IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at

CHARLESTON, WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 13-0574

STATE OF WEST VIRGINIA

v.

CARLOS ANGLE

Marion County Circuit Court
Case No. 11-F-171
The Honorable Fred Fox, Presiding

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. THE LOWER COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE PETITIONER HAD TO HAVE COMMITTED AND BEEN CONVICTED AND SENTENCED ON EACH PRIOR CRIME BEFORE THE NEXT CRIME WAS COMMITTED IN ORDER TO USE IT AS A SEPARATE PREDICATE OFFENSE.

2. THE RECIDIVIST INFORMATION FILED HEREIN WAS INSUFFICIENT ON ITS FACE AS IT FAILED TO ALLEGE THE DATES OF FORMER CONVICTIONS AND SENTENCE AS REQUIRED BY W. VA. CODE §61-11-19. THIS ASSIGNMENT INVOLVES PLAIN ERROR.

3. THE LOWER COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISALLOW THE USE OF HIS 1990 EXTORTION CONVICTION AS A SEPARATE AND FIRST PREDICATE OFFENSE PRECEDING HIS LATER CONVICTIONS.

4. THE LOWER COURT AND THE STATE OF WEST VIRGINIA VIOLATED THE PETITIONER'S RIGHT TO TRIAL IN A REASONABLE TIME BY WAITING SIXTEEN (16) MONTHS FROM THE FILING OF THE INFORMATION TO HOLD A TRIAL THEREON. THE PETITIONER FURTHER ASSERTS THAT HE IS PROTECTED BY THE SPEEDY TRIAL PROVISIONS OF ARTICLE III, SECTION 6 OF THE WEST VIRGINIA CONSTITUTION AND, AS SUCH, HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

5. THE LOWER COURT ERRED BY GRANTING A CONTINUANCE OUTSIDE THE PRESENCE OF THE PETITIONER ON OR ABOUT AUGUST 27, 2012. THE PETITIONER WAS NEVER PRESENT FOR A HEARING ON THIS CONTINUANCE WHICH IS A CRITICAL STAGE OF THE PROCEEDING, AND THE PETITIONER DID NOT CONSENT TO IT.

6. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE PETITIONER'S PROBATION OFFICER INTERVIEWED HIM AFTER HIS SEXUAL ABUSE CONVICTION, OBTAINED A STATEMENT FROM HIM ADMITTING HE HAD BEEN CONVICTED OF THREE (3) PRIOR FELONIES AND THEN TESTIFIED TO HIS ADMISSIONS AT TRIAL. THIS ASSIGNMENT INVOLVES PLAIN ERROR.

7. THE LOWER COURT ERRED BY ADMITTING CERTAIN HEARSAY DOCUMENTS WHICH WERE USED TO ESTABLISH IDENTITY AND, WITHOUT WHICH, THE STATE HAD INSUFFICIENT PROOF TO ESTABLISH IDENTITY BEYOND A REASONABLE DOUBT. THIS ASSIGNMENT INVOLVES PLAIN ERROR.

8. THE LOWER COURT ERRED BY HOLDING BENCH CONFERENCES OFF THE RECORD ON AT LEAST FOUR (4) SEPARATE OCCASIONS DURING PETITIONER'S TRIAL. THE RECORD FAILS TO ESTABLISH THAT THE PETITIONER WAS PRESENT FOR AT LEAST ONE OF THESE CONFERENCES.

9. THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AS HIS COUNSEL'S PERFORMANCES WAS DEFECTIVE IN THE FOLLOWING RESPECTS:

   a. He failed to object to the insufficiency of the information,
   b. He failed to offer a proper instruction on the order of previous offenses and convictions and also failed to object to the lower courts' incomplete instruction,
   c. He failed to object to the admissions of several documents which were critical to proof of identity.
   d. He failed to assure the petitioner's presence at critical stages of the proceeding, to wit: the motion to continue and at least one bench conference.
   e. He failed to object to the off-the-record bench conferences which hampers judicial review thereof, and failed to object to the dismissal of a juror after an off-the-record bench conference.

f. He failed to object to the probation officer's testimony regarding petitioner's admissions,

g. He failed to raise an objection to the timeliness of petitioner's trial and, in fact, contributed to the delay by agreeing to the continuance without assuring petitioner's right to be present on a hearing for the continuance.

10. THE LIFE SENTENCE IMPOSED ON THE PETITIONER IS DISPROPORTIONATE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

STATEMENT OF THE CASE

A. Procedural History

On or about July 28, 2011, the Petitioner was convicted of First Degree Sexual Abuse in the Circuit Court of Marion County, West Virginia, in Case No. 09-F-83. (App. Ex. 2). On September 23, 2011, a timely Recidivist Information was filed by the Prosecuting Attorney in the Circuit Court of Marion County, West Virginia, in Case No. 11-F-171. (App. Ex. 1). Accordingly, no further proceedings were held in Case No. 09-F-83.

The Information alleges that the Petitioner had previously been convicted of the offense of Extortion on July 20, 1990; two (2) counts of Unlawful Wounding on December 10, 1991 and one count of Unlawful Wounding on December 16, 1991. (App. Ex. 2).

The Information further alleges that the Extortion and December 10, 1991, convictions occurred in Marion County Circuit Court but does not specify the Count for the December 16, 1991 conviction. (App. Ex. 2).

The Information fails to allege the date of sentencing for any of the above convictions or the date on which the various offenses were committed. (App. Ex. 2).

The Petitioner was arraigned and duly cautioned on said Information on September 23, 2011. (App. Ex. 3). At that time, the Court "Ordered that the matter be scheduled at a later date

so that a jury may be empanelled to inquire whether the Defendant is the same person as alleged in the Information." (App. Ex. 3). No specific trial date was set. (App. Ex. 3).

On August 27, 2012, an Order which purports to be an Agreed Order Continuing until the Next Term of Court was entered by the lower court. However, the typewritten portion of that Order shows that it applies to Case No. 09-F-197, which was a different case involving the Petitioner that was eventually dismissed. (App. Ex. 10).

Attached to the Agreed Order is a document signed, but not written, by the Petitioner in which he waives "my right to trial within the term and right to be present at the hearing on the motion to continue". (App. Ex. 10). No such Motion appears in the court file for the Petitioner's recidivism case.

The Petitioner's intent in signing such document was to agree to the continuance of Case No. 09-F-197 and not Case No: 11-F-171. The Petitioner advised the lower court of this during trial but was afforded no relief. (Tr. pps 34-35). The Petitioner never appeared before the Court and consented, in person, to a continuance.

Petitioner's trial on the Recidivist Information was not held until January 30, 2013. On January 23, 2011, the Petitioner submitted a pro se Motion to Dismiss on the grounds, inter alia, that his 1990 conviction was not final for enhancement purposes until after the commission of all subsequent offenses changed in the Information. (App. Ex. 9). He argued this Motion again during trial. (Tr. pps. 32-34). The Motion was denied both times. (App. Ex. 1) and Tr. pps. 35-36).

B. Statement of Facts

Attached to the Recidivist Information is a series of Orders from the Circuit Court of Marion County, West Virginia.

The first Order is a Sentencing Order dated July 20, 1990, in Case No: 90-F-102, State of West Virginia v. Carlos Angle. The Order reflects that the Defendant therein had pled guilty to the crime of Extortion. The arrest date for this offense was June 29, 1990. (Tr. pg 55). Based thereon, the Court sentenced the Defendant to not less than one year nor more than five years in

the W.Va. State Penitentiary. However, the execution of the sentence was suspended and the Defendant was placed on probation for a period of two (2) years. The Order never adjudicates him as guilty of the crime of Extortion. (App. Ex. 4). After the filing of the charge against Petitioner in Case No: 91-F-161, the State filed a Petition for Revocation of Probation in Case No: 90-F-102. On January 6, 1992, the parties resolved the revocation matter, as the Petitioner agreed to admit to the violation and the State recommended that the Petitioner's sentence in Case No. 90-F-102 run concurrent with the 1-5 years sentence be received in Case No: 91-F-162. (App. Ex. 5). The Court accepted said recommendation and, by Order entered January 21, 1922, Ordered the sentences to run concurrent, effectively reducing said sentence. (App. Ex. 5).

The second Order is from Case No: 91-F-161, State v. Carlos Angle and is dated December 16, 1991. This Order sentences the Defendant therein to 1-5 years in the penitentiary pursuant to his plea of guilty to Unlawful Wounding. The arrest date for this offense was July 25, 1991. (Tr. pg. 56). (App. Ex. 7). The Order never adjudicates him as guilty of Unlawful Wounding.

