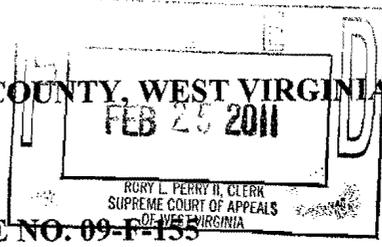


IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA  
STATE OF WEST VIRGINIA

V.

DONALD SURBER, JR.

CASE NO. 09-F-155



BERKELEY COUNTY  
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2011 FEB -3 P11 2:32  
VIRGINIA M. SIME, CLERK

**AMENDED NOTICE OF INTENT TO APPEAL**

Comes now the Defendant/Appellant, Donald Surber, Jr., by counsel, Nicholas Forrest Colvin, Esq. and notices his intent to appeal pursuant to Rule 37 of the West Virginia Rules of Criminal Procedure. The Defendant appeals from all adverse findings, conclusions and holdings in his plea taking before the Court and appeals from the Order of Conviction entered by the Honorable Judge Christopher Wilkes in Berkeley County Circuit Court. The Defendant Appellant further appeals from the Sentencing Order entered on August 5<sup>th</sup>, 2010. Specifically, the Defendant appeals based upon the following grounds of relief:

Assignment I: The Defendant/Appellant, Donald Surber, Jr. did not knowingly, voluntarily and intelligently enter into his plea of guilty.

Assignment II: The Defendant/Appellant, Donald Surber, Jr., did not knowingly, voluntarily and intelligently waive his sixth amendment right to counsel.

Assignment III: The Defendant/Appellant, Donald Surber, Jr., received an excessive sentence.

Assignment IV: The Defendant/Appellant, Donald Surber, Jr., received ineffective assistance of standby counsel.

For purposes of this appeal, the Defendant designates the entire record pertaining to this matter as listed above in case number 09-F-155. The Defendant reserves the right to amend this notice as the interests of justice require.

Respectfully Submitted,  
Donald Surber, Jr., by Counsel

*s/ Nicholas Forrest Colvin, Esq.*

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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

CASE NO. 09-F-155

DONALD SURBER, JR.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR APPEAL**

Comes now the Defendant/Appellant, Donald Surber, Jr., by and through his counsel, Nicholas Forrest Colvin, Esq. and submits for this Honorable Court's consideration the following memorandum of law in support of defendant's motion for post-conviction appellate relief.

**Statement of the Facts of the Case**

On or about the 25<sup>th</sup> day of June 2010 the Defendant, Donald Surber, Jr., (hereinafter Appellant) entered a plea of guilty to Murder in the First Degree, Kidnapping and five additional counts with neither the benefit of a plea agreement nor trial by jury. This conviction resulted in the August 2<sup>nd</sup>, 2010 sentencing hearing whereby the Appellant received the maximum sentence permissible by Law, life without mercy. The Appellant, previously requesting the Court to permit him to represent himself; had the arduous task of pro se representation with the purported assistance of standby counsel facing multiple capital charges. The Appellant informed both counsel and the Court repeatedly that he was, in essence, being tortured while housed via the regional jail housing authority. This torment included kicking open his door in the middle of the night, leaving him naked on the floor without even a mattress to rest upon, denying him food,

BERKELEY COUNTY  
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shooting him during an attempted “escape”, daily epitaphs regarding his need to “burn in hell”, and keeping him in lockdown, super max custody in excess of one year.<sup>1</sup>

The Appellant told the Court at the plea taking that he was changing his plea to guilty, without the benefit of any plea agreement, to the aforementioned capital offenses for two reasons: selflessness and self-preservation. The first reason, selflessness, was based upon his desire to not put the families and, specifically, the children through any more grief. The second reason, self-preservation, was based upon his desire to “get down the road” and be sentenced to Division of Corrections custody as soon as possible to, presumably, avoid further torment at the hands of his captors. All parties involved, the Court, standby counsel and the Appellant’s family encouraged his desire to enter DOC custody. When asked point blank by the Court whether he felt coerced into the change of plea, the Appellant reiterated his two reasons stated above, questioning why the Court would ask him repeatedly the same question if he had already answered it honestly. As such, the Appellant answered the Court’s inquiry in the affirmative that he was in fact coerced into entering his plea of guilty. The plea taking should have stopped right then and there as an involuntary plea but the parties and the Court pressed forward and granted the Appellant’s wish to be placed in the WVDOC.

The lower Court and counsel, blinded by the horror of the case before them and desiring to render “justice” for the victim’s family abandoned the principles of due process and disregarded the founding principles of our state and nation. Due process considerations are founded upon one basic tenet: the ends never justify the means. Facing multiple life without mercy sentences, this Appellant was placed upon the crucible of public opinion. Simply because

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<sup>1</sup> As the Court is aware, super max lockdown custody consists, at a minimum, of spending at least 23 out of 24 hours in the smallest cell imaginable, usually utilized to punish unruly prisoners, it is not uncommon for such places to be filthy, windowless pits. It is in this “hole” that the Appellant awaited over a year.

the Appellant wanted to be crucified and commit suicide by the lower Court does not mean that the Courts and counsel can abandon their sacred duty to uphold the Constitution by picking up a hammer and a handful of nails.

The Appellant argues that, given the backdrop of constant coercion, that he did not knowingly, voluntarily or intelligently waive his right to counsel nor did he enter into the change of plea via his own free will and accord. The Appellant further argues that standby counsel failed to assist him upon his request by not aiding him in the preparation of potentially vital Sentencing material. The Defendant Appellant further appeals from the Sentencing Order entered on August 5<sup>th</sup>, 2010 pertaining to his maximum sentence of incarceration received on or about August 2<sup>nd</sup>, 2010 and arguing that this sentence is excessive in nature.

Due to numerous errors that negatively impacted the Defendant's rights as guaranteed under the United States Constitution, 5<sup>th</sup> and 6<sup>th</sup> Amendments as they apply to the States via the 14<sup>th</sup> Amendment, West Virginia Constitution Article 3 §14 and relevant statutory authority, the Defendant presents the following for the Court's consideration.

#### **Standard of Review**

“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syl. Pt. 1 Chrystal R. M. v. Charlie A. L., 194 W. Va. 138, 459 S. E. 2d 415, (1995) “In 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." Syl. Pt. 2, Walker v. West Virginia Ethics Commn., 201 W. Va. 108, 492 S. E. 2d 167, (1997)

### Assignments of Error

**Assignment I: The Defendant/Appellant, Donald Surber, Jr. did not knowingly, voluntarily and intelligently enter into his plea of guilty.**

**Assignment II: The Defendant/Appellant, Donald Surber, Jr., did not knowingly, voluntarily and intelligently waive his sixth amendment right to counsel.**

**Assignment III: The Defendant/Appellant, Donald Surber, Jr., received an excessive sentence.**

**Assignment IV: The Defendant/Appellant, Donald Surber, Jr., received ineffective assistance of standby counsel.**

### Argument

**Assignment I: The Defendant/Appellant, Donald Surber, Jr. did not knowingly, voluntarily and intelligently enter into his plea of guilty.**

"A guilty plea is a most serious waiver of a constitutional right--the right to a trial by jury, the privilege against compulsory self-incrimination and the right to confront accusers. It has been described as the most devastating waiver possible under our constitution." State v. Barnett, 161 W. Va. 6, 240 S. E. 2d 540 (1977) Because a criminal defendant's plea of guilty necessarily results in the waiver of certain constitutional rights, we have long held that the circuit court, before accepting such a plea, must conduct a very thorough inquiry as to the defendant's

willingness so to plead and his/her understanding of the consequences of entering such a plea.(fn7) See State v. Duke, 200 W. Va. 356, 489 S. E. 2d 738, (1997)

The Petitioner alleges in his first assignment of error that his change of plea was not entered knowingly, intelligently and voluntarily. The Petitioner notes that Call v. McKenzie, 159 W. Va. 191, 220 S. E. 2d 665, (1975), as the precursor to Rule 11 of the West Virginia Rules of Criminal Procedure in its modern form, merely suggested that certain inquiries be made of the Defendant at the time of his plea taking to protect against future collateral attack. As such, a simple derivation is not sufficient to warrant overturning a conviction.

