No. _____

IN THE
Supreme Court of the United States

KEITH ALLEN WOOD,

Petitioner,

v.

SHAWN STRAUGHN, SUPERINTENDENT
NORTHERN REGIONAL CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

KEITH ALLEN WOOD, Petitioner,
v.
SHAWN STRAUGHN, Respondent.
Civil Action No. 3:24-CV-41 (GROH)

REPORT AND RECOMMENDATION

I. INTRODUCTION

This case was initiated on April 10, 2024, when the Petitioner, by counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. ECF No.1.[1] The Petitioner paid the $5.00 filing fee on the same date he filed his petition. Id. The Petitioner is currently an inmate at the Mount Olive Correctional Center in Mount Olive, West Virginia.[2]

A report and recommendation was filed, but the District Court declined to adopt the same, and recommitted this matter to the undersigned for a second report and recommendation pursuant to Local Rule of Prisoner Litigation Procedure (LR PL P) 2, et seq., and 28 U.S.C. §§ 1915(e) and 1915(A). ECF Nos. 3, 5. For the reasons set forth below, the undersigned

[1] All ECF references herein are in the instant case, 3:24-CV-41, unless otherwise noted.
[2] See West Virginia Division of Corrections and Rehabilitation Offender Search for Prisons, https://apps.wv.gov/ois/offendersearch/doc.

recommends that the petition be denied and dismissed with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

A. The Petitioner's State Conviction, Sentence, and Direct Appeal

1. First Trial, Mistrial and Interlocutory Appeals

On March 5, 2018, a Brooke County grand jury returned an indictment which charged the Petitioner, who was then more than 65 years old, with two counts of sexual assault in the first degree in violation of West Virginia Code §§ 61-8B-3(2)(b) and (c), of a child less than 12 years of age, known as "A.R.R.," or "ARR," and two counts of sexual abuse by a parent, guardian, custodian, or a person in a position of trust to a child in violation of West Virginia Code § 61-8D-5, also of ARR ECF 1-2 at 3–4. All four offenses were alleged to have occurred between May 1, 2017, and July 10, 2017. Id. at 3–4.

On July 10, 2018, the circuit court entered a Stipulation and Agreed Order, which provided that the State and Petitioner agreed that a July 10, 2017, video recorded interview of the victim, conducted by Danielle Stroud, a "nonmedical forensic interviewer at Comfort House," who interviewed the victim for investigative or forensic purposes, would "not be played to the jury during the presentation of the State's case," and was "inadmissible as evidence" at trial pursuant to *Syllabus Pt. 9*, State v. Pettrey, 209 W. Va. 449, 549 S.E.2d 323 (W.Va. 2001)." ECF 1-2 at 184–85. However, pursuant to the Stipulation and Agreed Order, the State reserved the right to request

the Court to use the July 10, 2017, video recorded interview "if appropriate for rebuttal purposes." Id.

Before the first trial commenced, the trial court entered an order on April 17, 2020, granting in part the Petitioner's motion to suppress any expert testimony by Ms. Aspenleiter, a licensed clinical social worker, but not a licensed psychiatrist or psychologist. ECF No. 1-2 at 187. The Court further found that Ms. Aspenleiter did not possess the requisite skill, experience or training necessary to be designated an expert and could not render an expert opinion at trial. Further, the Court found that because Ms. Aspenleiter could not be deemed a treating physician, "any statements made by the alleged victim and her mother during counseling sessions with Ms. Aspenleiter are inadmissible hearsay as the hearsay exception under W. Va. R. Evid. 803(4) does not apply." Id. at 188. Finally, the circuit court advised the parties that "this ruling does not prevent Ms. Aspenleiter from testifying as a lay witness regarding any direct knowledge she may possess about the underlying allegations." Id.

On February 16, 2021, the Petitioner's first trial commenced in Brooke County, West Virginia Circuit Court. ECF No. 1-2 at 5. In his opening statement at trial, the Petitioner's counsel made numerous, specific references to interviews of the victim, and repeated statements made by the alleged victim during her interview conducted at Comfort House, and during counseling sessions with Ms. Aspenleiter. Id. at 57–63. Following opening statements, the parties appeared before the Court in chambers to discuss whether the Petitioner's counsel violated the

court's order and possible ameliorative options. Id. at 64–71. The Court ruled that the Petitioner's counsel, ". . . ran grossly far afield and mentioned things that were excluded in the prior Court's rulings in both the Comfort House interview and within the Aspenleiter treatment notes. Then out of fundamental fairness, I am forced, I have to declare a mistrial . . ." Id. at 71. Prior to making that ruling, the trial court attempted to find suitable alternatives without success. Id.