The final Order is from Case No: 91-F-162, State v. Carlos Angle and is dated February 24, 1992. (App. Ex. 8). It sentences the Defendant therein to two (2) sentences of 1-5 years in the penitentiary on Counts One and Three of the underlying Indictment, each of which charge Unlawful Wounding. The arrest date for this offense was June 6, 1991. (Tr. pgs 55-56). (App. Ex. 8).

The offenses charged in Case Nos: 91-F-161 and 91-F-162 all occurred before conviction and sentencing on either Indictment. Counsel believes it is undisputed that all of the charges in 91-F-161 and 91-F-162, therefore, only count as one prior felony.

The triggering offense giving rise to the Recidivist Information was Petitioner's conviction for First Degree Sexual Abuse on July 28, 2011 in Marion County Circuit Court Case No: 09-F-83. (App. Ex. 2). After his conviction therein, Heather Campbell, Adult Probation Officer, interviewed the Petitioner as part of her pre-sentence investigation report. (Tr. pg. 66). During the interview, she asked Petitioner if he was the same person that was convicted and sentenced on three prior felonies and he acknowledged that he was. (Tr. pg. 70). Petitioner's counsel was not

on three prior felonies and he acknowledged that he was. (Tr. pg. 70). Petitioner's counsel was not present for that interview. (Tr. pg. 72). She was permitted at the recidivist trial to testify to that conversation, without objection. (Tr. pg. 70).

Ms. Campbell was also permitted to testify about two different social security numbers for Petitioner as well as his birth date. (Tr. pg. 67). She did not indicate that this information came from Petitioner. She did, however, identify various sources of information which she used in collecting information. Specifically, she identified the Interstate Identification Index (a collection of FBI records) and unspecified investigative documents. (Tr. pg. 67). These records were not introduced into evidence and no foundation was laid to establish their reliability, their method of preparation or their status as public records. There was no objection by defense counsel to Ms. Campbell's testimony. She also admitted that she was not present for any of the proceedings in the underlying felonies. (Tr. pg. 71), and that all of her testimony was based on the records she reviewed, other than her conversation with Petitioner. (Tr. pg. 71).

The only other witness called by the State was Sgt. William Pigott, police officer for the City of Fairmont. Sgt. Pigott utilized a series of documents for his testimony. One of them was the Fairmont Police Department arrest report for Case No: 09-F-83, which contained the fingerprint card for said arrest. (Tr. p. 39). This document was admitted into evidence without objection. Based upon this document, Sgt. Pigott was permitted to testify that Petitioner's birth date was 3/26/72 and his social security number is 236-21-3253. (Tr. pg. 40). Sgt. Pigott did not identify the source of this information. No objection of said testimony or report was made and no foundation for authenticity, reliability, method of preparation or status as a public record was laid.

Sgt. Pigott further testified that he sent the above noted fingerprint card to the West Virginia Criminal Investigation Bureau (CIB). (Tr. pg. 41). He testified that the CIB compares those fingerprints to records they have on file. They maintain a record showing what fingerprints were submitted on a certain date and what arrests were made for those charges. (Tr. pg. 41). They also maintain records showing the disposition of the various cases to which the fingerprints correspond. (Tr. pg. 41). Finally, they submit a report containing this information back to Sgt. Pigott. (Tr. pg. 41).

At no time was there a foundation laid for the source of Sgt. Pigott's knowledge regarding the activities of the CIB. Nor was there any foundation laid for the authenticity, reliability, method of preparation or status as a public record for this information.

Nevertheless, the report from CIB was admitted into evidence without objection from defense counsel. (Tr. pg. 43).

Based on these records, Sgt. Pigott was permitted to testify as to Petitioner's social security number and the existence of a second social security number for Petitioner which is the same as the one set forth above except it ends with an 8 instead of a 3. (Tr. pg. 42).

Later, Sgt. Pigott was permitted to testify that, based on the CIB report, Petitioner had three prior convictions for felonies in the State of West Virginia as set forth above. (Tr. pg. 45). No objection was made in this testimony.

Finally, State's Exhibit Number 7 was a series of documents under seal from the West Virginia Division of Corrections, containing a twenty-year (20) old picture of an inmate associated with these records, two fingerprint cards collected when a person is first taken into the prison system, commitment forms for Case Nos: 91-F-161 and 162, a Sentencing Order for Case No: 91-F-16, and the Commitment Order and Order Revoking Probation for Case No: 90-F-102. (Tr. pgs 57-59). No foundation was laid for the reliability, method of preparation or status as a public record for these documents. Nevertheless, they were admitted into evidence without objection.

These documents were used to establish that the photograph therein depicted the same Carlos Angle that was convicted in Case No: 09-F-83 and that the individual committed to the prison system for these offenses has the same birth date and social security number as the Petitioner herein. (Tr. pg. 59).

Sgt. Pigott further testified that he was not involved in any of the proceedings on the underlying felonies and has no personal knowledge thereof. (Tr. pg. 60).

There is a discrepancy in the social security number for Petitioner. The records for Case No: 09-F-83 show it to be 236-21-3253. (Tr. pg. 40). The pre-sentence investigation report for

Case No: 91-F-162 shows it to be 236-21-3258. (Tr. pg. 52). The Division of Corrections documents for the underlying felonies also show it to be 236-21-3258. (Tr. pg. 57). While the prosecuting attorney explained this away in his opening statement as a clerical error by the Division of Corrections, no evidence was introduced to establish that fact.

At the recidivist trial, the lower court gave the following instruction to the jury:

> "The defendant is charged with having two or more felony convictions. One of two verdicts may be returned by you under this count of the information. They are: 1) The defendant has not been convicted twice or more before in the United States of a crime punishable by confinement in a penitentiary; and 2) The defendant has been twice or more before convicted in the United States of a crime punishable by confinement in the penitentiary.
>
> The burden is upon the State to prove the defendant guilty of two or more felony convictions beyond a reasonable doubt. The defendant, Carlos Angle, is not required to prove himself innocent. He is presumed by law to be innocent of this charge and this presumption remains with him throughout the entire trial.
>
> Before the defendant, Carlos Angle, can be guilty of two or more prior offenses, the State must overcome the presumption that he is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that the defendant, Carlos Angle –

1. The defendant, Carlos Angle;
2. In Marion County, West Virginia;
3. On or about the 28th day of July, 2011;
4. Was convicted of sexual abuse in the first degree a crime punishable by confinement in the penitentiary;
5. After Carlos Angle was convicted of at least two of the following offenses:
    A. On or about the 20th day of July, 1990, of extortion, a felony offense punishable by confinement in the penitentiary;
    B. On or about the 10th day of December, 1991, of two counts of unlawful wounding, felony offenses punishable by confinement in the penitentiary; and
    C. On or about the 16th day of December, 1991, the offense of unlawful wounding, a felony offense punishable by confinement in the penitentiary.

> After impartially considering, weighing and comparing all the evidence, the jury and each member the jury is convinced beyond a reasonable doubt of the truth of the charge as to prior conviction, you may find Carlos Angle guilty of two prior convictions as charged. If the jury, and each member the jury, has a reasonable doubt as to the truth of the charge to any one or more of these elements of third offense felony shall find for the defendant Carlos Angle." (Tr. pgs. 86-87).

There is no mention in the rest of the lower court's charge of the State's burden to prove that each penitentiary offense was committed subsequent to each preceding conviction and sentence.

The lower court went off the record and had bench conferences on four separate occasions during the Recidivist trial. (Tr. pgs. 21, 73, 74 and 80).

It is unknown by the undersigned what transpired at the bench conference on page 21, 73 and 80. However, the Defendant was not present for the bench conference on page 73.

After the conference held on page 74, the lower court dismissed Juror Number 1 for reasons which do not appear on the record.

Finally, as a part of his Post-trial Motions, the Defendant submitted to the lower court a copy of the Commitment signed by Judge Fox for his alleged Extortion conviction. This Commitment shows an Effective Sentencing Date of January 6, 1992. (App. Ex. 6). This date is after the arrest dates for the charges in both 91-F-161 and 91-F-162.

SUMMARY OF ARGUMENT

1. THE LOWER COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE PETITIONER HAD TO HAVE COMMITTED AND BEEN CONVICTED AND SENTENCED ON EACH PRIOR CRIME BEFORE THE NEXT CRIME WAS COMMITTED IN ORDER TO USE IT AS A SEPARATE PREDICATE OFFENSE.

> "Trial court was without jurisdiction, in habitual criminal proceedings, imposing any additional sentence in excess of sentence provided for the principal offense

> where no showing was made that each of defendant's penitentiary offenses, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence and jury rendered no verdict as to such issue." State v. McMannis, 242 S.E. 2d 571 (W.Va. 1978).

