No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Richard Lamar, Jr., *Petitioner,*

v.

Donnie Ames, Superintendent,

Mount Olive Correctional Complex*, Respondent.*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Charles L.,
Plaintiff Below, Petitioner

vs) No. 17-0824 (Preston County 16-C-166)

Donnie Ames, Superintendent,
Mt. Olive Correctional Complex,
Defendant Below, Respondent

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Charles L.[1] was convicted of one count of first-degree sexual abuse and one count of sexual abuse by a guardian, custodian, or person in a position of trust. Petitioner was in his early twenties when he committed the crimes. The victim was the nine-year-old half-sister of Petitioner's wife. Petitioner filed a petition for a writ of habeas corpus in the Circuit Court of Preston County, West Virginia, and by order entered September 8, 2017, it denied relief. On appeal to this Court, Petitioner raised several assignments of error.[2]

This Court has considered the parties' briefs, their oral arguments, and the record on appeal. Upon review, the Court discerns no substantial question of law and no prejudicial error. Consequently, a memorandum decision affirming the order of the circuit court is the appropriate disposition pursuant to Rule 21 of the West Virginia Rules of Appellate Procedure.

I. Procedural History

The grand jury returned an indictment against Petitioner in 2010, charging him with four felonies: two counts of first-degree sexual assault in violation of West Virginia Code § 61-8B-3 (2014), and two counts of sexual abuse by a parent, guardian, or custodian in violation of West Virginia Code § 61-8D-5 (2014). The case against Petitioner proceeded to trial in January 2011. At trial, the victim testified that while Petitioner was babysitting her, she was sitting on his lap watching television and that Petitioner touched her vagina for "[a] couple of minutes maybe;"

[1] Consistent with our long-standing practice, we endeavor to protect the identity of the juvenile victim in this sensitive matter by refraining from referring to Petitioner by his surname. *See, e.g., Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[2] Petitioner is represented by counsel, Jeremy B. Cooper. Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, is represented by counsel, Zachary Viglianco and Scott E. Johnson, Assistant Attorney Generals.

that it happened more than once but she was unable to say exactly how many times; and that "[i]t hurt a little bit." The victim's mother testified that the victim told her about Petitioner's actions.

One of the victim's therapists, psychologist Abigail Leslie, testified that the victim told her that Petitioner touched her in her private parts. She stated that the victim had some physical reactions to the stress caused by the abuse. According to Ms. Leslie, during their counseling sessions, the victim told her that "she was sitting on the couch with – on [Petitioner's] lap and he put his hands down her pants and stuck his hands in her vagina." Another therapist, Rebecca Fiest, testified similarly to Ms. Leslie regarding the victim's disclosure.

Petitioner testified in his own defense. While he denied that he intentionally touched the victim's vagina, he stated that

> [i]f I had any contact with her vagina, it would have been fully clothed. It would have been totally accidentally. While we could have been wrestling around or tickling or horseplaying, there could have been—there was no intentional touching of the vagina, and I explained that to Detective Bryan on every occasion.

The jury convicted Petitioner of one count of first-degree sexual abuse[3] (the lesser-included offense of first-degree sexual assault) and one count of sexual abuse by a custodian. Petitioner was found not guilty of the remaining charges in the indictment. Petitioner's subsequent motion for judgment of acquittal or a new trial was denied.

Prior to sentencing, the State requested the appointment of a special prosecutor due to a conflict. Police were investigating reports from an inmate that Petitioner was attempting to arrange the murder of the prosecuting attorney. The circuit court granted this request, appointed a new prosecuting attorney, and placed documents related to this investigation under seal.[4] Petitioner's trial counsel withdrew due to a conflict, and new counsel was appointed. In light of these events, the circuit court rescheduled the sentencing hearing.

In October 2011, the circuit court sentenced Petitioner to five to twenty-five years of incarceration on the first-degree sexual abuse charge and ten to twenty years on the sexual abuse by a custodian charge. The sentences were ordered to run consecutively. This Court affirmed Petitioner's convictions on direct appeal. *See State v. Charles [L.]*, No. 11-1416, 2013 WL 1501073 (W.Va. Apr. 12, 2013) (memorandum decision).

In 2016, Petitioner, pro se, filed a petition for a writ of habeas corpus. In 2017, the petition was amended upon appointment of counsel.[5] The circuit court conducted an omnibus habeas corpus hearing and denied relief. This appeal followed.

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[3] *See* W.Va. Code § 61-8B-7.

[4] The State did not file charges against Petitioner following this investigation.

[5] Petitioner asserted the following grounds in the amended petition: (1) denial of the right to a speedy trial; (2) consecutive sentences for the same transaction; (3) suppression of "helpful

II. Standard of Review

Petitioner raises six assignments of error on appeal. This Court reviews appeals of circuit court orders denying habeas relief under the following standard:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong[ed] standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009). Further, a habeas petitioner bears the burden of establishing that he is entitled to the relief sought. *See Markley v. Coleman*, 215 W.Va. 729, 734, 601 S.E.2d 49, 54 (2004).

III. Discussion

Petitioner first contends that the jury instruction on first-degree sexual abuse resulted in him being convicted for conduct not charged in the indictment.[6] He argues that the facts underlying his indictment on first-degree sexual assault relate to the victim's report of digital sexual penetration. Petitioner essentially speculates that the jury must have discredited her report of sexual penetration because it did not return a guilty verdict on that charge. Petitioner then claims the only evidence that the jury could have used to support his conviction for the lesser-included offense of first-degree sexual abuse was his testimony wherein he denied any inappropriate sexual contact and explained that his hand may have accidentally grazed the victim's vagina over her clothes during horseplay (not when she was sitting on his lap). The circuit court rejected this argument because the jury instruction and the conviction on the lesser-included offense of first-degree sexual abuse (which only required sexual contact, either through clothing or directly) was consistent with the indictment and supported by the evidence adduced at trial—the victim's testimony. *See* W.Va. Code § 61-8B-7(a)(3).

We concur with the circuit court's reasoning. To prove sexual abuse in the first degree, the State must show that a defendant, at least fourteen years old, subjected a child under the age of twelve to sexual contact. *Id*. The victim (who was nine years old when the crimes occurred and eleven years old at the time of trial) testified that she was sitting in her father's chair in

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evidence" by the prosecutor; (4) the State's knowing use of perjured testimony; (5) information in presentence report is erroneous; (6) ineffective assistance of counsel; (7) non-disclosure of grand jury minutes; (8) claims concerning the use of informers to convict; (9) constitutional errors in evidentiary rulings; (10) jury instructions; (11) claims of prejudicial statements by the trial judge; (12) claims of prejudicial statements by the prosecutor; (13) sufficiency of the evidence; (14) severer sentence than expected; and (15) excessive sentence.

[6] Petitioner raised this argument below in the context of his ineffective assistance of counsel claim. *See infra* note 9.

Petitioner's lap when Petitioner (who was older than fourteen) touched her vagina. She stated the touch lasted "a couple of minutes maybe" and that this touching made her feel "uncomfortable[,]" and "[a]wkward." This evidence was consistent with the indictment and sufficient to support the conviction.

Petitioner's first argument also lacks merit for a more obvious reason. Had the jury found Petitioner's horseplay explanation credible, it would have found the commission of *no* offense because the mens rea element of the crime would be lacking. *See id.* § 61-8B-1(6) (defining sexual contact as intentional touching "done for the purpose of gratifying the sexual desire of either party.").

Consequently, we reject Petitioner's second assignment of error wherein he makes the related argument that the prosecutor made impermissible comments when referencing Petitioner's horseplay testimony because it "invited the jury to convict based upon conduct separate from that which was charged in the indictment." As already discussed, and contrary to Petitioner's suggestion otherwise, the victim's testimony by itself was consistent with the indictment and sufficient to establish the required elements of first-degree sexual abuse. *See* W.Va. R. Crim. Pro. 31(c) (stating that defendant may be found guilty of an offense necessarily included in the offense charged).[7]

In his third assignment of error, Petitioner complains that the State failed to disclose exculpatory evidence when it did not provide a copy of the results of a medical examination of the victim that Ms. Leslie mentioned while testifying. The circuit court denied relief on this ground because Petitioner did not show that this report (if one actually existed) was favorable to him or how the nondisclosure prejudiced his defense. Thus, Petitioner failed to prove or even plead any of the factors necessary to sustain a finding of a constitutional due process violation.[8] Likewise, we find Petitioner failed to meet his burden on this issue.

As his fourth assignment of error, Petitioner argued ineffective assistance of trial counsel. We have previously held that

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[7] Petitioner's reliance on *State v. Corra*, 223 W.Va. 573, 678 S.E.2d 306 (2009), is misplaced. In *Corra*, the proof at trial (that the defendant furnished "non-intoxicating beer" to underage persons) was different than what was charged in the indictment (that the defendant provided "alcoholic liquor" to underage persons). In *Corra*, the act of furnishing non-intoxicating beer to minors was *not* a lesser-included offense of furnishing alcoholic liquors to minors. In the instant case, however, first-degree sexual abuse constitutes a lesser-included offense of first-degree sexual assault. And Petitioner did not argue otherwise.

[8] *See* Syl. Pt. 2, *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007) ("There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.").

> "[i]n 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, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 1, *State v. Frye*, 221 W.Va. 154, 650 S.E.2d 574 (2006). Moreover,

> [i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. Pt. 6, *Miller*, 194 W.Va. at 6-7, 459 S.E.2d at 117-18.

Our review of the record uncovers no error by the circuit court in denying habeas corpus relief to Petitioner based on his numerous claims of ineffective assistance of counsel. Succinctly stated, Petitioner failed to overcome the "strong presumption" that his trial counsel's representation fell "within the wide range of reasonable professional assistance[.]" Syl. Pt. 3, in part, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). We adopt the findings of the circuit court.[9]

[9] The circuit court found that even assuming for the sake of argument that trial counsel's failure to obtain the grand jury transcript was deficient, Petitioner demonstrated no prejudice related to this failure.

The circuit court rejected Petitioner's claim that trial counsel was deficient by failing to use a video of a Domestic Violence Protective Order hearing to impeach the victim's mother. Because the victim's mother testified consistently with the video, this evidence would not have constituted a prior inconsistent statement under either Rule 613 or Rule 801 of the West Virginia Rules of Evidence.

