

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BLUEFIELD

BARRY WHITE,

Plaintiff,

v.

CIVIL ACTION NO. 1:07-0567

DAVID BALLARD, Warden,  
Mount Olive Correctional Complex,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the court is plaintiff's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. By Standing Order, the action was referred to United States Magistrate Judge R. Clarke VanDervort for submission of findings of fact and recommendations regarding disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge VanDervort submitted his Findings and Recommendation ("PF&R") to the court on July 22, 2014, in which he recommended that this court grant defendant's motion for summary judgment, dismiss plaintiff's petition under 28 U.S.C. § 2254, and remove the matter from the court's docket.

In accordance with the provisions of 28 U.S.C. § 636(b), the parties were allotted fourteen days plus three mailing days in which to file any objections to Magistrate Judge VanDervort's Findings and Recommendations. After receiving several extensions

of the deadline for filing his objections, counsel for White, Thomas J. Gillooly, filed an "unopposed supplemental motion for order extending deadline for objections, and permitting petitioner to file objections pro se." (Doc. No. 96).

Construing Mr. Gillooly's motion as one to withdraw as counsel, the court granted the motion on September 4, 2014. In that Order, the court also gave White an opportunity to file pro se objections to the PF&R. On September 17, 2014, plaintiff filed timely objections to the Magistrate Judge's Findings and Recommendation. With respect to those objections, the court has conducted a de novo review.<sup>1</sup>

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<sup>1</sup> To the extent that White argues that this court has somehow run afoul of Anders v. California, 386 U.S. 738 (1967), in granting Mr. Gillooly's motion to withdraw, that claim fails. In Anders, the Supreme Court "outline[d] the circumstances under which an appellate court may grant appointed counsel's motion to withdraw from representation of a defendant who desires to appeal when counsel believes an appeal would be frivolous." Williams v. Angelone, 178 F.3d 1288, 1999 WL 249026, \*4 (4th Cir. 1999). However, the constitutional right to appointed counsel is a prerequisite to application of Anders procedures. Pennsylvania v. Finley, 481 U.S. 551, 556 (1987). Given that prisoners have no constitutional right to counsel in mounting collateral attacks on convictions as the right to appointed counsel extends only to the first appeal of right, there was no requirement that Mr. Gillooly file an Anders brief in this matter. See id. at 555-56; see also D'Antoni v. United States, 59 F.3d 173, 1995 WL 375874, \*1 (7th Cir. June 20, 1995) ("An Anders brief need not be filed in a civil case. Because we are not constitutionally required to appoint counsel in a section 2255 proceeding, post-conviction counsel has no due process obligation to follow the procedures of Anders when attempting to withdraw. . . ."). Accordingly, there is no merit to White's argument that he is entitled to a more searching review than would normally be required because Mr. Gillooly did not file an Anders brief. See Objections at p.3 ("This Court based upon this failure, must now examine the entire record and consider any potetial [sic] objectable material, whether the Petitioner has

On December 7, 2001, following a four-day jury trial in the Circuit Court of Mercer County, West Virginia, White was convicted of sexually abusing his stepchildren. Specifically, the jury found him guilty of thirty-one counts of first degree sexual assault and seventy-three counts of sexual abuse by a custodian. The stepchildren, D.H., St.H., Sh.H, and M.H., were between the ages of two and eight at the time of the abuse. By Order entered on April 24, 2002, White was sentenced to a term of imprisonment of not less than fifteen or more than thirty-five years on Counts 1, 72, 88, and 104, and to a term of not less than ten nor more than twenty years on Counts 2, 73, 89, and 105, all of which were ordered to run consecutively for a total term of imprisonment of between 100 to 220 years. The sentences on the remaining counts were ordered to run concurrently with each other and the aforementioned eight consecutive sentences.

White's first objection concerns the testimony of Phyllis Hasty, a licensed play therapist, whose testimony according to him, should not have been admissible at his criminal trial. In this case, White contends that Hasty's testimony: 1) violated his constitutional right to confront and cross examine his accusers; 2) was admitted without laying a proper foundation; 3) invaded

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specifically raised an objection or not under his new pro se, status in this case."). In reviewing plaintiff's objections, the court has, however, applied the liberal standard applicable in pro se cases. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

the province of the jury by testifying as to the ultimate issue; 4) was unreliable; 5) exceeded the scope of its admissibility under State v. Pettrey, 209 W. Va. 449 (2001); and 6) serves as a basis for his claim of ineffective assistance of counsel.

