

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

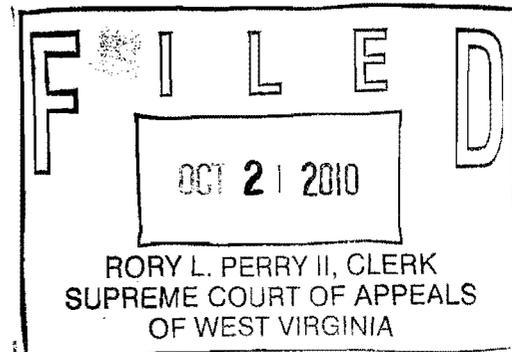
**STATE OF WEST VIRGINIA,
Appellee**

v.

**CHRISTOPHER PROCTOR,
Appellant**

Supreme Court No. 35647

**Circuit No. 08-F-520
(Kanawha County)**



BRIEF OF APPELLANT

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**CHRISTOPHER PROCTOR,
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BRIEF OF APPELLANT

INTRODUCTION

The Appellant, Christopher Proctor, appeals the denial of his Motion for Reduction of Sentence. The Motion for Reduction of Sentence was based on the grounds that:

(1) The Sheriff's Department Report of Investigation, the Probation Office's Presentence Report, and the Forensic Psychological Evaluation of the Appellant contained material misstatements regarding the facts of this case, misstatements that resulted in an excessive sentence for the offenses of sexual abuse and sexual abuse by a guardian. Consequently, the Appellant is serving a sentence in the penitentiary of 15 to 45 years where the only direct evidence of sexual contact is the Appellant's own admission to a single touching or rubbing that was so minimal that the victim doesn't appear to know that it even occurred.

(2) Two sentences for a single act, to be served consecutively, violate the constitutional protections against double jeopardy. A careful review of West Virginia caselaw upholding such multiple penalties reveals that the cases were wrongly decided. Consequently, West Virginia appears to be the only State in the Union that allows multiple punishments in cases of sexual abuse and sexual abuse by a guardian.

PROCEEDINGS AND RULINGS BELOW

On March 9, 2009, the Appellant pled guilty to one count of sexual abuse, in violation of W.Va. Code § 61-8B-7, and one count of sexual abuse by a guardian, in violation of W.Va. Code § 61-8D-5. (Although the Appellant pled guilty to two counts, both counts were based on a single act, as explained below.) On June 24, 2009, the Court sentenced the Appellant to an indeterminate term of 5 to 25 years in the penitentiary for the conviction of sexual abuse, and to an indeterminate term of 10 to 20 years for the conviction of sexual abuse by a guardian. The sentences were ordered to be served consecutively, for a total sentence of 15 to 45 years.

On October 22, 2009, the Appellant filed a Motion for Reduction of Sentence. The Motion was based on the grounds that the Sheriff's Department Report of Investigation, the Probation Office's Presentence Report, and the Forensic Psychological Evaluation of the Appellant contained material misstatements regarding the facts of this case, and that two sentences, for a single act, violate the constitutional protections against double jeopardy.

On November 23, 2009, without a hearing, the Circuit Court denied the Motion for Reduction of Sentence in a one-sentence Order, stating simply that the Motion for Reduction of Sentence is "hereby denied."

On December 23, 2009, the Appellant filed a timely Notice of Intent to Appeal. The Petition for Appeal was filed on March 23, 2010, and granted by Order of June 22, 2010.

STATEMENT OF FACTS

On February 7, 2008, the Appellant was arrested by a Kanawha County Deputy Sheriff and charged with first degree sexual abuse and sexual abuse by a parent, guardian or custodian. The Appellant was subsequently indicted in the September 2008 term of court and charged with four counts: two counts of first degree sexual abuse, in violation of W.Va. Code § 61-8B-7; and two counts of sexual abuse by a parent, guardian or custodian, in violation of W.Va. Code § 61-8D-5.

