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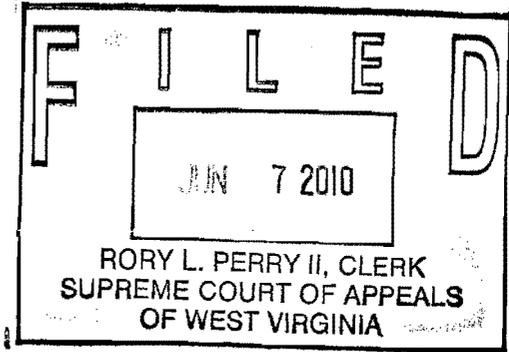
IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
STATE OF WEST VIRGINIA,

Plaintiff Below/Appellee

v.

SANDY MARTIN COOK,

Defendant Below/Appellant



BRIEF OF APPELLANT

Submitted by:

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Preliminary Statement

The first issues herein raised concern the Fifth and Sixth Amendment rights of an accused. More particularly, Mr. Cook stands convicted of crimes which were alleged to have occurred “within” 15 to 17 years pre-indictment. Moreover, after Mr. Cook was charged with these crimes by way of an arrest warrant, but before the indictment was returned some twelve (12) months later he lost the most important potential witness who could support his defense. In fact, she died approximately two (2) months before the indictment was returned.

Mr. Cook urges this Court to reverse and remand this case on grounds among others that his motions to dismiss the charges against him were not considered under the rules set forth in State ex rel. Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009). Mr. Cook further urges this Court to revisit the issues raised in Knotts and to expand the protections afforded against prosecutions which are based upon charges made years after the events are alleged to have taken place. Mr. Cook contends that criminal charges that are first brought about events alleged to have taken place at non-specific times many years previously by necessity infringe upon the accused’s right to remain silent. Moreover, such stale charges have a significantly adverse impact upon defense counsel’s ability to offer an effective defense. While these matters are in ways arcane, to the accused and his counsel they are poignant.

I. Kind of Proceeding and Nature of Ruling

Mr. Cook was convicted in the Circuit Court of Kanawha County of 16 counts of violating West Virginia Code §§ 61-8B-5 and 61-8D-5, which are respectively sexual assault in the third degree and sexual abuse by a parent, guardian or custodian. The Court sentenced Mr.

Cook to a term of not less than 20 and up to 60 years in prison by running four (4) convictions under §61-8D-5 consecutively¹ and making other sentences run concurrent.

Most of the issues presented in this appeal were argued and ruled upon in pretrial motions while a few are trial errors. At a hearing conducted on February 24, 2009 the Circuit Court denied Mr. Cook's Motion to Dismiss Based Upon Gross and Extreme Pre-Accusation Delay, R 278-284, 447-450 (State Response) and R 700, T 107-110, 121-122, 137-142. The trial court denied the motion by concluding that "[t]his is not a situation where the State knew about the charges . . . for 15 or 17 years and sat and did nothing about it" and "the current status of the law is . . . if this delay was to gain some tactical advantage . . ." T 140.

The Circuit Court likewise considered and denied Mr. Cook's Motion to Dismiss Based Upon Delay Between Initial Accusation and Return of Indictment, R 291-293, 495-499 (State Response), and R 700 T 135-137. The Court reasoned that "there is nothing to indicate that [the delay] is presumptively prejudicial, which means . . . it would be unnecessary to consider the other factors to make a determination about undue delay. However, [given the loss of defendant's mother] I still find, giving consideration to the length of the delay, the reasons for it . . . that the delay does not mandate that this matter be dismissed," T 136-137.

At pretrial hearings Mr. Cook moved and unsuccessfully argued that the counts alleging violations of § 61-8D-5, R 285-290, R 700, T 116-120, 133-135 should be dismissed as embracing *ex post facto* interpretations of the law as embodied in applications and concepts which came into existence after the dates of the alleged crimes. This issue was also raised during trial and in post trial motions.

¹Due to the crime dates alleged the sentence then available under §61-8D-5 was 5 to 15 years.

Other errors relied upon in this appeal will be addressed *in seriatim* as they were ruled upon by the court below.

Statement of Facts of the Case

Sandy Martin Cook was 50 years old when this case was tried. If the unspecified dates contained in the indictment are assumed he would then have been a man in his early-30s. Mr. Cook is a well-respected registered nurse, the former director of the cardiac cath lab at CAMC, Memorial Division in Charleston, and the long-time pastor of the Shrewsbury Church of God, see Witness Testimony, T 588-590, 600-601, 644-645, and 681-686. At sentencing the Court noted the “voluminous stack” of letters of support and the favorable report submitted by psychologist Dr. David Clayman, R 705 T 15-18. Mr. Cook was described as a hard-working man of charity who diligently tended to the well-being of both his church parishioners and his hospital patients.

On September 3, 2007 an arrest warrant was issued charging Mr. Cook with 44 counts of sexual assault in the third degree and 3 counts of sexual abuse by a person of trust,² R 114. The date of crime set forth in the warrant was January 1, 1994 which later would appear as a fiction. A search warrant followed, R 174. That warrant was promptly executed in which many items were seized including video tapes, a computer, photographs and camera. Nothing suggestive of any criminal activity was found and of course none of these seized items was used as evidence at trial, see property seized, items sought, and “facts” said to support the search and seizure, R 175-196. On September 11, 2007, Mr. Cook waived a preliminary hearing. On September 19, 2008, a Kanawha County grand jury returned a 22 count indictment accusing Mr. Cook of sex crimes

²As noted elsewhere herein the “person of trust” part of § 61-8D-5 was enacted in 2005.

against four (4) person, R 1(the indictment incorrectly numbers 23 counts, having omitted number 22).

The indictment follows the pattern of naming an alleged victim who is then included in a consecutive sequence of counts, which charge violations of § 61-8D-5 mixed with alleged violations of § 61-8B-5. Counts 1 through 8 name as the victim José Strickland. Counts 9 through 12 name Michael Bradley. Counts 13 and 14 name David Mullins and Counts 14 through 23 (22) name Michael Lewis. The dates of the alleged crimes are no more certain than being “within 15 years” or “within 17 years” of the indictment.

The first witness to testify at trial was José Strickland. Mr. Strickland is the accuser who is named in the first eight (8) counts of the indictment. Of those, counts numbered 7 and 8 were dismissed by the State before trial. Mr. Strickland was a member of Mr. Cook’s church, the Shrewsbury Church of God. A photograph of his baptism was admitted as State’s Exhibit No. 2, R 700, T 236. Mr. Strickland described conversations with Mr. Cook concerning “sexual matters,” T 237 and claimed that Mr. Cook masturbated him at a time when they were in Mr. Cook’s van, T 238. He also alleged acts of oral sex in the van when he was age 13 or 14, T 39, 41-42. Strickland stated that he told no one about these allegations until August of 2007 when he told his wife, T 244. He attributes that to an epiphany which he had while on a vacation trip to the beach, T 246-248.

