ARGUMENT DOCKET

NO. 35465

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

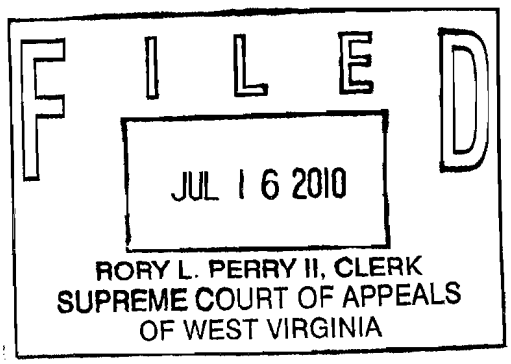
STATE OF WEST VIRGINIA,

Plaintiff Below/Appellee,

v.

SANDY MARTIN COOK,

Defendant Below/Appellant.



BRIEF OF THE APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF THE APPELLEE,
STATE OF WEST VIRGINIA

I.

INTRODUCTION

This is a tragic case, not for the Appellant, who complains of the "harshness" of his 20-year minimum sentence, but for his three victims, who were repeatedly assaulted, sodomized and/or anally raped during their adolescence by a man who presented himself not only as a father figure but also as the person who would help them find a path to let God work in their lives.

II.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

In the September 2008 Term of Court, Felony Indictment 08-F-461 was returned by a Kanawha County grand jury, charging the Appellant with twenty-two sexual offenses against three then-minor victims. Eight counts (two of which were subsequently dismissed) involved victim Josè S.; four counts involved victim Michael B.; eight counts (two of which were subsequently

dismissed) involved victim Michael L.; and two counts, later nollied because they were outside the time frame alleged in the indictment, involved a fourth victim.

The Appellant's brief contains an accurate recitation of the material pre-trial motions and their respective dispositions.

The case was tried over a period of five days, between February 23-27, 2009, and the Appellant was convicted by a jury of the sixteen counts remaining in the indictment. It is fair to say that the case was hard fought, with excellent attorneys on both sides and an experienced trial judge guiding the proceedings.

On May 21, 2009, the trial court entered its final order, sentencing the Appellant to an effective sentence of 20-80 years.

III.

STATEMENT OF FACTS

The statement of facts which follows is faithful to the rule of Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995):

> An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court.

Significantly, although the Appellant attempts to bob and weave around the most damning testimony at trial, he does *not* contend that the evidence was insufficient to sustain the verdict.

At all relevant times, the Appellant was the pastor of the Shrewsbury Church of God (hereinafter "the church"). The crimes charged in the indictment all occurred in either the Appellant's church van or in the parsonage. All of the victims were boys in their early teens. All

of the victims were extremely poor; trips to McDonald's in the church van were a big deal to them. All of the victims were searching for a father figure[1] and all of them wanted to be part of a church family.

Victim Josè S. was twelve years old, poor, and fatherless when the Appellant drew him into the church. (Tr., vol. II, pp. 232-33.) Josè considered the Appellant to be a man of God, a role model and a father figure. (Tr., vol. II, p. 243.) The young man soon found himself the object of the Appellant's lustful disposition; the Appellant performed fellatio on him four or five times, then progressed to oral sex. (Tr., vol. II, pp. 237-39.) When Josè was asked why he went along with these practices, he testified that

> I was under the impression that this was the way a father was supposed to teach his son.

(Tr., vol. II, p. 240.)

When Josè was fifteen, the Appellant came up with the creative "fatherly" advice that oral sex would help Josè – who was small, slight and self-conscious – grow pubic and chest hair. (Tr., vol. II, p. 241.)

Victim Michael L., called Andy by many of the witnesses (including the Appellant) and in the exhibits, was also twelve years old, poor, and the product of a dysfunctional home when the Appellant drew him into the church. Like Josè, Andy viewed the Appellant as a father, "and he always referred to me as a son." (Tr., vol. III, pp. 344, 348-49.)

One night while Andy was sleeping at the parsonage, he woke up with the Appellant stroking his penis while praying, "God use this young man's life." (Tr., vol. III, pp. 332-33.) The incidents

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[1]Josè had no father; Michael L. had a stepfather who was emotionally unavailable and uninterested; Michael B. had a stepfather who was a drunk and a drug abuser.

of fellatio continued and ultimately progressed to oral sex, all while Andy was still twelve. (Tr., vol. III, pp. 337-38, 341-42.) The Appellant told Andy, who was a very religious young man with a yearning for God,[2] that:

> [T]his is what men do; if you want anything to do with God in your life, this is what has to happen.

(Tr., vol. III, p. 418.)

The Appellant used a religious justification over and over again with this vulnerable young man. Andy was told that if he didn't perform sexual acts with the Appellant willingly, God wouldn't use his life and "you'll never be anybody." (Tr., vol. III, p. 335.) The Appellant explained that what he and Andy were doing was "how David and Jonathan solidified their covenant." (Tr., vol. III, pp. 340-41.)

