioner never objected to the use of juror notebooks or to the Court permitting the jurors to take notes.

Additionally, the Court properly instructed the jury on the taking of notes during the trial. At the time the jury was empaneled the court stated:

> *"Because you're the jurors you need to know however about some special rules. First, you will be given notebooks to help you understand. And notebooks are broken down into the five alleged victims in the case. They have dividers. And you can take notes.*
>
> *The idea that I have in mind is that since we do have five alleged victims and 29 counts, that I want to make certain that you are able to distinguish among all of them. Because with each alleged crime, you will have to consider making a decision as to whether the State has proved beyond a reasonable doubt all of the elements of that crime as to that individual and as to that individual person. So it's important that you understand the charges. It's important that you understand who the alleged victims are.*
>
> *Now, there is no law requiring that you keep notes. Whether you keep notes or not is entirely within your discretion. But if you do keep notes, you need to understand this: The notes are your personal notes. Nobody will read them, other than you. But you will not be permitted to take your notebook home at night. At the end of each day, they'll be collected by the clerk. And it is the clerk's responsibility to make certain that they are placed in a place where nobody can read them, and that they are returned the next day.*
>
> *The extent to which you keep notes is entirely your choice. The notes may be used by you at the end of the case to refresh your recollection as to what the testimony was.*
>
> *If you do not keep notes, you should not be unduly influenced by somebody else's notes. Because what's critical is that any decision that you make concerning these charges must be your individual decision, first of all, and you should not be using somebody else's notes as the authority in the case." (TR Oct 27, 2010 pg 112-114)*

Therefore, because it is permissible for the court to permit note-taking by the jury and there is nothing prejudicial about providing notebooks with each of the five victims' names on a separate page of paper, the Petitioner's State and Federal Constitutional rights were not violated and he is not entitled to habeas relief on this claim.

Next, the Petitioner argues that his constitutional rights have been violated because the Court provided copies of the verdict form to the jury during the Court's instructions. The Petitioner makes no argument that the content of the verdict form was improper but only that the jury was provided a copy while the Court instructed the jury and may have maintained a copy during the closing arguments of counsel. The Petitioner cites no authority for his assertion that it is improper for the jury members to be provided a copy of the verdict form during the court's instructions. Nor can the Petitioner state that the verdict form invades the jury's role by assuming the existence of a disputed fact since it, by its very nature, provides the mechanism for the jury to set forth their findings.

The Court's paramount concern is to provide a fair trial to the Petitioner. The Court's instructions in this matter totaled fifty-one pages and took approximately an hour and a half to present to the jury. (TR Vol. IV pg 4.) The Court being cognizant of the limited attention span of jurors subjected to lengthy instructions, provided a copy of the verdict form to the jurors as an aide as they navigated through the Court's instructions. The Court directed that the verdict forms would be retrieved at the end of the Court's instruction and then a single

verdict form would accompany the jurors back to their deliberations. (TR Vol. IV pg. 4.) The verdict forms did not advocate the existence of any fact in dispute in the case. Therefore, based upon the forgoing, the Petitioner's assertions that providing a copy of the verdict form to the jury during the charge to the jury violated his constitutional rights is without merit.

The Petitioner finally asserts that the jury failed to consider all of the evidence. His only factual basis for this allegation is that the jury returned the verdict in an hour and thirty-five minutes. The West Virginia Supreme Court of Appeals has recognized that intrinsic challenges to a jury verdict based solely upon the length of deliberations will not be entertained on appeal. See, State v. Jenner, 236 W.Va. 406, 417, 780 S.E.2d 762, 773 (2015). A short deliberation period can equally be seen as an indicator that the jury found overwhelming evidence of the defendant's guilt. In fact, in State v. Greenfield, 237 W. Va. 773, 780, 791 S.E.2d 403, 410 (2016), the West Virginia Supreme Court of Appeals determined that when a jury returned its verdict after deliberating seventy minutes in a First Degree Murder case, the deliberation time alone did not indicate juror misconduct. Without anything beyond the time it took the jury to return their verdict, the Petitioner has alleged an insufficient basis upon which to conclude that the jury ignored its instructions or failed to consider the evidence, and therefore this claim is without merit.