The charges were based on the allegation that the Appellant made sexual contact with the 3 year, 7 month old daughter of his fiancée. According to pretrial discovery in this case, the only direct evidence of actual sexual contact was the Appellant's own admission during the course of his interrogation by the Kanawha County Sheriff's Department and in his psychological evaluation. The Appellant admitted to a single sexual touching or rubbing of an area around the vagina, a touching or rubbing that was minimal, short in duration, and did not involve penetration. Interrogation, Feb. 7, 2008, at 12, 18; Forensic Psychological Evaluation, at 4.

The victim was interviewed by Maureen Runyon, a specialist in forensic interviewing of child sexual abuse victims. During the interview, the child was shown a large diagram of a female body and asked detailed questions about sexual contact. Because of the child's young age, during the 20 minute interview she was able to answer some questions clearly, but unable to answer others. The questions she was able to answer show that she had no memory of sexual

contact and no knowledge that sexual contact had even occurred. Pointing to the sexual parts of the female diagram, the interviewer asked:

Q: Has any grown-up ever touched you right here on your body?

A: No.

DVD, Feb. 11, 2008, at 13:30:00

Pointing again to the sexual parts of the female diagram, the interviewer then asked:

Q: Has Daddy ever given you any touches here on your body?

A: No.

DVD, Feb. 11, 2008, at 13:48:30

The answers provided by the child in the forensic interview appear to confirm the Appellant's assertion that the touching was minimal, in that the child appears to have no memory or knowledge that the touching even occurred.

Unfortunately, both the Sheriff Department's Report of Investigation and the Probation Office's Presentence Report (relying on the police report) are misleading regarding the child's assertions. First, the Report of Investigation failed to acknowledge the child's actual denials and instead reported only that "[The child] did not disclose anything during the interview." Report of Investigation, at 10.

More significantly, the Presentence Report (relying on the police report) misleadingly states "When authorities spoke with the minor victim . . . and asked if her father touched her, she answered, 'Yes.'" Presentence Report, at 2. In fact, in addition to the forensic interview by Maureen Runyon -- in which the child answered "No" -- the child had also been interviewed by

Deputy C.E. O'Neal. Deputy O'Neal reported a touching, but not of a sexual part of the body. As Deputy O'Neal wrote, "I spoke with [the child] and asked her if Daddy had touched her and she answered 'Yes,' *but it wasn't clear what was meant by her answer.*" West Virginia Uniform Incident/Offense Report Form, page G (emphasis added). In part because it wasn't clear what the child meant, the child was referred to Maureen Runyon, as a specialist in forensic interviewing of child sexual abuse victims. As set forth above, in the interview with Maureen Runyon, what the child meant was clarified, and the child confirmed that she had no knowledge of being touched on a *sexual* part of her body.

The Appellant's statements regarding minimal contact, and the child's lack of knowledge of any sexual contact, appear to be corroborated by the sexual assault exam. The sexual assault exam (conducted immediately after the touching) showed no redness, no abrasions, no swelling -- no evidence at all. Sex Crime Kit Feedback Form, Data Collection Form, and Sexual Assault Information Form, Feb. 7, 2008. Also, the Appellant voluntarily provided a DNA sample, but no biological evidence was identified or reported.

On March 9, 2009, the Appellant entered into a plea agreement in which he pled guilty to one count of first degree sexual abuse and one count of sexual abuse by a guardian, in exchange for the dismissal of the remaining two counts.

The only evidence in support of the *dismissed* counts was the Appellant's own statement regarding a touching that he stated was not sexual in nature and did not involve contact with an intimate body part. Interrogation, Feb. 7, 2008, at 14-15.) Unfortunately, the Presentence Report (once again, relying on the police report) is erroneous in this regard, too, stating that "Subject acknowledged touching the child victim *sexually* on another occasion as well," without noting that the Appellant's references to an occasion in the past was in fact a denial -- not an

admission -- of sexual contact. Presentence Report at 6. Consequently, there appears to be no evidence at all to support the two additional charges. (These charges were dismissed as part of the plea agreement that was entered in this case. Order, March 9, 2009.)