Andy eventually moved into the parsonage and lived there for years with the Appellant and the Appellant's mother.[3] On two occasions, when Andy was sixteen, he woke up with the Appellant performing anal sex on him. (Tr., vol. III, pp. 351-54.) It was painful, and after the second occurrence Andy told the Appellant that it had to stop, he wouldn't do "that." (Tr., vol. III, pp. 353-54.)

After Michael had grown up and left the parsonage, the Appellant wrote him a series of letters, which were entered into evidence at trial as State's Exhibits 4-10. (R., vol. II.)[4] They cannot

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[2]Michael L. had a vocation, and ultimately became the Senior Pastor at New Life Church in Cedar Grove.

[3]According to his testimony, Andy and the Appellant's mother became very close.

[4]Document examiner Kevin McDowell testified without contradiction that the letters had been written by the Appellant.

be characterized as anything other than expressions of love and yearning from a lover – *not* a father or a mentor.

> Andy, I was praying today. I was praying for you because you seem so depressed. I know that I have ruined your life, and I am so sorry for it, but I don't know what to do about it. If I could go back a few years, I would not have allowed us to get so close.
>
> Please don't show this to mom, because she loves you. It just upsets her. Please forgive me for all I have done. I have ruined your life.
>
> All I am doing is trying to stay away from you so you might be happy. But it doesn't seem to be helping. If you could only talk to me and tell me what to do! I have fasted prayed cried and still I don't know what to do! You seem so hateful to me when I try to talk to you. I know I am at fault but please, please, PLEASE forgive me – or at least try to forgive me ... Please forgive me! PLEASE I BEG OF YOU! Please tell me what I can do – I don't know!

Victim Michael B. was young, poor and the product of an abusive home when the Appellant drew him into the church. Michael was hoping to get his family involved in the church, because "church is what you see brings a family together." (Tr., vol. III, p. 484.) When Michael was fifteen, the Appellant started rubbing his genitals, then performed oral sex on him. (Tr., vol. III, p. 482.) This happened twice. (Tr., vol. III, p. 486.)

Michael disclosed the sexual abuse to his girlfriend, who got her father, Pastor Paul Farley, involved. (Tr., vol. III, pp. 486-87, 514-15.) Pastor Farley testified that he called the State Overseer (a church office) and that there was a meeting, but Michael didn't want to sign his statement and his (Michael's) mother didn't want him to go through the "humiliation" of a confrontation. (Tr., vol. III, pp. 514-17.)

After the State rested, the Appellant called a number of witnesses to testify that Josè S. and Michael L. were liars and not worthy of belief; that other individuals who were in the parsonage never saw any pornography, which two of the victims had testified was lying around; and that the

Appellant is an honest and truthful person. Further, the Appellant contended, both through the testimony of witnesses and the cross-examination of the State's witnesses, that the three victims had conspired and colluded to make false accusations against the Appellant.[5] Additionally, the Appellant called Trooper Malcolm Napier to testify as to alleged inconsistencies between Michael L.'s statement and his trial testimony. Finally, the Appellant took the stand and denied the existence of any sexual contact with the victims. He emphasized the fact that his mother had lived in the parsonage during many of the years in which the victims claimed to have been fellated, sodomized and/or raped, and that Michael L./Andy's behavior toward him years after he (Andy) was grown, married and gone belied the existence of such abuse.

After the defense rested, the State called two brief rebuttal witnesses, both of whom testified that Michael L. was an honest, truthful person.

Following the instructions of the court and the arguments of counsel, the jury retired for a brief period of time and returned verdicts of guilty on all counts.

IV.

ISSUES

1. The prosecution of the Appellant on the charges in the indictment did not contravene his due process rights under the United States Constitution, Amend V, or the West Virginia Constitution, art. III, §10; or his right to a prompt and speedy trial under the United States Constitution, Amend VI, or the West Virginia Constitution, art. III, § 14.

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[5]The Appellant's theory of motive was that Michael L. had attempted, and failed, to take over as Pastor of the Shrewsbury Church of God.

2. The prosecution of the Appellant on the charges in the indictment did not contravene his rights, by ex post facto application of a new concept of "custodian."

3. The doctrine of cumulative error does not apply in this case.

4. The Appellant's sentence did not violate the proportionality principle of West Virginia Constitution, art. III, § 5.

V.

STANDARD OF REVIEW

"Whether pre-indictment delay has caused actual prejudice requiring curative action is always an issue addressed to the sound discretion of the trial court." *State v. Ayers*, 168 W. Va. 137, 137, 282 S.E.2d 876, 877 (1981). Similarly, this Court "review[s] any trial court's decision in its management of a trial for an abuse of discretion[,]" *State v. Snider,* 196 W. Va. 513, 516 n.9, 474 S.E.2d 180, 183 n.9 (1996) (*per curiam*), and such discretion extends to the scope and extent of opening statements. *E.g., United States v. Bucci,* 582 F.3d 108, 118 (1st Cir. 2009); *United States v. Urbina,* 431 F.3d 305, 310 (8th Cir. 2005). And, likewise, "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis,* 204 W. Va. 58, 511 S.E.2d 469 (1998). "An appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally." *State v. Beard,* 194 W. Va. 740, 748, 461 S.E.2d 486, 494 (1995).

