IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Jun 03 2023
05:14PM EDT
Transaction ID 70134953

CHARLESTON, WEST VIRGINIA

NO. 23-129

HENRY WAYNE JOHNSTON,

Petitioner,

v.

Appeal from a final order
of the Circuit Court of
Kanawha County (22-P-219)

DONALD AMES, Superintendent
Mt. Olive Correctional Complex

Respondent.

PETITIONER'S BRIEF

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1) The lower court erred in denying the Petitioner habeas corpus relief as his confrontation clause rights were violated at trial by permitting the alleged victim to testify while shielding herself with a computer monitor screen.

2) The lower court erred by failing to find that the Petitioner received ineffective assistance of counsel when his trial counsel made a deliberate choice not to view favorable pretrial discovery.

STATEMENT OF THE CASE

In September 2015, the Petitioner, Henry Wayne Johnston was indicted by the Grand Jury of Kanawha County on fourteen (14) counts: three (3) counts of sexual assault in the first degree, two (2) counts of sexual abuse in the first degree, five (5) counts of sexual abuse by a parent, guardian and/or custodian, and four (4) counts of distribution of depictions of minor children in sexually explicit positions in case number 15-F-635. Appendix Record ("A.R.") at 3. All the physical sexual allegations were against one minor child, K.D. *Id.*

The Petitioner went to trial on November 13, 2015. Prior to the jury verdict the Court dismissed the four (4) counts related to the depiction of minor children because the State Police Forensic Analyst failed to gather and provide to the Petitioner the metadata from the pictures or other potentially exculpatory information. *Id.* at 454.

On the third day of trial, the remaining ten (10) counts of the indictment were submitted to the jury and the Petitioner was convicted of eight (8): two (2) counts of first degree sexual assault with an "under 12" enhancement, four (4) counts of sexual abuse by a parent, guardian, and/or custodian, two (2) counts of sexual abuse in the first degree, and was acquitted on one (1) count of sexual assault in the first degree and one (1) count of abuse by a parent, guardian, and/or custodian. *Id.* at 604.

On December 30, 2015, the Petitioner's post-trial motions were denied, and he was sentenced consecutively for a cumulative term of one hundred (100) to three hundred thirty (330) years of incarceration plus fifty (50) years of supervised release. *Id.* at 615.

The Petitioner appealed these convictions and sentences to this Court and all requested relief was denied. *State v. Henry W. J.*, No. 16-0088 (W.Va. Sup. Ct., January 27, 2017) (memorandum decision).

On June 14, 2022, the Petitioner, with the aid of counsel (also current counsel on appeal) filed a post-conviction Petition for a Writ of Habeas Corpus. A.R. at 613. In it he alleged, in relevant part, that trial counsel was ineffective for two separate reasons, first, that he did not object to permitting the minor child victim to testify while hidden behind a computer monitor, and second that he failed to view pretrial discovery which would have prevented the jury from seeing the information related to the child erotica. *Id.*

The Respondent filed an Answer, and the Petitioner replied to this Answer in accordance with the scheduling order of the lower court. *Id.* at 652; 666. An omnibus hearing was held on September 20, 2022, at which trial counsel and the Petitioner testified. *Id.* at 671.

After the parties submitted their proposed orders, on November 17, 2022, the lower court denied all relief. *Id.* at 728.

The Petitioner now comes to this Court seeking habeas corpus relief from his underlying convictions.

SUMMARY OF ARGUMENT

The confrontation clauses of the State and Federal Constitutions contain a basic right that we all have to a day in court where we meet our accusers face to face. Although this is an unfortunate and stressful situation for truthful victims, it may expose the lies of a false accuser.

In this matter, the only evidence against the Petitioner, the testimony of the alleged child victim, was taken while she was permitted by the lower court and her trial counsel to shield herself from the Petitioner behind a computer monitor[1]. This was a clear violation of the Petitioner's constitutional right to a fair trial whether styled as plain error by the trial court or ineffective assistance of trial and/or appellate counsels. He should be granted a new trial where the confrontation clause is respected.

