THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HENRY WAYNE JOHNSTON,
Petitioner,

v. **22-P-219**
Judge Louis H. Bloom

DONALD F. AMES. SUPERINTENDENT,
MT. OLIVE CORRECTIONAL COMPLEX,
Respondent.

AMENDED FINAL ORDER AND ORDER GRANTING MOTION TO APPOINT APPELLATE COUNSEL

Pending before the Court is a Motion for Extension of Time filed on February 8, 2023, by the petitioner, Henry Wayne Johnston, by counsel Jason T. Gain. Petitioner moves the Court to reenter its November 17, 2022, Final Order denying the Petition for Writ of Habeas Corpus. In support, Counsel for Petitioner asserts – by sworn affidavit – that Counsel did not receive a copy of the Court's Final Order. Counsel thus asserts that he was not aware of the Final Order within the appellate period and thus moves the Court to reenter the Final Order so Petitioner may appeal the Final Order.

The Court **FINDS** that Petitioner has presented good cause to reenter the Final Order and thus enters the instant Amended Final Order. In addition, Counsel asks to be appointed as Counsel for Petitioner to file an appeal of the Final Order. The Court therefore **APPOINTS** Jason T. Gain as Counsel for Petitioner for the purpose of filing an appeal of this Court's Final Order. The remainder of this Amended Final Order is identical to the Final Order entered by the Court on November 17, 2022.

Pending before this Court is an amended petition for writ of habeas corpus. The petitioner asserts error in failing to afford petitioner a speedy trial; denial of right of confrontation, and ineffective assistance of counsel.

Following a review of the underlying criminal file, the appellate proceedings, the written submissions of the petitioner and the respondent in this action, a review of the testimony from the omnibus evidentiary hearing, as well as a review of the applicable law, this Court finds that petitioner has failed to carry his burden as to any issue, and further finds that the amended petition should be denied and dismissed.

I.

FINDINGS OF FACT

1. The Court adopts the following underlying facts proven in the criminal case:

In October of 2015, petitioner was indicted by a Kanawha County Grand Jury in a fourteen count indictment alleging three counts of first degree sexual assault in violation of West Virginia Code § 61-8B-3(c); five counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust **[*2]** in violation of West Virginia Code § 61-8D-5; two counts of sexual abuse in the first degree in violation of West Virginia Code § 61-8B-7(c); and four counts of unlawful possession or distribution of material portraying a minor engaged in sexually explicit conduct in violation of West Virginia Code § 61-8C-3. The sexual assault and abuse counts stem from several incidents that occurred between petitioner and an eight-year old child, K.D. ("the victim.") The unlawful possession counts stem from sexually explicit photographs of other children found on petitioner's computer. The offenses were discovered when the victim's cousin found the victim looking at explicit pictures on petitioner's computer. She inquired of the victim, and the victim disclosed that petitioner was sexually abusing her.Ms. Maureen Runyon, a forensic interviewer with the Child Advocacy Center at Women and Children's Hospital conducted a forensic interview of the victim. During the interview, the victim disclosed that petitioner touched her with his finger, a vibrator, and his penis; that he performed oral sex upon her, and forced her to perform oral sex upon him. Law enforcement recovered and seized petitioner's computer, and found several pictures depicting juveniles in graphic sexual positions. **[*3]**

At trial, the victim testified that she was eight years old and in the third grade when petitioner began abusing her. The victim testified that petitioner forced her to perform oral sex upon him, rubbed his penis on her vagina, touched her vagina with his fingers, and touched her with a vibrator. The victim testified that petitioner told her that he would kill her if she told anyone. The State also introduced evidence from Dr. Istafon, a pediatrician who specializes in child abuse and neglect. Dr. Istafon testified that he examined the victim and that she had a very deep tear in her hymen that was so severe that it is referred to as a "transection." Dr. Istafon testified further that this injury could not have been done by K.D. to herself. The State also introduced evidence regarding the graphic photographs found on petitioner's computer. At the close of the State's evidence, upon the motion of petitioner's counsel, the photographs were excluded and counts eleven through fourteen of the indictment were dismissed.