Just as in McMannis, the jury here did not render a verdict on the issue of the chronological order of the Petitioner's prior convictions. Neither defense counsel, the prosecuting attorney nor the lower court ever mentioned the issue at any point during the trial and there was absolutely no instruction requiring the jury to make a finding on the issue. Under these circumstances, the lower court lacked jurisdiction to impose the enhanced life sentence.

2. THE RECIDIVIST INFORMATION FILED HEREIN WAS INSUFFICIENT ON ITS FACE AS IT FAILED TO ALLEGE THE DATES OF FORMER CONVICTIONS AND SENTENCE AS REQUIRED BY W. VA. CODE §61-11-19.

> "It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the term at which person was convicted, cause such person or prisoner to be brought before it, and upon an Information filed by the prosecuting attorney, setting forth the records of conviction and sentence or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not".

The Information filed herein fails to allege any of the records of sentences on the predicate offenses. It merely alleges convictions.

> "In the absence of a written Information filed with the Court, setting forth the previous conviction and sentence, or convictions and sentences, an additional sentence imposed, under the provisions of Code, 61-11-18, as amended....is void. "State ex rel Yokum v. Adams, 114 S.E. 2d 892 (W.Va. 1960).

The provisions of the habitual criminal statute are mandatory and must be complied with fully before an enhanced sentence for recidivism may be imposed. State v. Cavallaro 210 W.Va. 237, 557 S.E. 2d 291 (2001).

> "Where the language of a statute is free from ambiguity, its' plain meaning is to be accepted and applied without resort to interpretation." State ex rel Daye v. McBride, 222 W.Va. 17, 658, S.E. 2d 547 (W.Va. 2007).

W.Va. Code §61-11-19 is unambiguous in its requirement that the Information set forth the Petitioner's prior sentences. It fails to do so. A strict application of said statute in favor of the Petitioner is warranted and his enhanced sentence should be deemed void.

3. THE LOWER COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISALLOW THE USE OF HIS 1990 EXTORTION CONVICTION AS A SEPARATE AND FIRST PREDICATE OFFENSE PRECEDING HIS LATER CONVICTIONS.

The original sentencing Order for the 1990 Extortion conviction was entered on July 20, 1990. However, it suspended the execution of the sentence and placed the Defendant therein on probation.

However,

> "No final conviction occurs when a person is placed on probation and the conviction becomes final only when that probation is revoked and a sentence imposed." Murphy v. State, 689 S.W. 2d 341 (Tex App. 1985).

Petitioner's probation on the extortion charge was not revoked until January 6, 1992, and his sentence was reduced at that time to run concurrent with the sentence in Case No: 91-F-162. Therefore, Petitioner was not finally sentenced on the 1990 conviction until after the offenses giving rise to Case Nos: 91-F-161 and 91-F-162 were committed. Accordingly, the Extortion conviction should not have been allowed to serve as a separate and first predicate conviction for recidivist purposes.

W.Va. Code §62-12-3 permits the circuit courts to "suspend the imposition or execution of sentence and release the offender on probation."

If the Petitioner had simply been put on probation in 1990 and the Court had suspended imposition of sentence, then it seems clear that his 1990 conviction could not be used as a separate predicate offense since sentencing would not have been completed until January 1992, after commission of the other offenses. In other words, a person similarly situated to the Petitioner would have been treated differently simply because a judge decided to suspend the imposition of the sentence versus the execution of it. In either case, the fundamental right of liberty is implicated and such an arbitrary classification for disparate treatment is not necessary to accomplish a compelling state interest.

4. THE LOWER COURT AND THE STATE OF WEST VIRGINIA VIOLATED THE PETITIONER'S RIGHT TO TRIAL IN A REASONABLE TIME BY WAITING SIXTEEN (16) MONTHS FROM THE FILING OF THE INFORMATION TO HOLD A TRIAL THEREON. THE PETITIONER FURTHER ASSERTS THAT HE IS PROTECTED BY THE SPEEDY TRIAL PROVISIONS OF ART. III, §6 OF THE WEST VIRGINIA CONSTITUTION AND, AS SUCH, HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

> "...[W]here a habitual criminal Information is filed...W.V. Code §61-11-19 does not prohibit trial upon the Information at a subsequent term of court within a reasonable time." State v. Deal, 358 S.E. 2d 226, 178 W.Va. 142 (W.Va. 1987).

Trial on Petitioner's Recidivist Information was not commenced until January 30, 2013, some sixteen (16) months after the Information was filed. The Defendant did not consent to the continuance granted on August 27, 2012 and no other continuance appears to be fairly attributable to his action or within the provisions of W.Va. Code §62-3-21.

Petitioner further contends he is entitled to the full array of speedy trial rights granted by Art III, §14 of the West Virginia Constitution and W.Va. Code §62-3-21. While it appears that this Court has never spoken to this issue, this Court has extended the rights granted by several other constitutional provisions to recidivist proceedings, such as the Equal Protection Clause, see Martin v. Leverette, 161 W.Va. 547, 244 S.E. 2d 39 (1978); proportionality principle in Article III §5, see

Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E. 2d 205 (1981); and "substantial due process protections," see State v. Vance, 164 W.Va. 216, 262 S.E. 2d 423 (1980).

5. THE LOWER COURT ERRED BY GRANTING A CONTINUANCE OUTSIDE THE PRESENCE OF THE PETITIONER ON OR ABOUT AUGUST 27, 2012. THE PETITIONER WAS NEVER PRESENT FOR A HEARING ON THIS CONTINUANCE WHICH IS A CRITICAL STAGE OF THE PROCEEDING, AND THE PETITIONER DID NOT CONSENT TO IT.

> "Because of the impact of the right to a speedy trial, matters surrounding a continuance should require the presence of the Defendant." State v. Boyd, 160 W.Va. 234, 233 S.E. 2d 710 (1977).

It appears from the record that defense counsel never filed a Motion to Continue from the June 2013, term of court and no hearing was held on such a motion. Therefore, Petitioner was never brought before the court to consent to the continuance. This was a critical stage of the proceeding.

> "If the State is to avoid the consequences of the rule requiring the presence of the accused at all critical stages of the criminal proceeding upon the doctrine of harmless error, it must take the responsibility of preserving a record of such critical stage, in order that it can be shown beyond a reasonable doubt the harmlessness of the defendant's absence." State v. Boyd, supra.

6. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE PETITIONER'S PROBATION OFFICER INTERVIEWED HIM AFTER HIS SEXUAL ABUSE CONVICTION, OBTAINED A STATEMENT FROM HIM ADMITTING HE HAD BEEN CONVICTED OF THREE (3) PRIOR FELONIES AND THEN TESTIFIED TO HIS ADMISSIONS AT TRIAL.

> "The Sixth Amendment guarantees the accused, from at least the initiation of formal charges, the right to rely on counsel as a medium between him and the State. Knowing exploitation of the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the

intentional creation of such an opportunity." Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed. 2d 481 (1985).

The recidivist proceeding is simply a continuation of the sentencing process for the triggering offense in Case No: 09-F-83. Petitioner already had counsel appointed in that case by the time the pre-sentence investigation was conducted. While the probation officer may have had the right and a legitimate reason to interview the Petitioner, she may also have been aware of the State's intention to file a Recidivist Information. In either event, use of the Petitioner's statement against him at trial was a "knowing exploitation by the State of an opportunity to confront the accused without counsel being present."

7. THE LOWER COURT ERRED BY ADMITTING CERTAIN HEARSAY DOCUMENTS WHICH WERE USED TO ESTABLISH IDENTITY AND, WITHOUT WHICH, THE STATE HAD INSUFFICIENT PROOF TO ESTABLISH IDENTITY BEYOND A REASONABLE DOUBT.

"Where the issue of identity is contested in a habitual criminal proceeding, the State must prove identity beyond reasonable doubt." State v. Barlow, 181 W.Va. 565, 383 S.E. 2d 530 (1989).

The evidence presented by the State was purely documentary. The State did not present a single witness who could testify that they were present during the proceedings for the underlying offenses. Besides the statement of the Petitioner, the State's case was based entirely on fingerprints matching the birth dates for the various offenses and social security numbers. However, the social security numbers did not match and no evidence was presented to explain why. Moreover, much of the documentation used to establish these matters was hearsay. There was not a proper foundation laid to qualify these documents as an exception to the hearsay rule. Without them, the evidence was insufficient to establish identity beyond a reasonable doubt.

8. THE LOWER COURT ERRED BY HOLDING BENCH CONFERENCES OFF THE RECORD ON AT LEAST FOUR (4) SEPARATE OCCASIONS DURING PETITIONER'S TRIAL. THE RECORD FAILS TO ESTABLISH THAT THE PETITIONER WAS PRESENT FOR AT LEAST ONE OF THESE CONFERENCES.