VI.

ARGUMENT

A. THE PROSECUTION OF THE APPELLANT ON THE CHARGES IN THE INDICTMENT DID NOT CONTRAVENE HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION, AMEND. V, OR THE WEST VIRGINIA CONSTITUTION, ART. III, §10; OR HIS RIGHT TO A PROMPT AND SPEEDY TRIAL UNDER THE UNITED STATES CONSTITUTION, AMEND. VI, OR THE WEST VIRGINIA CONSTITUTION, ART. III, § 14.

"Pre-arrest or pre-accusatory delays are usually governed by statutes of limitations[.]" *State ex rel. Leonard v. Hey*, 269 S.E.2d 394, 396 (W. Va. 1980), *overruled on other grounds by State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009). West Virginia, though (like the federal government, Adam Walsh Act, Pub. L. No. 109-248, § 211, 120 Stat. 587, 611 (2006) (codified at 18 U.S.C. § 3299)), has no statute of limitations on sexual felonies.[6] In the absence of a statute of limitation, the effect of preindictment delay is measured under the due process clauses of the United States and West Virginia Constitutions. The test for determining whether a constitutional violation has occurred mandating corrective action was set forth in Syllabus Point 3, in part, of *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009):

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[6]South Carolina and Wyoming have no criminal statutes of limitations at all, while Maryland, North Carolina,, Virginia, West Virginia have statutes reaching only misdemeanors. Brian Porto, *New Hampshire's New Statute of Limitations for Child Sexual Assault: Is it Constitutional and Is it Good Public Policy?*, 26 New Eng L. J. 141, 159 (1991). There is no statute of limitations in Alabama for a sex offense against someone less than sixteen years of age. Ala. Code § 16-3-5(a)(4). There is no statute of limitation for felony child sexual abuse in Alaska, Alaska St. Ann. § 12.10.010(a)(3), or for unlawful sexual contact or incest of a victim under sixteen years of age, Me. Rev. St. Ann. § 17A-8(1), or for indecency with a child in Texas, Tex. Code Crim. Pro. Art. 12.01(1)(E). Arizona tolls the seven-year statute of limitations for child sex offenses during anytime when the identity of the perpetrator is unknown. Az. Rev. St. § 13-107(E). Ohio requires the discovery of the corpus delecti before the statute of limitations of six years is triggered. Ohio Rev. Code Ann. § 2901.13(A)(1)(a), (F). Oklahoma's five-year statute of limitations does not commence until the crime is discovered. Okla. Stat. Ann. tit. 22, § 152(A).

> In determining whether preindictment delay violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, the initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay. In balancing these competing interests, the core inquiry is whether the government's decision to prosecute after substantial delay violates fundamental notions of justice or the community's sense of fair play.[7]

The Appellant has fallen woefully short of meeting his burden and, as such, his convictions should be affirmed.

1. <u>There Is No State Action Involved In The Preindictment Delay</u>.

Before addressing the *Knotts* test, the Court must answer a threshold question, is the alleged due process violation the result of state action or only private conduct? While "[t]he Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest[,]" Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), it does not "protect[] the individual from deprivations by . . . private persons." *Queen v. West Virginia Univ. Hosp., Inc.*, 179 W. Va. 95, 103, 365 S.E.2d 375, 383 (1987). Similarly, "[e]mbedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how

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[7]Technically, the Fifth Amendment's due process clause is not implicated here. The Fifth Amendment's due process clause applies only to the federal government; the due process clause of the Fourteenth Amendment applies to the States. *Virginia Elec. and Power Co. v. PSC,* 162 W. Va. 202, 210 n.3, 248 S.E.2d 322, 327 n.3 (1978); *Simpson v. Stanton,* 119 W. Va. 235, 193 S.E. 64, 66 (1937). In general, the two clauses are coextensive. *State ex rel. Riley v. Rudloff,* 212 W. Va. 767, 778 n.12, 575 S.E.2d 377, 388 n.12 (2002). Since the Fifth Amendment's due process clause is coextensive with the Fourteenth's, and Article III, § 10's is coextensive with the Fourteenth, for ease of reference, this Brief will generically refer to the Fourteenth Amendment as shorthand for them all.

unfair that conduct may be." *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (footnote omitted). *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities."). "Until there is a finding, implicit or explicit, of state action, the due process requirements of the Fourteenth Amendment are not implicated and should not be addressed." *Morris v. Metri-yakool,* 344 N.W.2d 736, 747 n.2 (Mich. 1984); *State v. Birch*, 956 So.2d 793, 800 (La. Ct. App. 2007) ("Where no state action is involved, there are no due process implications.").

