

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1156

**CHARLES ELDER,**

*Petitioner,*

v.

**ANNABELLE SCOLAPIA, HOME CONFINEMENT  
OFFICER FOR HARRISON COUNTY,**

*Respondent.*

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**SUMMARY RESPONSE ON BEHALF OF ANNABELLE SCOLAPIA**

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Comes now the Respondent, by counsel, Laura Young, Assistant Attorney General and files the within summary response to the brief on appeal, pursuant to Rule 10 (e) of the Revised Rules of Appellate Procedure and an order from this Honorable Court dated August 12, 2011.

I.

STATEMENT OF THE CASE

The Petitioner, upon his guilty pleas to the felony offenses of sexual abuse by a person in a position of trust and sexual assault in the third degree, was sentenced to concurrent terms of 10 to 20 years, and 1 to 5 years, and permitted to serve those sentences, over the objection of the state, on home confinement. (App. at 2.) Specifically, the record below indicated that the Petitioner had “perpetrated hundreds, if not thousands of sexual assaults against his stepdaughters while they were minors” and that after one of the stepdaughters was impregnated by the Petitioner, the Petitioner “himself performed a crude abortion on the victim.” (*Id.* at 20.) The victims wished the matter

below resolved by a plea. (*Id.* at 21.) The Petitioner accepted the plea agreement, admitted engaging in the sexual conduct with his stepdaughters, and indicated he understood the potential sentence he faced. (*Id.* at 22.)

As noted above, the Petitioner was sentenced to concurrent terms of home incarceration under the standard terms and conditions, excepting that he was additionally ordered not to possess pornographic materials, that he not take erectile dysfunction medicine, that he attend sex offender treatment, and that he comply with the terms and conditions of supervised release while on home confinement. (*Id.* at 23.) Petitioner below moved to modify the terms and conditions of home confinement to result in less stringent conditions. (*Id.*)

The court below denied that motion noting that release, reduction or alternative relief would unduly depreciate the seriousness of the crime, and that the court had considered the Petitioner's medical condition in ordering home confinement, as opposed to a penitentiary sentence. (*Id.* at 50.)

Following denial of the modification of the terms and conditions of home confinement, the Petitioner filed a petition for writ of habeas corpus. An omnibus hearing was held. During that hearing, it was acknowledged that the Petitioner is being treated for Parkinson's Disease, a neurological disorder. (Habeas Hr'g Tr. 31, Aug. 25, 2010.) There is no medical literature or studies indicating that home confinement exacerbates Parkinson's, and in fact, the Petitioner could receive in home services that would include physical therapy. (*Id.*) The treatment for Parkinson's is primarily drug therapy, deep brain stimulation, with physical therapy being a secondary treatment. Further, Petitioner's expressed wishes were to visit Texas, visit friends, and sit on the porch, none of which aid in the treatment of Parkinson's Disease. (*Id.* at 33.) It was acknowledged that all confinement results in a deleterious effect on mental health. (*Id.* 34.)

The court indicated that the Petitioner was not attending church at the time his sentence of home confinement was imposed, and further noted that the conditions when a person is placed on home incarceration is that it is akin to being in jail. (*Id.* at 95.) At the hearing, the court modified the home incarceration to ensure that the Petitioner received some time of outside exercise commensurate with what was allowed inmates (*id.* at 98) and that upon request and notification the home confinement office would accommodate the Petitioner's outside medical appointments and in home health care needs. (*Id.* at 95.)

At the hearing on ineffective assistance of counsel, Mr. Dyer testified that the Petitioner received a "fabulous" deal and that the sentence was far more lenient than anyone had anticipated. Further, counsel informed the Petitioner that he was one of the luckiest men that counsel had ever represented and that there was nothing to appeal. (Habeas Hr'g Tr. 6, Dec. 2, 2010.) Counsel filed a motion to reconsider, and when denied, informed the Petitioner that an appeal of that denial would be without merit. (*Id.* at 8.) Further, although the Petitioner was not attending church at the time of disposition, following imposition of home incarceration, and only after such imposition, Petitioner evinced interest in attending three religious services a week. (*Id.* at 20.)

Noteworthy in that hearing was the State's comment that there was a penal aspect to the Petitioner's sentence, and further, that the Petitioner never expressed remorse for his offenses. (*Id.* at 26.)