Magistrate Judge VanDervort found no merit in these arguments.

In Pettrey, the Supreme Court of Appeals of West Virginia addressed the admissibility of a play therapist's testimony regarding statements made to her during such therapy. State v. Pettrey, 209 W. Va. 449 (2001). In that case, the court held:

[W]hen a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony 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 in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes. Moreover, statements which attribute fault to a member of the victim's household may reasonably be pertinent to treatment and are thus admissible because these statements are relevant to prevention of recurrence of injury.

Id. at 460. In so holding, West Virginia's highest court specifically considered whether admission of the play therapist's testimony denied Pettrey his right to confrontation under the Sixth Amendment. See id. at 457-60. Citing applicable Supreme Court guidance on that issue, Ohio v. Roberts, 448 U.S. 56

(1980), the West Virginia Supreme Court of Appeals found that it did not. See id.

During the underlying trial, Ms. Hasty testified she is a children's counselor and registered play therapist at Southern Highlands Community Mental Health Center. See Exhibit<sup>2</sup> 10 at 205. Ms. Hasty testified that she has a bachelor's degree and a master's degree in social work and that she is also a licensed social worker. See id. at 205-06. Prior to being employed in her current job, Hasty worked for the West Virginia Department of Health and Human Resources as a child protective service worker. See id. at 205. Of the qualifications for becoming licensed in play therapy, Ms. Hasty testified that "you have to have a Masters Degree, then you have to have 2000 hours of counseling post Masters Degree, you have to have 500 of those hours supervised by a Registered Play Therapy Supervisor, you have to have a [sic] 150 hours of training specifically in play therapy that has been approved by the National Play Therapy Association." Id. at 206.

As to the importance of play therapy in treating young children, Ms. Hasty testified:

Children, particularly young children, do not enter into a traditional counseling relationship like you or I would, a talk relationship where I would come in and tell you I

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<sup>2</sup> Exhibits are to Defendant's Motion for Summary Judgment.

was feeling sad and why I was feeling sad, children don't have that kind of verbal skill to do that kind of processing so they are enabled to do that through their language, and their language is play, so when you give them tools such as puppets, such as a dollhouse, such as activities where you're doing drawings or a painting, a lot of times children can express their feelings in those modalities when they can't just come in and tell you I'm upset today because my dog died yesterday.

Id. at 207. Upon further questioning, Hasty stated:

Q: Before we go into specifics, maybe this is jumping ahead a bit, but what's - - what's the purpose of play therapy, like when you take these children into treat 'em where are you headed, I mean I don't know how you cure a child whose been sexually abused?

A: Basically, with - - with any therapy you're - - you're trying to raise the level of functioning of the child, you're trying to reduce the symptoms they came in with, so for a sexually abused child a lot of times they've come in with fears, and nightmares, a lot of times that's where we need to begin, we - - we work on trying to help the child feel safe, I work with the family in setting up certain things that they do to - - to give the child a sense of safety, then you need to process the abuse. You can't just let the child bury that abuse and pretend it didn't happen and not process it, it - - a child needs to verbalize it, and a lot of times they need to reframe it because a child is looking at it that it was their fault and you need to help that child look at the facts, you're this big that person was that big, what kind of control was taken away from you, you reframe it, you help the child get rid of the shame, the guilt, the anger, the - - the grief, they lost - - control was taken away from them and a lot of these kids are in grief when they come.

Id. at 209-10.