"Plainly, crime victims . . . are not state actors." Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 Utah L. Rev. 861, 914. A "private citizen does not become a state actor just because he reports a crime and the police rely on his report to make an arrest." *Marotta v. Cortez*, No. 08-cv-02421-CMA-CBS, 2009 WL 5491622, at *4 (D. Colo. Nov. 3, 2009). "There is no allegation to support a basis for a claim that the individual defendants had any control over the prosecution . . . or the failure to prosecute . . . . That control was vested by law in the prosecuting official. The mere fact that the individual defendants were complainants and witnesses in action which itself was prosecuted under color of law does not make their complaining or testifying other than what it was, i. e., the action of private persons not acting under color of law." *Grow v. Fisher,* 523 F.2d 875, 879 (7th Cir. 1975). Hence, a crime victim's delay in reporting a crime is no more a due process violation than in making the report itself.

Here, any delay between the occurrence of the sexual abuse and assaults and bringing an indictment was not due to the State-it was due to the victims not coming forward. It was not until

August 3, 2007, that the incidents involving José S. were reported to Trooper Napier. (R. at 448.) Prior to August 3, 2007, the State had no knowledge of the offenses or reasons to suspect that the offenses had occurred. A similar situation was confronted by the Ohio Court of Appeals in *State v. Warren*, 859 N.E.2d 998 (Ohio Ct. App. 2006).

In *Warren*, the state brought charges of sexual misconduct against a defendant sixteen years after the events occurred. *Id.* at 1002. The defendant moved to dismiss the charges based on a claim that the preindictment delay violated due process. *Id.* In disagreeing, the Court of Appeals explained that "[t]he victim did not report the crime to the police until April 2004. Her delay in reporting the crime cannot be ascribed to the state for purposes of finding a violation of appellant's due process rights." *Id.* at 1003. As such, "the delay was not caused by government action or inaction[,]" and the motion to dismiss under due process was not well taken. *Id.* The well reasoned decision in *Warren*, on facts essential identical to this case, is ample support to affirm the circuit court.

2. <u>The State Was Not Culpable In This Case So No Due Process Violation Occurred.</u>

The test this Court adopted in Syllabus Pt. 3 of *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009), for judging a due process violation attributable to preindictment delay is the same test as used by the United States Court of Appeals for the Fourth and Ninth Circuits. *Id.* at 601, 678 S.E.2d at 854 (citing *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990) and *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir.1997)).

In *Ross*, the Ninth Circuit has identified "some government culpability must be shown to prove a deprivation of due process." 123 F.3d at 1185. *See Howell*, 904 F.2d at 895 ("At oral argument, counsel for the State of North Carolina unequivocally and candidly stated that North Carolina's justification for the preindictment delay was mere convenience, and that North Carolina

was 'negligent' in not prosecuting the defendant earlier."). *See also State v. Oppelt*, No. 62074-6-I, 2010 WL 1433480, at * 3 (Wash. Ct. App. Apr. 12, 2010) (footnotes omitted) ("The Fourth and Ninth Circuits, . . . have explicitly rejected the bad faith requirement in favor of a lesser showing of government culpability that includes negligence."). There is no need to undertake a prejudice analysis where there is no showing of governmental culpability in the delay. *See United States v. McLean*, No. 97-30386, 1998 WL 894564, at *1 (9th Cir. Dec. 9, 1998).

Here, the State was unaware that any crimes had occurred and there is no showing that it should have had any belief or suspicion that any crimes had occurred. Once, however, the State Police were informed a crime occurred, the State Police investigated and the Prosecuting Attorney presented a case to the Grand Jury that returned a true bill. "The record is devoid of any evidence of negligence or other culpability on the part of the government." *McLean*, 1998 WL 894564, at *1. Consequently, the circuit court should be affirmed.

3. **<u>The Appellant Has Not Shown Substantial, Actual Prejudice</u>.**

To demonstrate that preindictment delay violates the Fourteenth Amendment, "a defendant must introduce substantial evidence of actual prejudice which proves he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was or will be likely affected." Syl. Pt. 4, in part, *State ex rel. Knotts v. Facemire, supra*. "'Courts apply the actual prejudice test stringently.'" *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir.1995) (quoting *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993)). The actual prejudice test imposes a "'a heavy burden[,]'" *Knotts*, 223 S.E.2d at 603, 678 S.E.2d at 856 (citation omitted), and an "exacting one." *United States v. Canoy,* 38 F.3d 893, 902 (7th Cir. 1994). "In the overwhelming majority of cases in which defendants have raised the issue

of pre-indictment delay, the courts have held that the showing necessary to require dismissal of charges has not been made," *United States v. Antonino*, 830 F.2d 798, 804 (7th Cir. 1987); thus, the actual prejudice test is "rarely met." 42 C.J.S. *Indictments* § 26. "[A]llegations of prejudice must be specific, concrete and supported by the evidence-vague, speculative, or conclusory allegations will not suffice." *United States v. Fuesting*, 845 F.2d 664, 669 (7th Cir.1988).

