

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Roger Simmons,
Petitioner Below, Petitioner**

vs) **No. 11-0759** (Webster County 06-P-10)

**Marvin Plumley, Warden,
Respondent Below, Respondent**

FILED

November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, Roger Simmons, by counsel, Steven B. Nanners, appeals from the “Order Denying Post-Conviction Habeas Corpus Petition” entered by the Circuit Court of Webster County on April 7, 2011. Respondent, Marvin Plumley,¹ Warden of the Huttonsville Correctional Center, appears by counsel, Thomas W. Rodd.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On January 4, 2001, petitioner was arrested by the Webster County Sheriff’s Department on charges that he had engaged in sexual acts with his step-daughter, who was born on June 5, 1988. Petitioner gave a tape-recorded statement to the investigating officer, and he was arraigned before the magistrate court later that day. Following a preliminary hearing, the matter was bound over to the grand jury.

On March 27, 2001, an abuse and neglect petition was filed in the circuit court asserting many of the same allegations contained in the arrest warrant. The abuse and neglect case ran concurrently with the criminal proceedings and were both heard by the same circuit judge.² Petitioner states that there were significant factual inconsistencies between the statements the victim

¹ Pursuant to Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, we have replaced the respondent’s name with Marvin Plumley, Warden. The initial respondent on appeal, Teresa Waid, is no longer the warden at Huttonsville Correctional Center.

² Petitioner filed a motion to recuse the circuit judge in the abuse and neglect case. The Chief Justice of this Court found no justification for the recusal and permitted the judge to remain on the case.

gave during the criminal investigation and those she gave in the abuse and neglect proceeding. Petitioner adds that during the course of the proceedings, the victim recanted the sexual abuse allegations. The victim then retracted her recantation and indicated that her mother made her recant to help petitioner get out of jail.

On May 8, 2001, the grand jury returned a thirty-two count indictment charging petitioner with eleven counts of first degree sexual assault in violation of West Virginia Code § 61-8B-3, ten counts of sexual abuse by a parent, guardian or custodian in violation of West Virginia Code § 61-8D-5, nine counts of incest in violation of West Virginia Code § 61-8-12, and two counts of second degree sexual assault in violation of West Virginia Code § 61-8B-4.

On May 16, 2001, petitioner filed a motion to suppress the tape-recorded statement he gave to law enforcement, as well as all evidence recovered during the execution of search warrants of petitioner's home and the home of a family member. Following an evidentiary hearing, the motion was denied. Thereafter, the State made a plea offer to allow petitioner to plead guilty to one count of second degree sexual assault and one count of incest with the remaining thirty counts to be dismissed. The plea agreement provided that the State would stand silent regarding how the sentences for those two crimes would be imposed. Petitioner accepted the plea offer and pled guilty to those charges.

Following a psychological evaluation of petitioner and a presentence investigation, the circuit court sentenced petitioner to ten to fifteen years in the penitentiary on the second degree sexual assault conviction and five to fifteen years in the penitentiary on the incest conviction for a total of fifteen to forty years with credit for time served. Petitioner's motion to reconsider sentencing was denied.

Petitioner filed a pro se petition for a writ of habeas corpus. The circuit court appointed habeas counsel for petitioner. Habeas counsel filed an amended petition for a writ of habeas corpus. An evidentiary hearing was held before the circuit court during which petitioner testified. Petitioner also presented the testimony of an expert witness to address the quality of the tape-recording of the statement petitioner gave to law enforcement following his arrest. Petitioner's trial counsel also testified in response to petitioner's allegations of ineffective assistance of counsel. On April 7, 2011, the circuit court entered a thirty-three page order denying habeas relief on all grounds asserted.

In his second amended brief filed with this Court, petitioner asserts as his only assignment of error that the circuit court improperly denied his petition for habeas relief. We note, however, that petitioner addresses multiple issues related to his sole assignment of error in his second amended brief: ineffective assistance of counsel; irregularities in arrest; illegal detention prior to arraignment; excessiveness or denial of bail; sufficiency of the evidence; prosecutorial misconduct; constitutional errors in evidentiary rulings; trial court's refusal of a continuance; the question of actual guilt upon an acceptable guilty plea; the falsification of the transcript of petitioner's statement to law enforcement following his arrest; involuntary guilty plea; mental competency at the time of the crime; ability to understand the proceedings due to educational level and reading ability; coerced confession; challenges to the composition of the grand jury or its procedure; defects

in the indictment; and incompetence at the time of the offense, as opposed to at the time of trial. All of these issues were addressed in the circuit court's April 7, 2011, order.

The Court has previously stated that “[i]n reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). The Court has considered the merits of the arguments set forth in petitioner's amended brief and in respondent's brief, and it has reviewed the designated appendix. Having reviewed the circuit court's “Order Denying Post-Conviction Habeas Corpus Petition” entered on April 7, 2011, we hereby adopt and incorporate the circuit court's findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

ROGER SIMMONS,
Petitioner,

v.

Case No.: 06-P-10
Honorable Judge Jack Alsop

TERESA WAID, Administrator,
Huttonsville Correctional Facility,
Respondent.

JEANIE MOORE, CLERK
WEBSTER COUNTY
CIRCUIT COURT, W. VA.

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ORDER DENYING POST-CONVICTION HABEAS CORPUS PETITION

This matter came before this Court on the Petition for post-conviction habeas corpus relief filed by Steven B. Nanners on May 28, 2008. On the 2nd day of October, 2008, Dwayne Vandevender, Prosecuting Attorney of Webster County, West Virginia, on behalf of the Respondent, filed an Answer to the Petition for Habeas Corpus. Following the filing of the Answer, the Court conducted a thorough review of the record and determined an evidentiary hearing would be needed to fairly and fully adjudicate Petitioner's claim.

On November 20, 2009, Petitioner, by and through his counsel, Steven B. Nanners, filed an Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum. An Omnibus Habeas Hearing was held before this Court on the 4th day of February, 2010. The Petitioner appeared in person and with counsel, Steven B. Nanners, and the Respondent appeared by counsel, Dwayne Vandevender, Prosecuting Attorney of Webster County, West Virginia. After carefully considering the evidence, the arguments presented by each party, the parties' briefs, the record of Petitioner's trial, and pertinent legal authority, the Court has concluded the Petitioner has failed

to establish a basis for the relief requested in his Amended Habeas Petition. The reasons for this decision are set forth below.

