

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charles Elder, Petitioner

vs.) No. 11-1156

**Annabelle Scolapia, Home Confinement
Officer for Harrison County, Respondent**

NOV - 7 2011

PETITIONER'S BRIEF

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III. ASSIGNMENTS OF ERROR

- I. Whether the trial court abused its discretion in failing to permit the Petitioner to attend church; and thereby abridged Petitioner's constitutional right of freedom of religion and whether the trial court failed to apply the mandatory provisions of *West Virginia Code* § 62-11(B)-5-1(E)?
- II. Whether the trial court abused its discretion in failing to grant the Petitioner probation?
- III. Whether the Petitioner's Petition for Habeas Corpus relief should be granted based upon the claim of ineffective assistance for failure to take the appeal and for failure to timely file a Motion to Reconsider?
- IV. Whether the Trial court's amendments to its prior Order failed to adequately provide for recreation time, consistent with the Department of Corrections' guidelines?
- V. Whether Petitioner's medical condition has deteriorated so severely that the Supreme Court should *sua sponte* grant appropriate relief to protect the Petitioner and whether Petitioner's home confinement monitoring is too severe for his medical condition?

IV. STATEMENT OF THE CASE

The Petitioner initially entered into a plea arrangement with the Harrison County Prosecuting Attorney's office. On December 8, 2008, the Petitioner appeared before the trial court and entered a plea of guilty to each of the offenses obtained in the information; namely, (1) count of sexual abuse by a person in a position of trust and (1) count of third degree sexual assault. At the time, the trial court accepted the Petitioner's guilty plea. Petitioner did not raise or challenge any issues regarding his plea arrangement and acceptance of the guilty plea by the trial court. All of Petitioner's prayers for relief center around issues and circumstances surrounding Petitioner's sentencing and post-sentencing issues. On February 9, 2009, the trial court in Harrison County sentenced the Petitioner to not less than ten (10) nor more than twenty (20) years, pursuant to Petitioner's plea of guilty to sexual abuse by a person in a position of trust and not less than one (1) or more than five (5) years, pursuant to his plea of guilty to the offense of third degree sexual assault. It was ordered that these sentences run concurrent. In addition, the trial court permitted the Petitioner to serve these sentences by the alternate means of electronically monitored home confinement. Evidence was submitted during the omnibus habeas hearing regarding the failure to take an appeal, see Appendix of Record, Page 94. Evidence was also presented at the omnibus habeas hearing regarding the failure to properly and timely file a Motion to Reconsider and/or Appeal, see Appendix of Record, Page 96. The Petitioner appeared for a hearing on August 25, 2010, which was the initial evidence and evidentiary stage of the

omnibus habeas hearing.

Petitioner categorized the issues which he wished the trial court to address in the following six (6) areas:

- a. Failure of counsel to take an appeal *Losh v. McKenzie* checklist number 13).
- b. Information of presentence report erroneous (*Losh v. McKenzie* checklist number 20).
- c. Ineffective assistance of counsel (only in regards to sentencing/post-sentencing appeal, motion to reconsider, etc.) (*Losh v. McKenzie* checklist number 21).
- d. Severe sentence then expected (*Losh v. McKenzie* checklist number 50).
- e. Excessive sentence (*Losh v. McKenzie* checklist number 51)
- f. Mistaken advice of counsel as to parole eligibility (*Losh v. McKenzie* checklist number 52)

The conclusion of the evidentiary hearing regarding the omnibus habeas hearing was held on December 2, 2010. At the hearing on December 2, 2010, the trial court granted the Petitioner the following relief:

1. The Petitioner shall be permitted to leave the State of West Virginia for properly scheduled and necessary medical appointments in regards to his condition.
2. The home confinement office shall provide the Petitioner one (1) hour of recreation time outside his home per day. The Petitioner shall not leave

the confines of his yard during this one hour period; however, the Petitioner is free to walk his dog within his yard and get such other exercise within his yard as is consistent with the restrictions of home confinement. The trial court determined that this was consistent with the rules, regulations and other information available in regards to outside therapy/recreation (yard time) provided to inmates within the Department of Corrections (D.O.C.).