In addition, as noted above, the Petitioner was charged with possessing child erotica on his computer. These pictures were shown to the jury and after trial counsel, during the trial, found crucial foundational data missing, the lower court dismissed the child erotica counts and told the jury to disregard them. Had trial counsel paid a visit to the prosecuting attorney's office prior to trial, thereby conducting the most basic of investigations, the jury would have never seen the pictures. Although juries are generally presumed to follow instructions, it cannot be said that the dismissal and instruction was harmless in such an emotionally charged area such as child sexual abuse.

For this additional reason, the Petitioner received ineffective assistance of counsel and he should receive a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that argument under Rule 20 is appropriate as this case involves a fundamental issue regarding the right to face to face confrontation which has been guaranteed to free citizens for hundreds of years.

[1] This is not a euphemism for closed circuit testimony. The lower court and trial counsel literally permitted a piece of computer hardware in the courtroom to physically shield the witness from seeing the Petitioner.

Alternatively, argument under Rule 19 would be appropriate as it presents a unique question of law regarding the vitality of jury instructions which basically tell them to "unsee" pictures of children in stages of undress.

Given the important issues in this case, the Petitioner respectfully suggests that a memorandum decision is not appropriate.

ARGUMENT

Standard of Review

This Court reviews a circuit court's denial of a habeas petition under the following standard:

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

I. The lower court erred in denying the Petitioner habeas corpus relief as his confrontation clause rights were violated at trial by permitting the alleged victim to testify while shielding herself with a computer monitor screen.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. Amend. VI; *see also* W.Va. CONST. Art. III §14. Sixth Amendment confrontation has almost universally held to be the right of *face-to-face* confrontation. *See Coy v. Iowa*, 487 U.S. 1012 (1988) (holding unconstitutional a state law provision allowing a child accuser to testify behind a screen); *State v. Murray*, 375 S.E.2d 405, 412 (W.Va. 1988).

> Confrontation in criminal law has been defined as the act of *setting a witness face to face with the accused* so that the latter may make any objection he has to the witness and the witness may identify the accused, and this must take place in

> the presence of the court having jurisdiction to permit the privilege of cross-examination.

State ex rel. Grob v. Blair, 214 S.E.2d, 330, 334 (W.Va. 1975) (emphasis added in *Murray*). It follows that our Court then held that:

> We thus conclude, on the authority of Coy and Blair, that the right to confrontation assured by the Sixth Amendment and W.Va. Const. art. III, § 14 is violated where a witness testifies at trial and the defendant is denied the opportunity to confront the witness face-to-face.

Murray, 375 S.E.2d at 412. This idea of what confrontation entails is rather straightforward and has been a typical part of human interaction. "Look me in the face and say that" is a common challenge to a liar. Sir Walter Raleigh's trial, largely the source of the confrontation clause, became famous for Raleigh's demand to the court that "let Cobham be here, let him speak it. Call my accuser before my face…." Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 (1972).

In this case, the Petitioner was denied his right to face to face confrontation with his accuser and in addition, the unconstitutional denial of confrontation was discussed and argued at length throughout the trial testimony and in closing argument.

When the child was being interviewed by the Court to determine her competency, it was held that she did not have to sit in the witness chair:

> THE COURT: Okay. Now, when, when we come back here in a few minutes, we're going to have you sit in the chair there, and you're going to need to speak up; okay? Can you do that?
>
> THE WITNESS: (Nods head up and down.) Can I sit over there?
>
> THE COURT: Can you sit where?
>
> THE WITNESS: Over here where I am?

> THE COURT: Sure. You certainly can. And we'll figure out somehow to bring a microphone over there.
>
> MR. HOLICKER [defense counsel]: Judge, I'm standing over here. I can't see her.
>
> THE COURT: You're going to need to sit down. You're welcome to sit there. Or Mr. Holicker may sit over there in the corner if he wants to. You can sit anywhere you like over there, Mr. Holicker. In fact, I'll even let you stand over there, if you would like to, but not leaning against the jury post.
>
> MR. HOLICKER: May I stand here.
>
> THE COURT: You can. That's fine. Actually you can pull up a chair and sit down there….
> …
>
> THE COURT: Delbert, we're going to need to figure out how to get another microphone over here. Or maybe if you just have one with a long cord, we can disconnect it --- somehow connect it up here. We'll work that out somehow.

