IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-129

HENRY WAYNE JOHNSTON,
Petitioner,

v.

DONALD AMES, Superintendent
Mt. Olive Correctional Complex,
Respondent.

RESPONDENT'S BRIEF

Appeal from the
Circuit Court of Kanawha County
Case No. 22-P-219

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INTRODUCTION

Respondent Donald Ames, Superintendent, responds to Henry Wayne Johnston's (Petitioner's) Petition for Appeal from the denial of his Petition for Writ of Habeas Corpus. Petitioner is convicted of eight sex crimes against a child, K.D.[1] Petitioner claims he was denied his right to confront K.D. face-to-face because the court allowed a computer monitor to be placed in such a way that K.D. could not see Petitioner when she testified. But this arrangement was proper because K.D. was traumatized by Petitioner's presence in the courtroom, and other procedural safeguards ensured Petitioner received a fair trial. Petitioner also complains of child pornography pictures published to the jury before these charges were dismissed, but Petitioner's counsel was not responsible for that action, and Petitioner was not prejudiced thereby.

ASSIGNMENTS OF ERROR

> 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.

Pet'r's Br. 2.

STATEMENT OF THE CASE

In September 2015, Petitioner was indicted for fourteen sex crimes, to-wit: three counts of First Degree Sexual Assault (Counts One, Three, and Nine), two counts of First Degree Sexual Abuse (Counts Five and Seven), five counts of Sexual Abuse by a Parent, Guardian, Custodian, or Person in Position of Trust (Counts Two, Four, Six, Eight and Ten), and four counts of Possessing

[1] Following the traditional practice in cases involving sensitive facts, the State will use the first name and last initial of Petitioner and the adult witnesses at trial. *See* W. Va. R. App. P. 40(e)(1). The State will also use the initials of the child victims and any other minor witnesses at trial. *See State v. Timothy C.*, 237 W. Va. 435, 439 n.1, 787 S.E.2d 888, 892 n.1 (2016).

Material Depicting a Minor Engaged in Sexually Explicit Conduct (Counts 11-14). App. 3-10, 729. At trial, the court dismissed Counts 11-14 pursuant to Petitioner's motion relating to the State's failure to produce exculpatory evidence. App. 454-55, 684-85. Ultimately, the jury convicted Petitioner for Counts One through Eight of the Indictment: First Degree Sexual Assault (x2); Sexual Abuse by Parent, Guardian, or Custodian (x4), and First Degree Sexual Abuse (x2). App. 604-06. The jury found Petitioner not guilty of Counts Nine and Ten. App. 605-06.

Prior to opening statements, the court brought the eleven-year-old child victim, K.D., into the courtroom. App. 145-52. The court conducted a colloquy with K.D. to ensure she was competent to testify. In relevant part, the court's colloquy with K.D. reads as follows –

> THE COURT: How are you? You're a little upset; aren't you? Try not to be upset. You know, I've got some little, I've got some little granddaughters that are about your age. So you just be a big girl and do the best you can; okay? Can you look at me? Okay. Can you raise your right hand? Do you swear or affirm to tell the truth?
>
> THE WITNESS: I swear.
>
> ***
>
> THE COURT: Okay. Now, 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 here?
>
> 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: 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 a chair up and sit down there. Now, nobody is going to hurt you; okay?

THE WITNESS: (Nods head up and down).

THE COURT: Do you understand that?

THE WITNESS: (Nods head up and down).

THE COURT: And we're just going to tell the truth, and the lawyers are going to ask you questions; and if you don't hear a question, you can tell me you didn't hear it; okay?

THE WITNESS: Okay.

THE COURT: But you're going to have to speak up into the microphone. 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 here somehow. So you do you think you're going to be able to do this?

THE WITNESS: (Nods head up and down).

THE COURT: Okay. It's not going to be easy; right?

THE WITNESS: Yes.

App. 145-50. After K.D. was excused from the courtroom, the court noted "[s]he's very shy and very delicate here." App. 150. The State responded "Judge, [K.D.'s] 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." App. 150. The Court replied, "[a]ll right, that's fine." App. 150.

