

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

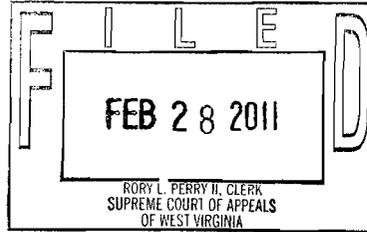
Appellee/Plaintiff Below,

v.

Docket No.:  
(Berkeley County Case No.: 09-F-155)

DONALD BERKELEY SURBER, JR.,

Appellant/Defendant Below.



**RESPONSE OF STATE OF WEST VIRGINIA  
TO PETITION FOR APPEAL**

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## **I. ASSIGNMENTS OF ERROR.**

A. WHETHER THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED HIS PLEA OF GUILTY WHILE REPRESENTING HIMSELF UPON HIS OWN MOTION?

B. WHETHER THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN, AFTER BEING FOUND COMPETENT TO STAND TRIAL AND CRIMINALLY RESPONSIBLE, THE APPELLANT MOVED TO REPRESENT HIMSELF NOTWITHSTANDING THAT HE HAD APPOINTED COUNSEL?

C. WHETHER THE TRIAL COURT PROPERLY SENTENCED THE APPELLANT TO THE STATUTORY SENTENCES FOR THE CRIMES OF WHICH HE WAS CONVICTED?

D. WHETHER THE APPELLANT PROVES, OR CAN EVEN BRING ON DIRECT APPEAL, A CLAIM OF INEFFECTIVE ASSISTANCE OF STANDBY COUNSEL WHEN HE MOVED TO REPRESENT HIMSELF AND DISMISS HIS APPOINTED COUNSEL?

## **II. STATEMENT OF THE CASE.**

1. After taking an ex-girlfriend, Katherine Sharp, hostage in her own home on or about June 15, 2009, and while police were attempting to negotiate a peaceful release, the Appellant repeatedly stabbed Ms. Sharp with a knife. Ms. Sharp died immediately. [Pre-sentence Investigation Report, 8/2/10.]

2. After taking the Appellant into custody, the Appellant attempted to escape by cutting himself, causing the Eastern Regional Jail to transport him to the local hospital. Once at the hospital, the Appellant attempted to run and disarm the correctional officer guarding him, causing the correctional officer to shoot the Appellant. After being treated for his injuries, the Appellant was returned to the Eastern Regional Jail. [Id.]

3. On June 25, 2009, the circuit court appointed the Public Defender to represent the Appellant on the charges of Murder, Kidnaping and Escape. The Appellant refused to fill out the required financial affidavit, so the Public Defender moved the circuit court to find the Appellant

eligible and appoint her office. [Order 6/29/09, Case No.: 09-P-CR-121; Order, 6/25/09, Case No.: 09-P-CR-121.]

4. On the Public Defender's motion, the circuit court ordered that the Appellant be evaluated for mental competency and criminal responsibility. [Order for Evaluation of Defendant's Competency to Stand Trial and Criminal Responsibility, 6/30/09.]

5. The Public Defender moved to set bond for the Appellant. [Motion to Set Bond, 9/29/09; Scheduling Order, 9/30/09.]

6. The Appellant sent an *ex parte* letter to the circuit court, dated September 29, 2009, asking that he be allowed to represent himself. [Letter, 10/1/09.]

7. At the first meeting of the Grand Jury after the Appellant committed these crimes the Grand Jury indicted the Appellant on felony charges of: Murder in the First Degree; Kidnaping (of Katherine Sharp); Attempted Kidnaping (of Tori Weller, a child); Burglary; Destruction of Property; Attempted Escape; Attempt to Disarm an Officer; Attempted Possession of a Firearm by an Inmate; and the misdemeanor of Domestic Assault. [Indictment, 10/20/09.]

8. The Appellant was arraigned on the Indictment in open court and trial dates scheduled for February 2010. [Arraignment Order, 10/29/09.]

9. The trial court deferred the Appellant's request to represent himself pending receipt of the competency evaluation and denied bail. [Bond Hearing Order, 10/29/09.]