On June 28, 2021, the Petitioner executed a *Petition for Writ of Prohibition* which he filed with the Clerk of the Supreme Court of Appeals of West Virginia ("WVSCA") on June 30, 2021. Id. at 79–111, 113. On July 15, 2021, the WVSCA issued an order declining to issue a Rule to Show Cause. ECF No. 1-2 at 113.

On July 23, 2021, the Petitioner filed a Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 in this Court. 1:21-CV-103, ECF No. 1. On September 28, 2021, Chief District Judge Thomas S. Kleeh entered an Order adopting the August 10, 2021, Report and Recommendation [1:21-CV-103, ECF No. 3] and dismissing the case without prejudice. 1:21-CV-103, ECF No. 4.

Following the mistrial, on March 18, 2021, the Petitioner filed a motion to dismiss on double jeopardy grounds which the circuit court denied in part on June 8, 2021. ECF No. 1-2 at 74, 76–78. On June 8, 2021, the trial court granted in part and denied in part the motion. Id. at 76–78. The Court denied the request to dismiss all charges, finding "in the present case, Defense counsel violated the

Court's pre-trial evidentiary orders." [3] Id. at 77. However, the Court granted in part the motion, dismissed the superseding indictment, but allowed the original indictment to stand, and ruled that the State was barred from bringing a new indictment stemming from the same factual circumstances. Id. at 77–78.

2. Second Trial, Conviction, and Sentence in Brooke County Circuit Court

The Petitioner's second trial was commenced on August 10, 2021, and ran through August 13, 2021, in Brooke County, West Virginia Circuit Court. ECF No. 1-2 at 114. The Petitioner was convicted by the jury of two counts of sexual assault in the first degree, as charged in Counts 1 and 2 of the original indictment, and two counts of sexual abuse by a guardian, as charged in Counts 3 and 4.[4] ECF No. 1-2 at 114–117. See also State v. Wood, No. 21-0964, 2023 WL 2866229, at *1 (W. Va. Apr. 10, 2023). The Circuit Court sentenced the Petitioner to consecutive sentences which resulted in an effective term of not less than 70 nor more than 240 years of incarceration, comprised of not less than 25 nor more than 100 years in prison for each of the two counts of sexual assault in the first degree, and not less than 10 nor more than 20 years in prison for each of the two counts of sexual abuse by a guardian. Id.

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[3] The trial court ruled that, "[t]he Defendant cannot enjoy the fruits of double jeopardy acquittal when his actions created a 'manifest necessity' to discharge the jury and re-try the case." ECF No. 1-2 at 77.

[4] West Virginia Code §§ 61-8B-3(2)(b), 61-8D-5

3. Appeal to the Supreme Court of Appeals of West Virginia

The Petitioner filed a direct appeal in the Supreme Court of Appeals of West Virginia in that court's docket-number 21-0964, which by Memorandum Opinion issued on April 10, 2023, affirmed the Petitioner's conviction and consecutive sentences. ECF No. 1-2 at 173–179. The Petitioner raised the following seven grounds in his appeal from the circuit court: (1) that the circuit court erred in excluding the Petitioner's offered expert testimony; (2) the circuit court erred in jury instructions related to the victim witness; (3) the circuit court erred in jury instructions related to reasonable doubt; (4) the circuit court erred in its evidentiary ruling which denied the Petitioner's request to redact hearsay statements made by the victim witness; (5) the circuit court committed plain error in permitting certain members of the public into the courtroom whom the Petitioner claimed intimidated the jury; (6) that the Petitioner was subjected to double jeopardy after his first trial ended in a mistrial based on statements made by his counsel in opening; and (7) the trial court abused its discretion in sentencing the Petitioner to consecutive sentences. Id.

B. Instant Federal Habeas Petition

1. Claims in the Petition

In his § 2254 petition and supporting memorandum filed herein on April 10, 2024, the Petitioner articulates two grounds for relief: (1) that the trial judge violated the Petitioner's right against double jeopardy by declaring a mistrial following

opening statements [5] at the first trial over the objection of the Petitioner, and gave "no meaningful consideration to alternative[ ]" measures [ECF No. 1 at 5–6]; and (2) the trial court gave a jury instruction related to the "inherent incredibility" of witness testimony which improperly shifted the burden of proof to the Petitioner, and thereby violated the Petitioner's Due Process rights [Id. at 7–8]. The Petitioner requests that the Court reverse his conviction and sentence in the Circuit Court of Brooke County, West Virginia, and immediately release him from incarceration. Id. at 10.