Petitioner testified on his own behalf. Petitioner denied any wrongdoing, and claimed that the victim's family forced the victim to fabricate the claims. Petitioner's counsel **[*4]** argued in closing argument that the victim was embarrassed to be found looking at pornography, and so made up the story to get out of trouble.

Before the jury deliberated, petitioner's counsel requested that the trial court give a curative instruction regarding the admissibility of the excluded photographs. The trial court agreed, and the parties conferred and agreed upon the following instruction:

For reasons not important to your deliberations, I have dismissed counts 11 through 14 dealing with the child pornography. In considering your verdict on the remaining counts, you should not consider the dismissal of counts 11 through 14 or the evidence, including the pictures, submitted in connection with those counts for any purpose.

Following jury deliberations, petitioner was convicted of two counts of first degree sexual assault; four counts of sexual abuse by a parent, guardian, custodian, or person in position of trust; and two counts of first degree sexual abuse. *State v. Henry W. j.,* 16-0088, Memorandum Decision, WVSCA, January 27, 2017.

2.The grounds asserted on appeal included presentation of false and misleading testimony from Deputy Boner, failure to protect petitioner's right to a fair trial by showing inadmissible evidence to the jury, insufficient evidence.

3.Petitioner asserts in this action in habeas corpus the denial of a right to a speedy trial, ineffective assistance of counsel, error of constitutional dimension in evidentiary rulings, specifically violation of the right to confrontation.

4. An omnibus evidentiary hearing was held in this matter at which trial counsel, Richard Holicker testified. The petitioner did not testify.

5. Petitioner's counsel reviewed the Losh list with petitioner. (Omnibus hearing transcript at 4.) The petitioner acknowledged he had been informed that he waived every ground he did not raise in this proceeding. (Id. at 5.) The petitioner could think of no additional grounds to raise. (Id.) The petitioner further understood that by raising ineffective assistance of counsel he was waiving the privilege of confidential communications between him and his trial attorney. (Id. at 6.)

6. The petitioner understood the issues being raised and those being waived. He'd discussed them with his lawyer and was making an informed decision in this matter. He was satisfied with his lawyer's explanations. The Court found that the petitioner had made a free and voluntary waived of the issues, that he was competently advised, and made an informed decision. (Id. at 11-12.)

7. As noted above, petitioner's trial counsel, Richard Holicker testified. (Id. at 12.)

8. The petitioner had been charged with sexual assault of a child and child pornography. (Id. at 13.)

9. At trial, counsel succeeded in having the child pornography charges dismissed.

10. Mr. Holicker did not have a specific recollection of viewing, or failing to view, certain material. However, his position was that if he had not viewed the material, he believed his client had a right to also view the material and was unable to do so. (Id. at 15.)

11. As to the confrontation issue, Mr. Holicker has no independent recollection, but believed that the witness was seated in the witness box, which also had a computer monitor affixed. He thought the child did not have a direct line of view of the petitioner. (Id. at 17.)

12. Mr. Holicker did not know the view the petitioner had of the child, but did mention the petitioner had stated he turned away from her anyway. (Id. at 18.)

13. Mr. Holicker held a license to practice law when he represented the petitioner and had handled serious criminal cases both to trial and plea. (Id. at 22-23).

14. Mr. Holicler believed it was a strategic decision not to review the material in question and further believed it was a successful strategy since those counts were dismissed. (Id. at23-24.)

15. A curative instruction was given to the jury regarding those counts. (Id. at 24.)

16. The child was physically present in the courtroom when she testified. (Id.) So was the petitioner. (Id. at 25.)

II.

CONCLUSIONS OF LAW AND DISCUSSION

1. West Virginia Code §53-4A-1 provides for post-conviction habeas relief for "[a]NY person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State or both. . ."