At the conclusion of the hearing, the lower court ordered that the Petitioner would be permitted to leave the state for scheduled and necessary medical treatment. The Petitioner was permitted outside exercise for one hour a day. The court noted that as to the request to attend church services, the Petitioner had not been attending church before being placed on home confinement, and

balancing the Petitioner's religious freedom with the threat to the children in church, particularly since the Petitioner was not a regular (or apparently even occasional church goer before home incarceration was imposed) declined to allow the Petitioner to leave home for church, while not restricting church members from visiting the Petitioner and practicing religion in his home. The monitoring device was to be the least restrictive possible. (App. at 91-100.) In a separate order dealing with the issue of ineffective assistance of counsel, the court determined that the actions of counsel were those a reasonable criminal defense attorney would take under the circumstances. Further, there was no evidence that any action taken in regard to the Petitioner's home confinement sentence would have resulted in a different outcome. Therefore, counsel was not ineffective. (*Id.* at 103-15.) Thereafter, this appeal from the judge's orders ensued.

### III.

#### ARGUMENT

As noted in the response below (*id.* at 24.), it is an open question as to whether home confinement constitutes a "sentence of imprisonment" for the purpose of invoking the protections of the postconviction writ of habeas corpus. For example, *State v. Lewis*, 195 W. Va. 282, 465 S.E.2d 384 (1995), notes that home incarceration is not confinement within the meaning of the probation statute. The *Lewis* court noted that a person sentenced to home confinement enjoys virtually the same freedom as a probationer. (*Id.* at 287, 465 S.E.2d at 389.) Although the federal courts have broadened the definition of incarceration and custody to include home confinement, West Virginia heretofore has not, defining incarceration as "confinement in a jail or penitentiary." *State ex rel. Goff v. Merrifield*, 191 W. Va. 475, 446 S.E.2d 695 (1994). However, this Honorable Court has also noted that for the purpose of pre-trial bail, the home incarceration restriction is not

considered the same as actual incarceration for the purposes of giving credit for time served, despite the “penal nature” of the Home Incarceration Act. Syllabus Point 2 and 3, in paraphrase, *State v. McGuire*, 2-8 W. Va. 459, 533 S.E.2d 685 (2000).

However, the lower court entertained this petition for writ of habeas corpus, and the orders denying in part (but also modifying the terms of home confinement) are being appealed.

The court below is not limiting the Petitioner’s exercise of his religious freedom. Nothing in the orders denying the Petitioner’s writ prohibits members of the church in question from visiting with the Petitioner in his home, praying with him, reading the Bible with him, or even holding an organized religious service. What the judge is disallowing is the Petitioner being permitted from leaving his home three times a week, for two hours at a time, and another hour and a half of travel time for each service to attend church services, when the Petitioner himself stated that he did not attend church prior to his home incarceration. Although one may find salvation in a jail cell, the Petitioner’s sudden conversion to a church going member three times a week can only raise the suspicion that when the Petitioner’s plaintive requests to be allowed to go to Texas to visit relatives went unfulfilled, that the request to go to church came next. Had this pedophile, who repeatedly sexually abused his stepdaughters gone to prison, he would be permitted to attend services in jail. He would not be bussed, on a bus where children ride, to a church three times a week, where children attend. The court below correctly balanced the Petitioner’s interests against those of society as a whole, and the protection of the children in particular and determined that while the Petitioner may practice his religion freely while at home, he may not leave home to attend church services which he voluntarily chose not to attend until after he was sentenced to home confinement.

In determining the effectiveness of counsel--or the lack thereof--West Virginia has adopted the test enunciated by the United States Supreme Court. See, for example, Syl. Pt. 3 of *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 674 S.E.2d (2007) which states that claims of ineffective assistance of counsel are governed by “the two pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984)” which first objectively tests counsel’s performance for reasonableness, and additionally, there must be a reasonable probability, that save for counsel’s conduct, the result would have been different. Additionally, Syllabus Points 4 and 5 of *Humphries*, state that a court is to refrain from second guessing strategic decisions, asking rather whether a reasonable lawyer would have so acted. The trial court found that Petitioner never specifically requested either an appeal of his sentence or a modification of the terms and conditions of home confinement. Mr. Dyer, Petitioner’s trial counsel testified emphatically that there was nothing to appeal, that the Petitioner was the luckiest client he (Dyer) ever represented, and that the original sentence was incredibly lenient. The trial court noted that any reasonable counsel would have acted as Mr. Dyer did. What was Mr. Dyer to appeal? There is no indication that the plea was involuntary. The sentence was within legal limits. In fact, the sentence was incredibly lenient. Any issue with specific restrictions of home confinement could have and should have been addressed by the Petitioner to the home confinement officer, rather than wasting the resources of the judicial system.

