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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

CHARLES R. ELDER,

Petitioner,

v.

Civil Action No. 10-C-103-3

Judge James A. Matish

ANNABELLE SCOLAPIO,

Respondent.

**ORDER DENYING PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS  
REGARDING ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL**

Presently pending before this Court is a Petition for Post-Conviction Writ of Habeas Corpus. The Petitioner, Charles R. Elder, by his counsel, filed a Petition for Post-Conviction Writ of Habeas Corpus on March 18, 2010. The Respondent filed on April 27, 2010, "Respondent's Response to Petition for Post Conviction Writ of Habeas Corpus." By Order entered on April 13, 2010, this Court directed Petitioner's counsel to follow the procedures set forth in Losh v. McKenzie, 166 W. Va. 762, 768-71, 277 S.E.2d 606, 610-12 (1981), and utilize the Losh List of potential grounds for habeas corpus relief. On August 9, 2010, Petitioner's counsel filed "Checklist of Grounds for Post-Conviction Habeas Corpus Relief."

On August 25, 2010, and on December 2, 2010, this Court conducted an Omnibus hearing. The Petitioner, Charles R. Elder, appeared in person and through counsel, Steven Cook. The Respondent also appeared in person and through counsel, James Armstrong, Assistant Prosecuting Attorney for Harrison County, West Virginia. Both parties were present pursuant to Orders of the Court entered on August 19, 2010, and November 20, 2010. During the hearing on August 25, 2010, the Court inquired whether the Petitioner and his counsel had raised, in their pleadings, all grounds they

believed would entitle the Petitioner to a writ of habeas corpus. In response to inquiries by this Court, the Petitioner and his counsel stated that they had discussed the principle of waiver and its limited exceptions. Furthermore, the Petitioner stated he had initialed on the Losh List each ground for relief he was waiving.

After considering the evidence presented by the parties in this proceeding, reviewing the Petition, the Response to the Petition, and the Losh Checklist, conducting a thorough examination of the record, and analyzing pertinent legal authority, this Court concludes that the Petitioner's Petition for Writ of Habeas Corpus is denied regarding the Petitioner's allegations of ineffective assistance of counsel. The reasons for this conclusion and the finding of fact and legal authority upon which the conclusion is based are set forth below.

#### **A. Findings of Fact**

1. This ORDER **solely** addresses the Petitioner's allegation of Ineffective Assistance of Counsel; All other issues having been raised and addressed by separate order to be entered contemporaneously with this Order.

2. After a review of the "Checklist of Grounds for Post-Conviction Habeas Corpus Relief" filed pursuant to Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981), and as confirmed by the Petitioner and his counsel upon the record in this matter at the time of the omnibus hearing, the Court noted that the Petitioner, Charles R. Elder, knowingly and intelligently waived the following grounds:

- 1) Trial court lacked jurisdiction;
- 2) Statute under which conviction obtained unconstitutional;
- 3) Indictment shows on face no offense was committed;

- 4) Prejudicial pre-trial publicity;
- 5) Denial of right to speedy trial;
- 6) Involuntary guilty plea;
- 7) Mental competency at time of crime;
- 8) Mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate;
- 9) Incapacity to stand trial due to drug use;
- 10) Language barrier to understanding the proceedings;
- 11) Denial of counsel;
- 12) Unintelligent waiver of counsel;
- 13) (Raised);
- 14) Consecutive sentence for same transaction;
- 15) Coerced confessions;
- 16) Suppression of helpful evidence by prosecutor;
- 17) State's knowing use of perjured testimony;
- 18) Falsification of a transcript by prosecutor;
- 19) Unfulfilled plea bargains;
- 20) (Raised);
- 21) (Raised);
- 22) Double jeopardy;
- 23) Irregularities in arrest;
- 24) Excessiveness or denial of bail;
- 25) No preliminary hearing;

- 26) Illegal detention prior to arraignment;
- 27) Irregularities or errors in arraignment;
- 28) Challenges to the composition of grand jury or its procedures;
- 29) Failure to provide copy of indictment to defendant;
- 30) Defects in indictment;
- 31) Improper venue;
- 32) Pre-indictment delay;
- 33) Refusal of continuance;
- 34) Refusal to subpoena witnesses;
- 35) Prejudicial joinder of defendants;
- 36) Lack of full public hearing;
- 37) Non-disclosure of Grand Jury minutes;
- 38) Refusal to turn over witness notes after witness has testified;
- 39) Claim of incompetence at time of offense, as opposed to time of trial;
- 40) Claims concerning use of informers to convict;
- 41) Constitutional errors in evidentiary rulings;
- 42) Instructions to the jury;
- 43) Claims of prejudicial statements by trial judge;
- 44) Claims of prejudicial statements by prosecutor;
- 45) Sufficiency of evidence;
- 46) Acquittal of co-defendant on same charge;
- 47) Defendant's absence from part of proceedings;
- 48) Improper communications between prosecutor or witness and jury;

49) Question of actual guilt upon an acceptable guilty plea;

50)(Raised);

51)(Raised);

52)(Raised); and

53) Amount of time served on sentence, credit for time served.