2. The contentions and the grounds in fact or law must "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 in a prior petition or petitions 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." West Virginia Code §53-4A-1.

3. West Virginia's post-conviction habeas corpus statute "clearly contemplates that [a] person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding." Syl. Pt. 1, *Markley v. Coleman*, 215 W.Va. 729, 601 S.E. 2d 49 (2004) (citations omitted). Such proceeding gives the Petitioner an opportunity to "raise any collateral issues which have not previously been fully and fairly litigated." *Coleman* at 732, 601 S.E.2d at 52. The initial habeas corpus hearing is *res judicata* as to all matters raised and to all matters known or which, with reasonable diligence, could have been known. Syl. Pt. 2, *Coleman, supra.* The habeas corpus statute "contemplates the exercise of discretion by the court." *Perdue v. Coiner,* 156 W. Va. 467, 194 S.E.2d 657 (1973).

4. The circuit court denying or granting relief in a habeas corpus proceeding must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. *State ex rel. Watson v. Hill, 200* W. Va. 201, 488 S.E.2d 476 (1997).

5. "Habeas corpus proceedings are civil proceedings. The post-conviction habeas corpus procedure provided for by Chapter 85, Acts of the Legislature, Regular Session, 1967, is expressly stated therein to be 'civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case.'" *State ex rel. Harrison v. Coiner*, 154 W. Va. 467, 476, 176 S.E.2d677, 682 (1970). The burden is on the petitioner to prove his claims by a preponderance of the evidence.

6. "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, 254 S.E.2d 805 (1979). Moreover, "[t]he sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by due process of law." Syl. Pt. 1, *State ex rel. Tune v. Thompson,* 151 W. Va. 282, 151 S.E.2d 732 (1966).

7. A circuit court having jurisdiction over habeas corpus proceedings has broad discretion in dealing with habeas corpus allegations. *Markley, supra* at 733, 601 S.E.2d at 53. It may deny the petition without a hearing and without appointing counsel if the petition, exhibits, affidavits, and other documentary evidence show to the circuit court's satisfaction that the Petitioner is not entitled to relief. Syl. Pt. 3, *Markley, supra.* A circuit court may also find that the habeas corpus allegation has been previously waived or adjudicated and if so, the court "shall by order entered of record refuse to grant a writ and such refusal shall constitute a final judgment." *Markley, supra,* at 733, 601 S.E. 2d at 53 (2004) (citations omitted). (citing W.Va. Code section 53-4A-3(a)).

8. When determining whether to grant or deny relief, a circuit court is statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner and to state the grounds upon which each matter was determined. Syl. Pt. 4, *Markley, supra. See also* W.Va. Code §53-4A-3(a).

9. Further, there now exists a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance. The burden of proof rests upon the petitioner to rebut that presumption. Syllabus Pts 1 and 2, in paraphrase, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972).

10. Claims of ineffective assistance begin and in large measure end with the standards set forth in *Strickland/Miller.*

11. West Virginia evaluates an ineffective assistance of counsel claim under the two-prong standard set forth by the Supreme Court of the United States in *Strickland v. Washington.* Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E. 2d 114 (1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To succeed on such a claim, a petitioner must establish that: 1) his trial 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 would have been different." (*Id.*) "Failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Vernatter v. Warden, W. Virginia Penitentiary*, 207 W. Va. 11, 528 S.E. 2d 207 (1999).

12. The *Strickland* standard is not easily satisfied. *See Miller*, 194 W. Va. at 16 ("[T]he cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between."), *State ex rel. Daniel v. Gurski*, 195 W. Va. 314, 319, 465 S.E. 2d 416, 421

(1995)(ineffective assistance claims are "rarely" granted and only when a claim has "substantial merit"), *see also*, *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005)("Petitioners claiming ineffective assistance of counsel under *Strickland* have a heavy burden of proof.").

