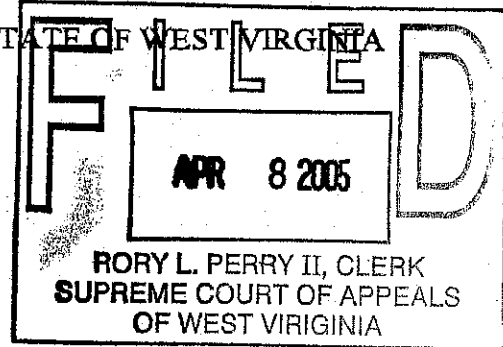


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IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
AT CHARLESTON

No. 32567



STATE OF WEST VIRGINIA, EX REL.
JAMES MICHAEL WENSELL
Appellant,

VS.

Monongalia County Habeas Case No: 01-C-511
(Underlying Criminal Case 96-F-22)

GEORGE TRENT, WARDEN, MOUNT
OLIVE CORRECTIONAL COMPLEX
Appellee.

APPELLANT'S BRIEF

**APPEAL FROM ORDER DENYING HABEAS CORPUS RELIEF FOLLOWING
OMNIBUS HEARING**

COUNSEL FOR APPELLANT:

Mark Pellegrin

MARK PELLEGRIN WV BAR #6650
203 GRAND STREET,
MORGANTOWN, WV. 26501
(304) 296-4144

MEMORANDUM OF PARTIES

APPELLANT: JAMES MICHAEL WENSELL

By Counsel Mark Pellegrin
203 Grand St, Morgantown, WV. 26501
(304) 296-4144

APPELLEE: STATE OF WEST VIRGINIA

Marsha Ashdown, Monongalia County Prosecuting
Attorney, Monongalia County Courthouse
Morgantown, WV, 26505 (304) 291-7250
Darrell V McGraw, Jr. Office of Attorney General
State Capitol Complex, Bldg. 1, Room E26
Charleston WV 25305 (304) 558-2021

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**I. PROCEDURAL HISTORY AND NATURE OF RULING IN THE
CIRCUIT COURT**

James Michael Wensell was charged in the Magistrate Court of Monongalia County, West Virginia in this case on or about November 22, 1995 in cases 99-F-383 through 99-F-389. The complaints alleged that Mr. Wensell had committed numerous sexual offenses against his two stepdaughters. On November 28, 1995, Howard Higgins was appointed to represent Mr. Wensell.

On January 4, 1996, Mr. Wensell was Indicted on thirteen counts of sexual felonies against his stepdaughters. He was charged with eight counts of first degree sexual assault, three counts of first degree sexual abuse, and two counts of sexual abuse by a custodian. All the counts of the Indictment alleged the misconduct took place between 1992 and 1995.

On July 16, 1996 a trial began in this case. Judge Robert B. Stone presided. The Trial was completed on July 19, 1996. The Jury's verdict was 'guilty' on all thirteen counts. On July 29, 1996, unknown to the Defendant, Mr. Higgins filed for a new trial and for judgment of acquittal. On October 24, 1996, the Defendant terminated the services of Howard Higgins and hired George Daugherty to represent him at the post-trial motions and sentencing. On October 30, 1996, the Defendant's Motion for Judgment of Acquittal was granted as to one of the thirteen counts. At the sentencing hearing Mr. Wensell was sentenced to twenty-one years to fifty-five years in the State Penitentiary. Mr. Wensell is still serving that sentence in the Mount Olive Correctional Complex.

On March 31, 1997, defense counsel filed an appeal with the Supreme Court of Appeals of West Virginia. The appeal was denied without prejudice. A Writ of Habeas Corpus was filed in the Monongalia Circuit Court on October 18, 2001. An Omnibus Hearing was held on July 23, 2002 and August 23, 2002. On July 15, 2004, Judge Stone Entered an Order denying habeas corpus relief.

Subsequently, Mark Pellegrin was appointed to represent Mr. Wensell. An Order granting an extension of time for filing appeal was granted on October 21, 2004.

II.

STATEMENT OF FACTS

James Michael Wensell's ex wife Bobbie Wensell was married to Brian Ellifritz in 1987. Two children were born as a result of that marriage, namely, Tricia Ellifritz (born March 8, 1987) and Amy Ellifritz (born May 16, 1988). The couple was divorced in 1991 after a very traumatic and abusive marriage. In fact, during the marriage, Brian

and Bobbie lost custody of the two troubled children for over six months due to alleged abuse in the family home.

James Michael Wensell and Bobbie Wensell were married in 1991. One child was born as a result of that marriage, namely, Jessica Wensell (born September 9, 1992). Bobbie Wensell had obtained custody of Tricia and Amy Ellifritz after her divorce from Brian Ellifritz in 1991.

The three children moved into the home of Michael and Bobbie Wensell after their marriage in 1991 and the family lived in Morgantown for the duration of their marriage. At the trial there was testimony that the marriage suffered through ups and downs however the Petitioner was very close to his stepdaughters and for the most part they had a loving relationship. Although the Petitioner and his wife disagreed on a number of areas concerning the marriage, including financial, moral and spiritual matters, there were no cases of reported violence until approximately August of 1994 when in the heat of an emotional argument, Mr. Wensell assaulted his wife. As a result, Mr. Wensell was charged with misdemeanor assault, plead guilty and was ordered to undergo counseling with his wife. Michael and Bobbie Wensell received counseling from Hiro Kondo, a psychologist (Trial Transcript Pgs. 239-240). Michael Wensell had no further legal problems until 1996 when he was indicted on thirteen counts of sexual felonies against Tricia and Amy Ellifritz on January 4, 1996. The Trial was scheduled to begin on Tuesday, July 16, 1996.

Prior to the trial, appointed attorney Howard Higgins filed a Motion for Psychological and/or Physical Evaluation. On May 2, 1996, this motion was heard by the Honorable Robert B. Stone. At the motion hearing the Court granted the Defense motion

regarding the appointment of a psychologist and a private investigator. Further, the Court allotted money to obtain such services and provided that if additional funds were needed that the Defendant should return to Court. Accordingly, the Court stated, "I'll probably give it to you. I need to kind of have some idea. It's a lot of counts. It's a major case, and I grant you that right." (See Motion Hearing Transcript from May 2, 1996)

Although Defense counsel stated that: "we believe that it's CRUCIAL to our defense, and that's what we are asking for," appointed counsel Howard Higgins did not obtain an expert witness, psychologist or investigator for the defense!