A.R. at 148-49. In case the purpose of not sitting in the witness stand was not clear enough from this exchange, the State confirmed its unconstitutional purpose shortly thereafter:

> MR. GIGGENBACH [Prosecutor]: Judge, her, her main concern **is seeing the defendant**, and I think that's why she wants to be in the corner over there with the **monitor blocking her from seeing the defendant**. And – so I just want to bring that to the Court's attention.
>
> THE COURT: All right, that's fine. Are you going to be able to do that?
>
> THE BAILIFF: I'm going to try, Judge.

Id. at 150 (emphasis added). There was no objection from trial counsel to this violation of his own client's Sixth Amendment rights. The State told the jury about this arrangement in its opening remarks: "You'll see that she won't even be able to look at Henry Wayne Johnston, Poppa Wayne. She'll have to sit back in that corner and have the monitor block her from seeing him. She is so petrified to come into this courtroom and testify." *Id.* at 154-55.

During K.D.'s direct testimony, defense counsel could not see her and had to jockey for position. *Id.* at 168, 178, 179. If counsel could not see her then it is clear that the Petitioner, sitting beside him, could not see her.

The questioning confirmed that the view between K.D. and the Petitioner was blocked. *Id.* at 176 ("And I know the monitor is blocking you right now, but can you describe his hair?"); *id.* at 219 ("Q. Do you want to look at him? A. No.)

During his testimony, the Petitioner confirmed that he was unable to see K.D. testify.

> Q. Okay. Well, you were sitting here when she testified; weren't you?
>
> A. Yes, but I was facing this way.
>
> Q. Okay. Well, when you were sitting here and she was testifying, do you remember when [K] stuck herself in the corner back there behind the monitor and couldn't look at you? Do you remember that?
>
> A. Well, I know she couldn't look at me.
>
> Q. Well, do you remember that?
>
> A. Yeah.

Id. at 490; *see also id*. at 499 ("How about when she walked into court and testified and hid behind the monitor?")

Not ready to leave this denial of confrontation alone, the State highlighted it in closing arguments. *Id.* at 565 ("How about when in the trial she was on the witness stand --- well, you remember how she had to hide behind the monitor?")

Trial counsel, instead of objecting, played into the game as well during his closing:

> Mr. Giggenbach made a big deal out of the fact that [K] didn't want to look at Mr. Johnston in court and hid behind the monitor to avoid looking at him. He suggested that this was because he had hurt her and thus she was afraid of him. I propose that perhaps it was because she was feeling overwhelming guilt for having put him in the position he's now in.

Id. at 584-5. The State got the final assault on the Sixth Amendment in this trial during its rebuttal argument to the jury:

> [mimicking defense counsel] 'She got on the stand, and she couldn't even keep up with her lies, so she had to go behind the monitor. She couldn't, she couldn't help it. But the conspiracy theory is not our defense.'
>
> You know why? Because when his client got on the stand, he made himself look foolish with his crazy ideas about what happened in this case.

Id. at 590. The unconstitutional testimony and the numerous mentions of it permeated the Petitioner's trial with unfairness. *Coy* specifically and unequivocally prohibits placing a barrier between a defendant and a testifying witness, even an alleged child sexual assault victim. *Coy*, 487 U.S. at 1020 ("The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective… **It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.**") (emphasis added).

"That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* A person may be emotionally unable to testify in the presence of a particular defendant, but:

> to say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

Maryland v. Craig, 497 U.S. 836, 867 (1990) (Scalia, J, dissenting).

The Petitioner's confrontation clause rights were clearly violated, and the lower court erred by finding that they were not.

a) The Petitioner should be awarded a new trial under either Plain Error or Ineffective Assistance of Counsel

i) Plain Error

Plain error is: "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *State v. Miller*, 459 S.E.2d 114, 129 (W.Va. 1995).

The plain error doctrine is on all fours of this case. This sort of "hide behind a computer monitor" testimony is fundamentally and unfairly unique in Anglo-American jurisprudence. It seriously degrades what lawyers and laypersons alike believe are the hallmarks of fair trials. The Petitioner asked the lower court to conduct a plain error analysis below and under the independent ground of "Constitutional Errors in Evidentiary Rulings.". A.R. at 628; 650. The lower court declined because it did not find error in the first instance. *See* Section I, (b), *infra*. The Petitioner respectfully requests plain error relief in the form of a new trial.