When K.D. testified at trial, Petitioner's counsel moved so that he could see her. App. 168, 178, 179. K.D. identified Petitioner at trial. App. 176. K.D. further testified she was scared in the courtroom, and did not want to look at Petitioner. App. 219. K.D. testified that Petitioner threatened to kill her if she told anyone about his abuse. App. 211-14. Petitioner also told K.D.

that if he went to jail, he would kill her when he got out. App. 213. Petitioner's threats scared K.D. App. 213. And K.D. provided a factual basis for the sex crimes charged in the indictment. App. 194-221.

K.D. lived with Petitioner and her mother in South Charleston. App. 176-77. Petitioner told K.D. to go to a website, porn.com, to look up pictures of naked people on the internet. App. 184-85. One of the searches she recalled using was "[w]hy do guys hurt little girls?" App. 186. K.D. agreed to go to the basement with Petitioner when her mother was home because she "didn't want to get hurt" in the event her mother found out what Petitioner was doing to her. App. 213-14.

Petitioner testified that he saw K.D. crying when she came into the courtroom to testify. App. 489-90. When asked if K.D. appeared scared, Petitioner said "[w]ell, she was crying. I would imagine that's why she was crying." App. 491. Petitioner further proclaimed his innocence and that he was framed by K.D.'s family. App. 502.

K.D.'s cousin, Kelcie T., testified that she looked at a tablet computer used by K.D. and saw evidence of a Google search for "grown men having sex with young girls." App. 335. Kelcie T. also noted that the tablet was used to access many pornographic sites. *Id.* When Kelcie T. confronted K.D. about this, K.D. admitted "[Petitioner] had showed her" the porn sites. App. 336-37. K.D. further admitted to Kelcie T. that Petitioner had "touched her." App. 337. After disclosing abuse to Kelcie T., K.D. told her mother Amber S. App. 338. Amber S. testified that after learning of K.D.'s disclosure, she took her for a forensic interview at CAMC Women's and Children's Hospital. App. 321.

Erin D., K.D.'s stepmother, testified that she looked at a cell phone and tablet computer used by K.D., and she found that K.D. had visited "porn sites" that depicted "[g]rown men performing sexual acts with children." App. 347. When Erin D. questioned K.D. about this, "[s]he

said [Petitioner] would have her watch these videos so that she would know what to do for him." App. 350. K.D. further disclosed that she performed oral sex on Petitioner and he touched her vagina. App. 350-51.

Maureen Runyon, a forensic interviewer with the Child Advocacy Center at CAMC Women's and Children's Hospital, testified at Petitioner's trial about her forensic interview of the child victim. App. 287-310. K.D. provided a detailed disclosure to Runyon that Petitioner sexually molested her and watched pornography with her. App. 308-09. Further, Dr. Sharon Istafon examined K.D., and testified that she had a very deep tear in her hymen called a "transection" that is indicative of trauma. App. 265-68.

On direct appeal, this Court rejected Petitioner's claims of insufficient evidence, willful and intentional fraud before the grand jury, and jury instruction error. *State v. Henry W.J.*, No. 16-0088, 2017 WL 383778 (W. Va. Supreme Court, Jan. 27, 2017) (memorandum decision).

In June 2022, Petitioner filed a Petition for Writ of Habeas Corpus and *Losh* list. App. 613-651. The Petition alleges denial of a right to speedy trial, ineffective assistance of counsel, and a violation of the Confrontation Clause. App. 613-651, 730. Respondent filed an Answer to the Petition. App. 652-64. The court held an omnibus hearing on the Petition. App. 671-700.

Regarding K.D.'s "visibility during her testimony" at trial, Petitioner's counsel testified "I believe that the computer monitor was probably moved in such a way that [K.D.] did not have a direct line of view to [Petitioner]." App. 686-87. The monitor did not block anyone else's view of Petitioner. App. 687. During the trial, Petitioner was seated next to his attorney. App. 687-88. When asked if Petitioner could not see K.D. when she testified, Petitioner's counsel stated "I don't know. It's possible. But also based on my review of documents, it appears that [Petitioner] was turned away from her anyway. So even if the monitor wasn't there, he would not have been able

to see her." App. 688. Petitioner's counsel was asked if he believes Petitioner "was deliberately looking away from [K.D.]," during her testimony and he responded "[t]hat's how I interpret it." App. 689. In February 2023, the court entered a final order denying the Petition for Writ of Habeas Corpus. App. 728-41.