The circuit court found trial counsel's failure to obtain any experts or investigators to assist in Petitioner's defense did not rise to the level of deficient performance. It would be entirely speculative as to whether the victim would have qualified for a taint expert or that a taint expert could have been found who would have testified in a way favorable to Petitioner such that it would have had any effect on the outcome of the trial.

The circuit court held Petitioner failed to prove that counsel's performance—by waiving his speedy trial rights while he was out on bond to obtain discovery and prepare for trial—fell below an objective standard of reasonableness.

Finally, the circuit court rejected Petitioner's argument that trial counsel was deficient by failing to seek a limiting instruction on his horseplay testimony or to object to the alleged

As his fifth assignment of error, Petitioner claimed the circuit court improperly denied habeas counsel access to files held by the special prosecutor related to the investigation of an inmate's report that Petitioner was attempting to arrange the murder of the prosecuting attorney. Petitioner argued that access to these files was necessary to fully litigate his "claims involving the use of informers." Essentially, Petitioner maintained this information may have influenced the sentencing court. The circuit court denied Petitioner's request because the documents were not relevant to any cognizable claim in habeas corpus. It noted that the sentencing court sentenced Petitioner within the statutory limits and stated its reasons for doing so on the record (the victim's age and harm done; Petitioner's failure to accept responsibility, to recognize the problem, or to express a desire to change; and the seriousness of the crimes).[10] We concur with the circuit court's conclusion.

Finally, Petitioner contends that the errors committed in this case were prejudicial when considered cumulatively. We disagree. Because we have found no error, the cumulative error doctrine does not apply. *See State v. Knuckles*, 196 W.Va. 416, 425, 473 S.E.2d 131, 140 (1996) ("Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

IV. Conclusion

For the reasons set forth above, we affirm the September 8, 2017, order of the Circuit Court of Preston County that denied the petition for a writ of habeas corpus.

Affirmed.

ISSUED: March 6, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison

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variance between the evidence and indictment. It concluded *Corra* was factually distinguishable because first-degree sexual abuse was a lesser-included offense of first-degree sexual assault.

[10] West Virginia Code § 61-8B-7 provides for a sentence of imprisonment for "not less than five nor more than twenty-five years." West Virginia Code § 61-8D-5 provides for a sentence of imprisonment for "not less than ten nor more than twenty years." Additionally, "[w]hen a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does not provide, the sentences will run consecutively." Syl. Pt. 3, *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979).

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

STATE EX REL. CHARLES LAMAR, JR.,
Petitioner,

v. **//Case No. 16-C-166**
Honorable Lawrance S. Miller, Jr.

DAVID BALLARD, WARDEN,
Respondent.

OPINION ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS

On June 27, 2017, came the Petitioner, Charles Lamar, Jr., in person and by his counsel Jeremy Cooper, and came the Respondent Warden by his counsel Special Prosecuting Attorney Raymond K. LaMora III, for a previously scheduled omnibus hearing on Petitioner Lamar's April 18, 2017 Amended Petition for Writ of Habeas Corpus. At the conclusion of the hearing, the Court took the matter under advisement and ordered that Petitioner and Respondent provide the Court with post-hearing briefs. After considering the official record in *State of West Virginia v. Charles Lamar, Jr.*, Preston County Case No. 10-F-9; the testimony presented at the omnibus hearing; the post-hearing briefs; and the pertinent legal authorities, the Court finds and concludes that the Amended Petition for Writ of Habeas Corpus should be denied for the reasons discussed in this Opinion Order.

PROCEDURAL HISTORY

On March 2, 2010, a Preston County Grand Jury returned an indictment against Petitioner Lamar charging him with two counts of first degree sexual assault and two counts of sexual abuse by a custodian stemming from two alleged separate incidents in which he was accused of digitally penetrating the vagina of C.M.,[1] his nine-year-old sister-in-law. The criminal complaint alleged that C.M. had revealed to her mother that then-Defendant Lamar,

[1] The Court uses the initials "C.M." throughout this Opinion Order in the place of the child victim's full name.

who was then 23 years old, had placed his finger inside her vagina while he was babysitting her in May 2009. On September 18, 2009, C.M. was interviewed by a forensic interviewer at the Monongalia County Child Advocacy Center and allegedly reported that Petitioner Lamar had placed his finger "inside her bird" on two separate occasions. C.M.'s mother called her pastor, who after speaking to the family suggested that C.M.'s mother contact a law enforcement officer in Monongalia County who attended their church. That law enforcement officer then contacted the Preston County Sheriff's Department.

Deputy John Bryan of the Preston County Sheriff's Department was the lead investigating officer in the case. He interviewed C.M.'s mother and father, and then arranged an appointment for C.M. to be interviewed at the Monongalia County Child Advocacy Center ("CAC"). The Criminal Complaint filed in the Magistrate Court of Preston County and included in the discovery in Case No. 10-F-9 stated that C.M. revealed during the CAC interview that "the defendant had placed is finger 'inside her bird' on two separate occasions."[2]

Deputy Bryan also spoke on three different occasions with Petitioner Lamar. Although those statements were not admitted at trial, Petitioner Lamar generally denied the alleged crimes. However, he told Deputy Bryan that in the course of horseplay and tickling C.M. and her younger sister, he may have unintentionally grazed her vagina.[3]

Deputy Bryan also conducted an interview with Samantha Lamar, Petitioner's wife (now ex-wife). In the police report, Deputy Bryan wrote the following regarding that interview:

> Detective Bryan met and spoke with Samantha Lamar, wife of Charles Lamar, Jr. and step[-]sister of [C.M.]. Samantha Lamar stated that she would like to believe that Charles had not did anything with C[.M.], but was unsure. Samantha Lamar stated that she has never known her sister to lie.

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[2] C.M. referred to her vagina as her "bird."
[3] The statements were not introduced at trial. Transcripts of the recorded statements between John Bryan and Charles Lamar, Jr., were included in the discovery in this case.

> Detective Bryan then asked Samantha Lamar if her and her husband had had any arguments over his fascination with pornography. Samantha Lamar stated that she has seen her husband looking at pornography, but never any child pornography, as alleged by her father and step[-]mother.

(Police Report, filed as Discovery in Case No. 10-F-9.)[4]

On November 10, 2009, the Magistrate Court of Preston County found probable cause for the issuance of an arrest warrant. Petitioner Lamar was arrested on November 20, 2009, and Assistant Public Defender Claire Niehaus was appointed to represent him. Petitioner Lamar posted bail and was released from custody until his conviction. A preliminary hearing was conducted on December 8, 2009, and the case was boundover to the Circuit Court.

On March 2, 2010, a Preston County Grand Jury returned a four-count indictment against Petitioner Lamar in which he was charged with the following: Count 1 – First Degree Sexual Assault; Count 2 – First Degree Sexual Assault; Count 3 – Sexual Abuse by a Custodian; and Count 4 – Sexual Abuse by a Custodian. Counts 1 and 3 constituted two crimes from the same alleged incident; similarly, Counts 2 and 4 constituted two crimes from the same alleged incident. Petitioner was arraigned in Circuit Court and his trial was scheduled for April 6, 2010.

The first continuance of Petitioner's jury trial, to which he now complains, came as a result of Petitioner Lamar's motion on April 2, 2010, in which he contended, through his trial attorney Claire Niehaus, that additional discovery was needed as well as further time to prepare. (*See* Mot. and Agreed Order Continuing Jury Trial, Apr. 6, 2010, Case No. 10-F-9.) The trial was rescheduled to June 9, 2010. Mr. Lamar signed the Motion and Agreed Order, along with attorney Niehaus and Prosecuting Attorney Melvin C. Snyder, III.

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[4] The Court prohibited the introduction of any reference regarding a "fascination with porno" during the trial. (*See* Order from Mot. Hr'g, Dec. 28, 2010.)

On June 2, 2010, the State filed a Motion to Postpone Jury Trial, in which the State represented that Petitioner had requested additional discovery, specifically a digital audio recording of statements made by then-Defendant Lamar and a forensic interview of C.M. The State further asserted that it had learned that C.M. had undergone counseling and was trying to obtain the records related to that counseling. The State further represented that the Petitioner did not oppose the Motion. On July 20, 2010, this Court entered an Order granting the State's Motion and scheduling the trial for July 20, 2010. Attorney Niehaus initialed that Order on behalf of then-Defendant Lamar.

The State thereafter submitted an "Order to Produce Records," in which the State requested the mental health records related to C.M. from the CAC. The State further requested that C.M. be appointed a guardian *ad litem* to review the records and make a recommendation to the Court regarding their disclosure.[5] This Court, with the agreement of attorney Niehaus, granted that request and appointed attorney Cheryl Warman as guardian *ad litem*.

The CAC counseling records were filed under seal in the official Court file on June 12, 2010. Based on those records, the State filed an "Additional Witness and Exhibit List" on July 14, 2010, in which it disclosed Abigail Leslie, a doctoral intern therapist at the CAC; Dr. Laura Capage, a licensed psychologist and supervisor at the CAC; and Rebecca Fiest, a therapist/forensic interviewer at the CAC. The State further indicated its intention to use documents obtained from the CAC, including a treatment plan, a clinical evaluation, and progress notes, as evidence in its case-in-chief.

On July 19, 2010, then-Defendant Lamar, by his attorney, submitted a Motion and Agreed Order Continuing [the July 20, 2010] Jury Trial on the basis that she had received

[5] The State cited *State v. Roy*, 194 W. Va. 276, 460 S.E.2d 277 (1995), without any specific analysis regarding the details of that case.

additional discovery during the previous week and needed further time to prepare. Ms. Niehaus further asserted that additional discovery had not been received, and that Charles Lamar, Jr., did not oppose postponing his trial to a later date. The Court granted that request and rescheduled the trial for August 31, 2010.

