IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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RORY L. PERRY, II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.

SUPREME COURT NO. 14-0086

JASON W. HOLSTEIN,
Defendant Below, Petitioner

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

A. Petitioner's Plea of Guilty to First Degree Murder was not entered Knowingly, Voluntarily, and, therefore, Intelligently.

B. Petitioner's Sentence Violates the Proportionality Principle Contained in West Virginia Constitution, Article 3, Section 5.[1]

[1] Petitioner wishes me to raise these issues.

IV.

STATEMENT OF THE CASE

Jason Holstein ("Petitioner") was convicted in Kanawha County of the crime of First Degree Murder in violation of Chapter 61, Article 2, Section 1, for which he received a sentence of life imprisonment without the possibility of parole. App. 80-81. Petitioner pleaded guilty to First Degree Murder on April 12, 2010. App. 9. Petitioner was sentenced on June 30, 2010. App. 45.

On January 19, 2009, Petitioner, along with co-defendants, Larry Cantrell and Joshua Taylor, arrived at David Scarbro's home with the intent to rob him. App. 83. During the commission of the robbery, Mr. Scarbro was shot and killed. Id. Mr. Cantrell and Mr. Taylor initially planned on robbing Mr. Scarbro, and they sought Petitioner's assistance in committing the crime. App. 91.

During the police investigation, Larry Cantrell was interviewed. Mr. Cantrell stated that he introduced Joshua Taylor to Petitioner.[2] App 177. According to Mr. Cantrell, Mr. Taylor owed him $200. Id. Mr. Cantrell stated that he introduced Mr. Taylor to Petitioner to assist in

[2] The Presentence Report included the 77 page Kanawha County Sheriff's Department's Report of Investigation ("ROI"). App. 103-198. The ROI included police interviews with Mr. Cantrell, Mr. Taylor, and Petitioner, as well as interviews of others. Id. Although at sentencing the ROI was admitted as part of the Presentence Report without objection, the co-defendants and prospective witnesses were not subject to cross-examination. Further, the Probation Department's Presentence Report referenced statements in the ROI. App. 91-92. Specifically, it referenced statements taken from Mr. Cantrell and Mr. Taylor, as well as others who stated that Petitioner disclosed he shot Mr. Scarbro. Id. Again, although Petitioner's trial counsel did not object, the individuals who implicated Petitioner were not subject to confrontation.

planning the robbery. Id. Mr. Cantrell stated that he and Petitioner obtained firearms which were to be used in the robbery. Id.

Mr. Cantrell said that he, Mr. Taylor, and Petitioner went into Mr. Scarbro's house to rob him. Id. During the robbery, Mr. Cantrell said he physically struck Mr. Scarbro because Mr. Scarbro resisted their attempt to rob him. Id. More specifically, Mr. Cantrell stated that he struck Mr. Scarbro so Mr. Scarbro "would be knocked out" because he would not stop fighting. Id.

Mr. Cantrell stated he was the first to leave Mr. Scarbro's residence, followed by Mr. Taylor, and Petitioner. Id. Mr. Cantrell said when he returned to the vehicle he heard a gunshot and learned from Petitioner and Mr. Cantrell that Mr. Scarbro had been shot. Id. After they left Mr. Scarbro's residence, Mr. Cantrell said they burned their clothes in Cabin Creek, West Virginia. Id. Mr. Cantrell said Petitioner told him that he shot Mr. Scarbro. Id.

Mr. Cantrell subsequently pleaded guilty to attempted first degree robbery, and first degree murder. App. 82. Mr. Cantrell was sentenced to a 20 year term of imprisonment, and to life imprisonment with the possibility of parole, respectively.[3] Id.