The consequences of the misstatements regarding previous misconduct carried over to other aspects of the case as well. In his forensic psychological evaluation that was included in the presentence information reported to the Circuit Court, Dr. Steven Dreyer appears to rely on the erroneous assertions in the police report and erroneously believed that the Appellant was an admitted repeat offender. Consequently, in his report Dr. Dreyer questioned the Appellant's integrity during the evaluation when the Appellant denied previous incidents. May 12, 2009, Forensic Psychological Evaluation, at 4. Had Dr. Dreyer been provided with correct information, he would have known that the Appellant's statements have been consistent, rather than inconsistent, and the results of his evaluation may have been much more favorable to the Appellant.

Despite the results of the forensic interview (documenting that the child had no knowledge of the touching), the child's mother submitted a victim impact statement asserting that the child "suffered horrifically" because of the touching, and may be "forever maimed." Victim Impact Statement, 1, 4. The child's mother also asserted that, because of the touching, the child is now suffering from post-traumatic stress syndrome, anxiety, mood swings, anger, hostility, depression, ADHD, is mentally challenged and suffers a speech impediment, and will be required to take medicine for the rest of her life. Victim Impact Statement, 6.

The only documentation submitted by the mother in support of her assertions is a one-paragraph letter from a psychiatrist that referred to treatment of the child for mood stability and PTSD, but did not attribute the conditions to any cause. Letter, John P. Hutton, March 5, 2009.

Because the interviews with the child confirmed that she has no knowledge of any sexual touching, it is clear that, if in fact the child is suffering from psychological conditions, they were not caused by the unnoticed touching.

Based on the mother's assertions and the erroneous information provided in the Police Report, the Presentence Report prepared by the Adult Probation Department erroneously repeated the errors, stating that the child has been traumatized by the offense, with a "tremendous negative impact . . . that may negatively affect her throughout her life." Presentence Report, 6. The Report also repeats the erroneous assertion that the Appellant "acknowledged touching the child victim sexually on another occasion as well." Presentence Report, 6.

At the sentencing hearing the prosecutor, in reliance on the erroneous statements in the Police Report and the Presentence Report, argued for consecutive sentences on the grounds that the unnoticed touching "has affected this little girl tremendously." Sentencing Hearing, June 24, 2009, at 4. At the conclusion of the hearing, the Court imposed the consecutive sentences, as urged by the prosecutor. Order, June 25, 2009.

ASSIGNMENTS OF ERROR

I. The Sentence of 15 to 45 Years in Prison Is Excessive in That It Is Based on Material Misstatements of Fact, and the Only Direct Evidence of Sexual Contact is the Appellant's Own Admission to a Single Touching or Rubbing That Was So Minimal that the Victim Doesn't Appear to Know That It Occurred.

II. Two Sentences for a Single Act, Ordered to be Served Consecutively, Violates the Constitutional Protections Against Double Jeopardy. Previous Rulings of This Court Appear to Be Wrongly Decided, and West Virginia Appears to be the Only State in the Union That allows Multiple Punishments in Cases of Sexual Abuse and Sexual Abuse by a Guardian.

DISCUSSION OF LAW

I. The Sentence of 15 to 45 Years in Prison Is Excessive in That It Is Based on Material Misstatements of Fact, and the Only Direct Evidence of Sexual Contact is the Appellant's Own Admission to a Single Touching or Rubbing That Was So Minimal that the Victim Doesn't Appear to Know That It Occurred.