On August 20, 2010, Prosecuting Attorney Snyder filed a Certificate of Service in which he stated that he had that day served the additional discovery, which consisted of a CD audio-recording of Charles Lamar's statement, and one DVD recording of C.M.'s forensic interview at the CAC. Due to the timing of the disclosure, then-Defendant Lamar filed a Motion to Continue Jury Trial on August 25, 2010. Ms. Niehaus asserted also that following a discovery conference conducted on August 24, 2010, she learned that additional discovery was still outstanding. Ms. Niehaus also asserted that then-Defendant Lamar did not oppose the continuance.[6] The Court scheduled a hearing on the matter for August 30, 2010. That hearing was ultimately rescheduled to August 26, 2010. On that date, after counsel had explained to the Court the discovery issues that remained outstanding, the Court conducted the following colloquy with Charles Lamar, Jr.:

> THE COURT: Mr. Lamar, do you understand, sir, that your attorney is asking the court to postpone the jury trial?
> BY DEFENDANT: Yes, Your Honor.
> THE COURT: Okay. And, actually, she's asking me to postpone it to the next Term of Court which means that the trial would take place somewhere between November 2010 and March of 2011?
> BY DEFENDANT: Yes, Your Honor.
> THE COURT: You do have the right to have a trial at this Term of Court if you wish.
> BY DEFENDANT: I know, Your Honor.
> THE COURT: Are you agreeable to postponing the trial at your attorney's request?
> BY DEFENDANT: Yes, Your Honor.
> THE COURT: Are you out on bond, sir?
> BY DEFENDANT: Yes, Your Honor.

[6] The Court notes that Mr. Lamar was free on bond at all times prior to his trial.

(Hr'g Tr. 4–5, Aug. 26, 2010.)

During that hearing, the Court scheduled the trial to be conducted on December 7, 2010, and also scheduled a motions hearing (for anticipated motions) for November 8, 2010. Thereafter, on November 1, 2010, then-Defendant Lamar filed the following: a Motion to Suppress Statements of Children in which he asserted any statements given or taken from C.M. to law enforcement officers and all other agents of the State were impermissible hearsay under the parameters of *Crawford v. Washington*, 541 U.S. 36 (2004); and a Motion in Limine in which he requested that any statements made by C.M. to others were hearsay not subject to any recognized exception. At the November 8, 2010 hearing, the Court heard arguments on both motions. Then-Defendant Lamar specifically sought to prohibit the statements made by C.M. during the forensic interview; the State asserted that because C.M. was going to testify, it intended to introduce the forensic interview after her testimony to alleviate any Confrontation Clause problem. (*See* Hr'g Tr. 6, Nov. 8, 2010.) The Court took those matters under advisement.

The Court ruled on those motions at the November 30, 2010 pretrial conference. First, regarding the forensic interview, the Court stated it would be governed by *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010), which held that statements made by a child to a forensic nurse during the examination could be admissible under West Virginia Rule of Evidence 803(4) (excepting statements made for the purposes of medical treatment or diagnosis from the general bar against hearsay) if the declarant's motive for making the statement was consistent with the purpose of promoting treatment and the content of the statement was reasonably relied upon by the nurse for treatment. (Pretrial Conf. Tr. 3–4, Nov. 30, 2010.)

On December 6, 2010, one day before the scheduled trial, the Court rescheduled the jury trial to January 11, 2011, due to a hazardous snow storm that was occurring in Preston County at that time. No party objected to the Court's rescheduling of the jury trial.

On December 8, 2010, the State submitted an "Order for Grand Jury Transcript," which was signed by this Court. The State was ordered to produce the transcript from the grand jury proceedings. A grand jury transcript was never produced.

The trial of this case was conducted on January 18, 2011.[7] The State presented the testimony of C.M., the victim. She testified that Petitioner Lamar was babysitting her and that she was sitting on his lap, watching television, and he touched her vagina. (Trial Tr. 109.) She testified that the touching lasted "[a] couple of minutes maybe." (*Id.* at 110.) She further testified that she knew it happened more than once but she was unable to say exactly how many times. (*Id.*) On redirect examination, she testified that "[it] hurt a little bit." (*Id.* at 128.)

S.M., the victim's mother, testified. Generally, the relevant portion of her testimony established that Petitioner Lamar had occasionally babysat her two daughters. S.M. also testified about C.M.'s revelation to her about Petitioner Lamar's actions. This Court gave a limiting instruction to the jury that C.M.'s statements to S.M. were not offered to prove the truth of the matters asserted, but instead were admitted solely for the purpose of explaining why S.M. took the actions that she did. (*Id.* at 147–48.) This testimony established that after the initial disclosure to law enforcement, an interview was scheduled with the Child Advocacy Center.

Deputy John Bryan, the investigating officer, also testified. Ms. Niehaus made several hearsay objections to his testimony, which this Court sustained. (*Id.* at 151, 152.) Further, the State attempted to introduce as evidence a video of the forensic interview at the Child Advocacy

[7] Although not contained in the record, the January 11, 2011 trial date was moved to January 18, 2011, because the presiding Circuit Court Judge was appointed to the Supreme Court of Appeals of West Virginia for a case in which oral argument was January 11, 2011.

Center. Ms. Niehaus objected to the introduction of the video. The Court sustained her objection pursuant to *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010).[8]

Next, the Court conducted an *in camera* hearing in which Abigail Leslie testified that she was a supervised psychologist and doctoral student in counseling psychology at West Virginia University. She worked at the Child Advocacy Center and counseled C.M. for 16 sessions. She testified that she provided C.M. with therapy. (Trial Tr. 163–66.) On cross-examination during the *in camera* testimony, Ms. Leslie indicated that she was aware of the forensic interview because she had read the report from it. Because then-Defendant Lamar had not received the forensic interview report (but he did have the DVD recording of the interview), the Court excluded any reference to the report or the forensic interview during her testimony. (*Id.* at 171–72, 175–76.)

Next, the State called Rebecca Fiest for an *in camera* hearing on the admissibility of her testimony. Ms. Fiest testified that she provided therapy services to C.M. at the Child Advocacy Center from June 2010 until the time of trial, and that she had taken over the sessions for Ms. Leslie. Because Petitioner Lamar did not have her notes from three sessions, the Court allowed the attorneys to have copies of the notes prior to her testimony. (*Id.* at 179–80.)

Ms. Leslie testified to the jury about her initial therapeutic interview with C.M., in which C.M. told her that Petitioner Lamar had touched her in her private parts. She further

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[8] *See* Syl. pt. 6, *Payne*, 225 W. Va. 602, 694 S.E.2d 935 ("When a child sexual abuse or assault victim is examined by a forensic nurse trained in sexual assault examination, the nurse's testimony regarding statements made by the child during the examination is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, *West Virginia Rule of Evidence* 803(4), if the declarant's motive for making the statement was consistent with the purposes of promoting treatment and the content of the statement was reasonably relied upon by the nurse for treatment. In determining whether the statement was made for purposes of promoting treatment, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose, but it is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.).

In this case, the State conceded that the forensic interview was not for medical purposes. (Trial Tr. at 155.) The Court found that therefore the Child Advocacy Center interview, pursuant to *Payne*, was inadmissible hearsay. (*Id.* at 157.)

testified that C.M. had some physical reactions to the stress caused by the abuse, as well as the family dynamics that had resulted from the disclosure of the abuse. (*Id.* at 191–92.) During the counseling sessions, C.M. told Ms. Leslie that "she was sitting on the couch with – on Charlie's lap and he put his hands down her pants and stuck his hands in her vagina." (*Id.* at 199.)

Attorney Niehaus cross-examined Ms. Leslie. Specifically, attorney Niehaus focused on Ms. Leslie's notes showing that she had a session educating C.M. on the process of testifying in court. (*Id.* at 208–09.) Ms. Niehaus's cross-examination set up her closing argument, during which she sought to persuade the jury that once C.M. told the story the first time and the "train had left the station," the counseling sessions helped her develop her story in preparation for her testimony. (*See* Trial Tr. 358.)

Rebecca Fiest also testified to the jury. Her testimony, as a therapist, was very similar, including C.M.'s disclosure of how the event occurred (on Petitioner's lap). (*Id.* at 233.)

The second and last day of the jury trial was January 19, 2011. The State rested its case at the beginning of the second day. Petitioner Lamar called his then-wife Samantha Lamar as his first witness.

During Samantha Lamar's testimony, attorney Niehaus attempted to question her about what C.M. said to her after the disclosure. Petitioner Lamar contended it was a prior inconsistent statement. The Court conducted a bench conference with Petitioner Lamar, his attorney, and the Prosecuting Attorney. The Prosecuting Attorney expressed reservations that a proper foundation had not been laid, at which time the following conversation took place at the bench:

COURT: Is there a foundation? Was anybody else present?

MS. NIEHAUS: She just testified S[.M.] was up there, Number 1, and first and foremost, this is non-hearsay. A prior inconsistent statement is not hearsay. Okay. So, his objection –

COURT: Don't talk to me like that.

MS. NIEHAUS: His objection about it is hearsay. It isn't. Under the rules it is not. A prior inconsistent statement does not qualify as hearsay so our objection is about the forensics are founded and separate and apart from this.

(Trial Tr. 258–59.)

Ultimately, the Court allowed Samantha Lamar to testify, under the confines of Rule 613(b) of the West Virginia Rules of Evidence. Samantha Lamar testified that at the time of the child's disclosure, she asked her if she was absolutely sure that Petitioner did it. Samantha Lamar testified that the child told her, "I think so, but I'm not sure." (Trial Tr. at 261.) She testified that the child's mother, S.M., thereafter stopped her from asking C.M. any more questions. (*Id.* at 262.) The Court gave the jury a limiting instruction that informed them it was not offered to prove the truth of the matters asserted. (*Id.* at 273–74.)

During the State's cross-examination of Samantha Lamar, the Prosecuting Attorney asked her if she told Detective Bryan that she (Ms. Lamar) was unsure if Petitioner did it. She answered, "No." (*Id.* at 266.) Specifically, the questioning was as follows:

Q: Do you remember what you told Detective Bryan?
A: I talked to him for a long time. I told him everything that I have said today, and we talked about other stuff, too.
Q: Do you remember telling him specifically that you did not believe that C[.M.] would lie?
A: I said that I hadn't really known her to lie.
Q: Specifically, you stated that you have never known her to lie?
A: Right.
Q: Do you also remember telling Detective Bryan what your reaction to this was?
A: I don't recall word for word what I said. I didn't know what to think about it at the time.
Q: You just testified to the jury you know your husband didn't do this?
A: Yes.

Q: Is that what you told Detective Bryan?
A: Yes, I told him I did not believe that he did it.
Q: You don't recall telling Detective Bryan that you would not like to believe that Charles had done anything to C[.M.] but you were unsure?
A: No. I have never doubted my husband.
Q: You didn't say that to Detective Bryan?
A: I have never said that I have doubted Charlie. I have never said was unsure if he did it.
Q: Okay. I'm asking you specifically when you talked to Detective Bryan you didn't say this?
A: No.
Q: Thank you. I have no further questions.