10. Concerned with the delay in receiving the previously ordered competency evaluation, the trial court ordered a new evaluation. The order reflects that the Appellant was by then being housed at the Tygart Valley Regional Jail [due to disruptions caused by the Appellant at the Eastern Regional Jail]. The new evaluation order was later rescinded upon receipt of the

originally ordered evaluation. [Order Directed New Forensic Evaluators, 10/29/09; Order Rescinding New Forensic Evaluators, 11/10/09.]

11. The Appellant's evaluation report was received by the trial court. [Forensic Psychiatry Report, 11/4/09, and 1/4/10.]

12. At a January 4, 2010, status hearing, the parties acknowledged the exchange of discovery but expressed concern that they had not yet received the Appellant's criminal responsibility evaluation. [Status Hearing Order, 2/16/10.]

13. The Public Defender then moved to continue the trial while awaiting finalization of the Appellant's criminal responsibility evaluation, and moved to sever the counts of the Indictment related to the escape from the other counts. [Defendant's Motion to Continue, 1/20/10; Motion to Sever, 1/20/10.]

14. The motion to continue was granted and trial rescheduled for August 2010. [Order Continuing Pretrial and Trial, 1/22/10.]

15. The Appellant's psychiatric report regarding criminal responsibility was received. [Forensic Psychiatry Report, 3/2/10 and 3/18/10.]

16. At April 12, 2010, hearing, the Appellant's motion for bail filed by the Public Defender was denied again. The Appellant requested that he be allowed to represent himself. [Bail Denial Order, 6/8/10.]

17. The Appellant wrote another *ex parte* letter to the trial court, dated April 12, 2010, asking to represent himself. [Letter, 5/13/10.]

18. The trial court scheduled a status hearing for June 25, 2010, on the Appellant's request that he be allowed to represent himself. [Order Setting Status Hearing, 5/13/10.]

19. At hearing on June 25, 2010, the Appellant moved to represent himself despite the objections of his counsel. The trial court engaged in a lengthy dialogue with the Appellant about his trial rights to counsel and the risks of self-representation, the Appellant's understanding of those rights and risks, and whether the Appellant's waiver of those rights to represent himself was knowing, intelligent and voluntary. The trial court also heard from the Public Defender and the efforts that she made to advise the Appellant of his rights and the risks of self-representation. The trial court then concluded that the Appellant was cognizant of his actions and, based on the psychiatric evaluations, the Appellant was competent to stand trial and deemed criminally responsible. The trial court found that the Appellant was making a knowing and voluntary choice and granted the Appellant's motion to represent himself. The trial court appointed the Public Defender as stand-by counsel, explaining that role to the Appellant. [Order Concerning Self Representation and Plea Order, 7/9/10; Tr. 6/25/10, 1-13.]

20. The Appellant advised the trial court that he wished to accept full responsibility for what he had done and to save the families from a trial. He told the trial court that he did not show mercy and did not want mercy shown. The Appellant advised the trial court that he wanted to plead guilty to all but the Attempt to Disarm an Officer and Attempted Possession of a Firearm by an Inmate charges (since he disputed those). The trial court engaged in a plea dialogue with the Appellant, who then entered his unconditional guilty pleas to the first seven counts of the Indictment: Murder in the First Degree; Kidnaping (of Katherine Sharp); Attempted Kidnaping (of Tori Weller, a child); Burglary; Destruction of Property; Attempted Escape; and the misdemeanor of Domestic Assault. The trial court asked the Public Defender if she believed that the Appellant understood his rights and was knowingly and voluntarily waiving them; she

responded “yes.” The trial court found the Appellant’s guilty pleas to be knowing, intelligent and voluntarily given. [Order Concerning Self Representation and Plea Order, 7/9/10; Tr. 6/25/10, 14-73.]

21. A Pre-sentence Investigation Report was prepared. [Pre-Sentence Investigation Report, 8/2/10.]

22. At sentencing, the Appellant indicated that there were no inaccuracies in the Pre-Sentence Report. The Appellant addressed the trial court. Family and friends of the murder victim addressed the trial court in person and in writing. The State addressed the trial court. The trial court imposed the following statutory sentences: Life, with no mercy (First Degree Murder); Life, with no mercy (Kidnaping); Three-to-fifteen years (Attempted Kidnaping); One-to-fifteen years (Burglary); One-to-ten years (Destruction of Property); Six months (Domestic Assault); and Five years (Attempted Escape). The sentences are to run consecutively to each other. The State dismissed the final two counts of the Indictment, which the Appellant did not plead guilty to. Restitution was ordered. The Appellant was advised of his appellate rights, and the Public Defender was appointed as stand-by counsel for appellate purposes. [Sentencing Order, 8/5/10; Tr. 8/2/10.]