13. In *Miller*, the court outlined the challenge faced by a petitioner claiming ineffective assistance, noting that judicial review of a defense counsel's performance "must be highly deferential" and explaining that there is a strong presumption that "counsel's performance was reasonable and adequate." *Miller*, 194 W.Va. at 16, 459 S.E.2d at 127. Moreover, the *Miller* court held that there is a "wide range" of performance which qualifies as constitutionally adequate assistance of counsel, stating:

> A defendant seeking to rebut the[e] strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a 'wide range.' The test of ineffectiveness has little or nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Id., *see also Vernatter*, 207 W. Va. at 17, 528 S.E.2d at 213 ("[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .' "(quoting *Strickland*, 466 U.S. at 689).

14. A petitioner claiming ineffective assistance must identify the specific "acts or omissions" of his counsel believed to be "outside the broad range of professionally competent assistance." *See Miller*, 194 W. Va. at 17, 459 S.E.2d at 128, *State ex rel. Myers v. Painter*, 213 W. Va. 32, 35, 576 S.E.2d 277, 280 (2002)("The first prong of [the *Strickland*] test requires that a petitioner identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment)(internal quotation marks omitted).

15. The reviewing court is then tasked with determining, "in light of all the circumstances" but without "engaging in hindsight," if that conduct was so objectively unreasonable as to be constitutionally inadequate. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

16. Strategic choices and tactical decisions, with very limited exception, fall outside the scope of this inquiry and cannot be the basis of an ineffective assistance claim. *Gurski*, 193 W. Va. at 328, 465 S.E.2d at 421 ("A decision regarding trial tactics cannot be the basis for finding of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness.")(internal quotation marks omitted), *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127 ("What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that courts will seldom, if ever, second guess.").

17. Identifying a mere mistake by defense counsel is not enough. *See Edwards v. United States*, 256 F.2d 707, 708 (D.C. Cir. 1958)("Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not . . . amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice.'"). As the *Miller* court noted, "with [the] luxury of time and the opportunity to focus resources on specific facts of a made record, [habeas counsel] inevitably will identify shortcomings in the performance of prior counsel;" however, the court continued, "perfection is not the standard for ineffective assistance of counsel." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

18. Even if defense counsel's conduct is deemed objectively unreasonable, and therefore satisfies the first *Strickland* prong, that conduct does not constitute ineffective assistance unless the petitioner can also establish that the deficient conduct had such a significant impact that there is a "reasonable probability that, but for counsel's unprofessional errors, the result the

proceedings would have been different." Syl. Pt. 5, *Miller*, *supra*. As the Supreme Court explained in *Strickland*, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Thus, satisfying *Strickland's* "prejudice prong" requires a showing that counsel's deficient performance was serious and impactful enough to "'deprive the defendant of a fair trial, a trial whose result is reliable.'" *State ex rel. Strogen v. Trent*, 196 W. Va. 148 at n. 4, 470 S.E.2d 7, 12 (1996) (quoting *Strickland*, 466 U.S. at 687), *see also Myers*, 213 W. Va. at 36, 576 S.E.2d at 281 (2002) ("The second or "prejudice" requirement of the *Strickland / Miller* test "focuses on whether counsel's deficient performance adversely affected the outcome in a given case.").

19. There is no precise formula, applicable in all cases, that can be applied to determine if the constitutionally-inadequate conduct in question so significantly degraded the reliability of the trial such that the prejudice prong is satisfied. *See Gurski*, 195 W. Va. at 325, 465 S.E.2d at 427 ("Assessments of prejudice are necessarily fact-intensive determinations peculiar to the circumstances of each case."). But there is no question that the burden of demonstrating prejudice lies with the petitioner. *Strickland*, 466 U.S. at 693, *Gurski*, 195 W. Va. at 319, 465 S.E.2d at 427 ("Assessments of prejudice are necessarily fact-intensive determinations peculiar to the circumstances of each case."). But there is no question that the burden of demonstrating prejudice lies with the petitioner. *Strickland*, 466 U.S. at 693, *Legursky*, 195 W. Va. at 319, 465 S.E.2d at 421.

