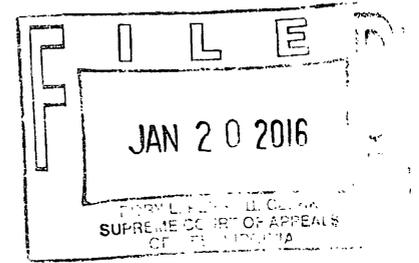


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0876



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

vs.

CHIP MELTON DAVIDOW,

*Defendant Below, Petitioner.*

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RESPONDENT'S BRIEF

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**PATRICK MORRISEY  
ATTORNEY GENERAL**

**DAVID A. STACKPOLE  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11082  
Email: David.A.Stackpole@wvago.gov**

*Counsel for Respondent*

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---

COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief.

I.

STATEMENT OF THE CASE

On June 23, 1994, Petitioner was arrested in Raleigh County, West Virginia, on the charge of First Degree Murder. (App. 1 at 14.) "The killing, on its face, appeared to be random, brutal and inexplicable." (App. 1 at 2.) Petitioner gave an account at the competency evaluation:

"He stated that he felt that people were stealing things from his house and spraying poisons around him. He left his home in his car and was driving down the road when he states that Howard Hughes and J. Edgar Hoover told him to assassinate a man in a panel truck. He subsequently forced the victim's truck off the road and shot him numerous times. He described the scene, stating the man was a 'quick healer', and that this was the reason that he shot and stabbed him as often as he did."

(App. 1 at 2) (quoting Forensic Psychiatric Evaluation, PsyCare Inc., Russ Voltin, M.D., 7/13/94.)

On December 20, 1994, the Circuit Court of Raleigh County, West Virginia entered an Order granting Petitioner's request to "be kept and securely confined to Bournemouth Hospital in Brookline, Massachusetts "to obtain a clinical setting evaluation and psychiatric care . . . prior to any further proceedings in th[e] matter." (App. 1 at 50-1.)

On August 23, 1995, the Circuit Court entered an Agreed Order allowing for the transfer of Petitioner to the Wild Acres Inn in Lexington, Massachusetts for the purpose of further psychiatric care, specifically stating that Petitioner was to "be kept and securely confined" at the facility. (App. 1 at 13.)

On December 23, 1996, the Circuit Court found that Petitioner "was suffering from a mental disease or defect which rendered him irresponsible for his actions and that he was unable to control his behavior in spite of understanding the wrongfulness of his actions." (App. 1 at 15.) Therefore, the Circuit Court held that Petitioner was not criminally competent at the time of the murder. *Id.* The first degree murder charge was dismissed and ordered Petitioner to be committed to a mental health facility for a period equal to the maximum sentence allowable." *Id.*

Over the next twenty (20) years, there were minimal communications with the Circuit Court. On January 8, 1999, the Circuit Court entered an Order permitting Petitioner to travel to Washington, D.C. for his mother's funeral. (App. 1 at 17-8.) Petitioner was required to be supervised by a staff person from the facility "at all times during the excursion." *Id.*

On May 24, 2000, the Circuit Court entered an Order for Transport and Commitment to William R. Sharpe Hospital (hereinafter "Sharpe Hospital"). (App. 1 at 19-20.) At the time the Circuit Court had been informed that Petitioner was no longer able to be kept at Wild Acres Inn.

*Id.* Therefore, the Circuit Court held that Petitioner was to be “committed to the care and custody of the West Virginia Division of Health at William Sharpe Hospital.” *Id.* Sharpe Hospital was ordered to “develop a case and care plan” and to “make periodic report to th[e] Circuit] Court.” *Id.* The Circuit Court was unable to “ascertain from the court file whether or not the authorities at Wild Acres Inn actually received a copy of th[e] Order.” (App. 1 at 3.) Nonetheless, Petitioner was not transferred in 2000. *Id.*