On cross-examination Strickland acknowledged being very close to another accuser, Michael Lewis, T 253. In fact, during cross-examination Strickland acknowledged that he was with Lewis at Lewis’ church during July of 2007 which was shortly before the accusations first emerged, T 223, 225. Strickland also acknowledged having invited Mr. Cook to his graduation

from the Navy and thereafter he acknowledges going to the Shrewsbury Church of God when he returned from the Navy. Significantly, in regards to the issues raised in this appeal Strickland acknowledged (while the State is claiming custodial status) that the acts which he accuses Mr. Cook of are alleged to have occurred in a van and not in any situation in which Cook was acting as his babysitter, T 280-282. Though Strickland was married and had several children his employment and living situation was erratic, T 254-255, 257, therefore he began asking people in the church for money which at some point was denied him, T 288. Moreover, he became angry with Mr. Cook when Mr. Cook refused to give him any further funds and when Mr. Cook told him "you should go get a job," T 289-290.

State Trooper Malcolm Napier next testified. He was the investigating officer. His testimony was limited to describing his meeting with Mr. Strickland who "showed up" at the Quincy Detachment, T 292-293 and thereafter going to see accuser Michael Lewis, T 294, and then contacting accuser Michael Bradley, T 296-297. On cross-examination Trooper Napier acknowledged that he was unaware of the close relationship between accuser Strickland and accuser Lewis and certainly unaware that they had been together at a time which was shortly before he met them in the course of his investigation, T 303-304. In fact, Trooper Napier also indicated that he was not aware that accuser Michael Bradley had indicated in his videotaped statement given to an Ohio policeman that he had previously talked to accuser Lewis, T 312. A search and seizure involving Mr. Cook's computer, camera and residential premises yielded no incriminating evidence, T 308-309.

Accuser Michael Lewis denied his contact with Bradley, R 702, T 324. Mr. Lewis claimed that things with Mr. Cook began with "sexual questions," T 328 and that he saw

pornography at Mr. Cook's parsonage, T 331. The alleged sexual misconduct began at what was referred to as the old parsonage, T 332 and thereafter proceeded to the vehicle although predominantly it was alleged to have been at the parsonage, T 334. Lewis claims that it began when he was age 12 in 1991, T 335. He described acts of oral sex at the old parsonage and in Mr. Cook's van when parked in a secluded area and occurring as often as once or twice per week, T 338-339. Lewis indicated that Mrs. Cook and, in fact, the accused's late father lived with Mr. Cook during the times of these alleged events, T 343-345. He says that he (Lewis) moved into the new parsonage in March of 1995, T 347. He was very close to the late Mrs. Cook, T 348 and Mr. Cook referred to him as "a son," T 344. Mr. Lewis claims that the abuse stopped when he was 16 or 17 years old around 1995 or 1996, T 352-358. It is noteworthy that Mr. and Mrs. Cook and Mr. Lewis and his wife Amanda were married together in a double ring ceremony, T 362. Various letters between these parties were offered into evidence, T 366.

On cross-examination Mr. Lewis admitted taking Mr. Cook's money which he called the church's money, T 372. Later testimony revealed that he had received \$2,000 from Mr. Cook to help him and his wife to release him from a real estate transaction in Pennsylvania, R 703, T 752.

After his return from Pennsylvania Mr. Lewis worked at the Shrewsbury Church of God. The Shrewsbury Church of God served as the "mother church" to a new outreach which became known as the New Life Center Church, T 374-376. Eventually, this new church became Mr. Lewis' church after a rift developed between Mr. Lewis and Mr. Cook, see Avowal T 383-384. Mr. Lewis acknowledges that he and Mr. Cook had meetings with the Church of God state officials and another meeting with the Peyton Law Firm concerning ownership of property, part of which became Mr. Lewis' church site. Mr. Lewis however denied on cross-examination that

he had told Mr. Cook that he expected to take over Mr. Cook's church. The meeting with the state Church of God officials was described as being tense, T 379-380. There is no disagreement about the fact that Mr. Lewis' relationship ended with the Shrewsbury Church of God and that he then began the New Life Center Church, T 386.

Mr. Lewis denied that he had told Trooper Napier that the first act of sexual abuse occurred in Mr. Cook's Chevrolet Astro van which would contradict his trial testimony that it occurred at the old parsonage, T 393-394. Trooper Napier was recalled as a part of the defense presentation at which time a tape recording of the trooper's interview of Mr. Lewis was played. The tape recording indicates that Mr. Lewis told Trooper Napier that it "really began in his vehicle," T 680-681.

Mr. Lewis states that he was abused when Mrs. Cook was living at her son's parsonage and even at times when Mrs. Cook was staying 5 to 6 feet away from Mr. Cook's room at the parsonage, T 398-399.

Mr. Lewis specifically denied being with José Strickland in the months of July or August of 2007 and denies having talked to accuser Michael Bradley before Mr. Bradley's statement was taken by an Ohio policeman at the request of Trooper Napier.

A series of defense exhibits was then introduced through Mr. Lewis, Defendant's Exhibits 3, 4, 5 and 6. These exhibits are cards and one (1) paper written by Mr. Lewis either to or about Mr. Cook. Exhibit 2 is a paper submitted at age 15 when Mr. Lewis was in the ninth grade describing "My Hero," T 415. The Defendant's Exhibits 3 and 4 are Birthday and Father's Day cards sent by Mr. Lewis and Mr. Lewis' wife to Mr. Cook, T 419, 424, 426, 430. In an exhibit which is identified as Exhibit 6 Mr. Lewis states that "Thank you for your influence in

my life . . . I love you.” A series of cards and letters from Mr. Cook to Mr. Lewis were introduced during Mr. Lewis’ testimony, State’s Exhibits 4 through 10, T 365.

The State presented Kevin McDowell, a state police forensic document examiner, T 459. There was no objection to, and no cross-examination of, Mr. McDowell. He testified that the handwriting on the cards which are State Exhibits 4 through 10 was that of Sandy Cook, T 465.

The next witness to testify was Michael Bradley. The allegations involving Mr. Bradley are contained in Counts 9 through 12 of the indictment. Mr. Bradley is a resident of Ohio. When he lived in eastern Kanawha County he went to church at the Shrewsbury Church of God, T 478. He also went on trips with the church youth, T 479. Mr. Bradley described his home life at the time of his teenage years as difficult as his dad was “a drunk and had drug problems, and him and my mom fought a lot,” T 484. Mr. Bradley testified that in late 1994 when he was age 14 or 15 he spent a couple of nights at the parsonage, T 480. The accused’s mother Mrs. Cook was living there at the time. Bradley says that Mr. Cook crawled into his bed and performed oral sex, T 481. Bradley described a second incident after which he claimed he told his girlfriend, Paula Farley who is now deceased, T 486-487. His girlfriend’s father was minister Paul Farley. Reverend Farley called a meeting with church officials, T 490-491. What happened at that meeting was a source of disputed testimony during this trial.

On cross-examination Mr. Bradley acknowledged that Mr. Lewis had called him, T 493 and put the time at being after Trooper Napier telephoned him, T 494. He indicated that calls were made both ways, T 494 and that there may have been as many as two (2) to four (4) calls, T 496.

The last witness to testify during the State's case in chief was Reverend Paul Farley. Reverend Farley testified about attending a meeting with the state Church of God overseers concerning Bradley's accusations against Mr. Cook. That meeting was said to have taken place in October of 1994, T 515. He described the meeting in general terms and stated that both Mr. Bradley and Mr. Bradley's mother were unwilling to sign an accusation against Mr. Cook, T 516-517. Both the Bradleys and the Cooks attended, including Mr. Cook's late mother, T 519-520. Mr. Bradley's accusations then centered on a claim that he was molested in a jacuzzi and that there were three (3) incidents involving "a hand in the pants," T 524-525.