"Under the provisions of W.Va. Code §51-7-1 and 2, all proceedings in the criminal trial are required to be reported; however, the failure, to all of the

proceedings may not in all instances constitute reversible error." State v. Brown, 210 W.Va. 14, 552 S.E. 2d 390 (2001).

"Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal."

Subsequent to the afternoon recess, and after the jury had been sworn, the lower court, sua sponte, called for an off-the-record bench conference. At the conclusion thereof, the court dismissed a juror.

Pursuant to Rule 24, W.Va. R. Cr. P., a judge may discharge a juror who has become or is found to be "unable or disqualified to perform their duties."

In this case, the record is silent as to the reason for the discharge as well as whether or not there was a motion by the State for such discharge or an objection by defense counsel. Under these circumstances, it cannot be ascertained whether or not the lower court complied with Rule 24 and the Petitioner's appeal is specifically prejudiced.

Prior to the recess, another off-the-record bench conference was held in the Petitioner's absence, in violation of his right to be present at all critical stages. Given the timing of this conference, it is reasonable to infer it had something to do with the juror but this cannot be proven. In any event, the State cannot prove beyond a reasonable doubt that what transpired in Petitioner's absence was harmless.

9. THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AS HIS COUNSEL'S PERFORMANCES WERE DEFECTIVE IN THE FOLLOWING RESPECTS:

   a. He failed to object to the insufficiency of the information,
   b. He failed to offer a proper instruction on the order of previous offenses and convictions and also failed to object to the lower courts' incomplete instruction,
   c. He failed to object to the admissions of several documents which were critical to proof of identity.
   d. He failed to assure the petitioner's presence at critical stages of the proceeding, to wit: the motion to continue and at least one bench conference.

e. He failed to object to the off-the-record bench conferences which hampers judicial review thereof, and failed to object to the dismissal of a juror after an off-the-record bench conference.

f. He failed to object to the probation officer's testimony regarding petitioner's admissions.

g. He failed to raise an objection to the timeliness of petitioner's trial and, in fact, contributed to the delay by agreeing to the continuance without assuring petitioner's right to be present on a hearing for the continuance.

Particularly with regard to the lower court's instructions, sufficiency of the Information, admission of hearsay documents, the Petitioner's statement to the probation officer and the use of his 1990 conviction, there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

10. THE LIFE SENTENCE IMPOSED ON THE PETITIONER IS DISPROPORTIONATE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

W. Va. Constitution Article III, Section 5 states:

> "Penalties shall be proportioned to the character and degree of the offense."

This Court applied this provision to recidivist proceedings in State v. Wyne, 460 S.E. 2d 450 (W.Va. 1995).

Given the age of the Defendant and the length of time he spent as a law-abiding citizen, it is disproportionate to apply a life sentence to his conduct. While this Court has previously held that remoteness of prior convictions is not to be considered, Petitioner contends that it should be used for considering whether or not his previous convictions and length of time between them and the triggering offense show that he has largely been deterred from criminal conduct already and that the triggering offense is an isolated aberration in his behavior.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary under Rule 20. The dispositive issues have not been authoritatively decided and the legal arguments may not be adequately presented in the briefs given the page limitation. Therefore, the decisional process would be significantly aided by such argument.

Argument under Rule 20 is appropriate as the case presents issues of first impression and fundamental public importance.

ARGUMENT

1. THE LOWER COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE PETITIONER HAD TO HAVE COMMITTED AND BEEN CONVICTED AND SENTENCED ON EACH PRIOR CRIME BEFORE THE NEXT CRIME WAS COMMITTED IN ORDER TO USE IT AS A SEPARATE PREDICATE OFFENSE.

> "Trial court was without jurisdiction, in habitual criminal proceedings, to impose any additional sentence in excess of sentence provided for the principal offense where no showing was made that each of defendant's penitentiary offenses, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence and jury rendered no verdict as to such issue." State v. McMannis, 242 S.E. 2d 571 (W.Va. 1978).

In McMannis, the Defendant was sentenced to life recidivist. The Information filed therein alleged that the Defendant had previously been convicted of B & E in 1970 and Grand Larceny in September 1971. The triggering offense was his Grand Larceny conviction in 1975.

However, the Information did not allege in what sequence the prior offenses were committed nor did it state what the sentences on those offenses were.

At trial, the State failed to prove beyond a reasonable doubt the order of each preceding conviction and sentence. This Court reversed, stating:

> "Because no such showing was made in the instant habitual criminal proceeding, and because the jury rendered no verdict as to this issue, the trial court was without jurisdiction to impose any additional sentence in excess of the sentence of imprisonment provided by statute for the principal offenses."

Just as in McMannis, the jury here did not render a verdict on the issue of the chronological order of the Petitioner's prior convictions. Neither defense counsel, the prosecuting attorney or the lower court ever mention the issue at any point during the trial and there was no instruction requiring the jury to make a finding on the issue. Under these circumstances, the lower court lacked jurisdiction to impose the enhanced life sentence.

Further, the "State has the burden of proving that trial court has jurisdiction to impose any enhanced sentence under habitual criminal statute." McMannis, at page 574.

At no time during the trial did the State acknowledge to the jury that it was required to prove the order of the offenses nor did it proffer an adequate instruction to the Court to be read to the jury.

It is pure guesswork to attempt to ascertain which two or more of the previous offenses the jury may have relied on in reaching its verdict. As stated above, all of the unlawful wounding convictions can only count as one prior as they were committed on or before June 6, 1991 and July 25, 1991 but no conviction was had thereon until December 10, 1991. Only the extortion conviction and sentence is alleged to have occurred prior to June 6, 1991. The Verdict Form simply states:

> "We the jury find the Defendant, Carlos Angle, guilty of the offense of third offense felony."

Since the jury was unaware of the need to find a chronological progression, it cannot be assumed that they intended to use the Extortion conviction as one of the prior offenses.

2. THE RECIDIVIST INFORMATION FILED HEREIN WAS INSUFFICIENT ON ITS FACE AS IT FAILED TO ALLEGE THE DATES OF FORMER CONVICTIONS AND SENTENCE AS REQUIRED BY W. VA. CODE §61-11-19.

> "It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the term at which person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and

> sentence or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not".

The Information filed herein fails to allege any of the records of sentences on the predicate offenses. It merely alleges convictions.

> "In the absence of a written Information filed with the Court, setting forth the previous conviction and sentence, or convictions and sentences, an additional sentence imposed, under the provisions of Code, §61-11-18, as amended....is void. "State ex rel Yokum v. Adams, 114 S.E. 2d 892 (W.Va. 1960).

In McMannis, supra, the Recidivist Information did not set forth the sentences of imprisonment for the underlying felonies. While the Court reversed the sentence therein on the grounds that the prosecutor did not prove, nor did the jury find, that each conviction and sentence preceded the next, this Court commented:

> "We note that the amended information filed in the proceeding below does not set out the sentences of imprisonment previously imposed on the Defendant, and therefore does not comport with requirements of the statute." McMannis, at page 573.

Not only does the Information filed herein fail to allege the sentences of imprisonment previously imposed, it fails to allege the existence of any sentences.

Finally,

> "Being in derogation of common law, habitual criminal statutes are generally held to require strict construction in favor of prisoner." State v. Jones, 420 S.E. 2d 736 (W.Va. 1992).

The provisions of the habitual criminal statute are mandatory and must be complied with fully before an enhanced sentence for recidivism may be imposed. State v. Cavallaro 210 W.Va. 237, 557 S.E. 2d 291 (2001).

> "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." State ex rel Daye v. McBride, 222 W.Va. 17, 658, S.E. 2d 547 (W.Va. 2007).

W.Va. Code §61-11-19 is unambiguous in its requirement that the Information set forth the Petitioner's prior sentences. It fails to do so. A strict application of said statute in favor of the Petitioner is warranted and his enhanced sentence should be deemed void.

3. THE LOWER COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISALLOW THE USE OF HIS 1990 EXTORTION CONVICTION AS A SEPARATE AND FIRST PREDICATE OFFENSE PRECEDING HIS LATER CONVICTIONS.

The original sentencing Order for the 1990 Extortion conviction was entered on July 20, 1990. However, it suspended the execution of the sentence and placed the Defendant therein on probation. However,

> "No final conviction occurs when a person is placed on probation and the conviction becomes final only when that probation is revoked and a sentence imposed. "Murphy v. State, 689 S.W. 2d 341 (Tex App. 1985).

Petitioner's probation on the extortion charge was not revoked until January 6, 1992, and his sentence was reduced at that time to run concurrent with the sentence in Case No: 91-F-162. Therefore, Petitioner was not finally sentenced on the 1990 conviction until after the offenses giving rise to Case Nos: 91-F-161 and 91-F-162 were committed. Accordingly, the Extortion conviction should not have been allowed to serve as a separate and first predicate conviction for recidivist purposes.