On August 10, 2001, the Circuit Court entered an Order accepting a Petition for Appointment of Conservator to manage Petitioner’s daily affairs. (App. 1 at 35-6.) On June 4, 2002, the Circuit Court entered an Order accepting the Conservator’s report and approving of payments of expenses from August 10, 2001 to February 28, 2002. (App. 1 at 33-4.) On October 6, 2006, the Circuit Court entered an Order accepting the Conservator’s report and approving of payments of expenses from March 1, 2002 to February 28, 2006. (App. 1 at 37-40.) On August 28, 2008, the Circuit Court entered an Order accepting the Conservator’s report and approving of payments of expenses from March 1, 2006 to February 29, 2008. (App. 1 at 29-32.) No further Conservator’s reports were made to the Circuit Court. However, in 2014, the Superior Court for the State of California for the County of Los Angeles entered an Order creating a revocable trust using the same Conservator. (App. 2 at 212.)

Over the course of the almost twenty (20) years at Wild Acres Inn, Petitioner “progressed from a locked ward to a community setting” where he “was unsupervised in his movements, had his own apartment, and regularly traveled into the City of Boston to play music in a band.” (App. 1 at 3.) Petitioner was medicated and met with mental health professionals. *Id.* Petitioner “did not engage in any acts of violence toward any person.” *Id.* However, the Circuit Court did

not receive regular reports of Petitioner's condition and was not informed about Petitioner's movement to "complete freedom of movement." (App. 1 at 3-4.)

On August 29, 2014, the Circuit Court was informed of "the impending closure of the mental health facility where the [Petitioner] has been treated since entry of the Order entered December 23, 1996 in this matter." (App. 1 at 4, 21.) The Circuit Court scheduled a Hearing and required several reports be made. (App. 1 at 21-2.) The Circuit Court also required that Petitioner "be under around-the-clock direct supervision by a qualified and responsible mental health staff member." *Id.*

On September 12, 2014, the Circuit Court held a Motions Hearing in the matter. (App. 2 at 318-55.) The State argued that West Virginia Code requires that DHHR has to make a determination about a facility before any interstate placement can be made. (App. 2 at 337.) The Circuit Court, bound by the law, found that it was required to "start with an evaluation at Sharpe Hospital." (App. 2 at 340.) The Circuit Court reasoned that "because there is a change in his placement and the facility, we have to have an assessment." (App. 2 at 342-43.) Following the Motions Hearing, the Circuit Court ordered Petitioner be transferred from Wild Acres Inn to Sharpe Hospital. (App. 1 at 23-4.) The Circuit Court maintained the requirement that Petitioner "be maintained under around-the-clock supervision." *Id.*

On September 29, 2014, Dr. Kari-Beth Law (hereinafter "Dr. Law") performed a Dangerousness Risk Assessment on Petitioner for the State. (App. 1 at 5, 150-55.) Dr. Law "recommended that the [Petitioner] be advanced to the next Sharpe privilege level, as a reasonable progression in his treatment." *Id.*

On November 3, 2014, Dr. Timothy Saar, Ph.D., Licensed Psychologist (hereinafter "Dr. Saar") was retained by Petitioner and "administered a forensic evaluation." (App. 1 at 5, 157-

65.) Dr. Saar opined that Petitioner “presents a low risk to the community and for future violence.” *Id.* Dr. Saar recommended that based on West Virginia’s “paucity of resources for the treatment of patients such as” Petitioner, he “be allowed to reside at the Belmont House program, which would be similar to his previous level of care.” *Id.*

Petitioner was transferred from Sharpe Hospital to Highland Hospital in Clarksburg, West Virginia. (App. 1 at 107.) The Statewide Forensic Coordinator’s letter to the Circuit Court informed the Circuit Court that both facilities have similar processes for security and safety, including secure locked units with patients escorted by staff when they leave the unit. *Id.*

On May 4, 2015, Petitioner filed a Motion for Order Directing Transfer to Less Restrictive Placement. (App. 1 at 71-83.) On June 15, 2015, the Circuit Court held a Hearing on Petitioner’s Motion. (App. 1 at 1.) At the Hearing, the State argued that Petitioner should not get to choose his own facility just because he is rich. (App. 2 at 268.) The Prosecutor even called the Prosecutor in Massachusetts and discovered that the State of Massachusetts did not even use the facility that Petitioner was requesting for forensic patients. (App. 2 at 269-70.)