I. FINDINGS OF FACT

1. The Court takes judicial notice of all proceedings and the record in the underlying case, to wit: 01-F-24.
2. The Circuit Court of Webster County, West Virginia, has proper jurisdiction in this matter pursuant to W.Va. Code §53-4A-1 – 13 et. seq.
3. The Petitioner was charged in case number 01-F-24 with the felonious offenses of eleven (11) counts of First Degree Sexual Assault, in violation of W.Va. Code §61-8B-3; ten (10) counts of Sexual Abuse by a Parent, Guardian or Custodian, in violation of W.Va. Code §61-8D-5; nine (9) counts of Incest, in violation of W.Va. Code §61-8-12; and two (2) counts of Second Degree Sexual Assault, in violation of W.Va. Code §61-8B-4, in a thirty-two (32) count indictment returned by a Grand Jury on May 8, 2001, in Webster County, West Virginia.
4. Petitioner's trial counsel filed a Motion to Suppress the tape recorded statement given by Petitioner to the arresting officer, as well as a Motion to Suppress the two (2) search warrants that were issued by the Magistrate Court of Webster County, West Virginia, on May 15, 2001.
5. Trial counsel for Petitioner filed a Motion to Recuse the Honorable Judge Jack Alsop on July 7, 2001, asserting the Judge had bias feelings toward Petitioner.
6. The Honorable Judge Jack Alsop filed a response to the same with the West Virginia Supreme Court of Appeals stating that he could fairly and impartially preside over the case.

681

7. The West Virginia Supreme Court of Appeals entered an order finding there was no justification for the recusal and permitted Judge Alsop to remain the judge assigned to the case.

8. On the 24th day of August, 2001, Petitioner was given a handwritten plea offer purporting he plead guilty to one (1) count of sexual assault in the second degree and one (1) count of incest, with the remaining counts in the indictment to be dismissed.

9. On September 6, 2001, Petitioner accepted the plea offer from the State and entered a guilty plea to the felonious offenses of second degree sexual assault and incest.

10. On November 21, 2001, Petitioner was evaluated by Charleston Psychiatric Group, Inc. to determine if Petitioner was a candidate for alternative sentencing. The evaluation revealed he was not.

11. This Court sentenced the Petitioner by Order entered on the 7th day of February, 2002.

12. The Petitioner was sentenced as follows:

- a. Count Twenty-Seven: Sexual Assault in the Second Degree, not less than ten (10) but not more than twenty-five (25) years;
- b. Count Thirty-Two: Incest, not less than five (5) years but not more than fifteen (15) years.

13. This Court ordered the sentences for these Counts would run consecutively to each other. In effect, the Court sentenced Petitioner to a term of not less than fifteen (15) years but not more than forty (40) years in the penitentiary.

14. This Court entered a Commitment Order on February 8, 2002, that reflected the Sentencing Order entered on February 7, 2002.

II. PRELIMINARY LEGAL AUTHORITY

In post-conviction habeas corpus claims, the Petitioner is required to meet three preliminary standards before their claim will be recognized. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979). Therefore, the first requirement for post-conviction habeas corpus requires the Petitioner to allege that he or she has been denied a constitutional right. In this case, Petitioner makes numerous allegations regarding the denial of various constitutional rights. Each of these allegations along with the alleged constitutional violations will be discussed more thoroughly in this Court's *Petitioner's Grounds for Relief* section below. This Court recognizes that based on the allegations contained in the Amended Omnibus Habeas Petition, the Petitioner has satisfied the first requirement by alleging a violation of his constitutional rights.

The Petitioner must next show the alleged constitutional violation has not been previously and finally adjudicated or waived, and thus barred by W.Va. Code §53-4A-1 (b)(c) [1967]. In this case Petitioner alleges sixteen separate grounds in which his constitutional rights were violated. Trial counsel did not allege any of the sixteen constitutional violations raised in Petitioner's Amended Omnibus Habeas Corpus Petition before in any other habeas proceedings in the underlying case, to wit: 01-F-24. Additionally, this Court has not decided any claims regarding ineffective assistance of counsel; therefore, this Court has not previously decided said claims. Thus Petitioner has satisfied the second preliminary requirement.

Finally, the Court must determine whether the Petitioner has previously waived his rights with regard to the grounds alleged in the Amended Omnibus Habeas Petition. The Petitioner in this case has not waived any of his constitutional rights, except for the rights Petitioner waived at

the time of the entry of his guilty plea, under the alleged grounds of the Amended Petition; therefore, the third preliminary requirement has been met.

With these three preliminary standards satisfied, this Court proceeded to consider the merits of the claims alleged in Petitioner's Amended Omnibus Habeas Petition.

III. DISCUSSION

PETITIONER'S GROUNDS FOR RELIEF

The Petitioner raises six main issues, set forth as sixteen separate grounds, in his writ of habeas corpus. The Petitioner alleges the following grounds resulted in the denial of his constitutional rights: 1) Ineffective assistance of counsel; 2) Denial of due process and denial of a fair trial based on Prosecutorial Misconduct; 3) Denial of due process rights; 4) Eighth Amendment violations; 5) Grand Jury Misconduct; and 6) Judicial Misconduct. Petitioner advances these arguments under both the United States Constitution and the West Virginia Constitution. To prevail in post-conviction habeas corpus proceedings, "Petitioner has the burden of proving, by a preponderance of the evidence, the allegations contained in his petition or affidavit which would warrant his release." *State ex rel. Scott v. Boles, Syllabus pt. 1*, 150 W.Va. 435, 147 S.E.2d 426 (1966). This Court will address each of the issues raised by Petitioner, and any sub-issues that may arise, in turn.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges numerous ground in which his trial counsel failed to provide effective assistance of counsel. The West Virginia test by which claims of ineffective assistance of counsel are evaluated is set forth in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) and *Strickland v. Washington*, 446 S.E.2d 669 (1984). This two-prong test requires an appellant or

habeas petitioner claiming ineffective assistance of counsel to prove: (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. In applying the "objectiveness standard," found in part one of this test, the Supreme Court has held that "a reviewing court must ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Id.*, Syllabus pt. 6, in part. After thoroughly reviewing the record under the standard set forth above, this Court finds all of the alleged ineffective assistance of counsel claims found in Petitioner's Habeas Petition to be without merit. This Court will address each of these concerns below.

Ground One: Inadequate Investigation

Petitioner alleges trial counsel failed to adequately investigate the allegations in Petitioner's underlying case, resulting in ineffective assistance of counsel. "The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation." Syllabus point 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995). This Court is of the opinion, based on the record in the underlying case, counsel conducted a reasonable investigation fulfilling the requirement set forth in *Legursky*. Trial counsel requested and was provided with discovery, supplemental discovery, and answers to a

Motion for Bill of Particulars requesting facts regarding each charge against Petitioner in the indictment. The record reflects trial counsel met with Petitioner approximately 18 times prior to the entry of Petitioner's plea to fully discuss any questions or concerns Petitioner may have had regarding his criminal case. Further Petitioner advances no specific allegations as to how trial counsel failed to adequately investigate his case. As such, Petitioner's argument with regard to Ground One fails.

