
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0396

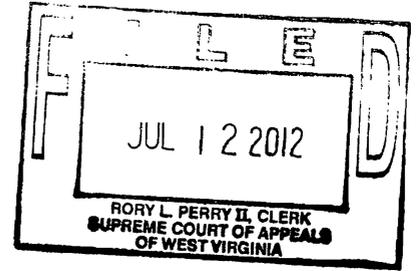
ROBERT L. HOLCOMB,

Petitioner,

v.

DAVID BALLARD, Warden,
Mt. Olive Correctional Complex,

Respondent.



BRIEF OF THE RESPONDENT,
DAVID BALLARD, WARDEN

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Respondent.

BRIEF OF THE RESPONDENT,
DAVID BALLARD, WARDEN

I.

ASSIGNMENTS OF ERROR

1. Under the facts and circumstances of this case, where the Petitioner had already been convicted by jury on a recidivist information following his initial conviction, where the initial conviction in the underlying case was subsequently overturned, and where the Petitioner was again convicted on retrial, the Petitioner was not entitled to a new trial on a new recidivist information.
2. Under the facts and circumstances of this case, the Petitioner's sentence of life imprisonment was not constitutionally disproportionate.
3. Trial counsel's advice to the Petitioner vis-a-vis the second recidivist information, specifically, to conditionally admit that he was the individual convicted of the prior offenses, did not constitute ineffective assistance of counsel.

II.

STATEMENT OF THE CASE

On January 10, 2006, the Petitioner was indicted by a Nicholas County grand jury on a felony charge of Child Neglect Creating a Substantial Risk of Serious Bodily Injury or Death, W. Va. Code § 61-8D-4(e). (App. 1, line 1.) Although the exact circumstances of the charge cannot be ascertained from either the materials contained in the Appendix or the information provided in Petitioner's Brief, it can be reasonably inferred that the Petitioner was, at the least, driving recklessly, with a seven year old child in the vehicle. (App. 75, 102, 108, 138.)¹

On April 5, 2006, the Petitioner was convicted following a jury trial on the charge. (App. 1, line 39; App. 21, ¶ 4.)

Thereafter, on the same date, April 5, 2006, the State filed an "Information of Prior Conviction," W. Va. Code § 61-11-18. (App. 1, line 42; App. 21, ¶ 5.)

On or about August 1, 2006, the Petitioner was convicted following a jury trial on the recidivist Information. (App. 3, line 131.)

On October 13, 2006, the court set aside the April 5, 2006 conviction on the ground that the jury had been improperly instructed on the elements of Child Neglect Creating a Substantial Risk

¹Although the Petitioner wanted his wife, another passenger in the car, to be called as a witness on his behalf, defense counsel testified that "[s]he had actually tried, if I recall my investigation correctly, tried to talk Mr. Holcomb into letting her drive that day, but he wouldn't do it, and I didn't find that to be valuable information, if I'm recalling my decision making." (App. 108.)

of Serious Bodily Injury or Death, and granted the Petitioner a new trial. (App. 3, line 138; Supp. App. at 1-5.)²

On January 4, 2007, the Petitioner was again convicted following a jury trial on the underlying charge. (App. 4, line 187; App. 22, ¶ 11.) Thereafter, there was a colloquy between the court and counsel, in which the State said that it intended to file a second “Information of Prior Conviction.” Said Information was filed on January 5, 2007, and served on the Petitioner on January 8, 2007 (App. 4, lines 188, 189; App. 22-23, ¶¶ 12-14; App. 51-53.)

January 8, 2007, was the final date of the September, 2006 Term of Court. (App. 23, ¶ 14.)

On January 26, 2007, the Petitioner filed a “Motion to Set Aside and/or Dismiss Information of Prior Conviction,” on the ground that he “. . . was not and has not yet been brought before the Circuit Court of Nicholas County to inquire of the defendant if he wished to enter a plea to the second Information that had been filed in said September 2006 term of court.” (App. 4, line 194; App. 115-117.) On April 23, 2007, the State filed a Response thereto (App. 5, line 203), which is not in the Appendix.

The court never ruled on the motion. Rather, on April 30, 2007, the Petitioner entered a conditional admission that he was the same individual named in four of the prior five charges³ set forth in the “Information of Prior Conviction.” (App. 23, ¶ 16; App. 131-132.)