Following the Defendant's motion for judgment of acquittal, T 532-542, Mr. Cook began calling witnesses during his case in chief, T 548.

Virginia Bowe who is now deceased testified from a nursing home where she has lived for the last five (5) years, T 550. She was the record keeper at the Shrewsbury Church of God and has known Mr. Cook for ten (10) to twelve (12) years, T 551. Mrs. Bowe testified that she knew both José Strickland and Michael Lewis, T 555. As the clerk she was asked by José Strickland to pay his utilities which was something she ultimately discontinued, T 561. She testified that he was mad about that. Mrs. Bowe testified that it was her opinion that neither Lewis nor Strickland had a good reputation for telling the truth, T 558-560. Moreover, when Mr. Lewis returned from Pennsylvania "he had the attitude that he was taking it all over and it was his church," T 557.

Mary L. Asbury of Dunbar, West Virginia testified that she began attending the Shrewsbury Church of God in 1991, T 572. At one time she was head of the ladies ministry at the church and in 2004 she started taking care of the general fund and the youth fund and

thereafter the general account, *id.* After Mr. Lewis returned from Pennsylvania she became upset by the belligerent manner in which Mr. Lewis “talked down to Sandy,” T 577-578. She noted that there was friction or deterioration at the church and that Mr. Lewis “pretty much wanted his way . . . he would persist until he did [get his way],” T 578. She described Mr. Lewis as forceful and controlling, *id.* Like Mrs. Bowe she did not believe that either Mr. Lewis or Mr. José Strickland had good reputations for truthfulness, T 579, 581.

Lina Mae Hodge is a long-time resident of Shrewsbury who also attended the church of which Mr. Cook was pastor and lived across the railroad track from it, T 588. She took care of the cleaning of the parsonage where accuser Lewis claimed he saw pornography. She cleaned that parsonage and said she never saw any pornography during the same time frame as Lewis’ accusations cover, T 597.

William E. Hodge, III, Mrs. Hodge’s grandson, testified that he lives three (3) houses down the street from his grandmother in Shrewsbury, T 600. He is an RN at CAMC. He was a member of the youth group at the Shrewsbury Church of God at the same time as accuser Lewis, T 601-602. He also was in the old parsonage up to the time frame of 1995, T 603-604. He never saw any evidence of pornography and reaffirmed that he was also familiar with the reputation of truthfulness of both José Strickland and Michael Lewis, neither of which was a good reputation, T 605-606. He also recalled that Mr. Cook’s mother and his father lived at the old parsonage during the time frame that Mr. Lewis accuses Mr. Cook of his crimes, T 607.

Larry Allen Rhodes, Jr., is a resident of Shrewsbury and formerly attended the Shrewsbury Church of God, T 614-615. He was a member of the youth group during the same time period as accusers and at the same time period as the Hodge family, T 617. He was in the

old parsonage on many occasions and described the layout of that premises for the jury, T 619-621. He confirmed that Mr. Cook's parents were living there with him, T 622. He saw no pornography in the old parsonage, *id.* and was well acquainted with José Strickland in that Mr. Strickland is married to his half-sister, *id.* Mr. Rhodes has known Mr. Lewis for "pretty much my whole life," T 624 and they used to be good friends. He testified that he would not believe either Strickland or Lewis, T 624.

Scott Hannigan was another witness who was a long-time resident of the Shrewsbury area, attended Shrewsbury Church of God and was a part of the same youth group as accusers and other witnesses, T 629-633. In all of the time that he had been in the presence of Mr. Cook and his accusers he never saw anything which seemed inappropriate, T 635.

Witness P.J. Hodge is a Kanawha County Deputy Sheriff, T 640. He was a member of the youth group at the Shrewsbury Church of God, was in the parsonage with Mr. Cook, never saw any pornography even though he was in the old parsonage and spent the night there at the same time as Lewis for 20 or 30 times, T 644. Deputy Hodge testified that Mr. Cook is an honest and hardworking person that you could go to for "any type of advice," T 644-645.

Crystal Staton is the niece of Sandy Cook and the granddaughter of Sandy's late mother, T 647-648. She testified about the parsonages where her grandmother lived and where her grandfather stayed during his illness, T 648-649. She described the premises and the fact that there was no pornography in her grandmother's house, T 650.

The Reverend Paul Farley returned to the witness stand to correct a mistake in his testimony during the State's case in chief, T 653. He recalled the meeting at the state Church of God in which the state overseer met with Mr. Lewis and Sandy Cook when Mr. Lewis was trying to start a church, T 656-657.

Donna Wattie is employed at Kroger's as the manager assistant where she has worked for 29 years, T 662. She was a member of the Shrewsbury Church of God during times when Mr. Lewis and Mr. Cook were both there. She described discord in the church and a conflict between Mr. Lewis and Mr. Cook which grew worse over time, T 667-668.

Trooper Napier was recalled as a witness at which time he played the tape recording of his meeting with Mr. Lewis, T 676-678. Specifically, the tape indicated that Mr. Lewis claimed in his interview that sex began in Mr. Cook's vehicle as opposed to at the parsonage which was his account at trial, T 680.

Dr. Howard James Stanton, a Charleston cardiologist testified as a character witness for Mr. Cook, T 681-685. Dr. Stanton testified that Mr. Cook is held in very high regard and he had known Mr. Cook from his work for about 20 years. Specifically, Dr. Stanton's opinion was that Mr. Cook is very truthful, T 685.

Sandy Martin Cook testified in his own behalf, T 686. Mr. Cook described the parsonage where his mother and father had lived as referred to as the old parsonage, T 690 and he described the Chevrolet Astro van which he bought on August 7, 2002 which was "low to the ground," thereby making accusations about driving into wooded areas unlikely," T 703. He moved into the new parsonage as did his mother in 1994, T 706. His mother died on July 17, 2008, T 713.

Mr. Cook's mother lived in the room which was right next to his in the new parsonage, T 715. With reference to the Bradley accusation Mr. Cook recounted that Bradley accused him of having sex in the jacuzzi when the matter first came up and that at the meeting with church officials it was established that the jacuzzi was not even functioning at the time of the claimed sexual assault, T 717. He also described the thin walls at the new parsonage, T 718 and

introduced a photograph of the double wedding with accuser Lewis and Lewis' wife, Defendant's Exhibit 11, T 720-721.

With respect to accuser José Strickland, Mr. Cook indicated that Mr. Strickland showed up at the church around 1995 and at no time did Mr. Strickland spend the night at the parsonage with him, T 723-724. Mr. Strickland was supported by the church with utility payments, food, diapers for his children, among other things which Mr. Cook also personally helped pay for, T 725. In fact, Mr. Cook performed José Strickland's marriage, T 727. It was in July of 2007 when Mr. Cook refused to give any more money to José Strickland which resulted in Strickland's getting angry, T 733-735.

Mr. Cook testified that Mr. Lewis moved into the new parsonage with Mr. Cook and his mother in early 1995 just before Lewis' 16th birthday, T 736-736. He remained there as a resident until they both married on December 11, 1999, T 739. He described Mr. Lewis as being like a member of his family as he bought Lewis a car after he had turned 16 and he and his mother bought Lewis clothing, T 746-747. In fact, he gave Mr. Lewis \$2,000 to help him return from Pennsylvania and "get out of the house deal," T 752. Mr. Cook denied ever having possessed pornography, T 748.