Ground Two: Failure to Meet with Petitioner

Petitioner alleges trial counsel failed to meet with him prior to the preliminary hearing and engaged in plea negotiations rather than focusing on the investigation of Petitioner's case resulting in ineffective assistance of counsel. After reviewing the record, the Court finds that trial counsel did not meet with Petitioner prior to the preliminary hearing; however trial counsel spent 1.4 hours reviewing the preliminary information related to Petitioner's case prior to the preliminary hearing. See *Defense Counsel Voucher*, Kevin Duffy, 9/3/2002. Further, trial counsel met with Petitioner for 1.5 hours, five days after the preliminary hearing to discuss the case and what occurred during the preliminary hearing. Trial counsel also met with Petitioner numerous times throughout the duration of Petitioner's case. As such, this Court finds trial counsel acted as any reasonably prudent attorney would. Therefore Petitioner's argument with regard to failure to adequately communicate is without merit.

Petitioner also alleges trial counsel engaged in and focused on plea negotiations rather than properly investigating Petitioner's case. There is nothing in the record to indicate that trial counsel did not adequately investigate Petitioner's case. Further, at Petitioner's Plea Hearing Petitioner agreed that he knew counsel was engaging in plea negotiations and Petitioner

consented to such acts. *9/6/01 Plea Hearing*, Recorded tape. Therefore, Petitioner's argument with regard to premature plea negotiation is without merit.

Accordingly, Petitioner's contentions found in Ground Two fail as a matter of law.

Ground Three: Failure to Adequately Communicate

Petitioner alleges trial counsel failed to adequately discuss, with Petitioner, the procedural aspects of Petitioner's case amounting to ineffective assistance of counsel. Petitioner further alleges he was not fully aware of the possible outcomes that may result due to procedural choices. There is nothing in the record to indicate that Petitioner was not fully aware of the procedural process and the outcomes that may result due to choices made by Petitioner and his counsel. During Petitioner's Plea Hearing the Court questioned Petitioner as to his satisfaction with trial counsel and Petitioner stated he had no complaints. The Court further stressed that if Petitioner had any problems or complaints, Petitioner should assert them during the Plea Hearing. Petitioner again confirmed that he did not. *9/6/01 Plea Hearing*, Recorded tape.

As such this Court is of the opinion Petitioner's argument is without merit. Accordingly, Petitioner's argument as to Ground Three fails.

Ground Four: Failure to Adequately Communicate

Petitioner alleges trial counsel failed to properly explain the effect the nature of the crimes for which Petitioner was convicted of would have on his parole eligibility and discharge of sentence. Although there is nothing in the record to indicate counsel informed Petitioner of the possible ramifications of his prior criminal history, the record does indicate the Court advised Petitioner that the parole board would take the crimes for which he was convicted into consideration and that could affect their decision regarding parole eligibility. *9/6/11 Plea*

Hearing, Recorded tape. Additionally, the trial court gave Petitioner the opportunity to confer with his counsel prior to entering his plea to discuss any questions or concerns the Petitioner might have. Therefore, Petitioner was aware of the effect the nature of his conviction may have on his ability to be paroled. Even if counsel failed to inform and discuss the effects of Petitioner's conviction prior to the date of the Plea Hearing, such was made known to the Petitioner at the Plea Hearing and therefore Petitioner's argument does not rise to the level of deficient representation as required by *Strickland/Miller*. As such, this Court finds Petitioner's argument with regard to Ground Four to be without merit.

Ground Five: Inadequate Investigation

Petitioner's second argument is counsel prematurely negotiated a plea deal, amounting to ineffective assistance of counsel. Petitioner contends counsel advised him to enter into a plea agreement prior to obtaining all discovery in Petitioner's case, making Petitioner unable to make a fully informed decision. Petitioner contends that had counsel obtained all discovery prior to beginning plea negotiations counsel would not have advised Petitioner to enter into the plea agreement. However, there is nothing in the record to indicate counsel did not obtain or have knowledge of all discovery prior to beginning plea negotiations in Petitioner's case.

The West Virginia Supreme Court of Appeals recognized in *State ex. rel. Justice v. Trent* that discovery has not been elevated to a constitutional dimension. 550 S.E. 2d 440, 209 W.Va. 614. Therefore, Petitioner cannot allege counsel was ineffective when he failed to obtain what the Petitioner deemed all discovery because this is not an argument that is constitutional in nature. Only constitutional errors will be reviewed in habeas corpus proceedings. *State ex. rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

Further, Petitioner was offered a "plea deal" prior to Petitioner being indicted. This offer was refused by both Petitioner and his counsel. No other plea offers were extended until June of 2001, one month after discovery was provided from the State of West Virginia. This offer was also refused, along with a plea offer made by the State of West Virginia in August of 2001. It was not until September 2001, that Petitioner and his counsel accepted a plea agreement from the State. Therefore, counsel clearly took time to investigate the case as he refused three plea offers before advising Petitioner to accept an offer from the State in September of 2001. Accordingly this Court finds Petitioner's argument with regard to premature plea negotiation to be without merit.

Ground Six: Failure to Meet with Petitioner

Petitioner alleges trial counsel failed to spend adequate time with the Petitioner prior to negotiating a plea on his behalf. There is nothing in the record to indicate trial counsel did not provide Petitioner and his case adequate attention. The record reflects trial counsel spent over 100 hours, not including time spent in court, working on this case and Petitioner's companion abuse and neglect case. The record further reflects that Petitioner did engage in plea negotiations throughout Petitioner's case but Petitioner did not object to such negotiations as evidenced by the record of Petitioner's Plea Hearing. The trial court questioned Petitioner regarding whether he was satisfied with the manner in which trial counsel represented him and he affirmed he was. As stated above the trial court further questioned Petitioner telling Petitioner that if he did have any complaints, now was the time to state them. Petitioner again confirmed he was satisfied with trial counsel's representation. *9/6/01 Plea Hearing, Recorded tape.*

As such this Court is of the opinion trial counsel acted as a reasonably prudent criminal defense attorney and trial counsel's actions did not rise to the level of ineffective assistance of

counsel as alleged by Petitioner. Accordingly Petitioner's argument as to Ground Six is without merit.

Ground Seven: Failure to Meet with Petitioner

Petitioner again alleges trial counsel was ineffective because counsel failed to meet with Petitioner prior to Petitioner's Sentencing to discuss the pre-sentence investigation and the sex offender evaluation, prepared by Charleston Psychiatric Group, on Petitioner. The record reflects that counsel did not meet with Petitioner prior to Sentencing. However, counsel did meet with Petitioner after the Plea Hearing on September 6, 2001, to further explain the next step in the judicial process. Trial counsel also spent 2.1 hours reviewing the psychiatric and sex offender evaluations on Petitioner prior to Sentencing. Although counsel should have discussed the pre-sentence investigation and sex offender evaluation with Petitioner; when viewing the totality of the circumstances this Court is of the opinion trial counsel's actions were reasonable and did not rise to the level of ineffective assistance of counsel as found in *Strickland/Miller*. Accordingly, Petitioner's argument with regard to Ground Seven fails.