² Simultaneously with the filing of this Brief, the Respondent is filing a motion to supplement the Appendix with the court’s Order of October 13, 2006. The Order is relevant because the Petitioner claimed at the habeas hearing that the court had set aside both the underlying conviction and the recidivist conviction (App. 79), which is not the case.

³ These prior offenses were: March 31, 1982, Grand Larceny; March 31, 1982, Unlawful Wounding; August 13, 1982, Receiving and Transferring Stolen Property; and January 23, 1989, Grand Larceny and Transferring Stolen Property.

On that same date, April 30, 2007, the court sentenced the Petitioner to a term of life imprisonment. (App. 135-140.) Of relevance to the second issue in this habeas action, the court stated:

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

(App. 138.)

On or about February 13, 2008, the Petitioner filed an appeal with this Court, and on or about September 4, 2008, the Court denied the appeal. (App. 5, line 248; App. 6, line 252; App. 23, ¶¶ 18, 19.)

On March 17, 2009, the Petitioner filed a pro se Petition for Writ of Habeas Corpus. (App. 7, line 1.) On April 22, 2011, following appointment of counsel, an Amended Petition was filed. (App. 7, line 12; App. 8-17.)⁴

On August 26, 2011, an omnibus hearing was held on the Amended Petition. (App. 61-114.) The Petitioner called three witnesses: himself, his wife, and his second trial counsel.

On or about November 22, 2011, the court entered a comprehensive Order denying relief on all nineteen grounds asserted. (App. 7, line 28; App. 20-31.)

This appeal followed.

⁴At some point prior to the filing of the Amended Petition, the Petitioner filed a *Losh v. McKenzie* checklist. (App. 18-19.)

III.

SUMMARY OF ARGUMENT

This Court has twice held that where a defendant is not arraigned on a recidivist information in the same term of court in which he was convicted of the underlying offense, the trial court is without jurisdiction to sentence him on the recidivist information. Syl. Pt. 3, *State ex rel. Housden v. Adams*, 143 W. Va. 601, 103 S.E.2d 873 (1958); Syl. Pt. 2, *State v. Cavallaro*, 210 W. Va. 237, 557 S.E.2d 291 (2001). Therefore, the court below was without jurisdiction to sentence the Petitioner on the second recidivist information, since the Petitioner was not arraigned thereon in the same term of court in which he was retried on the underlying offense.

The Respondent contends, however, that the second recidivist information was a legal nullity; when the court below awarded a new trial following the Petitioner's initial conviction on the underlying charges, it did not award a new trial on the recidivist proceedings, which were timely filed and prosecuted according to statute. Nothing in the original recidivist proceedings was affected by the error which led to reversal of Petitioner's conviction on the underlying charges; and nothing in the retrial of the underlying charges was affected by, or had an effect on, the result in the original recidivist proceedings. Therefore, this Court should vacate the sentence imposed on the basis of the Petitioner's admissions to the second recidivist information; and remand this case with instructions that the court below dismiss the second recidivist information, and thereafter sentence the Petitioner to life imprisonment on the original recidivist information.

A sentence of life imprisonment is neither disproportionate nor excessive under the facts and circumstances of this case. The triggering felony was a crime with a potential for violence: Child Neglect Creating a Substantial Risk of Serious Bodily Injury or Death, W. Va. Code § 61-8D-4(e).

A jury found that the Petitioner was the individual who had earlier committed four serious felony offenses, one of which (Unlawful Wounding) was a violent offense. In short, proceedings under the habitual criminal statute were warranted, and life imprisonment was an appropriate punishment, given the totality of the Petitioner's criminal history. *State ex rel. Daye v. McBride*, 222 W. Va. 17, 23, 658 S.E.2d 547, 553 (2007), *cert denied*, 555 U.S. 858 (2008).

Additionally, the Petitioner failed to provide this Court with an adequate record for review of the proportionality issue. *State v. Waldron*, 228 W. Va. 577, ___, 723 S.E.2d 402, 408 (2012). In this case, based on the materials contained in the Appendix, we know virtually nothing about the triggering offense other than it involved a car and a child; and we know almost nothing about the past offenses other than the fact that the original recidivist jury concluded the Petitioner had committed them.

The Petitioner's trial counsel did not provide ineffective assistance of counsel by advising him to conditionally admit the prior offenses in the second recidivist information. The Petitioner gained something from the plea deal (the fifth charge in the information was dismissed and not considered), and he lost nothing, as he retained the right to appeal all recidivist issues, including the sentence. Although the Petitioner claims in these habeas proceedings that he had bona fide defenses to the prior convictions, he presented no evidence whatsoever to support this claim, other than his own self-serving testimony which was incomprehensible, and presents no specifics to this Court on appeal.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that this case is proper for consideration on the Court's Rule 20 docket, as it involves an issue of first impression: whether a new trial is required on a recidivist

information, W. Va. Code § 61-11-19, where the underlying conviction is reversed and the defendant is convicted again on retrial.