A review of the habeas hearing testimony indicates that the Petitioner chafed under the restrictions of home confinement. However, as noted by the assistant prosecuting attorney, there is a penal element to the sentence. Home confinement is not a reward for good behavior. In this specific instance, home incarceration was designed as a penal sentence. The judge took into account the Petitioner’s medical conditions and his service to the country as a veteran in granting the

sentence in the first instance. Clearly, the judge wanted these terms of home confinement to limit the Petitioner's freedom, analogous to the limitations he would have received in prison. Had the Petitioner been sentenced to prison, it would not be a basis for habeas relief that he was sick and depressed. Therefore, being sick and depressed should not be a basis for making his home incarceration less restrictive.

His specific complaints, as adduced at the habeas hearing, indicated that he wanted to be able to walk his dog and to go out of state to visit relatives. The testimony indicated that the Petitioner was depressed because of the conditions of home confinement. However, the testimony also indicated that all persons who are confined suffer from depression. One can only posit that the depression the Petitioner felt while sitting in his living room watching ESPN was significantly less than he would have felt had been confined to Mount Olive for the 11 to 25 year sentence that everyone, including defense counsel anticipated.

In general, a sentence which is within statutory limits is not subject to appellate review. *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). The trial court did not abuse its discretion in placing the Petitioner upon home confinement, as opposed to straight probation, and this Honorable Court should not remove the restrictions of home confinement and place the Petitioner on straight probation. Had the Petitioner been sentenced to consecutive terms in the penitentiary, it would not have been an abuse of discretion based upon the multiple--perhaps thousands--of instances of sexual abuse he inflicted upon his stepdaughters. A prison sentence would not have been an abuse of discretion even considering the Petitioner's illness. Individuals who commit crimes who have AIDS, Parkinson's, MS, or even paraplegia and being confined in a wheelchair do not get a get out

of jail card because of their physical conditions. This Petitioner should not be granted the infinite mercy of straight probation when he has already received an incredibly lenient sentence.

Upon a review of the guidelines from the Department of Correction, the Petitioner was permitted exercise time outside. This exercise was permitted even though the consensus from the medical testimony was that unattended exercise could be dangerous for this Petitioner because of the danger of falling. The testimony from the habeas hearing was that the Petitioner's mood might be improved by physical exercise. As noted above, while the conditions of home confinement should not be so onerous as to constitute torture, this particular home confinement sentence was designed to be penal in nature based upon the horrific nature of the Petitioner's offenses balanced against his medical condition. One might fairly assume that the real reason for home confinement was to save the taxpayers the cost of Mr. Elder's medical treatment. Be that as it may, it is not the function of the trial court nor an appellate court to improve the Petitioner's mood. The conditions of home confinement were modified to permit outdoor exercise. The appeal apparently seeks more outdoor exercise. Again, the trial court's order would appear to be reasonable in regards to balancing the Petitioner's exercise regimen and the penal nature of this home incarceration sentence.

### **III.**

#### **CONCLUSION AND RELIEF SOUGHT**

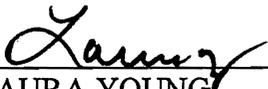
Based upon the foregoing, the Respondent respectfully requests that this Honorable Court affirm the orders of the Circuit Court of Harrison County, entered July 11, 2011, denying the petition for writ of habeas corpus (although modifying the terms of home confinement in some respects). The lower court did not abuse its discretion in not granting the Petitioner probation, counsel was not ineffective, and the terms of conditions of home confinement are reasonable and constitutional.

*Respectfully submitted,*

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

*by Counsel,*

DARRELL V. MCGRAW, JR.  
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**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*SUMMARY RESPONSE ON BEHALF OF ANNABELLE SCOLAPIA*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 13<sup>th</sup> day of December, 2011, addressed as follows:

To: Steven T. Cook, Esq.  
Stapleton Law Offices  
400 5th Avenue  
Huntington, WV 25701

  
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LAURA YOUNG