The Statewide Forensic Coordinator, Georgette Bradstreet (hereinafter “Ms. Bradstreet”) testified. (App. 1 at 6; App. 2 at 281-309.) Ms. Bradstreet testified “that her principal goal in these cases is to determine the least restrictive environment for patients in the State in a manner that is consistent with the public safety.” (App. 1 at 6; App. 2 at 282.) Ms. Bradstreet testified that “[t]he Belmont Wild Acres Inns facility is not designated by the DHHR to receive forensic patients from the State of West Virginia” and that “our West Virginia facilities are well-suited to meet such goals, using not only secure facilities but also approved group homes and supported apartments.” (App. 1 at 6; App. 2 at 282-83, 286.) Ms. Bradstreet testified that if a forensic

patient is deemed safe, the patient can be released to the community. (App. 2 at 289.) Ms. Bradstreet testified that placement depends upon multiple factors. (App. 2 at 284.)

Ms. Bradstreet testified that Highland Hospital is not “prison like” as described by Petitioner. (App. 2 at 288.) “In fact, moving to Highland Hospital is a step down, so to speak, of a lesser secured facility than even what Sharpe Hospital is.” (App. at 288-89.) Ms. Bradstreet testified that she had reviewed the State’s evaluation of Petitioner and that Petitioner would continue to be evaluated as to what is the least restrictive environment. (App. 2 at 292, 296, 302.) Currently, Petitioner is taking his medications, but is not attending the group therapy or choosing to be involved in the other programming. (App. 2 at 308.)

On August 5, 2015, the Circuit Court entered an Order Denying Petitioner’s Motion. (App. 1 at 1-12.) This appeal followed.

## II.

### SUMMARY OF THE ARGUMENT

Trial Courts have broad discretion to determine the appropriate disposition of persons found not guilty for mental health reasons. In this case, Petitioner seeks to pick his own mental health facility placement and has chosen an out-of-state placement in Massachusetts. There is no law allowing a person who was acquitted on the basis of mental health to choose whatever mental health facility, anywhere in the country, where they wish to reside. Additionally, the facility that Petitioner has chosen is not one that DHHR has approved. To require DHHR to travel to Massachusetts to inspect and determine if the facility could be approved for use would place an undue burden and expense on DHHR.

Petitioner is entitled to be in a least restrictive environment, but West Virginia is well-equipped to provide Petitioner a least restrictive environment without resorting to out-of-state

facilities. The Circuit Court appropriately considered Petitioner's treatment needs and the need for public safety. The Circuit Court did not base its decision on the crime, but did take into consideration Petitioner's twenty (20) year non-violent history. The Circuit Court also considered Ms. Bradstreet's testimony as the Statewide Forensic Coordinator as well as the assessment done by Dr. Law in making a factual finding that West Virginia can provide Petitioner a least restrictive environment placement. Keeping Petitioner in West Virginia ensures that the Circuit Court will have a better ability to get ongoing updates about Petitioner's treatment. Such updates did not occur while Petitioner was in Massachusetts and the Circuit Court was left completely in the dark as to Petitioner's utter freedom of movement until it was made aware the facility was closing.

Treatment is an ongoing process and Petitioner will have the opportunity to move through the step-down process. West Virginia has possible options such as residential group homes and supported apartments. Continued monitoring of Petitioner's treatment has been ordered by the Circuit Court and will likely occur as long as Petitioner continues treatment in West Virginia. Such monitoring did not occur while Petitioner was in Massachusetts. Therefore, this Court should affirm the Circuit Court's denial of Petitioner's Motion for an Order Directing Transfer to a Less Restrictive Placement.

### **III.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

There is clear statutory law on point in this matter. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument as requested by Petitioner. However, if this Court were to desire Oral

Argument, then Oral Argument should be conducted pursuant to Rule 19. This matter is appropriate for a Memorandum Decision.