Ground Eight: Failure to Obtain Transcripts

Petitioner alleges trial counsel was ineffective because counsel failed to obtain transcripts from Petitioner's companion abuse and neglect proceedings to use for impeachment purposes in the criminal proceedings. However, Petitioner's case concluded with the entry of a plea, therefore no testimony was taken that would require transcripts from the companion abuse and neglect case. Therefore, as to this ground, under the facts of Petitioner's case, trial counsel acted as a reasonably prudent attorney, therefore fulfilling the requirements of the *Strickland/Miller* test. As such, Petitioner's argument as to Ground Eight is without merit.

Ground Nine: Failure to Hire an Expert

Petitioner alleges trial counsel was ineffective because counsel did not hire an expert witness to analyze the tape recording of his statement given on January 4, 2001. The Supreme Court of Appeals of West Virginia has never held that an expert witness must be hired to analyze and review tape recordings that are unclear to fully protect the constitutional rights of the accused. This is a choice entirely within counsel's discretion. At the Suppression Hearing held on August 24, 2001, the following correspondence occurred (8/24/01 Hearing Transcript, Pages 16-17):

MR. VANDEVENDER: Did I give you a copy of the tape?

MR. DUFFY: No, because I could never get anybody who can analyze it.

Accordingly the record suggests trial counsel investigated the possibility of obtaining an expert to examine the tapes but could not obtain such an individual. Further, Petitioner's statement was never played for a jury nor was it subjected to the scrutiny of the Court for purposes of establishing Petitioner's guilt. Additionally, the record reflects numerous amounts of other evidence against Petitioner that established his guilt. Accordingly this Court is of the opinion trial counsel's failure to obtain an expert witness to analyze Petitioner's taped statement did not rise to the level of ineffective assistance of counsel as found in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Miller*, 194 W.Va. 3, S.E. 2d 114 (1995). Petitioner's argument as to Ground Nine fails.

Ground Ten: Failure to Send Discovery

Petitioner alleges trial counsel was ineffective because he failed to provide a copy of all discovery to Petitioner. There is nothing in the record to indicate that trial counsel did provide a copy of all discovery to Petitioner. Additionally, Paragraph L of Petitioner's Habeas Corpus

Petition states Petitioner had a very limited education and therefore had trouble ascertaining the pleadings from both the State and trial counsel. In that same Paragraph Petitioner admits that his case was continued to the next term of court to allow trial counsel additional time to review, with Petitioner, the information pertaining to Petitioner's case. Accordingly, it would appear that trial counsel may not have sent Petitioner discovery because Petitioner was unable to understand the meaning of such documents.

Trial counsel instead waited until meeting with Petitioner to give Petitioner such information so as to avoid confusion. The record indicates that trial counsel met with Petitioner nearly 18 times prior to the Petitioner's entry of a plea to discuss matters involving Petitioner's case. Therefore, this Court is of the opinion trial counsel was not deficient in his representation of Petitioner. As such Petitioner's argument with regard to Ground Ten is without merit.

Ground Eleven: Failure to Obtain Psychological Evaluation

Petitioner alleges trial counsel failed to require a psychological or psychiatric evaluation be performed on the alleged child victim, amounting to ineffective assistance of counsel. The choice whether to request the child victim undergo a psychiatric or psychological evaluation was entirely within trial counsel's discretion and can likely be attributed to future trial strategy. Child victims are very sensitive and can invoke extreme emotions in jurors. Therefore as part of counsel's future trial strategy, trial counsel chose not to require the child victim to undergo such evaluations as it would likely have had an adverse effect on his client in later proceedings. Although this case settled through a plea deal, trial counsel acted as reasonably qualified defense attorney, as he was trying to preserve the reputation of Petitioner. Accordingly, Petitioner's argument as to Ground Eleven fails.

Ground Twelve: Failure to File a Motion

Petitioner alleges trial counsel did not timely file a Motion to Disqualify the Circuit Judge resulting in ineffective assistance of counsel as outlined in the *Strickland/Miller* test. Trial counsel filed a Motion to Disqualify the Honorable Jack Alsop on July 9, 2001. This motion was reviewed by the Supreme Court and was found to be without merit. The denial by the Supreme Court stated Judge Alsop was more than qualified to hear Petitioner's case and there was no mention of the motion being filed in an untimely manner. Accordingly trial counsel was not ineffective as counsel filed the Motion to Disqualify and it was denied. As such, Petitioner's argument with regard to Ground Twelve fails.

Ground Thirteen: Plea Negotiations

Petitioner alleges trial counsel negotiated a plea of guilty to Count 27 of the Indictment when in fact the testimony of the victim does not support such a plea. Petitioner was charged in a thirty-two count indictment on May 8, 2001. The allegations against Petitioner alleged numerous acts on numerous occasions. Although the testimony taken from the victim during an in-camera hearing, held in the companion abuse and neglect case in the underlying matter, did not support the exact date found in Count 27, Petitioner's guilt is not alleviated. The State of West Virginia is not required to prove such date with certainty as a variance in the pleading and proof with regard to the time of the commission of a crime does not constitute prejudicial error where time is not of the essence of the crime charged. W.Va. Code 62-2-10; *State v. Chaffin*, 156 W. Va. 264, 192 S.E. 2d 728 (1972); *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000).

Petitioner was charged with assaulting the victim numerous times in thirty-two count indictment. Petitioner cannot claim constitutionally reversible error and ineffective assistance of

counsel simply because the victim did not testify to the specific date alleged in Count 27. Petitioner received a highly favorable plea agreement in this matter as he pled guilty to only two counts when he was charged with thirty-two.

Further Petitioner was present at the Plea Hearing and made no objection to the two proposed Counts to which he was to plead guilty. Therefore, when looking to the standard set forth in *Strickland/Miller* this Court is of the opinion trial counsel was not ineffective. As such, Petitioner's argument with regard to Ground Thirteen fails.

Conclusion: Grounds One through Thirteen

After reviewing the record and all evidence, the Court concludes that trial counsel was not ineffective as asserted by Petitioner, but was instead acting within the strategic and tactical boundaries of a reasonable defense attorney in his position. Trial counsel adequately represented the Petitioner and even if trial counsel had performed all the aforementioned actions requested by Petitioner, the Petitioner can not prove by a preponderance of the evidence that the results in this case would have been different.

B. DUE PROCESS VIOLATION

Petitioner alleges six grounds in which he was denied his constitutional right to due process as found in the Fourteenth Amendment of the United States Constitution and Article III § 10 of the West Virginia Constitution. The Court will address each allegation in turn.