Syl. Pt. 3, State v. Sandor, 218 W. Va. 469, 624 S. E. 2d 906, (2005) states: "'A person accused of a crime may waive his constitutional right to assistance of counsel and his constitutional right to trial by jury, if such waivers are made intelligently and understandingly.'" Syl. Pt. 5, State ex rel. Powers v. Boles, 149 W.Va. 6, 138 S.E.2d 159 (1964).

The Appellant faced the following charges: Murder in the First Degree (a capital offense); kidnapping (a capital offense); attempted kidnapping, burglary, destruction of property, domestic assault, attempted escape, attempt to disarm an officer, and attempt to possess a weapon while in custody.<sup>2</sup>

The Appellant had taken a number of powerful anti-psychotic medications that could very easily affect his competency to understand the proceedings against him. Without the assistance of counsel or any expert witness on his behalf, the Appellant was at the mercy of the

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<sup>2</sup> It should be noted that the Appellant did not elect to plead to the final two charges stating that he did not do them.

whims of the Court.<sup>3</sup> Likewise, the Appellant, since this plea taking was given without the protections of a typical plea agreement was forced to make admissions that could be potentially used against him in further court proceedings, if applicable.

The Appellant was shot on his knees while in the custody of the Regional Jail Authority. Given the number of threats that the Appellant describes from his jailors and law enforcement officers, the Appellant believes that absent the involvement of a nurse, he would have been summarily executed.<sup>4</sup>

The Appellant elucidated clearly to the Court that he was not voluntarily entering his plea of guilty when he informed the Court about his continued punishment at the hands of his captors. As listed below, the unedited transcript depicts exactly the concerns of the Appellant.

**June 25<sup>th</sup>, 2010 Plea Hearing, Pg. 49, lines 10-16**

The Court: And in fact, has anybody made any representations or promises to you in any way to get you to come in here and plead guilty today?

Defendant: No sir your honor other than just like I said, the regional jail just the constant...I mean and it has nothing to do with it but I think it's something that needs to be heard.

**ID., Pg. 50, lines 10-24, pg. 51, pg. 52, pg. 53, pg. 54, pg. 55, pg. 56, lines 1-16**

The Court: Has anybody threatened you or used any force, pressure or intimidation to get you to come in here and plead guilty?

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<sup>3</sup> Defendant: The jail has got me on Depakote, Buspar. It's another one I can't remember. Then they got my on Naprosyn for my injury on my shoulder and Neurontin from the nerve damage in my arm. See June 25<sup>th</sup>, 2010 plea transcript, pg. 19, lines 6-9

<sup>4</sup> Defendant: Don't know why I stopped but I stopped. I went to my knees, put my hands up. The officer shot me while I was on my knees already given up which like I said I did attempt to run. He shot me while I was on my knees.

Defendant: I hear Corporal Brown after he shot me telling...Officer Brown telling Corporal Wright you go to cover me on this, you got to cover me on this making that comment. See June 25<sup>th</sup>, 2010 plea transcript pg. 43, lines 10-14, pg. 44, lines 1-4

Defendant: Just the constant...when I was at the regional, just the constant officers that...**police officers that would come to my door kicking on my door waking me up. (emphasis added)**

The Court: You mean corrections officers?

Defendant: No. I'm talking about police officers.

The Court: Would come to the regional jail?

Defendant: Yeah, when they would bring people in just kicking on my door and telling me what I did was...

The Court: Where are you housed now?

Defendant: I'm now at Central. I've been to Potomac Highlands, Tygart Valley, Northern....

The Court: But none of these police officers have been from this area or any of these investigators have they?

Defendant: Yes. State troopers, Berkeley County, Jefferson County. One of the Jefferson county police officers is a Spanish gentleman that would come to my cell. Apparently he had...

The Court: in which jail?

Defendant: At Eastern. Apparently Kathy went...Kathy went to a baby shower in her neighborhood and his wife was holding the baby shower or a wedding shower and that **officer was there and he come by and he said he hopes I burn in hell and I'm a piece of shit and the best thing I can do is...(emphasis added)**

The Court: Whoever that was leave right now. You got to go.

Defendant: Stop winking at me too.

The Court: Quiet.

Defendant: She's part of the reason.

The Court: Sir, you're out too. One more statement and I'm clearing the courtroom. It's between you and I, not them. If anybody thinks they're not going to behave they're going to find themselves facing contempt and paying fines or going to jail themselves. What I'm trying to get at sir is no one is doing anything to get you to come in here and plead guilty. Has anybody threatened you to come in here and plead guilty?

**Defendant: My thing is like I said, from the git-go I've had officers that...from the state troopers to Berkeley County to Martinsburg, City Police to Jefferson County come to my door. Sergeant Tate who is there actually had to pull one of the officers away, take him outside because he was like open his cell, open his cell, let me take him out and put a gun to his head. He actually said that to me. (emphasis added)**

The Court: I understand that, but what I'm saying is that make you plead guilty today?

Defendant: I need to...

The severe restrictions placed upon “stand around” counsel, notwithstanding, it was apparent that the limited degree of counsel provided encouraged the Appellant to do what he needed to do to protect himself from the Regional Jail Authority by removing himself immediately via lifetime without mercy conviction and sentence to the Division of Corrections.

Ms. Lawson: **Your honor, part of our discussions with Mr. Surber has been the conditions of his confinement.** There were a number of difficulties that arose out of his confinement in the Eastern Regional Jail which led to him being moved from place to place in the state. **Part of what we discussed in plea negotiations is before and after sentencing disposition of a person in his situation and that the conditions of his confinement in the regional jail system are probably substantially different then what his conditions of confinement would be in the Department of Corrections facility at Mount Olive which is presumably where he would go. That may affect the timing but not the voluntariness.** Mr. Surber once he has made his decision wants to get through the system so that he can be housed in a DOC facility and out of the regional jail system because he has been confined as a super max prisoner basically over a year basically in lockdown plus for that extended period of time. Now that he has come to this decision he wants to get through the process and into the Division of Corrections so that he can be one of their people and have their rules apply to him rather than the regional jail rules. That’s primarily what he’s getting at here.<sup>5</sup> **(emphasis added)**

The Court: I understand. And what I’m getting at Mr. Surber is I need to make sure that you’re pleading guilty because number one, of your own free will and that no one coerced you or tricked you or forced you into entering this plea of guilty and basically you’re pleading guilty because you committed the crime and understand what you’re charged with and understand the penalties and what your rights are and you just want to go ahead and plead guilty. I also understand that you have concerns about the status of your confinement. I don’t know Mr. Hofe is there a way that I can enter an order whereby as soon as possible because...because of the volume of the charges and because of the nature of the charges I have to order a presentencing investigation prior to sentencing. Is there a way to order confinement in the DOC prior to sentencing? That’s the problem. I don’t know that I can order you to go to prison before sentence. From what Ms. Lawson has said and I take it from your concerns you would like out of the regional jail custody and into the department of corrections custody and be housed in one of the correction complexes, is that fair?