3. The Petitioner's monitoring device shall be the least restrictive as possible, to the extent available to the home confinement office shall use the wrist monitor or other less restrictive monitoring device, so as to eliminate the damage and abuse to the Petitioner's leg from the monitoring device. The trial court denotes that pictures were submitted following the hearing, pursuant to leave given by the trial court to file the same. The pictures filed with the trial court are consistent with the markings displayed in court and the testimony of the witnesses in regards to the same.
4. To the extent not specifically modified in one to three above, the prior terms of sentencing and prior terms of home confinement shall remain in full force and affect on the Petitioner. In regards to all other allegations in the Writ of Habeas Corpus not specifically addressed above the same were denied.
5. All other grounds as specifically enumerated in *Losh v. McKenzie* were waived on the record by the Petitioner.

The following evidence was presented during the Omnibus Habeas hearing held on October 25, 2010 and continued on December 2, 2010 (the same evidence is related to the Supreme Court appeal as filed by the Petitioner):

1. The issues as set forth above that the Petitioner is preserving, under *Losh v. McKenzie* in the issues which Petitioner waived are specifically set forth on the trial transcript from August 25, 2010 on page 6 through 17. On page 23 and page 24 of the transcript, Dr. Miller testified that the risk level of the Petitioner had been reduced from a moderate level at the time of sentencing to a low risk at the time of his new report which was March 8, 2010. On page 28, Dr. Miller testified that, "the greatest threat to this [Petitioner]'s future actually is his Parkinson Disease." On page 31, Dr. Miller testified, "my concern is that [Petitioner]'s current level of incarceration is incapable with his physical needs." On page 45 of the transcript, Dr. Miller stated, in regards to questions regarding probation and home confinement, "it could include a number of things from some liberalization of his physical limitations of home confinement all the way up to a minimum supervision with continued treatment, meaning probation with therapy. When I stated in my what I attempted to do in my report is to explain why I believe his risk level has changed, why I, any treatment recommendation that would reasonable to ambulate his condition and what the spectrum of a reasonable plan would be going forward given his current medical and emotional condition, understanding that it is the finder of facts who makes these decisions." Dr. Miller also testified on page 48

of the transcript that, [Petitioner] lower extremities showed stacisis in other words, edema due to lack of activity and cardiovascular condition.” “His neurological exam was mostly prominent for Brady Kinesia, slowness of movement, and his resting tremor, which is really quite severe. This man is not in good shape.” Dr. Miller went on to say on page 48 of the transcript, “[the bracelet] is creating chronic skin changes, tremor changes, his skin was becoming thin and shiny.”

2. Matt DeLuca testified as follows, after being declared an expert as a sex offender therapist, “I have certainly witnessed Mr. Elder’s physical health deteriorate visually from the standpoint of he has very, very difficult time with any mobilization, whether it is getting in and out of a chair or couch in my office, whether its trying to get his wallet out of his back pocket to give me papers to sign. He has a very difficult untying the knot on his bag that may be his homework. I have witnessed tremors. I have witnessed a stuttering type of behavior when he attempts to formulate sentences or thoughts, so I have certainly witnessed numerous instances like that, that were not present when I first met Mr. Elder.” Matt DeLuca also testified that he had seen visible ticks in court today and the Petitioner was having difficulty in standing. And that was consistent with what Matt DeLuca has seen over time. Matt DeLuca testified on page 54 of the transcript that some liberalization of the home confinement restrictions may help the Petitioner mentally.
3. Evidence of payment for retention of post-sentencing services was

presented on page 77 of the transcript which involved a handwritten receipt for \$1,500.00 from Patrick Clayton on behalf of the Petitioner on June 15, 2009. Patrick Clayton testified that the same was a receipt from Mr. Dyer delivered from the Petitioner the sum of \$1,500.00 to file the appeal and was from an attorney conference with Tom Dyer which Patrick Clayton transported the Petitioner.