SUMMARY OF ARGUMENT

Petitioner raises two arguments on appeal – both fail. First, the court properly allowed K.D. to use a computer monitor to shield her view of Petitioner when she testified at trial. The court found such an arrangement to be necessary to protect K.D.'s welfare because she was traumatized by Petitioner's presence in the courtroom, and there were adequate procedural safeguards to ensure Petitioner received a fair trial. Petitioner's attorney was not ineffective for failing to object to this arrangement because it was proper under the circumstances, and Petitioner did not prove prejudice. Second, Petitioner's counsel did not provide ineffective assistance when certain child pornography photos were shown to the jury. After these photos were displayed, the court granted Petitioner's motion to dismiss the child pornography charges (Counts 11-14) because the State did not produce a potentially exculpatory "extraction report" from Petitioner's computer. Further, the photos were stricken from evidence and the jury was instructed to disregard them.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

ARGUMENT

A. Standard of review.

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. Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

"Three separate levels of scrutiny apply to Confrontation Clause claims: The circuit court's order is reviewed for abuse of discretion; its factual findings are reviewed for clear error; and its legal rulings are reviewed de novo." *State v. Martin*, No-0112, 2013 WL 5676628 at*2 (W. Va. Supreme Court, Oct. 18, 2013) (memorandum decision) .

"Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, *Grob v. Blair,* 158 W. Va. 647, 214 S.E.2d 330 (1975). The doctrine of harmless constitutional error applies to a "denial of face-to-face confrontation." *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

B. The courtroom arrangement did not violate Petitioner's right to confrontation. [2]

1. Given K.D.'s upset mental state at trial, the court properly allowed her to testify behind a computer monitor that shielded her view of Petitioner.

Petitioner claims the use of a computer monitor to shield K.D.'s view of him violated his right to confrontation, and the court plainly erred when it allowed K.D. to do so. Pet'r's Br. 5-10. The Confrontation Clause generally provides Petitioner with a right to confront his accuser "face-

[2] Petitioner's counsel acknowledges research assistance provided on this issue by a summer law clerk for the Attorney General's Office – Matthew N. Tinor, 2L, West Virginia University College of Law.

to-face." *Coy v. Iowa,* 487 U.S. 1012, 1015 (1988). But this right is subject to exceptions that are "firmly rooted in our jurisprudence." *Id.* at 1021 (citing *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)); *see State v. Murray*, 180 W. Va. 41, 48 n.3, 375 S.E.2d 405, 412 n.3 (1988) (recognizing that *Coy* may allow an exception to the Confrontation Clause "when necessary to further an important public policy."). And even if this Court finds that the monitor shielding Petitioner's view of K.D. violated his right to confrontation, this Court may affirm the jury's verdict if it finds this error was harmless beyond a reasonable doubt. Syl. Pt. 5, *Grob,* 158 W. Va. 647, 214 S.E.2d 330; *Coy,* 487 U.S. at 1021 (holding that other types of Confrontation Clause violations are subject to constitutional harmless error analysis and there is "no reason why denial of face-to-face confrontation should not be treated the same.").

The right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial when the denial of such confrontation is necessary to further an important public policy and where the testimony's reliability is otherwise assured. *Coy*, 498 U.S. at 1021. In a child sex abuse case such as this, a defendant's right to confront his accuser face-to-face "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).[3] The Confrontation Clause merely reflects a "preference" for face-to-face confrontation that "must occasionally give way to considerations of public policy and the necessities of the case." *Craig* at 849. In other words, face-to-face confrontation of witnesses is not "an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Id.* at 849-50. Rather, "it is all but universally assumed that there are

[3] Under certain conditions, West Virginia Code § 62-6B-1 et seq. allows a child witness to testify by closed-circuit television, or the defendant may elect to absent himself from the courtroom when the child testifies. Neither of these situations occurred in the instant case.

circumstances that excuse compliance with the right of confrontation." *Id.* at 850. One of these circumstances arose in this case when the court found K.D. in an emotionally upset state at trial. App. 145-50.

States have a compelling interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" and "safeguarding the physical and psychological well-being of a minor." *Craig*, 497 U.S. at 852-53 (citing *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982) and *Osborne v. Ohio*, 495 U.S. 103, 109 (1990)). Further, the State has a traditional and "transcendent interest in protecting the welfare of children," which is reinforced by "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court." *Craig* at 855. Thus, "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Craig* at 853.