Ms. Hasty testified that D.H. and St. H. started coming to Southern Highlands Community Mental Health Center in 1998 for "behavioral problems." Id. at 210. Their mother brought them back in 1999 a "couple of times" but, after they were placed in foster care in August of 2000, they began coming to Southern Highlands on a more regular basis. See id. at 210-14. During her second session with Ms. Hasty, D.H. "shocked" Hasty when she recounted being touched inappropriately by defendant. Id. at 220-21. According to Hasty, she was the first person to whom D.H. had mentioned abuse at the hands of her stepfather and that D.H. "just told me out of the blue." Id. at 221. In later sessions, D.H. elaborated on the sexual abuse. See id. St.H., who had initially begun seeing Ms. Hasty for treatment of attention deficit disorder and aggressive behavior, later reported that defendant had sexually abused he and his siblings. See id. at 227-29. Ms. Hasty also testified that D.H., St.H., and Sh.H had all reported that defendant had told all four children to perform oral sex on each other. See id. at 224. Ms. Hasty later began working with Sh.H. in order "to teach her proper boundaries and body rights." Id. at 224.

Ms. Hasty testified that she began seeing the children at the request of their foster mother, "for incidents, as far as

[she] knew, totally unrelated to [criminal] proceedings." Exhibit 8 at 37. According to her, her involvement "was not an investigative evaluation by any means." Id. at 38. Based on the foregoing, the trial court determined that Ms. Hasty's testimony was admissible under Pettrey. Both the state habeas court and the Supreme Court of Appeals agreed.<sup>3</sup>

The issue before this court is whether Hasty's statements violated White's Sixth Amendment right to confront the witnesses against him. See Nelson v. Farrey, 874 F.2d 1222, 1226 (7th Cir. 1989) (Whether the Supreme Court of Wisconsin correctly found that the admission into evidence of T.'s statements to Dr. McLean did not violate Wisconsin's hearsay rule is an issue of state law; it is nothing to us. The only question for us is whether the admission of those statements, as the district court believed, denied [petitioner] his Sixth Amendment right. . . to confront the witnesses against him."). This court agrees with Magistrate Judge VanDervort that they did not.

Under 28 U.S.C. § 2254, White is entitled to federal habeas relief only if he "is in custody in violation of the Constitution or laws or treaties of the United States." 28

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<sup>3</sup> Of the usefulness, of this type of testimony, Judge Posner noted that "[i]f such evidence were never admissible, molesters of small children, especially incestuous molesters, would rarely be punished." Nelson v. Farrey, 874 F.2d 1222, 1229 (7th Cir. 1989).



U.S.C. § 2254(a). Section 2254(d) provides that when the issues raised in a § 2254 petition were raised and considered on the merits in State court habeas proceedings, federal habeas relief is unavailable unless the State court's decision:

(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.

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court stated that under the "contrary to" clause in § 2254(d)(1), a federal habeas Court may grant habeas relief "if the State court arrives at a conclusion opposite to that reached by this Court on a question of law or if the State court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams, 529 U.S. 362, 412-13 (2000). A federal habeas Court may grant relief under the "unreasonable application" clause of § 2254(d)(1) where the State court identified the appropriate Supreme Court precedent but unreasonably applied the governing principles. Id. In determining whether the State court's decision was contrary to, or was an unreasonable application of, Supreme Court precedent, all factual determinations by the State court are entitled to a presumption of correctness. See 28 U.S.C. § 2254(e).

A state court's decision is "contrary to" clearly established federal law when it "applies a rule that contradicts the governing law set forth" by the United States Supreme Court, or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." Williams, 529 U.S. at 405-06. A state court's decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1) "if the state court identifies the correct governing legal rule from . . . [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407. "The state court's application of clearly established federal law must be 'objectively unreasonable,' and 'a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Robinson v. Polk, 438 F.3d 350, 355 (4th Cir.2006) (quoting Williams, 529 U.S. at 411). Moreover, when "assessing the reasonableness of the state court's application of federal law, the federal courts are to review the result that the state court reached, not whether [its decision] [was] well

reasoned." Wilson v. Ozmint, 352 F.3d 847, 855 (4th Cir.2003) (quotation marks omitted).