- 4 The Petitioner presented that he would be able to attend church as a condition of his home confinement, specifically, on Page 18 of the transcript Pastor Randall Layne Hughes of the Weston Church of God testified that there was a church van that could come and take the Petitioner to and from services, that security and other issues were already in place to address the Petitioner attending church, that the church was aware he was a convicted pedophile, and that knowing that the church was going to accept him into the church, and that the Petitioner would be accompanied by a security official. When asked by the prosecutor why he would want to attend the church, the pastor testified that the Petitioner's neighbor was a member of the church and that the neighbor, as well as the Petitioner were both veterans and good friends and that the church van could pick them both up. On Page 31 of the transcript from December 2, 2010, the trial court denoted that in regards to having the home incarceration modified to allow the Petitioner to attend church services, that the trial court interpreted that section regarding church services that he would have been regularly attending at the time of

sentencing, that the court is not inclined to grant any modification with respect to allowing the Petitioner to attend Pastor Hughes's church because it was not something that he was attending at the time of sentencing on a regular basis. The trial court went on to indicate that, because Petitioner had been adjudicated for crimes against children and that there were children in the church, that his request would also be denied.

5. On Page 32, the trial court allowed a modification for the time period that the Petitioner would be allowed out of the home for a one hour period per day and this was consistent with the minimum D.O.C. guidelines.

V. SUMMARY OF ARGUMENT

- I. **Whether the trial court abused its discretion in failing to permit the Petitioner to attend church; and thereby abridged Petitioner's constitutional right of freedom of religion and whether the trial court failed to apply the mandatory provisions of *West Virginia Code* § 62-11(B)-5(E)?**

West Virginia Code § 62-11(B)-5(1)(E) requires that an offender confined to the home, except when he is attending a regularly scheduled religious service at a place of worship, is a required, and the same is a mandatory requirement, for a home confinement order under § 62-11(B)(1)(5). Because this requirement

is mandatory, the Petitioner argues that the trial court was not permitted to deny Petitioner's constitutional right to freedom of religion by declaring that he was prohibited from attending church at the Weston Church of God at the three regularly scheduled services as set forth in the trial script and by the testimony of the witnesses. Pursuant to the Appendix of Record, it is clear that the trial court failed to abide by this mandatory requirement for an order in a home incarceration case. This error constitutes plain error and requires that the Writ of Habeas Corpus be granted because Petitioner's statutory and constitutional rights were violated by the trial court's conduct in this case.

II. Whether the trial court abused its discretion in failing to grant the Petitioner probation?

Petitioner's health has deteriorated so severely that the only fair form of relief, based upon the trial court's misconduct by providing home incarceration which was more severe than permissible under applicable law, and pursuant to the arguments contained herein, is to grant the Writ of Habeas Corpus and that Petitioner be released immediately, or in the alternative, that the Supreme Court should *sua sponte* declare probation as the appropriate sentence, based upon the statutory and constitutional errors made by the trial court.

III. Whether the Petitioner's Petition for Habeas Corpus relief should be granted based upon the claim of ineffective assistance for failure to take the appeal and for failure to timely file a Motion to Reconsider?

Petitioner paid for retained services to provide a Motion to Reconsider and/or Appeal. Petitioner received neither and the same constitutes ineffective assistance of counsel. These are constitutionally and statutorily protected rights of the Petitioner in the criminal process and the denial of the same is grounds for the granting of the Writ of Habeas Corpus. Further, trial counsel failed to timely file a Motion to Reconsider and thereby prejudiced the Petitioner because the same was denied without a hearing on the merits. Further, trial counsel compounded this error by failing to appeal the issue.