As set forth in detail in the Statement of Facts above, the Sheriff's Department Report of Investigation, the Probation Office's Presentence Report, and the Forensic Psychological Evaluation of the Appellant all contain material misstatements regarding the facts of this case. The material misstatements involve erroneous statements attributed to both the child and the Appellant, including (1) the erroneous assertion that the Petitioner admitted to being a repeat offender and then falsely denied it, and (2) the erroneous assertion that the child suffered severe psychological trauma from the sexual contact, when in fact the child's own statements to the forensic interviewer confirm that the contact was so minimal that the child did not even know that it had occurred. The misstatements were brought to the Circuit Court's attention in full detail in the Appellant's Motion for Reduction of Sentence, filed in the Circuit Court on October 22, 2009.

The misstatements were not brought to the Circuit Court's attention previously because the primary evidence of the misstatements are contained in an untranscribed DVD of the forensic interview of the child, and because of a last-minute substitution of counsel, prior to sentencing, due to emergency leave of trial counsel. Because new counsel was not aware of the contents of the untranscribed CD, neither new counsel nor the Appellant himself were able to rebut the assertions that the victim suffered psychological trauma from the touching. June 24, 2009,

Sentencing Hearing, at 7, 11. When the misstatements were discovered by new counsel, the misstatements were brought to the Circuit Court's attention in a timely Motion for Reduction of Sentence pursuant to Rule 35 of the Rules of Criminal Procedure (authorizing correction or reduction of a sentence with 120 days after the sentence is imposed.)

In *State v. Craft*, 200 W.Va. 496, 499, 490 S.E.2d 315, 318 (1997), this Court held that "A defendant has a due process right to be sentenced on the basis of accurate information. *Fox v. State*, 176 W.Va. 677, 682, 347 S.E.2d 197, 202 (1986). See *United States v. Tucker*, 404 U.S. 443 (1972)." The Court further stated that, if factual inaccuracies are alleged by counsel, the trial court has a mandatory duty to make written findings and attach its findings to the presentence report that is made available to the Parole Board. 200 W.Va. at 500, 490 S.E.2d at 319.

Because the Circuit Court in the present case denied the Motion for Reconsideration without providing a hearing and without stating findings on the contested facts, the Appellant has been denied the due process rights set forth in *State v. Craft*. The consequences for the Appellant are severe, in that he is now serving a sentence in the penitentiary of 15 to 45 years based on the factually erroneous information that (1) he is a repeat offender, and (2) that he inflicted substantial psychological trauma on the victim.

Additionally, a combined penalty of 15 to 45 years for contact that was so minimal that the victim doesn't appear to know it occurred appears to be a constitutionally disproportionate sentence, in violation of the Cruel and Unusual Clause of Art. III, § 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution. As this Court stated in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981):

The constitutional requirement that a criminal sentence "shall be proportioned to the character and degree of the offence" is explicitly stated in Article III, Section 5 of our State Constitution. This principle of proportionality has been recognized in a number of our cases. *E.g.*, *State v. Houston*, 166 W.Va. 205, 273 S.E.2d 375 (1980); *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980); *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978); *State ex rel. Harris v. Calendine*, 160 W.Va. 172, 233 S.E.2d 318 (1977); *Franklin v. Brown*, 73 W.Va. 727 S.E. 405 (1914).

166 W.Va. at 528-29, 276 S.E.2d at 209.

In *Wanstreet*, this Court acknowledged that one of the factors to consider in determining the proportionality of a sentence is "a comparison of punishment with other offenses within the same jurisdiction." 166 W.Va. at 532, 276 S.E.2d at 211. In comparing the sentence imposed on the Appellant for the unnoticed touching with the punishment for other offenses, it is apparent that the sentence is constitutionally excessive. Under his sentence of 15 to 45 years, the Appellant will be eligible to apply for parole in 15 years, the same penalty he would have received if he had *murdered* the victim, with premeditation, and received mercy. W.Va. Code § 62-3-15 (verdict and sentence in murder cases). If the Appellant had been convicted of attempting to kill or injure the victim by poison, he would be eligible to apply for parole after three years -- just one fifth of the period of time before parole eligibility that he is currently serving. W.Va. Code § 61-2-1 (Attempt to kill or injure by poison). If he shot or stabbed the victim with the intent to maim or kill her, he would be eligible to apply for parole after two years. W.Va. Code § 61-2-9 (Malicious or unlawful assault).