During the police investigation, Joshua Taylor was interviewed. App. 177-178. Mr. Taylor stated that Mr. Cantrell introduced him to Petitioner to assist Mr. Taylor in robbing Mr. Scarbro. Id. Mr. Taylor stated after talking to Petitioner about the robbery, Mr. Cantrell and Petitioner retrieved firearms. Id. Mr. Taylor said that he, Mr. Cantrell, and Petitioner talked

[3] The sentences were ordered to run concurrently. Id.

about using guns to scare Mr. Scarbro to ensure that he would readily produce drugs and money. Id.

Mr. Taylor stated when they arrived at Mr. Scarbro's residence, Petitioner knocked on the door. Id. When Mr. Scarbro opened his door, Mr. Taylor stated Petitioner produced a firearm and he, Mr. Cantrell, and Petitioner went inside Mr. Scarbro's residence. Id. Once inside the residence, Mr. Taylor said that Petitioner went to Mr. Scarbro's bedroom, while Mr. Cantrell and Mr. Scarbro engaged in a physical confrontation. Id. Mr. Taylor stated that Mr. Cantrell hit Mr. Scarbro twice in the head with a shotgun, and Mr. Taylor said he kicked Mr. Scarbro in the ribs. Id.

Mr. Taylor said Mr. Scarbro's wife knocked on the front door during the robbery. Id. Mr. Cantrell opened the door, and, according to Mr. Taylor, Mr. Cantrell grabbed her and threw her on the living room floor. Id. Mr. Taylor stated that Mr. Cantrell then ran out of the door. Id. Mr. Taylor said he ran out of the door behind Mr. Cantrell, followed by Petitioner. Id. Mr. Cantrell said he saw Petitioner shoot Mr. Scarbro on the porch as they fled. Id. Mr. Taylor said the three returned to Petitioner's car, and drove to Cabin Creek, West Virginia, where they burned their clothes. Id.

Mr. Taylor pleaded guilty to first degree murder. App. 82. Mr. Taylor was sentenced to life imprisonment with the possibility of parole. Id. Both Mr. Taylor and Mr. Cantrell were sentenced prior to Petitioner's sentencing hearing. Id.

During the police investigation, Petitioner was interviewed. Petitioner stated that Mr. Cantrell asked him to speak to Mr. Taylor about robberies. App. 179. According to Petitioner, Mr. Taylor said that he wanted to rob Mr. Scarbro. Id. Petitoner said he told Mr. Taylor that he should take a weapon in the event the intended victim possessed weapons. Id.

Petitioner stated that he and Mr. Cantrell retrieved a shotgun, and a semi-automatic pistol to use in the robbery. Id. Petitioner stated that he remained in the car when Mr. Cantrell and Mr. Taylor went inside Mr. Scarbro's residence to rob him. Id. Petitioner said that Mr. Cantrell possessed the shotgun, and Mr. Taylor possessed the pistol. Id.

Petitoner said he stepped out of the parked car when he saw a woman walk towards the front door of Mr. Scarbro's residence. Id. Before he could intervene, Petitioner said someone pulled the woman into the residence. Id. Petitioner stated when he stepped onto the porch, Mr. Scarbro fell out of the front door and ran into him. Id. Petitioner said Mr. Scarbro had a significant amount of blood on his face. Id. Mr. Cantrell then ran out of the house, which, according to Petitioner, caused him [Petitioner] to begin running towards the car. Id. Petitioner stated as he ran towards the car, he heard a gunshot. Id. At the car, Petitioner stated that Mr. Taylor said the gun "just went off." Id. Petitioner denied shooting Mr. Scarbro. Id. Petitioner said he drove Mr. Cantrell and Mr. Taylor to the Cabin Creek area, where all three burned their clothes. Id.

Members of the Kanawha County Sheriff's Department found Mr. Scarbro's body lying face down on his porch. App. 125. Mr. Scarbro had lacerations on his head and face, and a gunshot wound to his back. App. 126.