23. The Public Defender withdrew and new counsel was appointed. [Order, 8/19/10.]

24. After receiving an extension of time to file a Petition for Appeal, the Appellant, by counsel, filed a Memorandum of Law in Support of Defendant’s Motion for Appeal alleging: an involuntary guilty plea; an unknowing waiver of his right to counsel; an excessive sentence; and ineffective assistance of counsel. [Memorandum of Law in Support of Defendant’s Motion for Appeal, 2/3/11.]

### **III. SUMMARY OF THE ARGUMENT.**

The Appellant brutally murdered an ex-girlfriend while the police were trying to negotiate with him to peacefully release the woman. The Appellant earlier broke into the woman's house and held her hostage. The woman's daughter managed to escape.

After his arrest, the Appellant attempted escape. The Appellant inflicted injuries upon himself requiring his transport to the local hospital. At the hospital he tried to run and, when he tried to take an officer's weapon, was shot in the shoulder.

The Grand Jury indicted the Appellant on felony charges of: Murder in the First Degree; Kidnaping (of Katherine Sharp); Attempted Kidnaping (of Tori Weller, a child); Burglary; Destruction of Property; Attempted Escape; Attempt to Disarm an Officer; Attempted Possession of a Firearm by an Inmate; and the misdemeanor of Domestic Assault.

Separate psychiatric evaluations of the Appellant deemed him to be both competent and criminally responsible. Despite the very diligent efforts to defend the Appellant put forth by the seasoned and experienced Public Defender, the Appellant was adamant throughout the proceedings that the trial court allow him to represent himself. Following a lengthy dialogue with the Appellant, including the court's admonitions of the risks of self-representation, the trial court found the Appellant to be competent to stand trial, capable of representing himself and knowingly, intelligently and voluntarily deciding to represent himself. The trial court granted the Appellant's motion and appointed the Public Defender as standby counsel.

Prior to the plea hearing, and again at the plea hearing, the Appellant complained about the regional jails, from which he tried to escape and in which he was placed on strict restrictions, in compliance with jail regulations, for his continued misconduct.

The Appellant indicated to the trial court that he wanted to plead guilty to all of the crimes but for the Attempt to Disarm an Officer and the Attempted Possession of a Firearm by an Inmate. The Appellant informed the trial court that he showed no mercy and he did not want mercy shown to him. Following a lengthy plea dialogue with the Appellant, the trial court found the Appellant to knowingly, intelligently and voluntarily plead guilty to the offenses, and found the Appellant guilty on his guilty pleas.

At sentencing, the trial court imposed the statutory penalties, including two life terms without eligibility for parole, all to run consecutively to each other.

The Appellant knowingly, intelligently and voluntarily entered his guilty pleas. The Appellant knowingly, intelligently and voluntarily moved to represent himself. The trial court imposed the statutory penalties for the offenses to which the Appellant pleaded guilty. The Appellant received very effective assistance of counsel by the Public Defender.

The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

#### **IV. ARGUMENT.**

##### **A. THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED HIS PLEA OF GUILTY WHILE REPRESENTING HIMSELF UPON HIS OWN MOTION.**

###### **1. Standard of Review.**

This Court applies the following general standard for review of criminal cases:

“This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syllabus Point

4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Syl. Pt. 3, *State v. Malfregeot*, 224 W.Va. 264, 685 S.E.2d 237 (2009).

## 2. Discussion.

The trial court did not abuse its discretion in finding that the Appellant knowingly, intelligently and voluntarily entered his plea of guilty. This Court holds that “A defendant may knowingly and intelligently waive constitutional rights [...]nce having done so he cannot be heard to complain thereafter.” *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665, 669 (1975) (citations omitted).