However, given the discretionary nature of plain error review, the Petitioner brings a more direct claim under ineffective assistance of trial and/or appellate counsel for failing to object to this matter in the first instance.

ii) Ineffective Assistance of Counsel

In regard to ineffective assistance of counsel, this Court has held that:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)*: (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.
>
> *Miller* at Syl. Pt. 5.
>
> The first prong of this 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. The court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, 466 U.S. at 690. In the second prong, a defendant "must show that there is *a reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to *undermine confidence* in the outcome." *Id.* at 694 (emphasis added).

Many attorneys on both sides of the issue complain that it produces unsatisfactory results as a subjective view by a judge can place an act or omission, or the determination of prejudice on either side of the line depending on his view of the underlying merits of the case. This problem can be overcome with an application of the portion of *Strickland* that is rarely cited:

> Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, **the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.**

Id. at 696 (emphasis added). This Court has seemingly upended prior precedent as to whether a trial attorney's actual conduct or even his testimony related to his trial conduct means anything. *State ex rel. Goodman v. Searls*, No. 20-0169 (W.Va. Sup. Ct., June 8, 2022) (signed opinion). Previously it was very important for trial counsel to "explain the motive and reason behind his or her trial behavior" and he was "the most significant witness" in ineffective assistance of counsel claims. *Miller*, 459 S.E.2d at 126. "It is apparent that we intelligently cannot determine the merits of this ineffective assistance claim without an adequate record giving trial counsel the courtesy of being able to explain his trial actions." *Id.* at 128.

The dissent argued that the Court will now construe trial counsel's strategy and decision making not from what he actually did, but from a "manufactured" retroactive analysis of what an objectively reasonable attorney *might* have done. *Goodman* at *15 (Wooton, J, dissenting).

The Petitioner believes and hopes that Justice Wooton was incorrect in his assessment of the majority opinion in *Goodman*. *Goodman* did not suggest that it was overruling Justice Cleckley's lengthy and reasoned opinion in *Miller* which has been the staple of ineffective assistance of counsel claims in this State for the last twenty-eight (28) years. Further, such a bold reversal would make any ineffective assistance of counsel claim nearly meaningless. Surely some lawyer somewhere has won a criminal case by the most idiosyncratic methods imaginable.

Most importantly, such an expansive reading of *Goodman* would ignore the fact that one trial tactic typically builds upon another. The State could always "divide and conquer" by pointing out that each step taken in isolation may have been done by some reasonable lawyer somewhere even though a particular attorney's jumbled choices have created an unimaginable mess in his or her defense of the case at hand.

The Petitioner suggests that the best reading of *Goodman* is that it is confined only to those tactical decisions which do not have "downstream" consequences and frustrate the defense theory of the case. For example, the failure to request a *Caudill* instruction in *Goodman* was a one off. The jury did not otherwise alter its perception of Mr. Goodman's case by not hearing this instruction.

In cases such as this one, where the theory of the case was actual innocence and that the alleged child victim was making up her story, the *Goodman* theory would not be appropriate.

Turning to the facts of this case, it is clear that shielding a witness from a defendant is a constitutional violation that trial counsel failed to object to, and appellate counsel failed to raise for plain error. *Coy*, 482 U.S. at 1012. This was not a tactical decision as trial counsel testified at the omnibus hearing that it was not:

> Q. Okay. Was it – now looking back –and I know your memory is not really fresh – but looking back, is it, was it your trial strategy to allow this child witness to be blocked from Mr. Johnston or yourself?
>
> A. It wasn't my idea. I don't recall whether I objected on or off the record. That's all I have to give you.
>
> Q. Okay. Based on that scenario, have you ever read any case or treatise or ever heard of such a strategy from a defense attorney to block a potentially damaging witness from the defendant's view?
>
> A. Well, again – and I'm not trying to pick nits here—but it wasn't my pretrial strategy to block the witness from viewing my client. That was the prosecutor's request. So it wouldn't have been my strategy to make that happen.
>
> Q. Okay. Well, that was the last question. I guess I wasn't clear how I formed it.
> Have you ever heard of any defense counsel – and I'm – you said you didn't do that in this case. In any case, in any English-speaking court, have you ever heard of that being a reasonable strategy, just in your experience?
>
> A. It wasn't my strategy to block him from her view. So it's not an issue that I researched in anticipation of trial. It's not an issue that I have researched in preparation for testifying today?
>
> Q. Okay. And again ---once again, I'll state that it – I understand that it was not your strategy in this trial, but have you ever in any other case employed such purported strategy?
>
> THE COURT: It seems you're badgering the witness. **The witness has said a number of times that is not a strategy he employed.**
>
> MR. GAIN: Yes. And I'm not – if I may, Judge, be heard on that, the Supreme Court has said it's based on what a reasonably prudent, reasonably knowledgeable attorney would do, not on what Mr. Holicker would do. I accept the fact that this was not his strategy. But I know the State either on appeal or here is going to argue – and they have in their response –they argued it was a reasonable trial strategy to attempt to block the child's view or the defendant's