As to the part of the defense motion that requested a physical examination, the Court denied such examination, stating according to the criteria in *State v Delaney*, 417 S.E.2d 903 (1992), that among other factors, too much time had elapsed between the original physical examination of the children by the State in this case. Appointed counsel Higgins explained, "Your Honor, if it will help time-wise, I will concede that I believe that I am on shaky footing on the physical examination requirement and deal strictly with the psychological evaluation (T. Pg. 24). As counsel for Mr. Wensell was appointed in this case on November 28, 1995, approximately six months had elapsed between his appointment and the defense request for examinations. Appointed counsel had ample time to have requested and have had physical examinations done on the alleged victims.

On Monday, July 8, 1996, eight days prior to trial, Mr. Higgin's motion for a continuance was heard before Judge Stone. At the hearing, appointed counsel cited various other obligations, including other Court deadlines, activities as mental hygiene commissioner, and prepaid vacation plans which interfered with his ability to adequately

prepare for a defense in this matter. The hearing transcripts identify the following reasons Defense Counsel thought a continuance should be granted:

"That case, as well as other obligations that I have, namely trying to meet the deadlines that have been set forth by the Fourth Circuit Court of Appeals and their briefing schedule. I have two briefs which are due in Federal Court...two of which are due in Federal Court; one which was due today, which I got out today to be filed, another one which is due in the Fourth Circuit in the case, United States v Peterson on July 15. That brief I do not have to complete, so that is another obligation, which I have. As outlined in my motion, the Court knows I also was on call for the month of June as mental hygiene commissioner. That was a heavy month in terms of the number of cases we did I think the court will recall we talked about that at the time about appointing a temporary commissioner due to the conflicting schedules of myself and Mr. Frere, that I have averaged a case a day for 21 days in June. So there were a lot of obligations, which caused me not have enough time, since I received the State's response for Bill of Particulars, having adequate time to prepare Mr. Wensell's defense. I am here asking for a continuance because I don't think that it's fair to Mr. Wensell, due to his luck of the draw in receiving somebody who has had those kinds of obligations fall upon them in such a short period of time. I know we all have obligations and we all have to try to keep those balls juggled and the cases moving as it is, but the Court needs to take into consideration, also that I am a sole practitioner. When I go on vacation, there's nobody else working the cases. Unfortunately, my vacation was prepaid and planned more than a year in advance and its one of those situations where if I don't go, I lose my money. It's a situation where I had to go. I am here asking the Court to consider, a postponement of this case until later this term, and if that is not feasible on the Court's docket, then a continuance until the next term of court." (See transcript from Habeas Hearing held on August 23, 2002, p.124-125)

The defense request for a continuance was denied and eight days later, Mr. Higgins represented Mr. Wensell at the trial.

Prior to the commencement of the trial in this case, the Prosecutor made a motion out of the presence of the jury to allow her to admit through the complaining witnesses, Bobbie Wensell, Amy Ellifritz and Tricia Ellifritz, other bad acts of Mr. Wensell under WV Rules of Evidence 404(b) and other relevant evidence regarding the Defendant's prior violent behavior. It was the State's position that these acts were, although unrelated to the sexual charges, part and parcel with those types of activities and offered them to

show the "children were in a particular mind set" because of the conduct of the Defendant toward them from time to time in the area of discipline and excessive discipline to keep the allegations that they have made secret over the course of time, out of fear of retribution. It was the Court's ruling that according to the case of State v McGinnis, 455 S.E.2d 516, and WV Rules of Evidence 403 and 404, prior bad acts must be shown by a preponderance of the evidence that they occurred. The Court found by a 'simple proffer' that the evidence would indicate that the acts did occur. Defense Counsel although objecting to the Court's final ruling, at no time filed a Motion in Limine or requested a specific hearing to elicit testimony as to whether there was evidence that the acts had occurred. Additionally, at no time did Defense Counsel argue case law, the findings of the appropriate case law, and differences of facts at issue. (T. Pgs. 154-175)

Additionally, a member of the jury panel Delbert Gillespie, testified that his wife and her sister had been sexually abused by their father (T. Pg. 63). However, when asked if this would affect his decision to be a just and impartial juror, Mr. Gillespie stated "no." Another member of the jury panel, Steven Purlow testified that his sister had been kidnapped and sexually assaulted at age fifteen. Mr. Purlow testified that this would not affect his ability to be a just and impartial juror (T.Pg.129) At this point, Defense Counsel did not raise a motion to have these two potential jurors stricken for cause. More importantly, he did not use any of his preemptory strikes to remove them from the jury. Both men ultimately sat on the final jury that determined the fate of James Michael Wensell.

As the trial began on July 16, 1996, the prosecutor's opening statement was filled with improper argumentative language (T.Pgs. 188-205). At no time during this statement, did Defense Counsel object to the nature and form of these statements.

Defense Counsel committed error by not objecting to the prosecution's direct examination (T.Pg 248), when the prosecutor elicited hearsay from Bobbie Wensell that Kelly Elliot of the DHHR told Bobbie Wensell that both the children had disclosed sexual abuse to her. This was entered upon the record without objection from appointed counsel.

Bobbie Wensell testified that she obtained a Family Violence Order on October 11, 1995, on the basis of physical abuse (T.Pgs. 234, 235). Defense Counsel failed to adequately cross-examine Bobbie Wensell regarding prior acts of violence. For example, Bobbie Wensell had testified at the earlier hearing in Magistrate Court that the Defendant had only assaulted her in August of 1994. Her Protective Order states he assaulted her on October 1, 1995. There were other instances of circumstances and charges in Bobbie's testimony that were never revealed in cross-examination. Defense Counsel failed to produce or have available, counseling records from Hiro Kondo or reports (statements to police and other agencies) relating to Bobbie Wensell's allegations and testimony. Mr. Higgins failed to have available prior records regarding Mrs. Wensell's acknowledgement of her children being removed from her custody during her first marriage. Appointed Counsel also failed to inquire appropriately on cross-examination into Mrs. Wensell's lack of specificity in her reports of bruise marks and mysterious behaviors on the part of her children, Amy and Tricia Ellifritz. Finally, it appears that Defense Counsel had no information regarding the prior history of Mrs. Wensell's male

cousin who had lived with her and her children, regarding his potential for child sexual assault and abuse.