IV. Whether the trial court's amendments to its prior Order failed to adequately provide for recreation time, consistent with the Department of Corrections' guidelines?

While the trial court modified its previously erroneous Order which permitted no outdoor recreation time for the Petitioner while on home confinement, the trial court's remedy by allowing the Petitioner one hour of outdoor recreation time still constitutes an abuse of discretion. The Department of Corrections provides that all inmates should receive at least one hour of outdoor recreation time; however, the one hour of recreation time is solely reserved for inmates which are on solitary confinement for the breaking of prison rules. In this case, Petitioner should have been given more liberal recreation time in his yard. This form of recreation was a necessary medical treatment for

the Petitioner and the denial of the same was even more severe than the Department of Corrections' regulations.

V. Whether Petitioner's medical condition has deteriorated so severely that the Supreme Court should *sua sponte* grant appropriate relief to protect the Petitioner and whether Petitioner's home confinement monitoring are too severe for his medical condition?

Based upon the Petitioner's deterioration from Parkinsons Disease, Post Traumatic Stress Disorder and Depression and his other medical symptoms as outlined in the Appendix of Record, and based upon the fact that the deterioration was enhanced by the statutorily impermissible and excessively severe conditions initially placed on the Petitioner for home confinement and based upon the fact that, even though the trial court modified the conditions nearly two years after imposing the same on the Petitioner, the trial court's modification still left the Petitioner's conditions in excess of statutory law and in excess of his constitutionally protected rights; therefore, Petitioner argues that the Writ of Habeas Corpus should be granted as moulded immediately, releasing the Petitioner from further incarceration; or in the alternative, that the Supreme Court should *sua sponte* place the Petitioner on probation under such terms and conditions as will permit him to travel to Texas for his required medical care.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for the Petitioner believes that, pursuant to Rule 18(a) Section (3) and (4), that the dispositive issues have been authoritatively decided and that the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument. Counsel believes that, because the arguments as set forth in Assignment of Error Number I are mandatory requirements of the trial court, that the relief can be determined as required based upon the mandatory statutory law and the written brief of the Petitioner. Based thereon, counsel believes that oral arguments are not required under Rule 18, 19 or 20.

VII. ARGUMENT

- I. Whether the trial court abused its discretion in failing to permit the Petitioner to attend church; and thereby abridged Petitioner's constitutional right of freedom of religion and whether the trial court failed to apply the mandatory provisions of *West Virginia Code* § 62-11(B)-5(1)(E)?**

Petitioner asserts that the trial court erred in failing to permit him to attend church. The Petitioner produced evidence that the Weston Church of God would allow him to attend, would have provided transportation and security the entire time that Mr. Elder attended church. **Petitioner argues that *West Virginia***

Code § 62-11(B)-5 requirements for order of for home incarceration, specifically states that, “an order for home incarceration of an offender under Section 4 of this Article, is to include but not be limited to the following” (1)(E) attending a regularly scheduled religious service at a place of worship.” Petitioner argues that this requirement states that West Virginia law requires that the Petitioner be permitted to attend regularly scheduled religious services at a place of worship. Petitioner argues that he produced evidence that the community would be safe, the church would be safe and that the Petitioner would have transportation to and from the services with the accompaniment of appropriate security personnel. Petitioner argues that failure to follow West Virginia law in this matter abridges his constitutionally protected right to the freedom of religion under the West Virginia Constitution Article III § 3-15 as well as under the United States Constitution Amendment I. Petitioner argues that even criminals who are incarcerated in the Department of Corrections are permitted time to attend the chapel at the incarceration site. Petitioner argues that, “pursuant to the provisions of the Home Incarceration Act, *West Virginia Code* § 62-11(B)-1 to 11(B)-12, when an offender is placed on home incarceration . . . the home incarceration order . . . at a minimum [requires], the mandatory statutory requirements enunciated in *West Virginia Code* § 62-11(B)-5 . . . whether or not the order specifically references the Home Incarceration Act.” As stated in *State of West Virginia vs. Lori Ann McGuire*, 207 W.Va. 459, 533 S.E. 2nd 685 West Virginia (2000) indicates that the mandatory