Ground One: Irregularities in Arrest

Petitioner alleges the Webster County Sheriff's Department arrested Petitioner after hours in an effort to delay presentment of the Petitioner to the Magistrate Court in violation of his

constitutional due process rights. Petitioner claims he was then taken to the Sheriff's Department and questioned, without being afforded his constitutional right to counsel, in order to obtain a confession prior to presentment to a Magistrate. There is nothing in the record to indicate the Webster County Sheriff's Department intentionally arrested Petitioner after hours or failed to provide him counsel.

The testimony given by Deputy Knight at a Suppression Hearing held on August 21, 2001, indicates that there was no delay in arresting Petitioner after they received information of the alleged sexual assault and obtained a warrant for Petitioner's arrest. *8/24/01 Suppression Hearing Transcript*, Pages 6-7. The Suppression Hearing transcript further indicates Deputy Knight mirandized Petitioner, pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when he was arrested as well as after he got to the Webster County Sheriff's Department, informing him of all rights he may have. *8/24/01 Suppression Hearing Transcript*, Pages 8-9. Further, Deputy Knight testified that she specifically explained the process of the interview as well as the Miranda rights form to Petitioner while he was at the Webster County Sheriff's Department. *8/24/01 Suppression Hearing Transcript*, Pages 9-12. Specifically Deputy Knight stated prior to the interview she told Petitioner the following (*8/24/01 Suppression Hearing Transcript*, Page 10, Lines 15-19):

"You have the right to talk to a lawyer for advice before we ask you any questions and to have him or her with you during questioning." I asked [Petitioner] if he understood that and he said "yes," he did and he signed his initials again.

Further Petitioner's counsel asked Deputy Knight, "Did [Petitioner] ever ask you during the taped statement or during the time he was there, 'I want to talk to a lawyer?'" To which

Deputy Knight responded, "No, sir. At no time did he ever ask for an attorney." 8/24/01 *Suppression Hearing Transcript*, Page 59, Lines 3-7.

As such Petitioner was fully aware of his right to counsel and chose not to have counsel present. He initialed the Miranda Rights Form indicating he understood his rights. Further there is nothing in the record to indicate Petitioner was coerced into making a statement; he voluntarily spoke with Deputy Knight at the Webster County Sheriff's Department. Additionally Deputy Knight read Petitioner his Miranda rights again on the recorded interview, prior to Petitioner giving his statement. 8/24/01 *Suppression Hearing Transcript*, Pages 13-14. Therefore, Petitioner was informed of his rights three times prior to giving his recorded statement. Accordingly, Petitioner's Argument with regard to Ground One fails.

Ground Two: Involuntary Guilty Plea

Petitioner claims trial counsel coerced him into accepting the plea agreement and Petitioner did not fully understand the nature of the proceedings, thus violating his due process rights. After a review of the record it appears that during Petitioner's Plea Hearing the trial court explained to Petitioner that he did not have to accept the plea agreement and further questioned Petitioner regarding whether he was entering this plea out of his own free will. The Petitioner affirmed that he wanted to enter the plea and was doing so out of his own free will. The trial court also discussed whether the Petitioner felt trial counsel was effective and asked if Petitioner had any problems whatsoever with trial counsel. Petitioner affirmed that he was adequately represented and made no statements or complaints about his counsel. 9/6/01 *Plea Hearing*, Recorded Tape.

Accordingly, Petitioner has presented no evidence in the record to reflect any undue influence from trial counsel on Petitioner. Further, Petitioner points this Court to nothing in the

record which would lead the Court to believe he did not understand the nature of the proceedings. Therefore, Petitioner's argument with regard to Ground Two is without merit.

Ground Three: Mental Competency

Petitioner alleges that his mental competency at the time of the trial is questionable because of a pro-longed addiction to alcohol. This allegation is entirely without merit as Petitioner's case never went to trial. Petitioner entered a plea pursuant to an agreement with the State of West Virginia. During Petitioner's Plea Hearing, the trial court questioned Petitioner regarding his mental capacity as well as whether Petitioner was under the influence of alcohol or suffering withdraw symptoms from such. Petitioner stated he was not. *9/6/01 Plea Hearing, Recorded Tape.*

Additionally, Petitioner underwent a sexual offender evaluation as ordered in the companion abuse and neglect case on the underlying charges, and Dr. Smith, the medical evaluator, made no note as to any concerns regarding Petitioner's competency. In fact, Dr. Smith noted that Petitioner was oriented to time, person, and place and that his recent and remote memory was in tact.

Therefore, this Court is of the opinion Petitioner's argument as to Ground Three, mental competency, fails as a matter of law because Petitioner denied any such impairment when directly questioned by the trial court and was examined by a competent medical examiner who made no note of such impairment.

Ground Four: Language Barrier to Understanding the Proceedings

Petitioner contends that at the time of the proceedings he was only able to function and understand on a 6th grade educational level and therefore did not understand what was occurring

throughout the underlying case. There is nothing in the record to indicate Petitioner did not understand what was occurring. During Petitioner's Plea Hearing the trial court questioned Petitioner as to his comprehension of the proceedings and Petitioner confirmed he understood what was occurring. *9/6/01 Plea Hearing*, Recorded Tape. The trial court also gave Petitioner the opportunity to meet with his trial counsel after his rights were explained to him to discuss any questions or issues he may have concerning the case.

Additionally, trial counsel met with Petitioner numerous times throughout Petitioner's case to discuss the proceedings as well as any questions or concerns the Petitioner may have. This Court does note that trial counsel informed the trial court of Petitioner's limited ability and the trial court proceeded with extra caution so as to insure the Petitioner understood the proceedings.

As such this Court is of the opinion Petitioner was aware of what was occurring throughout the proceedings in the underlying case. Petitioner was appointed competent representation and was given numerous opportunities to discuss any questions or concerns with counsel. Accordingly, Petitioner's argument with regard to Ground Four fails.

Ground Five: Coerced Confession

Petitioner claims he was coerced into giving a confession because he was arrested after hours and told by Deputy Knight that "if he would give a statement and cooperate things would go easier." There is nothing in the record to indicate either of these allegations is true. As discussed above in *Ground One* of this section, the Petitioner was arrested as soon as the Webster County Sheriff's Department obtained a warrant for his arrest. The record reflects there was no delay in arresting Petitioner, in an attempt to arrest him after hours, in order to obtain a confession.

Additionally, during the Plea Hearing, Petitioner waived his constitutional rights as to all pre-trial defects, as well as defects with regard to his arrest, the gathering of evidence, and any statements made to police officials by Petitioner. As to the statements made by Deputy Knight, Petitioner presents no evidence that Deputy Knight made any such statement. Accordingly, Petitioner's argument fails as to Ground Five.