During the police investigation, Mr. Scarbro's wife was interviewed. App. 122. Ms. Scarbro said as she walked towards their residence, she could hear Mr. Scarbro inside arguing with a man. Id. She stated when she tried to open the door and walk into the residence, someone grabbed her and threw her on a chair. Id. Ms. Scarbro stated that she saw two males inside the residence who were wearing black ski masks. Id. Ms. Scarbro said immediately after she was thrown on the chair, the two men and Mr. Scarbro ran onto the porch. Id. Ms. Scarbro stated she then heard two gunshots, and found Mr. Scarbro lying on the front porch. Id. Mr. Scarbro could not identify the two masked men, or who shot her husband. App. 122-123.

During the police investigation, Mark Neely was interviewed. App. 161-162. Mr. Neely stated that Petitioner contacted him on January 19, 2009, to obtain firearms. Id. A short time later, Mr. Neely said Petitioner and Mr. Cantrell arrived at his residence. Id. Mr. Neely said he gave a pistol and a shotgun to Mr. Cantrell. Id. After the shooting, police officers later obtained a shotgun from Mr. Neely, which was believed to be used during the commission of the crimes. App. 164.

During the police investigation, Izsac Kazee was interviewed. App. 150. Mr. Kazee was friends with Mr. Taylor. Id. Mr. Kazee said that he was at Mr. Cantrell's residence, along with Mr. Cantrell, Mr. Taylor, and Petitioner. Id. Mr. Kazee said that Mr. Cantrell, Mr. Taylor, and Petitoner were planning to rob Mr. Scarbro. Id. Mr. Kazee said he saw a shotgun and a semi-automatic pistol inside Mr. Cantrell's home. Id. Mr. Kazee said later that evening, the men said they were about to leave to commit the robbery. App. 150-151. After the robbery, Mr. Kazee

said he went to Mr. Cantrell's house, where Mr. Taylor and Petitioner were present. App. 151. Mr. Kazee told police that Petitioner said that he shot Mr. Scarbro. [4] Id.

When Petitioner stated his factual basis during his plea hearing, he did not admit that he shot Mr. Scarbro. App. 39. Further, the State did not identify who shot Mr. Scarbro when it supplemented Petitioner's factual basis, or at any other time. App. 40.

Petitioner entered a plea of guilty to First Degree Murder pursuant to written plea agreement. App. 7-8. In exchange for Petitioner's plea of guilty, the State of West Virginia agreed to make no sentencing recommendation, and to request the trial court to dismiss the remaining counts in the Indictment.[5] Id.

During Petitioner's plea colloquy, Petitioner advised the trial court that he suffered from Bi-Polar disorder. App. 18. Petitioner advised the trial court that he was taking 50 milligrams of Elavil, and 30 milligrams of Remeron.[6] Id. Petitioner advised the trial court since he was incarcerated for the instant offenses, he had been under the care of a psychiatric physician who prescribed the Elavil and Remeron. App. 18-19. At his plea hearing, the trial court did not question Petitioner regarding the current status of his mental illness.[7] App. 9-44.

Petitioner advised the trial court that he understood the plea agreement, and asked the court to accept his plea. App. 13-14. Petitioner told the trial court that he understood the

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[4] In Petitioner's presentence interview, Petitioner denied saying to Mr. Kazee, or to anyone else, that he shot Mr. Scarbro. App. 91.
[5] Petitioner was indicted for the offenses of Burglary, Attempted Robbery, and First Degree Murder. App. 4-6.
[6] Petitioner described both drugs as anti-depressants. App. 18.
[7] Before Petitioner said he was being treated for Bi-Polar disorder, and was under the care of a psychiatric physician, he advised the trial court that he had never been treated for any mental health issues. App. 17.

constitutional rights he was waiving by entering his plea, the maximum penalty the court could impose, and his right to go to trial. App. 9-44.

Petitioner's trial counsel further advised the trial court that during the course of discussions he had with Petitioner the day of the plea hearing, Petitioner was lucid, he was oriented to time and place, and, in counsel's opinion, Petitioner understood what he was doing in entering his plea. App. 19. Through inquiries to Petitioner's trial counsel, the trial court also elicited that Petitioner had always seemed to be able to recall past events, Petitioner had been active in his defense, and Petitioner had always been lucid with trial counsel. App. 19-20.