requirements contained therein are required for any person on home confinement, therefore, Petitioner's requests to attend church were improperly denied by the trial court at his sentencing and in his Omnibus Habeas proceeding. Petitioner argues that the statute is mandatory and denotes that this Supreme Court has referred to the statutory section in numerous Supreme Court opinions by referring to the statutory section in the footnotes and the body of numerous decisions, including but not limited to *State of West Virginia vs. Lori Ann McGuire*, 207 W.Va. 459, 533 S.E. 2nd 685 West Virginia (2000) and *State v. Hughes*, 197 W.Va. 518, 476 S.E. 2nd 189 (West Virginia 1996). Counsel is not aware of any West Virginia cases which have directly addressed this issue, because said statute is mandatory, and counsel is unaware of any other person on home confinement who is not permitted to attend regularly scheduled religious services at a place of worship. The order for home detention was required to include language permitting the attending of a regularly scheduled religious service at a place of worship, and the trial court's failure to include the same, even over the specific objection of the Petitioner, constitutes plain error. The trial court's failure to provide this mandatory requirement is consistent with the trial court's imposition of a more severe sentence than is permissible and consistent with the trial court's initial language which would not permit the Petitioner to even step foot on his porch. Petitioner acknowledges that certain restrictions of the initial home confinement have been reduced through the Omnibus Habeas proceeding; however, the trial court failed to recognize its mandatory duty as set forth above in permitting the Petitioner his religious

freedoms and statutorily required religious freedoms. As denoted in the medical records, walking is a necessary therapeutic issue and the trial court's denial of permitting the Petitioner to attend church at the regularly scheduled meetings three times a week, again, limited his ability to address the Parkinsons issues by walking outdoors.

II. Whether the trial court abused its discretion in failing to grant the Petitioner probation?

The trial court abused its discretion in failing to grant the Petitioner probation, pursuant to the facts of this case. The Petitioner's physical deterioration constitutes grounds to afford the Petitioner probation. The Petitioner suffers from Parkinsons Syndrome, including drooling, mass facial continents, urinary incontinence, shuffling gate, requiring medications to reduce these symptoms. The Petitioner also suffers from Post Traumatic Stress Disorder and Depression, see Affidavit of Sydney B. Jackson, who testified at the hearing, Appendix Page 69. The Petitioner is an elderly veteran whose physical condition has severely deteriorated since his initial placement on home confinement. Photographic evidence was submitted at Omnibus Habeas Hearing of the damage that the monitoring device was causing to the Petitioner. Certain modifications of the home confinement were made by the trial court during the habeas proceeding which alleviated some of the Petitioner's

concerns; however, the Petitioner's should be granted probation based upon the physical deterioration, as well as his improvements which have occurred through his sexual abuse counseling. Dr. Miller found that the Petitioner was a low risk to reoffend. All of the Petitioner's medical experts who testified indicated that less restrictive confinement of the Petitioner was necessary, based upon his decreased physical health.

Of course, Petitioner acknowledges that there is significant adverse authority in regards to this ground. Specifically, counsel cites "sentences opposed by the trial court if, within statutory limits and not based upon some impermissible factor are not subject to appellate review. Syllabus Point 4 *State v. Goodnight* 169 W.VA. 366, 287 S.E. 2nd 504 (1982). Also, the West Virginia Supreme Court has stated that, "probation is a matter of grace and not a matter of right." Syllabus Point 1 *State v. Rose*, 156 W.Va. 342, 192 S.E. 2nd 84 (1972). Nonetheless, Petitioner argues in good faith that his medical condition warrants less restrictive sentencing in this case. Petitioner prays that his sentence be commuted to probation, or in the alternative, that this matter be remanded for further consideration, consistent with his other prayers for relief as set forth below.