During the trial, State witness Judy Smith, Executive Director of the Rape and Domestic Violence Center, was called to testify. Defense Counsel properly objected to Mrs. Smith who was there to testify in place of Mr. Jeff Prichard, who had originally taken the report in this case; however, Defense Counsel failed to object to the numerous instances of hearsay contained in Mr. Smith's testimony. Although Ms. Smith admitted that she was the official keeper of the records for the Rape and Domestic Violence Center, she was never qualified as such and no documents that were ever offered for admission for that purpose. Most importantly, Ms. Smith testified from documents that were not presented to the Defense by way of discovery prior to trial. This issue was vital to Mr. Wensell's case, however, Mr. Higgins never raised that objection. Instead, Mr. Higgins and Mr. Wensell were given time prior to proceeding with testimony to review said documents, but this lack of disclosure was extremely harmful to Mr. Wensell's case. Ms. Smith testified without objection on numerous occasions to hearsay involving Bobbie Wensell (T.Pgs. 113, 321). Additionally, Ms. Smith testified as to hearsay regarding the Child Protective Services Worker about sexual abuse (T. Pg. 322). Said instances of hearsay were never admitted as an exception to hearsay rule and clearly the defense was at a severe disadvantage in not being able to cross-examine on these issues.

Testimony by State witness Kelly Elliott, Child Protective Service Worker with the DHHR, likewise contained hearsay and double hearsay and was not objected to by Defense Counsel. Ms. Elliott testified that she went to the children's school on November 7, 1995 and elicited "disclosures" of sexual abuse from both Tricia and Amy Ellifritz (T.

Pg 338, et. Seq). Prior to that account, Ms. Elliot testified in detail regarding her education (bachelor's in sociology and anthropology) and the substance of the referral through her office and substance of her initial interview with Bobbie Wensell (T.Pg. 347). Further, Ms. Elliot testified to in-depth analysis and interview reports with the Defendant's stepdaughters. Such testimony as to what the two children disclosed to Ms. Elliott included hearsay and were neither objected to nor offered as an exception to the hearsay rule (T.Pgs. 350-362). Rather, these statements and others were offered distinctly for the truth of the matter asserted. In addition, Howard Higgins failed to object to conclusions and summations made by Ms. Elliot in areas that she was unqualified to testify to as an expert. (See T.Pg. 355, where Ms. Elliot stated that she could tell that the child was having a hard time and wasn't really sure if it was okay to talk or not) Clearly, such testimony was inadmissible and appointed counsel should have objected. Further, Ms. Elliot testified regarding prior bad acts allegedly occurring in 1991 and an incident regarding Jessica Wensell's broken foot without defense counsel's objection (T.Pgs 359-360, 367). Finally, counsel failed to make a Motion in Limine or object to references that the children were referred for follow-up therapy as it was prejudicial and based upon hearsay from the psychologists (T.Pg. 363). In Defense Counsel's cross-examination of Ms. Elliot, counsel opened the door on numerous occasions for Ms. Elliot to testify to prior instances of bad acts of conduct and allowed the witness to expound upon simple yes or no questions. Finally, Defense Counsel failed to cross-examine Ms. Elliot regarding her report, specifically where the children reported being abused by Mr. Wensell's brother Jason and regarding instances of contradictions in evidence and testimony (for example testimony that Mr. Wensell would always remove his own pants

and would pull Tricia's pants down) Further, Ms. Elliot referred both children to separate psychologists. Ms. Elliot contended that the psychologists did not take any information from her until after a couple of interviews so that the psychologist would not be biased nor would they know any information about why the children were there. As is evidenced by transcripts and references to the psychologist's testimony such testimony is untrue and should have been made note of on cross-examination, along with numerous other inconsistencies that were never raised by Defense Counsel.

The State called Dr. Rosas, a pediatrician who testified as an expert. (Prior to the trial Ms. Elliot notified Detective Bonnett of the Monongalia Sheriff's Dept. and they jointly decided to set up physical examinations and psychological examinations. (T.Pg 357) Physical examinations were conducted on November 10, 1995 (T.Pgs. 357, 358). Although Dr. Rosas testified as an expert in this matter, the prosecution never specified as to what area of expertise Dr. Rosas was requesting her admission as an expert. Unfortunately, at this point, defense counsel not only elected not to voir dire the credentials of Dr. Rosas but made a damaging statement in front of the jury by stating "I am very familiar with her and I believe that she is qualified" (T.pg. 376) ! Additionally, Defense Counsel failed to object to numerous statements containing hearsay from Dr. Rosas. Dr. Rosas testified regarding double hearsay of information taken by her secretary from Kelly Elliott suggesting abuse (T.Pgs. 377-378). Further, there were numerous other hearsay statements to which defense counsel did not object including allegations against Jason Wensell, all of which went to the truth of the matter asserted in this particular case. Other instances of hearsay that were not objected to included information and testimony that came into evidence through Dr. Rosas regarding

statements made by Bobbie Wensell and Kelly Elliott (T. Pg. 381). These statements went directly to the truth of the matter asserted regarding instances of physical and sexual abuse. There were also instances of leading questions regarding the expectations of bruising, stretching without tearing and suggestive vs. specific findings that may or may not be consistent with these allegations. (T. Pgs 381, 394, 395). Dr. Rosas found, after a complete physical examination of all three children that Amy had a zipper or adhesion-type condition upon genital examination known as labial adhesions commonly found in young girls under five years of age, but not girls of Amy's age. She indicated that such finding can be normal, but that in this instance where sexual abuse or assault was reported, it could be consistent with the reporting as well (T.Pgs. 3820384). With respect to Tricia, she reported a large tear at the most lower part of her hymen tissue, a t about six o'clock. (T.Pg. 385). She testified the tear indicated a penetration injury of the hymen, not from an accident, but penetration directly by something attempting to pass the hymen opening and that you couldn't say what the object was but that it was something large enough that it would not be accommodated by the girl's hymen. She further stated that Amy's condition was consistent with 'sexual assault' and Tricia's condition was 'specific for penetration injury' and she explained the difference (T.Pgs. 392-394). During her testimony, Dr. Rosas expressed an opinion regarding psychological reasons for a child reporting or failing to report instances of abuse, however, Defense Counsel failed to object even though this witness was not qualified in this field of expertise (T. Pg. 395). In addition, with regard to Dr. Rosas testimony, it is important to note that the medical records indicate that all physical exams were performed by Dr. Rosas's assistant Dr. Tran, and as such, certainly Defense Counsel should have availed himself of the ability to