GROUND 2: THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE

GROUND 6: THE STATE FAILED TO ADVISE THE COURT OF PERJURED TESTIMONY BY C.M. & V.N. IN VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS

The Petitioner argues in both his second and sixth grounds presented in this Petition that the State knew of, failed to disclose, and presented false testimony. He asserts that during trial "it was brought to the attention of the defendant that victim C.M. left the courtroom and told the defendant's mother and the defendant's sister-in-law that she had not been truthful while testifying..." Petition pg.8. The Petitioner further asserts that C.M. told the defendant's mother and the defendant's sister-in-law that she went to the office of the prosecuting attorney prior to trial and recanted her accusations. The Petitioner alleges that this information was not provided by the State to the defendant as exculpatory evidence.

The Assistant Prosecuting Attorney who handled the case at trial has denied the assertion that C.M. recanted her accusations at their office prior to trial. Additionally, trial counsel for the Petitioner asserts that they were never made aware by the Petitioner's mother or sister-in-law of the alleged statements by C.M. at the time of trial. Therefore, there is no substantiating evidence to support the Petitioner's claim that exculpatory evidence was withheld. In fact, the Petitioner's expert, Michael Benninger, Esq., determined that this claim is unsupported by the record. Therefore, based upon the forgoing, the Petitioner's assertions that the State withheld exculpatory evidence is without merit.

GROUND 4: THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

The Petitioner asserts that under the totality of the circumstances his counsel failed to provide professional competent assistance. Specifically, he asserts the following deficiencies: 1) failure to advise the defendant of a proposed plea agreement; 2) failure to object to the improper use of notebooks by the jury; 3) failure to recall C.M. after she advised she had been untruthful in her testimony; 4) failure to object to the Court instructing the State to summarize the testimony of the victims to the jury; 5) failure to interview witnesses and/or prepare their own witnesses; 6) failure to present expert testimony regarding defendant's inability to perform the acts of fondling and sexual intercourse due to his medical problems; 7) failure to have a sex offender evaluation performed and failure to present and argue mitigating factors at sentencing; 8) reusing to subpoena Joe N[redacted] and Quentin S[redacted] to testify at trial.

In support of this allegation, the Petitioner presented his own testimony and that of expert James Michael Benninger. Mr. R[redacted] testified that the Gillisons did not have any in-depth discussions with him regarding a potential plea agreement. He asserts that any time the issue of a plea agreement would be raised Mr. Gillison would tell him "[i]t doesn't matter because we are not going to take a plea bargain anyhow." He denies that he received the letter addressed to him from the Gillisons directing him to contact their office so that they can discuss a plea offer from the State. His position is that he placed all confidence in the Gillisons to advise him on the taking of a plea and they did not seriously consider any offer or present it to him to consider and therefore, he did not receive meaningful or

effective advice on whether to accept the plea agreement offered by the State. Importantly though, Mr. R admits that at the time of the trial he did not want to accept a plea because he was innocent of the charges.

Mr. R also testified that he was told by the Gillisons that his daughter, Jessica would be called to testify as well as John O and Quentin S, who had been accused by some of the victims of inappropriate touching in the past, however, none of these three witnesses were ever called.

Mr. R 's testimony on June 7, 2017, is six years after the time of trial. He testified that he has since experienced major medical issues while incarcerated including a triple-bypass and diabetic neuropathy that has affected his ability to remember things clearly.

Mr. Benninger testified that Mr. R 's testimony before the Court bolstered his opinion that the Gillisons' representation of Mr. R was ineffective. Mr. Benninger's testimony is that, in his opinion, the Gillisions' made limited efforts to find the identified witnesses. He further testified that the Gillisons' failure to identify, interview, contact, find, and account for every witness who could be identified from the discovery either prior to or at trial prevented them from thoroughly evaluating Mr. F 's case and prevented them from giving Mr. R proper advice as to whether to consider taking a plea. It is Mr. Benninger's opinion that the Gillisons' failed to conduct a thorough enough investigation of the charges facing their client. It is Mr. Bittinger's belief that the

Gillisons' secretary, Ms. Petteway, attempted to find and analyze the discovery and the Gillisons failed to visit the scenes of the various charges. Additionally, Mr. Benninger testified that if the Gillisons had hired a private investigator to attempt to find the witnesses, who then were not locatable, that he would have no criticisms.

