

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA  
CIRCUIT CLERK  
ROBERT HOLCOMB, NICHOLAS COUNTY, WV  
PETITIONER  
2012 MAR -2 AM 10: 09

VS://                      CASE NO. 09-C-44

DAVID BALLARD, Warden, etc.,  
RESPONDENT,

### ORDER

The court having received a written request from T. J. Drake, counsel for the petitioner in this action to be relieved as court appointed counsel for the above named petitioner, and the court having been further informed that the petitioner desires to appeal this court's order denying habeas corpus relief, the court being of the opinion that good cause exists to relieve counsel, it is accordingly ADJUDGED and ORDERED that T. J. Drake be relieved in this matter, as counsel for the petitioner, and that Steve Nanners be appointed to represent the petitioner in the pursuit of any appeal in this habeas corpus petition.

The Court further being of the opinion that good cause does exist to extend the appeal times in this matter, it ADJUDGED and ORDERED that the period for the petitioner to file a notice of intent to appeal shall be 30 days from the date of the entry of this order of appointment and four months from this date to perfect the appeal, unless the Supreme Court of Appeals of West Virginia shall direct other action in regards to this matter.

It is further ORDERED that the Clerk shall send certified copies of this Order to counsel of record, the new counsel and to the petitioner,

Robert Holcomb, Inmate # 15955-2, Mt. Olive Correctional Facility, One  
Mountainside Way, Mt. Olive, West Virginia.

ENTERED this the 29 day of February, 2012.



JACK ALSOP, JUDGE  
Sitting by Special Assignment

A true ~~copy~~ <sup>copy</sup> certified this  
29 day of March, 2012  
Debbie FaceMire  
DEBBIE FACEMIRE CIRCUIT CLERK  
Nicholas County Circuit Court  
Summersville, WV 26651  
By \_\_\_\_\_, Deputy

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IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

ROBERT LEE HOLCOMB,

Petitioner,

v.

Case No.: 09-C-44  
Honorable Jack Alsop

DAVID BALLARD, Warden,  
Mount Olive Correctional Center,

Respondent.

ORDER DENYING POST-CONVICTION HABEAS CORPUS PETITION

This matter came before this Court on the Petition for post-conviction habeas corpus relief filed pro se, by Petitioner, on the 17<sup>th</sup> day of March, 2009. On the 28<sup>th</sup> day of October, 2009, this Court appointed Mr. Thomas J. Drake as counsel for Petitioner. On April 22, 2011, Petitioner, by and through counsel filed "Petition for Writ of Habeas Corpus Ad Subjiciendum", this being Petitioner's second habeas petition. On the 22<sup>nd</sup> day of April, 2011, a status hearing was held with regard to this matter, at which time this Court ordered a competency evaluation be performed on Petitioner. On the 19<sup>th</sup> day of July, 2011, this Court entered an order finding, based on the psychiatric evaluation performed on Petitioner by Clayman & Associates, PLLC, Petitioner competent to stand trial and understand the proceedings before this Court. Further, after receiving the evaluation, the Court conducted a thorough review of the record and determined an evidentiary hearing would be needed to fully and fairly adjudicate Petitioner's claim.

An Omnibus Habeas Hearing was held before this Court on the 26<sup>th</sup> day of August, 2011. The Petitioner appeared in person and with counsel, Thomas J. Drake, and the Respondent

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appeared by counsel, James R. Milam, II, Prosecuting Attorney of Nicholas County, West Virginia. After carefully considering the evidence, the arguments presented by each party, the parties' briefs, the record of Petitioner's underlying trials, and pertinent legal authority, the Court has concluded the Petitioner has failed to establish a basis for the relief requested in his Habeas Petition. The reasons for this decision are set forth below.

### I. FINDINGS OF FACT

1. The Court takes judicial notice of all proceedings and the record in the underlying case, to wit: 06-F-4.
2. The Circuit Court of Nicholas County, West Virginia, has proper jurisdiction in this matter pursuant to W.Va. Code §53-4A-1 – 13 et. seq.
3. The Petitioner was charged in case number 06-F-4 with the felonious offense of Child Neglect Creating the Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e), in a one count indictment returned by the Grand Jury of Nicholas County, West Virginia, on January 10, 2006.
4. The case was tried on April 4 and 5, 2006, in the Circuit Court of Nicholas County, West Virginia. On April 5, 2006, a petit jury returned a verdict finding the Petitioner guilty of Child Neglect Creating Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e), as charged in the indictment.
5. On the 5<sup>th</sup> day of April, 2006, the State of West Virginia, through counsel, Kelly Hamon, filed an "Information of Prior Conviction" against Petitioner, in conformity with West Virginia Code §61-11-18, the West Virginia recidivist statute.

6. On the 22<sup>nd</sup> day of May, 2006, Judge Johnson of the 28<sup>th</sup> Judicial Circuit of West Virginia, voluntarily recused himself, based on the Information filed by the State of West Virginia, and requested a judge be assigned in his place

7. On June 2, 2006, Robin Davis, Chief Justice of the West Virginia Supreme Court of Appeals, entered an order appointing the Honorable Jack Alsop to preside over sentencing and the recidivist proceedings in Petitioner's underlying case.

8. On the 1<sup>st</sup> day of August, 2006, a petit jury convened to hear testimony regarding the Information filed against Petitioner. After hearing the testimony, the jury returned a verdict finding Petitioner to be the same person previously convicted of the prior felonies as found in the Information filed by the State of West Virginia on 5<sup>th</sup> day of April, 2006.

9. On September 1, 2006, Petitioner filed a Motion to Vacate Judgment and Grant a New Trial on the underlying felony charge of Child Neglect Creating the Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e), alleging improper jury instruction.

10. By Order entered on the 13<sup>th</sup> day of October, 2006, this Court granted Petitioner a new trial based on improper jury instruction in Petitioner's first trial.

11. The case was again tried on January 4, 2007, in the Circuit Court of Nicholas County, West Virginia. On January 4, 2007, a petit jury again returned a verdict finding the Petitioner guilty of Child Neglect Creating Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e), as charged in the indictment.