(Trial Tr. at 264–66.)

Petitioner also called B.M., the younger sister of C.M. and Samantha Lamar, as a witness. She testified that she never saw anything happen between Petitioner and C.M. (*Id.* at 279.)

Finally, Petitioner Lamar testified. He denied that he intentionally touched C.M.'s vagina. (*Id.* at 297.) When asked if he had any contact with her vagina, he stated:

> If I had any contact with her vagina, it would have been fully clothed. It would have been totally accidentally. While we could have been wrestling around or tickling or horseplaying, there could have been – there was no intentional touching of the vagina, and I explained that to Detective Bryan on every occasion.

(*Id.*)

Petitioner Lamar rested his case at the conclusion of his testimony. The State called S.M., the victim's mother, in rebuttal. She testified that to the best of her recollection, she thought that when Samantha Lamar asked C.M. if she was sure he did it, C.M. had said, "I think so." (*Id.* at 323.)

The Court had previously furnished a draft copy of the Jury Charge to the attorneys. During the charge conference, the issue regarding lesser-included offenses was raised. The State wanted a first degree sexual abuse charge as a lesser included charge of first degree sexual

assault. Petitioner Lamar objected. (*See id.* at 332.) The Court instructed the jury on both first degree sexual assault and first degree sexual abuse.

The jury returned a verdict of guilty of one count of first degree sexual abuse (the lesser included offense of Count One), and one count of sexual abuse by a custodian. The jury found Petitioner Lamar not guilty of the remaining charges in the indictment stemming from the other alleged incident. The Court ordered the Probation Office to perform a presentence investigation and scheduled sentencing for April 4, 2011.

Attorney Niehaus filed a Motion for Judgment of Acquittal or a New Trial on January 28, 2011. Ms. Niehaus asserted the following grounds: insufficient evidence; error in allowing the children to testify in a different place than the witness box and allowing a guardian *ad litem* to sit nearby; error in not striking a juror who had revealed that she had been a victim of sexual abuse; error in allowing the therapists to testify about what the victim told them; error in not ordering production of the forensic interview report; the length of time the jury deliberated (less than 30 minutes); and any and all other errors. The Court conducted a hearing on February 16, 2011, and thereafter issued a 28-page Order denying the Motion for Judgment of Acquittal or a New Trial for the reasons explained therein.

The sentencing hearing was postponed on two occasions. First, Petitioner Lamar's counsel needed more time to prepare a treatment plan for Petitioner. *See* W. Va. Code § 62-12-2(e) (2006) (requiring certain sex offenders to undergo a physical, mental, and psychiatric study and diagnosis that includes an on-going treatment plan to be eligible for probation). The second postponement of the sentencing hearing was based on the State's motion due to the victim's mother's unavailability.

However, on May 25, 2011, the State filed a "Request for Appointment of Special Prosecutor," in which the State contended that a conflict had been created for the Prosecuting Attorney because "[t]hreats have been made by the Defendant against the Prosecuting Attorney . . . ." By Order of Disqualification entered on May 25, 2011, this Court granted the request, ordered the request be filed under seal, and that the order and the request be transmitted to the Executive Director of the West Virginia Prosecuting Attorneys Institute. On June 24, 2011, attorney Claire Niehaus filed a Motion to Withdraw as Court-Appointed Counsel, in which she asserted that after consultation with the Office of Disciplinary Counsel, she believed a conflict existed for her to continue to represent Petitioner. This Court granted the motion and appointed attorney Kevin Tipton to represent Petitioner Lamar. The Prosecuting Attorney Institute appointed Tucker County Prosecuting Attorney Mont Miller. Accordingly, both the attorney representing the State and the attorney representing Charles Lamar at the sentencing hearing were new to the case. To facilitate this change of events, the sentencing hearing was rescheduled to July 1, 2011. Based on an agreement by the parties, this Court ordered that the sentencing hearing be rescheduled to October 3, 2011.

This Court sentenced Petitioner Lamar to 5 to 25 years on the first degree sexual abuse charge and 10 to 20 years on the sexual abuse by a custodian charge. This Court ordered that the sentences run consecutively. The Court further ordered a 20-year term of Supervised Release following Petitioner's release from incarceration.

Attorney Tipton appealed the conviction and the sentencing order to the Supreme Court of Appeals of West Virginia. That Court issued a memorandum decision in *State v. Lamar*, No. 11-1416, 2013 WL 1501073 (W. Va. Apr. 12, 2013). The Supreme Court rejected an argument by Petitioner that this Court erred by allowing C.M. to testify outside the witness box in

proximity to the guardian *ad litem*. The Supreme Court further rejected Petitioner's argument that insufficient evidence existed to convict him of the crimes. Finally, the Supreme Court found that Petitioner Lamar failed to ask this Court to strike Juror No. 7 for cause because she had been a victim of sexual abuse as a child. The Supreme Court stated that "[i]mportantly, on voir dire, Juror No. 17 stated strongly and unequivocally that her prior sexual abuse would not affect her impartiality." *Lamar*, 2013 WL 1501073, at *3.

After the Petitioner's appeal was denied by the Supreme Court, this Court entered an Order Denying Defendant's Motion for Reconsideration and Order Appointing Attorney for Post-Conviction Matters on June 10, 2013. No other action was taken in Case No. 10-F-9 until Petitioner Lamar filed a *pro se* Petition for Writ of Habeas Corpus in Case No. 16-C-166 on September 19, 2016. Attorney Jeremy Cooper was appointed to represent Petitioner Lamar.

This Court set a scheduling conference on February 6, 2017. At that hearing, Tucker County Prosecuting Attorney Raymond LaMora (who had succeeded Mont Miller as Prosecuting Attorney) provided documents to the Court regarding the underlying investigation that prompted Preston County Prosecuting Attorney Melvin C. Snyder, III, to disqualify himself. This Court conducted an *in camera* review of those documents, which related to the alleged post-conviction threats towards Prosecutor Snyder. The Court noted that no charges were ever filed against Mr. Lamar as a result of the investigation. This Court ultimately concluded that nothing contained in the documents were relevant to any claim cognizable in habeas corpus review. (*See* Order Denying Access to Sealed Documents and Order Extending Timeframe to File Amended Pet., Case No. 16-C-166, Mar. 28, 2017.)

On April 18, 2017, Petitioner Lamar, by counsel Jeremy Cooper, filed his Amended Petition for Writ of Habeas Corpus. This Court conducted an omnibus evidentiary hearing on

June 27, 2010. The Court heard the testimony of trial attorney Claire Niehaus, Samantha Lamar, and Petitioner Charles Lamar, Jr. The Court admitted, without objection, a DVD recording of a domestic violence final hearing in the Family Court of Preston County in Case No. 09-DV-235. The Respondent Warden did not present any evidence. At the conclusion of the hearing, the Court took the matter under advisement and ordered both parties to file proposed findings of fact and conclusions of law.

On July 25, 2017, Petitioner Lamar filed his Proposed Findings of Fact and Conclusions of Law. On August, 24, 2017, Respondent Warden filed his Proposed Findings of Fact and Conclusions of Law.

GROUNDS ASSERTED

Petitioner alleged the following grounds in his Amended Petition for Writ of Habeas Corpus:

1) Denial of right to speedy trial;
2) Consecutive sentences for same transaction;
3) Suppression of helpful evidence by prosecutor;
4) State's knowing use of perjured testimony;
5) Information in presentence report erroneous;
6) Ineffective assistance of counsel;
7) Non-disclosure of Grand Jury minutes;
8) Claims concerning use of informers to convict;
9) Constitutional errors in evidentiary rulings;
10) Jury instructions;
11) Claims of prejudicial statements by trial judges;
12) Claims of prejudicial statements by prosecutor;
13) Sufficiency of evidence;
14) Severer sentence than expected; and
15) Excessive Sentence.

(*See* Am. Pet. at 1–2.)

In his Proposed Findings of Fact and Conclusions of Law, Petitioner Lamar focuses on three main grounds: the Court's instructions to the jury regarding sexual abuse in the first

degree as a lesser-included offense of Counts 1 and 2 of the indictment; ineffective assistance of counsel; and suppression of helpful evidence by the Prosecuting Attorney.

STANDARD OF REVIEW

West Virginia Code § 53-4A-1 states in part that

> [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, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

W. Va. Code Ann. § 53-4A-1(a) (LexisNexis 2008) (in part). Following the evidentiary hearing, the Court must do the following:

> The court shall draft a comprehensive order including: (1) findings as to whether a state and/or federal right was presented in each ground raised in the petition; (2) findings of fact and conclusions of law addressing each ground raised in the petition; (3) specific findings as to whether the petitioner was advised concerning his obligation to raise all grounds for post conviction relief in one proceeding; and (4) if the petitioner appeared pro se, specific findings as to whether the petitioner knowingly and intelligently waived his right to counsel.

Rules Governing Post-Conviction Habeas Corpus Proceedings 9(c).

Finally, the Petitioner bears the burden of proving the allegations contained in the petition that warrant his release by a preponderance of the evidence. *State ex rel. Scott v. Boles*, 150 W. Va. 453, 456, 147 S.E.2d 486, 489 (1966).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Petitioner Lamar has been represented by counsel throughout the entirety of these habeas corpus proceedings, and the Court has advised Petitioner of his obligation to raise all grounds for post-conviction relief in one proceeding.

The Court finds that Petitioner Lamar was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. The Court appointed attorney Jeremy Cooper at the time Petitioner Lamar filed his *pro se* Petition. The Court further finds that on April 18, 2017, Petitioner Lamar filed along with his Amended Petition a "Checklist of Grounds for Post Conviction Habeas Corpus Relief," in which he checked grounds he deemed not applicable. Under the heading of Certificate of Petitioner on the *Losh* Checklist, Petitioner signed his name that his attorney had advised him that any grounds not raised would be considered waived.

Next, at the outset of the June 27, 2017 omnibus hearing, this Court asked, pursuant to Rule 9 of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, if Petitioner Lamar was knowingly and intelligently waiving all grounds not asserted in the Amended Petition. Attorney Cooper, in the presence of Petitioner Lamar, stated that his "client has indicated that he is waiving those grounds." (Omnibus Hr'g Tr. at 3.)

Accordingly, this Court finds and concludes that Petitioner Lamar was advised concerning his obligation to raise all grounds for post-conviction relief in this proceeding, and that he knowingly and intelligently, with the assistance and advice of counsel, has waived all grounds not asserted in his Amended Petition.