20. **Petitioner's Claim 1, Denial of a Right to a Speedy Trial.** Petitioner asserts in a conclusory manner he should have been tried in the term in which he was indicted. Petitioner acknowledges the rule of a trial in the term in which one is indicted is a personal statutory right, and not part of the constitutional guarantee of a speedy trial.

21. As noted above, petitions for writ of habeas corpus are to redress constitutional wrongs. As this rule is not a constitutional guarantee, it may not be addressed in habeas. The state concedes that case law is adverse to his claim that he was entitled to dismissal when retrial in the term of his indictment, and agrees to an adverse ruling on this point. This claim entitles the petitioner no relief. This claim is denied.

22. **Petitioner's Claim 2, ineffective assistance of counsel.**

In order for the petitioner to obtain relief on this claim, he bears the burden of demonstrating that he has satisfied all the mandates of *Strickland/Miller*. That is, he generally must show that the conduct of counsel in any particular was objectively unreasonable, and that counsel's errors or omissions resulted in an adverse result.

23. The petitioner contends that it was objectively unreasonable conduct for counsel to fail to respond to and view the material, and that had counsel done so, the defects in the procedure would have been found before trial, and the jury would not have seen the evidence.

24. This issue was litigated before the Supreme Court in the direct appeal. The Supreme Court determined that though improper photographs were presented to the jury, a curative instruction was given. The trial court conferred with the state and the defense and a curative instruction was given. Petitioner's trial counsel announced that the instruction was agreeable. *Jury W, J, at *9-10.* The Supreme Court deemed any objection to the procedure utilized in the curative instruction to be waived.

25. Further, petitioner fails to prove that had defense counsel viewed the material prior to trial and objected prior to trial so the jury never saw the pictures, that the result of the trial would have been an acquittal. A curative instruction was given. It is not enough to prove that reasonable effective counsel would have viewed the material. Petitioner must also prove that

failure to view the material resulted in a decision adverse to petitioner. In this case, counsel testified that he believed he did not view the photographs because of a strategic decision and that further, that strategy was successful because those counts were dismissed. Petitioner has not proven that viewing those photographs contributed to the guilty verdict. In short, petitioner has fallen short of proving both prongs of *Strickland/Miller* and his claim is denied.

26. And petitioner is quite simply incorrect when he states this was a credibility contest between two people testifying. Dr. Istafon testified that the victim suffered what was described as a transection to her hymen, an injury she could not inflict upon herself. The Supreme Court, in affirming petitioner's convictions, noted that the testimony of the victim that the petitioner placed his penis on her female sex organ, and touched her female sex organ with a vibrator, and forced her to perform oral sex upon him is "credible, relevant testimony." *Henry W. J. at *12.* Moreover, the Supreme Court noted that "this testimony is bolstered by the physical evidence of injury introduced by Dr. Istafon, who testified that the victim's hymen was transected, and that the victim could not have inflicted this injury upon herself." *Id.*

27. The petitioner fails to satisfy both prongs of *Strickland/Miller*. This claim fails and the petitioner no relief.

28. Petitioner's Claim 3, constitutional errors in evidentiary rulings, specifically involving the right to confrontation.

29.The child and the petitioner were both present in the courtroom when she testified. Neither the omnibus hearing testimony. No evidence was presented that the petitioner could see the child at the omnibus hearing. In fact, the testimony from that hearing was that the petitioner chose not to look at the child. Even according to petitioner's pleadings, he petitioner indicates he was sitting there while she testified but was facing "this way." And then stated "I know she didn't

look at *Me.*" (Petitioner's brief at 13.) The petitioner has failed to prove that his right to confrontation was violated.