2. Respondent's Motion for Summary Judgment

The Respondent filed a Motion for Summary Judgment, along with a memorandum and exhibits in support thereof on September 30, 2024. ECF Nos. 8, 8-1 through 8-6, 9. Therein, the Respondent argues that: (1) the state court determination that the Petitioner's right against double jeopardy was not violated, is not contrary to, nor does it involve an unreasonable application of clearly established federal law, because the Petitioner's counsel created the manifest necessity which caused the mistrial in the first trial [ECF No. 9 at 11–16]; and (2) in the Petitioner's second trial, he was not denied a fair

[5] The Petitioner's counsel asserts that this occurred after "opening arguments," [ECF No. 1 at 5] or after "opening statements" [Id. at 6], however, a trial lawyer's initial remarks to the jury are properly called "opening statements." See West Virginia Trial Court Rules, Rule 23.04(a). https://www.courtswv.gov/legal-community/court-rules/wv-trial-court-rules-contents#rule2304.

trial when the trial court instructed the jury on inherent incredibility because the instruction was a correct statement of West Virginia law, and moreover, the decision of the SCAWV which affirmed the circuit court's actions, was not contrary to, nor did it constitute an unreasonable application of clearly established federal law [Id. at 17–20].

3. Petitioner's Response

On November 4, 2024, the Petitioner filed a Response which asserts that: (1) the Petitioner's right against double jeopardy was violated by the SCAWV which affirmed the trial court's "precipitately declared" mistrial [ECF No. 12 at 5–13]; and (2) the Petitioner's right to a fair trial was violated when he was convicted based on the uncorroborated testimony of the complaining witness, about whom the trial court improperly instructed the jury regarding inherent incredibility [Id. at 13–16].

4. Respondent's Reply

The Respondent filed a Reply on November 4, 2024, which argues: (1) dispositive motions are appropriate responses to Section 2254 petitions; (2) the Petitioner's "blatant disregard" of the trial court's pretrial orders caused the mistrial, and accordingly the trial court's decision was not an unreasonable application of clearly established federal law; and (3) the trial court's jury instruction was a correct statement of law, and the WVSCA decision affirming that instruction was not contrary to, nor an unreasonable application of clearly established federal law. ECF No. 13.

III. LEGAL STANDARD

A. Review of Petitions for Relief

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and this Court's local rules, the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the District Court. This Court is charged with screening Petitioner's case to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts; see also Rule 1(b) Rules Governing Section 2254 Cases in the U.S. District Courts (a district court may apply these rules to a habeas corpus petition not filed pursuant to § 2254).

B. Petitions for Relief Under 28 U.S.C. § 2254

Substantively, the provisions of 28 U.S.C. § 2254 must be examined to determine whether habeas relief is proper. Under 28 U.S.C. § 2254(a) a district court must entertain a petition for habeas corpus relief from a prisoner in State custody, but "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

However, the statute, 28 U.S.C. § 2254, provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in

> State court proceedings **unless** the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

See also Williams v. Taylor, 529 U.S. 362 (2000) (emphasis added). "By its terms, § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." Harrington v. Richter, 562 U.S. 86, 98, 131 S.Ct. 770, 784 (2011).

> This standard . . . is difficult to meet. Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

White v. Woodall, 572 U.S. 415, 419 – 20, 134 S. Ct. 1697, 1702 (2014) (cleaned up). Further, in Brown v. Davenport,596 U.S. 118, 142 S.Ct. 1510 (2022), the Supreme Court recognized that while the 1996 enactment of the AEDPA, including 28 U.S.C. § 2254:

> Announced certain new conditions to relief, it did not guarantee relief upon their satisfaction. Instead, Congress left intact the equitable discretion traditionally invested in federal courts by preexisting habeas statutes. So even a petitioner who prevails under AEDPA must still today persuade a federal habeas court that "law and justice require" relief. . . . Today, then, a federal court must *deny* relief to a state habeas petitioner who fails to satisfy either of this Court's equitable precedents or AEDPA. But to *grant* relief, a court must find that the petitioner has cleared both tests.

Id. at 1524.

The statute also fully addresses factual determinations made in state court:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall

> have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e).

A claim is generally considered to have been "adjudicated on the merits" when it is "substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree." Thomas v. Davis, 192 F.3d 445, 455 (4th Cir. 1999). The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have separate and independent meanings. Williams v. Taylor, 529 U.S. 362, 364 (2000). A state court decision warrants habeas relief under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court's." Lewis v. Wheeler, 609 F.3d 291, 300 (4th Cir. 2010) (quoting Williams, 529 US at 405) (internal quotations omitted). A writ of habeas corpus may be granted under the "unreasonable application" clause if the state court "identifies the correct governing legal rule from the [Supreme] Court's cases but unreasonably applies it to the facts of the particular case." Id. at 300 - 301 (internal marks omitted). Therefore, the AEDPA limits the habeas court's scope of review to the reasonableness, rather than the correctness, of the state court's decision.

C. Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), the Court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In applying the standard for summary judgment, the Court must review all the evidence in the light most favorable to the nonmoving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322 – 23 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex, the Supreme Court held that the moving party bears the initial burden of informing the Court of the basis for the motion to, "demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323. Once "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

"The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a verdict." Anderson, supra, at 256. Thus, the nonmoving party must present specific facts showing the existence of a genuine issue for trial, meaning that "a party

opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. The "mere existence of a scintilla of evidence" favoring the nonmoving party will not prevent the entry of summary judgment. Id. at 248.

To withstand such a motion, the nonmoving party must offer evidence from which a "fair-minded jury could return a verdict for the [party]." Id. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987). Such evidence must consist of facts which are material, meaning that they create fair doubt rather than encourage mere speculation. Anderson, supra, at 248.

Summary judgment is proper only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita, supra, at 587. "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. citing First Ntl. Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289, 88 S.Ct. 155, 1592 (1968). See Miller v. Fed. Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990). Although any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate.

Matsushita, supra, at 587-88. Anderson, supra, at 248-49.

IV. ANALYSIS

A. Summary Judgment is Proper in a § 2254 Proceeding

As an initial matter, the Court addresses whether consideration of a motion for summary judgment is proper in a habeas corpus claim filed under § 2254. The Petitioner argues that summary judgment is an improper vehicle to address a habeas corpus claim filed under § 2254. However, the Fourth Circuit has previously affirmed cases filed under § 2254, which were decided upon motions for summary judgment. Juniper v. Davis, 74 F.4th 196, 208 (4th Cir. 2023). See also Bryant v. Stirling, 126 F.4th 991 (4th Cir. 2025) (unpublished per curiam opinion affirming the district court's dismissal of a 2254 petition upon a motion for summary judgment); Stanko v. Stirling, 109 F.4th 681 (4th Cir. 2024), cert. denied, No. 24-6420, 2025 WL 1287095 (U.S. May 5, 2025) (affirming in part, dismissing in part § 2254 petition which disposed of the matter by granting summary judgment). Even where § 2254 cases decided upon summary judgment were reversed or vacated and remanded, those decisions were not based on the procedural determination that a motion for summary judgment was inappropriate in a § 2254 proceeding. See Woody v. Nance, 108 F.4th 232, 241 (4th Cir. 2024) (vacating and remanding to the district court to determine timeliness of notice of the certificate of appealability within 21 days of its entry). For all these reasons, the undersigned finds that the Petitioner's assertion that a motion for summary

judgment is inappropriate for disposition of a § 2254 habeas corpus proceeding is without merit.

B. The Petitioner's Claims Were Both Previously Raised and Adjudicated in State Court and Do Not Meet the Requirement for Habeas Corpus Relief Under § 2254

The Petitioner is not entitled to relief because he seeks the writ of habeas corpus upon two grounds which have previously been raised and decided by the SCAWV on direct appeal[6], and the Petitioner cannot demonstrate that: (1) the adjudication of his two claims was contrary to, or involved an unreasonable application of clearly established law, as determined by the Supreme Court; or (2) resulted in an unreasonable determination of the facts. 28 U.S.C. § 2254(d), (d)(1), (d)(2).

1. Claim 1: Double Jeopardy

The Petitioner's Ground 1 was addressed and adjudicated by the SCAWV in its decision on direct appeal. Id. This ground is based on the trial court's declaration of a mistrial after the Petitioner's counsel during opening statements repeatedly referred to evidence which by written order of the court in a pretrial ruling had excluded from evidence. The SCAWV wrote in its opinion affirming the Petitioner's conviction and sentence:

> Petitioner's first trial was declared a mistrial due to his counsel's improper

[6] The Petitioner's claims were both addressed and adjudicated by the SCAWV in its decision on direct appeal issued April 10, 2023. State v. Wood, No. 21-0964, 2023 WL 2866229 (W. Va. April 10, 2023).

comments on opening. Thereafter, the trial court denied petitioner's motion to dismiss all charges on double jeopardy grounds. The circuit court's decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.

West Virginia's double jeopardy clause provides, in part, that no person shall be ... twice put in jeopardy of life or liberty for the same offence." W. Va. Const. art. III, § 5. A trial court may grant a mistrial, and avoid the double jeopardy clause, only if there is a "manifest necessity" to terminate the trial.