Mr. Cook testified that he and Mr. Lewis had what he described as a big fight in January of 2006 surrounding the meeting with church officials in Beckley, T 759. In fact, according to Mr. Cook, their disagreement became very heated probably as early as September of 2005 after which Mr. Cook said "I was going to wash my hands of it, because I was so tired of it," T 758. Accuser Lewis knew of the Bradley accusation, T 762.

The State called two (2) witnesses in rebuttal who testified about their belief concerning Michael Lewis' good reputation for veracity, T 781-799.

III. Assignment of Error and Circuit Court's Rulings Below

Mr. Cook relies upon the following errors in his appeal:

1. The Court below committed prejudicial error when it denied Mr. Cook's Motion to Dismiss Based Upon Gross and Extreme Pre-Accusation Delay, R 700 T 137-142.

a. Subsequently, but while this case was pending this Court decided in State ex rel Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009). The rule relied upon by the Circuit Court below was overruled, see Knotts, syl. pts. 2 and 3 expressly overruling State ex rel Leonard v. Hey, 269 S.E.2d 394 (1980) and Hundley v. Ashworth, 382 S.E.2d 573 (1989).

b. In that a constitutional principle is involved it should be applied retroactively. Mr. Cook fully raised and argued the issue in conformity with the ruling in Knotts, Adkins v. Leverette, 239 S.E.2d 496 (1977) syl. pt. 1.

The Court below rendered its decision based upon the very principles stated in the now overruled cases.

2. The Court below committed prejudicial error when it denied Mr. Cook's Motion to Dismiss Based Upon Delay Between Initial Accusation and Return of Indictment, R 700 T 135-137.

a. This Court in State ex rel Knotts v. Facemire, *supra* overruled State ex rel Leonard v. Hey which had found *prima facie* prejudice from a prosecution delay of eleven years.

The Court below, relying upon its interpretation of U.S. Supreme precedent and Leonard, concluded that because there was nothing presumptively prejudicial in the length of delay between first allegation and the time of indictment, rejected Mr. Cook's motion to dismiss.

3. The Court below committed prejudicial error when it denied Mr. Cook's Motion to Dismiss all charges under West Virginia Code, Chapter 61, Article 8D, Section 5 in that his convictions of these particular charges rested upon principles not extant at the time of the acts alleged. As a consequence, due process rights which embrace *ex post facto* concepts were infringed, R 700, T 116-119, 132-135.

The Court below revisited this question at the close of the State's case in chief when the Court addressed the Motion for Acquittal, again rejecting Mr. Cook's argument that the legal standards and definitions being relied upon did not exist at the time of the alleged acts, T 533-542.

4. The Court committed prejudicial errors in various evidentiary rulings, the cumulative effect of which deprived Mr. Cook of a fair trial.

The Circuit Court twice prevented counsel from addressing or in any way mentioning the dismissed counts of the indictment, even though they reflected a prior inconsistent statement by an accuser, T 223-226, 258-263.

In a similar vein the Court prohibited questions on cross-examination of another accuser designed to develop significant changes in his story, T 500-503.

The Court prevented questions of a defense character witness to the effect that Mr. Cook had a good reputation as a law-abiding citizen, T 635-638.

The Court also overruled defense objections to the prosecutor's improper questions asked of Mr. Cook during his cross-examination, T 767-768, 776-777.

5. Mr. Cook's sentence is disproportional in violation of West Virginia Constitution Article III, Section 5.

In spite of the “voluminous stack” of letters of support, the character evidence presented at trial and the favorable report from Dr. Clayman, the Circuit Court ordered that Mr. Cook spend at least 20 years in prison. This sentence ignores the fact that the dates alleged in these charges were distant and that there was no evidence whatsoever of any wrongdoing for the years more recent than the non-specific times in the early 1990s.

IV. Points and Authorities, Discussion of Law and Relief Prayed For

A. Points and Authorities

1. The Prosecution of These Charges Contravened Mr. Cook’s Due Process Rights As Protected By the U.S. Constitution 5th Amendment and the West Virginia Constitution, Article III, Section 10.

Barker v. Wingo, 407 U.S. 514, 532 (1972)
Gregory v. U.S., 369 F.2d 185 (D.C.Cir. 1966)
Humble Oil & Refining Co. v. Lane, 152 W.Va. 578, 165 S.E.2d 379 (1969)
Hundley v. Ashworth, 181 W.Va. 379, 382 S.E.2d 573 (1989)
Myers v. Painter, 213 W.Va. 32, 576 S.E.2d 277 (2002)
People v. Avery, 377 N.E.2d 1271 (Ill. 1978)
State v. Hickman, 338 S.E.2d 188 (1985)
State ex rel Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009)
State v. Lee, 653 S.E.2d 59 (S.C. 2007)
State ex rel Leonard v. Hey, ___ W.Va. ___, 269 S.E.2d 394 (1980)
State v. Mussehl, 408 N.W.2d 844 (Minn. 1987)
U.S. v. Cornielle, 171 F.3d 748 (2nd Cir. 1999)
U.S. v. Fernandez, 780 F.2d 1573 (11th Cir, 1986)
U.S. v. Sabath, 990 F.Supp. 1007 (N.D. Ill 1998)
Michie’s Juris. Limitation of Actions § 2
Cal. Penal Code, § 801
H.R.S. § 707-730
R.S.Neb. § 29-110(2)
La. R.S. Art. 571.1
ABA Standards on Criminal Justice § 3.3.1(c) (1982)

2. The Prosecution of These Charges Contravened Mr. Cook’s Right to a Prompt and Speedy Trial as Protected by the West Virginia Constitution, Article III, Section 14 and the U.S. Constitution, 6th Amendment.

Barker v. Wingo, 417 U.S. 514, 523 (1972)
State v. Foddrell, 171 W.Va. 54, 297 S.E.2d 829 (1982)
State v. Jessie (No. 34589 11-24-09)
State ex rel Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009)
State ex rel Leonard v. Hey, *supra*

3. The Application of Definitions Rules or Legal Principles Not in Existence at the Time of the Alleged Acts for Which Mr. Cook Is Convicted Violates Due Process.

Bouie v. City of Columbia, 378 U.S. 347 (1964)
Marks v. U.S., 430 U.S. 188 (1977)
State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
W.Va. Dept. of Human Services v. Boley, 358 S.E.2d 438 (1987)
West Virginia Code, § 49-1-5(5)
West Virginia Code, § 61-8D-1(4)
West Virginia Code, § 61-8D-5

4. The Cumulative Effect of the Court's Erroneous Evidentiary Rulings Was to Deny Mr. Cook a Fair Trial.

State v. Cecil (No. 33298 11-21-07) ___ S.E.2d ___
State v. Jackson, 181 W.Va. 447, 383 S.E.2d 79 (1989)
State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989)
State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972)
Cleckley, Handbook on Evidence for West Virginia Lawyers p. 271 (3d ed.)

