

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

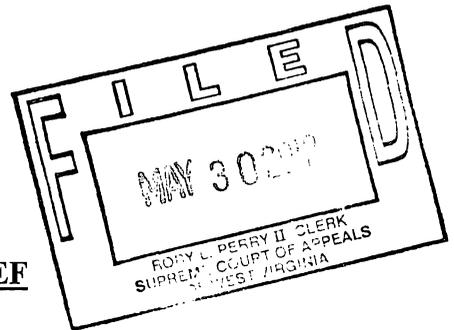
APPELLATE DOCKET NUMBER

11-1496(J11-F-2)

DARRELL K. DAVIS

Petitioner.

PETITIONER'S BRIEF



BRIEF

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BRIEF

TABLE OF AUTHORITIES

1.	Faretta v. California	422 U.S. 806, 95 S.Ct. 2525 (1975)
2.	Matheny v. Farley	66 W.Va. 680, 66 S.E.2d 1060 (1910)
3.	State v. Blosser	158 W.Va. 164, 207 S.E.2d 186 (1974)
4.	State v. Powers	211 W.Va. 116, 563 S.E.2d 781 (2001)
5.	State v. Sandler	175 W.Va. 572, 336 S.E.2d 535 (1985)
6.	State v. Sandor, III.	624 S.E.2d 906 (2005)
7.	State v. Sheppard	172 W.Va. 656, 310 S.E.2d 173 (1983)
8.	State v. Surber	January 2012 No. 11-0361 (not yet published)
9.	State v. Thomas	W.Va., 203 S.E.2d 445 (1974)
10.	State v. Yoes	67 W.Va. 546, S.E. 181 (1910)
11.	State ex rel. Powers v. Boles	149 W.Va. 6, 138 S.E.2d 159 (1964)
12.	United States v. West	877 F.2d. 281 (4 th Cir. 1989)
13.	Watson v. Black	161 W.Va. 46, 239 S.E.2d 664 (1977)

ASSIGNMENTS OF ERROR

1. The trial court erred by permitting the Petitioner to represent himself when he was charged with several felonies, thereby depriving the Petitioner of his constitutional right to assistance of counsel.
2. The trial court erred by allowing the Petitioner's court-appointed attorney to withdraw absent good cause and thereby denied the Petitioner his constitutional right to assistance of counsel.
3. The trial court erred by appointing standby counsel to participate in the defense of the Petitioner without articulating the scope of the representation of standby counsel.

STATEMENT OF THE CASE

The Petitioner was charged in the Mingo County Circuit Court with multiple felonies stemming from an incident that occurred early on the morning of July 31, 2010. (Appendix Record Vol. 5, p.5.) For the first several months that this case was pending, first in the Magistrate Court and subsequently in the Circuit Court, the defendant was afforded court-appointed counsel. (Vol. 5, p. 5). Less than three months prior to trial, the Petitioner indicated that he wanted to represent himself. (Vol. 5, p. 35). The trial court accepted the Petitioner's request, allowed the Petitioner's court-appointed counsel to withdraw and appointed another local attorney to serve in the capacity as standby counsel. (Vol. 5, p. 35). No specific direction was given regarding the role of standby counsel in the defense of the case, and it was made clear that the Petitioner was to "take the lead" on his defense. (Vol. 5, p. 45). Within three weeks of trial, on July 13, 2011 the trial court granted the newly-appointed standby counsel's Motion to Withdraw and appointed another attorney to serve in the capacity of standby counsel. (Vol. 5, p. 45). On July 20, 2011, the Petitioner hired another attorney of his choosing to serve in the capacity of standby counsel and the trial commenced on schedule. (Vol. 3, p. 1-25). As a result of the confusion generated by the multiple appointments of counsel, and because the Petitioner was not competent to represent himself against such serious charges, the evidence presented by the Petitioner at trial was minimal and clearly without any strategy, and the jury found the Petitioner guilty on all charges. (Vol. 8, p. 94-95). The trial court entered judgment on the verdict and from that Order this appeal is taken.