For all of the above reasons, the Circuit Court ruling denying the Appellant's Motion for Reconsideration of Sentence, without a hearing, should be reversed.

II. Two Sentences for a Single Act, Ordered to be Served Consecutively, Violates the Constitutional Protections Against Double Jeopardy. Previous Rulings of This Court Appear to Be Wrongly Decided, and West Virginia Appears to be the Only State in the Union That allows Multiple Punishments in Cases of Sexual Abuse and Sexual Abuse by a Guardian.

Although this Court upheld the imposition of multiple penalties for single sexual acts in *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992), and its progeny, none of the decisions of the United States Supreme Court discussed in *Gill* involve sex offense statutes. More significantly, the cases relied upon in *Gill* do not involve multiple statutes addressing sexual abuse and sexual abuse by a guardian. For the reasons set forth below, *State v. Gill* appears to have been wrongly decided, and West Virginia appears to be the only state in the Union that permits multiple punishments in cases of sexual abuse and sexual abuse by a guardian.

In *Missouri v. Hunter*, 459 U.S. 359 (1983), the primary case relied on in *State v. Gill*, the United States Supreme Court considered a case where a defendant was charged with armed criminal action, first-degree robbery, and assault with malice, all arising from the robbery of a supermarket. Although all three charges were related, it is significant that -- unlike with the West Virginia charges of sexual abuse and sexual abuse by a guardian -- the three charges in *Missouri v. Hunter* did not address the precisely identical act. The charges in *Missouri v. Hunter* arise from three different acts: an armed criminal action, a robbery, and an assault. They are related, but they are also different. By contrast, the sexual abuse charges in the Petitioner's case address precisely the same, single act.

Similarly, in *Ohio v. Johnson*, 467 U.S. 493 (1984), also relied on in *State v. Gill*, the two charges were murder and grand theft -- clearly distinct acts. Additionally, the charges in *Albernaz v. United States*, 450 U.S. 333 (1981) (possession of marijuana, conspiracy to import, and conspiracy to distribute) are also related but clearly different acts. Finally, in the fourth and

final holding of the United States Supreme Court that was relied on in *State v. Gill*, the charges in *Garrett v. United States*, 471 U.S. 773 (1985) (importing marijuana and conspiracy to import marijuana), are, once again, related but clearly distinct acts.

As a consequence, it is apparent that the cases relied on in *State v. Gill* did not address the issue of multiple punishments for a single act of sexual abuse committed by a guardian. Except for West Virginia, there does not appear to be a single jurisdiction in the nation that allows separate punishments for sexual abuse and sexual abuse by a guardian, when only one act was committed. In a review of the sexual offense statutes in all fifty states, there does not appear to be a single jurisdiction, other than West Virginia, that has adopted or upheld legislation authorizing separate punishments for any form of sexual abuse while simultaneously allowing a second prosecution and punishment, for the same act, punishable as sexual abuse by a parent, guardian or custodian.¹