12. At the conclusion of the trial the Prosecuting Attorney of Nicholas County, West Virginia, stated that the State intended to file a Recidivist Information seeking a life sentence for Petitioner.

13. On January 5, 2007, the State of West Virginia filed an "Information of Prior Conviction" seeking the imposition of a life sentence for Petitioner based on the Recidivist Statute, West Virginia Code §61-11-19. This Recidivist information alleged the same acts as found in the Recidivist Information filed by the State of West Virginia on April 5, 2006.

14. The Petitioner was served with said "Information of Prior Conviction" on the 8<sup>th</sup> day of January, 2007, the final date of the September 2006 term of court.

15. A hearing was held on the 23<sup>rd</sup> day of April, 2007, before the Honorable Jack Alsop to hear any post-trial motions prior to sentencing.

16. The Petitioner appeared before this Court on the 30<sup>th</sup> day of April, 2007, regarding the charges set forth in the Recidivist Information. At that time, Petitioner stipulated that he was the same individual named in the Recidivist Information, reserving the right to challenge the propriety of the Recidivist Information filed.

17. On the 30<sup>th</sup> day of April, 2007, after hearing the stipulations of Petitioner, this Court sentenced Petitioner to life in prison, based on West Virginia Code §61-11-19.

18. On the 13<sup>th</sup> day of February, 2008, Petitioner, by and through counsel, filed an Appeal with the West Virginia Supreme Court of Appeals as to the underlying conviction and this Court's life sentence imposed in this matter.

19. On September 4, 2008, the West Virginia Supreme Court of Appeals refused Petitioner's appeal.

## II. PRELIMINARY LEGAL AUTHORITY

In post-conviction habeas corpus claims, the Petitioner is required to meet three preliminary standards before their claim will be recognized. "A habeas corpus proceeding is not

a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979). Therefore, the first requirement for post-conviction habeas corpus requires the Petitioner to allege that he or she has been denied a constitutional right. In this case, the Petitioner makes two specific allegations regarding the denial of his constitutional rights. Petitioner also alleges numerous other grounds in which his constitutional rights were violated under *Paragraph 3* of his Habeas Corpus Petition. Each of these allegations along with the alleged constitutional violations will be discussed more thoroughly in this Court’s *Discussion* section below. This Court recognizes that based on the allegations contained in Petitioner’s “Petition for Writ of Habeas Petition Ad Subjiciendum”, the Petitioner has satisfied the first requirement by alleging a violation of his constitutional rights.

The Petitioner must next show the alleged constitutional violation has not been previously and finally adjudicated or waived, and thus barred by W.Va. Code §53-4A-1 (b)(c) [1967]. In this case, Petitioner alleges numerous grounds in which his constitutional rights were violated. Trial counsel did not allege any of the constitutional violations raised in Petitioner’s “Petition for Writ of Habeas Petition Ad Subjiciendum” before in any other Habeas proceedings in the underlying case, to wit: 06-F-4. Additionally, this Court has not decided any claims regarding the issue of ineffective assistance of counsel; therefore, this Court has not previously decided any of the alleged claims in Petitioner’s Habeas Corpus Petition. Thus Petitioner has satisfied the second preliminary requirement.

Finally, the Court must determine whether the Petitioner has previously waived his rights with regard to the grounds alleged in his “Petition for Writ of Habeas Corpus Ad Subjiciendum”.

The Petitioner in this case has not waived any of his constitutional rights under the alleged grounds of the Petition; therefore, the third preliminary requirement has been met.

With these three preliminary standards satisfied, this Court proceeded to consider the merits of the claims alleged in Petitioner's Amended Omnibus Habeas Petition.

### III. DISCUSSION

#### PETITIONER'S GROUNDS FOR RELIEF

The Petitioner raises two main issues in his writ of habeas corpus. The Petitioner alleges the following grounds resulted in the denial of his constitutional rights: 1) Denial of Procedural Due Process and 2) Excessive Sentence. Petitioner further advances nineteen separate allegations set forth as "Additional grounds upon which Petitioner is being held unlawfully" in his Petition for Habeas Corpus. These allegations involve various constitutional violations which the Court will address more fully below. Petitioner advances these arguments under both the United States Constitution and the West Virginia Constitution. To prevail in post-conviction habeas corpus proceedings, "Petitioner has the burden of proving, by a preponderance of the evidence, the allegations contained in his petition or affidavit which would warrant his release." *State ex rel. Scott v. Boles, Syllabus pt. 1*, 150 W.Va. 435, 147 S.E.2d 426 (1966). This Court will address each of the issues raised by Petitioner, and any sub-issues that may arise, in turn.

#### A. PROCEDURAL DUE PROCESS

Petitioner advances one ground in which his procedural due process rights were violated. Petitioner advances this argument based on a violation of Article III § 10, of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution.

**Ground One: Procedural Due Process Violation**

Petitioner contends the trial court violated his procedural due process rights when it sentenced him to life in prison for the remainder of his natural life based on West Virginia Code §61-11-18(a).<sup>1</sup> Specifically, Petitioner contends that the trial court violated West Virginia Code §61-11-19(a), as this section requires, in pertinent part: "Said Court shall, *before expiration of the term* at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not." *Emphasis added.* Petitioner advances this argument under *Paragraph 2, subsection a*, of his Habeas Corpus Petition. This Court is of opinion Petitioner's due process rights were not violated and Petitioner's argument with regard to this matter is without merit.

This Court will begin its analysis by stating the record reflects Petitioner was granted two (2) separate jury trials with regard to the underlying criminal matter in this case. The first trial being held on the 4<sup>th</sup> and 5<sup>th</sup> days of April, 2006; and the second being held on January 4, 2007. Following the conclusion of both jury trials, the State of West Virginia filed a Recidivist Information, alleging Petitioner was the same individual that had committed three or more prior felonies. On the 1<sup>st</sup> day of August, 2006, the Petitioner was brought before the Court and given a jury trial with regard to the Recidivist Information.<sup>2</sup> This was following the first trial. The Petitioner was found to be the same individual as that listed in the Recidivist Information and as

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<sup>1</sup> West Virginia Code §61-11-18 and §61-11-19 comprise the Recidivist Statute in West Virginia.