W.Va. Code §62-12-3 permits the circuit courts to "suspend the imposition or execution of sentence and release the offender on probation."

In Murphy v. State, supra, the Defendant was sentenced to seven years confinement for robbery on July 1, 1981. His sentence was suspended and he was placed on probation. That probation was subsequently revoked on September 2, 1982.

Sometime later, the Defendant was convicted of burglary. The State enhanced his sentencing using his prior robbery conviction. In the enhancement paragraph of the Indictment, the State alleged that Defendant had been convicted of robbery on September 2, 1982. The Defendant appealed, claiming that the conviction date should have been July 1, 1981, the date of the original sentence.

The Court of Appeals upheld the sentence, using the language quoted above and further stated: "When the probation was revoked on September 2, 1982, the conviction became final as alleged in the enhancement paragraph in question."

The United States Supreme Court has likewise acknowledged the ongoing nature of criminal proceedings when probation is granted. In Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), the Defendant was convicted of burglary and granted two years probation with sentencing deferred. Eventually, the State filed to revoke his probation but the Defendant was not provided counsel for the revocation proceeding. Probation was revoked and a 10-year sentence imposed. Mempa appealed and the Supreme Court reversed, stating:

> "...appointment of counsel for an indigent is required and every stage of a criminal proceeding where substantial rights of a criminal accused may be affected...
>
> ...All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing..."

In other words, the Court recognized that the grant of probation and suspension of execution of sentence granted to this Petitioner in 1990 did not signal the end of the criminal proceeding.

This Court has likewise acknowledged the ongoing nature of a criminal proceeding where probation has been granted. In State ex rel Strickland v. Melton, 152 W.Va. 500, 165 S.E. 2d 90 (W.Va. 1968), the Defendant was placed on probation with sentencing deferred. His probation was later revoked and he was sentenced to 5 to 20 years. The record was silent as to whether the Defendant was afforded Counsel at the revocation and sentencing. Quoting Mempa, this Court reversed, acknowledging that 1) revocation of probation is a stage in a criminal proceeding and 2) that "probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime."

The 1990 Extortion conviction was pursuant to a plea bargain and the Petitioner was not granted any credit for time served. Accordingly, he was not imprisoned until his probation was revoked. Under these circumstances, his sentence was not final.

In State ex rel. Myers v. Frazier, 173 W.Va. 658, 319 S.E. 2d 782 (W.Va. 1984), this Court stated:

"Where imprisonment has begun in satisfaction of a valid sentence, the trial court is without jurisdiction, even during the same term of court, to set aside such valid sentence and impose an additional or increased sentence."

"[I]n criminal cases where the judgment has been satisfied in whole or in part, [the rule] is limited to those cases in which the trial court reduces the penalty imposed. Cases in which the penalty is increased are treated as subjecting the accused to double jeopardy and therefore the second sentence is void, leaving in effect the original sentence."

"We conclude that the entry of a nolo contendere or a guilty plea pursuant to a plea bargain and the oral pronouncement of a sentence by a circuit court does not impose a double jeopardy bar where the defendant has not served any portion of the sentence."

Since Petitioner did not serve any time on his 1990 conviction, his sentence was subject to change under the rules laid down in Myers and, therefore, cannot be considered final.

The Defendant preserved this point before the lower court on multiple occasions with little help from defense counsel.

Petitioner also contends that the use of the 1990 conviction would violate the rights granted to him by the Equal Protection Clause of the West Virginia and United State Constitutions.

"Equal protection is guaranteed by provision of State Constitution that no person shall be deprived of life, liberty or property without due process of law and judgment of peers." O'Dell v. Town of Gauley Bridge, 425 S.E.2d 551 (W.Va. 1992).

"When a suspect classification...or a fundamental, constitutional right, such as speech, is involved, the legislation must survive, 'strict scrutiny,' that is, the legislative classification must be necessary to obtain a compelling state interest." Lewis v. Canaan Valley Resorts, Inc., 408 S.E.2d 634 (W.Va. 1991).

W.Va Code §§61-11-18 and 19 provide for a class of individuals who may receive enhanced sentences of imprisonment, thereby depriving them of their liberty. Petitioner is a member of that class. The deprivation of liberty is dependent on the prior commission of felonies and the entry of final sentences thereon.

However, W.Va. Code §62-12-3 permits criminal defendants in similar or, even identical, circumstances to be treated differently for no apparent reason as one may be placed on probation with sentence imposed but execution thereof suspended and the other placed on probation with the very imposition of sentence suspended. There are no guidelines or rules as to when sentence or imposition thereof should be suspended. Accordingly, the decisions which treat defendants differently are arbitrary and wholly dependent on a particular judge on a particular day.

However, the differing effects of those decisions can be dramatic under the circumstances presented by the instant case.

Had the Petitioner herein been placed on probation in July, 1990, and the imposition of sentence had been suspended, then no sentence would have been pronounced at the time because, "probation is not a sentence for a crime." See Strickland v. Melton, supra. Under those circumstances, the State would have been unable to prove that the 1991 offenses were committed subsequent to the preceding sentence because none was imposed prior thereto.

However, the Petitioner was not so lucky. If this Court rejects the argument set forth in the first part of this assignment of error and considers the July 20, 1990 sentence to be final and countable, the effect on Petitioner's life is potentially devastating.

As a result, W.Va. Code §§61-11-18 and 19 and W.Va. Code §62-12-3, read in para materia, would thereby endorse arbitrary and diverse treatment for members of the same class.

The Petitioner concedes that enhanced punishment for habitual criminals is a compelling state interest but denies that such an arbitrary classification is necessary to obtain it.

4. THE LOWER COURT AND THE STATE OF WEST VIRGINIA VIOLATED THE PETITIONER'S RIGHT TO TRIAL IN A REASONABLE TIME BY WAITING SIXTEEN (16) MONTHS FROM THE FILING OF THE INFORMATION TO HOLD A TRIAL THEREON. THE PETITIONER FURTHER ASSERTS THAT HE IS PROTECTED BY THE SPEEDY TRIAL PROVISIONS OF ARTICLE III, SECTION 6 OF THE WEST VIRGINIA CONSTITUTION AND, AS SUCH, HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

> "...[W]here a habitual criminal information is filed...W.V. Code §61-11-19 does not prohibit trial upon the information at a subsequent term of court within a reasonable time." State v. Deal, 358 S.E. 2d 226, 178 W.Va. 142 (W.Va. 1987).

Trial on Petitioner's Recidivist Information was not commenced until January 30, 2013, some sixteen (16) months after the Information was filed. The Defendant did not consent to the continuance granted on August 27, 2012 and no other continuance appears to be fairly attributable to his action or within the provisions of W.Va. Code §62-3-21.

It does not appear that this Court has 1) expounded on what a reasonable time for trial is in recidivist proceedings or 2) decided the issue of whether the constitutional right to a speedy trial and W.Va. Code §62-3-21 apply to recidivist proceedings.

However, this Court has applied several constitutional provisions to recidivist proceedings which do not expressly apply thereto.

In Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W.Va. 1981), the Defendant appealed his life recidivist sentence. This Court stated:

> "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned the character and degree of the offence.'

Article III, Section 5 makes no reference to recidivist proceedings, only to "the degree of the offence." In recidivist proceedings, however, there's no single "offense" to which Article III, Section 5 can apply and the penalty imposed is not limited to the nature of the triggering offense but necessarily contemplates all underlying offenses.

This Court has also extended the protection of the Due Process Clause in Article III, Section 10 to recidivist proceedings.

> "A recidivist proceeding is not simply a sentencing hearing, but a proceeding whereby a new criminal status, that of being a habitual criminal is determined. If an individual is successfully prosecuted as a habitual criminal, a greater penalty than that attending to the underlying crime is imposed. For these reasons, courts have required substantial due process protection in recidivist proceedings." State v. Vance, 164 W.Va 216, 262 S.E. 2d 423 (W.Va. 1980).

Finally, the Court has applied the Double Jeopardy and Equal Protection Clauses to recidivist proceedings to require credit for time served on an enhanced recidivist sentence. Martin v. Leverette, 161 W.Va. 547, 244 S.E.2d 39 (1978).

Article III, Section 14 of the West Virginia Constitution provides, in part:

> "Trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay..."