cross-examine the credentials and findings of Dr. Tran, individually. Finally, appointed counsel failed to object and strike Dr. Rosas' testimony as it was not cited in the form of an opinion. Moreover, it was not cited in the form of an opinion to a reasonable degree of medical certainty and/or probability. To say the least, Dr. Rosas' testimony necessitated a careful cross-examination; however, inconceivably, defense counsel, regarding his cross-examination, stated, "Your Honor, we have no questions for the witness." (T. Pg. 404) ! Consequently, defense counsel did not cross-examine Dr. Rosas regarding the medical reports which provided that: Although Tricia had had bleeding in the past, at the time of the examination she was negative for bleeding and bruising and scars and that she was active, cooperative and in no distress at the time of her examination; Amy's medical report revealed the possibility of sexual abuse and that in effect labial adhesions are common findings in non-abused children. Additionally defense counsel failed to cross-examine Dr. Rosas regarding the medical examination report of Jessica Wensell that was in fact, negative for any sort of vaginal discharge or bleeding, scars, redness, or bruising, and that the findings were normal and again 'does not' refute the possibility of sexual abuse. Finally, defense counsel failed to elicit from Dr. Rosas her explanation of how the vaginal area is much like the mouth in that it heals quickly. This being the case, it would have been imperative to solicit from Dr. Rosas her opinion as to how these conditions existed in these children months after their exposure to the Defendant was alleviated. (See Duhowitz Affidavit in court file)

Tamar Hoier (a psychologist to whom Amy Ellifritz had been referred by Ms. Elliott) testified for the State. Dr. Hoier saw Amy on November 14, 1995, and November 15, 1995. Dr. Hoier testified to numerous disclosures and discussed drawings she had the

child make, as well as numerous indicators of sexual abuse. Defense Counsel did not question Dr. Hoier's protocol or her qualifications. The entire cross-examination of Dr. Hoier by defense counsel was contained in five pages, while her direct testimony was approximately 28 pages. (T. Pgs. 566-594). When the prosecution requested the Court accept Dr. Hoier as an expert in psychology, defense counsel again, had no voir dire and did not challenge the qualifications of Dr. Hoier. When asked whether or not Amy Ellifritz is a sexually abused child, defense counsel failed to object although such questioning was 1) leading and 2) the ultimate question to be determined by the trier of fact (T. Pg. 587) -- in this case, the jury. Additionally, defense counsel failed to object to numerous questions regarding information obtained through hearsay from parents, teachers, and social worker, Kelly Elliott (T. Pgs 581-586). Although the children, Tricia and Amy Ellifritz, were referred to group therapy that was conducted by Dr. Hoier's associate, testimony regarding such information and the results of said therapy were prejudicial and not objected to by defense counsel (T. Pg. 589). Additionally, defense counsel failed to object to leading questions by the prosecution as to how abused children feel about their perpetrator and why there may be non-disclosure by children as to occurrences of these events (T. Pgs. 590-593). Most importantly, however, it appears that the conversations between Dr. Hoier and Amy Ellifritz were privileged conversations between psychologist/counselor/client and at no time was any evidence displayed for which the child's privilege could or should have been properly waived. Finally, defense counsel failed to object to the overall hearsay of the testimony of Dr. Hoier with regard to her interviews with Amy Ellifritz. Amy was present to testify in court, and her conversations with Dr. Hoier did not fall within any exception of the hearsay rule. It may

have been proper for Dr. Hoier to give conclusions on what her conversations revealed but in fact she should not have been allowed to testify as to the direct conversation and hearsay of Amy Ellifritz. Finally, as previously noted, defense counsel failed to cross-examine Dr. Hoier to any significant extent so as to be able to question her about her report, especially areas which did not indicate acute symptoms of dramatic experience and details regarding sketches or drawings. Furthermore, Dr. Hoier did not render her opinions to a reasonable degree of medical certainty or probability.

William Fremouw, (a psychologist to whom Tricia Ellifritz had been referred by Ms. Elliot) testified for the State. Dr. Fremouw saw Tricia on November 22, 1995, November 28, 1995 and November 30, 1995. Although the prosecuting attorney asked that Dr. Fremouw be qualified as an expert in psychology, she did not limit his degree of expertise to that of child psychology or child abuse. However, no objection was made by the defense counsel. Additionally, defense counsel again stated in front of the jury that he was well acquainted with Dr. Fremouw. This statement could only inure to the detriment of the Defendant. Dr. Fremouw's testimony was replete with hearsay from what he had learned from Kelly Elliot and checklists from Tricia's mother and social worker. All of this information was testified to without an objection from Mr. Higgins. Additionally defense counsel did not object to Dr. Fremouw testifying as to what exactly Tricia had told him. This again is hearsay and as Tricia was available to testify on her own behalf, such testimony without objection was improper (T.Pgs. 673-677). Dr. Fremouw was allowed to testify to issues regarding delays of children reporting instances of abuse and defense counsel again, did not object although these questions were put to Dr. Fremouw in a general sense and his opinion was not specific. Dr. Fremouw opined, again, without

defense counsel's objection that Tricia was sexually abused. As this was the ultimate question for the jury, allowing such opinion was improper. Additionally, as defense counsel did not object, Dr. Fremouw was able to give his opinion without rendering said opinion to a reasonable degree of medical certainty or probability. Defense counsel's direct examination was irrelevant and had no direction toward the witness's qualifications or opinions. On redirect, the prosecuting attorney was able to ask several leading questions without objection as to Tricia's response regarding questions about Jason Wensell's alleged sexual assaults on her and concepts of good and bad touching (T.Pg. 697). Finally, defense counsel failed to cross-examine Dr. Fremouw regarding his report and inconsistencies between Tricia's statements that her sleep is good and that she has no nightmares or disturbances and has a good appetite compared to her mother's testimony that she has behavioral problems. Dr. Fremouw testified that he had received written records and studied them before talking to the child (T.Pg. 675). Further Dr. Fremouw testified that he interviewed Mrs. Wendell and asked her and Kelly Elliot to complete a checklist. It seems certain then, that the written records received were those of Kelly Elliot which contradicts Ms. Elliot's testimony that the psychologist would see the child cold so as not to be biased. This contradiction was not discussed in cross-examination. Dr. Fremouw did intelligence testing and had the child do drawings after discussing good touches and bad touches and testified "My opinion is that she is a sexually abused child, unfortunately." (T. Pg. 686) None of Dr. Fremouw's opinions were to the requisite degree of certainty, as mentioned above. Dr. Fremouw referred this child to Dr. Hoier's group for treatment. Defense counsel's cross-examination was approximately four and one half pages in the transcripts (T. Pgs. 693-698) (See Clayman affidavit)