<sup>2</sup> As to the first Recidivist Information filed on April 6, 2006, the Petitioner was arraigned, and made aware of the charges against him, on April 25, 2006, which was within the same term he was convicted as required by West Virginia Code §61-11-18; however, the trial with regard to the Recidivist Information was not held until the May 2006 term of court.

such a candidate for sentencing under the recidivist statute. Subsequent to being found guilty under the Recidivist Information, Petitioner filed a motion requesting a new trial based on inappropriate jury instruction and was granted such. On the 4<sup>th</sup> day of January, 2007, Petitioner received a new trial by a jury of his peers and was found guilty of the offense of Child Neglect Creating Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e). The State of West Virginia again filed a Recidivist Information against Petitioner on the 5<sup>th</sup> day of January, 2007. The Recidivist Information filed was identical to that which was filed following Petitioner's first jury trial. Petitioner did not receive service of the Information filed by the State of West Virginia until January 8, 2007, the final day of the September 2006 term of court.<sup>3</sup> The Petitioner was not arraigned on this Recidivist Information until the January 2007 Term.

The trial court made the following remarks at the close of Petitioner's jury trial on the 4<sup>th</sup> day of January, 2007 (1/4/07 Trial Transcript, Pages 208 – 209):

THE COURT: In regards to this matter, out of an abundance of caution – and I haven't decided exactly how we will proceed from this point forward as to the recidivist issue, the State of West Virginia – they'll have until about 4:00 o'clock tomorrow since tomorrow concludes the term – will need to file an information in this case charging the prior offenses, and then we will deal post-trial as to whether or not I believe the defendant's entitled to a new trial on the issue of recidivist, or whether or not I will impose sentence based upon the prior finding of the jury on the recidivist statute.

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<sup>3</sup> Although Petitioner was tried in the September 2006 term of court on January 4, 2007, in the Circuit Court of Nicholas County, West Virginia, the Order from that jury trial was not entered until March 5, 2007, the January 2007 term of court.

As such the trial court was aware the September term of court was set to expire and Petitioner would be unable to be brought before the court prior to the end of the term. However, the trial court protected itself and its right to sentence Petitioner pursuant to West Virginia Code §61-11-18, as Petitioner had already been brought before the Court, subsequent to his first jury trial, and notified of the charges alleged in the Recidivist Information filed by the State of West Virginia. Therefore, the trial court remained compliant with the requirements of §61-11-18, as Petitioner was brought before the Court prior to the expiration of the term in which the Recidivist Information was filed. Although Petitioner was granted a new trial regarding the criminal charges in the underlying case, this did not affect the fact that he was previously brought before the Court to answer the allegations in the Recidivist Information.

This Court recognizes Petitioner was not brought before the Court prior to the expiration of the term in which his second jury trial was held. However, the first Recidivist Information filed against Petitioner proceeded in a timely fashion as required by West Virginia Code §61-11-19, as Petitioner appeared before the Court to answer the allegations contained in the first Recidivist Information. This Court can find nowhere in the Code, and Petitioner cites no authority, that requires if a recidivist trial has been held and the verdict in the underlying matter is then set aside, the case is then re-tried, and the defendant is again found guilty, that the defendant be granted another separate trial regarding the recidivist information. Although the State of West Virginia did file a Recidivist Information following the conclusion of Petitioner's second jury trial, it was at the request of the trial court, which adequately protected itself with its comments following said trial. Further, Petitioner was aware of all the allegations contained in the Recidivist Information as it was identical to the Recidivist Information filed following Petitioner's first jury trial.

The Petitioner in this case cites *State v. Cavallaro*, 210 W. Va. 237, 557 S.E.2d, claiming the facts to be identical to his case. This Court does not agree with this analysis. There are two key distinctions between Petitioner's case and the *Cavallaro* case. First Petitioner had two separate jury trials and was found guilty at the conclusion of each trial. The defendant in *Cavallaro* had only one trial. Secondly, following Petitioner's first jury trial, a petit jury was summonsed to hear the allegations and determine if Petitioner was the same individual named in the Recidivist Information. The jury found Petitioner to be the same individual and therefore guilty. Further, this trial regarding the Recidivist Information was held within the same term as Petitioner's first jury trial. This did not occur in *Cavallaro*, as the defendant in *Cavallaro* was not brought before the Court to answer to the allegations in the Recidivist Information until the following term. Although Petitioner was again tried on the underlying charges and again found guilty subsequent to the recidivist proceedings, this does not invalidate those proceedings. The State of West Virginia did again file a Recidivist Information against Petitioner; however, none of the facts changed between the filing of the first and second Recidivist Information. Therefore, Petitioner had adequate notice of the allegations against him.

Accordingly, this Court finds Petitioner's due process rights were not violated as Petitioner was brought before the court to answer to the Recidivist Information charges prior to the expiration of the term in which he was tried. Additionally, a petit jury was summonsed to hear testimony regarding the Recidivist Information and determined Petitioner was in fact the same person listed in the Recidivist Information filed by the State of West Virginia on the 5<sup>th</sup> day of April, 2006.

The trial court gave Petitioner a second hearing with regard to the Recidivist Information after Petitioner was convicted by a petit jury, for the second time, on the underlying charge;

although this hearing was not within the time limits as described in West Virginia Code § 61-11-19, this Court is of the opinion this is harmless error. There is nothing in the Code that requires a second Information be filed with regard to a recidivist conviction, but the trial court required the State to file a second Recidivist Information and gave Petitioner a second hearing with regard to this matter out of an abundance of precaution.

As such, this Court is of the opinion Petitioner was given a fair trial and the Recidivist proceedings advanced in a timely manner and were within the restrictions of West Virginia Code §61-11-19. Accordingly, Petitioner's procedural due process rights were not violated, and Petitioner is not entitled to the relief requested based on *Paragraph 2, subsection a*. The sentence imposed by the trial court is affirmed.