> view. So that was the point of my question. But I'll withdraw that. It's not my intention to badger Mr. Holicker.

A.R. at 691-92. (emphasis added). Indeed, no published case supports a defense attorney affirmatively permitting a witness to shield herself from a defendant.

Perhaps in another case where a defendant had admitted guilt to his attorney, it might be reasonable to sit back and hope that the entire judicial system abandons the confrontation clause to limit the damage that a truthful testifying victim will cause. However, in this case the Petitioner consistently maintained his innocence to his trial counsel and maintains it to this day. *Id.* at 690. It cannot be said that any reasonable attorney in such a position would fear that the child would become "hysterical at the sight of the defendant" and develop a trial tactic to acquiesce in allowing the child not to face his client as required by the confrontation clause. *Id.* at 730.

There was certainly a reasonable probability of a different outcome. The very purpose of facing a defendant is meant to be emotionally upsetting so that it "may confound and undo the false accuser." *Coy*, 487 U.S. at 1020. Additionally, such a strategy would be inconsistent with the theory of the case that the child is fabricating her testimony. Allowing the jury to see the child shielded from view and cowering behind a computer monitor gives a powerful impression to a jury that the child is in genuine fear of a defendant.

This prejudice is amplified in child sexual assault cases without corroboration. Although a conviction in such cases "may" be had on uncorroborated alleged victim testimony, *see, e.g.*, *State v. Beck*, 286 S.E.2d 234, 242 (W.Va. 1981), a conviction is not *mandatory* in such cases and the fair presentation of evidence, including confrontation rights to determine witness credibility, is crucial to a fair trial.

The Respondent argued (and the court found) below that an expert testified that the child "suffered what was described as a transection to her hymen, an injury she could not inflict on herself." A.R. at 661; 739. The Respondent and the lower court both held that this Court previously held that this expert's testimony "bolstered" the child's testimony. *Henry W.J.*, No. 16-0088 at *12; A.R. at 661; 739.

The Petitioner respectfully disagrees. The injury to the child could have occurred at any time and from anyone, including from voluntary sexual activity with her peers. Nothing in this expert's testimony implicated the Petitioner. Further the prejudice prong of *Strickland/Miller* is not one of absolute certainty of an acquittal but one of "reasonable probability" of a different outcome. *Miller* at Syl. Pt. 5. The Petitioner believes that in this particular case with the egregious violation of his confrontation rights he has shown at minimum such reasonable probability.

As both prongs of *Strickland/Miller* are met and the adversarial process broke down because of a fundamental denial of the basic truth-seeking function in criminal trials, the Petitioner has shown that he received ineffective assistance of counsel. He asks that this Court reverse the denial of habeas relief and order a new trial.

b) The lower court clearly erred in its factual determination and application of law.

The lower court's treatment of this issue was cursory, taking merely one half of a page of ruling copied completely from the Respondent's proposed order including typographical errors. *Compare* A.R. at 739-40 with A.R. at 712. It first noted that "[t]he child and the petitioner were both present in the courtroom when she testified, per the omnibus hearing testimony." *Id.* at 739. This is certainly true, but meaningless. Face to face confrontation does

not mean “face to computer hardware” confrontation or a requirement that one be seated in the same courtroom as an accuser.

The court continued, “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 (sic) petitioner indicated he was sitting there while she testified by was facing ‘this way.’ And then stated, “I know *she* couldn’t look at *Me*.” *Id*. at 739-40 (emphasis and capitalization added in original without attribution.)