This Court further holds in *Call v. McKenzie*:

3. When a criminal defendant proposes to enter a plea of guilty, the trial judge should interrogate such defendant on the record with regard to his intelligent understanding of the following rights, some of which he will waive by pleading guilty; 1) the right to retain counsel of his choice, and if indigent, the right to court appointed counsel; 2) the right to consult with counsel and have counsel prepare the defense; 3) the right to a public trial by an impartial jury of twelve persons; 4) the right to have the State prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings; 5) the right to confront and cross-examine his accusers; 6) the right to present witnesses in his own defense and to testify himself in his own defense; 7) the right to appeal the conviction for any errors of law; 8) the right to move to suppress illegally obtained evidence and illegally obtained confessions; and, 9) the right to challenge in the trial court and on appeal all pre-trial proceedings.

[...]

5. A trial court should spread upon the record the defendant's education, whether he consulted with friends or relatives about his plea, any history of mental illness or drug use, the extent he consulted with counsel, and all other relevant matters which will demonstrate to an appellate court or a trial court proceeding in Habeas corpus that the defendant's plea was

knowingly and intelligently made with due regard to the intelligent waiver of known rights.

Syl. Pts. 3 and 5, Call v. McKenzie, *id.*

Many of these items to be addressed by a trial court to a criminal defendant were carried over by this Court's subsequent adoption of *W.V.R.Cr.P.* 11, which reads in pertinent part:

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that the defendant has the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, the right against compelled self-incrimination, and the right to call witnesses; and

(4) That if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false swearing.

(d) **Ensuring That the Plea Is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by

addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendant or the defendant's attorney.

*W.V.R.Cr.P.* 11. The requirements of this rule assist in compliance with the due process requirement that a guilty plea is voluntary, but the rule itself is not of constitutional significance.

State ex rel. Vernatter v. Warden, 207 W. Va. 11, 528 S.E.2d 207 (1999).

The record demonstrates that as early as October 1, 2009, the Appellant was demanding that he represent himself. [Letter, 10/1/09.] The record also shows that two months before the plea hearing, at an April 2010 bail hearing, the Appellant sought to dismiss his counsel so he could represent himself, complained of the conditions at the regional jail, and expressed his desire--over the admonition of his counsel-- to accept responsibility for the crimes with which he was charged. [Tr. 4/12/10, pp. 7-12.] The trial court indicated that the concerns that the Appellant expressed about the jail were administrative issues, and the Appellant's counsel addressed that issue:

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.

[Tr. 4/12/10, p. 10.]

The Appellant's displeasure with the regional jails would resurface at the June 25, 2011, hearing, which became the plea hearing. The Appellant's continued complaints about the jail did not affect the voluntariness of his guilty pleas. The record from the proceedings in open court demonstrate the knowing and voluntary nature of the Appellant's guilty pleas. The Appellant requested that the trial court allow him to represent himself. [Tr. 6/25/10, pp. 3-4.] The trial court conducted a long colloquy with the Appellant about representing himself and the attendant risks of self-representation, but ultimately granted the Appellant's request for self-representation. [Order Concerning Self Representation and Plea Order, 7/9/10; Tr. 6/25/10, pp. 4-13.]

Based on the psychiatric evaluations conducted on the Appellant, the trial court found that the Appellant was competent to stand trial and criminally responsible. [Order Concerning Self Representation and Plea Order, 7/9/10; Tr. 6/25/10, p. 13.] This Court recognizes that:

“The test for mental competency to stand trial and the test for mental competency to plead guilty are the same.” Syllabus Point 2, *State v. Cheshire*, 170 W.Va. 217, 292 S.E.2d 628 (1982).

Syl. Pt. 4, *State v. Chapman*, 210 W.Va. 292, 557 S.E.2d 346 (2001).

The Appellant himself initiated pleading guilty to the offenses, reporting to the court at two separate hearings that he has had long to think about this, has discussed it with his parents, and takes full responsibility for his actions. [Tr. 6/25/10, p. 6, l. 5-6; pp. 8- 9; Tr. 4/12/10, pp. 10-12.]