In response to the Court’s inquiry, the Appellant reaffirmed his fears in an incarcerated setting and the horrors he had been privy to during the past year of confinement.

Defendant: Yes, sir. It’s like I’ve told you I wouldn’t say numerous times but a bunch of times and I told Ms. Lawson perfect example **after I gotten shot I was taken back to Eastern and as a punishment the doctor put me on pain medicine they dropped me to ibuprofen, didn’t give it to me, put me in a cell naked with nothing. Not a mattress or anything. I mean, it’s just things like that. And I will put names out there. Lieutenant Cox at Tygart Valley constantly come into my cell He started out at**

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<sup>5</sup> Inexplicably, “stand around” counsel suggests to the Court that the Appellant’s desire to go to DOC to protect himself from further injury does not affect the voluntary nature of his plea.

Eastern. Asking what I did to his boys up there. He's going to make me pay. Other officers have come and told me at the academy where they train he's constantly asking about me hoping I try to run again. One time when I was being transported I'm this high risk maximum security prisoner they take me out at a community rest area and asked me if I needed to go to the bathroom. They both sit in the truck. I mentioned that to Ms. Lawson. It's little things like that just constantly they're trying to get me to aggravate...withholding food, things like that. Then when I react to them I'm the one that..like I said, I don't know that it happened. All I know is that Potomac Highlands had come to me...the administrator came to me and told me that the prosecutor called him and wanted me moved because I was threatening his ex-wife on the phone and little things like that. You've got every other recording that I made. Why all of a sudden you don't have that recording? **(emphasis added)**

The Court: I don't know. Like I say, I'm not privy to a lot of those things. If that occurred then they could have taken whatever action in that county with that prosecutor if they had a recording of it. **So I'm not in any way disputing what you're saying nor am I saying it happened.** What I want to make sure is that you're pleading guilty today—I have no problem trying to find the quickest way to get you into the Division of Corrections. I'm not in any way disputing what's going on. The law...there's certain things I can and cannot do. I will be more than happy to go ahead and...can I sentence today? **I could sentence today on...certain things require victim impact and those matters but if I sentence today...the problem is if I sentence you and there's still something hanging for sentencing they're not going to take you to the Division of Corrections while something is pending I bet.** **(emphasis added)**

Most telling, the Appellant answered in the affirmative that he was coerced into changing his plea to that of guilty. Unconscionably, the Court still accepted his plea and his "stand around" counsel articulated that such a plea, under these circumstances, was voluntarily rendered in their opinion.

**Pg. 58, lines 12-24, pg. 59, pg. 60, pg. 61**

Defendant: How long would it take if you did that sentencing that way? I guess that's my...

The Court: I don't have any control. Right now, normally **I will say this, experience has been long sentences, life sentences, things like that go into the Division of Corrections a lot faster than..**a lot of people do 1 to 15 and they end up doing their whole year in the regional jail but longer sentences they kind of classify and go quicker into DOC because there's no chance of you paroling out because they say the bed shortage in the prison system is why they do that, I in no way want you to think that I'm representing in any way that I can get you anywhere quicker anywhere else in doing it. Let's go back to the original thing is when I asked you about any person coercing you or threatening you into entering this plea. **No one has threatened you or coerced you into coming in here and saying you're guilty today, have they? I understand you have been harassed in your cell that you're saying that the guards are harassing you, police officers are harassing you, and things like that, but is that leading you to plead guilty today?** **(emphasis added)**

The Defendant: **I'm pleading guilty for a couple of reasons and one of them to be one hundred percent honest with you is that, yes, it's a simple fact that I want to get out of the regional jail system because of the constant harassment.** When I'm being..I'm sleeping and I get my door kicked in, lights kicked on, and then I react and you know I even have..whether they say it or not state troopers around the state know who I am. They talk. Even when I'm at another facility they're talking about it. Officers know me from that facility. They're doing that. Am I also pleading guilty because like I said there's four children involved yes

absolutely on that part too. **So yes to answer your question both ways yes I want to get out of the system because I feel like I'm being threatened I feel like my life is being threatened. I feel like with other inmates I can take care of myself but with officers and guards I can't do anything about that because first time I put my hands on one of them I'm going to lockdown and they can do and say whatever they want. They can constantly make comments. You know they can constantly tell me you need to plead guilty to get out of the system if you don't like us. Just things like that. It's constantly. I guess my biggest thing is the constant...everything is on camera supposedly but when this happens all of a sudden the cameras are not working that day. (emphasis added)**

The Court: I understand you have all of these reasons but I guess...

Defendant: **That's the best I can answer it your honor. (emphasis added)**

The Appellant's desire to "get out of the system" makes logical sense given the backdrop of torment that he received at the hands of his captors. The puzzling element is why the lower Court did not stop the plea taking once the Appellant answered affirmatively that his decision to plead guilty was driven, in no small part, by his conditions of imprisonment. It is axiomatic that once a Defendant answers a question rendered by the Court concerning his ability to voluntarily, knowingly and intelligently enter into a plea of guilty in such a manner that indicates that he has been forced into the plea, in any way, that the Court shall not accept the plea. To draw any other conclusion would render the purpose of the plea colloquy with the Court meaningless. Nor may the Court look behind the answers of the Appellant and presume that he does not mean what he says he means. Such a question by the Court would naturally lend itself to create a question of the competence of the Appellant. Most significantly, even after the Appellant answered the Court's question as honestly as he could, the Court, apparently confused or dissatisfied with the answer, pressed onward and attempted to reword the prior question in an effort to obtain another answer. As indicated below:

The Court: What I want to do, see, the law....if you...you have to plead guilty freely and voluntarily of your own free will and accord. You have to say I'm not contesting the charges, this is what I did and I did it and I'm telling you I did it and these are the offenses. Is that the motivation for your pleading guilty is because you did it? I understand there are other thoughts in your mind and I'm not going to disagree or agree that you don't want the four children...I believe you said there are four children involved?

Defendant: Yes. Two of mine and two of hers.

The Court: I understand all that, but did you do what they claim you did? I mean, what you're pleading guilty, did you do what you told me you did?

Defendant: What was the...

The Court: We'll go back. Basically as I explained to you, I have to be assured that you're not pleading guilty because you're coerced into it that you're threatened into it, but that you're pleading guilty because you did what you're alleged to have done you understand the consequences of it and you want to accept the consequences of it and go ahead and freely and voluntarily plead guilty. Is that a fair statement?

**Defendant: I think I've already answered that. I feel like. I don't know. I know what you're trying to get at but I'm trying to be one hundred percent honest with you. I told you...you asked me to tell you what happened. I told you that. You asked me why I'm entering the plea. I told you there's two parts to that and I told you why that there's two parts to that. You stated earlier that one of the reasons that counsel would advise you to go to trial because it wouldn't...your chances if you're found guilty are no different than if I'm pleading guilty. You made that comment so then you asked me a question so I've been honest with you and then you want me...I'm not saying you want me, but now you're asking me to answer a question and not be honest with you. (emphasis added)**

The Court: No. I want you to be honest with me and I appreciate your forthrightness. What I'm saying is are you sure that you did it?