II. Petitioner Lamar has failed to prove by a preponderance of the evidence the allegations contained in his Amended Petition for Writ of Habeas Corpus.

1) Denial of Right to Speedy Trial

In his Amended Petition, Petitioner Lamar contends that he was denied the right to a speedy trial due to multiple continuances either sought to or agreed to by his counsel. Consequently, Petitioner Lamar contends that he does not raise this ground as a standalone issue; instead, he asserts that this issue is within the scope of ineffective assistance of counsel. Accordingly, the Court will address this ground as part of its analysis of Petitioner's ineffective assistance of counsel claim.

2) Consecutive Sentences for Same Transaction/Excessive Sentence/Severer Sentence Than Expected

Petitioner Lamar contends in his Amended Petition that he received consecutive sentences for the same transaction and that the sentences were excessive, which he acknowledges are within the bounds of the law. (*See* Am. Pet. at 3.) Instead of making an outright double jeopardy claim, he asserts that these issues should be considered "as being cumulative with the other issues set forth in the Amended Petition." (*Id.*) He further alleges that he received a severer sentence than he expected. (Am. Pet. at 9–10.) He claims now that he was unaware until he was sentenced, despite acknowledging that this Court told him the potential penalties at trial, of the possible outcome. (*Id.* at 10.)

This Court finds and concludes that these grounds are without merit. The Court finds and concludes that Petitioner Lamar was found guilty of one count of sexual abuse in the first degree, which carried with it a possible penalty of "imprisonment for not less than five nor more than twenty-five years . . . ." W. Va. Code Ann. § 61-8B-7(c) (2006) (West 2017).[9] He was

[9] C.M. was less than twelve years old, and Petitioner was more than eighteen years of age. *See* W. Va. Code § 61-8B-7(c).

also convicted, for the same criminal event, of sexual abuse by a custodian, which carried with it a possible penalty of "not less than ten nor more than twenty years . . . ." W. Va. Code Ann. § 61-8D-5(a) (2005) (Repl. Vol. 2005).[10]

Addressing Petitioner's argument (albeit asserted as a "cumulative" issue) that he was sentenced twice for the same transaction; the Court finds no merit to the argument under West Virginia law. First, West Virginia Code § 61-8D-5(a) stated that "[i]n addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection . . . ." W. Va. Code Ann. § 61-8D-5(a) (2005) (Repl. Vol. 2005).

In *State v. Cecil*, 221 W. Va. 495, 655 S.E.2d 517 (2007), the appellant contended that the principles of double jeopardy prevented him from being convicted of both sexual abuse in the first degree and sexual abuse by a custodian. The Supreme Court, quoting Syllabus Point 9 of *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992), held that

> W.Va.Code, 61–8D–5(a) (1988), states, in part: "In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]" Thus, the legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians, W.Va.Code, 61–8D–5, is a separate and distinct crime from general sexual offenses, W.Va.Code, 61–8B–1, *et seq.*, for purposes of punishment.

State v. Cecil, 187 W. Va. at 503, 655 S.E.2d at 525.

Accordingly, this Court finds and concludes that Petitioner Lamar's argument that he was sentenced consecutively for the same transaction, although true in fact, was not a violation of his rights against being "subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

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[10] Petitioner Lamar's conduct for which he was convicted took place in 2009, before the current version of the statute took effect in 2010. The possible penalties did not change.

Next, Petitioner Lamar contends that this Court should consider the cumulative effect that his "excessive sentence" has on his Amended Petition. The Court finds and concludes that this assertion is also without merit, because the sentences imposed by this Court were within the statutory limits.

"Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Holstein*, 235 W. Va. 56, 770 S.E.2d 556 (2015); Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Because the sentences imposed were both within the statutory limits, and were not based on any impermissible factors, this Court finds and concludes that Petitioner Lamar's constitutional right against disproportionate sentences, *see* W. Va. Const. art. III, § 5, has not been violated.

Finally, the Court finds Petitioner Lamar's assertion that he was unaware of the possible penalties he was facing to be without merit. This Court specifically told Petitioner Lamar on the first day of his trial, before the State's case-in-chief, of the possible penalties for sexual assault in the first degree, sexual abuse in the first degree, and sexual abuse by a custodian. (*See* Trial Tr. at 94–95.) This Court's review of the trial transcript shows that the Court accurately described the potential sentences to Petitioner Lamar. Accordingly, this Court finds and concludes that this ground is without merit.

For those reasons, the Court finds and concludes that there is nothing to cumulatively consider regarding these assertions, as neither sentence nor the fact that they were run consecutively violated any of Petitioner's constitutional rights. The Court further finds and concludes that Petitioner was aware, or should have been aware, of the potential sentences he was facing if convicted because this Court informed him of those penalties on the record.

3) Suppression of Helpful Evidence by Prosecutor

In his Amended Petition, Petitioner Lamar contends that the Prosecuting Attorney failed to disclose exculpatory evidence, namely a written report of the alleged victim's forensic interview, a report of a medical appointment, and possible notes of a police interview by Deputy Bryan with Samantha Lamar. (Am. Pet. at 4–5.) In his Proposed Findings of Fact and Conclusions of Law, Petitioner argues that the State is required to turn over any exculpatory evidence in possession of his investigative team irrespective of whether he has personal knowledge of the evidence in question . . . ." (Pet'r's Proposed Findings of Fact and Conclusions of Law ¶ 56.)

In *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), the seminal case in West Virginia on the State's duty to disclose evidence favorable to a defendant, the Court held the following:

> 1. A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor.
>
> 2. There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. pts. 1 and 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007).

Petitioner's first assertion is that the State failed to disclose a report from the forensic interview. During Ms. Niehaus's cross-examination of Abigal Leslie in the *in camera* hearing, Ms. Leslie stated that she became aware of the forensic interview after "[r]eading the report that

was done." (Trial Tr. 167.) Attorney Niehaus continued to question Ms. Leslie about the report, which Ms. Leslie said that she did not have and did not know who may have had it. (*See id.*) Prosecuting Attorney Snyder informed the Court that he did not have the report. (*Id.* at 170.) The Court found that the discovery in the case included the DVD recording of the actual forensic interview, which would have formed the basis of any report that may have been created. (*Id.* at 170–71.)

The Court finds and concludes for two reasons that Petitioner has not proven by a preponderance of the evidence that his constitutional right to have the State disclose evidence favorable to him has been violated by the failure to produce a forensic interview report. First, Petitioner has failed to show that the information contained in the alleged forensic interview report would have been favorable to him, thus failing the first prong of the *Youngblood/Hatfield* test. Second, Petitioner has failed to show that the alleged forensic interview report was material in that it prejudiced his defense at trial. Petitioner was given as part of the discovery the DVD recording of the actual forensic interview. Petitioner was aware of everything that took place during the forensic interview and the allegations C.M. made. He has simply not shown that the alleged forensic interview report was either favorable or material. Accordingly, the Court finds this ground to be without merit.

Second, Petitioner contends that the report of a medical appointment for C.M. was not disclosed to him. During Ms. Niehaus's cross-examination of Ms. Leslie during her testimony to the jury, Ms. Niehaus asked the following: "On February 18th you talk about the exam, the medical exam that happened. Then you talk down further in your notes that the client's anxiety regarding specific situations related to the trauma. Is she talking about the abuse at that point also?" (Trial Tr. 212.) At the omnibus hearing in this case, attorney Niehaus testified that she

did not have an actual recollection of not receiving a report from a medical examination. (*See* Omnibus Hr'g Tr. 24.) She read the trial transcript, and was at best able to acknowledge that the medical examination "appears from the record that it was referred to by some means . . . ." (Omnibus Hr'g Tr. 24.)

This Court finds and concludes that Petitioner has failed to prove by a preponderance of the evidence his assertion that his right to the disclosure by the State of evidence favorable to him has been violated. First, he has not shown that the medical examination report (if one actually exists) is favorable to him. Second, he has not shown by a preponderance of the evidence that it prejudiced his defense at trial. For those reasons, the Court finds and concludes that this assertion is without merit.

Finally, Petitioner contends that he was not provided with notes from Deputy Bryan's interview with Samantha Lamar. Prosecuting Attorney Snyder made reference to alleged statements Ms. Lamar made to Deputy Bryan during his cross-examination of her. She generally denied his characterizations of her statements to Deputy Bryan. (*See* Trial Tr. at 264–66.) During Ms. Niehaus's redirect examination of Ms. Lamar, Ms. Lamar testified that she did not give a recorded statement to Deputy Bryan, nor was Deputy Bryan taking notes during the interview. (*Id.* at 268.) During the omnibus hearing, Ms. Niehaus testified that a report from Deputy Bryan's interview with Samantha Lamar was never disclosed. (Omnibus Hr'g Tr. 24.)

From this Court's review of the official record, the Court discerns that Prosecuting Attorney Snyder's brief referral to Samantha Lamar's prior statements to Deputy Bryan are contained in the "Action Taken" section of Deputy Bryan's police report. On Tuesday, September 1, 2009, at 1720 hours, Deputy Bryan writes that he did the following:

> Detective Bryan met and spoke with Samantha Lamar, wife of Charles Lamar, Jr. an step sister of [C.M.] Samantha Lamar stated that she would like to believe

> that Charles had not done anything with [C.M.] but was unsure. Samantha Lamar stated that she has never known her sister to lie.
> Detective Bryan then asked Samantha Lamar if her and her husband had had any arguments over his fascination with pornography. Samantha Lamar stated that she has seen her husband looking at pornography, but never any child pornography, as alleged by her father and step mother.

(Report of Criminal Investigation, filed as discovery in Case No. 10-F-9.)

The Court finds and concludes that Petitioner Lamar has failed to prove by a preponderance of the evidence that his constitutional right to have the State disclose favorable evidence to him has been violated. First, the substance of Samantha Lamar's statements were known to Petitioner from the discovery filed in the case and provided to him, which included the Report of Criminal Investigation. Samantha Lamar testified that she did not give a recorded statement, nor did Deputy Bryan take notes during the interview. Finally, Samantha Lamar testified to the jury that Prosecutor Snyder's recitation of Deputy Bryan's characterization of her statement was erroneous, and that she believed Petitioner Lamar was innocent. Petitioner has failed to show that his defense at trial was prejudiced.