V.

ARGUMENT

A. **UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, WHERE THE PETITIONER HAD ALREADY BEEN CONVICTED BY JURY ON A RECIDIVIST INFORMATION FOLLOWING HIS INITIAL CONVICTION, WHERE THE INITIAL CONVICTION IN THE UNDERLYING CASE WAS SUBSEQUENTLY OVERTURNED, AND WHERE THE PETITIONER WAS AGAIN CONVICTED ON RETRIAL, THE PETITIONER WAS NOT ENTITLED TO A NEW TRIAL ON A NEW RECIDIVIST INFORMATION.**

Standard of Review: “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); Syl. Pt. 1, *State v. Cavallaro*, 210 W. Va. 237, 557 S.E.2d 291 (2001).

West Virginia Code § 61-11-19, “Procedure in trial of persons for second or third offense,” provides in relevant part that:

It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. 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 supplied.)

The primary purpose of the statute is “. . . to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent

felony offenses[,]’ Syl. Pt. 3, in part, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992) and ‘to protect society from habitual criminals. . . .’ *State v. Stout*, 116 W. Va. 398, 402, 180 S.E. 443, 444 (1935).” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 519, 583 S.E.2d 800, 814 (2002).

Notwithstanding the purpose of the statute, this Court has consistently held that its provisions are mandatory and jurisdictional. *State ex rel. Ringer v. Boles*, 151 W. Va. 864, 157 S.E.2d 554 (1967); *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992). Consistent therewith, the Court has twice held that where a defendant is not arraigned on a recidivist information in the same term of court in which he was convicted of the underlying offense, the trial court is without jurisdiction to sentence him on the recidivist information. Syl. Pt. 3, *State ex rel. Housden v. Adams*, 143 W. Va. 601, 103 S.E.2d 873 (1958); Syl. Pt. 2, *State v. Cavallaro*, 210 W. Va. 237, 557 S.E.2d 291 (2001).

In the instant case, it is undisputed that the Petitioner was not arraigned on the second recidivist information during the same term of court in which he was convicted on retrial of the underlying offense. (App. 26-27.) Therefore, the sentence on the second recidivist information cannot stand, or be deemed harmless error, because under this Court’s precedents the court below had no jurisdiction to impose it. Syl. Pt. 3, *State ex rel. Housden v. Adams, supra*; Syl. Pt. 2, *State v. Cavallaro, supra*.

Notwithstanding the above, the Respondent contends that this is not the end of the inquiry. The question for decision is: was the State required to file a new recidivist information after the retrial, and was the Petitioner entitled to a new trial thereon? The Respondent believes that the answer to both questions is no, and that the error in this case can therefore be remedied by a remand for the court below to sentence the Petitioner on the initial recidivist information.

The court recognized at least a part of this issue as soon as the Petitioner was convicted on retrial:

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.

(App. 27, citing Tr. Transcript of January 4, 2007, pp. 208-09.)

The court never did decide the issue. Rather, as set forth in the Statement of the Case, the State filed the new recidivist information; the Petitioner was not timely arraigned thereon, and thereafter filed a motion to dismiss on that basis; the Petitioner entered conditional admissions that he was the individual who had committed the prior felonies set forth in the new recidivist information, thus preserving for appellate review the issue raised in the motion to dismiss; and the Petitioner was sentenced on the basis of the conditional admissions.

In the habeas proceedings, the court below analyzed this whole sequence of events as a due process issue, concluding that since the second recidivist information was identical to the first, the Petitioner had adequate notice of the allegations against him in the second information and the failure to timely arraign was therefore harmless error. (App. 26-30.) Although the Respondent agrees with the court's factual findings – nothing in this sequence of events either surprised or prejudiced the Petitioner – it cannot agree with the court's analysis, since the issue under *Housden* and *Cavallaro* is jurisdiction, not due process.⁵

⁵The "Petition for Writ of Habeas Corpus *Ad Subjiciendum*" mentions due process only in passing, although to be fair to the court below, the interjection of the magic words in the final
(continued...)