Under this deferential standard, the court cannot say that the State court's adjudication of the Confrontation Clause issue is contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. The state habeas court determined that the Confrontation Clause jurisprudence flowing from Ohio v. Roberts, 448 U.S. 56 (1980) as applied in Pettrey, applicable to White's claim would not bar the use of Hasty's testimony.<sup>4</sup> The evidence shows that the child victims were not brought to Ms. Hasty for investigative or forensic purposes. The statements made to Ms. Hasty by the children regarding the sexual abuse were made in a therapeutic context. Her sole involvement with the children was for diagnosis and treatment. Furthermore, the statements were such that they were reasonably relied upon by Ms. Hasty in her diagnosis and treatment. Accordingly, White's

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<sup>4</sup> The state court correctly noted that Crawford v. Washington, 541 U.S. 36 (2004), does not apply retroactively and was not applicable during White's trial. See Whorton v. Bockting, 549 U.S. 406, 421 (2007). However, even under Crawford, the testimony would not have been inadmissible. See Blount v. Hardy, 337 F. App'x 271, 276 (4th Cir. 2009) (concluding that admission of three-year-old victim's statements to therapist did not violate defendant's Confrontation Clause rights); United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005) (holding the admission of statements to a physician by a child regarding physical abuse does not violate the Sixth Amendment right to confrontation).

objection to that testimony on Confrontation Clause grounds is OVERRULED. Furthermore, given the foregoing and for the reasons expressed in the PF&R, White's other objections concerning the Hasty testimony are likewise OVERRULED.

White's next objection goes to the magistrate judge's conclusion that there was no merit to his challenge to the sufficiency of the indictment. White claims that the indictment was non-specific and, therefore, violated his right to due process because it failed to describe conduct with sufficient specificity to give him notice of the charges against him.

Under federal law, an indictment is sufficient under the United States Constitution if it, "first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). Furthermore, as our appeals court has stated "because the Fifth Amendment requirement of indictment by grand jury does not apply to the states . . . federal cases involving indictments are of little value when evaluating the sufficiency of a state accusatory pleading." Hartman v. Lee, 283 F.3d 190, 195 n.4 (4th Cir. 2002) (internal citations and quotations omitted). "[T]he sufficiency of a state indictment "is not a matter for federal habeas corpus relief unless the indictment is

so defective that the convicting court had no jurisdiction.”  
Evans v. Cain, 577 F.3d 620, 624 (5th Cir. 2009) (emphasis in original).

After reviewing the indictment herein, the court finds that the indictment was not so fatally defective. As Magistrate Judge VanDervort noted, in its simplest form, the indictment herein charged White as follows:

- 1) With First Degree Sexual Assault by having sexual intercourse with D.H., who was eleven years old or less, on 5 occasions in July (Counts 1, 3, 5, 7, 8), August (Counts 13, 15, 17, 19, 20), September (Counts 25, 27, 29, 31, 32), October (Counts 37, 39, 41, 43, 44), and November (Counts 49, 51, 53, 55, 56);
- 2) With sexual abuse by a custodian by engaging in sexual intercourse with D.H. on 4 occasions in July (Counts 2, 4, 6, 9), August (Counts 14, 16, 18, 21), September (Counts 26, 28, 30, 33), October (Counts 38, 40, 42, 45), and November (50, 52, 54, 57);
- 3) With sexual abuse by a custodian by engaging in sexual exploitation of D.H. by forcing her to have sexual intercourse with another child (St.H. Sh.H., and M.H.) on 3 occasions in July (Counts

10-12), August (Counts 22-24), September (Counts 34-36), October (Counts 46-48), and November (Counts 58-60);

- 4) With First Degree Sexual Assault by having sexual intercourse with St.H., who was eleven years old or less, on 1 occasion in July (Count 64), August (Count 68), September (Count 72), October (Count 76), and November (Count 80);
- 5) With sexual abuse by a custodian by engaging in sexual exploitation of St.H. by forcing him to have sexual intercourse with another child (D.H. Sh.H., and M.H.) on 3 occasions in July (Counts 61-63), August (Counts 65-67), September (Counts 69-71), October (Counts 73-75), and November (Counts 77-79);
- 6) With First Degree Sexual Assault by having sexual intercourse with Sh.H., who was eleven years old or less, on 1 occasion in July (Count 84), August (Count 88), September (Count 92), October (Count 96), and November (Count 100);
- 7) With sexual abuse by a custodian by engaging in sexual exploitation of Sh.H. by forcing her to have sexual intercourse with another child (D.H. St.H., and M.H.) on 3 occasions in July (Counts