Defendant: Was I the one that went into the house?

The Court: Yes.

Defendant: Yes, I was the one that went into the house.

**The Court: Are you sure that you want to waive these rights we've talked about regarding going to trial and all those matters and plead guilty to that and accept the consequences?**

**Defendant: I...I do and I want to show for the record like I said that the regional jail no matter what people say is...I mean, these guys are sitting there. There's been other incidents that happened. I know you don't want to hear about that. (emphasis added)**

Whether or not the Court believes the concerns of the Appellant is immaterial to the voluntariness of the plea taking process. The requisite question is whether or not the Appellant, himself, is knowingly, intelligently and voluntarily entering into the plea of guilty. Both the Court and counsel had an obligation to the Law and the fair administration of Justice to stop the plea taking process based upon the undue influences placed upon the Appellant. Yet, the focus was squarely upon what crimes the Appellant committed and not why he was pleading guilty to multiple capital offenses without any protection via any plea agreement.

The Court: I'm sure it's not easy but what I have to make sure is that you're pleading guilty to this crime because you understand what you're charged with. June 25<sup>th</sup>, 2010 plea transcript, Pg. 63, lines 10-12

The Court did recognize that the Appellant may have issues with the Regional Jail Authority such that he should not be complacent about reporting his concerns, however, the Appellant was cautioned that complaining while under the Regional Jail Authority could make his life more difficult.

**ID., Pg. 64, lines 7-16**

The Court: If you've got complaints they should be heard. I agree with you wholeheartedly. Two, I don't want to do it while you're still in the regional jail so I don't want to get anything down there while you're still in the regional jail authority because if in fact what's going on...that you allege is going on is going on if they get a complaint it comes from me things are going to get worse for you so I wouldn't want to do it until you're over in DOC custody if you want to do that.

The Appellant does not dispute that the lower Court is almost certainly correct with the assertion that the Appellant shall receive further comeuppance if he "whistle blows" against his captors.

The troubling aspect is that the Courts and defense counsel, even in a "standby" capacity, should be ever at the ready to diligently fight injustice when they recognize it, not cower in fear from it.

A complaint from the Appellant to the Regional Jail Authority in this context should create anxiety for the Jail and not cause heightened concerns for the Appellant's personal safety.

Time and time again, the Appellant reiterated to the Court that the coercive elements behind his change of plea was ever-present in his mind, forcing him to change his plea.

**ID. Pg. 64, lines 20-24, pg. 65, lines 1-5**

Mr. Adams: May I confer with him, your honor?

The Court: Sure.

Defendant: Okay, what I want to say to get it clear is that I did it, I will take responsibility. I did the crime. I have no problem..I have no problem admitting that, **but also like I said that has nothing to do with what I'm trying to bring up. If I can't let it be heard here it's not going to be heard anywhere because you say to write it to you. (emphasis added)**

All the Appellant was looking to obtain was a way “down the road” as listed below:

**Pg. 74, lines 18-24**

Defendant: I had one other question. When I come back on August 2<sup>nd</sup> is there any way that you can order the prosecutor could ask...can I be whatever jail I'm at be transported by that jail and have nothing to do with Eastern? That's where all my issues are **even when I stayed overnight last night they just threw me in with a mat. (emphasis added)**

**Pg. 75, lines 18-20, pg. 76, lines 1-3**

Defendant: I'm not trying to take up the Court's time. I just want, my biggest thing is I want to get down the road.

Defendant: I want to get it over with. I want to get down the road. I know what you're saying. I want to get this sentencing over with.

Based upon the foregoing record, this Honorable Court can readily see that the Appellant did not knowingly, intelligently and voluntarily enter his change of plea. The entry of this plea was predicated upon: a pro se Defendant with a history of mental illness, with “standby” counsel; without the benefit of any plea agreement; pleading to multiple felonies including two capital offenses with multiple life without mercy sentences; with a background riddled with abuse in the jails who admitted to being coerced into entering the change of plea.

The Appellant cannot fathom a more horrific set of facts for this Honorable Court to confront. Nor can the Appellant stress enough the need for this Honorable Court to take the lead once again to protect the citizens of West Virginia. What the Court has witnessed, just in the first assignment of error alone, is a depiction of a breakdown of the entire system of Justice. All of the requisite safeguards, every single levee, was broken leaving us not with a hurricane but Katrina herself. No one came to the aid of the system. Not the prosecutor. Not “stand around” counsel. Not the Judge. Not the Regional Jail Authority who are tasked with keeping inmates safe. Everyone who swore an oath to protect the Law placed their swords back in their scabbards and sat upon their hands instead. The Appellant has only one hope: this Honorable Court to stem the floodwaters of injustice and restore integrity to the Law of the Land. If this transgression is

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permitted to continue unchallenged, what will happen to the next citizen who finds himself "encouraged" to plea involuntarily? As such, the Appellant requests that this Honorable Court grant him relief in the form of nullifying his change of plea and having the matter reset for trial by jury and any other relief that this Honorable Court deems appropriate, fair and just.

**Assignment II: The Defendant/Appellant, Donald Surber, Jr., did not knowingly, voluntarily and intelligently waive his sixth amendment right to counsel and the Court improperly assigned trial counsel as standby counsel.**

"A person accused of a crime may waive his constitutional right to assistance of counsel and his constitutional right to trial by jury, if such waivers are made intelligently and understandingly." Syl. Pt. 3, State v. Sandor, 218 W. Va. 469, 624 S. E. 2d 906, (2005), Syl. Pt. 5, State ex rel. Powers v. Boles, 149 W.Va. 6, 138 S.E.2d 159 (1964).

Hybrid modes of representation pose particularly serious dilemmas for the appointed attorney. The terms "advisory counsel" and "standby counsel" are seldom[563 S.E.2d 787] defined with any sort of analytical precision. (see, e.g., [people v. hamilton.] 48 Cal.3d[, 1142.] 1164, fn. 14, 259 Cal.Rptr. 701, 774 P.2d 730[ (1989) ] ("The cases have loosely used such terms as ... advisory counsel,' standby counsel,' and 'hybrid representation' to describe a multitude of situations in which both the accused and professional counsel are involved in the presentation of the defense case.")).

As indicated above, the ambiguity over the role of standby counsel arises, at least in part, from the variety of ways courts have defined the role. See, e.g., McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (permitting standby counsel to participate actively at trial, i.e., conducting voir dire of a witness and giving opening argument); Faretta, 422 U.S. at

835 n. 46, 95 S.Ct. at 2541 n. 46, 45 L.Ed.2d at 581 n. 46 (indicating standby counsel would generally "aid the accused if and when the accused requests help, and ... be available to represent the accused in the event that termination of the defendant's self-representation is necessary." (citation omitted)); United States v. Lawrence, 161 F.3d 250 (1998) (restricting standby counsel's advice to procedural matters); United States v. Patterson, 42 F.3d 246, 248 (5th Cir.1994) (per curiam) (defining "advisory counsel" as "an attorney who would be limited to assisting [defendant] in technical matters"); Blankenship, 337 N.C. 543, 447 S.E.2d 727 (informing defendant that standby counsel could answer his legal questions and would be permitted to resume defense if defendant decided to relinquish right of self-representation, but would not be permitted to otherwise participate in trial, e.g., to object to incompetent evidence or appear on behalf of defendant).