West Virginia has adopted the standard for assessing the competence of counsel announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Miller, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995). Strickland requires the defendant prove two things: (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." 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. When considering whether counsel's performance was deficient the court must maintain a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See, Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. To demonstrate prejudice, a defendant must prove there is a "reasonable probability" that, absent the errors, the jury would have reached a different result. 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

In considering the Petitioner's claim that he was prejudiced by ineffective assistance of counsel in violation of the State and Federal Constitutions this Court will measure and compare trial counsel's performance by whether they exhibited normal and customary degree of skill possessed by attorneys who are reasonably

knowledgeable of criminal law. Any error that does not affect the outcome of this case will be regarded as harmless. See, U.S.C.A. Const.Amend. 6. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

a. Failure to advise the defendant of a proposed plea agreement. The Petitioner alleges that his counsel failed to advise him of a proposed plea agreement. This claim is without merit. Both counsel for the defendant testified that they informed the defendant of the possibility of a plea, however, because he professed his innocence, he refused to consider any offer. Specifically, Mr. Gillison testified that when he talked with Mr. R[redacted] about a plea agreement "he said he wasn't pleading to anything because he's not guilty." (TR. Ed Gillison pg. 100 ln. 5) Mr. R[redacted] himself testified that at the time of trial he did not want to plead to something he did not do. Further, on April 1, 2010, trial counsel sent a letter to the defendant notifying him that a plea offer had been made that that he should make an appointment to discuss the plea with counsel. Finally, the Court extensively addressed with the defendant and his counsel the plea offer made by the State and the sentence for each crime alleged in the indictment and the reduced sentence offered to him in the proposed plea agreement tendered by the state both prior to the jury trial and after the close of the State's case in chief. To assert now that he was unaware of a possible plea is disingenuous. Therefore, this court cannot find that trial counsels' performance was deficient under an objective standard of reasonableness.

b. **Failure to object to the improper use of notebooks by the jury and failure to object to the Court instructing the State to summarize the testimony of the victims to the jury.** As discussed above, this Court has determined that the notebooks and summarization procedure used by the Court were permissable within the right of the Court to control the orderly process of a trial did not prejudice the defendant's case. Therefore, this court cannot find that trial counsels' performance in failing to object was deficient under an objective standard of reasonableness

c. **Failure to recall C.M. after she advised she had been untruthful in her testimony.** This allegation presupposes that C.M. was untruthful in her testimony and that counsel was aware of that fact at the time of trial, however, the Petitioner has provided no evidence that C.M. was untruthful, that she disclosed that she was untruthful to anyone, or that trial counsel was informed of any untruthful testimony of C.M. at the time of trial. The only assertion in support of this allegation is from the Petitioner's family who claims that C.M. made a statement to them that she was not truthful in her testimony at trial. However, both trial counsel deny that they were made aware of any statement from C.M. Specifically Helen Jackson-Gillison testified that "I don't recall all of that, no. And I don't think that [C.M.] would have talked to them [Mr. R[redacted]s family]. Because those girls were very, very protective of each other. They were very much with each other. They were protective of their mother. And I don't believe that [C.M.] would have told her that, but I don't know." (Depo Helen Gillison Tr. Pg 53) Edward Gillison stated that "[t]he first time that I heard that [C.M. stating that she was untruthful

on the stand] was when you—when I read your Petition."(Depo Edward Gillison Tr. Pg. 98)

The Court finds that Mr. R[redacted] has failed to show that C.M. ever stated that she was untruthful on the witness stand, however, even if she had made these statements, it is clear that neither attorney was aware of these statements at the time of trial and therefore trial counsel was not derelict in their duty. *See,* State v. Spence, 182 W.Va. 472, 388 S.E.2d 498 (1989); State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982) (failure to call a witness is not due to dereliction on the part of counsel, then there is no ineffective assistance.) Therefore, this court cannot find that trial counsels' performance was deficient under an objective standard of reasonableness.