81-83), August (Counts 85-87), September (Counts 89-91), October (Counts 93-95), and November (Counts 97-99);

- 8) With First Degree Sexual Assault by having sexual intercourse with M.H., who was eleven years old or less, on 1 occasion in July (Count 104), August (Count 108), September (Count 112), October (Count 116), and November (Count 120); and
- 9) With sexual abuse by a custodian by engaging in sexual exploitation of M.H. by forcing him to have sexual intercourse with another child (D.H. St.H., and Sh.H.) on 3 occasions in July (Counts 101-103), August (Counts 105-107), September (Counts 109-111), October (Counts 113-115), and November (Counts 117-119).

PF&R at 39-40.

"[U]nder West Virginia law, an indictment is not defective though it contains no allegation of the time of the offense, unless time is of the essence of it." Tincher v. Boles, 364 F.2d 497, 498 (4th Cir. 1966). Furthermore, under West Virginia law, "[i]t is well established . . . that time is not an element of sexually-based offenses." State v. Harris, 230 W. Va. 717, 724 n.1 (2013).

Moreover, the state court's decision in this regard was not contrary to, or an unreasonable application of, the standard announced by the Supreme Court in Hamling. "[A]cknowledg[ing] the reality of situations where young child victims are involved. . . numerous [courts] have found that fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements." Valentine v. Konteh, 395 F. 3d 626, 632 (6th Cir. 2005); see also Dupont v. Coplan, 104 F. App'x 747, 749 (1st Cir. 2004) (finding sufficient an indictment charging state prisoner with sixty-nine counts of felonious sexual assault against his stepdaughter where indictment alleged month and year when such contact occurred); Fawcett v. Bablitch, 962 F.2d 617, 619 (7th Cir. 1992) (information alleging that defendant's sexual contact with minor occurred during a six-month period gave defendant sufficient notice to permit him to defend against charges); King v. Mirandy, Civil Action No. 2:12-CV-81, 2013 WL 6882280, \*17 (N.D.W. Va. Dec. 31, 2013). (declining to award habeas relief based on sufficiency of indictment where "indictment told petitioner that he was being charged with having sexual contact and sexual intercourse with his stepdaughter on three occasions in March and/or April of 2002"); Dilworth v. Markle, 970 F. Supp.2d 498, 508 (N.D.W. Va. 2013) (finding indictment sufficient that charged state prisoner "with sexually touching his stepdaughter on ten



separate occasions in 2001"); Voymas v. Unger, No. 10-CV-2670023, \*5 (W.D.N.Y. July 7, 2011) (finding that 4 and 1/2 month time span on rape charge and one year time span on sexual abuse charge was not unreasonable because victim was child); State v. Reed, 204 W. Va. 520, 524 (1999) (holding that variance between pleading and evidence with regard to time of commission of sexual assault did not require dismissal); State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550, 557 (1995) ("[Y]oung children cannot be expected to be exact regarding times and dates[.]"). Therefore, Whites's objection is OVERRULED.

White's final objection is to Magistrate Judge VanDervort's conclusion that his sentence was not excessive. Of the Eighth's Amendment's prohibition, our appeals court recently stated:

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Punishment is deemed cruel and unusual not only when it is "inherently barbaric," but also when it is disproportionate to the crime for which it is imposed. Graham v. Florida, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010); see Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L.Ed. 793 (1910) (referring to the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense").

A defendant may challenge the proportionality of a sentence under the Eighth Amendment in two different ways. Under an "as-applied" challenge, a defendant contests the

length of a certain term-of-years sentence as being disproportionate "given all the circumstances in a particular case." Graham, 560 U.S. at 59, 130 S. Ct. 2011. In a "categorical" challenge, a defendant asserts that an entire class of sentences is disproportionate based on "the nature of the offense" or "the characteristics of the offender." Id. at 60, 130 S. Ct. 2011. . . .