- III. Whether the Petitioner's Petition for Habeas Corpus relief should be granted based upon the claim of ineffective assistance for failure to take the appeal and for failure to timely file a Motion to Reconsider?**

Petitioner argues that his Petition for Writ of Habeas Corpus should be granted based upon the claim of ineffective assistance of counsel. Petitioner acknowledges that he waived any claim of ineffective assistance of counsel prior to the sentencing phase of the original trial court proceedings. Petitioner acknowledges that counsel's performance was exemplary up and until the sentencing phase of the underlying proceedings. Petitioner then argues that he paid \$1,500.00 for retainer that was to include either a Motion to Reconsider and/or an Appeal. The failure of counsel to timely execute the Motion to Reconsider and/or Appeal violated Petitioner's constitutional rights under the West Virginia and United States Constitutions and the same constituted ineffective assistance of counsel. Petitioner argues this error is compounded because of the plain error as set forth in Argument One above, where the trial court failed to follow the required statutory law and permit the Petitioner to attend religious services at regularly scheduled religious services at a place of worship. Petitioner's constitutional right to a Writ of Habeas Corpus shall not be abridged and is constitutionally protected West Virginia Constitution III §3-4. Under the circumstances as outlined above, Petitioner's Writ of Habeas Corpus should be granted. By failing to timely file a Motion to Reconsider, trial counsel prevented Petitioner from having a hearing on the Motion to Reconsider in front of the trial court and also prevented Petitioner from appealing the underlying trial court matter to the Supreme Court by failing to adhere to the time frame orders of the Rules of West Virginia Criminal Procedure and appropriate statutory law. Petitioner produced evidence that he had tendered \$1,500.00 for said attorney

work and received no benefit therefrom, based upon the time frame delay and the failure to attach the appropriate affidavits and cite the appropriate errors. Based thereon, Petitioner argues that it is appropriate to grant the Writ of Habeas Corpus and release the Petitioner from any further incarceration, whatsoever. Petitioner argues that his confinement was more severe than is permitted by either statute and more severe than is constitutionally permissible. Further, Petitioner's health deterioration merits in favor of this Supreme Court granting the Writ as moulded and releasing the Petitioner from incarceration.

IV. Whether the trial court's amendments to its prior Order failed to adequately provide for recreation time, consistent with the Department of Corrections' guidelines?

Petitioner argues that, even if he were incarcerated, the Department of Corrections would have permitted at least one hour of recreation time outdoors on any given day. Further, were the Petitioner not on some sort of solitary confinement, based upon prison violations, the Petitioner would have been given liberal outdoor recreation time, consisting of the majority of the day in the yard. Petitioner argues that the trial court did ultimately amend its prior initial order by permitting the Petitioner one hour of outdoor recreation time; however, the same is the minimum that is normally reserved for a violent criminal on solitary confinement and based upon his violations of prison requirements. Therefore, counsel argues that the trial court failed to effectively protect the Petitioner's

constitutional rights by permitting him such additional yard time. This is particularly compounded by the Petitioner's severe physical disability and impairment as caused by the Parkinsons Disease, Post Traumatic Stress Disorder and Depression. Petitioners medical experts testified that his mood and affect would have been improved by allowing him additional time outdoors. Petitioner argues that the Home Confinement Rules and Regulations should be modified so that they are in no way more severe than those as promulgated by the Department of Corrections. In other words, the minimum flooring for any home confinement set of conditions should be no less severe than those as provided and set forth in the Rules and Regulations of the Department of Corrections.

V. Whether Petitioner's medical condition has deteriorated so severely that the Supreme Court should *sua sponte* grant appropriate relief to protect the Petitioner and whether Petitioner's home confinement monitoring are too severe for his medical condition?