Ground Six: Incompetence at the time of the Offense

Petitioner contends that due to his severe alcohol addiction he was mentally incompetent at the time he committed the offenses. As discussed above in *Ground Three: Mental Competency*, Petitioner underwent a sexual offender evaluation in which the medical professional, Dr. Smith, made no mention of any issues with regard to Petitioner's competency. Petitioner also made no statements regarding his competency during any stage of the proceedings. Further when questioned by the trial court, Petitioner stated that he was not under the influence of alcohol nor was he suffering any symptoms of withdraw when he chose to enter his plea of guilty. *9/6/01 Plea Hearing, Recorded Tape*. Accordingly, this Court is of the opinion Petitioner was not of a diminished capacity during the proceedings in the underlying case or at the time the offenses were committed. Petitioner's argument fails as to Ground Six.

C. EIGHTH AMENDMENT VIOLATION

Ground One: Excessive Bail

Petitioner alleges his constitutional rights were violated because the \$100,000.00 bail set in Petitioner's case was excessive in violation of the Eighth Amendment of the United States Constitution and Article III § 5 of the West Virginia Constitution. Petitioner alleges because he was given such an excessive bail he was unable to assist his attorney in defense of his case and

as such could not adequately prepare for trial. Petitioner alleges this information was placed on the record at the August 24, 2001, Suppression Hearing. However, after a review of the record this Court finds this is not an adequate representation.

Petitioner's trial counsel does state that Petitioner was incarcerated and of a lower level of intelligence which made it more difficult to communicate with Petitioner. However, Petitioner's counsel further states he met with Petitioner several times during Petitioner's incarceration at the Central Regional Jail. *8/24/01 Suppression Hearing Transcript*, Page 83, Lines 8-19. Additionally, the Court addressed the fact that Petitioner was also involved in divorce proceedings in Webster County Family Court, as well as an abuse and neglect case in the Webster County Circuit Court and the same counsel was appointed to represent Petitioner and was therefore present during those proceedings; thus giving counsel and Petitioner time to discuss Petitioner's case. *8/24/01 Suppression Hearing Transcript*, Pages 83 and 86. Further, the underlying case in this matter was resolved through a plea agreement. Therefore Petitioner's incarceration did not interfere with trial preparation.

Accordingly, the Court is of the opinion Petitioner's argument is without merit. There is nothing in the record to indicate bail was excessive or hampered Petitioner's participation in the underlying case. Therefore, Petitioner's argument with regard to Ground One fails.

D. PREJUDICIAL ACTIONS OF THE PROSECUTING ATTORNEY

Petitioner alleges three grounds in which the prejudicial acts of the Prosecuting Attorney resulted in the denial of his due process under the Fourteenth Amendment of the United States Constitution and Article III § 10 of the West Virginia Constitution, and his right to a fair and

impartial trial as guaranteed by the Sixth Amendment of the United States Constitution. The Court will address each allegation in turn.

Ground One: Insufficient Evidence

Petitioner alleges there was a significant problem with the evidence used against him in the underlying case, thus violating his constitutional right to a fair and impartial trial as well as his constitutional due process rights. Specifically, Petitioner alleges four main issues. First, Petitioner claims that Deputy Knight gave conflicting statements with respect to her investigation and the victim's statements. Second, the recorded statement given by Petitioner was inherently unreliable due to the numerous pauses and restarts on the tape. Third, the victim initially recanted her story and due to coercion from the Prosecutor's office recanted her initial recantation. Finally, there was inconsistent testimony regarding the allegations that Petitioner tied up the victim during the assaults. The Court will further address each of these issues.

First, the allegation regarding conflicting statements given by Deputy Knight pursuant to the investigation is without merit. Petitioner states no specific discrepancies or inconsistencies regarding Deputy Knight's recitation of Petitioner's arrest and the investigation that ensued thereafter. Petitioner also does not point the Court to any evidence on the record in which Deputy Knight gave conflicting testimony regarding the sufficiency of the evidence used to obtain a search warrant in Petitioner's underlying case. Further, Petitioner sets forth no specific instances in which Deputy Knight gave conflicting testimony regarding statements made by the victim. Therefore, Petitioner provides no evidence that supports his contention that Deputy Knight provided conflicting, inconsistent testimony.

Petitioner's second allegation relates to the unreliability of Petitioner's recorded statement. Petitioner contends the recorded statement is unreliable because of the numerous

pauses and restarts found on the tape. However, this argument is without merit. First, neither this Court nor the West Virginia Supreme Court of Appeals has ever held that all exculpatory statements made by a defendant must be tape-recorded. However that is not an issue in this case as the record reflects Petitioner's statement was recorded. Petitioner instead argues the recording is not an accurate representation of the interview due to the pauses. When questioned regarding these pauses Deputy Knight testified as follows (8/24/01 Suppression Hearing Transcript, Pages 34-35):

PETITIONER'S COUNSEL: Let me go back first to the voice activation button. How does a voice activation button work?

DEPUTY KNIGHT: When somebody talks, the machine automatically clicks on. When somebody stops talking, I think it pauses for just – I mean it stays on for a second and then it goes off when there isn't conversation. So if there was a pause there, it would go off and then just come right back on when someone started talking again.

Therefore, there is nothing in the record to indicate the tape-recorded statement was tampered with. Further the statement was not suppressed by the trial court, and this fact must be considered by the Court. Additionally, this tape was never played before a jury, as Petitioner's underlying case resolved through a plea agreement. Accordingly, the Court finds Petitioner's argument as to the unreliability of Petitioner's recorded statement is without merit.

Petitioner's third allegation regarding insufficient evidence is that the victim recanted her statement incriminating Petitioner and then due to coercion from the Prosecutor's office recanted her recantation. The record reflects the victim provided a written statement recanting the allegations against Petitioner only after the Petitioner made recorded telephone calls from the Central Regional Jail to his wife, the victim's mother, asking the mother to coerce the victim into

recanting her story. Further, the victim's written recantation was nearly identical to what the Petitioner requested from his wife. After receiving the recantation Deputy Knight spoke with the victim and offered the victim help if she had been coerced to make the written statement. The record reflects at that time the victim advised Deputy Knight that her mother had forced her to write the recantation. Therefore, the Court finds there was no coercion by the State of West Virginia and further Petitioner is misrepresenting the facts.

Finally, Petitioner alleges the testimony is inconsistent regarding the marks on the victim's ankles and wrists. Petitioner claims that there is no medical evidence to support the testimony of Deputy Knight about the rope marks on the victim's wrists and ankles. Petitioner claims the victim was treated for a four-wheeler accident very shortly after Petitioner's arrest and the treating physician made no notations in the medical records of any marks on the victim's wrists and ankles. However, in the medical records from Webster County Memorial Hospital, dated March 29, 2001, the doctor noted faint, healing abrasions on both ankles of the victim. Therefore, this Court is of the opinion there is sufficient evidence on the record to show the victim had marks consistent with the testimony of Deputy Knight. Accordingly, Petitioner's argument is not valid.