Once the trial court granted the Appellant's motion to represent himself, the trial court turned to the Appellant's desire to plead guilty. The trial court determined that the Appellant understood the charges he was facing and the maximum penalties provided by law. [Tr. 6/25/10, pp. 14-15, 44-47.] The Appellant asserted that the Depakote, Buspar, Naprosyn (for the injury to

his shoulder) and Neurontin (for nerve damage in his arm) did not affect his ability to understand what he was doing in court that day. [Id., pp. 3-13, 19.] The trial court determined that the Appellant understood that he had the right to an attorney at every stage of the proceedings, and that one could be appointed for him but that he was choosing to represent himself. [Id., pp. 3-13, 19-20, 21.] The trial court determined that the Appellant understood that he had the right to plead guilty or not guilty and persist in that plea, the right to a trial by jury and the assistance of counsel for that trial, the right to confront and cross-examine adverse witnesses, the right to not self-incriminate, and the right to call witnesses. [Id., pp. 19-21.] The trial court determined that the Appellant understood that if the court accepted the guilty plea, there would be no trial and the Appellant was waiving his right to trial. [Id., p. 22.] The trial court determined that the Appellant understood that the statements he made about the offenses could be used adversely against him both civilly and criminally. [Id., pp. 26-27.] The trial court's discussion with the Appellant of each of these matters and rights, each of which was acknowledged as understood by the Appellant, complied with the requirements of *W.V.R.Cr.P.* 11.

The Appellant described in detail for the record what he did the day that he murdered Katherine Sharp, and the subsequent day when he tried to escape from the regional jail authorities at the hospital, all of which formed the factual basis for the seven offenses for which he was pleading guilty. [Tr.6/25/10, pp. 27-44.]

The trial court also inquired of the Appellant about his discussions with the Public Defender about a guilty plea. The Appellant acknowledged that he and his counsel (who had just become standby counsel) previously discussed the options of going to trial and the penalties involved for each of the offenses. [Id., p. 48.]

The Appellant also acknowledged that his decision to plead guilty was not the result of force or threats or any promise outside the discussion had in court. [Id., pp. 48-49.] At the outset of the June 25, 2010, hearing, the Appellant complained to the trial court about the strict restrictions he was on at the regional jail, although he recognized there was reason for him to be on restrictions. [Id., p. 4.] The reasons for the Appellant's restrictions are his attempted escape and the administrative actions based on the Appellant's misconduct as were referenced by his counsel at the April 12, 2010, hearing (referenced, *supra*). The Appellant also complained about the regional jail when describing his attempted escape by asserting that the officer shot him after he was on his knees [Tr. 6/25/10, p. 43]--an assertion uncorroborated by the facts. The Appellant again raised his complaints about the regional jail during the plea dialogue, but acknowledged that *it had nothing to do with his decision to plead guilty*:

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.

THE COURT: Okay. I understand that, but what I want to make sure is that nobody is kind of whispering in your ear saying hey, you go in there and plead guilty and he'll give you mercy or you plead guilty and we'll get you parole or we'll give you anything in return. The term could be anybody giving you any sort of reward and when I say that by way of light sentence or anything like that. Has anybody made any representations you go in there and plead guilty and this is what is going to happen.

DEFENDANT: No. That's why I said it in the beginning, Your Honor, I didn't show no mercy, I'm not asking for mercy.

THE COURT: Right, but I just want to make sure that

nobody is tricking you into coming in here and pleading guilty.

DEFENDANT: No, sir.

[Id., p. 49, l. 10 through p. 50, l. 9.]

The Appellant was steadfast that he was pleading guilty because he is guilty, wanted to accept responsibility and that he did not want to go to trial. [Id., p. 6, l. 5-6, pp. 8-9; 59, l. 21-23; p. 62, l. 18-22; p. 64, l. 23-24 through p. 65, l. 1-3.] But the Appellant also wanted to voice his displeasure with the regional jail. The Appellant represented to the court events he claimed happened at the jail--but for which there was no evidence to corroborate--but which, in any event, were not reflective of any coercive conduct to get him to plead guilty. [Id., pp. 50-55, 59-63.] The Appellant's counsel previously represented to the court that her review of the Appellant's administrative records from the regional jails demonstrated that the jails complied with their requirements in dealing with the Appellant. [Tr. 4/12/10, p. 10.] That the Appellant was displeased with the regional jail system and preferred being in the Department of Corrections does not make his plea involuntary. The Public Defender represented to the court that she had discussions with the Appellant about the conditions of his confinement and that his desire to move to the Department of Corrections affects "the timing but not the voluntariness" of his plea. [Tr. 6/25/10, pp. 52-53.]