As stated, the Respondent believes that the real issue here is whether it was necessary for the State to file a new recidivist information at the conclusion of the retrial proceedings. The Respondent contends that it was not.

When the court below awarded a new trial following the Petitioner's conviction on the underlying charges, it did not award a new trial on the recidivist proceedings. (Supp. App. 1-5.) Those original proceedings were timely filed and prosecuted according to statute; the Petitioner had a jury trial; and the jury determined that the Petitioner was the individual who had committed four previous felony offenses. See fn. 3, *infra*. Nothing in the original recidivist proceedings was affected by the error which led to reversal of Petitioner's conviction on the underlying charges; and nothing in the retrial of the underlying charges was affected by, or had an effect on, the result in the original recidivist proceedings

What we have here is the flip side of a line of cases in which issues of guilt and penalty were bifurcated at trial; this Court has consistently refused to grant a new trial on guilt or innocence, despite having granted a new trial on sentence. *State v. Doman*, 204 W. Va. 289, 512 S.E.2d 211 (1998); *State v. Finley*, 219 W. Va. 747, 639 S.E.2d 839 (2006), *cert. denied*, 549 U.S. 1298 (1007); *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 655 S.E.2d 794 (2007); *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010).

The following language from *State ex rel. Shelton v. Painter*, *supra*, 221 W. Va. at 586, 655 S.E.2d at 802, sets forth a cogent rationale (albeit, again, on the flip side):

⁵(...continued)
sentence of a four page argument certainly muddled what had previously been a straightforward statutory argument under *Housden* and *Cavallaro*. (App. 10-13.)

[W]here the actions of trial counsel could not have affected the finding of guilt, we believe that it would be a waste of judicial resources to require an entirely new trial. Therefore, rather than require a new trial on the issues of guilt and penalty, we believe the more prudent course would be to require a limited new trial only on the penalty issue. . . .

In the instant case, the court below would have been justified in following his own inclination, voiced immediately after the Petitioner's conviction on remand, to just ". . . impose sentence based upon the prior finding of the jury on the recidivist statute." (App. 27, citing Trial Transcript of January 4, 2007, pp. 208-09.) Going through new recidivist proceedings added nothing, as nothing in the original proceedings had been affected in any way by the reversal of, and then re-conviction on, the underlying proceedings.

Of course, what happened here is that because the time constraints required everyone to act in an abundance of caution, a new recidivist information was filed, and the Petitioner was sentenced on the basis of his admissions thereto. As set forth above, the Respondent contends that all of this was a legal nullity, as the Petitioner was not entitled to new recidivist proceedings. In the event the Court agrees, this leaves one final question for resolution: what is the proper disposition of this case?

As counterintuitive as it may sound, the Respondent believes that the proper disposition is for this Court to vacate the sentence, which was imposed on the basis of the Petitioner's admissions to the second recidivist information, and to remand the case with instructions that the court below dismiss the second information and thereafter sentence the Petitioner to life imprisonment on the original recidivist information.⁶

⁶As set forth in Argument B, *infra*, a sentence of life imprisonment is mandatory. Syl. Pt. 3, in part, *State ex rel. Cobb v. Boles*, 149 W. Va. 365, 141 S.E.2d 59 (1965); Syl. Pt. 5, in part, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966).

B. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE PETITIONER'S SENTENCE OF LIFE IMPRISONMENT WAS NOT CONSTITUTIONALLY DISPROPORTIONATE.

Standard of review: “The Supreme Court of Appeals reviewed sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1 in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). “In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

As a threshold matter, the Petitioner’s argument must be construed, conceptually at least, as an attack on the constitutionality of the habitual criminal statute as applied to his case, not as an attack on the sentence imposed. This is so because it has been the law in this jurisdiction for decades that if one is found by a jury to be the same person named in a recidivist information, W. Va. Code § 61-11-18, then “. . . the court is without authority to impose any sentence other than as prescribed by [the statute].” Syl. Pt. 3, in part, *State ex rel. Cobb v. Boles*, 149 W. Va. 365, 141 S.E.2d 59 (1965); Syl. Pt. 5, in part, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966); *State ex rel. Daye v. McBride*, 222 W. Va. 17, 22, 658 S.E.2d 547, 552 (2007), *cert. denied*, 555 U.S. 858 (2008) (expressly reaffirming *Cobb* and *Combs*).

In this appeal, as below, the Petitioner contends that his sentence is constitutionally disproportionate and excessive because (a) the triggering offense was not a “violent” offense under

the relevant case law,⁷ and (b) the prior offenses set forth in the recidivist information, although serious in nature, were 18-20 years old.