3. The Petitioner categorized the issues he wished the Court to address in the following six (6) areas:

- a. Failure of counsel to take an appeal (Losh Checklist No. 13);
- b. Information in pre-sentence report erroneous (Losh Checklist No. 20);
- c. Ineffective assistance of counsel (only in regards to sentencing/post-sentencing/appeal/motion to consider, etc.) (Losh Checklist No. 21);
- d. Severer sentence than expected (Losh Checklist No. 50);
- e. Excessive sentence (Losh Checklist No. 51); and
- f. Mistaken advice of counsel as to parole or probation eligibility (Losh Checklist No. 52).

4. In the Spring of 2008, the Petitioner was charged with one (1) count of Sexual Abuse by a Parent, Guardian, Custodian or Person in Position of Trust and one (1) count of Second Degree Sexual Assault.

5. The Petitioner was offered, by the Harrison County Prosecuting Attorney's Office, a plea agreement.

6. On December 8, 2008, the Petitioner appeared before this Court and entered pleas of guilty to the offenses contained in the Information (one (1) count of Sexual Abuse by a Person in a Person in Position of Trust and one (1) count of Third Degree

Sexual Assault), and this Court accepted the Petitioner's guilty pleas.

7. On February 12, 2009, this Court sentenced the Petitioner to not less than ten (10) nor more than twenty (20) years pursuant to his plea of guilty to Sexual Abuse by a Person in Position of Trust and not less than one (1) nor more than (5) years pursuant to his plea of guilty to the offense of Third Degree Sexual Assault. It was ordered that the sentences run concurrent. Nevertheless, this Court permitted the Petitioner to serve the sentences by alternate means of electronically-monitored home confinement.

8. As noted above, an Omnibus hearing was held on August 25, 2010, and on December 2, 2010. At the hearings, this Court heard arguments from Petitioner's counsel and Respondent's counsel.

9. Petitioner's counsel submitted an affidavit, executed by D. Conrad Gall, which revealed the Petitioner had retained Mr. Gall to file a motion to reconsider after the Petitioner was sentenced. Conrad Gall's affidavit also revealed that, after Thomas G. Dyer, the attorney who represented the Petitioner at Sentencing, had contacted him regarding filing a Motion to Modify the Terms of Home Confinement, the Petitioner contacted Mr. Gall and told him that he would no longer need his legal services.

10. On December 2, 2010, this Court also heard testimony from Thomas Dyer. Thomas Dyer testified to the following:

- He represented the Petitioner during the Petitioner's sentencing;
- During the hearing, he called two doctors that testified to the Petitioner's health and medical concerns;
- He had no recollection of personal conversations with the Petitioner during the sentencing;

- The sentence imposed was within the statutory guidelines; The maximum sentence was not imposed;
- He noted that the Petitioner's sentence was one of the most favorable outcomes he had ever seen;
- He discussed with the Petitioner his rights concerning an appeal after sentencing;
- He briefly followed up with the Petitioner after the sentencing hearing; He advised the Petitioner that there were no appealable issues;
- He was not aware that the Petitioner had retained D. Conrad Gall to file a motion to reconsider.
- The Petitioner was concerned with the terms of his home confinement, especially not being able to walk out onto his front porch; He explained that the Petitioner should "play by the rules" of his home confinement for a period of time, and he would later make request to the Court to relax the terms of home confinement;
- The Petitioner was interested in filing a Motion to Modify the Terms of his Home Confinement, and accordingly, the Petitioner retained him to file the Motion;
- The Motion was denied without a hearing; He again explained to the Petitioner his right to appeal and that an appeal would be meritless and a waste of resources; and
- He never told the Petitioner that he would file an appeal after the denial of the Motion to Modify the Terms of Home Confinement.

11. No other evidence was presented with respect to the other grounds (3b., 3d., 3e., and 3f. above) raised under the Losh checklist.