5. Mr. Cook's Prison Sentence Violates the Proportionality Principle of West Virginia Article III, Section 5.

State v. Adams, 565 S.E.2d 553 (2002)
State v. Houston, 273 S.E.2d 375 (1980)
State v. Lewis, 447 S.E.2d 570 (1994)
State v. Watkins, 590 S.E.2d 670 (2003)
West Virginia Constitution, Article III, Section 5
West Virginia Code, §61-2-3
West Virginia Code, §61-2-4
West Virginia Code, §61-2-10a
West Virginia Code, §61-2-28(d)
West Virginia Code, §61-3-14(a) and (b)
West Virginia Code, §61-8D-5
Idaho Code §18-1506 (Michie 2005)
Ky. Rev. Stat. Ann §510.120 (Michie 2004)

La. Rev. Stat. Ann. §14:81.2 (West 2005)
Ohio Rev. Code Ann. §2907.03 (West 2005)
Ohio R.C. 2929.14 and 2929.18
Va. Code Ann. §18.2-370.1 (Michie 2005) and §18.2-10
Va. Code Ann. §18.2-371 (Michie 2005)
Marosco, The Prosecution and Defense of Sex Crimes, Chapter 12A

B. Discussion

1. **The Prosecution of These Charges Contravened Mr. Cook's Due Process Rights As Protected By the U.S. Constitution 5th Amendment and the West Virginia Constitution, Article III, Section 10.**

The Circuit Court overruled Mr. Cook's Motion to Dismiss Based Upon Gross and Extreme Pre-Indictment Delay, however when doing so, the Court delivered the following prescient remarks:

“And if I haven't stated it on the record, I find that although there's been much delay in the reporting of these alleged acts, there is no delay to gain a tactical or otherwise advantage. Quite frankly, the delay that has occurred in this case is delay that your courts have not given us a lot of guidance on. We have the fact that there is no statute of limitations on a felony, but the courts have not given us a lot of guidance on delay where that delay results in the reporting of the accusation, not delay between accusation and indictment or delay by law enforcement once the accusation has been made and the bringing of the actual charge.

And so, perhaps at some point, other than there just being a statute of limitations on a felony, perhaps our courts will give us some guidance on that type of delay because we are seeing more and more of these types of cases, particularly in the areas of sexual-abuse and sexual-assault allegations by folks who were children at the time the alleged acts occurred. Perhaps we'll get some guidance. But right now there simply is not much guidance in the law on delay in a person reporting allegations to a law enforcement or prosecutorial agency.” T 141 (Emphasis added).

Of course, the Circuit Court was then guided in its rulings by this Court's precedent in Hundley v. Ashworth and State ex rel Leonard v. Hey. The Circuit Court's remarks occurred on February

23, 2009. On June 5, 2009 this Court handed down its opinion in State ex rel Knotts v. Facemire, *supra* which overruled the above-named cases and provided needed guidance which the Judge had alluded to.

Counsel submits the following in view of the prejudice which accrues to an accused due to the inordinate passage of time and due to this Court's opinion in Knotts. The prejudice to the accused impairs his ability to defend himself, denies him opportunities to show the trial court what evidence has been forever lost, Barker v. Wingo, 407 U.S. 514, 532 (1972) (. . . what has been forgotten can rarely be shown), negatively impacts counsel's ability to defend, reduces the options of available defenses *e.g.* virtually no chance for an alibi defense exists, and increases exponentially the necessity that the defendant must testify at trial.

The foregoing problems existed in this case at the time of trial and are manifest in the record. However, the Circuit Court and Mr. Cook did not have the benefit of this Court's ruling in Knotts. As a consequence, Mr. Cook's conviction must be reversed so that Mr. Cook's motion can at a minimum be considered under the principles set forth in Knotts. Further, this Court is respectfully asked to extend the matters considered when addressing the motion to dismiss beyond those stated in Knotts so that trial courts can address both 6th Amendment effective assistance of counsel concerns and the 5th Amendment compulsion to testify versus the right to remain silent.

The Knotts Decision

This Court's opinion in Knotts requires that the defendant show actual prejudice in order to establish a claim that pre-indictment delay violates due process, syl. pt. 2. Once the defendant meets his initial burden by showing actual prejudice caused by the delay the court must then

balance the resulting prejudice against the reasonableness of the delay, syl. pt. 3. The core inquiry for the trial court is whether the State's decision to prosecute after such substantial delay violates fundamental notions of justice or the community's sense of fair play, *Id.* The test is whether the defendant has introduced substantial evidence of actual prejudice proving that he was meaningfully impaired in his ability to defend the charges to such extent that the disposition of his case was or will be likely affected, syl. pt. 4.

Like Mr. Cook's situation, Mr. Knotts was accused of committing multiple sex crimes albeit many more than Mr. Cook. The delay was at least 13 years. As alleged in the case of accuser Bradley herein, it was said in Knotts that the parents of the alleged victim did not want to prosecute, T 517.

In Knotts this Court cited with favor the decision in State v. Lee, 653 S.E.2d 59 (S.C. 2007). The court there found that Mr. Lee had established actual substantial prejudice due to the pre-indictment delay. Similar to our case, the allegations against Mr. Lee were that he had sexually abused two stepdaughters. The delay was 12 years. Critical to the Lee court's decision was the loss of evidence in the form of Social Services' reports. Mr. Lee, like Mr. Cook, lacked the ability to adequately cross-examine witnesses due to the absence of contemporaneous evidence. Moreover, like Mr. Cook, Lee's access to exculpatory evidence was lost.

Other cases cited in Knotts have much in common with the case *sub judice*. One court found that actual prejudice may be demonstrated by the loss of documentary evidence or the unavailability of a key witness, U.S. v. Cornielle, 171 F.3d 748 (2nd Cir. 1999). In another, the combination of lost evidence, impaired memories and deceased key witnesses may be deemed to constitute actual substantial prejudice, U.S. v. Sabath, 990 F.Supp. 1007 (N.D. Ill 1998). These

same factors exist in Mr. Cook's case and were presented to the Circuit Court below, R 280-284. Four (4) persons, each of whom could have been a key trial witness were now dead, physical evidence was unavailable, records were missing and witnesses with temporal connections to the accusers and to other evidence have simply disappeared over time, including loss of their actual identities.

On behalf of Mr. Cook it is submitted that he has met the test contained in Knotts, syl. pt.

4. Key witnesses, in fact the central defense witness, had died. Memories were faded and impaired. Dates were rendered meaningless by the passage of time, thus available defense witnesses could not even be identified. Fifteen (15) to seventeen (17) year old records are unavailable and when coupled with the absence of even a specific year, much less a day, are rendered useless even if they were available. As will be addressed *infra*, all that is left is for Mr. Cook or any other defendant in like circumstances to take the witness stand to deny the charges against him.

Knotts speaks of the core inquiry including the fundamental notions of justice or the community's sense of fair play. Counsel submits that the test of what represents the fundamental notion of justice is best found in our basic constitutional rights. All would agree that the notion of what is a fair trial includes at a minimum the right to confront, cross-examine and to meaningfully test the veracity of the witnesses against you. The notion of a fair trial would also contemplate effective representation of counsel, the ability to call witnesses on your behalf, and the presumption of innocence. The latter should not be undermined by the defendant's silence at trial. These characteristics of a fair trial, representing our core values, are all undermined when one is accused 15 to 17 years after the alleged fact.