During Petitioner's presentence interview, Petitioner stated that he entered Mr. Scarbro's house, along with Mr. Cantrell and Mr. Taylor. App. 83. Petitioner stated after entering Mr. Scarbro's living room, he handed a pistol to a co-defendant, and he began searching the residence for drugs and money. Id.

Petitioner said when he heard Mr. Cantrell and Mr. Taylor beating Mr. Scarbro, he reentered the living room to see why they were attacking him. Id. Petitioner stated his co-defendant said that he was trying to "knock the victim out," but he had a difficult time doing so. [8] Id. Petitioner said as they ran out of the residence, Mr. Scarbro was shot in the back. Id. When he heard the gunshot, Petitioner said he believed Ms. Scarbro was shooting at them. Id. Petitioner denied shooting Mr. Scarbro during his pre-sentence interview.

[8] In the Presentence Report, Petitioner did not identify who he was referring to when he referenced a "co-defendant." Petitioner stated that he knew who shot Mr. Scarbro, but refused to disclose the shooter for fear of retaliation by his co-defendants, and others. App. 91.

During his presentence interview, Petitioner also stated that he had previously been diagnosed with Bi-Polar disorder during substance abuse treatment he received at an outpatient facility.[9] App. 88. Petitioner further told the probation officer since his incarceration in the South Central Regional Jail on the instant charges, medical staff diagnosed him with Post-Traumatic Stress Disorder due to his instant charges, and medical staff affirmed his diagnosis of Bi-Polar disorder. Id. Petitioner told his probation officer that he previously attempted suicide on approximately four occasions. Id. Further, Petitioner stated he sometimes questioned the necessity of his medications prescribed to him by the jail's Medical Unit, and he said he "neglect (sic) taking them in the a.m."[10] Id.

Petitioner also reported as a child he was disciplined excessively with belts, and clothes hangers. App. 87. He said that his father was rarely in his life, and, when he was a child, his mother engaged in an alternative lifestyle which included "stripping and prostituting." Id. In reference to whether he was physically or sexually abused, Petitioner stated, "I have moved on with this part of my life and prefer not to recall this." App. 88.

At Petitioner's sentencing hearing, four character witnesses testified on his behalf.[11] App. 50-69. During allocution, Petitioner acknowledged that he arrived at Mr. Scarbro's residence to rob him, and he took responsibility for felony murder. App. 71-74. Petitioner also apologized to Mr. Scarbro's family, his family, and to the court. Id.

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[9] Petitioner said that he was first diagnosed with Bi-Polar disorder when he attended outpatient substance abuse treatment at Prestera. App. 88.

[10] Among the medications he told the probation officer he was prescribed were the anti-depressants, Elavil and Remeron. App. 88.

[11] Mr. Holstein's mother, step-father, brother, and a close friend, testified at his sentencing hearing. App. 50-69.

Petitioner was 29 years old when he was sentenced. App. 82. Petitioner graduated from high school, and he has a young son. App. 88-89. At the time Petitioner was sentenced, he had been convicted of approximately eight felony (8) breaking and entering offenses.[12] Id. However, Petitioner had never been charged with a crime of violence until the instant offenses. Id. The trial court imposed a sentence of life without the possibility of parole.[13] App. 78.

[12] In 2004, Petitioner pleaded guilty to four counts of breaking and entering which were charged in a Kanawha County Indictment. App. 85-86. In 2006, Petitioner was convicted of four additional counts of breaking and entering. Id.

[13] In imposing such sentence, the trial court noted Petitioner's prior felony convictions. App. 76-78. The trial court further implicitly acknowledged that it believed Petitioner was the shooter based on statements made to the police during its investigation, and other inferences drawn from the ROI in the Presentence Report. Id.

V.