The Supreme Court in *Craig* devised a three-part test that balances the Petitioner's right to confrontation with the victim's right to testify against her accuser without suffering trauma. The requisite finding of necessity is "case-specific." *Id.* First, "[t]he trial court must hear evidence and determine whether use of [a procedure other than face-to-face confrontation] is necessary to protect the welfare of the particular child witness who seeks to testify." *Craig* at 855. Second, the trial court must "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Craig* at 856. Third, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than mere nervousness or excitement or some reluctance to testify." *Craig* at 856; *see also State v. Davis*, 830 P.2d 1309, 1315 (Mont. 1992) (holding that a trial court made sufficient

individualized findings of trauma to child witnesses if they testified in defendant's presence; thus, placement of an opaque screen between defendant and the witnesses did not violate Confrontation Clause).

In this case, the court properly found it necessary to limit Petitioner's right to face-to-face confrontation of K.D. to protect her psychological well-being. This Court should not second-guess the trial court's finding of K.D.'s emotional trauma on the basis of a cold record with no opportunity to witness K.D.'s demeanor. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (holding that a federal habeas court cannot "redetermine credibility of witnesses whose demeanor has been observed the state trial court, but not by them."). The court saw evidence that K.D. needed to be protected from the trauma of facing Petitioner in the courtroom. Throughout the competency colloquy with K.D., the court found that K.D. was "upset," "very shy and very delicate." App. 146, 150. Even Petitioner deduced that K.D. was emotionally upset, because she was crying when she entered the courtroom. App. 489-91. Further, Petitioner threatened to kill K.D. if she told her story. App. 211-14. K.D. was scared in the courtroom and did not want to look at Petitioner. App. 219. Given the evidence presented regarding K.D's fear of seeing Petitioner in the courtroom, it was necessary to limit Petitioner's face-to-face confrontation. It was evident to the court that K.D. needed to have some measure of security to protect her from seeing the man who threatened to kill her if she spoke against him. App. 211-14; *see Craig* at 850. When the court told K.D. she would need to sit in the witness chair, K.D. responded "[c]an I sit over here?" App. 148. The court agreed to bring a microphone to K.D. in the corner of the courtroom, and instructed Petitioner's counsel that he could move to a different location in the courtroom to see K.D. when she testified. App. 148-50. Considering the totality of the circumstances, there is "an adequate showing of necessity" to limit Petitioner's right to face-to-face confrontation of K.D. *Craig* at 855. It was evident from

K.D.'s demeanor that she was traumatized by Petitioner's presence in the courtroom, and the emotional distress K.D. suffered in the presence of Petitioner was more than *de minimis*. *See id.* at 855-56.

Further, the court assured K.D.'s testimony was reliable. *See id.* at 850. The trial provided adequate safeguards to ensure that, despite the monitor blocking K.D.'s view of Petitioner, K.D.'s testimony was "both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* at 851. The court conducted a colloquy with K.D. to establish her competence to testify. App. 145-51. When K.D. testified, her demeanor was visible to Petitioner's counsel, and she was able to identify Petitioner in court. *See Craig* at 851; App. 222-43, 250-51, 168, 178, 179. Petitioner presents no evidence that the jury was unable to observe K.D.'s demeanor. Petitioner had a fair trial and the evidence supports the trial court's limitation of Petitioner's right to face-to-face confrontation under the *Craig* factors. In sum, the court did not commit plain error when it limited Petitioner's right to confront K.D. face-to-face.

Additionally, the court properly exercised its inherent discretion when conducting Petitioner's trial. "Under Rule 611(a) of the West Virginia Rules of Evidence [2014], the trial judge clearly has discretion to exercise reasonable control over the mode and order of [examining] witnesses and presenting evidence" if the court balances "the fairness to both parties." Syl. Pt. 3, in part, *State v. Dunn*, 237 W. Va. 155, 786 S.E.2d 174 (2016) (quoting Syl. Pt. 2, *Gable v. Kroger Co.*, 186 W. Va. 62, 410 S.E.2d 701 (1991) (internal quotations omitted)); *see People v. Rose*, 808 N.W.2d 301, 310 (Mich. Ct. App. 2010) (holding that a trial court's decision to permit eight-year-old victim to testify using one-way witness screen did not violate defendant's right to confront witnesses). In this case, the court balanced fairness to both parties by ensuring K.D.'s competence to testify, and allowing Petitioner's counsel to move in the courtroom so he could observe K.D.'s