First, the court below determined that the triggering offense in this case was indeed a crime of violence, because it created “. . . a *significant risk* of injury to the person and that being an infant child.” (App. 138, emphasis supplied.) This Court has never held that a life sentence offends proportionality principles if the triggering felony did not involve actual violence. In *State v. Housden*, 184 W. Va. 171, 174, 399 S.E.2d 882, 885 (1990), the court found that the felony offense of burglary carried the *potential* for violence, even though the defendant had taken steps to ensure that the victim would not be present when the burglary was committed.

Consequently, even though the appellant asserts that he ascertained that the victim was not present before he burglarized his home and took some \$6,000.00 in personal property, that did not render the crime nonviolent in nature. The potential for threatened harm or violence to either the victim, had he returned home at the time the crime was committed or to another innocent person such as the victim’s son, who testified that he was regularly checking on the home for his father, still existed at the time the appellant committed the crime.

In the instant case, whatever it is that the Petitioner was doing behind the wheel of his vehicle,⁸ a properly instructed jury found that the State had proved each and every element of Child

⁷As noted earlier, it is impossible to ascertain from anything contained in the Appendix just exactly what it is that the Petitioner did, while driving his car, to create what the court below characterized as “. . . risk of serious bodily injury or death . . . a significant risk of injury to the person and that being an infant child.” (App. 138.) . In his brief at p. 12, Petitioner’s counsel states that “[i]n this case there is no allegation that the Petitioner was under the influence of alcohol or did anything that would be consistent with the dangers imposed by Driving Under the Influence of Alcohol line of reasoning.” Undersigned counsel accepts the representation of Petitioner’s counsel; both of us are officers of the court.

⁸ See fn. 7, *infra*. All we know, from the habeas judge’s analysis of a search and seizure issue that has not been appealed, is that (a) there was a BOLO on the car that the Petitioner was driving, “. . . as the person driving said vehicle was the subject of a warrant in Nicholas County, West
(continued...)

Neglect Creating a Substantial Risk of Serious Bodily Injury or Death, W. Va. Code § 61-8D-4(e), beyond a reasonable doubt. Therefore, the triggering offense easily falls within the *ratio decidendi* of *Housden*. See also *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 515, 583 S.E.2d 800, 812 (2002), *cert. denied*, 539 U.S. 948 (2003), quoting with approval *Solem v. Helm*, 463 U.S. 277, 296-97, 315-16 (1983) (dissenting opinion): ““At the very least, respondent’s burglaries and his third offense drunk driving posed a real risk of serious harm to others. It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel. . . .””); *State v. Williams*, 196 W. Va. 639, 474 S.E.2d 569 (1996) (recidivist statute may be applied in a DUI case despite the fact that the felony conviction resulted from an enhanced misdemeanor).

Further, although all of the prior felonies set forth in the recidivist information were quite old, they were all “fairly serious,” as Petitioner’s counsel candidly admits at page 11 of his brief: grand larceny; unlawful wounding; receiving stolen goods; grand larceny/receiving stolen goods. Additionally, the court below was justified in concluding that one of the prior felonies, unlawful wounding, was a crime of violence to the person. (App. 138.)

In *State ex rel. Daye v. McBride*, 222 W. Va. 17, 23, 658 S.E.2d 547, 553 (2007), *cert. denied*, 555 U.S. 858 (2008), this Court held that proceedings under the habitual criminal statute are warranted in cases where the totality of one’s criminal history makes life imprisonment an appropriate punishment. That is the situation in the case at bar. A review of the Information of Prior Conviction (App. at 51-54, 55-58) shows that the Petitioner had a lengthy rap sheet of serious felony offenses,

⁸(...continued)
Virginia . . .,” and (b) the Petitioner failed to signal at the intersection of Routes 20 and 39. (App. 42 & n. 7.)

and that the sentence imposed on the recidivist information – after Strike Five⁹ – was not punitive, excessive, unwarranted, or disproportionate.