This is a clearly erroneous determination of the facts. Of the largely four pages of this brief containing testimony where the witness’ view was blocked by a computer monitor and the parties talking about it incessantly, *see* p. 5-8, *supra*, the lower court picked out a single sentence:

> Q. Okay. Well, you were sitting here when she testified; weren’t you?
>
> A. Yes, but I was facing this way.

Id. at 490. The court’s conclusion missed the very next lines of the questioning:

> Q. Okay. Well, when you were sitting here and she was testifying, do you remember when [K] **stuck herself in the corner back there behind the monitor and couldn’t look at you**? Do you remember that?
>
> A. Well, I know she couldn’t look at me.
>
> Q. Well, do you remember that?
>
> A. Yeah.

Id. Indisputably, had the witness “stuck herself in the corner” the Petitioner would have by necessity unable to face her: the very reason for his complaint. This analysis not only ignores the other incontrovertible portions of trial transcripts, but trial counsel’s unrebutted testimony at the omnibus hearing:

Q. Now, do you have a specific recollection, looking back at the child witness' visibility during her testimony?

A. I don't have an independent recollection absent what I have been able to review; but pulling it together in my mind, I believe that the child was seated in the witness box; and there is a computer monitor in the witness box, as I recall, so that witnesses can look at exhibits; and I **believe that the computer monitor was probably moved in such a way that the child did not have a direct line of view to Mr. Johnston.**

Q. You say it was moved in such a way. Who would have moved that, to your recollection?

A. I couldn't tell you. I don't have a memory of that.

Q. In your recollection, were all the other witnesses' views similarly blocked?

A. Oh, I **don't believe that anybody's view of Mr. Johnston was blocked other than the child.**

Q. Okay.

A. But I believe that was at Mr. – **I believe that was at Mr. Giggenbach's request**.

Id. at 686-87 (emphasis added). The lower court further stated that "Nowhere in petitioner's argument does he state unequivocally that petitioner could not see the child..(sic) This issue is one that could have been presented on direct appeal, but was not and is therefore waived for this proceeding." *Id.* at 740.

At the outset, the Petitioner did "explicitly" argue that he could not see her. *Id.* at 626 ("If counsel could not see her, not only could the Petitioner not see her, but counsel was unavailable to receive notes or whisper to the Petitioner during testimony."). However, even without this statement, this holding is fatuous. The Petitioner claimed throughout that the computer monitor was blocking the alleged victim's view of him and it was placed there for that purpose. One does not need a law degree to understand that sight is a two-way street which requires a path of light free of obstruction from one end to the other. If the witness is

blocked from seeing the Petitioner, then *a fortiori* the Petitioner is blocked from seeing her in violation of his confrontation clause rights.

The lower court then denied plain error review (had it found error) because counsel below did not object nor did his appellate counsel raise the error on direct appeal. *Id.* at 740. For that reason, as noted above, the Petitioner asks this Court to conduct that plain error review.

Turning to the holding regarding ineffective assistance of counsel related to this assignment was the concluding rationale of the lower court's order denying habeas relief. "Additionally, it was sound strategic decision not to object 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." *Id.* at 740.

This is an astounding proposition unsupported by any published case. It first requires that every effective defense counsel simply assume his client's guilt despite his or her client's statements to the contrary. The theory of the case all along was that the Petitioner was innocent of these crimes and that the child was fabricating her statements. Indeed, the Petitioner maintained his innocence in his confidential communications with trial counsel throughout the underlying case. *Id.* at 690. As stated above, perhaps in another case where a defendant admitted guilt to his trial counsel, he may want to rest on his extra constitutional victory, but that is far afield from the facts of this case.

Defendants have fought for years and continue to fight to get cases such as *Coy*, and later *Crawford v. Washington*, 541 U.S. 36 (2004) and others in front of high courts to secure their right to confrontation. A powerful way for defendants to defeat false testimony is by face-to-face confrontation and "to sit in the presence of the child, and to ask, personally or through

counsel, 'it is really not true, is it, that I -- your father (or mother) whom you see before you -- did these terrible things?' *Craig*, 497 U.S. at 861 (Scalia, J, dissenting).