As set forth above, this Court has already held that trial in a recidivist proceeding must be held "within a reasonable time." This is substantially equivalent, if not equal, to "without unreasonable delay." A recidivist trial may not be a "trial of a crime" but it is an integral part of one. It is also "not simply a sentencing hearing, but a proceeding whereby a new criminal status....is determined." Vance, supra. It is a significant extension of the trial on the underlying offence and, if successful, results in "a greater penalty than that attaching to the underlying crime... For these reasons, courts have required "substantial due process protections in recidivist proceedings." Vance, Id

Finally, one of the purposes of the speedy trial provision is "the prevention, in criminal cases especially, of unnecessary delay and the securing of prompt and efficient administration of the criminal law." State ex rel. Holstein v. Casey, 265 S.E.2d 530 (W.Va. 1980).

Given the enhanced sentences in recidivist proceedings, Petitioner intends that there is greater reason to attach constitutional protections to his right to trial "within a reasonable time" than there is to nearly all crimes. Moreover, there is equal reason to "secure the prompt and efficient administration of the criminal law."

Regardless, of which standard the court applies, it still must be determined what constitutes "a reasonable time."

> "It is the three-term rule, W.Va. Code §62-3-21, which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution." Good v. Handlan, 176 W.Va. 145, 342 S.E.2d 111 (1986).

Whether or not this Court attaches constitutional dimension to Petitioner's right to trial "within a reasonable time", the three-term rule is as good an analogy as any. It is not merely a protection for the Defendant, it also affords the State a reasonably adequate time to prepare for trial. In that regard, this Court has stated:

> "A speedy trial is, in general, one had as soon as the prosecution, with reasonable diligence, can prepare for it; a trial according to fixed rules, free

> from capricious and oppressive delays, but the time within which it must be had to satisfy the guaranty depends on the circumstances. State ex rel. Farley v. Kramer, 153 W.Va. 159, 169, S.E. 2d 106 (1969).

In this case, the State called only two witnesses. They obtained documents from the Circuit Clerk's Office and they obtained documents which were already in the Fairmont Police records at the time of the filing of the Recidivist Information. It is unclear whether they had to obtain the records they used from the Division of Corrections but, with due diligence, these documents should have been obtained easily. In short, it was an easy trial to prepare for and should not have taken sixteen (16) months.

The State will undoubtedly argue that the Petitioner consented to a continuance on August 24, 2012, to the next term of court. While this is in dispute, the next term of court began in Marion County on the 1st day of October, 2012. This delay was a mere thirty-eight (38) days. The State then waited until January 30, 2013 to afford the Petitioner a trial. Even if you subtract the thirty-eight (38) days, there was still a period in excess of fourteen months from the filing of the Information to the trial. It's still over fourteen (14) months if you subtract the term of the filing of the Information.

In summary, the Petitioner contends that he was not afforded trial within a reasonable time as the issues to be tried were few, the evidence was already on hand and the witnesses were few and readily available.

5. THE LOWER COURT ERRED BY GRANTING A CONTINUANCE OUTSIDE THE PRESENCE OF THE PETITIONER ON OR ABOUT AUGUST 27, 2012. THE PETITIONER WAS NEVER PRESENT FOR A HEARING ON THIS CONTINUANCE WHICH IS A CRITICAL STAGE OF THE PROCEEDING, AND THE PETITIONER DID NOT CONSENT TO IT.

> "Generally, all matters starting with the commencement of the actual trial require the presence of the accused through final judgment." State v. Boyd, 160 W.Va. 234, 233 S.E. 2d 710 (W.Va. 1977).

> "Since...sentencing is a critical stage and the habitual offender proceeding is a procedure for determining what sentence defendant is to be given... it necessarily follows that the habitual offender proceeding is a critical stage of the criminal prosecution." People v. Stevens, 276 N.W. 2d 910 (Mich. App. 1979).

> "Because of the impact of the right to a speedy trial, matters surrounding a continuance should require the presence of the Defendant." State v. Boyd, 160 W.Va. 234, 233 S.E. 2d 710 (1977).

It appears from the record that defense counsel never filed a Motion to Continue from the June 2013, term of court and no hearing was held on such a motion. Therefore, Petitioner was never brought before the court to consent to the continuance. This was a critical stage of the proceeding.

> "If the State is to avoid the consequences of the rule requiring the presence of the accused at all critical stages of the criminal proceeding upon the doctrine of harmless error, it must take the responsibility of preserving a record of such critical stage, in order that it can be shown beyond a reasonable doubt the harmlessness of the defendant's absence." State v. Boyd, supra.

Since there was no hearing on a Motion to Continue, there is obviously no transcript thereof. The only documents on the record are the Agreed Order and attached letter from the Defendant. In its typewritten language, the Order purports only to continue Case No: 09-F-197, a matter unrelated to the recidivist trial. Underneath that, the Case No: 91-F-171 is handwritten in. The Order does not bear Petitioner's signature. The Petitioner denies that the handwritten numbers were on it when he executed the attached consent and waiver and further denies he intended to consent to a continuance of the recidivist trial. The attachment does not bear a Case Number.

Interestingly, the attachment, which was not prepared by Petitioner, states:

> "After discussing said rights with my counsel, I hereby waive my right to trial within the term and right to be present at the hearing on the Motion to Continue."

First, there was no hearing on the Motion. Second, the attachment is couched in traditional speedy trial language which, under the current state of the law, is more applicable to traditional criminal prosecutions such as that against the Petitioner in Case No: 09-F-197.

The Agreed Order continued the case until the October 2012 term of Court from the June 2012, term of Court. The June term of Court was the last of the three terms succeeding the term at which the Information was filed. Accordingly, the continuance effectively denied the Petitioner his right to a speedy trial.

"If an accused demonstrates that...he was absent during a critical stage of the trial proceeding, his conviction of a felony will be reversed where a possibility of prejudice appears from the abrogation of the constitutional or statutory right." State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E. 2d 330 (1975).

"Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Grob Id.

Grob also provides that an accused can waive a fundamental right protected by the Constitution if it is demonstrated that such waiver was made knowingly and intelligently.

However, Petitioner was never brought before the lower court to inquire whether his consent to the continuance and waiver of his speedy trial rights was knowing and intelligent. As a result, we are left with a disputed record. Petitioner submits that the very purpose of bringing him before the court is to avoid this type of situation where the Defendant is not advised of the rights he is waiving by the court and a knowing and intelligent waiver is not obtained on the record.

This Court is without sufficient information to be assured that Petitioner was not prejudiced by the abrogation of his right to be present and the State cannot prove beyond a reasonable doubt that the error was harmless.

6. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE PETITIONER'S PROBATION OFFICER INTERVIEWED HIM AFTER HIS SEXUAL ABUSE CONVICTION, OBTAINED A STATEMENT FROM HIM ADMITTING HE HAD BEEN CONVICTED OF THREE (3) PRIOR FELONIES AND THEN TESTIFIED TO HIS ADMISSIONS AT TRIAL.

"The Sixth Amendment guarantees the accused, from at least the initiation of formal charges, the right to rely on counsel as a medium between him and the State. Knowing exploitation of the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." Maine v. Moulton, 474, U.S. 159, 106 S.Ct. 477, 88, L.Ed. 2d 481 (1985).

The recidivist proceeding is simply a continuation of the sentencing process for the triggering offense in Case No: 09-F-83. Petitioner already had counsel appointed in that case by

the time the pre-sentence investigation was conducted. While the probation officer may have had the right and a legitimate reason to interview the Petitioner, she may also have been aware of the State's intention to file a Recidlvist Information. In either event, use of the Petitioner's statement against him at trial was a "knowing exploitation by the State of an opportunity to confront the accused without counsel being present."

In Maine, the State admitted at trial incriminating statements made by the defendant to his co-defendant after indictment and at a meeting of the two to plan defense strategy for the upcoming trial. The defendant arranged the meeting himself but did not know that his co-defendant was working with the prosecution by that time. The State made arrangements with the co-defendant to record the conversation and then used the recording against the defendant at trial.

The United States Supreme Court reversed the conviction, stating:

> "Whatever else it may mean, the right to counsel means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. Pp. 168-170. Once the right to counsel has attached and been asserted, the State must honor it."
>
> ...The State misreads *Massiah, supra,* and *Henry, supra*, in contending that the decisive fact in those cases was that the police set up the confrontation between the accused and a police agent at which incriminating statements were elicited, and thus respondent's Sixth Amendment rights were not violated here because he rather than Colson initiated the recorded conversations. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.
>
> ...In this case the State clearly violated respondent's Sixth Amendment right when it arranged to record conversations between respondent and its undercover informant, Colson. When the police requested that Colson wear a body wire transmitter to the meeting with respondent, the police knew that respondent would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. By concealing the fact that Colson was an agent of the State, the police denied respondent the opportunity

> to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.
>
> There is no merit to the argument that the incriminating statements obtained by the police should not be suppressed because the police had other, legitimate reasons for listening to respondent's conversations with Colson, namely, to investigate respondent's alleged plan to kill the State's witness and to insure Colson's safety."