For those reasons, the Court finds and concludes that Petitioner has failed to prove a *Brady/Hatfield/Youngblood* violation by a preponderance of the evidence.

4) State's Knowing Use of Perjured Testimony

Petitioner contends that the State used Deputy Bryan's report, which he contends was intentionally misleading, to cross-examine Samantha Lamar in a way that was misleading and prejudicial to Petitioner Lamar. (Am. Pet. at 4.) Petitioner does not further develop this assertion in his Proposed Findings of Fact and Conclusions of Law.

The Court finds that Petitioner's assertion is wholly speculative. Prosecuting Attorney Snyder asked Samantha Lamar if she told Deputy Bryan that she was unsure if Charles Lamar committed the sexual abuse. Ms. Lamar replied unequivocally that "I have never doubted my

husband." (Trial Tr. 265.) When pressed further by Prosecutor Snyder, Ms. Lamar outright denied she said anything to that effect to Deputy Bryan. (*Id.* at 265–66.)

Petitioner has not shown that Deputy Bryan's characterizations of Ms. Lamar's statements to him in his Report of Criminal Investigation are misleading. Even if those characterizations were misleading, Samantha Lamar testified unequivocally to the jury that she did not believe her husband committed the crimes. Furthermore, because even Petitioner recognizes that this does not constitute "perjured testimony," he has failed to show that Petitioner's constitutional rights were violated by the State's cross-examination of Ms. Lamar.

Furthermore, even if this was evidence, which the Prosecuting Attorney's remarks are not, and assuming *arguendo* it was false, Petitioner has still failed to show that it had any effect at all on the jury verdict. "Although it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be aside unless it is shown that the false evidence had a material effect on the jury verdict." Syl. pt. 2, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Div.*, 190 W. Va. 321, 438 S.E.2d 501 (1993). In this case, Petitioner makes a blanket assertion that this was prejudicial. However, in this Court's review of the trial transcript, it provided the opportunity for Ms. Lamar to deny that she had ever been equivocal about her husband's innocence, and she opined to the jury that she did not believe that he committed the crime. (*See* Trial Tr. 265.)

For these reasons, the Court finds and concludes that Petitioner Lamar has failed to prove by a preponderance of the evidence that his due process rights were violated by the State's alleged knowing use of perjured testimony.

5) Information in Presentence Report Erroneous

Petitioner Lamar contends in his Amended Petition that he "may have been prejudiced by the inclusion of irrelevant considerations including the criminal history of family members" in the presentence investigation report. (Am. Pet. at 4.) Petitioner has failed to further develop this theory, presented no evidence at the omnibus hearing on the subject, and did not address it in his Proposed Findings of Fact and Conclusions of Law.

Because it appears to this Court that Petitioner has withdrawn this ground in support of his Amended Petition for Writ of Habeas Corpus, and because he has failed to prove this assertion by a preponderance of the evidence, the Court finds and concludes that the Amended Petition should be denied as it pertains to this ground for relief.

6) Ineffective Assistance of Counsel

Petitioner contends that his trial counsel, Claire Niehaus, and his sentencing and direct appeal counsel, Kevin Tipton, were ineffective in violation of his Sixth Amendment and Article III, § 14 rights.

The Sixth Amendment to the Constitution of the United States provides that the accused in all criminal prosecutions shall "have the assistance of counsel for his defence." U.S. Const. amend. VI. Similarly, Article III, § 14 of the Constitution of the State of West Virginia provides that the accused in a criminal trial "shall have the assistance of counsel." W. Va. Const. art. III, § 14.

The right to the effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, *see Strickland v. Washington*, 466 U.S. 668, 688 (1984) (effective assistance of counsel "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary

process that the [Sixth] Amendment envisions"), and that right "is made obligatory upon the states by virtue of the due process clause of the Fourteenth Amendment." Syl. pt. 1, *State ex rel. May v. Boles*, 149 W. Va. 155, 139 S.E.2d 177 (1964).

The law in West Virginia regarding ineffective assistance of counsel requires the application of the two-pronged test as announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984) and by the State Supreme Court in *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995).

> *Strickland* requires the defendant to prove two things: (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." When assessing whether counsel's performance was deficient, [a court] "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" To demonstrate prejudice, a defendant must prove there is a "reasonable probability" that, absent the errors, the jury would have reached a different result.

State v. Miller, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995) (internal citations omitted). The *Miller* Court, by Justice Cleckley, cautioned courts from judging counsel's performance through hindsight, 194 W. Va. at 17, 459 S.E.2d at 128, and instead urged courts to ask "whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." 194 W. Va. at 16, 459 S.E.2d at 127.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court of the United States stated that

> [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless

> ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 466 U.S. 668, 689–90 (1984) (citations omitted).

"Under these rules and presumptions, the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another. This result is no accident, but instead flows from deliberate policy decisions . . . ." *State v. Miller*, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995). "In other words, we always should presume strongly that counsel's performance was reasonable and adequate." *Id.* The goal is not to "grad[e] lawyers' performances[,]" but instead to see "whether the adversarial process at the time, in fact, worked." *Id.*

Finally, the Petitioner bears the burden of proving the allegations contained in the petition that warrant his release by a preponderance of the evidence. *State ex rel. Scott v. Boles*, 150 W. Va. 453, 456, 147 S.E.2d 486, 489 (1966).

Accordingly, with the highly deferential standard of review for ineffective assistance of counsel claims in mind, this Court considers Petitioner's assertions.

First, although Petitioner alleged 16 different acts or omissions as grounds supporting a claim of ineffective assistance of counsel, in his Proposed Findings of Fact and Conclusions of Law, Petitioner only alleges the following reasons that attorney Niehaus was ineffective: "failed to obtain the Grand Jury Transcripts," (Pet'r's Proposed Findings of Fact and Conclusions of Law ¶ 44); "failed to use a video of a D[omestic] V[iolence] P[rotective] O[rder] hearing that Petitioner provided to her to impeach the testimony of the alleged victim's mother," (*id.* at ¶47); "failed to obtain any experts[,]" specifically a "Taint" expert, (*id.* at ¶ 50); "waived Petitioner's speedy trial rights without gaining any advantage for doing so[,]" (*id.* at ¶ 51); and "failed to seek a limiting instruction concerning the testimony of the Petitioner

'tickling' with the alleged victim, or object to the variance between the evidence and the indictment that was enabled by means of the lesser-included offense instruction on First Degree Sexual Abuse . . . [.]" (*Id.* at ¶ 52).

Because these are the only grounds Petitioner has sought to develop, the Court considers all other asserted grounds in the Amended Petition not developed to be abandoned and not proven by a preponderance of the evidence. Further, Petitioner has not sought to pursue his claims that sentencing and direct appeal attorney Kevin Tipton was ineffective, and the Court therefore considers that claim abandoned and not proven by a preponderance of the evidence.

Next, to address the grounds that Petitioner has developed, the Court begins with his assertion that attorney Niehaus was ineffective by failing to obtain the grand jury minutes.

During the omnibus hearing, attorney Niehaus testified that she simply "neglected to get them." (Omnibus Hr'g Tr. 15.) She further testified that it was a "failure on [her] part" and was "not a strategic decision[.]" (*Id.*) Viewing this through the *Strickland/Miller* test, the Court assumes *arguendo* that the failure to obtain the grand jury minutes was not objectively reasonable. However, Petitioner has wholly failed to show that the results of the proceedings would have been different if attorney Niehaus had obtained the grand jury minutes. For that reason, even assuming for the sake of argument that Ms. Niehaus's performance regarding the grand jury minutes was deficient, the Court is unable to find that such failure constitutes ineffective assistance to the extent that it would require relief in habeas corpus. Accordingly, the Court finds and concludes that the Amended Petition should be denied as it pertains to this asserted ground for relief.

Next, Petitioner contends that attorney Niehaus failed to use a video of a domestic violence protective order ("DVPO") hearing from the Family Court in which S.M., the victim's

mother, told the Family Court that she did not feel he would ever do anything. Petitioner contends that such video could have been used to impeach the testimony of S.M.

During the omnibus hearing, attorney Niehaus testified that she knew of no theory under which she could get that evidence in. Attorney Niehaus testified that if S.M. had testified inconsistently with what she told the Family Court, it was her intention to use the video to impeach S.M.; however, that opportunity did not present itself. (Omnibus Hr'g Tr. 14–15.)

From this Court's review of S.M.'s testimony at trial, the Court does not find that attorney Niehaus's performance was deficient. The Court does not find, as Petitioner acknowledges, that the trial transcript shows anywhere that S.M. ever testified that Petitioner was dangerous or that she thought he would take action against C.M. or her family. (*See* Trial Tr. 130–149.) Further, the Court cannot find, nor has it been pointed to any specific spot in the testimony, where this evidence would have constituted a prior inconsistent statement under either Rule 613 or Rule 801 of the West Virginia Rules of Evidence. Accordingly, the Court finds and concludes that Petitioner has not proven that attorney Niehaus's performance regarding the use of the DVPO hearing DVD was deficient under an objective standard of reasonableness.

Next, Petitioner contends that attorney Niehaus was ineffective in that she did not obtain any experts in the development of the defense. At the omnibus hearing, attorney Niehaus testified when asked if she would do anything differently (in other words, in hindsight), that she thought that enlisting a taint expert would have been prudent. (Omnibus Hr'g Tr. 26.) Ms. Niehaus explained that a

> Taint Hearing is done where children are under ten and so, I don't know that she would qualify, but it's to show that maybe the child's recollection of what happened isn't accurate and that they were tainted by conversations with other

people and so what happens to them is a false memory has been implanted in them.

(Omnibus Hr'g Tr. 27.)

This Court finds and concludes that this assertion falls squarely under Justice Cleckley's admonition in *Miller* to not judge an attorney's performance through hindsight. This Court finds and concludes that it is entirely speculative whether the victim would have qualified for a taint expert, that a taint expert could have been found who would have testified in a way favorable to Petitioner Lamar, or that it would have had any effect on the outcome of the trial. For these reasons, the Court finds and concludes that Petitioner Lamar has failed to prove this assertion by a preponderance of the evidence. The Court notes that attorney Niehaus did set forth a defense that once the child made the initial allegation, the "train had left the station" and that she was unable to withdraw the accusations. Indulging a "strong presumption that counsel's conduct f[ell] within the wide range of reasonable professional assistance" as it must under *Strickland/Miller*, the Court finds and concludes that attorney Niehaus had a reasonable trial strategy in defending Petitioner Lamar.