However according to the lower court, no lawyer worth his salt would ever want the things that the best appellate lawyers in the country are trying to get for him or her. This statement is pure judicial *ipse dixit* lacking support in case law or common sense and would serve to defeat any ineffective assistance of counsel claim on the basis that a lawyer can, without consultation with his client, unilaterally deny him the right of confrontation even though the client professes his innocence. To state the issue is to undermine it.

The lower court's order also ignores the fact that trial counsel affirmatively disclaimed that this was his strategy at all. A.R. at 690.

For the foregoing reasons, the lower court erred in denying habeas relief to the Petitioner for the violation of his confrontation clause rights either by not applying the plain error doctrine or finding that he had ineffective assistance of counsel. The Petitioner should be granted a new trial.

II. The lower court erred by failing to find that the Petitioner received ineffective assistance of counsel when his trial counsel made a deliberate choice not to view favorable pretrial discovery.

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

State ex rel. Daniel v. Legursky, Syl. Pt. 3, 465 S.E.2d 416 (W.Va. 1995) (emphasis added).

In addition to the sexual assault allegations, the Petitioner was purportedly found with child erotica pictures on his computer and was tried for those charges at the same time as the charges discussed in this Petition. A.R. at 3.

The State Police Forensics lab did not conduct a full extraction report on the hard drives which the images were found. *Id.* at 452. This failure meant that there was no metadata or other information putting the pictures in context and could have been potentially exculpatory to the Petitioner. *Id.* at 453-54. Upon learning of this at trial and **after the pictures had been published to the jury**, the Court dismissed these counts. *Id.* at 454.

In a post-trial motion, trial counsel attempted to blame the State for this development and alleged that the State violated *Brady*. *Id.* at 633.

The State responded that it was not in violation of *Brady* and had made every effort to provide trial counsel with all relevant evidence in its possession related to the pictures. *Id.* at 638-39. It noted that it only had the partial extraction provided by the State Police and "requested the defense to have a discovery conference and view the entire CD and CD portions containing child pornography and other evidence on the CD. *The defense refused to do so.*" *Id.* at 639 (emphasis in original).

The State then noted that at a prior hearing it had informed trial counsel that an additional report on a CD was three hundred ninety one (391) pages long and "asked for defense counsel to come to the State's office to go over these and any other materials on the CD. *No appointment or visit was made by the defense and the defense refused to do so.*" *Id.* (emphasis in original).

The State further claimed that a copy of the State Police lab report was provided in discovery on August 20, 2015, and gave trial counsel notice that the accompanying CD "could

be viewed by appointment. *No appointment or visit was made by the defense and the defense refused to do so*." *Id.* (emphasis in original).

Additionally, the State sent an email to trial counsel with expert witness certifications with a further invitation to view the CD. "*No appointment was requested by the defense* and counsel for the defense later informed the State: '*What would be the point?*'" *Id.* (emphasis in original).

On November 9, 2015, the State again informed trial counsel that the State Police data was ready for viewing. "*No appointment was requested by the defense and the defense never came by to see the CD. Again, the defense refused to look at the available evidence*." *Id.* at 639-40 (emphasis in original).

The next day the State sent additional notice regarding the extraction report of a tablet found in the possession of the minor alleged victim and "*no appointment was requested nor was a visit made to view the CD.*" *Id.* at 640.

The State admitted in its responsive pleading that "it became clear" during trial that the State Police did not generate a full extraction report on the hard drives and that the procedure at the State Police lab[2] is not to do a full investigation. *Id.* Its procedure is to simply have the forensic officer determine, in his sole, unfettered and unreviewable discretion, what items on a hard drive *he or she* believes is relevant to the State's case and simply ignore anything else that might be of interest to the defense. *Id.* at 452-53.

The State further conceded that had trial counsel accepted its invitation to view the discovery prior to trial, trial counsel would have discovered *then* what ultimately led to the dismissal of the sexual picture counts of the indictment: that no extraction had been performed

[2] Which counsel notes is sadly true in most if not all other cases.

on the hard drives. *Id.* at 641 ("Had the defense accepted the State's offer to view all of the evidence on the CD several months prior to trial, rather than turn a blind eye to this CD, this matter would have been moot.")