SUMMARY OF ARGUMENT

A. Petitioner was not questioned at his plea hearing regarding the status and severity of his mental illness, whether he was taking his medications as prescribed, or whether he was currently symptomatic. Because the record fails to establish that Petitioner's mental illness did not impact his decision to plead guilty or the implications of his plea, his plea was not entered knowingly, voluntarily, and, therefore, intelligently.

B. Petitioner was sentenced to life imprisonment without the possibility of parole, while his co-defendants were sentenced far less harshly. Petitioner's sentence of life imprisonment without the possibility of parole is disproportionate under the West Virginia Constitution, Article 3, Section 5.

VI.

ARGUMENT

A. Due to the unknown status of Petitioner's mental illness at the time of his plea hearing, the record fails to establish that Petitioner entered his plea knowingly, voluntarily, and, therefore, intelligently.

When there is a plea bargain by which the defendant pleads guilty in consideration for some benefit conferred by the State, the trial court should spread the terms of the bargain upon the record and interrogate the defendant concerning whether he understands the rights he is waiving by pleading guilty and whether there is any pressure upon him to plead guilty other than the consideration admitted on the record. Call v. McKenzie, 159 W.Va. 191 220 S.E.2d 665 (1975). A trial court should spread upon the record the defendant's education, whether he consulted with friends or relatives about his plea, any history of mental illness or drug use, the extent he consulted with counsel, and all other relevant matters which will demonstrate to an appellate court or a trial court proceeding in Habeas corpus, that the defendant's plea was knowingly and intelligently made with due regard to the intelligent waiver of known rights. Id.[14]

In Kevin E.E. v. Seifert, Kevin E.E. argued that he lacked the mental capacity to enter a plea. No. 12-1285 (W.Va. 2013). In relevant part, the Court found during his plea colloquy, Kevin E.E. said that he was taking medication for depression and chronic back pain, but answered in the negative when asked whether his use of those medications affected his ability to understand the proceedings. Id.

[14] The Court noted, "While a court's failure to interrogate the accused with regard to the matters set forth above, and to engage in the type of dialogue which this Court suggests, will not invalidate a conviction, a sedulous following of the procedure suggested above will substantially reduce the volume of litigation in the trial courts on Habeas corpus." Id.

In analyzing the claim, the Court noted that the Prosecutor proffered for the record a summary of the State's evidence against Kevin E.E. Id. Kevin E.E. did not object to the proffer of evidence. Id. The Court further found that Kevin E.E. was evaluated by a number of psychologists, none of whom indicated in their evaluations any impairment of Kevin E.E.'s mental health or intelligence that would have rendered him unable to enter a plea. Id. Therefore, the Court concluded that the trial court correctly followed the guidelines of Call v. McKenzie. 159 W.Va. 191, 220 S.E.2d (1975). Thus, Kevin E.E. failed to prove his plea was given involuntarily.

In Stevens v. Seifert, Stevens argued that mental issues or drug addiction at the time of his plea of guilty caused him not to have a rational understanding of the law or the plea consequences. No. 13-0691 (W.Va. 2014). In rejecting his claim, the Court observed that Stevens failed to demonstrate that there was any evidence that he was incompetent at the time he entered his plea. Id. The Court further noted that Stevens specified no current or past mental health disorders or addictions that affected his competency. Id. Further, the Court stated the circuit court's plea dialogue with Stevens addressed the issues. Id. Stevens admitted that he was not under the influence at that time and was never treated for any mental health or addiction issues. Id. The Court finally noted that Stevens did not present any current or past evaluation to support his argument. Id.

During the plea colloquy in the instant case, Petitioner stated that he was diagnosed with Bi-Polar disorder, and he was currently under the treatment of a psychiatric doctor for his mental illness. Petitioner further said he was currently prescribed Elavil and Remeron, two anti-

depressant medications, to control his mental illness. However, when Petitioner entered his plea, the trial court neither asked Petitioner if he was taking his anti-depressant medications, nor whether Petitioner was taking his anti-depressant medications as prescribed. Further, the trial court made no inquiries as to the symptoms of his Bi-Polar disorder, the severity of his Bi-Polar disorder, or whether he was experiencing any ill-effects from his Bi-Polar disorder at the time of his plea. The State further failed to request findings be made on Petitioner's mental status during his plea hearing.