The trial court informed the Appellant that if he wrote his complaints about the regional jail, the court would forward them to the Regional Jail Authority. [Id., pp. 63-66.] The trial court did forward the Appellant's letter when received. [Copy of Letter Judge Wilkes Sent to Executive Director, 8/11/10.]

The trial court asked the Public Defender whether she believed the Appellant's plea was

voluntary and in his best interest, to which she replied “yes.” [Tr. 6/25/10, pp. 67-68.] The Appellant also agreed that the plea was in his best interest. [Id., p. 68.] The trial court inquired again of the Appellant as to how he pleaded to each of the seven charges, to which the Appellant replied “guilty”, and the Appellant again acknowledged that his pleas of guilty were with full understanding of the charges and consequences and were given freely and voluntarily. [Id., pp. 69-70.] The court concluded that the Appellant’s guilty pleas were freely and voluntarily given, the Appellant signed the written plea form, and the court accepted the guilty pleas. [Id., pp. 71-72.] The court advised the Appellant that he could not thereafter withdraw his plea and confirmed with the Appellant that he was not asking for mercy. [Id., p. 72.] The trial court’s findings and conclusions were rendered into the written order. [Order Concerning Self Representation and Plea Order, 7/9/10.]

The trial court complied with the requirements of due process, Call v. McKenzie, *supra*, and *W.V.R.Cr.P.* 11 to assure that the Appellant’s guilty plea was knowing, intelligent and voluntary. The record demonstrates that the trial court did not abuse its discretion in finding the Appellant’s guilty plea freely and voluntarily given. The Appellant clearly stated to the court that he was pleading guilty because he was guilty and wanted to accept responsibility for what he had done. His guilty pleas were made with the full understanding of the charges, the consequences of pleading guilty, and a knowing waiver of his rights, of which he was fully informed and understood. The voluntariness of a guilty plea is determined by consideration of all of the relevant circumstances. Brady v. U.S., 397 U.S. 742, 749, 90 S.Ct. 1463 (1970).

That the Appellant also expressed his displeasure with the regional jails in which he was incarcerated and expressed a desire to move on to the Department of Corrections does not

demonstrate any coercive action on the part of any agent of the State that would affect the voluntariness of the plea. The trial court's conclusions are based on findings of fact that appear on the record and are not clearly erroneous. This Court's *de novo* review of the application of the law to the facts should demonstrate that the trial court's conclusions are correct. State v. Malfregeot, *supra*.

The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

**B. THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN, AFTER BEING FOUND COMPETENT TO STAND TRIAL AND CRIMINALLY RESPONSIBLE, THE APPELLANT MOVED TO REPRESENT HIMSELF NOTWITHSTANDING THAT HE HAD APPOINTED COUNSEL.**

1. Standard of review.

This Court reviews a trial court's decision regarding a criminal defendant's right to self-representation under an abuse of discretion standard: "A judge's decision to allow an accused to exercise his right to self-representation is reviewed under an abuse of discretion standard." Syl. Pt. 1, State v. Sandor, 218 W.Va. 469, 624 S.E.2d 906 (2005).

2. Discussion.

The trial court did not abuse its discretion in finding that the Appellant knowingly, intelligently and voluntarily waived his right to counsel to exercise his right to represent himself. This Court in Sandor reiterated a number of principles to guide trial courts when determining whether to allow a criminal defendant to represent himself, holding:

2. “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).

3. “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.” Syllabus Point 5, *State ex rel. Powers v. Boles*, 149 W.Va. 6, 138 S.E.2d 159 (1964).

4. “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.” Syllabus Point 8, *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983)

5. “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[, 671], 310 S.E.2d 173, 188 (1983) (citations omitted).” Syllabus Point 2, *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985).