SUMMARY OF ARGUMENT

The Petitioner was denied his constitutional right to effective assistance of counsel. The trial court committed three errors that, taken individually or collectively, constitute reversible error. First, the trial court permitted the Petitioner to represent himself in this matter – and thereby permitted him to waive his constitutional right to effective assistance of counsel -- despite failing to ascertain if that decision was made knowingly and intelligently. Second, the trial court allowed the Petitioner's court-appointed counsel to withdraw without good cause, and thereby denied the Petitioner his constitutional right to effective assistance of counsel. Finally, the trial court appointed counsel to participate in the Petitioner's defense in the capacity of "standby counsel" without further defining the scope of standby counsel's representation. As a result, there was significant confusion regarding the preparation of the defense and this caused significant prejudice to the Petitioner.

The record will clearly show that there was no colloquy between the trial court and the Petitioner from which the trial court could conclude that the Petitioner was prepared to knowingly and intelligently waive his constitutional right to effective assistance of counsel. Rather, once two doctors had determined that the Petitioner was "competent," and the Petitioner expressed a desire to represent himself, it was assumed from that point forward that the Petitioner's decision was made in a "constitutionally fair" manner. No further significant inquiry was ever made. It was, or should have been, apparent to the trial court that the Petitioner was not capable, particularly since he was incarcerated without bail, to represent himself in any meaningful way against these serious allegations. Here, the results speak for

themselves.

The trial court's decision to permit the Petitioner's court-appointed attorney to withdraw in the middle of discovery, with the ongoing issues regarding obtaining key documents and reviewing key evidence, constitutes reversible error. Had the trial court denied the motion to withdraw and forced the Petitioner to continue to work toward resolution of issues with court-appointed counsel – which would not be constitutionally impermissible or affront to the rulings of this Honorable Court – it is entirely possible that the relationship may have improved. The long litany of cases from this Court would absolve a trial judge who forced counsel upon an indigent criminal defendant that was uncooperative but unable to engage in self-representation. Reading our Constitution literally, this is a necessary result. Accordingly, the trial court's failure to inquire further into the nature of the complications between the Petitioner and his court-appointed counsel, and to permit withdraw during a critical pre-trial phase, was error.

Finally, the trial court's decision to appoint "standby counsel" without further articulating or identifying the scope of that representation constitutes error. The cases of this Honorable Court suggest that the trial court should create a clear record as to how the standby counsel will participate in the representation. Here, the trial court simply advised the standby counsel that they would act at the direction of the Petitioner, whom the trial court described as "lead." Without clarity, the standby counsels were confused as to their role, as the record shows, and for the most part were not able to give effective counsel to the Petitioner. The appointment of standby counsel without clarification of their responsibility constitutes reversible error.

Taken as a whole, there is little doubt that the Petitioner's right to effective assistance of counsel was denied by the trial court's rulings and handling of this difficult criminal defendant. Taken individually, they each justify remand for further proceedings wherein the Petitioner should not be denied the right to assistance of counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

None of the criteria set forth in Rule 18 (a) of the West Virginia Supreme Court Rules of Appellate Procedure is met in this matter and oral argument would aid the decisional process.

Rule 19 Oral Argument would be appropriate, as this appeal involves a narrow issue of law.

This appeal is appropriate for a new memorandum decision.

ARGUMENT

I. STATEMENT OF RELEVANT FACTS

(a) *Relevant Pre-trial Facts*

Your Petitioner was charged in the Circuit Court for Mingo County with having committed night-time burglary (in violation of West Virginia Code § 61-3-11), first degree murder (in violation of West Virginia Code §61-2-1), attempted murder (in violation of West Virginia Code § 61-11-8(1) and 61-2-1), kidnapping (in violation of West Virginia Code § 61-2-14(a), and arson in the first degree (61-3-1(a)). An arraignment was held at the Circuit Court of Mingo County on August 9, 2010, at which hearing the Honorable Judge Michael Thornsbury (“Judge”) presided and appointed Robert B. Kuenzel, Esquire, to represent the Petitioner “for the purpose of the arraignment only.” (Vol. 5 pg. 5). At that time, the Judge advised the petitioner of the charges against him, and the possible penalties for conviction of each charge. (Vol. 5 pg. 5-6). After the Petitioner entered a plea of not guilty, the Judge advised him that he was entitled to counsel and reiterated that Mr. Kuenzel was appointed to represent the Petitioner “at least for purpose of the arraignment today” and that “if [Mr. Kuenzel] or other counsel be appointed by order to represent you throughout the proceedings, you should keep in contact with your lawyer at all times.” (Vol. 5 pg. 7). The Judge also denied the Petitioner’s request for bond. (Vol. 5 pg.9).