Moreover, Petitioner was not asked any questions about his mental illness to determine if his mental condition at the time of his plea hearing impacted his decision to plead guilty; if his mental illness affected his ability to fully comprehend his constitutional rights; if his mental illness affected his ability to fully appreciate the sentence to which he would be exposed by virtue of his plea; if his mental illness in any way affected his decision to plead guilty; or, if his mental illness affected his ability to fully comprehend and rationally process all other aspects of his plea hearing.

Further, there is nothing in the record that indicates Petitioner's mental illness had been recently assessed prior to his plea hearing, which would have provided the trial court with some basis to evaluate Petitioner's mental status at the time he entered his plea. Petitioner respectfully submits, because there was no recent report to assess his mental condition prior to his plea, it made it even more incumbent on the trial court to develop the status of Petitioner's mental illness at the time of his plea.

Petitioner respectfully submits, his responses during his presentence interview strongly suggests that his mental illness was serious, and he had suffered from it well before he was charged with the instant offenses. It would further appear axiomatic that the stress and strain attendant with his charged offenses, and his entry of a plea to First Degree Murder, would only amplifty his mental disorder. Petitioner told the probation officer that he had previously tried to commit suicide on approximately five occasions, and his Bi-Polar disorder was first diagnosed at Prestera, as part of a substance abuse treatment program which he was attending.[15]

For purposes of evaluating his mental condition at the time of his plea hearing, Petitioner's response, during his pre-sentence interview, regarding the consistency in which he took his medications is further instructional. Petitioner told the probation officer that he questioned the necessity of taking his medications in the morning. Therefore, a fair inference is, at the time of his plea hearing, Petitioner was not taking his anti-depressant medications as prescribed, and he may not have taken them the morning of his plea hearing.

Petitioner submits neither fact would be fatal to the legality of his plea, if Petitioner's plea colloquy satisfactorily resolved Petitioner's mental status at the time of his plea to determine if the state of his mental illness played a part in inducing him to plead guilty. Further, Petitioner respectfully submits the trial court did not sufficiently determine if Petitioner's mental illness affected his decision making ability when he entered his plea, his ability to comprehend and fully appreciate his constitutional rights and the rights he was surrendering, and whether his mental

[15] Petitioner stated that he tried to overdose by taking pills twice, he tried to hang himself twice, and once he was drunk and tried to shoot himself. App. 88.

illness interfered with his ability to understand and appreciate the practical fact that someone was going to be held accountable for shooting the victim.

Based on the foregoing, Petitioner respectfully submits that the guidelines of Call v. McKenzie were not followed at his plea hearing. Consequently, Petitioner's plea of guilty was not entered knowingly, voluntarily, and, therefore, intelligently.

B. Petitioner's Sentence Violates the Proportionality Principle Contained in West Virginia Constitution, Article 3, Section 5.

Petitioner was sentenced to life imprisonment without the possibility of parole, while his co-defendants were sentenced far less harshly. Based on the totality of circumstances, Petitioner respectfully submits his sentence violates the proportionality principle of the West Virginia Constitution, Article 3, Section 5.

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates the West Virginia Constitution. Stockton v. Leeke, 237 S.E.896, 897 (W.Va. 1977). The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. State v. Cooper, 304 S.E.2d 851 (W.Va. 1983). If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. Id. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test spelled out in Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W.Va. 1981):

> In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the

punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

The Court has recognized that disparate sentences of co-defendants that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates the West Virginia Constitution. State v. Cooper, 304 S.E.2d 851 (W.Va. 1983). (Citing Smoot v. McKenzie, 277 S.E.2d 624 (W.Va. 1981)). Disparate sentences for co-defendants are not per se unconstitutional. Id. Courts consider many factors such as co-defendants' respective involvement in the criminal transaction (including who was the primary mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. Id.