At the omnibus hearing, trial counsel testified that he continued to believe that there had been a *Brady* violation. *Id.* at 684. When pressed about his failure to review the pretrial discovery, trial counsel stated:

> I don't have any specific recollection of that issue; but thinking it through, the only thing that makes sense to me, if I did decline to view the trial (sic) pornography, would have been that I believed Mr. Johnston had a right to review the evidence; and if he was not going to be allowed to review the evidence, it was pointless for me to review it. But that's just speculation on my part based on the way I typically do things.

Id. at 685. In assessing ineffective assistance of counsel in this matter no deference should be given to any purported strategic choices of trial counsel regarding the handling of the pictures because by the **State's own admissions**, he clearly failed to properly investigate the issue prior to trial. *Daniel* 465 S.E.2d at Syl. Pt. 3.

No serious argument can be made that failing to look at discovery provided by the State containing the *corpus delicti* of a charge contained in four counts of an indictment is what is to be expected of a reasonable defense attorney. Trial counsel's complaint that if the Petitioner was unable to view the material, then there was no point to *him* viewing it is silly. The reason the charges were dismissed *is exactly* the reason to view the State's evidence prior to trial.

Any prudent counsel should view the State's discovery for authenticity, chain of custody, independent investigation and examination; these are the very things that defense attorneys are here to do. It is unclear what information the Petitioner personally viewing the pictures would have given trial counsel. The Petitioner would have either said "mine" or "not

mine." In any event, trial counsel's duty would have been the same. Thus, the first prong of *Strickland/Miller* is met.

The prejudice from this deficiency is manifest. The only evidence against the Petitioner was the uncorroborated testimony of the alleged minor child victim, however the jury was told that the Petitioner kept child pornography on his computer, thus bolstering the idea that he was sexually attracted to young children. Had trial counsel viewed the discovery prior to trial, the jury would never have seen them. A.R. at 641.

Although the jury was instructed to disregard the photographs, and juries are generally presumed to follow instructions, this is simply a bell that cannot be unrung as "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 304 F.2d 883, 886 (5th Cir. 1962). The introduction of the pictures, which by diligence could have been excluded entirely, changed the whole complexion of the trial.

Juries, like all of us, are highly protective of children and it is simply too much to ask the human mind to acquit someone of child sexual assault after having seen pictures of children, purportedly contained on his computer, in stages of undress. A legal fiction of "the jury will disregard" can only be carried so far. The Petitioner has easily satisfied the second prong of *Strickland/Miller* and shown at least a reasonable probability of a different outcome but for deficient performance.

Finally, the introduction of the evidence made the trial fundamentally unfair. *Strickland*, 466 U.S. at 696. In what should have been a credibility contest between the Petitioner and alleged victim, the jury was shown that he enjoyed child pornography. This fact turned the issues away from the "he said/she said" nature of the testimony into a harsh judgment of the Petitioner's personal and illegal if true pornographic preferences.

The lower court's judgment was: first, that this Court on direct appeal had approved of the jury instruction given related to the photographs, and second, that the Petitioner "fail[ed] to prove" that had trial counsel viewed the pictures prior to trial, "that the result of the trial would have been an acquittal." *Id.* at 738. The lower court never addressed whether failing to view the pictures prior to trial was deficient performance.

On direct appeal, the Petitioner argued plain error by the trial court admitting the photographs in the first instance and failing to give a "stronger" curative instruction after the dismissal of the charges. *Henry W.J.*, No. 16-0088 at *4. This is nowhere near the argument the Petitioner raised below. The Petitioner said nothing about jury instructions or improper admission of the photographs by the trial court. The Petitioner argued clearly, as stated above, that it was ineffective assistance of counsel to fail to view them prior to trial and that this failure prejudiced him and caused a breakdown in the adversarial system. The lower court's finding misses the mark.

Turning to the prejudice prong, the lower court misstates the law. No habeas petitioner must affirmatively and conclusively prove that but for trial counsel's errors, he would have been guaranteed an acquittal. A Petitioner must simply show "**a reasonable probability** that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Miller* at Syl. Pt. 5 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As the lower court applied the incorrect standard for ineffective assistance of counsel and failed to address the substance of the Petitioner's arguments, this Court should reverse.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the denial of habeas corpus relief from the Circuit Court of Kanawha County and remand the matter to that court with instructions to grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of this "Petitioner's Brief" to served upon all parties by the Supreme Court efiling system on this 3rd day of June, 2023.

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