Perhaps the most important witnesses for the State, were Tricia Ellifritz and Amy Ellifritz. The prosecution initially elicited, through Tricia's testimony, acts of punishment that the Defendant had allegedly perpetrated upon Tricia. Defense counsel did not object to this even though it was highly prejudicial and irrelevant as to the sex acts in this particular case (T. Pg. 457). On numerous occasions throughout the testimony, the prosecution presented leading questions to this witness regarding sex acts and bruises to which Defense Counsel did not object. In fact, the prosecution's questions became so leading and so frequent that Judge Stone stated at one point "I'm going to sustain the objection that would be made to leading" (T. Pg. 476) ! The prosecution also was allowed to elicit evidence of group counseling, suggesting opinions of others that this child had been sexually abused and even was allowed to elicit from this witness that she was, "sexually abused." These forms of testimony were not objected to by defense counsel, especially in the areas that were ultimate questions of fact to be determined by the jury (T. Pgs. 466-67, 483) Defense Counsel's cross-examination of Tricia Ellifritz was lacking, at best, as he did not inquire deeply as to her knowledge and understanding of sexual acts and language, thereto. Defense Counsel failed to cross-examine Tricia as to the circumstances surrounding her being struck or disciplined by the Defendant. Additionally, Defense Counsel failed to adequately cross-examine Tricia as to her age and the time period of the alleged offenses or her contradictions thereto. Finally, and most importantly, Defense Counsel failed to adequately cross-examine Tricia about the inconsistencies in her testimony regarding alleged sexual abuse by the Defendant's brother, Jason. In fact, such inconsistencies were so prevalent during direct examination

that the Court called the parties to the bench for an explanation. Although this conference is not in the transcript, it is in the Defendant's affidavit.

In regard to the testimony of Amy Ellifritz, the prosecution elicited testimony from her by numerous leading questions regarding private parts, sexual terms, and sexual acts, and how they felt to her (T.Pgs. 522-530). In this instance again, Defense Counsel failed to object to ultimate jury questions regarding statements by this witness that the Defendant was the "one that abused me" (T.Pgs. 513). Defense Counsel also failed to object during Amy Ellifritz testimony to the prosecution's deliberate blocking of the view between Amy Ellifritz and the Defendant in the courtroom. This was highly prejudicial and intended to inflame the jury. Furthermore, Defense Counsel failed to object to questions regarding counseling and group sessions that were highly prejudicial and irrelevant (T. Pgs. 517, 530). More importantly, on cross-examination, defense counsel elicited testimony from Amy Ellifritz about events that she had forgotten regarding conversations with the social worker, Kelly Elliott. Additionally, Defense Counsel brought up instances on cross-examination of alleged physical abuse and instances of group therapy.

An important fact regarding Mr. Higgins preparation for trial was the fact that despite numerous requests, Defense Counsel never made arrangements or efforts to interview these witnesses prior to trial. Defense Counsel also failed to adequately cross-examine Amy as to the time of day or night that the alleged abuse occurred as the Defendant always worked during the day.

Mr. Higgins called only four witnesses other than the Defendant. Those were Nancy Sanders (T.Pg. 607), Amy Rogers (T.Pg. 627), Pastor Bennie Moran (T.Pg. 637),

and Pastor Mark Ruley (T.Pgs. 645-658). None of these witnesses presented a defense, an alibi, or were asked to attest to the Defendant's character.

During closing arguments, the prosecutor referred to statements made by Tricia and Amy Ellifritz to their counselors without proper foundation. (T.Pgs. 771, 772). The Prosecution inflamed the jury by making references that Amy Ellifritz "could hardly bare the Defendant to be looking at her from across the room and couldn't bare it." This clearly was the prosecutor's own subjective interpretation though it was not objected to by Mr. Higgins.

Mr. Wensell was convicted of all thirteen counts on Friday, July 19, 1996. (One count was later overturned by Judge Stone)

III.

ASSIGNMENTS OF ERROR

A. Appointed Trial Counsel was Ineffective: He failed to properly investigate the case, failed to retain an investigator, failed to retain an expert to help him cross-examine State experts, failed to meet with his client and help prepare his client for trial, failed to object to numerous instances of hearsay and improper statements by the prosecutor.

B. Trial Judge Erred in Admitting Evidence of Other Wrongs Allegedly Committed By James Michael Wensell.

IV.

ARGUMENT AND DISCUSSION OF LAW

A. Appointed Trial Counsel Was Ineffective : He failed to properly investigate the case, failed to retain an investigator, failed to retain an expert to help him cross-examine State experts, failed to meet with his client and help prepare his client for trial, failed to object to numerous instances of hearsay and improper statements by the prosecutor.

The United States Constitution guarantees that every Defendant has the right to effective assistance during a trial and during those critical stages leading

up to a trial. In West Virginia, claims of ineffective assistance of counsel are to be governed by the two pronged test established by the United States Supreme Court in Strickland v. Washington, 466 US 668, 104 S.Ct. 2052 (1984). First, the accused must demonstrate more likely than not that counsel's performance was deficient under an objective standard of reasonableness and, second, that there was a reasonable probability that, but for counsel's deficient conduct, the result of the proceeding may have been different. State v Miller, 459 S.E.2d 114 (1995) (See affidavit of Independent counsel) The reviewing court must avoid engaging in second guessing or "Monday Morning Quarterbacking" with respect to Trial Counsel's strategic decisions; rather, the court must apply an objective standard to determine whether, in light of all the circumstances the identified acts or admissions of Trial Counsel were outside the range of professionally competent assistance. State v Miller, 459 S.E.2d 114 (1995); State ex rel. Bess v Legursky, 195 W.Va. 435 ; 465 S.E.2d 895 (1995).