#### **B. EIGHTH AMENDMENT VIOLATIONS**

Petitioner advances one ground in which his Eighth Amendment rights were violated. Petitioner claims he was given an excessive sentence for the crime for which he was convicted. Petitioner advances this argument as a violation of Article III § 5, of the West Virginia Constitution and the Eighth Amendment of the United States Constitution.

#### **Ground One: Excessive Sentence**

Petitioner alleges that the sentence imposed by the trial court was excessive in nature and as such violated his constitutional rights. Petitioner advances this argument under *Paragraph 2, subsection b*, of his Habeas Petition. This Court finds Petitioner's argument to be without merit and finds the trial court acted within its authority with regard to this matter.

Petitioner was convicted of Child Neglect Creating Risk of Serious Bodily Injury or Death in violation of West Virginia Code §61-8D-4(e), in the underlying case.<sup>4</sup> Further, the Petitioner in this case had four (4) prior felony convictions, one for unlawful wounding, a crime of violence against the person. The State of West Virginia alleged these felonies against Petitioner in a Recidivist Information following the conclusion of each of Petitioner's jury trials; thus informing Petitioner of the allegations against him. On the 30<sup>th</sup> day of April, 2007<sup>5</sup>, Petitioner admitted to being the individual guilty of three of the said felonies found in the Recidivist Information.<sup>6</sup> Although this Court recognizes that the recidivist statute can be applied disproportionately, and can be excessive in nature, that was not case with regard to this matter.

"The recidivist statute is designed to deter those who are incapable of conforming their conduct to legitimately enacted obligations protecting society." *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002). The West Virginia Supreme Court of Appeals has held "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syllabus point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

In this case, Petitioner had three (3) prior felonies, two of which arose out of the same transaction and were therefore viewed as one (1) for purposes of recidivist proceedings. On the 31<sup>st</sup> day of March, 1982, Petitioner was convicted of the felonious offense of unlawful

<sup>4</sup> This is an offense of violence against a person, more specifically a child.

<sup>5</sup> Although Petitioner did make admissions on this day, Petitioner was previously found to be the same person named in the Recidivist Information on the 1<sup>st</sup> day of August, 2006, by a jury of his peers.

<sup>6</sup> Specifically, Petitioner made admissions that he was the same individual convicted of the felonious offenses of: 1) Grand Larceny, in case number 81-F-60, 2) Unlawful Wounding, in case number 81-F-88, and 3) Receiving and Transferring Stolen Property, in case number 82-F-75.

wounding, a crime of violence against the person. In the underlying case, Petitioner was convicted of Child Neglect Creating Risk of Serious Bodily Injury or Death in violation of West Virginia Code §61-8D-4(e), another crime against the person. The trial court noted that this was a tough decision with regard to the sentence of life imprisonment. Specifically the Court noted that had Petitioner not been convicted of unlawful wounding, a crime against the person, the court would have likely declined imposing a life sentence. *See* 4/30/07 Hearing Transcript, Page 18, Lines 7 – 23. Therefore, the trial court recognized the seriousness of a life sentence and sentenced Petitioner to such based on the fact he had two felony charges that were crimes of violence against the person.

Accordingly, this Court finds the sentence of life imprisonment as imposed on Petitioner was not excessive in nature and was done in accordance with West Virginia Code §61-11-18(c). Further, Petitioner had a lengthy criminal history prior to the commission of the underlying offense and the recidivist statute was designed to deter repeat offenders such as Petitioner. As such, Petitioner is not entitled to the relief requested in *Paragraph 2, subsection b*, of his Petition for Habeas Corpus.

**C. ADDITIONAL GROUNDS UPON WHICH PETITIONER IS BEING  
UNLAWFULLY HELD**

Petitioner advances nineteen separate grounds in which his constitutional rights were violated throughout the pendency of his underlying case. Petitioner asserts each of these arguments under *Paragraph 3* of his “Petition for Writ of Habeas Corpus Ad Subjiciendum”. Petitioner alleges numerous constitutional violations, involving numerous constitutional

provisions. The Court will address each of these allegations and the violations of such provisions below.

**Ground One: Unconstitutional Statute**

Petitioner alleges the statute under which his conviction was obtained is unconstitutional. Petitioner advances this argument under *Paragraph 3, subsection a*, of his Writ of Habeas Corpus. Petitioner does not specify as to which statute, West Virginia Code §61-11-18(a) or West Virginia Code §61-8D-4(e), that he is referring to. However, in either case, the Court finds Petitioner's argument to be without merit as Petitioner points this Court to nothing in the record or elsewhere that would support his contention with regard to either Code section.

Further, with regard to West Virginia Code §61-11-18(a), the West Virginia Supreme Court of Appeals held in *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800, that West Virginia Code §61-11-18(a) is a valid constitutional provision. Specifically, the Court held a "life sentence as recidivist would not be cruel and unusual punishment and would not violate proportionality requirement of state constitution." Therefore, with regard to West Virginia Code §61-11-18(a), the statute has been found to be constitutionally valid.

As to West Virginia Code §61-8D-4(e), this Court could find no language or case law that would support Petitioner's contention that this statute is unconstitutional.

Accordingly, Petitioner's argument with regard to Ground One is without merit and as such does not provide Petitioner with the grounds for the relief requested.

### Ground Two: Faulty Indictment

Petitioner claims the indictment, on its face, does not charge Petitioner with an offense. Petitioner advances this as *Paragraph 3, subsection b*, in his Petition for Habeas Corpus. Petitioner was charged with the felonious offense of Child Neglect Creating the Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e), in a one count indictment returned by the Grand Jury of Nicholas County, West Virginia, on January 10, 2006. The record further reflects the indictment in case number 06-F-4 charges Petitioner with the appropriate statutory language.

Accordingly, Petitioner's argument as to Ground Two fails, as a matter of law, as the indictment clearly charged Petitioner with a crime.

### Ground Three: Prejudicial Pre-Trial Publicity

Petitioner claims prejudicial pre-trial publicity prevented him from receiving a fair trial, in violation of the Sixth Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution. Petitioner advances this argument under *Paragraph 3, subsection c*, of his Habeas Corpus Petition. This Court finds Petitioner's argument to be without merit. Petitioner points this Court to nothing in the record that would indicate Petitioner did not receive a fair and impartial trial by a jury of his peers as required by the Constitution. As such, Petitioner's argument as to Ground Three fails as Petitioner provides no evidence that would justify the relief requested.