Petitioner argues that his medical condition has severely deteriorated. In fact, Petitioner was required to remain in the ER following his most recent regularly scheduled medical appointment at the Veterans' Administration Hospital. Petitioner's Parkinson's Disease, as well as his Post Traumatic Stress Disorder and Depression, have severely deteriorated and worsened since his

placement on home confinement. As evidence throughout the Appendix of Record and as evidence throughout the trial court testimony of all of the expert witnesses and specifically, as induced by the testimony of Dr. Bobby Miller and by his treating psychologist, Dr. Matt DeLuca, who was appointed by the trial court, pursuant to his home confinement. In this case, the severe conditions as imposed by the trial court under his home confinement, have caused the severe deterioration as evidenced on the Petitioner. The photographic evidence as presented to the trial court of the physical damage to Petitioner's leg by virtue of being required to wear the monitor, coupled with the significant evidence of Parkinsons deterioration because of the severe limitations initially placed by the trial court, created an environment which, under the totality of these circumstances, constituted cruel and unusual punishment in excess of that permissible under Petitioner's constitutional rights under the West Virginia constitution and United States Constitution. Wherefore, Petitioner argues under the plain error doctrine that the Supreme Court should *sua sponte* grant the Writ for Habeas Corpus relief as moulded and immediately release the Petitioner from any further incarceration. Under said circumstances, Petitioner would be able to travel to Texas and receive the necessary medical treatment he needs and would be compensation for the excessive constitutional violations which he has endured since the initial trial court sentencing in this matter in February 2009.

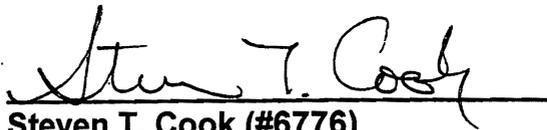
VIII. CONCLUSION

Based upon the above set forth assignments of error, statement of case, and summary of argument, Petitioner concludes by stating that his Writ of Habeas Corpus should be granted as molded and that the Petitioner be awarded his attorney fees and court costs in this matter and that the State of West Virginia be directed to pay the same. It in the alternative, Petitioner prays for the following alternative relief:

1. That the Petitioner be granted probation.
2. That the Petitioner be granted a less restrictive sentence.
3. That Petitioner be permitted to relocate to Texas to seek additional medical relief through the VA Medical Centers in Texas.
4. That Petitioner's terms and restrictions of home confinement be modified liberally so to effectuate and protect the Petitioner's constitutional rights.
5. That this case be remanded to the Circuit Court of Harrison County for such additional evidentiary matters as may be required and that the case be assigned to a different circuit judge who did not handle the original trial proceedings, as well as the Omnibus Habeas Petition Hearings.
6. That this case be remanded with directions for the trial court (or a different Circuit Judge) to comply with the mandatory language which requires the Petitioner to attend a regularly scheduled religious service at a place of worship.

And for such further general relief as this Honorable Court may deem just and to such further relief from said plain errors as exist on the record of this matter.

Petitioner by Counsel:

A handwritten signature in cursive script, reading "Steven T. Cook", written over a horizontal line.

**Steven T. Cook (#6776)
Counsel for Petitioner**

IX. CERTIFICATE OF SERVICE

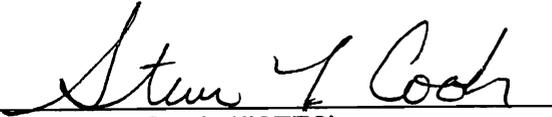
I, the undersigned attorney at law, certify that a copy of the below described instrument was served upon the person described below on the date set forth below and that the method of serving it upon said person was:

(X) enclosing the instrument by mail, first class United States Postal Service

“PETITIONER’S BRIEF”
(instrument)

Date: November 7, 2011

Attn: Laura Young
Asst. Attorney General
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Counsel for Annabelle Scolapia


Steven T. Cook (#6776)