The matter next came forward for hearing on January 20, 2011 for the purpose of “arraignment.” (Vol. 5 p.11). The Petitioner was present, Mr. Kuenzel was not present and the record reflects that Ms. Marsha Webb-Rumora, Esquire, was present in the capacity of

“standing in for Diana Carter-Wiedel, counsel for the Defendant.” (Vol. 5 p.11). At this time, the Judge asked the Petitioner if he had received a copy of the Indictment, if he had a fair and adequate opportunity to read it and have Ms. Weidel, who was not present during this exchange, explain the nature of the charges and the penalties for each. (Vol. 5 p.11-12). The Petitioner simply responded “Yes” or “Yes sir” to each of these three questions. (Vol. 5 p.12). Ms. Rumora then advised the Judge that the Petitioner wished to waive the formal reading of the Indictment and the Petitioner subsequently reiterated his “not guilty” plea on all charges. (Vol. 5 p.12). The Judge then said the following: “You are advised of your right to a jury trial. The matter is now set for a jury trial. You are advised of your right to counsel. Ms. Wiedel has been appointed to represent you. You should keep in contact with Ms. Wiedel at all times. Do you understand the scheduling order, the rights, duties, responsibilities, I’ve just outlined to you?” (Vol. 5 p.13). The Petitioner simply replied “Yes, sir.”

A hearing was again held on February 22, 2011, at which time Ms. Wiedel attended and advanced certain legal arguments on of the Petitioner’s behalf. (Vol. 5 p.15). The record does indicate that the Petitioner asked Ms. Wiedel to obtain the victim’s hospital records, and to get some independent testing performed. (Vol. 5 p.16). Ms. Wiedel stated to the Judge that it was her understanding that the defendant had obtained all of the victim’s hospital records. (Vol. 5 p.16). Another hearing was held on March 14, 2011 and Ms. Wiedel again appeared on behalf of the Petitioner.

On March 21, 2011, a hearing was held to determine the Petitioner’s competency. (Vol.

5 p.19). Ms. Wiedel again appeared as court-appointed counsel to the Petitioner. (Vol. 5 p.19). In finding the Petitioner competent, the Judge reviewed the report prepared by Dr's. Ralph Smith and Rosemary Smith and stated on the record directly from that report that, [the petitioner] stated [during the competency evaluation] he does not like his attorney because, "she doesn't work for me," and complained that he had not seen his attorney for four months and he had not been provided discovery materials until sometime in January." (Vol. 5 p.20). Other than reciting the report, the Judge did not otherwise address or discuss this statement made by the Petitioner during the competency evaluation. After reviewing the competency evaluation, the Judge found that the Petitioner was "criminally responsible and competent to stand trial." (Vol. 5 p.21). Ms. Wiedel continued to represent the Petitioner throughout the competency hearing, and advocated for a continuance and for additional discovery from the State. (Vol. 5 p.21-22).

On March 28, 2011, a status hearing was held in this matter. Ms. Wiedel appeared on behalf of the Petitioner and advocated for additional discovery from the State. (Vol. 5 p.23-27). On April 4, 2011, another hearing was held in this matter and Ms. Wiedel appeared on behalf of the Petitioner. (Vol. 5 p.28-32). At this hearing, Ms. Wiedel moved for a continuance on behalf of the Petitioner and thereby waived his constitutional right to a speedy trial. (Vol. 5 p.28-30). The Judge asked the defendant numerous questions about his decision to waive his right to a speedy trial, and explained the adverse consequences of same, despite the fact that the Petitioner had counsel present who had actually made the motion on his behalf. (Vol. 5 p.28-29). Ms. Wiedel also advocated for additional discovery during this hearing. (Vol. 5 p.30-32).