**Ground Four: Involuntary Guilty Plea**

Petitioner advances, under *Paragraph 3, subsection d*, of his Petition for Habeas Corpus, that he involuntarily pled to the allegations set forth in the recidivist information because his attorney told him that “he had no choice.” Petitioner claims this is a violation of his Fourteenth Amendment due process rights. This Court finds Petitioner’s argument to be without merit as Petitioner provides this Court with nothing on the record to indicate such occurred. Further, the following conversation took place between the Court and Petitioner regarding his admissions to the Recidivist Information filed by the State of West Virginia (4/30/07 Hearing Transcript, Page 8, Lines 12-19):

THE COURT: Do you understand that by making the admissions as to this – four of these offenses as set forth in the agreement, that this Court will find that you have four felony – previous felony convictions and that, under the recidivist statute in West Virginia, you could be sentenced to the penitentiary for the rest of your natural life? Do you understand that?

MR. HOLCOMB: Yes, sir.

The Court further questioned Petitioner regarding the voluntariness of his admission and Petitioner testified that he had not been threatened or promised anything to make such admissions and Petitioner was making such admissions based on his own free will, his own voluntary act. Petitioner further testified he was not under the influence of drugs or alcohol or suffering from symptoms of withdraw from such. *See* 4/30/07 Hearing Transcript, Pages 9 -10.

As such, this Court is of the opinion Petitioner’s argument with regard to an involuntary admission is without merit. Petitioner provides no evidence in the record to indicate he was coerced into admitting to the allegations contained in the Recidivist Information filed by the State of West Virginia. Accordingly, Ground Five fails as a matter of law.

**Ground Five: Lack of Mental Capacity**

Petitioner claims he lacked the mental capacity to be culpable at the time of the alleged offense. Petitioner advances this argument as *Paragraph 3, subsection e*, in his Habeas Corpus Petition. After a review of the record in the underlying case, this Court is of the opinion Petitioner's argument is not supported by the record and as such does not provide a substantial justification for the relief requested.

Petitioner made no reference to his inability to understand both the nature of the crime and his actions at the time the offense was committed during either trial in the underlying case. The only evidence in the record regarding Petitioner's mental capacity is the fact that he was under the influence of alcohol at the time the offense was committed, which is not an affirmative defense to the crime for which he is charged. Further, on the 7<sup>th</sup> day of June, 2011, Petitioner had a psychological evaluation, performed by Psychologist Stephen Fink of Clayman & Associates. Mr. Fink specifically found, "there is nothing in the record, psychological testing or interview which would indicate that Mr. Holcomb does or has ever experienced psychotic symptomatology that might render him incapacitated." *See Forensic Psychological Evaluation, Page 11, Clayman & Associates, Stephen Fink.*

Accordingly, Petitioner's argument with regard to mental competency at the time the offense was committed fails as Petitioner provides nothing in the record to indicate he was mentally incompetent at the time the offense was committed; in fact, the record indicates the contrary. As such, Petitioner's argument with regard to Ground Five does not provide grounds for the relief requested.

**Ground Six: Mental Capacity**

Petitioner alleges he was not competent at the time of trial. Petitioner advances this argument under *Paragraph 3, subsection f*, of his Petition for Habeas Corpus. As discussed in *Ground Five: Lack of Mental Capacity* above, this Court finds Petitioner's argument to be without merit as the evidence in the record is to the contrary.

A psychological evaluation was performed on Petitioner by Stephen Fink of Clayman & Associates, on the 7<sup>th</sup> day of June, 2011. With regard to Petitioner's mental capacity at the time of trial Mr. Fink finds as follows:

"It should be noted, that at the time of his trial in January of 2007, by his own admission, he had not used any drugs since his bond was rescinded in October of 2005. Therefore, any substances he took prior to October of 2005 would have cleared and had no impact on his cognitive ability fifteen months later. His contention that he was not used to making his own decisions prior to his trial in 2007, although perhaps based on fact, nevertheless does not reflect a psychological disorder that would incapacitate him and preclude him from assisting in his defense. His relatively clear thinking at the time of his trial is further evidenced by his own admission that he argued with his attorney concerning the decision not to contact witnesses for his case, and his admission that he determined to file a habeas corpus petition as soon as his trial ended because he knew he had not been adequately represented." See Forensic Psychological Evaluation, Page 11, Clayman & Associates, Stephen Fink.

Accordingly, this Court finds Petitioner's argument as to Ground Six fails as a matter of law and as such does not provide justification for the relief requested.

**Ground Seven: Ineffective Assistance of Counsel**

Petitioner advances, as *Paragraph 3, subsection g*, of his Petition for Habeas Corpus, that he was denied effective assistance of counsel during the appeal process, as appellate counsel failed to designate the record, request a transcript, or provide the record to the reviewing court. These allegations are a violation of Article 3 § 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. "In determining

appropriate relief in habeas corpus for ineffective assistance of counsel at the appellate stage, the court should consider whether there is a probability of actual injury as a result of such ineffective assistance.” *Cannellas v. McKenzie*, 160 W.Va. 431, 236 S.E.2d 327 (1977).

This Court finds Petitioner’s argument as to Ground Seven to be wholly without merit and the allegations alleged to be contrary of what is required by the West Virginia Rules of Appellate Procedure. Rule 3 of the West Virginia Rules of Appellate Procedure dictates what is required of appellate counsel with regard to filing a petition for appeal. In this case, the record reflects counsel for Petitioner complied with the rules as outlined in Rule 3 of the West Virginia Rules of Appellate Procedure, by filing an appeal with the West Virginia Supreme Court of Appeals on the 13<sup>th</sup> day of February, 2008. Further, the Petitioner cites nothing in the record to indicate the Petition did not comply with the requirements of Rule 3 of the West Virginia Rules of Appellate Procedure.

Petitioner claims that appellate counsel was ineffective because appellate counsel failed to request, and provide, a transcript to the reviewing Court. Pursuant to Rule 4A(a) of the West Virginia Rules of Appellate Procedure, this is not required.