#### IV.

#### ARGUMENT

There is a two (2) prong standard of review for challenges to findings and conclusions of a Circuit Court:

[i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

*State v. Robertson*, 230 W. Va. 548, 555, 741 S.E.2d 106, 113 (2013) (quoting Syl. Pt. 2, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997)). “In reviewing the circuit court's final order, we are mindful that ‘both by statute and case law, a trial court has broad discretion to determine the appropriate disposition of those found not guilty by reason of insanity.’” *Robertson*, 230 W. Va. at 555, 741 S.E.2d at 113 (quoting *State v. Catlett*, 207 W. Va. 740, 745, 536 S.E.2d 721, 726 (1999)).

Petitioner asserts two (2) assignments of error: [1] error to refuse to transfer Petitioner to a Massachusetts facility and [2] error to deny Petitioner's Motion for an Order Directing Transfer to a Less Restrictive Placement. Pet'r's Br. at 2. This Court should reject both of Petitioner's claims.

**A. The Circuit Court Held That West Virginia Is Well Equipped To Provide Petitioner With A Least Restrictive Environment Placement Without Transferring Petitioner To An Out Of State Facility.**

Petitioner's second assignment of error focuses upon Petitioner's misplaced belief that the Circuit Court was required to evaluate an out of state facility. *See* Pet'r's Br. at 2. Petitioner

is correct that he is entitled to be placed in the least restrictive environment. *See id.* at 11-3. However, that determination is made by the Department of Health and Human Resources (hereinafter “DHHR”) and is not a license for Petitioner to shop for a facility of his own choosing. W. Va. Code § 27-6A-4 (2007); W. Va. Code § 27-6A-3 (1995). Additionally, the Circuit Court made a finding, based upon testimony of Georgette Bradstreet (hereinafter “Ms. Bradstreet”), the Statewide Forensic Coordinator for the DHHR, that West Virginia is well equipped to provide Petitioner with a placement in the least restrictive environment without locating Petitioner in an out-of-state facility that has not been approved by DHHR. (App. 1 at 6-10.)

**1. Although Petitioner Is Entitled To A Placement In The Least Restrictive Environment, He Is Not Entitled To Pick His Own Placement.**

While the law does provide that Petitioner must be placed in the least restrictive environment, the law clearly states that facility designation is done by the DHHR. W. Va. Code § 27-6A-4 (2007); W. Va. Code § 27-6A-3 (1995). The current code provision is clear that the determination of what facilities are approved to be used as a least restrictive environment falls to the DHHR:

If the verdict in a criminal trial is a judgment of not guilty by reason of mental illness, the court shall determine on the record the offense or offenses of which the acquitee could have otherwise been convicted, and the maximum sentence he or she could have received. The acquitee shall remain under the court’s jurisdiction until the expiration of the maximum sentence or until discharged by the court. The court shall commit the acquitee to **a mental health facility designated by the department**<sup>1</sup> that is the least restrictive environment to manage the acquitee and that will allow for the protection of the public. Notice of the maximum sentence period with end date shall be provided to the mental health facility. The court shall order a qualified forensic evaluator to conduct a dangerousness evaluation to include dangerousness risk factors to be completed within thirty days of admission to the mental health facility and a report rendered

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<sup>1</sup> The statute defines the word department: “‘Department’ means the Department of Health and Human Resources.” W. Va. Code § 27-6A-1(a)(4) (2007).

to the court within ten business days of the completion of the evaluation. The medical director of the mental health facility shall provide the court a written clinical summary report of the defendant's condition at least annually during the time of the court's jurisdiction. The court's jurisdiction continues an additional ten days beyond any expiration to allow civil commitment proceedings to be instituted by the prosecutor pursuant to article five of this chapter. The defendant shall then be immediately released from the facility unless civilly committed.

W. Va. Code § 27-6A-4(e) (2007) (emphasis added). The code provision in existence at the time of the Order finding Petitioner not guilty by reason of mental illness is also clear that the determination of what facilities are approved to be used as a least restrictive environment falls to the DHHR:

After the entry of a judgment of not guilty by reason of mental illness, mental retardation or addiction, the court of record shall determine on the record the offense of which the person otherwise would have been convicted, and the maximum sentence he could have received. The court shall commit such defendant to **a mental health facility under the jurisdiction of the department of health**, with the court retaining jurisdiction over the defendant for the maximum sentence period.