In this case, the State knew or should have known that: 1) They were going to file a Recidivist Information, 2) The probation officer was going to conduct a pre-sentence investigation including an interview of the Petitioner wherein she would inquire about his criminal history, and 3) The right to counsel had already attached for the Petitioner on the triggering offense.

> The Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against a defendant by way of...indictment..." State v. Williams, 226 W.Va. 626, 704 S.E. 2d 418 (W.Va. 2010).

Since recidivist proceedings are in the nature of sentencing hearings for the triggering offense, Petitioner's right to counsel attached at least as of the date of indictment in Case No: 09-F-83. Recidivist cases present a unique scenario with regard to pre-sentence investigations after conviction on the triggering offense and their interplay with the right to counsel.

In most felony cases, a pre-sentence report will be done and during that investigation, the defendant will typically be asked about his criminal history. In traditional cases, the court may use that information to decide matters such as probation or home confinement, but the statute under which the defendant will be sentenced has already been determined by the verdict of the jury. This is so even under most enhanced penalty statutes such as DUIs or repeat drug offenders as the jury will have already determined the existence of such prior offenses. In other words, the defendant does not, in the vast majority of cases, expose himself to a greater penalty by being honest with his probation officer. This is not true in the context of recidivism.

As made clear by this case, the Petitioner subjected himself to a dramatically more severe sentence by being honest with his probation officer. The presence of counsel could have, in fact, should have, prevented this from occurring.

The Petitioner was convicted on July 28, 2011 in Case No: 09-F-83. The Recidivist Information was not filed until September 20, 2011, nearly two (2) months later. The record does not reflect that the probation officer knew that the Information was going to be filed but it doesn't reflect that she didn't know it either. However, as the Court said in Maine v. Moulton, supra, the State must honor the right to counsel once it attaches.

The State was undoubtedly aware that the probation officer would interview Petitioner. Failure by the State to advise her or counsel for the Petitioner of their intent to file the Information and then its use of Petitioner's statements at trial was a "knowing exploitation by the State of an opportunity to confront the accused without counsel being present" and is "a breach of the State's obligation not to circumvent the right to the assistance of counsel."

This Court discussed this issue in a somewhat different context in State v. Smith, 438 S.E. 2d 554 (W.Va. 1993). In Smith, the defendant entered into a plea bargain with the State and, as part of that process, he was interviewed by a probation officer. During the interview, he admitted to possession of marijuana. After his plea was set aside, the case proceeded to trial and the State called the probation officer to impeach the defendant's trial testimony. This Court reversed his conviction, stating:

> "Statements made by a defendant during a guilty plea proceeding cannot be used to impeach the defendant if he testifies at trial." Syl. Pt. 2.

The Court based its opinion on Rule 11 of the W.V.R. Cr.P so that portion of the opinion is not applicable here. However, the Court also stated:

> "The primary policy reason advanced in *Lawson* for denying a right to impeach was that it would discourage plea bargains by impairing the full and frank exchange of information. The court reasoned that "to use for impeachment purposes [plea bargain statements] will clearly affect the discussions and impair the frank and open atmosphere Rule 410 and 11(e)(6) were designed to foster.
>
> It appears to this Court that the remarks made to the probation officer by the defendant in the present case were made within the ambit of his plea discussions and were made as a part of the plea process. Also, there is nothing to suggest that the defendant would have made such remarks to an officer of the court if he had not believed that he was justified in being frank because of the plea arrangements."

The same public policy is at play here. The defendant in a criminal case is generally encouraged to be open and honest with the probation officer during the pre-sentence investigation. To sanction the admissibility of a defendant's admissions to prior convictions in a subsequent recidivist proceeding would have a substantial chilling effect on the motivation of defendants to be honest with their probation officer in any case where the specter of recidivism looms. It would also encourage, perhaps even mandate, that counsel advise clients to remain silent on the issue of past criminal history.

In Smith, this Court acknowledged that a probation officer is an officer of the court, much like the co-defendant in Moulton was an "agent of the state." Also as in Moulton, she had a legitimate reason to speak with Petitioner. It would be the height of naiveté for the State to argue that it was unaware she would ask Petitioner about his criminal history. The concealment in Moulton may have been somewhat more overt, but this is the substantial equivalent thereof with greater impact on the liberty rights of the Petitioner.

7. THE LOWER COURT ERRED BY ADMITTING CERTAIN HEARSAY DOCUMENTS WHICH WERE USED TO ESTABLISH IDENTITY AND, WITHOUT WHICH, THE STATE HAD INSUFFICIENT PROOF TO ESTABLISH IDENTITY BEYOND A REASONABLE DOUBT.

> "Where the issue of identity is contested in a habitual criminal proceeding, the State must prove identity beyond reasonable doubt." State v. Barlow, 181 W.Va. 565, 383, S.E. 2d 530 (1989).

The evidence presented by the State was purely documentary. The State did not present a witness who testified they were present during the proceedings for the underlying offenses. Besides Petitioner's statement, the State's case was based entirely on fingerprints, matching birth dates and SSNs. However, the social security numbers did not match and no evidence was presented to explain why. Moreover, much of the documentation used to establish these matters was hearsay. There was not a proper foundation laid to qualify these documents as an exception to the hearsay rule. Without them, the evidence was insufficient to establish identity beyond a reasonable doubt.

The first of these documents was the Fairmont City Police arrest report which contains a fingerprint card. This card was sent to the WV Criminal Investigation Bureau (CIB) and they send a report back to the Fairmont Police. This report was included in State's Exhibit 1 and they used it to compare fingerprints from previous convictions and identify the two social security numbers. It was a critical piece of evidence as it matched fingerprints.

The CIB report is not prepared by the Fairmont Police and is not their record. They just have a copy of it. Nobody from the CIB was called to testify and no foundation as to reliability or authenticity was laid. Unfortunately, no objection was made to it either.

The second document is State's Exhibit 6, a criminal history report from the CIB. This document is subject to the same objections as the first and Sgt. Pigott used it to associate Petitioner's fingerprints with all previous convictions. No objection was made.

The third document is State's Exhibit 7, a series of documents from the West Virginia Division of Corrections which include a twenty-year old photograph of Petitioner, fingerprint cards associating Petitioner with the prior convictions and a series of documents from these proceedings. While this exhibit was under seal, no witness from the West Virginia Division of Corrections was called to testify as to its method of preparation, who prepared it, or its status as a public record. No objection was made.

Finally, Ms. Campbell was permitted to testify as to the contents of a report from the Interstate Identification Index, a "collaboration" of FBI records of individual arrests. She used this document to detail Petitioner's criminal history. Nobody was called from the FBI to testify to authenticity, method of preparation, reliability or its status as a public record. No objection was made.

These documents constituted hearsay as they were "statements, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c) WVRE.

Rules 803(6) and (8) of the WVRE provide:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) **Records of Regularly Conducted Activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or date compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness...

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

In Crawford v. Snyder, 228 W.Va. 304, 719 S.E.2d 774 (2011), this Court stated:

"In order to satisfy the knowledge requirement of W.Va R. Evid. 803(6), the party seeking to admit such evidence may establish either (1) that the preparer of the record had knowledge of the matters reported; or (2) that the information reported was transmitted by a person with knowledge, who was acting in the course of a regularly conducted activity; or (3) that it was a regular practice of the activity to rely upon communications from persons with knowledge."

None of this foundation was laid for any of the above documents. The jury was given no information upon which to base their reliance on these documents nor were they given reason to question them.

Rule 803(8)(B) contains the specific exception that in criminal cases, matters observed by police officers or law enforcement personnel are not admissible. Rule 803(8)(C) specifically provides that "factual findings resulting from an investigation made pursuant to authority granted by law" are not admissible in favor of the state in criminal cases. If these documents are allowed in under the general rubric that they set forth "the activities of the office or agency" then the remainder of 803(8) would be emasculated and the specific exceptions therein rendered a nullity.

Since no objection was made to any of these documents, this assignment must be considered under the "plain error" doctrine.

> "To trigger the application of the plain error doctrine, there must be (1) an error; (2) that is plain; (3) that effects substantial rights and (4) seriously affects the fairness, integrity or public reputation of the judicial proceedings." State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (W.Va. 2001).

Petitioner contends that admitting hearsay evidence with no foundation laid is an error that is plain on its face. Since this was a recidivist proceeding, the substantial and constitutional right of Petitioner's liberty was affected.