Howard Higgins was appointed to represent Mr. Wensell in November of 1995. (See Habeas case 01-C-511 transcript from hearing held on August 23, 2002, p.84) At that time Mr. Higgins had only tried "two or three" serious felony sexual assault cases in his career. (See August 23, 2002 Habeas hearing Transcript, p.118). Amazingly, in preparation for the felony sexual assault case against Michael Wensell, appointed attorney Howard Higgins met with Mr. Wensell a total of only TWO times! (See Habeas hearing transcript, p.130. "Q: Prior to the trial you met with him twice? A: That's what it appears like on my sheet, that's correct. Q: So you basically met with him two days after he was

arraigned and you didn't meet with him again until one week prior to the beginning of the trial and that was after a motion to continue was denied, is that correct? A: That's what it looks like.")

Prior to the trial appointed counsel received received medical treatment reports on the alleged victims in this case. However, Mr. Higgins at no time attempted to find or receive any prior medical records to see if the children's 'symptoms' existed prior to the alleged incident dates. (See Habeas transcript p.135-136. "Q: After you got the medical reports on these two young ladies did you attempt to find or elicit their prior medical records to see if these symptoms existed prior to these dates? A: Not that I recall. Q: Would that not have been very important in this particular case? A: It could have been.")

In the case at hand, Trial Counsel did not produce a psychological or physical examination of the victims, nor did he pursue or receive permission to interview the victims prior to trial. Moreover and critically, Trial Counsel did not procure the assistance of a private investigator to help investigate leads in the Defendant's case. (See Habeas Transcript p.130-131) Additionally Trial Counsel did not retain an expert on child psychology or an expert on sexual abuse of children. Such experts would have helped Trial Counsel evaluate the various experts for the State. Additionally, such retained experts were necessary to help counsel in preparation for the evaluation and cross-examination of the children involved in the case.

Judge Stone addressed this issue in his Order denying habeas relief to the defendant:

At the omnibus hearing the petitioner's expert, Mr. Mills testified that the retention of both an investigator and a psychological expert is paramount to building a defense in a criminal case such as the underlying case at bar. He opined that the petitioner's trial counsel fell below professional standards in not retaining these individuals to assist in building a defense for Wensell.

Regarding the psychological expert, Mr. Mills testified that he did not believe a proper cross-examination of the State's psychological expert could be performed in a sexual abuse case without the retention of a psychological expert to assist the counsel for the defendant in understanding the psychological issues in play.

At the omnibus hearing, petitioner's trial counsel did not affirmatively say why he decided not to obtain a psychological expert. He did have some vague recollection of consulting with a medical doctor regarding some of the physical findings made by the State's medical expert, Dr. Rosas. However, Mr. Higgins never set forth any reasons during his testimony why he did not hire a psychological expert. (See Order Denying Habeas Relief, p.15)

Judge Stone also noted that Trial Counsel's explanation of why he did not hire a private investigator was unconvincing:

Regarding the hiring of an investigator, Mr. Higgins did expound a bit during the omnibus hearing as to why he did not retain an investigator to help prepare a defense. Mr. Higgins noted that initially, he thought it would be good to have an investigator to follow up on leads in the case given to him by the petitioner and his mother, Nancy Sanders, regarding possible motives for the petitioner's ex-wife, and the victim's mother, Bobbie Wensell, to make up and influence the victim's making up and reporting these allegations against the petitioner, as well as leads regarding possible other perpetrators of the sexual assault. However, Mr. Higgins said after making a few phone calls and other contacts with people who might have information, he determined that any helpful information was not first hand, but rather hearsay, and therefore would not be useful at trial. Consequently, based on his preliminary contacts with possible helpful witnesses to the petitioner's case, Higgins decided engaging the services of an investigator would not be fruitful.

Having reviewed this issue, this Court is of the opinion that the petitioner's counsel did fall below professional standards in not retaining an investigator and a psychological expert to assist with preparing the petitioner's case. This is because in light of the defendant/petitioner's defense that the victim's were making up these allegations against him at the behest of their mother, having both an investigator and a psychological expert could have led to helpful information. Having an investigator available to him would have assisted attorney Higgins to more closely follow up on some of these 'loose' leads that the petitioner and his mother gave to him. In fact, in this Court's opinion, the reasons stated by Mr. Higgins as to why he ultimately believed there was no need to retain an investigator are actually reasons why Mr. Higgins *should have* retained an

investigator. The fact that Mr. Higgins' cursory investigation of contacting a few people lead only to hearsay testimony shows that an investigator might have been able to help 'track down' any people that did have first hand knowledge of exculpatory evidence. (See Order Denying Habeas Relief, p.16)

Judge Stone added that hiring a "psychological expert **would** have assisted attorney Higgins in more effectively cross-examining the victims in the underlying criminal case, as well as cross-examining the psychological experts of the State, who interviewed the two victims. Moreover, it is possible that the petitioner might have even had a psychological expert testify on his own behalf... this Court believes that failing to retain a psychological expert, after obtaining court authorization to do so, fell below professional standards." (See Order Denying Habeas Relief, p.16-17) Strangely, after stating that a 'psychological expert **WOULD** have assisted attorney Higgins in "more effectively cross-examining the victims" at trial "as well as cross-examining the psychological experts of the State," Judge Stone ruled that at Mr. Wensell's habeas hearing it could not be demonstrated that Higgins failure to retain expert help had prejudiced Mr. Wensell to "any substantial effect."

Appellant strongly disagrees with Judge Stone's ultimate conclusion and agrees with Judge Stone's statement that Howard Higgins failure in retaining expert help did fall below professional standards and Appellant also agrees with Judge Stone's assessment that a psychological expert would have assisted attorney Higgins in cross-examining the victims and the State witnesses. Appellant also contends that in this particular case, given Mr. Higgins weak cross-examination of the victims and State witnesses, it is obvious that Mr. Higgins failure to seek expertise, **DID** strongly and unfairly prejudice Mr. Wensell and did

have a substantial effect on the outcome of the trial. The State's entire case centered on the complaining witnesses testimony as well as the State's expert witnesses. The fact that Mr. Higgins 'would' have been assisted in his cross-examination of the State's key witnesses in this case means that Higgins failure did indeed have a substantial effect on the outcome of the trial. That is the only reasonable and fair conclusion.