demeanor as she testified. App. 148-50. K.D. was subjected to vigorous cross-examination by Petitioner's counsel. App. 222-43, 250-51. During cross-examination, the court allowed Petitioner's counsel to move closer to K.D. App. 223. Balancing these procedural safeguards with K.D.'s apparent fear of Petitioner, the court properly exercised its inherent discretion under Rule 611(a) when it allowed K.D. to testify behind a monitor. *See* Syl. Pt. 3, *Dunn*, 237 W. Va. 155, 786 S.E.2d 174.

To the extent that the courtroom arrangement is error, it is harmless beyond a reasonable doubt. *See* Syl. Pt. 5, *Grob,* 158 W. Va. 647, 214 S.E.2d 330; *Coy,* 487 U.S. at 1021. An assessment of harmlessness "cannot include consideration of whether the [K.D.]'s testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy*, 487 U.S. at 1021 . Given the weight of evidence presented by the State at Petitioner's trial, which included the testimony of two experts on child sex abuse and three of K.D.'s relatives who corroborated K.D.'s testimony, any error that may have occurred is harmless beyond a reasonable doubt. Thus, this court should affirm the court's order.

2. The courtroom arrangement does not constitute plain error.

Petitioner argues that it was plain error for the court to allow K.D. to testify behind a computer monitor. "To trigger application of the 'plain error' doctrine, there must be (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." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). As stated above, the court properly applied the *Maryland v. Craig* factors when it found there was an adequate showing of necessity to limit Petitioner's right to face-to-face confrontation of K.D and balanced Petitioner's interest with K.D.'s fear of testifying against

Petitioner. Further, K.D.'s testimony was reliable because she was subject to cross-examination and the trial court assured her competence to testify. *Craig* at 855. Thus, there is no error.

Even if this Court finds that there was a plain error affecting substantial rights, this Court is not obligated to correct the error unless a fundamental miscarriage of justice has occurred. *State v. David K.*, 238 W. Va. 33, 44, 792 S.E.2d 44, 55 (2016) (citing *State v. Marple*, 197 W. Va. 47, 52, 475 S.E.2d 47, 52 (1996)). Given the weight of the evidence presented by K.D. and five other witnesses at trial – including two experts on child sex abuse – the court's assurance of K.D.'s competence, and Petitioner counsel's vigorous cross-examination of K.D., a fundamental miscarriage of justice did not occur in this case. The court properly exercised its inherent authority to control trial procedure and implemented procedural safeguards that protected the fairness, integrity, and public reputation of Petitioner's trial. In sum, Petitioner is not entitled to relief after plain error analysis.

3. Petitioner was not provided ineffective assistance of counsel because his attorney failed to object to the courtroom arrangement.

Petitioner claims that his attorney's failure to object to K.D. testifying behind a monitor constitutes ineffective assistance of counsel. Pet'r's Br. 10-19. Petitioner has a heavy and demanding burden in satisfying both *Strickland/Miller* prongs and it is a burden he has failed to carry.

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

Syl. Pt. 5, *Miller*, 194 W. Va. 3, 459 S.E.2d 114 . The *Strickland/Miller* test is conjunctive so that "[i]n deciding ineffective assistance claims, a court need not address both prongs of the conjunctive

standard of *Strickland v. Washington* . . . and *State v. Miller* . . . , but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). In other words, "[f]ailure 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*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999). Therefore, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

Counsel's failure to object to the courtroom arrangement was objectively reasonable because K.D. was afraid to see the man who threatened to kill her if she told anyone what he did. App. 211-19. The court properly limited Petitioner's right to face-to-face confrontation under the *Craig* factors and the court's inherent discretion to control trial procedure. 497 U.S. at 855-56; W. Va. R. Evid. 611(a). Petitioner's counsel conducted a full and fair cross-examination of K.D. and Petitioner received a fair trial. This Court should dispose of this issue for Petitioner's failure to satisfy the first prong of *Strickland/Miller.* Syl. Pt. 5, *Legursky*, 195 W. Va. 314, 465 S.E.2d 416 .