The Circuit Court in this case referred to the most common protection against stale claims, and the absence thereof, in West Virginia. As mentioned previously the Judge referred to the need for “guidance” and statute of limitations in considering motions to dismiss such as Mr. Cook presented, T 141. Counsel herein submits that statutes of limitations generally reflect the community’s sense of fair play. It is indeed an irony that in West Virginia one who must answer for an injury to another who seeks damages is free from suit in one or two years, but a person can be imprisoned for an act which is said to have taken place at any time (even an undated period of great length) before the charge is brought. The policy and purpose of the statute of limitations is to deter unreasonable delays in the assertion of a demand, see generally Vol. 12A. Michie’s Juris. Limitation of Actions § 2. The object of such statutes is to compel the exercise of a right of action within a reasonable time, Humble Oil & Refining Co. v. Lane, 152 W.Va. 578, 165 S.E.2d 379 (1969). Because West Virginia, unlike other jurisdictions, has no statute of limitations for felonies our sense of fair play is undermined. As reflected here, one can wait for many years before coming forward with a criminal accusation. In contrast to civil actions, there is no compulsion to exercise a claim within a reasonable time.

When a broader sense of “community” is considered it becomes painfully obvious that West Virginia’s open-ended approach to felony prosecutions is inimical to the community’s sense of fair play. West Virginia is said to be one of only four States which has no statute of limitations for felonies, <http://www.criminaldefenselawyer.com/criminal-defense-statute-of-limitations.cfm>.³ States such as California and Hawaii require that some felony sex crimes must be brought within three (3) years, Cal. Penal Code, § 801; H.R.S. § 707-730. In Hawaii the

³Counsel cites this website for its ease in review, however counsel does not argue its absolute accuracy. It is cited rather for the proposition that on this point West Virginia is in a substantial minority.

prosecution for a Class A felony sex crime must be brought within six (6) years. Many, indeed most jurisdictions, require that such charges must be brought within 5, 6 to 10 years after the commission of the offense. For underage victims Nebraska requires that charges must be commenced at least seven (7) years after the alleged victim's 16th birthday, R.S.Neb. § 29-110(2), Louisiana requires charges within ten (10) years of the victim's 18th birthday, La. R.S. Art. 571.1. In advancing this argument counsel is not suggesting that a trial court need not be sympathetic to a balance between the victims's rights and the rights of an accused. Counsel is suggesting that the balance is tipped in favor of the accused when core witnesses die and when memories fade away by periods which exceed a decade and further that the community at large expresses that view in their statutes of repose. That sense of fair play is also reflected in the equitable defense of laches.

Retroactive Application of Knotts

As earlier submitted, the principle and the test announced in State ex rel Knotts v. Facemire must at a minimum be applied in this case. The ruling is premised on the requirements of due process of law. Mr. Cook argued along the lines of reasoning contained in Knotts. His case was under appeal when Knotts was decided. The State argued and the Court ruled based on Leonard and Hundley which Knotts soon thereafter overruled. Our law favors and fully supports the application of Knotts in this case, Adkins v. Laverette, supra; see also State v. Hickman, 338 S.E.2d 188 (1985).

Effective Assistance By Counsel

In prosecutions of such distant allegations as these, particularly when a mere broad range of dates is charged, there exists a species of "imposed ineffectiveness of counsel." Typically

such circumstances as result in harming counsel's preparation are addressed in the context of prosecutor misconduct which results in disabling the effectiveness of counsel. For example, a prosecutor can render ineffective defense counsel's ability to communicate with witnesses by hiding witnesses or by directing them not to speak with counsel, People v. Avery, 377 N.E.2d 1271 (Ill. 1978); Gregory v. U.S., 369 F.2d 185 (D.C.Cir. 1966); State v. Mussehl, 408 N.W.2d 844 (Minn. 1987); ABA Standards on Criminal Justice § 3.3.1(c) (1982). Violating discovery rules can also impair defense counsel's ability to properly represent his/her client, U.S. v. Fernandez, 780 F.2d 1573 (11th Cir, 1986). In this case the passage of many years has had the same effect. The fulcrum for any ineffective assistance claim is the adequacy of counsel's investigation, Myers v. Painter, 213 W.Va. 32, 576 S.E.2d 277 (2002), syl. pt. 4. Simply stated, when 15 to 17 years goes by before a claim is made of criminal conduct the ability to investigate adequately is destroyed.

In order to effectively represent one who has been accused of crimes such as Mr. Cook an attorney must at a minimum interview witnesses and familiarize himself with the alleged crime scene. Records of events reflecting the activities of the accused or accuser at the times charged provide a good potential source of information. Persons who are familiar with the defendant and the accuser and their daily activities or motives are rich sources of information.

Each day which passes after an alleged act results in the loss of potential witnesses and other evidence. When the time which passes is expressed in years rather than in days or months, the potential evidence disappears or at least becomes so attenuated by the passage of time as to be useless.

In this case the accusations not only refer to no dates, they refer to no specific years. In fact, when literally interpreted the alleged criminal acts could refer to any time “within 15 [or 17] years.” When confronted with such an allegation records, fresh memories and photographs of the alleged crime scene are essential to a meaningful defense. However, the indictment against Mr. Cook by necessity creates the classic “he said/she said” situation in which fresh memories and temporally relevant evidence have been forever lost.

This Court is asked to consider not only what is lost by such stale accusations but the impact on counsel.

The Right To Remain Silent

The compulsion to testify can of course come from different sources. As previously mentioned herein, stale prosecutions over events alleged to have occurred many years previously necessarily results in “he said/he or she said” trials. The idea that one could have an alibi defense seems preposterous in light of the absence of a specific time, lack of records, lack of fresh memories and the total absence of witnesses due to death or from moving away. As a practical matter the accused must testify in this kind of case. To sit silent in the face of accusations of sex crimes is to risk conviction following a very brief jury deliberation.

It requires no citation of authority to note that the law instructs juries not to consider the defendant’s failure to testify. However, that is fine when the defendant has offered an alibi defense through credit card records and live witnesses, but when those things are impossible to retrieve the instruction rings hollow. When a photograph of the alleged crime scene demonstrates that the testimony of events is patently wrong or at least dubious, testimony from the accused may be mere surplusage. Indeed, some defendants do not make good witnesses even

when they are telling the truth. When an accused cannot point to a photograph or a record to corroborate his testimony his veracity is weakened. When a charge is as old as these charges are, the defendant is thereby virtually compelled to testify.

2. The Prosecution of These Charges Contravened Mr. Cook's Right to a Prompt and Speedy Trial as Protected by the West Virginia Constitution, Article III, Section 14 and the U.S. Constitution, 6th Amendment.

In his Motion to Dismiss Based Upon the Delay Between the Initial Accusation and the Return of the Indictment, R 291, Mr. Cook raised the issue of a 6th Amendment violation. The basis for the claim was the death of Mr. Cook's mother who lived in the very residence in which Mr. Cook's accusers claim most of these crimes took place. Moreover, she knew each of these accusers and was especially close to accuser Lewis who testified that he visited Mrs. Cook and met her for dinner even after his fracture with this appellant, T 386. She was like a mother to Lewis, T 723. Mrs. Cook attended the Church of God meeting when Michael Bradley made an accusation against her son, T 516-517. She lived in a room which was in close proximity to that of Mr. Cook's bedroom with walls which one could easily hear through, T 718-719. In sum, Mrs. Cook represented the best possible witness for the defense,

The delay in question is between his August 3 arrest or at least between September 11, 2007 when Mr. Cook waived his preliminary hearing and September 19, 2008 when he was indicted. Mrs. Cook died on July 17, 2008, R 614.