d) **Failure to interview witnesses and/or prepare their own witnesses and refusing to subpoena Joe N[redacted] and Quentin S[redacted] to testify at trial.** Counsel for a defendant must conduct a reasonable investigation that will enable them to make informed decisions about how best to represent their client. Wickline v. House, 188 W.Va. 344, 424 S.E.2d 579 (1992); State ex rel. Kidd v. Leverette, 178 W.Va. 324, 359 S.E.2d 344 (1987). Mr. R[redacted] alleges that trial counsel failed to interview the witnesses, Quentin S[redacted] John O[redacted] Joe N[redacted] Michael K[redacted] and Jessica R[redacted] or prepare their own witnesses, and had refused to subpoena Joe N[redacted] and Quentin S[redacted] as witnesses for the defense. Trial counsel asserts that they adequately prepared for trial. Neither party presented

documentary evidence in support of their contention that witness interviews were or were not conducted such as time sheets, attorney notes, or the like.

The testimony of trial counsel revealed that they had agreed on a division of the trial preparation responsibilities. Mrs. Gillison was responsible for preparation of the witnesses and testimony and Mr. Gillison was responsible for the legal arguments and research. Contrary to the assertions of Mr. R[redacted] trial counsel state that they did speak to witnesses and prepare witnesses to testify. Mrs. Gillison testified that she believed that they interviewed all of the State's witnesses with the exception of the victims. Specifically she stated "I would have spoken with every person who was listed on the notes from the Department. I did not meet in person, because they didn't make themselves available, but they made themselves available via telephone." (Depo. Helen Gillison Pg.58). Mrs. Gillison further testified that they made attempts to find individuals who might have information favorable to Mr. R[redacted] Finally, that they had prepared for and anticipated additional testimony from Mr. R[redacted]'s daughter, Jessica, but that she refused to testify. (Depo. Helen Gillison Pg. 70). Likewise, Mr. Gillison testified that "[w]e spent hours interviewing people. We interviewed all of Nick's family. Everybody who had anything that we thought was material, we had them come into the office. We spoke to all of them. We spent hours interviewing everybody to see if they had anything that could help us. Everybody was prepared for when we went to trial; all of our witnesses. The only thing we didn't do was talk to the girls." (Depo Edward Gillison Pg. 44-45)

Quentin S[redacted] is the step-father of S.N. and V.N. On a prior occasion, S.N. had falsely accused Mr. S[redacted] of improper sexually touching. Trial counsel testified that they attempted to find Quentin S[redacted] through mutual acquaintances and the use of their private investigator/process server. (Depo Helen Gillison Pg. 28). They were never able to reach him; however, they believed that his testimony would ultimately be duplicative of Crystal S[redacted] and Melissa S[redacted], S.N. and V.N.'s older sister, that she and V.N. had falsely accused their father Joe N[redacted] of sexually abusing them so they would not have to go with him for visitation. However, this assertion by trial counsel overlooks that the accusation of sexual touching by Quentin S[redacted] would be a separate incident from Joe N[redacted]

John O[redacted] was the boyfriend of Virginia B[redacted] the mother of J.H. B.M. and C.M. Mr. R[redacted] contends that the girls made allegations that Mr. O[redacted] sexually fondled them. Mrs. Gillison stated that she attempted to locate him for an interview however, it is her contention that he was evading them. Further, she stated that she believes that Virginia was helping him avoid trial counsel. It is her assertion that he was not interested in becoming involved because C.M. had also accused him of sexually abusing her. (Depo Helen Gillison Pg. 30-31).

Joe N[redacted] is the father of S.N and V.N. Mrs. Gillison testified that "Mr. N[redacted] was ready to beat all of us up... he was very, very mean toward us[.]" and therefore they were unable to interview him or call him as a witness. (Depo Helen Gillison Pg. 63-64).