Of course it is not true that a psychological expert must be retained in every case involving sexual assault allegations, but in this particular case, given the totality of the circumstances and the poor quality of Mr. Higgins cross-examination of the State witnesses, Mr. Higgins failure to seek an available court-approved psychological expert for his client, as well as Mr. Higgins failure to retain a private investigator to follow up leads in the case, combined with the fact that Mr. Higgins only met with his client TWICE before the felony trial, amounted to ineffective assistance of counsel.

Moreover, trial Counsel also failed to interview potential witnesses involved (see affidavits of lay witnesses and experts in court file).

At the pretrial motion hearing of February 5, 1996, Trial Counsel addressed the court regarding the Defendant's motion for psychological and/or physical evaluation:

"We are simply asking for an opportunity to help develop a defense in this case, to have our experts speak with the children, give us some indication of their professional evaluation of the children, their credibility, the manner in which it was disclosed."

Although this request for a psychological examination was granted, Trial Counsel did not follow up. Additionally, Defense Counsel's delays in asking for an independent medical examination resulted in this request being denied.

Additionally, trial Counsel failed to object to the admission of numerous instances of hearsay evidence, irrelevant evidence, opinion evidence, argumentative evidence, and evidence that was not provided by the prosecution pursuant to discovery prior to trial. (See Trial Transcript Direct Examinations of Kelly Elliot pps. 338-363 and Angela Rosas pps. 370-403)

Throughout the trial, Defense Counsel failed to object to hearsay evidence elicited from the alleged victim's doctors, caseworkers, and psychologists regarding the complaining witnesses statements. Additionally, Defense Counsel failed to object to statements by the victim's mother regarding statements from her children. Moreover, Defense Counsel failed to adequately cross-examine and attack the credibility and inconsistencies of the alleged victims themselves. (See Trial Transcript, pps. 484-503, pps. 534-541) Defense Counsel failed to move to strike their testimony as being incompetent, irrelevant, and inconsistent. Additionally, numerous instances of irrelevant evidence pertaining to prior bad acts and counseling were admitted into evidence without objection. Finally, Defense Counsel failed to object to the prosecution's experts rendering opinions that were not based upon a reasonable degree of medical probability or certainty and did not object to opinions given by experts that were not qualified to give in that they went beyond the witness's area of expertise.

Defense Counsel failed to properly investigate the Defendant's case and provide a defense thereto. As stated at the Motions Hearing, on May 2, 1996, the Court granted the Defendant's Motion in regard to appointing a psychologist and private investigator, thereto. However, Mr. Higgins did not follow up on this critical opportunity and failed to adequately provide a defense, thereto.

After the trial, the Defendant fired his appointed counsel and retained new counsel. The new defense counsel filed a motion to expound upon a motion for a new trial. Attached to that Motion are numerous documentations and requests from the Defendant and his family regarding ideas and suggestions for Defense Counsel to investigate the case. These include but are not limited to, speaking with other experts in psychiatry and pediatrics, interviewing potential witnesses, and procuring a polygraph test. Defense counsel was totally unprepared to present a defense in this case as he had not done an adequate investigation of it in the pretrial stages.

Moreover, Defense Counsel failed to properly voir dire the jury panel and strike potential jurors who had family members as victims of similar offenses. (See Trial Transcript p.63 and pg. 129.) A member of the jury panel, Delbert Gillespie testified that his wife and her sister had been abused by their father. Another member of the jury panel, Steven Purlow testified his sister had been kidnapped and sexually assaulted at age fifteen. Mr. Higgins did not raise a motion to strike the two jurors for cause and did not use his peremptory strikes to remove the two men from sitting on the Jury. Both men ultimately sat on the Jury.

Additionally, the Defense Counsel failed to properly voir dire and cross-examine the Prosecution's experts. The entire transcript with respect to Defense Counsel's cross-

examination of the State's experts totals twenty-four pages. No voir dire was done as to the protocol or the qualifications of any of the experts, (See Trial Transcript pps. 370-376) and, even more egregious, no expert testified with respect to any given opinion given to a reasonable degree of medical probability or certainty within their field of expertise. Defense Counsel failed to follow up on the Motion for Bill of Particulars after it was granted. Defense Counsel failed to object to the procedure that the Court followed for allowing evidence under WV Rules of Evidence 404(b), regarding prior bad acts of the Defendant. Defense Counsel should have requested an in-camera hearing as to whether these facts were true and actually happened and should have objected to the form of the jury instruction to that effect as it was not in conformity with case law and was prejudicial and harmful and that the Court's only instruction to the jury was improper.

Defense Counsel admitted at the pretrial hearing of July 8, 1996 that he was totally unprepared for trial: "I am here asking for a continuance because I don't think its fair to Mr. Wensell, due to his lack of the draw in receiving somebody who has those kinds of obligations fall upon him in such a short period of time." (T.Pg. 5)

Appellant strongly contends that given the all the aforementioned facts, appointed counsel Howard Higgins rendered Ineffective Assistance in this case. Higgin's performance was deficient under an objective standard of reasonableness and, there is a reasonable probability that, but for counsel's deficient conduct, the result of the proceeding may have been different. In a nutshell, Michael Wensell did not receive a fair trial because Howard Higgins was not prepared to defend Mr. Wensell.

B. Trial Judge Erred in Admitting Evidence of Other Wrongs Allegedly Committed By James Michael Wensell.

As a rule, evidence of crimes, wrongs, or bad acts allegedly committed by the accused, not embodied in indicted charges is inadmissible. WV Rule of Evidence 404(b), however, would allow evidence of other wrong-doings not charged to be admitted into evidence when it is offered for a purpose other than showing the Defendant's character, criminal disposition or propensity to commit the crime. It may be admissible after certain procedural safeguards are met, for reasons of showing motive, common scheme and design, lack of mistake or lustful disposition towards children when relevant to the primary charges. State v Edward Charles L. 183 W.Va. 641, 398 S.E.2d 123 (1990). It is clear under West Virginia law that the enumerated reasons contained in 404(b) are not exhaustive of the purposes or uses for which the State may use evidence of other wrongdoings.