W. Va. Code § 27-6A-3(a) (1995) (emphasis added).

There is no law in West Virginia that would permit Petitioner to pick his own placement and then based on his wishes, require that the DHHR travel out-of-state to evaluate a facility to determine whether such placement would qualify as a least restrictive environment. Such a requirement would place an undue burden and expense upon DHHR to investigate and scrutinize various facilities scattered throughout the country that could be chosen by persons acquitted on the basis of mental illness. For example, in *State v. Robertson*, 230 W. Va. 548, 741 S.E.2d 106 (2013), Ms. Bradstreet<sup>2</sup> had to make a trip to South Carolina and inspect the facility to determine the levels of staffing, the amount of security, the types and varieties of patients, and the levels of functioning of the patients. *Robertson*, 230 W. Va. at 554, 741 S.E.2d at 112. Additionally,

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<sup>2</sup> The Ms. Bradstreet who testified in *Robertson* is the same Ms. Bradstreet who testified in this case.

because of the out-of-state placement in *Robertson*, the Circuit Court had to commit to having review hearings every ninety (90) days. *Robertson*, 230 W. Va. at 555, 741 S.E.2d at 113.

*Robertson* is the anomaly for least restrictive environment placement, not the norm. In *Robertson*, the issue was that due to Mr. Robertson's extreme combative behavior, for which he was described as a "psychological terrorist," there were no placements in West Virginia designed to manage individuals such as Mr. Robertson and that the South Carolina facility was the least restrictive environment. *Robertson*, 230 W. Va. at 551-54, 741 S.E.2d at 106-12. There is nothing in the record to suggest that Petitioner is a "psychological terrorist" or that there is no facility in West Virginia that can provide a least restrictive environment. To the contrary, the record demonstrates that over the last twenty (20) years, Petitioner "did not engage in any acts of violence toward any person." (App. 1 at 3-4.) Moreover, as the Circuit Court found, there is "no necessity to look for an out-of-state placement" because "West Virginia is well-equipped to provide for [Petitioner] a less restrictive environment, and to appropriately meet his needs." (App. 1 at 10.)

As such, Petitioner's attempt to choose his own placement should be denied. The Circuit Court expressly took issue with the policy that would be created by allowing Petitioner to direct the Court where to place him when it reasoned that "[t]o allow acquitees to designate their own placements is a highly questionable practice, very much akin to letting the tail wag the dog." (App. 1 at 11-2.)

To the extent that Petitioner cites law that states that a person acquitted of a crime based on mental illness remains under the Court's jurisdiction for the safety of the public and treatment for the individual, but not for punitive reasons, Respondent wholeheartedly agrees. *See* Pet'r's Br. at 11-2. If Petitioner is implying that the Circuit Court's decision was an attempt to punish

Petitioner, then Petitioner is incorrect. There is nothing in the record to demonstrate any action on the part of the Circuit Court to impose punishment upon Petitioner. (App. 1 at 1-12.) To the contrary, the Circuit Court found Ms. Bradstreet's testimony, "disput[ing] defense counsel's characterization of Highland Hospital as a 'warehouse' or a 'maximum security prison'" to be credible. (App. 1 at 8-9.) Additionally, the Circuit Court found that "the State of West Virginia is able to meet the [Petitioner's] needs, and that the system in place can properly oversee his care, all the while maintaining public safety" and that "the State of West Virginia is well-equipped to provide for [Petitioner] a less restrictive environment, and to appropriately meet his needs." (App. 1 at 9-10.)

Therefore, because Trial Courts enjoy broad discretion to determine the appropriate disposition of persons found not guilty by reason of insanity; because Petitioner must be placed in the least restrictive environment; because the statute requires that DHHR make the determination of which facility is approved to be a least restrictive environment; because there is no law providing for Petitioner to choose his own placement; because allowing Petitioner to choose his own facility would place an undue burden and expense upon DHHR; because West Virginia is well-equipped to provide Petitioner with a placement in the least restrictive environment; because there was no punitive basis behind the Circuit Court's decision; and because the Circuit Court focused upon meeting Petitioner's treatment needs while ensuring public safety, this Court should affirm the Circuit Court's denial of Petitioner's Motion for an Order Directing Transfer to a Less Restrictive Placement.