The term "manifest necessity" covers a broad spectrum of situations which in some instances bear little relationship to the literal meaning of this phrase. This is particularly true in cases where the conduct of one party at trial has created sufficient jury prejudice toward the other that it is unfair to continue with the trial and a mistrial is warranted.

Keller v. Ferguson, 177 W.Va. 616, 620, 355 S.E.2d 405, 509 (1987). Here, petitioner's right against double jeopardy was not violated because, at his first trial, his counsel created a manifest necessity for the mistrial during his opening statement when he repeatedly referenced evidence that the trial court had clearly ruled inadmissible. On this record, we find no error in the trial court's refusal to dismiss petitioner's

> charges on double jeopardy grounds before his second trial.

ECF No. 1-2 at 178; State v. Wood, No. 21-0964, 2023 WL 2866229, at *5 (W. Va. Apr. 10, 2023), cleaned up.

2. Claim 2: Jury Instruction on Inherent Incredibility of a Victim Witness

The Petitioner's claim in Ground 2, that he was prejudiced by a jury instruction given by the trial court, was likewise raised and rejected in his direct appeal. The SCAWV addressed the Petitioner's claim on that issue, comparing the instruction given in the Petitioner's case with two similar instructions offered in other cases affirmed by the Supreme Court of Appeals:

> If an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise de novo review. However, when an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, this Court will review under an abuse of discretion standard.
>
> We review jury instructions to determine whether, taken as a whole and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the objecting party. So long as they do not, we reviewed the formulation of the instructions and the choice of language for an abuse of discretion. We will reverse only if the instructions are incorrect as a matter of law

or capable of confusing and thereby misleading the jury.

[*State v. Guthrie*, 194 W.Va. 657, 671–72, 461 S.E.2d 163, 177–78 (1995)]. We find the challenged instruction to be a correct statement of the law in light of the jury instructions in *State v. McPherson*, 179 W.Va. 612, 371 S.E.2d 333 (1988), and *State v. Haid*, 228 W.Va. 510, 721 S. E. 2d 529 (2011), on which the trial court relied. In *McPherson*, we approved an instruction that provided:

The Court instructs the jury that if you believe from the evidence in this case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, . . . then you should scrutinize her testimony with care and caution; although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible.

Similarly, in *Haid*, we approved the following instruction:

A conviction for the crimes charged by the indictment may be obtained or rest on the uncorroborated testimony of the alleged victim, unless you determine that such testimony is inherently incredible. The term "inherently incredible" means more than a contradiction, inconsistency or lack of corroboration.

> For the jury to decide that testimony is inherently incredible, you must decide that there has been a showing of complete untrustworthiness. In this regard, you should scrutinize her testimony with care and cause.
>
> The *Haid* Court found that:
>
> > The instruction in *McPherson* and the instruction given in the case at bar are quite similar. Both correctly state that a conviction for the sexual offenses so charged may be had on the uncorroborated testimony of the victim, unless the testimony of the victim is inherently incredible. Both instructions direct the jury to assess the credibility of the prosecuting witness with care and caution. The circuit judge's decision to instruct the jury, without the addition of the language as requested by the petitioner, was not an abuse of discretion, inasmuch as the instruction was a correct statement of the law, and more particularly, when we consider the entirety of the jury charge as a whole.
> >
> > Here, because the trial court's instruction was comparable to those upheld in *McPherson* and *Haid*, we find no error.
>
> ECF No. 1-2 at 174–75, cleaned up.

For the reasons set forth above, the undersigned finds the challenged state court decisions were not contrary to, nor did those decisions involve an unreasonable application of clearly established

federal law. Further, the undersigned finds that the state court decisions were not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

C. Petitioner Cannot Meet Either of the Two Exceptions in § 2254 as to His Two Claims

Because both of the Petitioner's claims have previously been adjudicated, relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court", unless the Petitioner can meet one of the two criteria in 28 U.S.C. § 2254, or in 28 U.S.C. § 2254(d)(2). The first of the exceptions provides that relief may be merited if the state adjudication of the claim, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The second exception provides that relief may be granted if the state adjudication of the claim, "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d)(2). Although the Petitioner asserts that both his claims meet the two exceptions contained in the statute, the undersigned finds that the Petitioner's contentions are without merit as to either of his claims.

1. Claim 1: Double Jeopardy

The Petitioner argues that the decision of the Supreme Court of Appeals of West Virginia finding manifest necessity existed to declare a mistrial was objectively unreasonable. ECF No. 1-1 at 15–21.