Syl. Pts. 2-5, *State v. Sandor*, *id.*

The Appellant concedes in his argument that the trial court made all of the proper findings under the law to grant the Appellant’s motion to represent himself. The record contains the Appellant’s timely and unequivocal requests that he be allowed to represent himself and to dismiss appointed counsel. [Tr. 4/12/10, pp. 7-12; Tr. 6/25/10, 3-4; Letter, 10/1/09; Letter,

5/13/10; Bond Hearing Order, 10/29/09.] The record contains the trial court's findings that the Appellant was competent to stand trial and criminally responsible, based on the psychiatric evaluations undertaken. [Order Concerning Self Representation and Plea Order, 7/9/10; Tr. 6/25/10, pp. 4-13.] The record demonstrates that the trial court had a lengthy discussion with the Appellant, informing the Appellant of his rights and the attendant risks of self-representation, and making sure that the Appellant had a clear understanding of those rights and risks. [Id.] The Appellant's request caused no delay or disruption in the process. [R., *passim*.] The trial court inquired of the Appellant's appointed counsel, who stated that she did not advise the Appellant to represent himself and previously sent him a letter describing the finality of a plea and the charges and the possible sentences. [Tr. 6/25/10, 10-12.] The trial court rendered its rulings into a written order. [Order Concerning Self Representation and Plea Order, 7/9/10.] The trial court's ruling complied with Syllabus Point 4 of State v. Sandor, *supra*.

There is nothing in the record to suggest that the trial court abused its discretion in granting the Appellant his right to represent himself. State v. Sandor, *id*.

As to the appointment of the Public Defender as standby counsel, this Court holds:

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.

Syl. Pt. 2, State v. Powers, 211 W.Va. 116, 563 S.E.2d 781 (2001).

The record plainly shows that, after the court granted the Appellant's motion for self-representation, the court informed the Appellant and the Public Defender that the Public Defender was appointed as standby counsel. The court then informed them that her role was to

be available to the Appellant to ask any questions he may have, and answer any questions the Appellant may have before the Appellant answered any questions the court asked of the Appellant. Standby counsel would neither be asking questions of the court, addressing the court or doing anything else on the Appellant's behalf. [Tr. 6/25/10, p. 13.] Those specific duties were clearly laid out in the record. The Appellant availed himself of standby counsel numerous times during the plea dialogue and later at sentencing. [Tr. 6/25/10, pp. 25-26, 31-32, 52-53, 56-57, 64, 65, 66, 67-68; Tr. 8/2/10, pp.7-8.]

There is nothing in the record to suggest that the trial court abused its discretion in appointing the Public Defender as standby counsel. State v. Powers, *supra*.

The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

**C. THE TRIAL COURT PROPERLY SENTENCED THE APPELLANT TO THE STATUTORY SENTENCES FOR THE CRIMES OF WHICH HE WAS CONVICTED?**

1. Standard of review.

This Court holds:

“Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 366, 287 S.E.2d 504, 505 (1982).

Syl. Pt. 6, State v. Woodson, 222 W.Va. 607, 671 S.E.2d 438 (2008). *See also*: Syl. Pt. 6, State v. Slater, 222 W.Va. 499, 665 S.E.2d 674 (2008); Syl. Pt. 3, State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002).

2. Discussion.

The trial court imposed the following statutory sentences: Life, with no mercy (First

Degree Murder); Life, with no mercy (Kidnaping); Three-to-fifteen years (Attempted Kidnaping); One-to-fifteen years (Burglary); One-to-ten years (Destruction of Property); Six months (Domestic Assault); and Five years (Attempted Escape). The sentences are to run consecutively to each other. [Sentencing Order, 8/5/10; Tr. 8/2/10.]

The trial court sentenced the Appellant to the statutory sentences for the crimes of which he was convicted upon his guilty plea. The State does not set out each and every one of those statutory sections here because the Appellant does not contend that he was sentenced to anything but the statutory sentences.

The Appellant asked that the court give him no mercy because he showed no mercy in his commission of the crimes. [Tr. 6/25/10, 50, 72.] At the sentencing hearing, the trial court considered the Appellant's statements, the statements of the family of the murder victim, Katherine Sharp, the State's arguments, and the contents of the Pre-sentence Report, including the Appellant's prior criminal history. These demonstrate the monumental risk to public safety that the Appellant poses. Given the brutality and calculated coldness of the kidnaping and murder, the other associated crimes, and the Appellant's attempted escape from custody, the trial court properly imposed the statutory sentences, to run consecutively. The State respectfully requests this Court to find that the Appellant is not entitled to review of these statutory sentences imposed. State v. Goodnight, *supra*.