**2. The Circuit Court Found That West Virginia Is Capable Of Providing Petitioner With A Placement In The Least Restrictive Environment.**

Petitioner's argument that the Circuit Court failed to make any findings regarding "whether Highland Hospital is the least restrictive environment" ignores three (3) key facts.

Pet'r's Br. at 13. First, the Circuit Court did make a finding that West Virginia is capable of providing Petitioner with a placement in the least restrictive environment. (App. 1 at 6-10.) Second, the Circuit Court expressly found that the Belmont Wild Acres Inns facility, Petitioner's personal choice for placement, "is not designated by the DHHR to receive forensic patients from the State of West Virginia." (App. 1 at 6-7.) Third, while Petitioner is currently in Highland Hospital, his placement within West Virginia facilities will be determined on an ongoing basis according to his comprehensive treatment plan. (App. 1 at 8-9.) Ms. Bradstreet explained that "there are a multitude of stepped-down facilities that would be appropriate to consider in this case, including residential group homes and supported apartments." *Id.* Petitioner acts as if his current placement and status is the end of the line rather than one stop on the line of treatment. *See* Pet'r's Br. at 13. Treatment is not a static, one (1) time decision, but rather an ongoing process. (App. 1 at 12.) That is why the Circuit Court stated that it "will regularly monitor this matter in the future to ensure that no statutory infractions occur and that the requirements of the law are fully satisfied." *Id.* Unlike the situation over the last twenty (20) years, where the Circuit Court was in the dark regarding Petitioner's treatment, with Petitioner in West Virginia facilities, the Circuit Court will be able to properly monitor Petitioner's treatment.

Therefore, because the Circuit Court found that West Virginia does have a least restrictive environment for Petitioner; because the Belmont Wild Acres Inns facility is not an approved provider; because treatment is an ongoing process; because West Virginia has possible options such as residential group homes and supported apartments; and because the Circuit Court will continue to monitor Petitioner's treatment, this Court should affirm the Circuit Court's denial of Petitioner's Motion for an Order Directing Transfer to a Less Restrictive Placement.

**B. Petitioner Would Have This Court Ignore Both The Law And The Circuit Court's Factual Findings Regarding Least Restrictive Environment.**

Petitioner's first assignment of error claims that the Circuit Court was required to transfer Petitioner to an out-of-state facility that he selected. Pet'r's Br. at 2. Petitioner brazenly asserts that he has determined that his placement of choice is the least restrictive environment. *Id.* at 13-5. Petitioner also argues that the Circuit Court improperly weighed the crime, Ms. Bradstreet's testimony, and Petitioner's history of non-violence. *Id.* at 15-7. Petitioner's claims require this Court to ignore the controlling statute as well as make factual findings contrary to those made by the Circuit Court.

**1. The Finding Of Least Restrictive Environment Is Made By The State And Not By Petitioner.**

Petitioner tries to make the factual findings regarding least restrictive environment for himself. *See* Pet'r's Br. at 13-5. West Virginia Code provides that the determination about which facilities are acceptable for placement is made by the DHHR. W. Va. Code § 27-6A-4 (2007); W. Va. Code § 27-6A-3 (1995). Petitioner contends that Belmont Wild Acres, his facility of choice, located in Massachusetts, "is the least restrictive environment available to manage [his] condition." Pet'r's Br. at 13. However, Petitioner's statements do not convert Belmont Wild Acres into either an acceptable placement under the law or into a least restrictive environment. DHHR has already determined that there is no need to spend resources in investigating and evaluating a facility 750 miles away from the Circuit Court charged with overseeing Petitioner's treatment. (App. 1 at 9-11.) This is especially so as the Circuit Court was "[a]larmed by the [Petitioner's] demonstrated freedoms" due to the fact that the Circuit Court had not been "provided with progress notes or reports of the [Petitioner's] condition" and that the Circuit Court had not been "aware that the [Petitioner] enjoyed complete freedom of movement,

coming and going more or less as he pleased.” (App. 1 at 3-4.) Having Petitioner treated in the jurisdiction makes it easier for the Circuit Court to be apprised of Petitioner’s condition and stage of treatment. (App. 1 at 9, 12.)