### **B. Conclusions of Law**

1. The applicable statutes for the issuance of a Writ of Habeas Corpus are West Virginia Code § 53-4A-1 et. seq.

2. The Court has concluded that the hearing conducted in this matter was an Omnibus Hearing. Therefore, the Petitioner has waived and is prevented from asserting any further grounds in a future Petition for Writ of Habeas Corpus regarding ineffective assistance of counsel. The West Virginia Supreme Court of Appeals has explained,

An omnibus hearing as contemplated in W. Va. Code 53-4A-1 et. seq. occurs when: (1) an applicant for habeas corpus is represented by counsel or appears pro se, having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel; and (4) the trial court drafts a comprehensive order including findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding.

Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981). In applying the standard to the instant case, this Court notes that the Petitioner has been represented by counsel throughout these proceedings. Second, this Court cautioned the Petitioner at the outset of these hearings that any grounds not raised in these hearings would be deemed waived. The Petitioner's waiver of these grounds is implied because he chose not to present any further evidence, and he chose not to proffer any evidence concerning the grounds for written habeas corpus relief. Finally, the within Order and the other order signed this date has ruled on the merits of the grounds presented at the hearings and in

the Petition for a Writ of Habeas Corpus.

3. The first of three threshold tests applied to post-conviction habeas corpus claims requires the Petitioner to allege the denial of a constitutional right. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. pt. 4, State ex rel. McMannis v. Mohn, 163 W. Va. 129, 254 S.E.2d 805 (1979). The Petitioner in the instant proceeding satisfies this threshold test by alleging a denial of the effective assistance of counsel right guarantee by the Art. 3 § 16 of the Constitution of West Virginia and the Sixth Amendment to the Constitution of the United States.

4. The second and third threshold test applied to the Petitioner's ineffective assistance of counsel claim require a determination of whether the claim has been previously and finally adjudicated or waived and thus, barred by W. Va. Code § 53-4A-1(b)(c) (1967). Upon review of the the record, this Court is of the opinion that the Petitioner's ineffective assistance of counsel claim has not been previously and finally adjudicated or waived.

5. With these three, necessary, threshold determinations resolved, the Court can proceed in considering the merits of the Petitioner's ineffective assistance of counsel claim.

6. To prevail in a post-conviction habeas corpus proceeding the "petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. pt. 1, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966). When applied to the Petitioner's contentions in his Petition, this burden requires the Petitioner to prove his counsel's

ineffectiveness by a preponderance of the evidence.

7. The West Virginia test by which claims of ineffective assistance are evaluated is set forth in Syl. pt. 5 of State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995). This test requires an appellant or habeas petitioner claiming ineffective assistance to prove the following: “(1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” In applying part one of the test, the “objective standard,” “a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” Id., Syl. pt. 6, in part.

8. “In deciding ineffective . . . assistance claims, a court need not address both prongs of the conjunctive standard of [Miller], but may dispose of such claim based solely on a petitioner’s failure to meet either prong of the test.” Syl. pt. 5, State ex rel. Daniel v. Leursky, 195 W. Va. 314, 465 S.E.2d 416 (1995).

9. The Petitioner’s ineffective assistance contention is based on two allegations: The Petitioner’s prior counsel, Thomas G. Dyer, failed to file an appeal and failed to file a Motion for Reconsideration of Sentence in a timely manner.

10. To prove his trial counsel was ineffective by reason of counsel’s failure to appeal after the Petitioner’s sentence, the Petitioner must begin by proving by a preponderance of evidence the first element of the Miller test. The Petitioner must prove his counsel’s actions were deficient under an objective standard of reasonableness.

11. “A defendant has the right to be properly advised of his right to appeal. . . . Once a defendant has been timely and adequately advised of his right to appeal, he may

voluntarily, knowingly and understandingly waive that right.” Carrico v. Griffith, 165 W. Va. 812, 272 S.E.2d 235 (1980).

12. According to Thomas G. Dyer’s testimony, Mr. Dyer discussed with the Petitioner his rights concerning an appeal after sentencing and after the denial of the Petitioner’s Motion to Modify the Terms of Home Confinement. Mr. Dyer further explained to the Petitioner, on separate occasions, that an appeal would be meritless and a waste of resources.

13. Furthermore, the Petitioner failed to present evidence that he explicitly requested that Mr. Dyer file an appeal. In addition, Mr. Dyer testified he never told the Petitioner that he would file an appeal on behalf of the defendant.