¹The sex offense statutes for all fifty jurisdictions are as follows. (Of the fifty states, only West Virginia has a provision authorizing separate crimes and separate punishments for the offenses of sexual abuse and sexual abuse by a guardian.) Ala. Code § 13A-6-60 through § 13A-6-70 ("Sexual Offenses"); Alaska Stat. § 11.41.410 through § 11.41.470 ("Sexual Offenses"); Ariz. Rev. Stat. § 13-1401 through § 13-1424 ("Sexual Offenses"); Ark. Code Ann. § 5-14-101 through § 5-14 132 ("Sexual Offenses"); Cal. Penal Code, Title 9, § 261 through § 268 ("Rape, Abduction, Carnal Abuse of Children, and Seduction"); Col. Rev. Stat. § 18-3-401 through § 18-3-417 ("Unlawful Sexual Behavior"); Conn. Gen. Stat. § 53a-65 through § 53a-90b ("Sex Offenses"); Del. Code Ann. tit. 11, § 53a-65 through 53a-90a ("Sexual Offenses"); D.C. Code Ann. § 22-3001 through 3024 ("Sexual Abuse"); Fla. Stat. Ann. § 794.005 through .075 ("Sexual Battery"); Ga. Code Ann. § 16-6-1 through 16-6-25 ("Sexual Offenses"); Haw. Rev. Stat. § 707-730 through 707-741 ("Sexual Offenses"); Idaho Code § 18-6101 through 6609 ("Rape"); Ill. Comp. Stat. 5/11-6 through 5/11-26 ("Sex Offenses"); Ind. Code § 35-42-4-1 through 35-42-4-13 ("Sex Crimes"); Iowa Code § 709.1 through 709.22 ("Sexual Abuse"); Kan. Stat. Ann. § 21-3501 through 21-3525 ("Sex Offenses"); Ky. Rev. Stat. Ann. 510.010 through 510.320 ("Sexual Offenses"); La. Rev. Stat. Ann. § 14:41 through 14.43.6 ("Rape and Sexual Battery"); Me. Rev. Stat. Ann. tit. 17-A, § 251 through 284 ("Sexual Assaults"); Md. Code Ann. § 3-303 through 323 ("Sexual Crimes"); Mass. Gen. Laws ch. 265, § 22 through 246; Mich. Comp. Laws § 750.520a through 520n ("Rape"); Minn. Stat. 609.293 through 365 ("Sex Crimes"); Miss. Code Ann. § 97-3-65 through 71; 95 through 104; Mo. Rev. Stat. § 566.010 through 147 ("Sex Offenses"); Mont. Code Ann. § 45-5-501 through 512 ("Sexual Crimes"); Neb. Rev. Stat. § 28-317 through 28-322-04; Nev. Rev. Stat. § 200.364 through 200.3784 ("Sexual Assault and Seduction"); N.H. Rev. Stat. Ann. § 632-A:1 through 10-c ("Sexual Assault and Related Offenses"); N.J. Stat. Ann. § 2C:14-1 through 10 ("Sexual Offenses"); N.M. Stat. Ann. § 30-9-1 through

Numerous states have adopted statutory provisions criminalizing sexual abuse by a parent, guardian or custodian, in addition to statutory provisions criminalizing sexual abuse in general. Most of these provisions, however, include sexual abuse by a guardian as *one of the alternative means* of committing the offense set forth in the general sexual abuse statute, usually with a higher penalty when the abuse is by a guardian. *See, e.g.*, Ariz. Rev. Stat. § 13-1405 (sexual contact with minor, where one of the alternatives means of committing the offense is if the sexual contact is committed by a guardian, resulting in a higher degree of the offense and more restrictive opportunities for release); Ark. Code Ann. § 5-14-125 (sexual assault in the second degree, where one of the several means of committing the offense is sexual contact by a guardian).

Although numerous states have adopted legislation criminalizing sexual abuse by a guardian, none of these states appear to have adopted or upheld legislation authorizing the conviction and sentencing for both sexual abuse and sexual abuse by a guardian. And none of the sex offense statutes in other states appear to contain the sweeping language of W.Va. Code § 61-8D-5, where the Legislature stated that "In addition to any other offenses set forth in this