Even if this Court finds Petitioner's counsel acted in an objectively unreasonable manner, Petitioner has not shown that the courtroom arrangement prejudiced him by changing the outcome of his trial. To demonstrate prejudice, Petitioner must show:

> 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. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting *Strickland* 466 U.S. at 693-94). Petitioner states that allowing K.D. to testify behind a computer monitor gave the impression to the jury that she was "in genuine fear of" the defendant. Pet'r's Br. 14. But K.D.'s fear of Petitioner is a valid

reason for her to testify behind the monitor. K.D. indicated she was fearful in the courtroom, and stated the Petitioner had threatened to kill her if she disclosed his crimes to anyone. App. 211-19. All Petitioner presents is mere speculation of prejudice, and Petitioner does not satisfy his burden under the second prong by merely showing "some conceivable effect on the outcome of" Petitioner's trial. *Richter*, 562 U.S. at 104. The record does not indicate the jury was swayed by the monitor. In fact, Petitioner was acquitted on Counts Nine and Ten – First Degree Sexual Assault and Sexual Abuse by a Person in Position of Trust. App. 605-06. Overall, Petitioner received a fair trial and was not prejudiced.

Petitioner states that "prejudice is amplified in child sexual assault cases without corroboration," but K.D.'s testimony was not uncorroborated. Pet'r's Br. 14. To the contrary, five witnesses corroborated K.D.'s testimony that Petitioner abused her. Two of these witnesses, Dr. Istafon and Maureen Runyon, were qualified as experts in the field of child sexual abuse. App. 254-310. Three other witnesses – K.D.'s mother, cousin, and stepmother – also provided evidence corroborating K.D.'s testimony of abuse. App. 311-363.

K.D. told Runyon that Petitioner fondled "the skin of her vaginal area," and touched "the inside of her vaginal area" with "something black and long, which we assumed was possibly a dildo or sexual toy that had been used in her vaginal areas." App. 261. K.D. further stated that Petitioner "licked her private area." App. 303. K.D. described "oral sex and actually described white stuff in her mouth." App. 261, 308-09. K.D. said that Petitioner kept condoms in a small U-Haul box. App. 305. K.D. also stated that if she resisted Petitioner's advances, he would punch her in the face and "knock her back." App. 305-06.

Dr. Istafon testified that K.D. "had a very deep, almost to the vaginal vault, what we call a transection, which is basically a tear in the hymen." App. 265. The only way a transection can

occur is by a "penetrating trauma to that area." App. 268. This medical finding is consistent with K.D.'s statement to Runyon that Petitioner "put things in her vagina." App. 270.

K.D.'s mother, Amber S., testified that she took K.D. to speak with Runyon and Dr. Istafon because "[s]he told her stepmom and her cousin that [Petitioner] had molested her." App. 321. K.D.'s cousin, Kelcie T., testified that K.D. sometimes used her tablet computer. App. 333. On the tablet, Kelcie T. discovered that K.D. "typed in on Google 'grown men having sex with young girls.'" App. 335. Kelcie T. questioned K.D. about this and she "told [Kelcie T.] that [Petitioner] had showed her." App. 337. Kelcie T. asked K.D. if Petitioner had touched her; K.D. "said yes, and she cried." *Id.*

Erin D., K.D.'s stepmother, testified that she looked at a cell phone and tablet computer used by K.D., and she found that K.D. had visited "porn sites" that depicted "[g]rown men performing sexual acts with children." App. 347. When Erin D. questioned K.D. about this, "[s]he said [Petitioner] would have her watch these videos so that she would know what to do for him." App. 350. K.D. further disclosed to Erin D. that she performed oral sex on Petitioner and he touched her vagina. App. 350-51. In sum, the factual basis for Petitioner's convictions is established by K.D's testimony and five other credible witnesses, including two experts in the field of child sex abuse.