In conclusion, this Court is of the opinion Petitioner's argument with regard to insufficient evidence is without merit. In *State v. Guthrie*, the West Virginia Supreme Court of Appeals held "when reviewing the sufficiency of the evidence to support a criminal conviction [it is necessary] to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

603
elements of the crime proved beyond a reasonable doubt." Syl. pt. 1, 194 W. Va. 657, 461 S.E.2d 163 (1995). In this case there was not a trial; however, the Court is of the opinion the evidence on the record was substantial in nature and sufficient to warrant the plea agreement Petitioner entered into.

Ground Two: Improper Conduct

Petitioner alleges the Prosecuting Attorney engaged in coercive and threatening behavior with the victim and her mother. Specifically, Petitioner alleges the Prosecuting Attorney threatened to prosecute the victim's mother or terminate the victim's mother's parental rights if the victim did not recant her initial recantation against Petitioner. As stated above in *Ground One* of this section, there is nothing in the record to show that the State of West Virginia engaged in any kind of coercive action toward the victim in this case. As stated above, the only person who discussed the recantation with the victim was Deputy Knight. Deputy Knight was the individual with whom the victim disclosed that she was coerced into making the written recantation that Petitioner had not assaulted her. Additionally, the telephonic evidence from the Central Regional Jail is uncontested. Therefore, Petitioner's argument fails as a matter of law.

Petitioner further argues the constitutional rights of the victim were violated because her parents were not present during the statements she gave. Petitioner has no standing to make this argument as he cannot assert the rights of the victim. As such this argument fails as a matter of law.

Accordingly this Court finds Petitioner argument with regard to Ground Two is without merit. There is nothing in the record to indicate prosecutorial misconduct.

Ground Three: Transcript Falsification

Petitioner claims the Prosecuting Attorney intentionally mis-transcribed the recording of the victim's statement taken on January 4, 2001. Specifically Petitioner claims the Prosecuting Attorney did not accurately transcribe the statement and did not make note of such error prior to presenting the same to the Grand Jury. Further Petitioner claims the Prosecutor intentionally transcribed the victim's statement incorrectly to make the Petitioner appear more guilty. The Court finds nothing in the record to indicate any malice or ill will on the part of the Prosecuting Attorney in Petitioner's case. Further, the Prosecuting Attorney provided both a copy of the transcript as well as a copy of the tape recorded statement to Petitioner and his counsel in discovery; therefore, any error could have been easily discovered and corrected prior to Petitioner's trial.

As such this Court finds Petitioner's argument to be without merit as there is nothing in the record to indicate the presence of prosecutorial misconduct.

E. JUDICIAL ERRORS

The Petitioner alleges three grounds in which judicial error resulted in the denial of his constitutional rights. Each allegation, and any sub-parts therein, will be discussed below.

Ground One: Evidentiary Rulings

Petitioner contends the trial court made two constitutionally erroneous rulings during the pre-trial phase of Petitioner's case. First, Petitioner contends the trial court erred in holding that the taped statement of the Petitioner taken on January 4, 2001, was proper and admissible at trial. Secondly, Petitioner claims the trial court erred when it found the search warrants obtained and

605
executed by Deputy Knight were proper and the evidence obtained pursuant to said warrants was admissible. The Court will further address each of these issues.

In reviewing challenges to findings and rulings made by a circuit court, appellate courts apply a two-pronged deferential standard of review: appellate courts review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and appellate courts review the circuit court's underlying factual findings under a clearly erroneous standard, but questions of law are subject to a de novo review. *State v. Keesecker*, 222 W.Va. 139, 663 S.E.2d 593 (2008).

In this case Petitioner claims that the taped statement taken on January 4, 2001, was inherently unreliable and the trial court erred when it allowed the State of West Virginia to use it in its case against Petitioner. Petitioner claims this violated his constitutional right to a fair and impartial trial as guaranteed by the Sixth Amendment of the United States Constitution. The testimony adduced at the Suppression Hearing held on August 24, 2001, showed that the tape recorder was set on voice activation mode during Petitioner's statement on January 4, 2001, and the only thing not recorded were silences that occurred during the interview. 8/24/01 *Suppression Hearing*, Pages 59-60. The voice activation mode was also the explanation for the numerous pauses found on Petitioner's taped statement. In reviewing this error, this Court must apply an abuse of discretion standard as the trial court was present for the presentation of the evidence and therefore the trial court's decision should be considered correct. The trial court's decision may only be reversed if there is clear abuse of discretion. In this case, the record reflects the trial court acted as it should have and thus a constitutionally erroneous error requiring reversal did not occur.

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Petitioner's second contention is the trial court erroneously found both search warrants obtained and executed by Deputy Knight were proper and the evidence obtained therefrom was admissible. The first search warrant was obtained on March 28, 2001, and was based on information that the Petitioner was engaging in correspondence with the victim in an effort to get her to recant her story. Petitioner claims there was no sufficient basis set forth in the search warrant, and the description of the evidence law enforcement was to search for was too vague. As such the search warrant should not have been issued. This argument was presented by Petitioner's counsel at the August 24, 2001 Suppression Hearing. The trial court found this argument to be without merit as the evidence obtained from this search was not going to be used in the State of West Virginia's case in chief. When reviewing this error, the Court must apply an abuse of discretion standard to determine whether reversible error occurred. The trial court heard all testimony and evidence relating to this case and its decision to find the search warrant dated March 28, 2001, proper, should be granted great deference. After reviewing the record this Court is of the opinion reversible error did not occur and therefore Petitioner's argument is without merit.

Petitioner also challenges the search warrant dated March 29, 2001, claiming this warrant was improperly issued because again Deputy Knight lacked sufficient justification to search Petitioner's residence for a white rope as she had a very vague description of the item and the description was obtained from the child victim. Petitioner claims Deputy Knight provided conflicting testimony regarding the white rope because during an in-camera abuse and neglect hearing, held in the companion case to Petitioner's underlying case, the victim testified she did not know where Petitioner kept the white rope while Deputy Knight testified the victim stated the rope was kept in the kitchen when she obtained the search warrant. During the August 24,

601
2001, Suppression Hearing the trial court found the warrant was validly obtained. As previously discussed this error must be reviewed under an abuse of discretion standard. This Court is of the opinion the trial court acted properly and as such Petitioner's argument is without merit.

Accordingly, Petitioner's argument as to Ground One fails. Petitioner has failed to establish the trial court abused its discretion in any manner and therefore has no valid claim as a matter of law.

Ground Two: Refusal of Continuance

Petitioner asserts the trial court improperly denied his request for a continuance to the next term of Court, thus violating his constitutionally protected rights. Petitioner claims he needed the continuance in order to have additional time to review discovery and prepare a defense. At the August 24, 2001, Suppression Hearing the Court addressed this motion to continue as follows (*8/24/01 Suppression Hearing Transcript, Page 86, Lines 9-21*):

THE COURT: Well, in regards to this matter, I mean this case has been going on now for some almost nine months. The defendant and his counsel have had available to him since, at a minimum, January the 12th, 2001, the confession that we heard today. The defendant has had available to them statements. They've been involved in the abuse and neglect case which was filed at the same time.