Further, the Petitioner challenges the reasoning of the SCAWV, "that Petitioner's counsel invited error by violating two pretrial evidentiary orders when Petitioner's counsel referred to prior inconsistent statements made by [the victim] ARR to a forensic examiner and a therapist." Id. The SCAWV wrote:

> Here, petitioner's right against double jeopardy was not violated because, at his first trial, his counsel created a manifest necessity for the mistrial during his opening statement when he repeatedly referenced evidence that the trial court had clearly ruled inadmissible. On this record, we find no error in the trial court's refusal to dismiss petitioner's charges on double jeopardy grounds before his second trial.

ECF No. 1-2 at 178.

The Petitioner asserts that only the State was barred by prior orders from using the video recorded forensic interviews, except for rebuttal purposes, but that the Petitioner was not precluded from using the interview.[7] Id. at 16. Additionally, the Petitioner contends that while social worker, Ms. Aspenleiter, was not qualified as an expert witness, she was still permitted to testify as a fact lay witness. Id. Further, the Petitioner asserts that even "if the trial judge was correct in finding that Petitioner's counsel violated the evidentiary orders, that alone is not sufficient to satisfy the test for manifest necessity." Id. at 17. Rather, according to the Petitioner, there

[7] The Petitioner also argues that the State violated this order. ECF No. 1-1 at 16.

"still must be a showing that counsel's actions completely prevented the jury from arriving at a fair and impartial verdict." Id.

A review of the trial transcript from the first trial shows that the State prepared for trial based on the evidentiary rulings of the trial court that the statements made in the Comfort House interview and counseling sessions with Ms. Aspenleiter would not be permitted to be entered into evidence. The Petitioner argues that he "cannot be blamed for the State's lack of preparation." ECF No. 1-1 at 17. Further, the Petitioner contends that the State was not prejudiced when his counsel mentioned the prohibited evidence, because he opened the door for the State to introduce the video-recorded interview, which the State previously sought to introduce into evidence, but which was excluded by pre-trial ruling which only applied to the State. Id. at 18. However, a review of the June 8, 2021, Order of the Court on that matter shows that the Court found "in the present case, Defense counsel violated the Court's pre-trial evidentiary orders." ECF No. 1-2 at 77. Further, the Court wrote that:

> As a result of these actions, the State made a motion for a mistrial. After discussing possible curative actions to salvage the trial with all attorneys and parties present in chambers, the Court determined it had no choice but to grant the mistrial. The Defendant cannot enjoy the fruits of double jeopardy acquittal when his actions created a "manifest necessity" to discharge the jury and retry the case.

ECF No. 1-2 at 177, citing U.S. v. Perez, 22 U.S. 579, 580 (1824). The Supreme Court of the United States has considered a similar factual scenario and determined that the trial judge's decision to declare a mistrial must be afforded respect:

> In this case the trial judge ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury. Although respondent insists that evidence of prosecutorial misconduct was admissible as a matter of Arizona law, and therefore that the opening statement was proper, we regard this issue as foreclosed by respondent's failure to proffer any Arizona precedent supportive of his contention and by the state court's interpretation of its own law, buttressed by the consistent opinion of the Federal District Court and the Court of Appeals. Cf. *Bishop v. Wood*, 426 U.S. 341, 346-347, 96 S.Ct. 2074, 2078-2079, 48 L.Ed.2d 684. We therefore start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury.
>
> We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding

> interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Arizona v. Washington, 434 U.S. 497, 510–11, 98 S. Ct. 824, 833, 54 L. Ed. 2d 717 (1978). Here, the Petitioner's counsel made similarly improper and prejudicial remarks during his opening statement to the jury. The trial court considered alternatives short of declaring a mistrial, but the overriding interest in the evenhanded administration of justice requires this Court to accord the highest degree of respect to the Brooke County trial judge's evaluation and the determination of the SCAWV that a mistrial was the appropriate disposition.

Further, the Supreme Court has explained the distinction between a double jeopardy claim which is premised on an acquittal versus a procedural dismissal:

> Both procedural dismissals and substantive rulings result in an early end to trial, but we explained in *Scott* that the double jeopardy consequences of each differ. "The law attaches particular significance to an acquittal," so a merits-related ruling concludes proceedings absolutely. [*United States v. Scott*, 437 U.S. 82] [ ] 91, 98 S.Ct. [2170,] 2187 [(1978)]. This is because "to permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high

> risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty,' " *ibid.* (quoting *Green v. United States,* 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). And retrial following an acquittal would upset a defendant's expectation of repose, for it would subject him to additional "embarrassment, expense and ordeal" while "compelling him to live in a continuing state of anxiety and insecurity." *Id.,* at 187, 78 S.Ct. 221. **In contrast, a "termination of the proceedings against a defendant on a basis unrelated to factual guilt or innocence of the offense of which he is accused,"** 437 U.S., at 98–99, 98 S.Ct. 2187, ***i.e.,* some procedural ground, does not pose the same concerns, because no expectation of finality attaches to a properly granted mistrial.**