This Court has recently reiterated the applicable rule for judging 6th Amendment violation claims such as here presented. In State v. Jessie (No. 34589 11-24-09) this Court held:

“The Sixth Amendment speedy trial right begins with the actual arrest of the defendant and will also be initiated where there has been no arrest, but formal charges have been brought by way of an

indictment or information.” Syl. Pt. 1, *State v. Drachman*, 178 W.Va, 207, 358 S.E.2d 603 (1987).

A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial. Syl. Pt. 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982).”

In Jessie as in Knotts this Court referenced that State ex rel Leonard v. Hey was overruled. Of course, Knotts specifically rejected reliance on presumed prejudice for 5th Amendment due process analyses. The question then is whether the concept of presumptive prejudice retains some vitality when considering 6th Amendment challenges. Jessie contained no reference which would suggest that it does retain some vitality.

The Circuit Court in this case, in agreeing with the State’s argument, found that this motion must fail in part because there was no delay which could be considered to be presumptively prejudicial, T 121-128, 135-137. Counsel submits this is error.

Applying the four (4) factors named in Jessie and Foddrell to the instant facts yields the following: (1) the delay was slightly more than 12 months, 13 months from the initial accusation (2) the reason given for the delay was that the trooper did not present his “grand jury report to [the prosecutor’s] office [until] July 17 of 2008,” T 122. By strange coincidence that was the very day Mrs. Cook died (3) the defendant made no assertion that he be indicted – no one does (4) the loss of Mrs. Cook resulted in enormous and substantial prejudice to Mr. Cook’s ability to defend himself. In considering this claim the Court is asked to consider the substantial difference this lovely elderly woman, a close friend and mother figure of one accuser, knowledgeable of all

accusers, present as a witness when Bradley first suggested wrongdoing years before, occupant of the homes where her son lived, could have made if the indictment were returned by the January, 2008 grand jury or even the May, 2008 term grand jury. In the latter term a video-taped deposition could have been taken when Mrs. Cook was hospitalized shortly before her death just as was done with witness Virginia Bowe.

Since the length of delay for a constitutional speedy trial purposes cannot be quantified into a specific number of days or months, the more important consideration in this case must be what happens during that delay, Barker v. Wingo, 417 U.S. 514, 523 (1972). As this Court held in Jessie, syl. pt. 6, the determination must be made on a case by case basis. This Court is urged to find that this delay between charge and indictment violated Mr. Cook's 6th Amendment and West Virginia Constitutional rights to a prompt and speedy trial.

3. The Application of Definitions Rules or Legal Principles Not in Existence at the Time of the Alleged Acts for Which Mr. Cook Is Convicted Violates Due Process.

Mr. Cook was convicted as a "custodian" under § 61-8D-5. In the period of 15 to 17 years before indictment Mr. Cook would not have been regarded as "custodian" of any of his accusers. Most certainly he could not have been such for Strickland or Bradley. And, for Lewis the definition or question would not have included the opinion in State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999).

This point was raised unsuccessfully in pre-trial motions, T 116-118, 133-135, and at the close of the State's case in chief, T 533. The constitutional basis for this argument is due process insofar as due process embraces *ex post facto* concepts. The underlying rationale is that a person must be on notice of whether something is a crime when the act occurs.

In the period of the early 1990s the precedent for who was a “custodian” was that contained in W.Va. Dept. of Human Services v. Boley, 358 S.E.2d 438 (1987) and contained in West Virginia Code, § 49-1-5(5), fn. 2 p. 439, which contains language virtually matching that in § 61-8D-1(4). Of course, the babysitting decision came later in 1999.

The *ex post facto* provision applies to legislative acts, but due process bars application of court made changes in interpretation when applied retroactively, Bouie v. City of Columbia, 378 347 (1964); Marks v. U.S., 430 U.S. 188 (1977),. This applies most specifically to the José Strickland testimony that he was sexually assaulted while a passenger in Mr. Cook’s vehicle, T 280-282.

In this connection it is worth noting that the case against Mr. Cook began as a charge that he violated § 61-8D-5 as a “person of trust,” R 238-241. The State acknowledged the same, T 119. That status was not enacted until 2005. Unfortunately, indeed unconstitutionally, the State and consequently the trial court continued to mix the concepts and apply the definitions which were not applicable to the times alleged in the indictment. Accordingly, on this basis also Mr. Cook’s convictions for violating § 61-8D-5 should be reversed. As Mr. Cook argued to the Circuit Court, he was entitled to a judgment of acquittal as to these charges in that proof of a critical element was lacking.

4. The Cumulative Effect of the Court’s Erroneous Evidentiary Rulings Was to Deny Mr. Cook a Fair Trial.

There exist other errors at trial which standing alone may be deemed harmless. However, together these errors deprived Mr. Cook of a fair trial, State v. Cecil (No. 33298 11-21-07) ____ S.E.2d ____, syl. pt. 11; State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

During opening statements counsel was precluded from any mention of the previously dismissed counts within the original indictment, T 223-226. That issue reappeared when counsel was attempting to cross-examine Mr. Strickland about his prior statement to police, T 258-263. These statements are admissible as prior inconsistent statements, T 261. The Circuit Court ruled that because counts were dismissed by the State counsel cannot mention them, *see in camera* hearing T 268-270. Simply stated, that is not grounds for denying the admission of otherwise admissible evidence.

The Circuit Court also would not allow counsel to cross-examine accuser Mike Bradley about the allegations which he previously gave to church officials at a meeting years previously T 500-503. Counsel's purpose was to lay a foundation to establish that his allegations had changed significantly *i.e.* prior inconsistencies. The Circuit Court improperly sustained the State's objection as being hearsay, T 500-501.

The Court would not allow character witness Scott Hannigan to give reputation evidence that Mr. Cook was a law-abiding citizen, T 635-638. Professor Cleckley writes ". . . courts have almost uniformly allowed general character to be introduced under the new rule," Cleckley, Handbook on Evidence for West Virginia Lawyers p. 271 (3d ed.). Professor Cleckley refers to the decisions of this Court in State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989) and State v. Jackson, 181 W.Va. 447, 383 S.E.2d 79 (1989) as supporting his conclusion. Indeed the cases support the propriety of a question which matches exactly what counsel asked of Mr. Hannigan – whether Mr. Cook had a good reputation as a law-abiding citizen, Marrs S.E.2d at 501; Jackson S.E.2d at 81-82.

During the State's cross-examination of Mr. Cook counsel made two objections which the Court overruled. First, the State was allowed to ask whether Strickland was in Mr. Cook's "care, custody and control" when riding in his vehicle, T 767. Second, the State was permitted to go beyond the scope of direct examination in order to ask Mr. Cook about letters written to accuser Lewis, T 776-777. The Court ruled that Mr. Cook could be asked about "anything relevant."

Counsel submits that the foregoing evidentiary rulings represent an abuse of discretion, State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998). These erroneous rulings prevented the presentation of a full and fair defense.