18 ("Sexual Offenses"); N.Y. Penal Law § 130.000 through 130.96 ("Sex Offenses"); N.C. Gen. Stat. § 14-27.1 through 14-27.10 ("Rape and Other Sex Offenses"); N.D. Cent. Code § 12.1-20-01 through 12.1-20-24 ("Sex Offenses"); Ohio Rev. Code Ann. § 2907.1 through 2907.41 ("Sex Offenses"); Okla. Stat. tit. 21, § 1111 through 1124 ("Rape, Abduction, Carnal Abuse of Children and Seduction"); Or. Rev. Stat. § 163.305 through 479 ("Sexual Offenses"); Pa. Stat. Ann. tit. 18, § 3101 through 3130 ("Sexual Offenses"); R.I. Gen. Laws § 11-37-1 through 11-37-17 ("Sexual Assault"); S.C. Code Ann. § 16-3-651 through 850; S.D. Codified Laws § 22-22-1 through 22-22 46 ("Sex Offenses"); Tenn. Code Ann. § 39-13-501 through 532 ("Sexual Offenses"); Tex. Penal Code Ann. § 22.011 and 22.021; Utah Code Ann. § 76-5-401 through 413 ("Sexual Offenses"); Vt. Stat. Ann. tit. 13, § 3251 through 3272 ("Sexual Assault"); Va. Code Ann. § 18.2-61 through 18.2-67.10 ("Criminal Sexual Assault"); Wash. Rev. Code § 9A.44.010 through 9A.44.170 ("Sex Offenses"); W.Va. Code § 61-8B-1 through 18 ("Sex Offenses"); Wis. Stat. § 940.225; Wyo. Stat. Ann. § 6-2-301 through 319 ("Sexual Assault").

code, the Legislature hereby declares *a separate and distinct offense* [of sexual abuse by a guardian]." [emphasis added]

The basic problem with criminalizing sexual abuse and sexual abuse by a guardian as separate crimes, and allowing punishment for both, is that sexual abuse is an *element* of sexual abuse by a guardian. The United States Supreme Court in *Missouri v. Hunter* and its progeny gave deference to legislatures to explicitly impose cumulative punishments for the same offense (as an alternative to the "same elements" double jeopardy test of *Blockburger v. United States*, 284 U.S. 299 (1932)), but the Supreme Court did not go so far as to allow a legislature to criminalize an act and then additionally criminalize each element of the act.

Although, as discussed above, the United States Supreme Court rulings in *Missouri v. Hunter* and its progeny involve different but related acts, even these rulings have been harshly criticized. As Justice Marshall stated in his dissent in *Missouri v. Hunter*, 459 U.S. 359 (1983):

If the prohibition against being "twice put in jeopardy" for "the same offence" is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name, or to create a series of greater and lesser included offenses, with the first crime a lesser included offense of the second, the second a lesser included offense of the third, and so on.

459 U.S. at 370-71.

Additional criticisms of multiple punishments for similar acts can be found in a variety of appellate opinions across the country, including majorities, concurrences, and dissents. *See, e.g. Richardson v. State of Indiana*, 717 N.E.2d 32 (Ind. 1999) (majority opinion); *In Re: S.L.M.*, 287

Mont. 23, 951 P.2d 1365 (1997)(concurrency); and *State v. Feliciano*, 115 P.3d 648 (Haw. 2005)(dissent).

As set forth vigorously in the discussions in the above cases, a basic tenet of the American system of justice is that courts, rather than legislatures, determine the meaning of the Constitution. Both logic and common sense dictate that two sentences to the penitentiary -- one for sexual abuse by a guardian and one for sexual abuse, when only one act of sexual abuse was committed -- is a violation of the Double Jeopardy Clause of both the West Virginia Constitution, Article III, Section 5, and the Fifth Amendment to the United States Constitution.

For these reasons, *State v. Gill* and its progeny appear to have been wrongly decided and should not provide the basis for multiple punishments in this case.

RELIEF REQUESTED

For the above reasons, the Order of the Circuit Court of Kanawha County, denying the Appellant's Motion for Reconsideration of Sentence, should be reversed, and the case remanded for the imposition of an appropriate sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 21st day of October, 2010, I served,
by hand, a copy of the foregoing Brief of Appellant upon:

Thomas W. Smith
Managing Deputy Attorney General
Office of the Attorney General
State Capitol
Charleston, WV 25305



George Castelle