When coupled with the admission of Petitioner's statement to Ms. Campbell, the prejudicial nature of the admission of these documents is apparent. If none of them had been admitted and Petitioner's statement excluded, the State's case would have consisted entirely of court records from the Clerk's Office and the testimony of Sgt. Pigott and Ms. Campbell regarding the conviction in 09-F-83. The only evidence linking Petitioner to the previous convictions would have been the court records and matching dates of birth. The social security numbers would not have matched.

There was no objection to these documents or the admission of Defendant's statement and the prejudicial evidentiary value of these documents are evident. In his closing, the Prosecutor emphasized these records stating: "The Division of Corrections documents are probably the nail in the coffin." Petitioner contends that this error "seriously affects the fairness, integrity or public reputation of the judicial proceedings."

8. THE LOWER COURT ERRED BY HOLDING BENCH CONFERENCES OFF THE RECORD ON AT LEAST FOUR (4) SEPARATE OCCASIONS DURING PETITIONER'S TRIAL. THE RECORD FAILS TO ESTABLISH THAT THE PETITIONER WAS PRESENT FOR AT LEAST ONE OF THESE CONFERENCES.

> "Under the provisions of W.Va. Code §51-7-1 and 2, all proceedings in the criminal trial are required to be reported; however, the failure, to report all of the proceedings may not in all instances constitute reversible error." State v. Brown, 210 W.Va. 14, 552 S.E. 2d 390 (2001).

"Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal."

After the afternoon recess, and after the jury had been sworn, the lower court, sua sponte, called for an off-the-record bench conference. At the conclusion thereof, the court dismissed a juror.

Pursuant to Rule 24, W.Va. R. Cr. P., a judge may discharge a juror who has become or is found to be "unable or disqualified to perform their duties."

In this case, the record is silent as to the reason for the discharge as well as whether or not there was a motion by the State for such discharge or an objection by defense counsel. Under these circumstances, it cannot be ascertained whether or not the lower court complied with Rule 24 and the Petitioner's appeal is specifically prejudiced.

Prior to the recess, another off-the-record bench conference was held in the Petitioner's absence, in violation of his right to be present at all critical stages. Given the timing of this conference, it is reasonable to infer it had something to do with the juror but this cannot be proven. In any event, the State cannot prove beyond a reasonable doubt that what transpired in Petitioner's absence was harmless.

9. THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AS HIS COUNSEL'S PERFORMANCES WAS DEFECTIVE IN THE FOLLOWING RESPECTS:
    a. He failed to object to the insufficiency of the information,
    b. He failed to offer a proper instruction on the order of previous offenses and convictions and also failed to object to the lower courts' incomplete instruction,
    c. He failed to object to the admissions of several documents which were critical to proof of identity.
    d. He failed to assure the petitioner's presence at critical stages of the proceeding, to wit: the motion to continue and at least one bench conference.
    e. He failed to object to the off-the-record bench conferences which hampers judicial review thereof, and failed to object to the dismissal of a juror after an off-the-record bench conference.

f. He failed to object to the probation officer's testimony regarding petitioner's admissions.

g. He failed to raise an objection to the timeliness of petitioner's trial and, in fact, contributed to the delay by agreeing to the continuance without assuring petitioner's right to be present on a hearing for the continuance.

All of the incidences in which Petitioner claims counsel was ineffective have been fully discussed above. The impact of these errors has also been discussed.

Petitioner notes, however, that none of the cited errors involve trial strategy or arguable courses of conduct. This case involved few issues but they were serious ones and the consequences to the Petitioner were of the utmost importance.

Nonetheless, this record is devoid of a single trial objection. Petitioner does not suggest that counsel should object just for the sake of it, but at least try something. Whether or not this Court sustains any of the assignments of error raised herein, they each have an arguable basis in the law.

This Court reviewed the standards for a claim of ineffective assistance of counsel in State ex rel. v. Painter, 213 W.Va. 32, 576 S.E.2d 277 (2002), stating:

> "This Court has recognized that the Sixth Amendment to the Constitution of the United States and Article III § 14, of the Constitution of West Virginia not only assures the "assistance of counsel" to a defendant in a criminal proceeding but also assures that such a defendant receives competent and effective assistance of counsel...In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)⊗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.
>
> The first prong of this test requires that a petitioner "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."

Petitioner has already detailed the acts or omissions of counsel which he alleges not to have been the result of reasonable professional judgment.

> "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue."

Petitioner contends that none of the claimed deficiencies can reasonably be considered "strategic decisions." In each instance, a successful result would have benefited the Petitioner while an unsuccessful result would have left him no worse off. A reasonable lawyer could have identified each of the legal issues involved and would have acted on them in defense of his client.

> "The second or "prejudice" requirement of the Strickland/Miller test looks to whether counsel's deficient performance adversely affected the outcome in a given case. Furthermore, prejudice must only be proven by a preponderance of the evidence:
>
> One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Myers, Id

In Myers, this Court overturned the Appellants' conviction on ineffective assistance grounds. A number of issues similar to this case arose in Myers as follows:

> "The appellant also argues that his trial counsel failed to assure the appellant's presence at critical stages of the proceedings and failed to ensure that a record of those proceedings was made.
>
> The appellant contends that his trial counsel attended a hearing without the appellant on March 7, 1996, and incorrectly indicated that the appellant had consented to a continuance of the March 11 trial date. The appellant says he in fact was not informed that a hearing was scheduled or that a continuance was being contemplated. There is no record of the continuance hearing, and it is difficult to assess the hearing's impact on the appellant's rights. We have stated that "[b]ecause of the impact of the right to a speedy trial, matters surrounding a continuance should require the presence of the defendant."

> The appellant also contends that during the trial, a bailiff spoke with a sitting juror who indicated that he had recognized an important State witness was a former neighbor. The bailiff apparently related the juror's story to the circuit judge, and thereafter some discussion of the matter was had during a bench conference with the appellant's counsel and the prosecutor. The appellant did not participate in this discussion; he asserts this was because his trial counsel never informed him of his right to participate.
>
> The bench conference was not transcribed, and apart from the recollections of the attorneys there is nothing in the trial record to indicate the conference ever occurred. When the appellant's trial counsel raised the issue in post-trial hearings, the circuit court indicated no recollection of the event, and in the absence of a record, counsel was constrained from arguing that the juror's presence on the panel was prejudicial."

For those and other reasons, the Court reversed.

As in Myers, the Petitioner has identified similar errors plus several others which prejudiced him.

For example, had defense counsel either objected to the lower court's instructions to the jury, or proffered his own appropriate instruction, and been overruled, this point would have been better preserved for appeal. While Petitioner contends that he did not at any time waive the lower court's need for jurisdiction to impose the recidivist sentence, it is always best to preserve objections.

The same is true as to the insufficiency of the information, the documents, the off-the-record bench conferences and the probation officer's testimony. Fortunately, Petitioner himself preserved objections to his right to be present at any continuance, his objection to the continuance and the use of his 1990 conviction.

In summary, Petitioner contends that "the actions and omissions of...trial counsel were outside the range of reasonable professional judgment, and taken together prejudiced the [Petitioner's] ability to obtain a fair trial." Myers Id.

10. THE LIFE SENTENCE IMPOSED ON THE PETITIONER IS DISPROPORTIONATE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

W. Va. Constitution Article III, Section 5 states:

> "Penalties shall be proportioned to the character and degree

of the offense."

This Court applied this provision to recidivist proceedings in State v. Wyne, 460 S.E. 2d 450 (W.Va. 1995)

Given the age of the Defendant and the length of time he spent as a law-abiding citizen, it is disproportionate to apply a life sentence to his conduct. While this Court has previously held that remoteness of prior convictions is not to be considered, Petitioner contends that it should be used for considering whether or not his previous convictions and length of time between them and the triggering offense show that he has largely been deterred from criminal conduct already and that the triggering offense is an isolated aberration in his behavior.

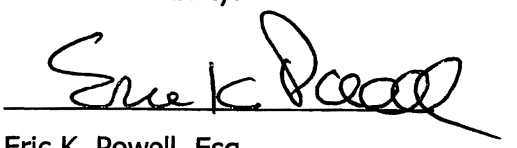
CONCLUSION

For the reasons set forth above, the Petitioner prays for the following relief:

a. Reversal of his recidivist sentence.
b. Dismissal of the Recidivist Information, and
c. Remand to the Circuit Court of Marion County for proper sentencing under Case No: 09-F-83, or, in the alternative,
d. Reversal of his recidivist sentence and remand to the Circuit Court of Marion County for a new trial in Case No: 11-F-171.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the facts alleged herein are faithfully represented and that they are accurately presented to the best of Counsel's ability.



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CERTIFICATE OF SERVICE

I certify that I have, on this 19th day of August, 2013, served a true and accurate copy of the Petitioner's Brief and Appendix on all counsel and parties of record by mailing a copy, via U.S. first class mail, to the following addresses:

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