Petitioner presents no concrete evidence of prejudice from the courtroom arrangements. And the jury's acquittal on two counts indicates it was not biased by presence of the computer monitor. App. 605-06. Petitioner received a fair trial under the circumstances of K.D.'s fear of seeing Petitioner while she testified. K.D. was competent to testify and she was cross-examined by Petitioner's counsel. App. 145-50, 194-251. K.D. was afraid and, more than once, Petitioner threatened to kill her if she spoke her truth. App. 211-14. Given the jury's acquittal for Counts

Nine and Ten and the abundance of corroborating evidence supporting his convictions, Petitioner has not carried his burden of proving that the courtroom arrangement affected the outcome of his trial. Thus, this Court should find that Petitioner did not receive ineffective assistance of counsel because his attorney's conduct was objectively reasonable and he was not prejudiced.

C. Counsel's alleged failure to view discovery did not cause the allegedly erroneous publication of photos at trial, and Petitioner presents no evidence that he was prejudiced by said photos.

Petitioner claims his attorney was ineffective because he did not view alleged child pornography photos found on one of his computers before trial, claiming this is the reason the photos were published at trial. Pet'r's Br. 19-24. Petitioner further alleges that the publication of these photos changed the outcome of his trial. *Id.*

> 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.

Syl. Pt. 3. *Legursky*, 195 W. Va. 314, 465 S.E.2d 416. Further, when:

> determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices.

Syl. Pt. 4, *Id.*.

First, Petitioner acted in an objectively reasonable manner with regard to the photos published to the jury. The court dismissed the child pornography charges (Counts 11-14) against Petitioner because the State did not create an "extraction report" when extracting the alleged child

pornography images from his computers that were seized by police; the court found this report is potentially exculpatory evidence. App. 451-55. Despite Petitioner's counsel's numerous requests before trial, the State Police never created an extraction report for the computer from which it seized the alleged child pornography. App. 452-54. As Petitioner admits, the issue of the missing extraction report did not become clear to the State until trial. Pet'r's Br. 21. The State's ultimate failure to produce an extraction report for the storage device that contained the illegal pictures of minors caused the court to dismiss Counts 11-14. App. 454. Petitioner's counsel cannot be blamed for the State's failure to produce the extraction report, because he "repeatedly" requested it before trial. App. 454. Once Petitioner's counsel learned that the extraction report was never created, he did his duty and successfully moved to dismiss Counts 11-14. App. 454-55. Because Petitioner's counsel acted in an objectively reasonable manner, this Court may dispose of this claim based solely on his failure to meet the first prong of the *Strickland/Miller* test. Syl. Pt. 5, *Legursky.*

Second, Petitioner has not shown that he was prejudiced by his attorney's failure to view the child pornography before trial because these charges were dismissed. App. 454-55. The court mitigated the prejudice to Petitioner by declaring the photos in question to be inadmissible and striking them from the record. *State v. Henry W.J.*, No. 16-0088, 2017 WL 383778 at *3 (West Virginia Supreme Court, Jan. 27, 2017) (memorandum decision). Further, the court cured any error by instructing the jury to disregard the photos as follows –

> [f]or reasons not important to your deliberations, I have dismissed counts 11 and 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 counts 11 through 14, for that purpose.

App. 536.

Petitioner presents no evidence above mere speculation that he was prejudiced by the photos in question. Petitioner inaccurately states that "[t]he only evidence against Petitioner was [K.D.'s] uncorroborated testimony," but as stated above, three fact witnesses and two experts in child sexual abuse corroborated K.D.'s testimony that Petitioner committed the crimes of conviction. App. 254-310, 321, 333-37, 347-51. Petitioner claims that "juries . . . are highly protective of children," but this general sentiment is inapposite because Petitioner's jury found him not guilty of Counts Nine and Ten. Pet'r's Br. 23; App. 605-06. This was not a mere "credibility contest" between Petitioner and K.D. Pet'r's Br. 23. Rather, the State presented substantial evidence of Petitioner's guilt on Counts One through Eight. Because Petitioner suffered no prejudice from the photos, this Court may dispose of this claim based solely on his failure to meet the second prong of the *Strickland/Miller* test. Syl. Pt. 5, *Legursky*.

CONCLUSION

For the reasons stated, this Court should affirm the lower court's order denying habeas relief.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-129

HENRY WAYNE JOHNSTON,
Petitioner,

v.

DONALD AMES,
Mt. Olive Correctional Complex
Respondent.

CERTIFICATE OF SERVICE

I, Jason David Parmer, do hereby certify that on the 17th day of July, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below:

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