In fact, this Court recently observed the confusion surrounding these terms in footnote 4 of State v. Layton, 189 W.Va. at 477, 432 S.E.2d at 747, wherein we commented that "[i]t has been suggested that there is a technical distinction between a 'hybrid' counsel and a 'standby' or 'advisory' counsel situation. Note, 12 Val. L.R. 331, The Accused as Co-Counsel: The Case for the Hybrid Defense (1977). However, the courts have not, as yet, apparently generally recognized the distinction."

Trial courts can easily remedy the confusion surrounding the differing roles apparently filled by standby counsel by exercising their supervisory powers to specifically define or restrict the duties of standby counsel whenever such counsel is appointed. See Lawrence, 161 F.3d at 253 ("[T]he district court, in keeping with its broad supervisory powers, has equally broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense." (citation omitted)). Given the lack of clarity over what,

exactly, is the role of standby counsel, we find it is of the utmost importance that, when appointing standby counsel, trial courts do in fact define, precisely, the role counsel is expected to assume. Furthermore, trial courts should clearly inform counsel and the defendant of that role. Accordingly, we hold that when a circuit court appoints standby counsel to assist a criminal defendant who has been permitted to proceed pro se, the circuit court must, on the record at the time of the appointment, advise both counsel and the defendant of the specific duties standby counsel should be prepared to perform. For example, the court must state whether counsel should be prepared to take over the case at the defendant's request.

In the present case, the duties of standby counsel was defined as doing nothing proactively, merely responding to the uneducated inquiries of the Appellant. A unique feature in the matter *sub judice* that separates itself from related cases before this Honorable Court is that those cases involved Defendants who proceeded pro se with standby counsel to trial. In the present matter, this case was resolved via a plea agreement. As such, the Appellant argues that heightened scrutiny is required in analyzing the circumstances surrounding this matter.

The Court has recognized that the failure of a trial court to adhere strictly to the guidelines set forth in Sheppard may not, of itself, warrant reversal of a defendant's conviction. "These guidelines are not mandatory. The omission of one or more of the warnings in a particular case would not necessarily require reversal, so long as it is apparent from the record that the defendant made a truly intelligent and knowledgeable waiver of his right to counsel." State v. Sandler, 175 W.Va. at 574, 336 S.E.2d at 537.

"The right of self-representation is a correlative of the right to assistance of counsel guaranteed by article III, section 14 of the West Virginia Constitution." Syllabus point 7, State v.

Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983). "A defendant in a criminal proceeding who is mentally competent and sui juris, has a constitutional right to appear and defend in person without the assistance of counsel provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial."

"The determination of whether an accused has knowingly and intelligently elected to proceed without the assistance of counsel depends on the facts and circumstances of the case. The test in such cases is not the wisdom of the accused's decision to represent himself or its effect upon the expeditious administration of justice, but, rather, whether the defendant is aware of the dangers of self-representation and clearly intends to waive the rights he relinquishes by electing to proceed pro se.' State v. Sheppard, 172 W.Va., 656, 310 S.E.2d 173, 188 (1983) (citations omitted)." Syl. Pt. 2, State v. Sandler W.Va. [572 ], 336 S.E.2d 535 (1985).

In State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983), we held that such a showing was one of the prerequisites giving rise to a criminal defendant's constitutional right to appear and defend himself without the assistance of counsel. See also Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The test of a valid election of self-representation was recently restated in Syllabus Point 2 of State v. Sandler, 175 W.Va. 572, 336 S.E.2d 535 (1985):

1. To ascertain if the defendant is cognizant of and willing to relinquish his right to assistance of counsel.
2. To insure that the accused is aware of the nature, complexity and seriousness of the charges against him and of the possible penalties that might be imposed.

3. To warn the accused of the danger and disadvantages of self-representation. (e.g., that self-representation is almost always detrimental and that he will be subject to all the technical rules of evidence and procedure, the same as if he had been represented by counsel.)
4. To advise the defendant that he waives his right to refuse to testify by going outside the scope of argument and testifying directly to the jury.
5. To make some inquiry into the defendant's intelligence and capacity to appreciate the consequences of his decision. (Citation omitted).

**April 12<sup>th</sup>, 2010 hearing, Pg. 5, lines 2-12**

The Court: Having reviewed the initial competency evaluation and the addendum in regards to criminal responsibility I think there are some certain matters that came up which still continue to give the Court some concern even though Dr. Cooper-Leki opined that competency was not a problem and also the criminal responsibility was not at issue as far as she was concerned. She, I think, found that there were some points of malingering and attempts to use maybe some malingering aspects in an attempt to continue a guise of lack of criminal responsibility defense.

**Pg. 5, lines 17-19**

The Court: most evident the attempted escape when being taken to the hospital from the jail

**Pg 5, lines 22-23**

The Court: I think he's better able to assist his counsel the way things are set up now

**Pg. 6, lines 11-14**

Ms. Lawson: There are no substantive issues. I think we need to lay a record as to the reasons why we're doing this on video as—

Defendant: I can't understand her at all. (trouble hearing her via video)

**Pg. 6, lines 19-20**

The Court: I do as much as I can on video to save the cost of transportation.

**Pg. 7, lines 4-23**

Defendant : Is it possible at this time now that the competency hearing is complete and you find me competent for trial and I would like to dismiss my attorneys would that be possible at this time or what do I have to do ? I wrote letters and I have them returned to me. Just issues I've had while I've been incarcerated that I wanted and everything and I feel like it's not being done. I don't know how to prepare an order or what I need to do.

The Court: What you need to do if you want to hire an attorney then you can hire an attorney but you've got court-appointed counsel now so what you need to do is work with your court-appointed counsel. The law is you're entitled to hire the attorney of your choice but if you get court-appointed counsel you're going to get the public defender's office appointed unless there's a conflict with co-defendants or something like that so basically what you need to do is work with your lawyers but as of now I'm not going to consider it now, no.

**Pg. 7, line 24, pg. 8, pg. 9, pg. 10, pg. 11, pg. 12, pg. 13, pg. 14, pg. 15**

Defendant: How do I get that? When do I get that? If I don't want to be represented I have that right to represent myself ,right, sir?

The Court: You sure do.

Defendant: That's what I'm trying to get at, how do I file or can I do that now? Can you set up a date where I want to represent myself?

The Court: If you want to represent yourself file a pleading that you want to represent yourself but I would advise go through State v. Shepard so we're cognizant that you know all those things out there and once you do that...

Defendant: Okay. How do I do that? That's what I wrote letters and I've wrote letters to the circuit court, your clerk and I don't know how to file it, what to do to represent myself.

The Court: I don't have any of those letters.

Ms. Lawson: The clerk...

Defendant: That's what I'm saying.

Ms. Lawson: You don't have the docket available in front of you?

The Court: Apparently the clerks' office isn't showing receipt of those letters.