Ideally, counsel would like to interview every potential witness, however, if trial counsel has reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

The review of the record does not reflect that the trial counsel was derelict in their attempts to locate Mr. S[redacted] Mr. C[redacted] Both men had significant motives for wanting to avoid being involved in this case. Trial counsel testified that they enlisted the help of mutual acquaintances and utilized a private investigator/process server to try and reach the witnesses but were unsuccessful. In fact, the Petitioner's expert Mr. Benninger testified that if these actions were taken, that he would have no criticism. Further, Mr. R[redacted] has not shown that the witnesses identified, in fact, would have provided beneficial testimony at the time of trial.

Given these circumstances, it is objectively reasonable for trial counsel not to subpoena Mr. C[redacted] or Mr. S[redacted] at trial. Further, this court cannot find that trial counsels' performance in interviewing, preparing and identifying potential witnesses was deficient under an objective standard of reasonableness.

e) <u>failure to present expert testimony regarding defendant's inability to perform the acts of fondling and sexual intercourse due to his medical problems</u>. Mr. R[redacted] asserts that trial counsel should have presented expert testimony , inability to perform acts of fondling and sexual intercourse.

Specifically he alleges that he was impotent during the period of time covered by the indictments. Trial counsel asserts that when that information was brought to their attention they wanted to subpoena Mr. R[redacted]'s medical records to support this allegation however, he informed his counsel that he had never disclosed this medical condition to his physicians, or in fact, to anyone. (Tr. Helen Gillison pg. 62). Mrs. Gillison testified that they obtained the medical records from Wheeling Hospital to see if there was anything helpful, but ultimately there was nothing to support Mr. R[redacted]s contention. Finally, Virginia B[redacted] and Crystal S[redacted] did not support the contention that Mr. R[redacted] was impotent or physically impaired in any way that would prevent him from committing the crimes for which he was charged.

In light of the complete lack of any supporting evidence, aside from the assertion of Mr. R[redacted], of a medical condition that would make him incapable of committing the offenses of inappropriate touching or intercourse, the court cannot find that trial counsels' performance was deficient under an objective standard of reasonableness in failing to present expert testimony of such medical condition.

f) **Failure to have a sex offender evaluation performed and failing to present and argue mitigating factors at sentencing**. It is uncontested that trial counsel did not have a sex offender evaluation performed. However, the defendant called seven (7) witnesses to testify on his behalf at the sentencing hearing. Additionally, the Court had at its disposal the pre-sentence evaluation. Mr. R[redacted] has steadfastly maintained that he is innocent of these charges.

As the Court stated at sentencing, Mr. R[redacted] was convicted of the most serious crimes in this criminal justice system; crimes against children. A sex offender evaluation is conducted to determine the level of risk to the community and to determine the best treatment options and placement. The choice whether to request the defendant undergo a sex offender evaluation was entirely within trial counsel's discretion and can likely be attributed to future trial strategy, weighing the likelihood that it will have little bearing on the decision of the court as to sentencing. After reviewing the record and all evidence, the Court concludes that trial counsel was not ineffective as asserted by Mr. R[redacted], but was instead acting within the strategic and tactical boundaries of a reasonable defense attorney in their position. Trial counsel adequately represented Mr. R[redacted] and even if trial counsel had arranged for a sexual offender evaluation, the Mr. R[redacted] cannot prove by a preponderance of the evidence that the results in this case would have been different.

GROUND 5: THERE WAS IMPROPER AND PROHIBITED CONTACT BETWEEN THE PROSECUTING ATTORNEY AND THE JURY DURING THEIR DELIBERATIONS IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

Mr. R[redacted] alleges that the prosecuting attorney entered the jury room two or three times and remained in the jury room for approximately sixty seconds each time for the purpose of delivering documents or evidence. Aside from this bald assertion, no evidence or argument is further provided. Accordingly, this Court finds Petitioner's argument with regard to Ground Five is without merit. There is nothing in the record to indicate improper contact with the jury.

GROUND 7: PREJUDICIAL PRE-TRIAL PUBLICITY

Again, aside from this bald assertion that there was prejudicial pre-trial publicity, no evidence or argument is further provided. Accordingly, this Court finds Petitioner's argument with regard to Ground Seven is without merit. There is nothing in the record to indicate prejudicial pre-trial publicity.