Accordingly, this Court finds Petitioner’s argument with regard to Ground Seven to be without merit, and as such will not grant the relief requested by Petitioner.

**Ground Eight: Prosecutorial Misconduct**

Petitioner contends the State of West Virginia failed to provide potentially exculpatory evidence when it failed to provide the video of the alleged incidents from the dash board camera of the police officer’s cruiser. Petitioner claims this prejudicial act of the Prosecuting Attorney resulted in the denial of his due process rights as outlined in the Fourteenth Amendment of the

United States Constitution, and his right to a fair and impartial trial as guaranteed by the Sixth Amendment of the United States Constitution. Petitioner advances this argument as *Paragraph 3, subsection h*, of his Habeas Petition.

This Court finds Petitioner's argument to be without merit as Petitioner has directed this Court to nothing on the record which would indicate any evidence was withheld and further Petitioner provides nothing in the record that said evidence was exculpatory in nature. The burden of proof lies on Petitioner to show that such evidence was in fact exculpatory and would have made a difference in his trial. As Petitioner has failed to meet this burden, this Court finds Petitioner's argument as to Ground Eight fails as a matter of law.

**Ground Nine: Prosecutorial Misconduct**

Petitioner alleges, under *Paragraph 3, subsection i*, of his Petition for Habeas Corpus, the State of West Virginia knowingly used perjured testimony as the investigating officer's testimony differed greatly at trial from that given to the Grand Jury. Petitioner does not however, point this Court to any evidence or statements in the record that would reflect any inconsistent testimony on behalf of the investigating officer. Accordingly, this Court finds Petitioner's argument with regard to Ground Nine to be without merit as Petitioner cites nothing in the record and places no evidence before the Court showing said conflicting testimony.

**Ground Ten: Pre-Sentence Investigation**

Petitioner contends the information contained in his pre-sentence report in the underlying case was erroneous. Petitioner advances this argument under *Paragraph 3, subsection j*, of his Petition for Habeas Corpus. Petitioner cites no specific information that was erroneous, but

simply makes a blanket statement. The Court finds this argument to without merit as this was directly addressed by the Court.

On the 30<sup>th</sup> day of April, 2007, a hearing was held with regard to the Recidivist Information filed against Petitioner and at that time, the Court specifically addressed the issue of erroneous information in the pre-sentence report through the following interaction with counsel (4/30/07 Hearing Transcript, Page 16, Lines 2-10):

THE COURT: The Court – The record will reflect the Court has directed that a pre-sentence investigation be made in this case, and that there has been previously provided to counsel for the parties the pre-sentence investigation.

To your knowledge, Mr. Williams, are there any factual inaccuracies contained within that report?

MR. WILLIAMS: (Shook head.) No factual inaccuracies, your Honor.

As such, this Court finds Petitioner's argument with regard to Ground Ten to be without merit.

**Ground Eleven: Ineffective Assistance of Counsel**

Petitioner alleges he was denied effective assistance of counsel, as required by Sixth Amendment of the United States Constitution and Article 3 § 14 of the West Virginia Constitution. Petitioner advances this argument under *Paragraph 3, subsection k*, of his Habeas Corpus Petition. Petitioner specifically contends that his trial counsel was ineffective because counsel was not prepared for trial, failed to call witnesses to testify on Petitioner's behalf, and failed to reasonably investigate the matter in the underlying case prior to trial. Other than these

broad allegations, Petitioner does not provide the Court with any evidence in record that would provide prove of these allegations.

The West Virginia test by which claims of ineffective assistance of counsel are evaluated is set forth in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) and *Strickland v. Washington*, 446 S.E.2d 669 (1984). This two-prong test requires an appellant or habeas petitioner claiming ineffective assistance of counsel to prove: (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors; the result of the proceedings would have been different. In applying the "objectiveness standard," found in part one of this test, the Supreme Court has held that "a reviewing court must ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Id.*, Syllabus pt. 6, in part. After reviewing the record based on the *Strickland/Miller* test set forth above, this Court is of the opinion Petitioner's argument is without merit.

As previously stated Petitioner directs this Court to nothing on the record which would indicate ineffective assistance of counsel. The Court does recognize that counsel did not call witnesses on behalf of Petitioner, even though Petitioner requested such be done. However, this can be attributed to trial strategy, which the Court must consider based on *State v. Thomas*, 157 W.Va. 640, 230 S.E.2d 445 (1974). In *State v. Thomas*; the Court concluded that in light of counsel's performance the Court must consider strategy and tactic in determining if his conduct can be deemed in the best interest of his client; and effective assistance will be found unless no reasonably qualified defense attorney would have so acted in the defense of the accused. *Id.*, *Syl. Pt. 21*; *State v. Wilson*, 190 W.Va. 583, 439 S.E.2d 448 (1993). The Court cannot and will not begin to try to figure out the inter-workings of trial counsel's mind. However, this Court is of

the opinion trial counsel acted reasonably in refraining from calling witnesses, and this was simply part of trial counsel's trial strategy and tactic.

Additionally, Petitioner had filed a Motion for Ineffective Assistance of Counsel but choose to withdraw said Motion on the 23<sup>rd</sup> day of May, 2006. This motion to withdraw was granted. The Court finds this evidence to be very persuasive.

Accordingly, this Court is of the opinion Petitioner was provided with effective assistance of counsel as constitutionally required, and as such does not establish a basis for relief in Ground Eleven.

#### Ground Twelve: Arrest

Petitioner contends there were irregularities in his arrest because the arresting officer had no reason or basis to stop the vehicle Petitioner was driving. Petitioner advances this argument under *Paragraph 3, subsection 1*, of his Petition for Habeas Corpus. After a review of the record this Court finds this argument to be without merit.