Defendant: Well, I have sent the letters. That's part of my issue that I've talked to my attorney on the phone is that at first...not here, at Northern, but other regional jails especially at Tygart Valley my letters weren't being sent. I sent five letters to my attorneys and they only got two of the letters. I've had my letters read right in front of me from Tygart Valley from Lieutenant Cox who would read my mail and I would tell my attorneys and the response I got back if there was anything important they would do it by phone. When I'm on the phone I'm talking on the phone it's being recorded so I feel like I'm not being protected, my rights aren't being protected at all because every time I turn around my letters are being read. The lieutenant there is telling me that the prosecutor that she's having me moved because I'm threatening people on the phone. If that's the case show me any records that show me threatening my ex-wife on the phone. The jails record, everything else but yet I've been moved almost four hours away from my family. I saw my attorney one time since I've been here and I understand it's further away but like two weeks before my trial?

The Court: Sounds like you've got administrative issues. Sounds like you've got administrative problems. There are jail regulations reading mail and phones and things like that but you know I can't address those now. You have to go through the administrative process on that.

Ms. Lawson: Your Honor, I can address some of that. Prior to his current placement at Northern Regional there were issues that came up at Tygart Valley. We obtained complete copies of his records while housed at the Eastern Regional Jail and Tygart Valley. There were administrative reasons for the acts that were undertaken there. I'm not aware of any problems where he's at now. I have not been made aware of any issues where he is at now. There were some issues though and they were all directly related to jail administrative procedures and policies and the jail, the provisions in the state regs and the internal handbooks of those institutions appear to have been followed as much as Mr. Surber dislikes them.

The Court: The administrative aspect of it I don't know. I'm just showing in the clerks' file it appears to be on January 13<sup>th</sup>, 2010 you sent a letter and that was the only letter we're showing there back in January.

Defendant: But that's what I'm saying, sir, is that, I guess the bottom line, sir, I've been incarcerated almost ten months and everything and there's four children that are involved two of Kathy's and two of mine, that are finally settling down and I don't want to bring up any dust or anything like that because what I did I guess my bottom line is right now I know...

Ms. Lawson: Mr. Surber, at this point I'm going to advise you as your attorney you're getting into the substance of the case and I'm going to advise you to stop talking about anything that relates to the underlying facts that relates to plea negotiations because that's not for the Court to consider at this time. If

you have a specific issue with me or Mr. Adams you can raise it in a letter. These are not issues relating to your counsel. These are issues relating to the underlying facts of the case.

Defendant: Okay. That's...this is what I'm...this is what I'm saying, your honor, I'm being talked out of something I want to do. I want to take criminal responsibility for what I've done. I've talked to my parents.

Ms. Lawson: We have...

Defendant: You can advise me all you want. You can advise me all you want. I want to represent myself. I've been trying to do this and I've been told I can't do it. The competency...I don't want these children to have to go through it anymore, I want to change my plea. I have that right.

The Court: Well...

Defendant: Do I not have that right?

Ms. Lawson: Mr. Surber.

The Court: Once we made a determination as to the fact you know your rights and all those matters and what the consequences of things can be, yes, you do, but competency has come back from the State's expert. Now I don't know if your lawyers are going to try to get their experts to come out and say there are problems or not. We've not had a competency hearing because we had to wait until Dr. Cooper-Leki's report comes back as to determination. Whether or not the Defense wants to hire an expert to counter the State's expert opinion so we've not had a competency hearing per se but if you want to put any of your problems...and like I said before, the best thing for your to do is cooperate with your lawyers. If you want to put your problems in writing you can file them, you can send a copy to the prosecutor and a copy to your lawyer and then I will review them but like I say you...probably the best thing to do is cooperate with your attorneys and ultimately though you're absolutely correct, if deemed competent you can represent yourself and you can do what you want but until that time that number one, we've determined there's going to be competency and number two you're fully apprised of what your rights are and what your obligations are in representing yourself. I've advised discuss it with your attorney but you're absolutely right, ultimately you can represent yourself and take the course that you deem appropriate but my advice...well, I don't even want to say advice. My caution now is to cooperate with your attorneys but you can put in writing what your concerns and what you want to do. Copy your counsel, copy the prosecutor, and send a copy to the clerk here and then we'll review it, okay?

Defendant: Your Honor, when you say you'll review it, if...I guess my thing is I do not want my attorneys to do anything further on behalf of me.

The Court: Okay.

The Court: Put it down in writing, Mr. Surber. Right now is not the time to do it because it wasn't brought on for...you have to put your concerns down in writing what you want to do and we can set up another hearing were we can address the issues. I need to let the prosecutor and your attorneys see what you want to do to give them advance warning as to what's going on.

Defendant: Okay. So if I put it in writing what am I looking at? Two, three months down the road because I don't want to drag this out for those kids.

The Court: Let me see...you put it in writing and let me see what it is and I can't give you an answer now because I don't know everything you want to do. The best route is put it in writing so we can have it in the file and go with it from there.

Defendant: Okay sir. I need to put it in writing that I want to represent myself and we can take care of it at that time.

The Court: Put...yes, put down the concerns you have and then..

Defendant: Thank you very much.

The Court: Thank you.

Ms. Lawson: Your Honor I was just going to add a Becton type disclosure because we have had discussions with the State to the ends Mr. Surber has mentioned today.

The Court: Now wouldn't be the time to do anything. We just came on for a bond hearing today and without giving everybody an opportunity to review what the concerns are I don't think it's fair to anybody and I want to take a look at them and ensure that everybody's rights are protected and both those are the State and the Defendant and take a look at it from there.

The determination of whether an accused has knowingly and intelligently elected to proceed without the assistance of counsel depends on the facts and circumstances of the case. After reviewing the record in this matter and the five prong test elucidated by the Court, it appears that the Court did warn the Appellant about the dangers of representing himself and further reviewed the charges against him. The Court further relied upon the recently received psychological evaluation finding the Appellant competent and, as such, found that the Appellant was competent. The Court also underwent a discussion of the penalties and seriousness of the matter at bar. There can be no doubt as well that the Appellant desired to relinquish the assistance of the Public Defenders Corporation. Accordingly, prongs 2, 3 and 5 and part of prong 1 appear to be satisfied.

There was no mention of the fourth prong involving the Appellant's ability to testify at trial and the corresponding warning that he waives his right to refuse to testify by going outside the scope of argument and testifying directly to the jury. Although the Appellant argues that since there was no mention of this prong, that in itself could prompt a violation, Appellant's counsel recognizes that since the matter revolved around the plea taking of the Appellant without consideration of the rigors and finer points of trial by jury, that such an oversight by the Court, potentially, was based upon a lack of perceived necessity. Be that as it may, the Appellant's concern is, given the backdrop of the proceedings as a whole, that the Appellant did not

cognizantly waive his right to counsel and that the hybrid version of representation he received was no substitute.