5. Mr. Cook's Prison Sentence Violates the Proportionality Principle of West Virginia Article III, Section 5.

Mr. Cook was sentenced to consecutive terms involving four (4) of convictions under §61-8D-5. Other terms are to run concurrently. The total prison time is 20-60 years. The West Virginia Constitution, Article III, Section 5 contains an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offense," Syl. 1 State v. Houston, 273 S.E.2d 375 (1980); State v. Lewis, 447 S.E.2d 570 91994). This Court reviews sentencing orders under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands, State v. Watkins, 590 S.E.2d 670 (2003).

This Court has considered such challenges by applying both a subjective and an objective test, see State v. Adams, 565 S.E.2d 553 (2002). Under the subjective test the Court determines whether the sentence which was imposed *shocks the conscience*. In reaching that determination the Court considers all of the circumstances surrounding the offense. Under the objective test the Court considers the nature of the offense, the legislative purpose behind the punishment,

compares the punishment to that in other jurisdictions and compares the punishment with other offenses in this jurisdiction.

Spread throughout the trial record and contained in the pre-sentence report which was prepared by the Adult Probation Department of Kanawha County is the fact that Mr. Cook not only has no criminal record whatsoever, but that he has an excellent work record, is well-educated, has many close friends and loyal parishioners and has contributed substantially to the betterment of his community. The character witnesses and the many letters of support forwarded to the probation officer and thereafter to the Court speak to his past good deeds and acts of kindness. In light of these facts together with the favorable report of psychologist Dr. Clayman that Mr. Cook represents a very low threat of re-offending and that the accusers were never "treated" by any medical provider and especially when viewed as occurrences 15 - 17 years ago the sentence is shocking. It cannot be overemphasized that there exists no claim of wrongdoing beyond the time frame offered at trial. If he were truly a threat to society surely there would have been some claim of more recent transgression.

Under the objective test, the first matter to consider is the nature of the offense. Nothing stated herein should be construed as suggesting that sexual misconduct of any kind involving children represents acceptable behavior. Mr. Cook testified and denied the accusations and he continues to stand upon his innocence notwithstanding the verdicts. There is no evidence of emotional or physical injury to any of the accusers. In fact, the evidence is to the contrary.

While the legislation at the time certainly permits an indeterminate sentence of not less than five nor more than fifteen years under §61-8D-5, the legislature also permits probation as an option. It is submitted that the mitigating factors in this case substantially outweigh any

aggravating factors. As set forth *infra* the penalty contained in West Virginia's statute ranks among the highest in the country.

When compared with the following punishments for other offenses in the State of West Virginia this sentence also appears disproportional. For example, under West Virginia law a person who kills another and is convicted of the felony offense of voluntary manslaughter is subject to a sentence of 3 - 15 years, §61-2-4. If the accused is found guilty of second degree murder the term of incarceration is 10 - 40 years, §61-2-3. For malicious wounding (which can be and usually is done by shooting or stabbing another) the penalty is 2 - 10 years. For kidnaping, even if a child is involved and the purpose of the kidnaping was sexual the potential term is either 3 - 10 or 1 - 10 years, §61-3-14(a) and (b). The maximum sentence for third offense domestic battery is 1 - 5 years, §61-2-28(d). For an act of violence against an elderly person the statute contains a provision which allows as an option a sentence of one year or less, §61-2-10a.

When compared with other jurisdictions West Virginia's penalties under §61-8D-5 ranks among the harshest.⁴ It is reported that some 40 States have at least some statute addressing the "persons in a position of trust" status, Marosco, The Prosecution and Defense of Sex Crimes, Chapter 12A *supra*. Sexual misconduct statutes which have been collected by the National District Attorney's Association are listed at www.ndaa-apri.org. By comparison, Louisiana law states that whoever commits the crime of molestation of a juvenile when the offender has control of supervision shall be fined not more than \$10,000 or imprisoned for not less than one nor more than fifteen years. La. Rev. Stat. Ann. §14:81.2 (West 2005). It is represented that Louisiana

⁴The current statute provides for a penalty which is greater than the penalty at the times involved in this case.

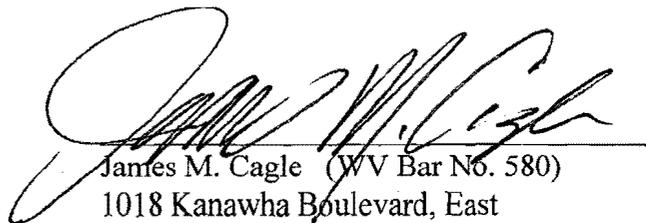
appears to fall at about the middle to high range for punishment. Idaho law sets the maximum period of incarceration for sexual abuse of a child under age 16 at 15 years, Idaho Code §18-1506 (Michie 2005). Kentucky law characterizes sexual abuse in the second degree even when committed by a person who provides a foster home for the abused child as a Class A misdemeanor, Ky. Rev. Stat. Ann §510.120 (Michie 2004). Our mother State of Virginia characterizes conduct by any person 18 years or older who has a custodial or supervisory relationship over a child under age 18 and has sexual relations with that child as a Class 6 felony which is punishable either by prison of 1 - 5 years, jail up to 12 months and a fine of \$2,500, Va. Code Ann. §18.2-370.1 (Michie 2005) and §18.2-10. Further, in Virginia when any person who is 18 years of age or older, including the parent who engages in consensual sexual intercourse with a child 15 years or older, that transgression may be considered as only a Class 1 misdemeanor, Va. Code Ann. §18.2-371 (Michie 2005). Ohio has a statute which addresses sex crimes by persons with “temporary or occasional disciplinary control.” Whoever violates that section is guilty of sexual battery which is a felony of the third degree, therefore subject to a penalty of either one, two, three, four or five years and up to \$10,000 fine, Ohio Rev. Code Ann. §2907.03 (West 2005) and Ohio R.C. 2929.14 and 2929.18.

Mr. Cook’s good character, his strong support group, and the psychologist’s report, the time frames of the accusations, all reflect the harshness of his 20 year minimum sentence. Consequently whether the subjective or objective test is employed, Mr. Cook’s sentence is disproportional.

C. Relief Prayed For

The Appellant Sandy Martin Cook respectfully prays that this Honorable Court reverse his convictions and/or remand the case for proceedings with directions that judgment be entered in Mr. Cook's favor.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James M. Cagle", is written over a horizontal line.

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No. 35465

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
STATE OF WEST VIRGINIA,

Plaintiff Below/Appellee

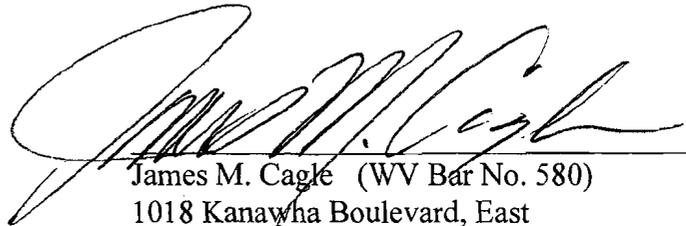
v.

SANDY MARTIN COOK,

Defendant Below/Appellant

CERTIFICATE OF SERVICE

The undersigned, Counsel for Sandy Martin Cook, does hereby certify that a true and correct copy of the Brief of Appellant was served by regular United States mail, postage prepaid to Thomas W. Smith, Office of the Attorney General, 1900 Kanawha Boulevard, East, Building 1, Room E-26, Charleston, West Virginia 25305, on this the 7th day of June, 2010.



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