Petitioner respectfully submits that his sentence violates the proportionality principle based on the objective test. Based on the statements of Mr. Cantrell, Mr. Taylor, and prospective witnesses which were included in the Presentence Report, it appears that the trial court concluded Petitioner was the shooter, which distinguished his culpability from that of his co-defendants'.

However, Petitioner submits he was not the shooter. Further, Petitioner submits he was not the leader in the plan to rob Mr. Scarbro. It was Mr. Cantrell and Mr. Taylor's idea to rob Mr. Scarbro, and they sought out Petitioner to assist them. Mr. Cantrell and Petitioner did obtain firearms to facilitate the robbery. However, according to the Presentence Report, once inside Mr. Scarbro's residence, Mr. Cantrell and Mr. Taylor beat Mr. Scarbro. Mr. Cantrell struck Mr. Scarbro with the the shotgun in an effort to try to "knock him out," and Mr. Taylor

kicked Mr. Scarbro. Moreover, there is nothing in the record that reflects Petitioner physically struck Mr. Scarbro at any time before the shooting.

Petitioner respectfully submits the fact it was co-defendants' idea to commit the robbery, that they had motive to commit the robbery, and, unlike Petitioner, they were violent and inflicted injuries to Mr. Scarbro during the commission of the robbery, are probative facts to infer who shot Mr. Scarbro. Moreover, Petitioner submits Mr. Taylor's statement that Petitioner admitted to being the shooter was self-serving, and Mr. Kazee's statement that Petitioner admitted to being the shooter lacked reliability, since Mr. Kazee was friends with Mr. Cantrell. Again, Petitioner never enjoyed the right to confront his co-defendants and other prospective witnesses who made inculpatory statements against Petitioner which were incorporated in the Pre-Sentence Report. And, as the Court is aware, cross-examination is the crucible in assessing the reliability of witness statements.

Petitioner was 29 years old when he was sentenced. At the time of sentencing, Petitioner was close to his mother and brother, as indicated, in part, by their testimony at his sentencing hearing. Petitioner is a high school graduate, and he has a young son. It is further clear from the sentencing transcript that Petitioner showed remorse for his actions, and recognized the seriousness of his criminal conduct.[16]

Petitioner endured a very difficult life as a child. As a child, Petitioner reported he was beaten with belts and clothes hangers. When he was young, Petitioner reported that his mom

[16] In addition to apologizing to Mr. Scarbro's family at his sentencing hearing, prior to his sentencing hearing, Petitioner sent the Scarbro family a letter in which he apologized. App. 90.

engaged in an alternative lifestyle that involved salacious behavior, and it can be inferred from the Presentence Report that Petitioner was physically and/or sexually abused as a child. Petitioner respectfully submits the toxic childhood he endured was a significant mitigating factor. Finally, although Petitioner was convicted of a number of breaking and entering offenses, he had never been charged with a crime of violence prior to the instant offenses.

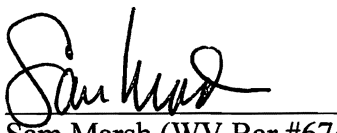
Based on the factors set forth in Cooper, Petitioner respectfully submits that his sentence is disproportional to the sentences imposed for Mr. Cantrell and Mr. Taylor. Accordingly, this Court is asked to find Petitioner's sentence violates the proportionality provision of W.Va. Constitution, Article 3, Section 5.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Honorable Court reverse the conviction and sentence below, and remand the case to the Circuit Court of Kanawha County.

Respectfully Submitted,

Jason Holstein, Petitioner
By Counsel



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CERTIFICATE OF SERVICE

I, Sam Marsh, do hereby certify that on the 13th day of June, 2014, a copy of the foregoing Petitioner's Brief was mailed to Chris Dodrill, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25305.

SAM MARSH
Counsel for Petitioner