The Court finds the testimony given by Deputy Holdren on the 4<sup>th</sup> day of January, 2007, showed the officer had reasonable articulable suspicion, based on information he had received from another officer, to stop the car driven by Petitioner on the night of Petitioner's arrest.<sup>7</sup> See 1/4/07 Hearing Transcript, Pages 72-73. This information is also reflected in Deputy Holdren's police report from the night of Petitioner's arrest. Further, the officer's testimony indicates that Petitioner failed to signal at the intersection of Routes 20 and 39, which is reasonable grounds for the officer to initiate a stop of the vehicle. See 1/4/07 Trial Transcript, Page 73, Lines 10 – 16.

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<sup>7</sup> Deputy Holdren had received information from another officer to be on the lookout for a blue, Dodge Daytona with North Carolina plates as the person driving said vehicle was the subject of a warrant in Nicholas County, West Virginia. Petitioner was the individual driving said vehicle.

Accordingly, this Court finds there were no irregularities with regard to Petitioner's arrest as Deputy Holdren had reasonable articulable suspicion to stop the vehicle Petitioner was driving. As such, Petitioner's argument with regard to Ground Twelve fails.

**Ground Thirteen: Excessive Bail**

Petitioner alleges the bail set in this matter was excessive and unreasonable, in violation of his Eighth Amendment rights. Petitioner advances this allegation as *Paragraph 3, subsection m*, of his Writ of Habeas Corpus. After a review of the record the Court finds Petitioner's allegation with regard to this matter to be meritless.

The record in Petitioner's underlying case indicates that prior to committing the offense in case number 06-F-4, Petitioner had twenty-six (26) other criminal convictions, both felony and misdemeanor offenses. Additionally, in 2002, the Petitioner posted bond in Nicholas County, West Virginia, for criminal charges, and failed to appear as required. Petitioner did not avail himself to the Court until being arrested for the charges in the underlying case. Based on these facts, the Honorable Gary Johnson set bail in the underlying matter at One-Hundred-Fifty Thousand dollars (\$150,000). This Court is of the opinion the Honorable Gary Johnson acted within his discretion based on Petitioner's prior criminal history and failure to appear.

Accordingly, this Court finds Petitioner was not given an unreasonable, excessive bail based on his prior criminal history. As such, Petitioner's constitutional rights were not violated and Petitioner's argument with regard to Ground Thirteen fails as a matter of law.

**Ground Fourteen: Defective Indictment**

Petitioner contends, under *Paragraph 3, subsection n*, of his Petition for Writ of Habeas Corpus, that there were defects in Petitioner's indictment that would warrant a new trial. After reviewing the record this Court finds this argument to be without merit. The record reflects Petitioner was granted a new trial based on improper jury instructions by the Honorable Jack Alsop on the 13<sup>th</sup> day of October, 2006. Petitioner was then tried by a petit jury, on the 4<sup>th</sup> day of January, 2007, and found guilty of the crime charged in the indictment. The record reflects that neither Petitioner nor counsel for Petitioner raised an issue with regard to the indictment in the underlying matter during either trial. Further, the Court reviewed the record and found no defects in the indictment in the underlying matter that would necessitate Petitioner receive a new trial.

Accordingly, Petitioner's argument as to Ground Fourteen does not provide justification to grant the relief requested.

**Ground Fifteen: Ineffective Assistance of Counsel**

Petitioner alleges his constitutional rights were violated when counsel for Petitioner refused to subpoena and call witnesses to testify on Petitioner's behalf. Petitioner advances this argument under *Paragraph 3, subsection o*, of Petitioner's Habeas Corpus Petition.

As previously discussed, under *State v. Thomas* this Court must recognize trial tactics and strategy of counsel. 157 W.Va. 640, 230 S.E.2d 445 (1974). In *State v. Thomas*, the Court concluded that in light of counsel's performance the Court must consider strategy and tactic in determining if his conduct can be deemed in the best interest of his client; and effective assistance will be found unless no reasonably qualified defense attorney would have so acted in

the defense of the accused. *Id.*, *Syl. Pt. 21; State v. Wilson*, 190 W.Va. 583, 439 S.E.2d 448 (1993). The Court cannot and will not begin to try to figure out the interworking's of trial counsel's mind. However, this Court is of the opinion trial counsel acted reasonably in refraining to call witnesses, and this was simply part of trial counsel's trial strategy and tactic. Petitioner made counsel aware of his desire to call witnesses; however, trial counsel was a skilled criminal defense attorney and used his experience and expertise when choosing not to call the witnesses requested by Petitioner.

As such this Court is of the opinion Petitioner's argument without regard to Ground Fifteen falls short of establishing the relief requested should be granted.

**Ground Sixteen: Trial Court Error**

Petitioner contends the trial court ruled improperly regarding constitutional challenges to the admissibility of evidence and such rulings were not reviewed once a special judge was assigned to the case. Petitioner presents this argument in *Paragraph 3, subsection p*, of his Writ for Habeas Corpus. Based on the record, the Court finds this allegation to be wholly without merit.

The record in the underlying matter indicates a pre-trial hearing was held with regard to the admissibility of evidence. This pre-trial hearing was conducted prior to Petitioner's first trial which was held in front of the Honorable Gary Johnson. The Honorable Judge Johnson made rulings with regard to the admissibility of evidence at that time. Subsequent to that trial, the Honorable Jack Alsop was appointed as special judge and set aside the jury verdict based on improper jury instruction. A second jury trial was then held with regard to this matter, in which Petitioner was again found guilty. The record reflects the Court held a pre-trial hearing on the

27<sup>th</sup> day of December, 2006, to hear motions regarding issues for trial. The Court may not have reviewed every pre-trial finding made by the Honorable Gary Johnson, but Petitioner cites no authority that would have required the trial court to do so. Further, the Court made its own rulings regarding motions filed by both the State and Petitioner on December 27, 2006.

The Petitioner has cited no authority that requires the trial court to further review the pre-trial rulings or conduct a separate pre-trial conference when the original jury conviction is set aside because of improper jury instruction and another trial is granted. However, the record does reflect a pre-trial motions hearing was held. Accordingly this Court is of the opinion the issues with regard to the admissibility of evidence have been fully litigated. As such, Petitioner's argument as to Ground Sixteen fails.