The Appellant alleges actual and substantial prejudice based on loss of four witnesses and loss of certain financial records and documents. He attempts to substantiate this claim with an affidavit. (R. at 280-84.) These claims and this affidavit are insufficient for numerous reasons.

First, "loss of witnesses or documents occurring before delay becomes improper are not considered." *United States v. Crouch*, 84 F.3d 1497, 1515 n.27 (5th Cir. 1996). Since there is no improper delay in this case, there is no loss of witnesses or documents that would trigger scrutiny under the Fourteenth Amendment.

Second, an uncorroborated allegation of what a decedent might testify to–even if in an affidavit such as that here–are insufficient to prove actual prejudice. "'Merely because appellant alleges that certain dead witnesses would testify for him and in a certain manner does not prove that the potential witnesses would testify in such a manner or even testify at all. We cannot accept such self-serving declarations as proof of actual prejudice resulting from the absence of these witnesses, and the affidavits alone do not satisfy the requirements of [*United States v. Marion*, 404 U.S. 307 (1971)].'" *Cherry v. State*, 933 So. 2d 377, 381 (Ala. Ct. Crim. App. 2004) (quoting *Stoner v. State*, 418 So. 2d 171, 180 (Ala. Ct. Crim. App.1982) (citing *United States v. Hauff*, 395 F.2d 555, 556 (7th 1968); *United States v. Mays*, 549 F.2d 670, 674 (9th 1977); *United States v. Hood*, 593 F.2d 293, 296 (8th Cir. 1979), *United States v. Revada*, 574 F.2d 1047 (10th Cir. 1978); *United States v. King*,

593 F.2d 269 (7th Cir. 1979); *United States v. Saunders*, 641 F.2d 659, 665 (9th Cir. 1980); *United States v. Mills*, 641 F.2d 785, 789 (9th Cir. 1981); *United States v. Surface*, 624 F.2d 23, 25 (5th Cir. 1980);*United States v. Radmall*, 591 F.2d 548 (10th Cir.1978) (Barnett, J., concurring)). *See also State v. Fairbanks*, No. 45039-5-I, 2000 WL 789831, at *2 (Wash. Ct. App. June 19, 2000) ("[W]e question whether actual prejudice can be established by a defendant's self-serving, uncorroborated allegations that certain witnesses existed and that their testimony would be favorable to the defense."); *State v. Gonzales*, 794 P.2d 361, 368 (N.M. Ct. App. 1990) ("We have been unable to locate any case in which a defendant established actual prejudice on the basis of his or her own uncorroborated statements."); *United States v. Holland,* 985 F. Supp. 587, 598 (D. Md. 1997) ("Absent sufficient corroboration that Horton would have testified as Holland suggests, however, I find insufficient prejudice to warrant dismissal of the indictment . . ."). The death of the potential witnesses the Appellant identifies in his affidavit would show actual substantial prejudice if (1) the Court is convinced they would actually have testified at trial; (2) the testimony would have withstood cross-examination; and, (3) the jury would have found the witnesses credible. *United States v. Williams*, 738 F.2d 172, 176 (7th Cir. 1984). "In the absence of other evidence tending to support these possibilities, we would merely be piling speculation upon speculation to reach a finding of actual and substantial prejudice here, and this we cannot do." *Id.*

Third, the Appellant claims that "[t]here are numerous other records and materials which are missing and would be useful in my defense." (R. at 283.) But, merely asserting that missing evidence would be "helpful" does not come close to establishing that its absence is proof of actual prejudice. *See United States v. Horowitz,* 756 F.2d 1400, 1405 (9th Cir. 1985) ("Mere assertions that the testimony of a missing witness might have been useful . . . is not 'proof of actual

prejudice'"). *See also United States v. Rogers,* 722 F.2d 557, 561 (9th Cir. 1983) (rule applied to documentary evidence).

Fourth, "to establish actual prejudice to the defense from the loss of these documents, defendants must . . . demonstrate how the documents were connected to the defense . . . ." *United States v. Sample*, 565 F. Supp. 1166, 1179 (E.D. Va. 1975). The Appellant asserts that journals kept by his mother have been lost. (R. at 281.) According to the Appellant, his mother's testimony and the journals "would help explain correspondence which the State has presented in discovery." (R. at 281.) The affidavit does not detail: (1) what correspondence is at issue; (2) why it is necessary to explain material produced in discovery; or, (3) how and what the testimony and journals would explain away. The affidavit has made no showing of how the journals were connected or germane to the defense.