Next, Petitioner contends that attorney Niehaus was ineffective by waiving "the Petitioner's speedy trial rights without gaining any advantage for doing so." (Pet'r's Proposed Findings of Fact and Conclusions of Law ¶ 51.) This Court finds Petitioner has failed to prove that Ms. Niehaus's performance – waiving his speedy trial rights while he was out on bond to obtain discovery and prepare for trial – fell below an objective standard of reasonableness. Further, Petitioner asserts this right was violated in thin air; he has not explained how he was prejudiced or even attempted to prove that but for waiving the speedy trial rights, the results would have been different. Accordingly, the Court finds and concludes that Petitioner has

failed to prove this ground for relief by a preponderance of the evidence, and that the Amended Petition should therefore be denied as it pertains to this asserted ground.

Next, Petitioner contends that attorney Niehaus was ineffective by failing to seek a limiting instruction concerning testimony of the Petitioner tickling the victim, or by objecting to the variance between the evidence and the indictment. Petitioner points to no authority that would suggest a limiting instruction would be appropriate in this circumstance. Petitioner testified to the jury that he may have accidentally grazed the child's vagina while he was tickling her, and that in his belief, this accidental grazing could have formed the basis for the child's accusation against him. (*See, e.g.*, Trial Tr. 297 ("If I had any contact with her vagina, it would have been fully clothed. It would have been totally accidentally. While we could have been wrestling around or tickling or horseplaying, there could have been – there was no intentional touching of the vagina . . . .").) The Court finds and concludes that no limiting instruction was necessary, and therefore attorney Niehaus's failure to ask for one did not fall below an objective standard of reasonableness.

Finally, the Court disagrees with Petitioner's assertion that attorney Niehaus failed to object to the lesser-included offense instruction on sexual abuse in the first degree. Ms. Niehaus did in fact object, which the Court will address next.

7) Inclusion of Sexual Abuse in the First Degree in the Jury Instructions

Petitioner contends that his constitutional due process rights were violated by this Court's instruction to the jury on sexual abuse in the first degree as a lesser-included offense of sexual assault in the first degree as charged in Counts 1 and 2 of the Indictment. Petitioner contends that attorney Niehaus was ineffective for failing to object; and he also contends that this was a violation of his due process rights as explained in *State v. Corra*, 223 W. Va. 573,

678 S.E.2d 306 (2009). This Court does not need to address Petitioner's argument that attorney Niehaus was ineffective for failing to object because this Court finds that *Corra* is not on point and the lesser-included offense instruction was proper under both the law and the evidence.

Petitioner was charged with two criminal episodes in the indictment; the State alleged each incident constituted first degree sexual assault and sexual abuse by a custodian. Both allegations included that Petitioner Lamar used his fingers to penetrate the vagina of C.M., who was nine years old. (*See* Indictment, Counts 1 and 2, Case No. 10-F-9.)

At trial, C.M. testified to the following: "I remember sitting on my dad's chair watching TV and I was sitting on his [Petitioner Lamar's] lap and some – I don't know why, but he touched my vagina." (Trial Tr. 109.) C.M. never testified during the trial that Petitioner actually penetrated her vagina with his fingers; instead, she testified that he "touched" her vagina. On redirect examination, C.M. was asked by the Prosecuting Attorney if she could describe how it felt when he touched her. She responded: "It hurt a little bit." (Trial Tr. 128.) The Prosecuting Attorney then asked her, "Was it the kind of pain that you had ever experienced before?" She answered, "No." (*Id.*) C.M. never testified that Petitioner digitally penetrated her vagina, although her answer that it "hurt a little bit" *may* also have supported the penetration allegations.

During the charge conference, the Court had already prepared and disseminated a draft jury charge that included a lesser-included offense instruction of sexual abuse in the first degree. The Court understood that the State wanted the instruction. (*See* Trial Tr. 332.)[11] Attorney Niehaus objected to the inclusion of the lesser-included offense instruction. (Trial Tr. 332.) The Court included it because: (1) first degree sexual abuse is a lesser-included offense

[11] The Court also informed Petitioner Lamar at the outset of the trial of the possible penalty for sexual abuse in the first degree. (Trial Tr. 95.)

of first degree sexual assault; (2) the Court found that there was evidence in the case that supported that instruction, to wit, C.M.'s own testimony that he "touched" her vagina; and (3) it is the duty of the Court to properly instruct the jury. (Trial Tr. 333.)

Petitioner now contends that it is a variance in the proof from that charged in the indictment and is a violation of his due process rights to notice as explained in *State v. Corra*, 223 W. Va. 573, 678 S.E.2d 306 (2009). This Court disagrees with Petitioner's reading of *Corra* and its applicability to the circumstances in this case.

First, in *Corra*, the appellant had been indicted under West Virginia Code § 60-3-22a(b) for providing "alcoholic liquor" to persons under the age of 21. The State's theory was that appellant had provided Coors Light beer to his 20-year-old daughter and her similarly underage friends, which ultimately resulted in a car crash in which two of the underage drinkers were killed. The problem resulted from the failure of the prosecuting attorney, the defense attorney, and the trial court to read the statute. "Non-intoxicating beer" was not included, and in fact was specifically excluded, in the definition of "alcoholic liquor." Further, during the charge conference, when asked by the trial judge if he should instruct the jury on the definition of "alcoholic liquor," the defense attorney stated that it was not necessary because beer was an alcoholic liquor and there was no issue there. *Corra*, 223 W. Va. at 578 n.6, 678 S.E.2d at 311 n.6.

On appeal, the State attempted to maintain that the appellant had failed to assert that error, in fact had helped create it, and that it would only be logical that non-intoxicating beer would be included in the definition. The Supreme Court disagreed.

The Supreme Court of Appeals of West Virginia held that "[w]hen a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not

indictment, then *per se* error has occurred, and the conviction cannot stand and must be reversed." Syl. pt. 7, *Corra*, 223 W. Va. 573, 678 S.E.2d 306.

Corra is not on point for the case at bar. In that case, furnishing non-intoxicating beer to minors was not and is not a lesser-included offense of furnishing alcoholic liquors to minors. The proof at trial was wholly different than what Corra was indicted for. Unlike in *Corra*, in the case at bar, first degree sexual abuse is a lesser-included offense of first degree sexual assault. Petitioner does not argue otherwise. Further, the evidence at trial, either a credibility determination regarding Petitioner's own testimony or from C.M.'s testimony, supported an instruction on first degree sexual abuse.

Further, the State has a right to request a lesser-included offense instruction over the objection of a defendant if it is warranted by the evidence. "A defendant does not have the right to preclude the State from seeking a lesser-included offense instruction where it is determined that the offense is legally lesser-included and that such an instruction is warranted by the evidence." Syl. pt. 4, *State v. Wallace*, 175 W. Va. 663, 337 S.E.2d 321 (1985). The Petitioner's Proposed Findings of Fact and Conclusions of Law concede that the State requested the lesser-included instruction. (Pet'r's Proposed Findings of Fact and Conclusions of Law ¶ 32.)

After a careful review of Petitioner's assertions and the evidence adduced at trial, this Court finds Petitioner's claim that the jury must have discredited the child victim's testimony because the jury did not return a verdict of guilty on the first degree sexual assault charge to be without merit. In fact, C.M. never testified to penetration at all. Further, she testified that she thought it happened more than once, although her testimony regarding how many times was equivocal. (Trial Tr. 110.) The Court finds and concludes that the jury instructions, as well as

the jury's finding of guilt on only one count of the lesser-included offense (which only required touching, either through clothing or directly)[12] to be supported by the evidence adduced at trial.

For these reasons, the Court finds and concludes that Petitioner has failed to prove by a preponderance of the evidence that his due process rights were violated by a variation in the proof at trial or by this Court's instruction on the lesser-included offense of first degree sexual abuse.

8) Non-disclosure of the Grand Jury Minutes

First, the Court has already concluded that Ms. Niehaus's failure to push for the grand jury minutes does not amount to ineffective assistance of counsel in this case because Petitioner has completely failed to demonstrate that the results would have been different had she done so. (*See* Part 6, *supra.*)

Next, Petitioner contends in his Amended Petition that the failure to disclose the grand jury minutes can also be viewed as a violation of the State's duty to disclose prior statements of witnesses as set forth in *State v. Kerns*, 187 W. Va. 620, 420 S.E.2d 891 (1992). Petitioner has failed to further develop this theory in his Proposed Findings of Fact and Conclusions of Law. However, in this Court's view, *State v. Watson*, 173 W. Va. 553, 318 S.E.2d 603 (1984), is more on point because it dealt directly with grand jury transcripts and Rule 26.2 of the Rules of Criminal Procedure.[13]

In *Watson*, the Court held that "[t]he term 'statement' is defined in Rule 26.2(f) of the West Virginia Rules of Criminal Procedure and includes a statement, however taken or

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[12] *See* W. Va. Code § 61-8B-7(a)(3) (2006) ("A person is guilty of sexual abuse in the first degree when . . . [s]uch person, being fourteen years old or more, subjects another person to sexual contact who is younger than twelve years old."). "Sexual contact" is defined as "any intentional touching, either directly or through clothing," of, *inter alia*, "any part of the sex organs of another person . . . ." W. Va. Code Ann. § 61-8B-1(6) (2007) (West 2017).

[13] Rule 26.2 of the West Virginia Rules of Criminal Procedure requires either the State or the defendant, as the case may be, to produce any statements of a witness that is in that parties' possession after that witness has testified in the trial.

recorded, or a transcription thereof, if any, made by said witness to a grand jury." Syl. pt. 3, *Watson*, 173 W. Va. 553, 318 S.E.2d 603.

In *Watson*, which was already being reversed for other reasons, the Court opined in footnote 9 the following: "Where the only error is the failure to disclose, courts under the Jencks Act have remanded the case for a determination of whether the statement comes within the act and whether the failure to disclose can be treated as harmless error." *Watson*, 173 W. Va. at 560 n.9, 318 S.E.2d at 610 n.9.

The Court first notes that it has substantial doubt that a Rule of Criminal Procedure regarding the production of statements after a witness has testified is necessarily elevated to a constitutional right. Assuming *arguendo* that it may implicate Petitioner's due process rights, the Court nevertheless finds that Petitioner has failed to prove more than harmless error by a preponderance of the evidence.