The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

**D. THE APPELLANT FAILS TO PROVE, AND CANNOT BRING ON DIRECT APPEAL, A CLAIM OF INEFFECTIVE ASSISTANCE OF STANDBY COUNSEL WHEN HE MOVED TO REPRESENT HIMSELF AND DISMISS HIS APPOINTED COUNSEL.**

1. Standard of Review.

This Court generally refuses to address allegations of ineffective assistance of counsel raised for the first time on direct appeal:

“It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.” Syl. pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995), *cited in State v. Day*, 225 W.Va. 794, 696 S.E.2d 310, 322 (2010).

Additionally, this Court holds that a criminal defendant who elects to represent himself cannot thereafter claim that his own inadequacies amounted to the denial of the effective assistance of counsel. *State v. Layton*, 189 W.Va. 470, 432 S.E.2d 740, 756 (1993). A criminal defendant representing himself, to whom standby counsel is appointed, must prove that counsel acted incompetently within the limited scope of their appointed duties and that, in absence of counsel’s conduct, there is a reasonable probability that there would have been a more favorable outcome. *Id.* “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.” *Id.*

## 2. Discussion.

The record plainly shows that, after the court granted the Appellant's motion for self-representation the court informed the Appellant and the Public Defender that the Public Defender was appointed as standby counsel. The court then informed them that her role was to be available to the Appellant to ask any questions he may have, and answer any questions the Appellant may have before the Appellant answered any questions the court asked of the Appellant. Standby counsel would neither be asking questions of the court, addressing the court or doing anything else on the Appellant's behalf. [Tr. 6/25/10, p. 13.]

The Appellant's sole assertion on appeal about standby counsel concern matters not part of the record. To the extent that the Appellant references in his appeal a letter he alleges he received from standby counsel, such letter was never provided to the undersigned, and in any event is not part of the record. This Court should not address this claim of ineffective assistance of standby counsel. State v. Garrett, *supra*.

If the Court were to address the claim, it is plain that standby counsel acted competently within the scope of her duties, which were to answer the Appellant's questions. The Appellant asserts, without reference to anything in the record, that he wanted standby counsel to obtain a pre-sentence evaluation, draft important legal documents, and obtain a sentencing expert. These are all things outside the scope of standby counsel's responsibilities. These are things that, if counsel incompetently did not perform, still cannot be reasonably asserted to have resulted in a more favorable sentence for this Appellant, given the brutal nature of his crimes, his attempted escape and his criminal history. State v. Layton, *supra*.

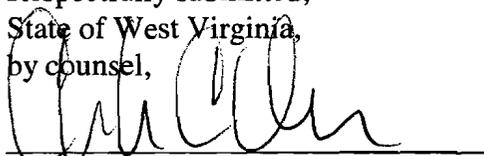
The State of West Virginia respectfully requests this Court refuse the Petition for Appeal.

**V. CONCLUSION.**

The Appellant fails to prove that the trial court abused its discretion in accepting his voluntary guilty pleas. Call v. McKenzie, *supra*; *W.V.R.Cr.P.* 11. The Appellant fails to prove that the trial court abused its discretion in granting his voluntary motion to represent himself. State v. Sandor, *supra*; State v. Powers, *supra*. The Appellant fails to prove that the imposition of the statutory sentences for the crimes of which he was convicted was in any way improper. State v. Goodnight, *supra*. The Appellant fails to prove that standby counsel was ineffective. State v. Garrett, *supra*; State v. Layton, *supra*.

The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

Respectfully submitted,  
State of West Virginia,  
by counsel,

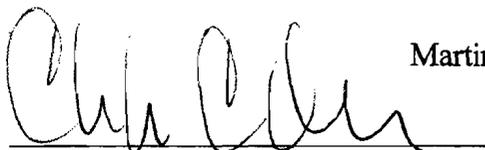


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **RESPONSE OF STATE OF WEST VIRGINIA TO PETITION FOR APPEAL** on this the 24<sup>th</sup> day of February, 2011, by  hand-delivery,  first-class mail, postage prepaid,  facsimile to:

Nicholas F. Colvin, Esq.  
P.O. Box 1720  
Martinsburg, West Virginia 25402

  
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Christopher C. Quasebarth