#### **Ground Seventeen: Insufficient Evidence**

Petitioner contends there was insufficient evidence to support the jury's finding of guilt in the underlying case. Petitioner advances this argument as *Paragraph 3, subsection q*, of his Habeas Petition. Petitioner does not provide the Court with any specifics regarding the lack of evidence to prove his guilt in the underlying case. Further, Petitioner was given two trials by a petit jury, both of which found him guilty.

Accordingly, this Court is of the opinion Petitioner's argument as to Ground Seventeen is without merit as Petitioner directs this Court to nothing in the record to indicate there was not sufficient evidence for the jury to return a guilty verdict.

**Ground Eighteen: Excessive Sentence**

Petitioner claims the sentence he received, life imprisonment, is disproportionate and excessive when viewed with the offense committed. Petitioner advances this argument under *Paragraph 3, subsection r*, of his Petition for Habeas Corpus. This Court is of the opinion this argument lacks merit as Petitioner was not sentenced to life imprisonment based merely on the crime of Child Neglect Creating Risk of Serious Bodily Injury or Death, in violation of West Virginia Code §61-8D-4(e). The State of West Virginia filed a Recidivist Information against Petitioner advancing four prior felony convictions. Petitioner then made admissions on the 30 day of April, 2007, confirming he was the same person convicted of the four prior felonies as found in the Information filed by the State of West Virginia.<sup>8</sup> It was based on these facts that Petitioner was sentenced to life in prison. Further, this Court has addressed the issue of the validity of the filing of the Recidivist Information and found such to in accordance with the laws of the State of West Virginia. *See* Subsection A, Ground One. Additionally, the Court explained to Petitioner, that based on this Recidivist filing he could be facing a term of life imprisonment, and Petitioner consented he understood. *See* 4/30/07 Hearing Transcript, Page 8, Lines 12-19.

Further, the Court noted the following with regard to sentence proportionality based Petitioner's prior criminal history (4/30/07 Hearing Transcript, Page 18, Lines 4 – 23):

THE COURT:           The Court would – would note that, despite the arguments of the State of West Virginia, this is -- this is a close call on the proportionality issue.

The Court would note, though, that the defendant does have a prior conviction of unlawful wounding which is a crime of violence to a person, and that this case of child neglect creating risk of serious bodily injury or death is – is a crime of violence which

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<sup>8</sup> Prior to this hearing, on the 1<sup>st</sup> day of August, 2006, Petitioner had a jury trial regarding the Recidivist Information filed by the State of West Virginia following Petitioner's first jury trial. During those proceedings, Petitioner was found by the jury to be the same individual named in the Recidivist Information.

creates – or a threat of criminal violence, a significant risk of injury to the person and that being an infant child.

The other two convictions are property convictions in – in that regards, and if – if the – if it weren't for the fact of the unlawful wounding, the Court would probably decline to impose a life sentence in this case, but in light of the -- looking to the case law and in light of the prior conviction for unlawful wounding, it is, accordingly, the judgment and order of the Court that upon your conviction for the offense of child neglect creating a risk of serious bodily injury or death, you be and are hereby sentenced to the penitentiary for the rest of your natural life.

Accordingly, this Court finds Petitioner's argument with regard to Ground Eighteen to lack merit. The Court finds the trial court clearly reviewed Petitioner's underlying case as well as case law with regard to this matter. Further, Petitioner was advised of the possible life sentence prior to making admissions on the 30<sup>th</sup> day of April, 2007. As such, this Court will not grant the relief requested by Petitioner in his Habeas Corpus Petition.

#### **Ground Nineteen: Parole/Probation Eligibility**

Petitioner contends, in *Paragraph 3, subsection s*, that he was mistakenly advised by counsel regarding the potential for parole or probation eligibility. There is nothing in the record to indicate counsel informed Petitioner of the possible ramifications of his prior criminal history, however, the record does indicate the Court advised Petitioner that Petitioner could be sentenced to the penitentiary for the rest of his natural life and Petitioner affirmed he understood. 4/30/07 Hearing Transcript, Page 8, Lines 12 – 19. Further, prior to Petitioner making any admissions, the trial court gave Petitioner the opportunity to confer with his counsel to discuss any questions

or concerns the Petitioner might have. *Id.* at Page 11, Lines 5 – 11. Therefore, even if counsel failed to inform and discuss the effects of Petitioner's prior criminal history, Petitioner was made aware of the effects his prior criminal history could have on his sentence in the underlying case and his chances for parole in the future.

As such, this Court is of the opinion Petitioner's argument with regard to Ground Nineteen is without merit, as Petitioner provides nothing on the record to indicate he was not aware of the possible ramifications his prior criminal history would have on his ability to be paroled.

#### IV. CONCLUSION

It is therefore **ADJUDGED** and **ORDERED** that the guilty verdict entered against the Petitioner is valid, and Petitioner is not entitled to have the verdict set aside.

It is **ADJUDGED** and **ORDERED** that the following sentence imposed in 06-F-4, is **AFFIRMED**, to wit:

As to Count One, Child Neglect Creating Risk of Serious Bodily Injury or Death in violation of West Virginia Code §61-8D-4(e), the Petitioner is sentenced to the penitentiary for a term of life, based on West Virginia Code §61-11-18 and West Virginia Code §61-11-18, the recidivist statute.

It is further **ADJUDGED** and **ORDERED** that Petitioner was brought before the Court in a timely manner to answer to the allegations contained in the Recidivist Information and the underlying court was compliant with the requirements of the language found in the West Virginia Recidivist Statute.

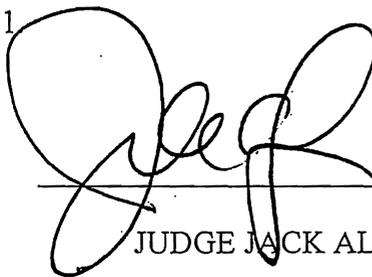
It is further **ADJUDGED** and **ORDERED** that this matter be dismissed and stricken from the active docket of this Court.

The Petitioner's objections and exceptions are noted.

The Clerk of this Court shall send certified copies of this Order to counsel of record.

Enter this 22 day of November, 2011

*Alcove*  
*12-2-11*  
*JA*



JUDGE JACK ALSOP