There may be a lot of discovery, but it's not information that hasn't been made available to the defendant for a number of months, I don't know of any good reason why this case should be continued. There has been adequate time to prepare

This Court is of the opinion the trial court acted within its discretion and fully examined the facts of the case before denying Petitioner's motion to continue. The record reflects that

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607

Petitioner had nearly nine months to perfect his case and therefore Petitioner was given adequate time to prepare his case. Accordingly, Petitioner's argument with regard to Ground Two fails.

Ground Three: Question of Actual Guilt upon Acceptable Guilty Plea

Petitioner argues there are significant questions regarding Petitioner's actual guilt and therefore the trial court should have further examined Petitioner's guilty plea. Specifically, Petitioner claims the conflicting testimony from Deputy Knight as well as conflicting testimony from the victim shows reasonable doubt did exist in his underlying case. Further Petitioner claims the January 4, 2001, recorded statement is inherently unreliable and therefore should not have been considered in Petitioner's case. All of these issues were addressed at the August 24, 2001, Suppression Hearing in which the Petitioner presented no valid evidence of conflicting testimony. Further the evidence adduced at that hearing demonstrated that the reason for the numerous pauses in the statement taken on January 4, 2001, was due to the recorder being placed on voice activation mode.

Further, even if this statement were found to be invalid, the Petitioner made inculpatory remarks to the victim's mother while he was incarcerated at the Central Regional Jail. Petitioner also was given a sexual offender evaluation in which Petitioner admitted to Dr. Ralph Smith that he had in fact sexually abused the victim on at least two occasions. When viewing the totality of the evidence against Petitioner, these statements help to establish Petitioner's guilt.

Additionally, the Petitioner was not required to take this plea and was in fact advised of such during his Plea Hearing. The trial court also questioned Petitioner's trial counsel as to whether he thought this agreement was in the Petitioner's best interest and trial counsel stated he thought it was. *9/6/01 Plea Hearing, Recorded tape.*

607

It should further be noted that it is not the Court's decision as to whether or not a defendant accepts a plea agreement. Accordingly, this Court finds Petitioner's argument to be without merit as Petitioner chose to enter into a plea agreement with the State of West Virginia after the trial court fully informed Petitioner of his right to trial.

F. GRAND JURY

Petitioner advances two grounds in which of the Grand Jury proceedings were highly prejudicial against Petitioner and thus resulted in a violation of Petitioner's constitutional due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and Article III § 10 of the West Virginia Constitution.

Ground One: Grand Jury Composition and Procedures

Petitioner alleges the transcript of the victim's statement used by Deputy Knight during the Grand Jury proceedings was inaccurate and resulted in improper charges against the Petitioner. Specifically Petitioner claims the transcript of the victim's statement read by Deputy Knight contained over 100 errors that were highly prejudicial to Petitioner and his case and therefore he was not judged on a fair and impartial basis.

The West Virginia Supreme Court of Appeals held in *State ex. rel. Miller v. Smith* that a grand jury's "primary responsibilities include the determination of whether there is probable cause to believe a crime has been committed, and protection of citizens against unfounded criminal accusations." 168 W.Va. 745 at 751, 285 S.E.2d 500 at 504 (1981). In Petitioner's case there were cumulative amounts of evidence, other than the victim's statement, presented to the grand jury establishing probable cause that Petitioner did in fact assault the victim. The testimony presented was not so misleading as to require reversal by this Court.

Accordingly this Court is of the opinion the Grand Jury in Petitioner's case upheld its essential duty to protect the accused against false charges, as the Prosecuting Attorney produced enough evidence to establish probable cause that a crime had been committed. Thus Petitioner's argument fails as to Ground One.

Ground Two: Defective Indictment

Petitioner asserts that there were defects in the indictment that were so prejudicial as to require the indictment be dismissed. Specifically Petitioner claims the indictment did not contain specific dates for each of the offenses Petitioner was indicted for; therefore, Petitioner could not prepare adequate defenses in violation of his constitutionally protected due process rights.

The Court finds this argument to be contrary to the laws of the State of West Virginia. "Although [a] challenge to [a] defective indictment is never waived, the Supreme Court of Appeals literally will construe indictment in favor of validity where [a] defendant fails timely to challenge its sufficiency; without objection, indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge [an] offense under West Virginia law or for which defendant was convicted." *State ex rel. Thompson v. Watkins*, 488 S.E.2d 894, 200 W.Va. 214 (1997), Rules Crim. Proc., Rule 12(b)(2). In Petitioner's case he failed to timely object to the indictment as this is the first time Petitioner has addressed this issue. Further the indictment in Petitioner's case will likely be upheld as Petitioner was charged with an offense recognizable under the laws of West Virginia and the Prosecutor obtained reasonable evidence to establish Petitioner's guilt for such offense.

Further the West Virginia Court of Appeals upheld a variance of over thirteen months between the dates alleged in the indictment and the dates set forth at trial in *State v. Reed*, 514 S.E.2d 171, 204 W.Va. 520 (1999). In Petitioner's case, the indictment contains both the month

and the year for each count of the indictment, it is merely lacking exact days. Accordingly, the dates found in Petitioner's indictment are within the standard accepted in the State of West Virginia.

Accordingly, Petitioner's argument with regard to Ground Two fails.

IV. CONCLUSION

It is therefore **ADJUDGED** and **ORDERED** that the guilty verdicts against the Petitioner are valid, and Petitioner is not entitled to have the verdicts set aside.

It is **ADJUDGED** and **ORDERED** that the following sentences imposed in 01-F-24, are **AFFIRMED**, to wit:

As to Count Twenty-Seven, Sexual Assault in the Second Degree, the Petitioner is sentenced to the penitentiary for a term of not less than ten (10) years but not more than twenty-five (25) years.

As to Count Thirty-Two, Incest, the Petitioner is sentenced to the penitentiary for a term of not less than five (5) years but not more than fifteen (15) years.

It is further **ADJUDGED** and **ORDERED** that Counts Twenty-Seven and Thirty-Two run consecutively. The Petitioner shall receive credit for all time served, as set forth in the Sentencing Order in 01-F-24.

It is further **ADJUDGED** and **ORDERED** that this matter be dismissed and stricken from the active docket of this Court.

The Petitioner's objections and exceptions are noted.

The Clerk of this Court shall send certified copies of this Order to counsel of record.

Enter this 7 day of April, 2011.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office

Attest: Jeanie Moore
Webster County, West Virginia

By [Signature]
Deputy Clerk

[Signature]
JUDGE JACK ALSOP