Petitioner argues that Highland Hospital “is a more restrictive environment than is necessary to manage his condition.” Pet’r’s Br. at 13. However, Petitioner ignores the fact that Petitioner’s current status is only one (1) step in the process as the Circuit Court will regularly monitor Petitioner’s treatment and that if at some point it becomes appropriate, West Virginia has “a multitude of stepped-down facilities . . . including residential group homes and supported apartments.” (App. 1 at 8, 12.) Even Petitioner admits that he had to “advance[] through the [Massachusetts] facility’s step-down procedures” in order to “eventually [be] permitted to reside in a group home on the grounds.” Pet’r’s Br. at 13. West Virginia can provide Petitioner with the same ability to advance through step-down procedures. (App. 1 at 8.)

Therefore, because DHHR makes the determination about whether a placement is acceptable; because the law does not permit Petitioner to make the determination of what facility provides a least restrictive environment; because Petitioner’s facility of choice is not an approved facility by DHHR; because it easier for the Circuit Court to monitor Petitioner’s treatment if Petitioner is cared for in West Virginia; because the Circuit Court was not made aware of Petitioner’s treatment during the twenty (20) years that he was in a Massachusetts facility; because treatment is a process; and because West Virginia provides a multitude of stepped-down facilities, this Court should affirm the Circuit Court’s denial of Petitioner’s Motion for an Order Directing Transfer to a Less Restrictive Placement.

**2. The Circuit Court Placed Proper Weight On Both The Law And The Evidence.**

Petitioner also argues that the Circuit Court improperly weighed the crime, Ms. Bradstreet's testimony, and Petitioner's history of non-violence. Pet'r's Br. at 15-7. Petitioner is incorrect on all three (3) assertions. First, to the extent that the Circuit Court discussed the crime in the Order, it was done as a predicate to the basis for the Court's jurisdiction on the second page of the Order and there is nothing in the Order to suggest that the crime was the basis for the Circuit Court's decision to deny Petitioner the facility of his own choosing. (App. 1 at 1-12.)

Second, the Circuit Court properly weighed Ms. Bradstreet's testimony. Ms. Bradstreet is the Statewide Forensic Coordinator for DHHR and has the responsibility "to oversee the forensic patients who are incompetent to stand trial, and those who are not guilty by reason of mental illness" and to "determine the least restrictive environment . . . in a manner that is consistent with the public safety." (App. 1 at 6-7.) Ms. Bradstreet is the very same person that this Court relied upon in determining that an out-of-state placement, which had been investigated and approved by DHHR, was appropriate in the *Robertson* matter. *Robertson*, 230 W. Va. at 554, 741 S.E.2d at 112. Petitioner would have this Court discount Ms. Bradstreet's testimony regarding DHHR's determination that Petitioner's choice for placement "is not designated by the DHHR to receive forensic patients from the State of West Virginia." (App. 1 at 6.)

To the extent that Petitioner claims that Ms. Bradstreet "could only present an outdated picture of" Petitioner and that "[h]er testimony did not account for his current condition," Petitioner is incorrect. Pet'r's Br. at 16. Ms. Bradstreet did not need to rely on the reports done by the facility while he was in Massachusetts prior to his transfer to West Virginia. Nor did she need to rely on the reports done by any of the doctors that Petitioner retained. Additionally, at the time Ms. Bradstreet was questioned regarding her knowledge of the reports that Petitioner

focuses on, it is uncontested that Ms. Bradstreet had not had access to such reports. (App. 2 at 297-99.)

Moreover, the State had conducted an assessment of Petitioner, done by Dr. Kari-Beth Law (hereinafter “Dr. Law”), which actually demonstrated that Petitioner is in the process of obtaining additional freedoms. (App. 1 at 150-55.)