Because of the high degree of potential for prejudice to the Defendant associated with the introduction of uncharged wrongs, the West Virginia Supreme Court has established some very stringent procedures that must be followed prior to the admissibility of 'other wrongs' evidence. These steps are summarized as follows: First, the State must identify the specific purpose for which the evidence is being offered. State v McGhee, 193, W.Va. 164, 455 S.E.2d 533 (1995). The mere recitation of the 'litany' or possible purposes or uses for the other crimes evidence contained in Rule 404(b) is insufficient. "The specific and precise purpose.....must clearly be shown from the record in that purpose alone must be told to the jury in the Trial Court's Instructions." State v McGhee. Once the prosecution has identified the specific and precise purpose for which the other

wrong evidence is to be offered, the Trial Court is duty-bound prior to admission to conduct an in-camera hearing on the collateral crimes evidence. Prior to allowing the jury to hear the evidence, the Court must be satisfied, more likely than not, (1) that the acts or conduct occurred, and (2) that the Defendant committed the acts. This is not the end of the inquiry, however, but the Trial Court must go on and determine that the material or the evidence is relevant for the purpose for which it is being offered and then must complete the Rule 403 balancing considerations, measuring it's probative value versus its prejudicial effect. State v McGhee, 455 S.E.2d 533 (1995).

Once all of these procedural hurdles have been overcome, the jury may hear the evidence. The jury, however is to be given a limiting instruction at the time the evidence is offered to show that the evidence may be considered only for the precise and specific purpose identified by the Court. The West Virginia Supreme Court also has indicated that a limiting instruction should be repeated in the general charge to the jury at the time the case is submitted making it plain that the bad-act evidence may only be considered for the precise and identified purpose for which it is offered. State v McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The Trial Court's rulings with respect to the Defendant violated these principles. As reflected in the trial transcripts the Prosecution was allowed to introduce numerous instances of other wrongdoing by the Defendant in the sexual crimes case. The following 'wrongs' were referenced by the prosecution: (1) The Defendant punished his children by spanking them with a paddle board. (2) The

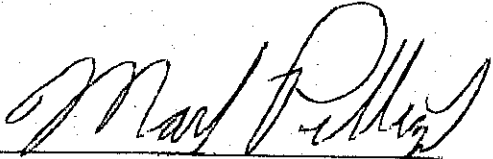
Defendant smacked his stepdaughter, Tricia Ellifritz with an open hand in 1992 causing her facial bruises, (3) The Defendant assaulted his wife in a domestic dispute in 1994, (4) The Defendant disciplined his children extensively in a non-physical manner such as sending them to their room, etc.

The Prosecution and Trial Court's reliance on State v Edward Charles L., in allowing the pedophilia testimony as misplaced. Although State v Edward Charles L. recognized the admissibility of collateral acts evidence and circumstances in which the State was attempting to prove lustful disposition toward children, the rule announced by the Court was limited and scoped to sexual crimes against children. When one reads the Charles case it is apparent that the Court is limited the lustful disposition section to those circumstances in which the base offense is child molestation and to collateral acts that relate to the SAME conduct. The Court specifically commented that other acts of deviant sexual behavior present in Edward Charles, were not probative and should not have been introduced for consideration of the jury. The trial court here, was inherently wrong in its assessment that all the evidence it allowed to come in relating to the Defendant's discipline or physical conduct against his stepdaughters and his wife was probative on whether he had sexually abused and assaulted Amy and Tricia Ellifritz.

CONCLUSION AND RELIEF REQUESTED

The Appellant has clearly demonstrated that the Michael Wensell's trial counsel Howard Higgins rendered Ineffective Assistance and that the Trial Judge erred in

allowing the Jury to hear unfairly prejudicial 'bad acts' that the Defendant allegedly committed. Therefore, the Appellant urges this Court to grant him a new trial and remand this case back to the Circuit Court of Monongalia County.



Mark Pellegrin, counsel for Appellant
WV Bar#6650
203 Grand St, Morgantown, WV 26501
296-4144

Michael Wensell,
Appellant by Counsel.

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, EX REL.
JAMES MICHAEL WENSELL
Petitioner,

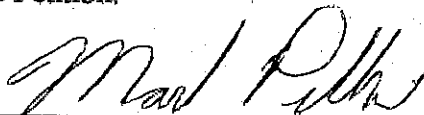
VS.

Monongalia County Habeas Case No: 01-C-511
(Underlying Criminal Case 96-F-22)

GEORGE TRENT, WARDEN, MOUNT
OLIVE CORRECTIONAL COMPLEX
Respondent.

DESIGNATION OF RECORD

The Petitioner, James Michael Wensell, by counsel Mark Pellegrin, again designates the entire case file in case 96-F-22 and the entire case file in case 01-C-511 for this Petition.



Mark Pellegrin, WV Bar #6650
203 Grand St. Morgantown, WV 26501
(304) 296-4144

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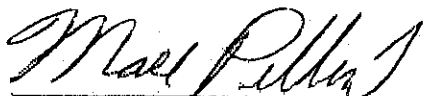
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CERTIFICATE OF SERVICE

I, Mark Pellegrin, hereby certify that I served a true and accurate copy of the attached, "APPEAL FROM ORDER DENYING HABEAS CORPUS RELIEF FOLLOWING OMNIBUS HEARING" upon Marsha Ashdown, by hand delivering an accurate copy of said document to the office of the Prosecuting Attorney of Monongalia County West Virginia, at the Monongalia County Court House, in Morgantown WV on April 8, 2005; Moreover, I mailed a copy to the Office of the Attorney General at the following address: State of West Virginia, Office of Attorney General, Bldg. I, Room E26, Charleston WV 25305 ; I also certify that I transmitted an original and nine accurate copies to Jean Friend, the Circuit Clerk of Monongalia County West Virginia, at the Circuit Clerk's office in the Monongalia County Courthouse on April 8, 2005.



Mark Pellegrin WVBar#6650
Counsel for Petitioner
203 Grand St, Morgantown, WV. 26501
(304) 296-4144