Fifth, "to establish actual prejudice to the defense from the loss of these documents, defendant[] must . . . show that there is no substitute source for the information in the documents. . . ." *United States v. Sample,* 565 F. Supp. 1166, 1179 (E.D. Va. 1983). See also *United States v. Bartlett,* 794 F.2d 1285, 1290 (8th Cir. 1986) ("the defendant must show that the missing . . . information is not available through substitute sources."). The Appellant states that he was accused of purchasing clothes for José S. but that his mother actually purchased the clothes, which he cannot prove because he has been unable to locate the records. (R. at 281.) However, the affidavit does not explain what steps he took to try to find the records, if he tried to contact his mother's credit card company to track down her bills, if he interviewed any of his mother's friends or relatives to determine if they could corroborate his story, or if he attempted to locate any businesses that his mother might have frequented to purchase clothes.

Further, the Appellant asserts that his credit card and checking account records are unretrievable as are his mother's bank records because the banks where she did her business are no longer in existence. (R. at 281-82.) Again, however, the Appellant does not explain what steps he took to try to find substitutes for these records. For example, there is no indication that he contacted the Division of Banking to see what pertinent records the Division may have had. There is, for example, no statement in the affidavit as to his contacting his mother's credit card companies or the merchants where she did business in order to determine if he could either obtain her credit card bills or duplicate receipts. Further, while the Appellant alleges that he could not obtain his mother's bank records because her bank had closed, he does not identify her bank or its location and there is no statement in the affidavit as to what efforts–if any–he made to track down his mother's bank records other than (apparently) concluding they were unavailable because her bank had closed, and of course, without providing the name of the now (allegedly) defunct institution or its location. *See, e.g.,* W. Va. Code § 31A-7-4 (Banking Commissioner may place insolvent bank in receivership and receiver obligated to take control of all, books, records, and papers of the institution).

The Appellant also alleges he cannot recreate his schedule of classes and duties to the Church because of absence of records. (R. at 283.) However, he does not explain if he checked with the vocational school to see if he could obtain attendance rosters or excuse slips or if he inquired of his fellow students or his instructors to see if they could provide him information on his schedule. Nor did he state that he checked with any hotels or motels he might have stayed in while on Church business, if he had checked with any people who might have attended church conferences with him that could assist him, or if he claimed deductions on his tax returns that might substantiate his claims.

The Appellant has made no showing that would come close to justifying relief on the grounds of preindictment delay. As such, his convictions should be affirmed.

B. THE PROSECUTION OF THE APPELLANT ON THE CHARGES IN THE INDICTMENT DID NOT CONTRAVENE HIS RIGHTS, BY EX-POST FACTO APPLICATION OF A NEW CONCEPT OF "CUSTODIAN."

The Appellant contends that in the period of time covered by the charges in the indictment, he would not have been regarded as a "custodian" of José S., Michael L. or Michael B. under then-existing precedent from this Court. The argument here is syllogistic, to-wit:

. . . that however one might characterize the Appellant's status vis-a-vis the child victims, that status could not be more "custodial" than the status of a babysitter; and

. . . that this Court did not decide until 1999, in *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999), that a babysitter was a custodian under W. Va. Code § 61-8D-5; and therefore

. . . even with respect to victim Michael L., who actually lived in the Appellant's home for years, the Appellant can't be deemed to have been a custodian prior to 1999.

Neither of the cases cited by the Appellant in support of this argument is on point. In *Bouie v. Columbia*, 378 U.S. 347 (1964), the Supreme Court of South Carolina had completely re-written a trespassing statute in order to uphold the conviction of African American residents who were attempting to desegregate the lunch counter in a drugstore. The United States Supreme Court reversed, correctly finding that a statute which prohibited "entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry . . .," could not be read to prohibit the defendants' conduct, which was to lawfully enter the store, which invited their purchase of anything except food, and then refuse to leave after being asked to do so. In *Marks v. United States*, 430 U.S. 188 (1977), the issue was whether the obscenity standards announced in *Miller v. California*, 413 U.S. 87

(1973), could be applied retroactively to a case which arose at a time when *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), authoritatively stated the obscenity standard then in effect. The United States Supreme Court held that *Miller* could not be applied, since the far more restrictive *Miller* case would ". . . penalize conduct innocent when performed [under *Memoirs*]. . . ."

In the instant case, *Stephens* didn't change the law; it simply answered a question about W. Va. Code § 61-8D-5 that had theretofore not been asked. Nothing in the case law or statutory language prior to *Stephens* excluded the Appellant as a custodian, and under the circumstances of the case, the jury was entitled to conclude beyond a reasonable doubt that he was one. All three boys spent a great deal of time with him, in his van and in his home, and Michael L. actually lived with him for years. All three boys were very young teenagers when the Appellant began to abuse them. All three boys had troubled home lives and the Appellant knew that and capitalized on it. All three boys were looking for a father figure, and the Appellant knew that and capitalized on it.

C. THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY IN THIS CASE.

The Appellant asserts that an number of allegedly harmless errors in the case combined to render his trial fundamentally unfair under the cumulative error doctrine. (Appellant's Br. at 30-32.) It is rare for cumulative error to be found. *United States v. Lindell,* 881 F.2d 1313, 1327 (5th Cir. 1989). *See also Vick v. State*, 863 S.W.2d 820, 825 (Ark. 1993) (We have entertained an argument of cumulative error in rare and egregious cases."); *State v. Rogers,* 78 P.3d 497 (Kan. Ct. App. 2003) (Table) (text available at 2003 WL 22479485, at *6) ("It is rare for an appellate court to reverse a conviction based upon cumulative error."). This case is not uncommon, and the Appellant has failed to show cumulative error.