The Court finds and concludes that regardless of how it is analyzed, Petitioner Lamar has failed to prove by a preponderance of the evidence that either the results of the trial would have been different, or that the failure to produce the grand jury transcript amounted to more than harmless error. The record in this habeas corpus case is devoid of anything more than mere speculation.

For these reasons, the Court finds and concludes that Petitioner's assertions regarding the failure to obtain the grand jury minutes does not entitle him to habeas corpus relief.

9) Claims Involving Use of Informers

In his Amended Petition, Petitioner Lamar asserts that he sought to preserve this ground "relating to what effect, if any, the use of a prison informant, who accused the Petitioner of

making threats against Prosecuting Attorney Mel Snyder, had on the Petitioner's sentencing." (Am. Pet. at 6.)

First, on September 16, 2016, Petitioner Lamar, through his habeas counsel Jeremy Cooper, filed a Motion to Permit Counsel to View and Copy Sealed Filings in Case No. 10-F-9. On that same day, this Court entered an Agreed Order Permitting Counsel to View and Copy Sealed Filings. Preston County Prosecuting Attorney Melvin Snyder's motion to disqualify himself was contained in the sealed filings.

On February 6, 2017, at a scheduling conference in this habeas corpus case, Tucker County Prosecuting Attorney Ray LaMora brought with him a voluminous stack of documents. The Court ordered the documents filed under seal and expressed that this Court would review them *in camera* and determine whether they should be disclosed to Petitioner. This Court thereafter reviewed the documents, which were notes and reports from an investigation of Petitioner Lamar and the circumstances surrounding the allegations that he had threatened to kill Prosecutor Snyder. No charges were ever filed against Petitioner Lamar stemming from those allegations.

On March 28, 2017, this Court entered an Order Denying Access to Sealed Documents and Order Extending Timeframe to File Amended Petition. The Court found that the documents should not be disseminated to Petitioner Lamar because they were not relevant to any cognizable claim in habeas corpus. The Court adopts *in toto* and incorporates by reference the findings of fact and conclusions of law contained in that Order.

Further, the Court notes that Petitioner Lamar was sentenced by this Court within the statutory limits, and stated its reasons for doing so on the record during his October 3, 2011 sentencing hearing.

> The court is considering the age of the victim and the harm that's been done to the victim in this case.[14]
> The court is also considering your failure to accept responsibility, failure to recognize the problem and failure to express a desire to change as indicated on Page 9 of the presentence report.
> The court is considering the seriousness of the crime. The court finds that to grant probation in this case would unduly depreciate the seriousness of the offenses which the defendant stands convicted.

(Sentencing Hr'g Tr. 66, Oct. 3, 2011.)

Accordingly, the Court finds no basis in fact or law to grant Petitioner habeas corpus relief on this ground contained in the Amended Petition.

10) Constitutional Errors in Evidentiary Rulings

Petitioner contends in his Amended Petition that "the Court's rulings on the manner of testimony of the juvenile alleged victim were prejudicial error of a constitutional scope; however this issue was already ruled upon by the Supreme Court of Appeals of West Virginia on direct appeal." (Am. Pet. at 7.)

Prior to C.M.'s testimony, the State and C.M.'s guardian *ad litem* filed a joint motion requesting that C.M. be allowed to testify outside the witness box due to the unique (at that time) location of the witness box to the table where Petitioner Lamar sat. This Court granted that request, over Mr. Lamar's objection, by order entered December 28, 2010. The Court cautioned the guardian *ad litem* that she would not be allowed to speak to C.M. or communicate with her while she testified. Further, C.M.'s testimony was in the physical presence of Petitioner Lamar, and he was able to see her while she testified.

Petitioner Lamar, by counsel Kevin Tipton, contended on direct appeal that the Court's order regarding C.M.'s location during her testimony was error because it unfairly bolstered her testimony. The Supreme Court disagreed. In *State v. Lamar*, No. 11-1416, 2013 WL 1501073

[14] For further detail, see Victim Impact Statement, filed March 23, 2011, and statements made by the victim's mother and the guardian *ad litem* at the sentencing hearing.

(W. Va. Apr. 12, 2013) (memorandum decision), the Court held that the ruling was not erroneous:

> Petitioner presents no law or fact showing that the testimony of a child victim is bolstered when the child victim testifies in a location other than the witness box. Therefore, his claims of prejudice are merely speculative.
>
> In the courtroom where the case at bar was tried, the witness box is located between the State's table and the Defense's table. CM.'s therapist believed that CM. might be traumatized by testifying in such close proximity to petitioner. Rule 611(a) of the Rules of Evidence provides that a trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Furthermore, it is not unusual for a witness to step outside of a witness box to highlight something on an exhibit or to testify outside a witness box if the witness's physical condition requires. Thus, we find that the trial court did not err in allowing CM. to testify outside the witness box.

Lamar, 2013 WL 1501073, at *3.

This Court agrees with Petitioner that this issue has already been fully and finally adjudicated and is barred from reconsideration on the principles of *res judicata*. Accordingly, the Court finds and concludes that Petitioner should not be afforded habeas corpus relief on this ground.

11) Claims of Prejudicial Statement by Trial Judge

In his Amended Petition, Petitioner Lamar contends that he was prejudiced, either standing alone or as part of his ineffective assistance claim, by this Court's statement to attorney Niehaus during a bench conference, in which the Court stated, "Don't talk to me like that." (Am. Pet. at 8.)

A review of the trial transcript shows that the Court was conducting a bench conference regarding an evidentiary issue, specifically, whether an adequate foundation had been laid to present what attorney Niehaus characterized as a prior inconsistent statement. At trial, the

transcript shows that the Court told Ms. Niehaus, "Don't talk to me like that" during the bench conference. (Trial Tr. 258.)

At the omnibus hearing, Ms. Niehaus was shown that portion of the trial transcript, and although she did not have an actual recollection of the event, she also did not dispute the transcript. (*See* Omnibus Hr'g Tr. 25–26.) She testified that she believed it "wasn't prudent to say anything that would cause the Trial Judge to say that. So, I regret that." (*Id.* at 26.)

First, this Court finds that it is wholly speculative whether the jury heard the comment during the bench conference. Even if so, the statement itself is an admonition to counsel and is not a prejudicial statement made by the trial court to the jury about the defendant. Further, even if the jury had heard the admonition, this Court instructed the jury that "nothing that I have said or done at any time during the trial is to be considered by you as evidence of any fact or as indicating any opinion concerning any fact, the credibility of any witness, the weight of any evidence, or the guilt or innocence of the defendant." (Judge's Charge to the Jury at 3.)

Finally, the Court notes that attorney Niehaus prevailed on that particular argument during the bench conference, and her client was allowed to present the testimony of Samantha Lamar to impeach the credibility of C.M.

For those reasons, and primarily because it is entirely speculative what effect, if any, the comment had on the jury, this Court finds that this ground has not been proven by a preponderance of the evidence.

12) Claims of Prejudicial Statements by Prosecutor

Petitioner Lamar contends in his Amended Petition that Prosecutor Snyder made prejudicial statements during his closing argument when he opined on Petitioner's testimony. Specifically, Petitioner is referring to the Prosecutor's statement during his closing argument:

"Does it really make sense for an adult male to be playing with little girls and touching them between their legs? Accidentally or otherwise? Think about that. That doesn't even make sense." (Trial Tr. 369; *see* Am. Pet. at 9.)

Petitioner recognizes that this is not a facially prejudicial remark; he contends that it is when considered in the context of the jury instruction on the lesser-included offense of sexual abuse in the first degree.

This Court finds and concludes that this ground is without merit. First, when read in context, Prosecutor Snyder was commenting to the jury on the evidence in the case, which included Petitioner's testimony that he may have accidentally touched her vagina while tickling her. Second, this Court has determined, *supra*, that the giving of the lesser-included offense instruction was appropriate, and evidence separate and apart from Petitioner's admission that he may have touched her vagina while tickling her supported such instruction. C.M. herself testified that he "touched" her vagina. Accordingly, the Court finds no merit to the Petitioner's claims.

13) Sufficiency of the Evidence

Petitioner Lamar contends in his Amended Petition that whether sufficient evidence to support the convictions was presented has already been ruled upon by the Supreme Court of Appeals of West Virginia. This Court agrees, and accordingly finds and concludes that this ground is barred by the principles of *res judicata*.

In *State v. Lamar*, No. 11-1416, 2013 WL 1501073 (W. Va. Apr. 12, 2013) (memorandum decision), the Court considered Petitioner Lamar's argument that insufficient evidence was presented to support his convictions. The Supreme Court, citing the oft-repeated

Syllabus Point 3 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995),[15] found that "a jury could have found sufficient evidence to support petitioner's convictions." *Lamar*, 2013 WL 1501073, at *2.

Although Petitioner's argument on his direct appeal was that sufficient evidence was not presented for the jury to find that he was a custodian, this Court finds and concludes that sufficient evidence was presented to support Petitioner's conviction of first degree sexual abuse. (*See supra*, Court's discussion regarding evidence to support lesser-included offense charge).

For those reasons, the Court finds and concludes that this ground for relief is without merit.

CONCLUSION

For the reasons discussed in this Opinion Order, the Court finds and concludes that Petitioner Lamar's Amended Petition for Writ of Habeas Corpus should be denied. Accordingly, the Court does hereby

ORDER that the Amended Petition for Writ of Habeas Corpus is denied.

Petitioner is saved his exceptions and objections to the rulings of the Court. It is further

ORDERED that Jeremy Cooper continue to represent Petitioner Charles Lamar, Jr., for any other post-conviction proceedings, including an appeal of this Court's denial of his Amended Petition if Petitioner and attorney Cooper deem it is warranted. It is further

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[15] *See* Syl. pt. 3, *State v. Guthrie,* 194 W.Va. 657, 461 S.E.2d 163 (1995) ("A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.").

ORDERED that the Clerk of the Court personally deliver or send via first-class mail a certified copy of this Order to Jeremy Cooper, counsel for Petitioner Lamar; and to Special Prosecuting Attorney Raymond LaMora III.

ENTER this 8 day of September, 2017.

2 - Copies
SAO 9-11-17

Lawrance S. Miller, Jr., JUDGE

ENTERED this 8 day of September, 2017.

Betsy Castle
Betsy Castle, CLERK
By: Lisa Leuhman - deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By Lisa Leuhman Deputy