Finally, if the Petitioner wants this Court to conclude that his sentence is constitutionally disproportionate to his crime(s), then it was his obligation to provide the Court with a record on which the Court could make such a determination. *See State v. Miller*, 194 W. Va. 3, 14, 459 S.E.2d 114, 125 (1995) (“[S]hould an appellant spurn his or her duty and drape an inadequate or incomplete record around this Court’s neck, this Court, in its discretion, either has scrutinized the merits of the case insofar as the record permits or has dismissed the appeal if the absence of a complete record thwarts intelligent review”); *State v. Waldron*, 228 W. Va. 577, ___, 723 S.E.2d 402, 408 (2012) (“Insofar as Mr. Waldron has failed to provide this Court with the text of the statements he alleges violated Crawford, we are unable to determine whether those statements fall outside the application of the general rule that such statements are admissible against the defendant, when they are not offered for the truth of the matter they assert. Consequently, based upon the record provided on this issue, we find no error in admitting the video and audio records of the drug transaction”).

In this case, based on the materials contained in the Appendix, we know virtually nothing about the triggering offense other than it involved a car and a child; and we know almost nothing about the past offenses other than the fact that the original recidivist jury concluded the Petitioner had committed them. In short, the Court does not have an adequate record on which to even review the proportionality claim, let alone decide it in the Petitioner’s favor.

⁹The fifth underlying felony set forth in the revidivist information, Delivery of a Controlled Substance, was not considered. *See* Argument C, *infra*. Had it been, the triggering felony would have been Strike Six.

C. TRIAL COUNSEL’S ADVICE TO THE PETITIONER VIS-A-VIS THE SECOND RECIDIVIST INFORMATION, SPECIFICALLY, TO CONDITIONALLY ADMIT THAT HE WAS THE INDIVIDUAL CONVICTED OF THE PRIOR OFFENSES, DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of review: “An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court’s findings of historical fact for clear error and its legal conclusions de novo. This means that we review the ultimate legal claim of ineffective assistance of counsel de novo and the circuit court’s findings of underlying predicate facts more deferentially.”

State ex rel. Daniel v. Legursky, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995):

The Respondent does not understand the factual basis for the Petitioner’s third assignment of error. He claims that his attorney’s advice to conditionally admit the offenses in the recidivist information constituted ineffective assistance of counsel, because (a) he “realized absolutely nothing” from the deal, and (b) “. . . had a legal basis for challenging convictions contained in the recidivist Petition.” (Petitioner’s Brief, p. 13.)

The so-called legal basis for challenging the convictions is set forth in the Petitioner’s testimony during the omnibus hearing (App. 82-84), where he seems to be saying that he hadn’t been convicted of the fifth charge in the recidivist information, and “. . . [s]upposedly, they amended – They went in and they was gonna strike – strike that out of the information. . . .”

The problem is that the fifth charge was, in fact, struck and not considered in the recidivist plea proceedings. (App. 124, 128, 130-31.) Therefore, the Petitioner did gain something from the deal, and lost nothing, as (a) he had already been found guilty, for lack of a better term, in the recidivist trial proceedings, and (b) retained the right the appeal all recidivist issues, including the sentence.

In light of the fact that a jury had already found the Petitioner to be the individual charged and convicted of the prior felony offenses, there can be no serious claim that counsel's strategy, to have him conditionally admit this in the second proceedings while still retaining the right to appeal, was "... deficient under an objective standard of reasonableness. . . ," let alone that "... there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, in part, *State v Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), citing *Strickland v. Washington*, 466 U.S. 668 (1984).

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Id., Syl. Pt. 6.

The fact is that entering a conditional plea under Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure is sound strategy in most cases and was sound strategy in the instant case. And if it wasn't, it was the Petitioner's burden to prove that in the habeas proceedings, which he failed to do. He presented no evidence whatsoever (other than his own self-serving testimony, which, to be charitable, was pretty incomprehensible on this point) to support his claim that he had bona fide defenses to the recidivist charges, and presents no specifics to this Court on appeal. Rather, his claim rises or falls on the characterization of counsel's strategy as "throwing in the towel." (Petitioner's Brief, p. 14.)

VI.

CONCLUSION

For all of the reasons set forth in this Brief and apparent on the face of the record, this Court should hold that the Petitioner's sentence of life imprisonment was neither excessive nor disproportionate, and that the performance of Petitioner's trial counsel did not fall below the *Strickland/Miller* standard. Thereafter, the Court should vacate the sentence and remand this case with instructions: that the court below dismiss the second recidivist information and sentence the Petitioner to life imprisonment on the first recidivist information, which was timely filed and prosecuted according to statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barbara H. Allen, do hereby certify that a copy of the within "Brief of the Respondent, David Ballard, Warden" was served on all counsel of record by United States mail, first-class postage prepaid, on the 12th day of July, 2012, addressed as follows:

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