The Supreme Court has emphasized the limited scope of both types of proportionality challenges. In the context of an as-applied challenge, the Court has explained that the "narrow proportionality principle" of the Eighth Amendment "does not require strict proportionality between crime and sentence," but "forbids only extreme sentences that are grossly disproportionate to the crime." Graham, 560 U.S. at 59-60, 130 S. Ct. 2011 (quoting Harmelin v. Michigan, 501 U.S. 957, 997, 1000-01, 111 S. Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring)) (internal quotation marks omitted). Before an appellate court concludes that a sentence is grossly disproportionate based on an as-applied challenge, the court first must determine that a "threshold comparison" of the gravity of the offense and the severity of the sentence "leads to an inference of gross disproportionality." Id. (quoting Harmelin, 501 U.S. at 1005, 111 S. Ct. 2680 (Kennedy, J., concurring)) (brackets omitted). In the "rare case" that a reviewing court concludes that such an inference may be drawn, the court is required to compare the defendant's sentence: (1) to sentences for other offenses in the same jurisdiction; and (2) to sentences for similar offenses in other jurisdictions. Id. If this extended analysis validates the threshold determination that the sentence is grossly disproportionate, the sentence is deemed "cruel and unusual" punishment under the Eighth Amendment. Id.

The Supreme Court has identified a term-of-years sentence as being grossly disproportionate on only one occasion. In Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77

L.Ed.2d 637 (1983), a recidivist defendant had been sentenced to life imprisonment without parole for passing a bad check in the amount of \$100. In reviewing the defendant's Eighth Amendment challenge to his sentence, the Court identified the following "objective criteria" to be used in conducting a full proportionality analysis: (1) "the gravity of the offense and the harshness of the penalty;" (2) "the sentences imposed on other criminals in the same jurisdiction;" and (3) "the sentences imposed for commission of the same crime in other jurisdictions." Id. at 292, 103 S. Ct. 3001. Because the bad check crime was "one of the most passive felonies a person could commit" and the punishment was "the most severe" non-capital sentence available, the Court inferred that the defendant's sentence was grossly disproportionate. Id. at 296-97, 103 S. Ct. 3001. Accordingly, the Court conducted an extended proportionality review, engaging in a comparative analysis of other penalties and other jurisdictions, and concluded that the defendant's sentence was unconstitutional. Id. at 296-300, 103 S. Ct. 3001.

Since the decision in Solem, no defendant before the Supreme Court has been successful in establishing even a threshold inference of gross disproportionality. . . .

United States v. Cobler, 748 F.3d 570, 575-76 (4th Cir. 2014).

Against this backdrop, the court cannot say that a threshold comparison of White's offenses and the severity of his sentence is grossly disproportionate to his crimes. See United States v. Cobler, 748 F.3d 570, 580 (4th Cir. 2014) ("Given the shocking and vile conduct underlying these criminal convictions, we hold that Cobler has failed to substantiate the required threshold inference of gross disproportionality. Even assuming, without deciding, that Cobler's 120-year term of imprisonment is

functionally equivalent to a sentence of life imprisonment without the possibility of parole, we conclude that Cobler's multiple child pornography crimes are at least as grave as the drug offense in Harmelin, which the Supreme Court deemed sufficiently egregious to justify a similar sentence." ). White was convicted of thirty-one counts of first degree sexual assault and seventy-three counts of sexual abuse by a custodian. The conduct for which he was convicted was vile and shocking - - sexually abusing four children between the ages of 2 and 8. The trial court imposed statutorily authorized sentences, i.e., it did not exceed the statutory maximum. Furthermore, the majority of the sentences were ordered to run concurrently. Therefore, the court agrees with the findings of Magistrate Judge VanDervort that White's sentence of 110 to 220 years does not constitute cruel and unusual punishment under the Eighth Amendment and, for this reason, his objection is OVERRULED.

Based on the foregoing, the court adopts the Findings and Recommendations of Magistrate Judge VanDervort, **GRANTS** defendant's motion for summary judgment, **DISMISSES** plaintiff's petition under 28 U.S.C. § 2254, and directs the Clerk to remove the matter from the court's docket.

Additionally, the court has considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial

showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court DENIES a certificate of appealability.

The Clerk is directed to send copies of this Memorandum Opinion and Order to counsel of record and to plaintiff pro se.

IT IS SO ORDERED this 29th day of September, 2014.

ENTER:



David A. Faber

Senior United States District Judge