The Circuit Court did weigh Petitioner’s history of non-violence. (App. 1 at 3-5.) The Circuit Court expressly recognized a period of “almost twenty (20) years” where Petitioner “progressed from a locked ward to a community setting.” (App. 1 at 3.) The Circuit Court acknowledged and considered the fact that Petitioner “was unsupervised in his movements, had his own apartment, and regularly traveled into the City of Boston to play music in a band.” *Id.* Additionally, the Circuit Court stated that “during this time, the [Petitioner] did not engage in any acts of violence toward any person.” (App. 1 at 3-4.) The Circuit Court also noted Dr. Law’s recommendation “that the [Petitioner] be advanced to the next Sharpe privilege level, as a reasonable progression in his treatment” and that Dr. Timothy Saar “opined that the [Petitioner] presents a low risk to the community and for future violence.” (App. 1 at 5.) For Petitioner to suggest that the Circuit Court did not consider or properly weigh Petitioner’s history of non-violence is to ignore the Order itself. However, the Circuit Court’s decision was not just about how good of a patient Petitioner has been for the last twenty (20) years.

The Circuit Court had to make a decision regarding a mental health facility, which was required by law to be designated by the DHHR that is the least restrictive environment to manage Petitioner. W. Va. Code § 27-6A-4 (2007); W. Va. Code § 27-6A-3 (1995). The facility that Petitioner would choose to go to for continued treatment is not a facility designated by DHHR. (App. 1 at 6.) The law requires the Circuit Court to place Petitioner in a mental health facility

designated by DHHR. W. Va. Code § 27-6A-4 (2007); W. Va. Code § 27-6A-3 (1995). Petitioner would have the Circuit Court and this Court ignore the statute. However, no matter how well behaved Petitioner has been in the past, the Circuit Court was not in a place to defy the Legislature and the law of the State of West Virginia. The Circuit Court had to make a determination as to whether or not West Virginia had the capability of placing Petitioner in a facility, designated by DHHR, which would be a least restrictive environment. *Id.* Based on the testimony of Ms. Bradstreet about the various types of alternatives that exist in West Virginia and based on her testimony that West Virginia is well-equipped to handle Petitioner's treatment in a least restrictive environment, the Circuit Court found that West Virginia could provide Petitioner with a placement in a least restrictive environment. (App. 1 at 1-12.)

Therefore, because the Circuit Court's Order mentions the crime only as a factual predicate for the Court's jurisdiction; because the Circuit Court did not give weight to the crime as the basis for denying Petitioner his facility of choice; because Ms. Bradstreet is the Statewide Forensic Coordinator; because Ms. Bradstreet's job is to make determinations like the one in this case and like the one in the *Robertson* matter; because Ms. Bradstreet was well aware of Petitioner's assessment conducted by the State; because there is no requirement that Ms. Bradstreet rely on the assessments done prior to Petitioner's return to West Virginia or the assessments done by Petitioner retained doctors; because the Circuit Court weighed Petitioner's history of non-violence; because the Circuit Court's decision was limited to facilities designated by DHHR; because Petitioner's preferred placement is not a facility designated by DHHR; and because West Virginia is well-equipped to handle Petitioner's treatment in a least restrictive environment, this Court should affirm the Circuit Court's denial of Petitioner's Motion for an Order Directing Transfer to a Less Restrictive Placement.

V.

**CONCLUSION**

For the foregoing reasons and others apparent to this Court, this Court should affirm  
Petitioner's conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Plaintiff Below, Respondent,*

By Counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL



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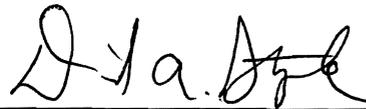
DAVID A. STACKPOLE  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11082  
Email: David.A.Stackpole@wvago.gov  
*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 20th day of January, 2016, addressed as follows:

Benjamin L. Bailey, Esquire  
Maryl C. Sattler, Esquire  
Bailey & Glasser LLP  
209 Capitol Street  
Charleston, WV 25301  
*Counsel for Petitioner*

Roberta F. Green, Esquire  
Shuman, McCuskey & Slicer, PLLC  
P.O. Box 3953  
Charleston, WV 25339  
*Counsel for Petitioner*



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DAVID A. STACKPOLE  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11082  
Email: David.A.Stackpole@wvago.gov  
*Counsel for Respondent*