14. Based upon the evidence presented, **this Court is of the opinion** that the Petitioner failed to establish the first prong of the Miller test, a deficiency in Mr. Dyer’s representation of him, regarding Mr. Dyer’s failure to file an appeal on behalf of the Petitioner. The record demonstrates that, during the time that Mr. Dyer was the Petitioner’s counsel, he took the necessary actions that a reasonable criminal defense attorney would take in a similar situation. No evidence was presented that the Petitioner instructed Mr. Dyer to appeal and he failed to do so. Accordingly, the Petitioner failed to satisfy his burden of proof.

15. To prove his trial counsel was ineffective by reason of counsel’s failure to file a Motion for Reconsideration of Sentence, the Petitioner must begin by proving by a preponderance of evidence the first element of the Miller test. The Petitioner must prove his counsel’s actions were deficient under an objective standard of reasonableness.

16. According to Thomas G. Dyer's testimony, the Petitioner expressed an interest in filing a Motion to Modify the Terms of his Home Confinement, not a Motion for Reconsideration of Sentence pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. Moreover, the Petitioner failed to present evidence that he explicitly requested that Mr. Dyer file a Motion for Reconsideration.

17. Based upon the evidence presented, **this Court is of the opinion** that the Petitioner failed to establish the first prong of the Miller test, a deficiency in Mr. Dyer's representation of him, regarding his failure to file a Motion for Reconsideration of the Petitioner's sentence. The record demonstrates that, during the time that Mr. Dyer was the Petitioner's counsel, he took the necessary actions that a reasonable criminal defense attorney would have taken in a similar situation. No evidence was presented that Mr. Dyer was asked to prepare a Motion for Reconsideration of Sentence. Here, the Petitioner only requested that Mr. Dyer prepare a Motion Modifying the Terms of his Home Confinement. Accordingly, the Petitioner failed to satisfy his burden of proof.

18. After considering the evidence presented by the parties in this proceeding, reviewing the Petition, the Response to the Petition, and the Losh Checklist, conducting a thorough examination of the record, and analyzing pertinent legal authority, this Court **CONCLUDES** that the Petitioner's Petition for Writ of Habeas Corpus is denied regarding the Petitioner's allegations of ineffective assistance of counsel and all other issues.

### **C. Ruling**

1. This Court **ORDERS** that, regarding the Petitioner's allegations of ineffective assistance of counsel, Charles Elder's Petition for Writ of Habeas Corpus is **DENIED**.

2. This Court **ORDERS** that the Circuit Clerk shall remove this case from the docket and place a certified copy of both this Order and the December 2, 2010, Order in Felony Indictment No. 08-F-228-3 and deliver a certified copies of both Orders to the following:

**Steven Cook, Esq. / Charles Elder**

Counsel for Petitioner  
400 5th Avenue  
Huntington, WV 25701

**Annabelle Scolapia**

Home Incarceration Supervisor  
Home Confinement of Harrison Co. Home Incarceration  
306 Washington Avenue  
Clarksburg, WV 26301

**James F. Armstrong**

Assistant Prosecuting Attorney  
Harrison County Prosecuting Attorney's Office  
Third Floor, Courthouse  
301 West Main Street  
Clarksburg, WV 26301

**Rory Perry, Clerk**

Supreme Court of Appeals of West Virginia  
State Capitol Room E-317  
Charleston, WV 25305

Enter: \_\_\_\_\_

07/11/2011 sam

\_\_\_\_\_  
Judge James A. Matish

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 11 day of July, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 11 day of July, 2011.

Donald L. Kopp II  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

**CERTIFICATE OF SERVICE**

I, the undersigned attorney at law, certify that a copy of the below described instrument was served upon the person described below on the date set forth below and that the method of serving it upon said person was:

( X ) enclosing the instrument by mail, first class United States Postal Service

**“NOTICE OF APPEAL”**

(instrument)

**Date: 8/8/11**

**James F. Armstrong, Assistant Prosecuting Attorney  
301 West Main Street  
Clarksburg, WV 26301**

**Annabelle Scolapia  
Home Incarceration Supervisor  
Home Confinement of Harrison Co. Home Incarceration  
306 Washington Avenue  
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**Renee Eades, Court Reporter  
Harrison County Courthouse  
301 West Main Street  
Clarksburg, WV 26301**

**Harrison County Circuit Clerk  
Harrison County Courthouse  
301 West Main Street  
Clarksburg, WV 26301**

  
\_\_\_\_\_  
**ATTORNEY AT LAW**