GROUND 8: SEVERITY OF SENTENCE

Mr. R[redacted] was sentenced to a cumulative penitentiary sentence of not less than 201 nor more than 410 years. The sentences imposed upon the Petitioner fall within the limits authorized by the statutes providing punishment for the offenses committed. However, Mr. R[redacted] contends that his sentence is cruel and unusual because it is disproportionately severe. A habeas Petitioner who seeks to challenge the severity of a prison sentence on Eighth Amendment grounds faces a formidable challenge in that the United States Supreme Court has stated that "successful challenges to the proportionality of particular sentences should be exceedingly rare." Rummel v. Estelle, 445 U.S. 263, 272, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980).

In determining the constitutionality of a given sentence, the West Virginia Supreme Court has stated that the sentence must be reviewed in light of the express proportionality requirement of *W.Va. Const.,* art. III, § 5: "Penalties shall be proportioned to the character and degree of the offence." A two part test was set forth in State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), to determine

whether a sentence is so disproportionate to the crime that it violates W.Va. Const. art. III, § 5. Part one is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. "If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." 172 W.Va. at 271, 304 S.E.2d at 857. Part two is an objective test: If the sentence does not shock the conscience, a disproportionality challenge is guided by the objective test spelled out in syllabus point 5 of Wanstreet v. Bordenkicher, 166 W.Va. 523, 276 S.E.2d 205 (1981):

> In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Mr. R[redacted] stands convicted of twenty-three counts of sexual offenses against multiple minors. He violated the trust of the women with which he became involved and instigated sexual contact with their underage daughters. Each of the separate acts is a separate crime and each may be punished as provided for under our statutes. The sentences in this case bespeak the abhorrent acts committed by Mr. R[redacted] and do not "shock the conscience." It is the actions of Mr. R that shock the conscience.

In reviewing the objective component, Mr. R[redacted] was convicted of nineteen counts of sexual abuse by a custodian each of which carries a sentence of

not less than (10) ten nor more than twenty (20) years; one count of sexual abuse in the first degree which carries a sentence of not less than one (1) nor more than five (5) years in the penitentiary; and one count of sexual assault in the second degree which carries a sentence of not less than ten (10) nor more than twenty- five (25) years in the penitentiary. The legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians is a separate and distinct crime from general sexual offenses for purposes of punishment and are treated more harshly than general sexual offenses. See, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992), State v. Cook, 228 W. Va. 563, 572, 723 S.E.2d 388, 397 (2010). West Virginia's statutes addressing molestation and sexual conduct with a minor advance the State's goal of combating sexual abuse.

Further this court finds that these are violent offenses against multiple children. The West Virginia Supreme Court has stated "[s]levere prison sentences, including life without parole, for serious crimes against the person, are not cruel or unusual punishment." Syl. Pt. 8, State v. Woodall, 182 W. Va. 15, 18, 385 S.E.2d 253, 256 (1989). Further, even for non-violent offenses, life sentences have been held not to be cruel and unusual when imposed under a recidivist statute. See, Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (a term of life imprisonment under a Texas recidivist statute when he was convicted of three separate nonviolent crimes of fraud involving less than $300.00.)

Therefore, in reviewing the sentence in this matter the Court finds that the Defendant's claim is without merit and the sentence Mr. R[redacted] received did not

constitute cruel or unusual punishment and were not unconstitutionally excessive and he is not entitled to habeas relief on this claim.

WHEREFORE, The Court accordingly **FINDS** that the Petitioner has not established that he is in custody in violation of the West Virginia or United States Constitution.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DENIED**. And this matter is STRICKEN from the active docket of the Court.

Copies of this Order shall be transmitted to Counsel for the State of West Virginia and Counsel for the Petitioner.

ENTERED this 6 day of OCTOBER, 2017.

Hon. Ronald E. Wilson, Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest Glenda Brooks
Clerk, Circuit Court
Brooke County, West Virginia
By: Mary L Wyatt Deputy