The Appellant's desire to represent himself and conclude the matter with a conviction was predicated upon self-preservation. As listed in the record and succinctly put, the Appellant was willing to do anything to expedite matters to get him out of the Regional Jail Authority and into the WVDOC, no matter what the cost. After his bond reduction motion was denied in April, the Appellant became even more desirous of resolving the matter as quickly as possible despite the consequences. Legal counsel carried the danger of drawn out proceedings and continuances and all manner of things that would delay the Appellant's release from the Regional Jail Authority. It is apparent that the relationship between counsel and the Appellant at the lower Court level was tumultuous at best.<sup>6</sup> The final solution for the Appellant meant that to save himself from further torment at the Regional Jail Authority that he needed to do whatever he could to speed up the process, to get it over with and get him "down the road."<sup>7</sup>

The Sixth Amendment of the United States Constitution, applicable to the states by virtue of the Fourteenth Amendment, clearly guarantees any defendant brought to trial the right to assistance of counsel before he may be validly convicted and punished by imprisonment. 1 As the United States Supreme Court has stated: "The assistance of counsel is one of the safeguards

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<sup>6</sup> It remains a mystery as to why the Public Defenders Corporation did not move to withdraw from the Appellant's case given the difficulties between them. It is further mystifying that the Appellant never received an opportunity to be appointed another counsel separate and apart from the Public Defenders Corporation. As this Honorable Court is well aware and as the caselaw fleshes out particularly in the area of hybrid representation cases, time and time again Defendants are provided at least one opportunity if not three or four chances to have new appointed counsel. These changes of counsel are granted in cases that are far less serious in nature than the present one. Appellant's counsel can only speculate that if such an opportunity had been afforded to this Appellant as is given to so many others if this matter would even be before the Court today.

<sup>7</sup> It is not surprising that within weeks of being placed in WVDOC custody that the Appellant requested that an appeal be filed on his behalf. With the coercive elements absent, the Appellant finally came to his senses albeit potentially too late absent this Court's intervention.

of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.... The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." Johnson v. Zerbst, 304 U.S. 458, 462 [58 S.Ct. 1019 1022, 82 L.Ed. 1461, 1465] (1938)." Gideon v. Wainwright, 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 804-05 (1963).

At the June 25<sup>th</sup>, 2010 status hearing/bond reduction hearing, the Appellant informed the Court that he desired to represent himself, *pro se*. As provided below, the Appellant described to the Court his rationale for the request to remove present counsel.

**Pg. 3, lines 13-24, pg. 4, pg. 5, lines 1-19**

Defendant: I just feel like everything that's been going on it's not so much I want to represent myself. I'm just unhappy with the counsel I have.

The Court: Okay. So the letter you wrote me that said that you wanted to represent yourself..

Defendant: I guess what it is that through letters and everything I've wrote four letters to this Court and apparently you all have only received two. Apparently I'm on a very strict restrictions at the regional jail which I understand why. I know you said it's up to them but I mean they keep moving me further and further away so my attorneys can't even come see me. Every time I try to ask to call there's guards standing around so I have no privacy. They're reading my mail that I send out to my attorneys. They're not scanning. They're actually reading my mail. So I have no privacy with my attorneys whatsoever. I've been told, I don't know how true it is, when I got moved, every time I get moved somewhere that the prosecutor is calling saying I'm threatening my ex-wife which I want to see on the record any phone calls that says I've threatened her.

The Court: Let's set something straight. The reason we're here today is because you wrote me a letter saying you want to represent yourself.

Defendant: Right.

The Court: And I was going to go over the colloquy in regards to what you know and what you have to know in representing yourself but the same concerns that you're bringing up now as I told you before are not matters that I'm going to get into in regards to your housing conditions and things like that. I'm here on the criminal trial. I'm not here on where you're located or anything that way.

Defendant: I guess I understand that, sir, but it's just the fact that so the regional jail can do basically whatever they want?

The Court: I tell you I'm here on the criminal side. I'm not going to tell you what goes on at the jail or not. I'm not going to give you legal advice.

Defendant: Isn't that part of my criminal trial they're not allowing me to make phone calls, they're not allowing me to write the letters?

There's also a kidnapping charge and some ancillary matters but if you're convicted by way of a plea of guilty or by a jury trial of murder in the first degree then the next step is to whether or not mercy gets attached that verdict, and what you're telling me now is you don't even want to ask for mercy. You just want to plead guilty...let me say something. If no mercy attaches to that then you have no possibility of parole ever. You spend the rest of your natural life in prison.

Defendant: What happened in that house that day...

The Court: Well, I...

Defendant What I'm trying to say is this is that I didn't show mercy, I'm not asking for mercy.

The Court: All I want to do is let you know that by saying you're saying you forgo any right of requesting mercy if you're saying I don't request mercy. I will take your plea. I think you know what you're doing. I think you've had an opportunity to think about it and reflect upon it but I have to make sure at the conclusion that you understand the ramifications of your actions because six months from now, one year from now, twenty years from now you're not going to be...I shouldn't say you're not. You can always file pleadings. You've been in jail long enough you know people can always file things. The Law is not going to allow you to say I want to reconsider that I wish I would have asked for mercy because I think I've done my time and I should get out now. I want to make sure you understand that a plea of guilty to murder in the first degree means that you would be sentenced to the penitentiary for the rest of your natural life with no eligibility for release.

Defendant: I understand that.

The Court: You understand that?

Defendant: Yes.

Pg. 11, lines 8-20

Ms. Lawson: Following that hearing on April 12<sup>th</sup> we put in writing what would happen, basically what the Court just said, that the plea would be final and that he could...I'm going to read from it here. When you enter a plea you not only accept judgment but give up all the defenses you may have to that charge. All pleas are final and the consequences and the likely sentence as the Court has laid out. WE asked him to respond in writing for some particular reason that I think the State would well understand. We never heard back from Mr. Surber either by telephone or in writing. We have not told him not to do this. I want to make that abundantly clear.

Pg. 12, lines 5-22

The Court: Well, I will put it this way, maybe I misspoke somewhat. Generally, defense counsel's advice to someone charged with a crime is well, go to trial because you can't get any worse of a result had you gone to trial than if you plead guilty but I also understand and I think Ms. Lawson also understands, at least I'm assuming, it seems from what you're saying that she also recognizes that you have reasons of your own that you may not...you do not want to go to trial and you just want to accept responsibility for your actions and understanding that there have been no plea offers, there's no guarantees as to any sentence whatsoever but that...you hate to say it but sometimes the law has taken it to the point that someone can't just come in and plead guilty to what they want to do but that's what you want to do is that correct, understanding all of that?

Defendant: Yes sir.

Pg. 12, lines 23-24, pg. 13, lines 1-22

The Court: What I'm going to do, Mr. Surber, then I'm going to grant your wish of representing yourself but what I'm going to do and I think you know enough of the law, you've talked to your lawyers, you have

filed pleadings and things on your behalf which show that I think your cognizant of your actions, you understand the consequences of your actions. The record can reflect that psychological evaluations were performed showing that there was no incompetency, no impediment to criminal responsibility nor anything that would lead the Court to believe that the Defendant is not competent to represent himself from a mental competency matter.<sup>8</sup> I am going to have Mr. Adams and Ms. Lawson remain as what we call standby counsel. That means they cannot ask questions of the Court, make comments to the Court or do anything on your behalf except for be there if you want to ask them questions, okay? You understand? So if you choose to ask them questions---because what I'm going to do is go through a plea dialog with you over the matter and if you choose to ask them questions they are there to answer any questions you may have prior to answering any of the questions that I'm going to be asking you. (emphasis added)

Defendant : Yes, sir.

**Assignment III: The Defendant/Appellant, Donald Surber, Jr., received an excessive sentence.**

"The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, State v. Lucas, 201 W. Va. 271, 496 S. E. 2d 221, (1997) "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syl. Pt. 5, State v. Cooper, 172 W.Va. 266, 304 S. E. 2d 851, (1983)

After reviewing the pre-sentence investigation report, the Court sentenced the Appellant to the maximum terms of years possible in the penitentiary house of this State. As such, the Appellant shall never be released in his natural life time and shall die in prison. This shocking revelation should not be lost upon this Honorable Court.