1. **The Dismissed Counts.**

Prior to trial, the State dismissed Counts 7 and 8 of the Indictment to which the Appellant's counsel did not object and which motion the circuit court granted. (R., vol. II at 5-6.) After the Appellant raised the issue of the dismissed counts in his opening, the circuit court instructed the parties not to venture into the area of the dismissed charges. *Id.* at 224. The Appellant claims that the dismissed counts constitute prior inconsistent statements from Josè S. (Appellant's Br. at 31.)

First, the Appellant's brief on this ground is a grand total of five sentences long. *Id.* It contains no citation to any legally recognized authority. *See id.* This court has said, "'[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . .'" *State v. Gray*, 217 W. Va. 591,600, 619 S.E.2d 104, 113 (2005) (*per curiam*) (citation omitted). Indeed, here the Appellant asserts that the witnesses statements are "admissible as prior inconsistent statements," (Appellant's Br. at 31), but the only "authority" he cites is himself. The absence of authority is sufficient to sound the death knell of any argument that the circuit court's ruling was error. *See id.*, 217 W. Va. at 600, 619 S.E.2d at 113 ("the appellant has not cited any legal authority for the admissibility of evidence . . . ."). *See also State v. Mitchell,* 214 W. Va. 516, 525, 590 S.E.2d 709, 718 (2003) (*per curiam*) ("Ms. Mitchell's argument is not supported with pertinent authority, and is consequently considered to be abandoned."); *State v. Allen,* 208 W. Va. 144, 162, 539 S.E.2d 87, 105 (1999) ("In the absence of supporting authority, we decline further to review this alleged error because it has not been adequately briefed.").

Second, the purpose of a prior inconsistent statement is to impeach the witness. Where a prior inconsistent statement will not serve to impeach a witness, it is inadmissible. *Cf. McDougal v. McCammon*, 193 W. Va. 229, 236 n.7, 455 S.E.2d 788, 795 n.7 (1995). Here, the circuit court

explained that Michael S.'s testimony was consistent with the circuit court's directive that counts seven and eight of the indictment not be mentioned. (R., vol. II at 268.) Thus, "it's simply not appropriate to impeach him with that when he is acting pursuant to a court order[,]" *id.*, because the prior inconsistent statement is not reflective of the witness's credibility, veracity, or believability. "The ruling of the . . . court is simply the application of the venerable maxim cessante ratione legis cessat ipsa lex (with the reason of law ceasing, the law itself ceases), so often applied in this court." *Hanley v. Richards,* 116 W. Va. 127, 178 S.E. 805, 807 (1935). *See also State v. Varner,* 212 W. Va. 532, 536, 575 S.E.2d 142, 146 (2002) ("Our rules of practice are not simply normative, but are crafted to achieve desirable ends. When applying them would not effectuate their underlying goals, we eschew their application.").

2. **<u>The Church Meeting Allegations</u>.**

The Appellant claims error in the circuit court's ruling declining to allow cross-examination of victim Michael B. This three sentence argument is, like the dismissed counts argument, unsupported by any legal authority and is not, therefore, adequately briefed to be perfected for review. *Allen,* 208 W. Va. at 162, 539 S.E.2d at 105 ("In the absence of supporting authority, we decline further to review this alleged error because it has not been adequately briefed.").

3. **<u>The Law-Abiding Citizen Question</u>.**

The Appellant attempted to elicit from Scott Hannigan the Appellant's reputation as a law-abiding citizen, which question was not permitted by the circuit court. (R., vol. II at 635, 638.) The State concedes that the Appellant is correct: the circuit court's ruling was error. (Appellant's Br. at 31.)

4. **The State's Cross-Examination Of The Defendant.**

The Appellant claims error in the circuit court overruling two of his objections to the State's cross-examination of the defendant. The Appellant's entire argument is:

> 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, custory 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."

(Appellant's Br. at 32.) This"'[a] skeletal 'argument', really nothing more than an assertion, does not preserve [the] claim . . . .'" *Gray*, 217 W. Va. at 600, 619 S.E.2d at 113. The failure to include or discuss any legal authority for a claim of error if a fatal weakness in the brief and prevents this Court from reaching the issue of whether the circuit court erred. *State v. Mitchell,* 214 W. Va. at 525, 590 S.E.2d at 718 ("Ms. Mitchell's argument is not supported with pertinent authority, and is consequently considered to be abandoned."); *State v. Allen,* 208 W. Va. at 162, 539 S.E.2d at 105 ("In the absence of supporting authority, we decline further to review this alleged error because it has not been adequately briefed.").