30. Nowhere in petitioner's argument does he state unequivocally that petitioner did not see the child.. This issue is one that could have been presented on direct appeal, but was not and is therefore waived for this proceeding. Additionally, it was a sound strategic decision not subject to efforts to keep the child calm and less fearful. No effective defense counsel would have welcomed the spectacle of the child becoming frozen or hysterical at the sight of the defendant. On page 15 of his brief, petitioner argues again that this was a he-said, she said case with no corroboration. That is simply incorrect. As noted by the Supreme Court, the victim was amply corroborated by Dr. Istafon. This claim affords the petitioner no relief.

III.

FINAL ORDER

CONCLUSION AND FINAL ORDER

THEREFORE, based upon a thorough and complete review of the complete record of the criminal case file in this matter; in consideration of the testimony at the omnibus evidentiary hearing, and considering the arguments of counsel for the petitioner and the warden at the hearing and in written submissions, it is ORDERED that the petition seeking a writ of habeas corpus be and the same is hereby DENIED. It is further ORDERED that said civil action be and the same is hereby DISMISSED. The Court notes the exceptions and objections of the petitioner. It is further ORDERED that the Clerk of the Circuit Court of Kanawha County send certified copies of this ORDER to counsel of record. Counsel will not be appointed automatically for the purpose of appealing this final ORDER. If the petitioner wishes to have counsel appointed for the purpose of appeal, he must file a motion with the Court requesting the appointment of counsel.

Further, the petitioner is notified that the notice of appeal must be filed within thirty (30) days of the entry of this order.

ENTERED 2/9/23

Judge Louis H. Bloom

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13 DAY OF February, 2023
Cathy Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:

Laura Young
Assistant Prosecuting Attorney
301 Virginia St., E.
Charleston, WV 25301
WV Bar ID# 4173

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

Criminal Action No. 15-F-635
Judge Louis H. Bloom

HENRY WAYNE JOHNSTON,
Defendant.

SCHEDULING ORDER AND ORDER APPOINTING HABEAS COUNSEL

On October 17, 2021, the Defendant, Henry Wayne Johnston, sent a letter to the Court seeking appointment of counsel to assist him in filing a petition for writ of habeas corpus.[1] The Court has reviewed the record and **FINDS** that Defendant has not previously filed a petition for writ of habeas corpus regarding this criminal conviction. Moreover, the Court **FINDS** that Defendant is incarcerated in Mount Olive Correctional Complex and thus financially unable to employ counsel to prosecute a habeas action. Accordingly, the Court **FINDS** Petitioner's request for appointment of counsel to be appropriate. The Court thus **APPOINTS Jason T. Gain,** an attorney practicing before the bar of this Court, to represent the Defendant and assist Defendant in filing a petition for writ of habeas corpus.

The Court **ORDERS** that the petition for writ of habeas corpus and supporting memorandum be filed on or before **January 28, 2022.** The answer and supporting memorandum shall be filed on or before **March 4, 2022.** Any reply memorandum shall be filed on or before **March 25, 2022.** An omnibus hearing shall be held on **April 13, 2022, at 2:00 p.m.**

It is further **ORDERED** that the Clerk send a certified copy of this Scheduling Order and Order Appointing Habeas Counsel to the Kanawha County Prosecutor's Office; to Jason T. Gain at P.O. Box 578 Anmoore, WV 26323; and to Defendant at Mount Olive Correctional Complex.

10/29/21 **ENTERED** this 28 day of October 2021.

Louis H. Bloom

Date: 10/29/21
Certified copies sent as:
___ counsel of record
___ parties
___ other
(please indicate)
By: J. Hagan
___ certified mail, return receipt
___ fax
___ hand delivery
___ inter-departmental
Other directives regarding distribution:
C. Coleman
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29
DAY OF OCTOBER 2021
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
C. Coleman

[1] Defendant's letter is attached hereto and shall be filed by the Clerk.

CERTIFICATE OF SERVICE

I certify that I have caused a copy of this Motion for Enlargement of Time to File Notice of Appeal to be filed by way of the Supreme Court efiling system on this 6th day of March, 2023.

/s/ Jason T. Gain

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