Evans v. Michigan, 568 U.S. 313, 319–20, 133 S. Ct. 1069, 1075, 185 L. Ed. 2d 124 (2013) (cleaned up) (emphasis added). The Supreme Court's determination in Evans makes clear that the Petitioner had no expectation of finality based on a properly granted mistrial. Moreover, the opinion in Arizona v. Washington[8] is directly on point in that the Supreme Court found no error in granting a

[8] Arizona v. Washington reversed and remanded the decision of the Court of Appeals for the Ninth Circuit which granted a state prisoner's petition for the writ of habeas corpus on double jeopardy grounds. 434 U.S. 497, 517.

mistrial where defense counsel made improper remarks to the jury during opening statements.

For all these reasons, the Petitioner cannot demonstrate that the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court in Arizona v. Washington. Accordingly, the Petitioner cannot meet the first exception to merit relief under § 2254 as to his double jeopardy claim.

As to the second exception, the Petitioner argues that "to deny Petitioner's appeal on double jeopardy grounds represents both a contradiction of and an unreasonable application of federal law." ECF No. 12 at 5. He continues to explain that the:

> [D]etermination that a mistrial was warranted by manifest necessity is objectively unreasonable because Petitioner's counsel's remarks regarding prior inconsistent statements by the alleged victim, ARR, were neither improper nor prejudicial to the prosecution. Moreover, the WVSCA's upholding of the trial court's finding of manifest necessity was contrary to federal law, as it overlooked the fact that the trial court acted precipitately in declaring a mistrial, disregarded concerns of double jeopardy, and failed to explore less extreme alternatives before taking such a drastic measure in declaring a mistrial.

Id. As discussed above, the Supreme Court of the United States ruled in Arizona v. Washington, that

improper remarks made by a defense lawyer in opening statements was sufficient basis for the declaration of a mistrial. The Petitioner himself cites to Arizona v. Washington to support the contention that "[c]learly established federal law mandates that a trial judge exercise 'sound discretion' in declaring a mistrial." ECF No. 12 at 6. However, the Petitioner does not address the factual scenario presented in that case which bears a striking resemblance to the facts here. Further, although the Petitioner correctly cites to the "unreasonable determination of the facts" standard [ECF No. 12 at 4] necessary to show that a § 2254 petition is merited, there is no substantive discussion of why the decisions of the trial court and the Supreme Court of Appeals of West Virginia made a decision that was based on an unreasonable determination of the facts.

Because the Petitioner has failed to articulate any legitimate basis for his contentions that the decisions of the State courts with regard to any double jeopardy issue were contrary to established Federal law or an unreasonable application of the facts, there is no basis on which relief should be granted as to this claim.

Claim 2: Jury Instruction on Inherent Incredibility of a Victim Witness

The Petitioner contends that the trial court's instruction in his second trial as to "inherent incredibility" of a complaining witness, "rendered the trial fundamentally unfair since it shifted the burden of proof to Petitioner." ECF No. 1-1 at 23. Further, the Petitioner asserts that an "erroneous jury charge may form the basis of a habeas petition where the

instruction 'so infected the entire trial that the resulting conviction violates due process' by rendering the trial fundamentally unfair." Id. quoting Cupp v. Naughten, 414 U.S. 141, 146–47 (1973). The Petitioner claims that by instructing the jury that "it may find Petitioner guilty 'unless you find the complaining witness inherently incredible,' the trial court shifted the burden to Petitioner to prove that ARR's uncorroborated testimony was 'complete[ly] untrustworth[y].' This erroneous jury instruction therefore violated Petitioner's rights guaranteed by the Fourteenth Amendment." Finally, the Petitioner contends that the decision of the SCAWV that the jury instruction here was permissible because it was comparable to that given in McPherson and Haid, was contrary to established federal law. ECF No. 1-1 at 24. The Petitioner argues that including the "inherent incredibility" language, without clarifying that the jury need not find ARR inherently incredible to acquit the Petitioner, "created a super witness in ARR and shifted the burden of proof to Petitioner." Id. at 25.