Further, during the State's cross-examination of the Appellant the State asked him whether victim Michael S., as a minor and in the defendant's car, was in the defendant's "care, custody and control." (R., vol. II at 767.) The Appellant responded, "I don't know what you mean by that." *Id.* The State then asked, "Oh, if a decision had to be made, an adult decision, would you have made it at that time when he was in your vehicle?" *Id.* It was only then that defense counsel objected, "to any interpretation of the law." *Id.* As the circuit court correctly found, the question sought not a legal conclusion from the Appellant, but a purely factual one concerning as to who had power over whom when it came to decision-making in the car. *Id.* The circuit court did not err.

Second, the Appellant objected to the introduction of certain letters he wrote to victim Michael L. (R., vol. II at 776.) The Appellant objected on the ground that "This is beyond the scope of direct." *Id.* The circuit court ruled, "Well, counsel, he's a defendant. He can be crossed on anything that is relevant . . . ." *Id.* The circuit court was undoubtedly correct.

While "[o]rdinarily, the scope of cross-examination is limited to facts and circumstances connected with statements elicited on direct examination and those matters affecting credibility[,] [i]n West Virginia trials, the scope is even broader for parties: 'A party may be cross-examined on any matter relevant to any issue in the case, including credibility.' W. Va. R. Evid. 611(b)(1)." *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742, 757 (1996).

In summary: at best, the Appellant has shown a single error (which he admits is singularly harmless), and a single error (a single *harmless* error) is not cumulative error. *See State v. Beard,* 194 W. Va. at 757, 461 S.E.2d at 503 ("Since the only error that occurred was the lack of a *Kastigar* hearing, the cumulative error rule has no application to this case."). *Cf. Hughes v. State,* 735 So. 2d 238, 280 (Miss. 1999) (finding no cumulative where there were two unrelated harmless errors).

D. THE APPELLANT'S SENTENCE DID NOT VIOLATE THE PROPORTIONALITY PRINCIPLE OF WEST VIRGINIA CONSTITUTION, ART. III, § 5.

The West Virginia Constitution, art. III, § 5, provides that "[p]enalties shall be proportioned to the character and degree of the offense." In this case, the Appellant contends that his effective sentence of 20-80 years is disproportionate because of his ". . . good character, his strong support group, the psychologist's report, [and] the time frames of the accusations. . . ." (Appellant's Brief at 35.)

"In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution consideration is given to the nature of the offense, the legislative purpose behind the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

Let us look at the offenses in question.

There were multiple offenses – sixteen of them – involving fellatio, oral sex and anal sex.

There were three separate victims, all very young, all very poor, all very trusting, all very naive.

All of the victims looked to the Appellant as a father figure, and the Appellant exploited this by telling the boys that this – meaning fellatio and oral sex, and in two instances anal sex – is how fathers teach their sons about life.

All of the victims looked to the Appellant for spiritual guidance, and the Appellant exploited this by telling the boys that God wouldn't work in their lives if they didn't consent to oral sex with him – that sex is how David and Jonathan "sealed their covenant" – that if they didn't do these things willingly, ". . . you'll never be anybody." (Tr., vol. III, p. 335.)

In light of these facts, there can be no serious argument that the sentence violates statutory or constitutional commands under *State v. Watkins*, 214 W. Va. 477, 590 S.E.2d 670 (2003), or "shocks the conscience" under *State v. Adams*, 211 W. Va. 231, 565 S.E2d 353 (2002). The court could have run all of the sentences consecutively, producing an effective sentence of 56-180 years; that the court did not is eloquent testament to the adage about tempering justice with mercy.

VII.

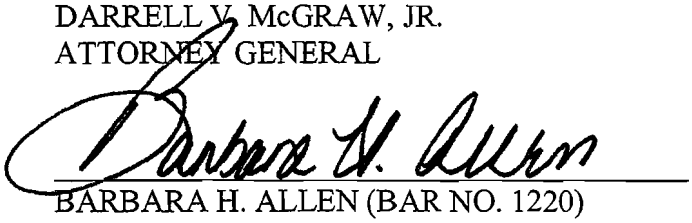
CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the Appellant's conviction and sentence should be affirmed.

STATE OF WEST VIRGINIA,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for Appellee, do hereby certify that a true and accurate copy of the foregoing "Brief of Appellee, State of West Virginia" was served upon plaintiff's counsel of record, by depositing the same in the United States mail, first-class postage prepaid, this 16th day of July, 2010, addressed as follows:

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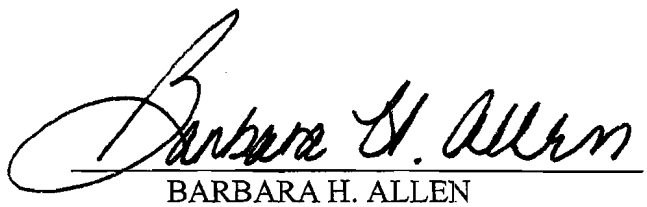

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