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<sup>8</sup> The Appellant did receive a competency evaluation through the State of West Virginia that indicated that he was a competent person to stand trial and assist counsel. See court file, Dr. Cooper-Lehki's report.

Accordingly, the Appellant requests that his disproportionate and excessive sentence be modified so that all sentences run concurrently to each other or in the alternative, that sentencing be further modified as the Court deems fit to adhere to the principles of Justice.

"Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syllabus Point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). "The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). "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 to the character and degree of the offense." Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980). "Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). "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." Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The glaring problem again stems from the lack of counsel and the Appellant's inability to understand the proceedings against him to effectively represent his interests fairly. As the Appellant stated at his Sentencing hearing:

Defendant: And with my side, is there anyone that can speak for me today or how does that work? I don't know how it works here in West Virginia.<sup>9</sup>

That statement, in a nutshell, describes exactly the Appellant's contention in this matter that he was completely alone at his Sentencing hearing and he had no idea, whatsoever, how to defend his interests. The Appellant had no witnesses, no experts, no lawyer, nothing but himself. Outside of his clumsy recitation to the Court and his request for no mercy, no mitigating evidence was presented to the Court. As such, the Court granted the Appellant's wish by sending him to the WVDOC, albeit for the rest of the Appellant's natural lifetime. (x2)

**Assignment IV: The Defendant/Appellant, Donald Surber, Jr., received ineffective assistance of standby counsel**

"In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged 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." Syl. Pt. 5, State v. Miller, 194 W. Va. 3, 459 S. E. 2d 114, (1995), See also Syl. Pt. 1, State v. Frye, 221 W. Va. 154, 650 S. Ed. 2d 574, (2006), Syl. Pt. 1, State ex rel. Daniel v. Legursky, 195 W. Va. 314, 465 S. E. 2d 416, (1995)

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<sup>9</sup> August 2<sup>nd</sup>, 2010 Sentencing Hearing, Pg. 9, lines 16-18

“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.” See State v. Miller, 194 W. Va. 3, 459 S. E. 2d 114, (1995)

To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently within the limited scope of the duties assigned to or assumed by counsel. (See People v. Hamilton, supra, 48 Cal.3d [1142] at pp. 1164-1165, fn. 14, 259 Cal.Rptr. 701, 774 P.2d 730); People v. Doane, supra, 200 Cal.App.3d at pp. 864-866, 246 Cal.Rptr. 366), and that a more favorable verdict was reasonably probable in the absence of counsel's failings, (see Strickland v. Washington (1984) 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674; People v. Fosselman (1983) 33 Cal.3d 572, 584, 189 Cal.Rptr. 855, 659 P.2d 1144). A self-represented defendant may not claim ineffective assistance on account of counsel's omission to perform an act within the scope of duties the defendant voluntarily undertook to perform personally at trial.

However, additionally, this Court notes that in the seminal case on the right of representation by counsel in West Virginia, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), it was stated that to establish a violation of the right to effective assistance of counsel, a criminal defendant not only has to show that his counsel's performance failed to conform with that of an attorney possessing the normal and customary skill possessed by attorneys who were reasonably knowledgeable in criminal law, but that the assistance of counsel rendered, because

of its ineffectiveness, affected the outcome of the case. As stated in syllabus point 19 of *State v. Thomas*:

In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.

The Appellant tried to request professional services from his standby counsel but received merely a sample form and instructions on how to file the requisite paperwork.<sup>10</sup> Essentially, he wished to undergo another psychological evaluation for purposes of sentencing. Of course, other than the Cooper-Lehki evaluation listed above, the Appellant had not received any additional expert testing from his counsel nor did he obtain it by himself. The Appellant attempted to utilize his standby counsel to draft important legal documents and obtain the services of a critical sentencing expert. In response, as indicated by the attached "letter" from standby counsel, the Appellant did not receive any substantive help whatsoever. In an incarcerated setting, he would not have access to any resources to know what to file, who to file with, what expert to obtain nor how to obtain them. The Appellant could not contact them by telephone as most of these providers do not accept collect phone calls nor could he write to them and effectively state his request for help. In essence, the Appellant was handed a proverbial scalpel and a physician's desk reference and told to perform open heart surgery on himself.

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<sup>10</sup> See Exhibit, June 30<sup>th</sup>, 2010 letter from standby counsel Deborah Lawson to Mr. Donald Surber, Jr. (Appellant)

When this “surgery” was not a success, one can hardly be surprised that the result is death in prison. Such treatment is below the standards expected by our legal professionals and despite whatever difficulties may have arisen between the Appellant and his former counsel, it is unacceptable. Again, former counsel could have asked for clarification from the Court if they were uncertain if they could file or provide any experts for the Appellant. Likewise, former counsel could have moved to withdraw if they did not feel comfortable as standby counsel. The end result was a splitting of the baby that provided the worst of both worlds.<sup>11</sup>

### **Prayer for Relief**

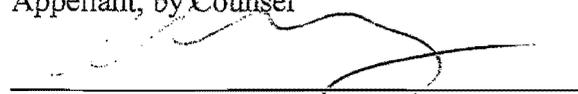
As such, the Appellant requests that his appeal be granted, the Appellant’s convictions vacated and new trial dates set before the lower tribunal. In the alternative, the Appellant requests that this matter be remanded to the trial court for a new trial and that the formerly tendered conviction and sentencing be rescinded and abrogated.

Based upon the foregoing, Appellant respectfully request that this Honorable Court grant him the relief sought in this Motion and accord any other relief that it deems appropriate.

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<sup>11</sup> The Appellant’s counsel notes that the position of standby counsel is a particularly tricky one to navigate and would wholeheartedly agree with the proposition that it would have been far better to refuse the appointment or at least note a vigorous objection and vouch the record as to why such an objection was posited. Given the recent changes in the Law regarding “shadow lawyering” and the ethical prohibition against such behavior, it appears directly incongruous that the Court can order counsel to perform “shadow stand by” counsel in direct opposition to their ethical duties. It is in this quagmire that the Appellant’s former counsel found themselves to which the Appellant’s counsel is not unsympathetic.

Respectfully Submitted,  
Appellant, by Counsel



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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

CASE NO. 09-F-155

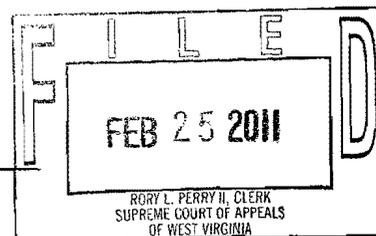
DONALD SURBER, JR.

CERTIFICATE OF SERVICE

I, Nicholas Forrest Colvin, Esquire, Attorney for the Defendant, Donald Surber, Jr., do hereby certify that I have served a true and accurate copy of the attached *Amended Notice of Intent to Appeal, Memorandum of Law in Support of Defendant's Motion for Appeal, Docketing Statement, and Affidavit of Indigency* upon Chief Deputy Prosecuting Attorney Christopher Quasebarth, Esq. at the Office of the Prosecuting Attorney for Berkeley County, West Virginia at 380 W. South St. Martinsburg, WV 25401 by United States Mail, first class, postage pre-paid and/or facsimile transmission on this 3<sup>rd</sup> day of February 2011.

/s/ Nicholas Forrest Colvin, Esq.

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