The Respondent argues that the inherent incredibility jury instruction was a correct statement of law and was neither contrary to nor involved an unreasonable application of clearly established federal law. ECF No. 9 at 2, 17–20. The contested jury instruction reads as follows:

> You are instructed that you may find the Defendant guilty of a sexual offense based on the uncorroborated testimony of the complaining witness unless you find the complaining witness is inherently

> incredible. The Court instructs the jury that inherent incredibility is more than contradiction and lack of corroboration. Inherent incredibility thus requires a determination by the jury of complete untrustworthiness. The Court instructs the jury that if they believe from the evidence the crimes charged against the Defendant rests alone on the testimony of the complaining witness, then the jury should scrutinize such testimony with care and caution. You are the sole judge of the credibility of each witness.

ECF No. 1-2 at 217.

The Respondent contends that the instruction is a correct formulation of West Virginia law, consistent with both Haid and McPherson, and that the instruction was upheld on the Petitioner's direct appeal to the SCAWV. ECF No. 9 at 18–19. Moreover, the Respondent argues that under West Virginia law, judges have discretion to formulate jury instructions, "so long as the instructions are correct as a matter of law and not misleading to the jury." Id. at 19. Finally, the Respondent asserts that the Petitioner's claim that the inherent incredibility instruction shifted the burden of proof is a "nonstarter," because the trial court explicitly instructed the jury that the burden of proof was always on the State, and the Petitioner was not required to prove himself innocent. Id., citing ECF No. 1-2 at 217.

In his response to the Motion to Dismiss, the Petition argues that "the trial court's instruction

forced the jury to apply an unconstitutional burden, whereby the Petitioner had to prove that ARR's testimony was entirely untrustworthy before they could acquit him." ECF No. 12 at 15. The Petitioner argued that the inherent incredibility instruction shifted the burden of proof to him, and undermined the presumption of innocence, in violation of the Fifth and Fourteenth Amendments. Id. However, these arguments appear to be a selective misinterpretation of the jury charge given, which must be considered as a whole.

The Supreme Court has recognized that, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991), quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400–01 (1973). Moreover, the Court has explained:

> If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis

> "requires careful attention to the words actually spoken to the jury ... , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom, supra,* 442 U.S., at 514, 99 S.Ct., at 2454.

Francis v. Franklin, 471 U.S. 307, 315, 105 S. Ct. 1965, 1971, 85 L. Ed. 2d 344 (1985), holding modified by Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)

The Petitioner's argument that the inherent incredibility instruction taken alone shifted the burden of proof to him is without merit. The instruction given immediately before the inherent incredibility instruction provided that, "The burden is on the State to prove the guilt of the Defendant beyond a reasonable doubt and the Defendant, Keith Wood, is not required to prove himself innocent. He is presumed by the law to be innocent of this charge and this presumption remains with him throughout the entire trial." ECF No. 1-2 at 217. When read as a whole, not in artificial isolation, the inherent incredibility instruction clearly did not shift the burden or proof to the Petitioner. Moreover, the instruction as given closely tracked similar permissible instructions given in Haid and McPherson, and the instruction here was likewise affirmed by the SCAWV.

Although the Petitioner claimed that the disputed instruction undermined his presumption of innocence, that claim did not explain ***how*** the state court decision was contrary to or involved an

unreasonable application of federal law, or ***how*** the state court decision was based on an unreasonable determination of the facts for any of his claims. The undersigned finds that neither of the challenged State court decisions related to this jury instruction were contrary to, or involved an unreasonable application of clearly established federal law. Further, the undersigned finds that those State court decisions were not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Accordingly, Petitioner's second claim as to the alleged violation of his rights related to the inherent incredibility instruction does not meet either exception listed in the statute. For all of the above reasons, the Petitioner's second claim for relief is without merit and should be denied.

V. RECOMMENDATION

For the reasons set forth in this opinion, it is **RECOMMENDED** that the petition [ECF No. 1] for habeas corpus filed pursuant to 28 U.S.C. § 2254 be **DISMISSED WITH PREJUDICE** and should thereafter be dismissed from the docket and Petitioner's request for Certificate of Appealability should be **DENIED**. It is further **RECOMMENDED** that Respondent's Motion for Summary Judgment [ECF No. 8] should be **GRANTED**.

Within fourteen (14) days after being served with a copy of this Recommendation, any party may file with the Clerk of the Court, **specific written objections, identifying the portions of the**

Report and Recommendation to which objection is made, and the basis of such objection. A copy of such objections should also be submitted to the Honorable Gina M. Groh, United States District Judge. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitation, consistent with LR PL P 12.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

This Report and Recommendation completes the referral from the district court. The Clerk is directed to terminate the Magistrate Judge's association with this case.

The Clerk is directed to provide a copy of this Report and Recommendation to all counsel of record, as applicable, as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

DATED: May 30, 2025

/s/ Robert W. Trumble
ROBERT W. TRUMBLE
UNITED STATES MAGISTRATE JUDGE