On May 23, 2011, Ms. Wiedel brought forward this matter for, *inter alia*, a hearing on her Motion to Withdraw as counsel for the Petitioner. (Vol. 5 p.33). Ms. Wiedel based her Motion on the Petitioner's statement that he no longer wanted her to continue to represent him and that he no longer had any faith in her representation. (Vol. 5 p.33). She also stated that the Petitioner refused to provide her with the names and addresses of his witnesses or provide any information regarding why he wanted them to testify. (Vol. 5 p.33). The Petitioner advised the Judge that he did not believe that he had received information he should have received. (Vol. 5 p.34). As to Ms. Wiedel's Motion to Withdraw, the Petitioner stated that he recommended it. (Vol. 5 p.34). The following dialogue then ensued:

THE COURT: You are having issues – attorney/client issues with Ms. Wiedel?

THE DEFENDANT: Yes, ma'am – yes, sir;

THE COURT: And you believe those issues have resulted in irreconcilable differences between you and Ms. Wiedel with regard to the manner in which you wish to defend your case?

THE DEFENDANT: Yes, sir.

THE COURT: Then I'm going to sustain the motion. Ms. Wiedel will be allowed to withdraw. The Court is going to appoint Susan Van Zant to represent you in this matter.

THE DEFENDANT: I'm going to represent myself, if you don't mind, sir.

THE COURT: Well, she'll be standby counsel. You can do that. I'd caution you against that. If you want to do that, that's fine. Ms. Van Zant will be your standby counsel in this case to assist you, to answer questions that you might have.

(Vol. 5 p.34-35)

The Judge went on to advise the Petitioner that “[y]ou can discuss the matter with Ms. Van Zant, and since it is your desire to represent yourself if you do represent yourself let me advise you you will have to comply with all the court’s rules and procedures associated with the matter. In other words, I want to respect your right to make that decision, although I think it’s an ill advised decision. You certainly can do that, but you’ll have to comply with all the court rules, all the discovery rules and all the other matters. Do you understand that?” (Vol. 5 p.35-36). To which the Petitioner simply replied, “Yes sir.” (Vol. 5 p.36). The Judge went on during this hearing to say that he would give the Petitioner “a chance to think about the counsel the Court has appointed....stand by. I’d urge you to discuss the matter with Ms. Van Zant so she can assist you with regard to the preparation of those motions and if you don’t want to do that that’s okay. I just want to make sure you’re making an informed decision.” (Vol. 5 p.36-37). The Judge also later acknowledged during this hearing that “[the petitioner has] primarily indicated he’s going to represent himself.” (Vol. 5 p.38-39). Also, at this May 23, 2011 hearing wherein the Petitioner first raised the issue of self-representation, and his court-appointed counsel was permitted to withdraw and standby counsel who was not present was appointed, the Judge stated that “[a]t this point in time I’ve allowed [Ms. Wiedel] to withdraw and your new counsel is not here, so I’m reluctant to do very much today.” (Vol. 5 p.39). The Judge again addressed the issue during the May 23, 2011 hearing, noting that “[w]hat you’re saying now gives prime examples of why you need assistance. It’s very difficult for you to get subpoenas requested, issued and the like while incarcerated, and counsel can do those things for you.” (Vol. 5 p.41).

At a hearing on May 31, 2011, Susan Van Zant, Esquire, appeared with the Petitioner as standby counsel pursuant to the Court's appointment on May 23, 2011. After the defendant indicated to the trial court that he was prepared to continue representing himself, Ms. Van Zant inquired of the trial court as to her role as standby counsel. (Vol. 5 p.45). The Judge responded by stating that "[t]here's a case that says he has a constitutional right to represent himself if he is otherwise competent. If the competency proceedings – if that becomes an issue then we'll have to deal with it, but, otherwise, he's lead counsel and I've already explained to him on the record his full responsibility for compliance with the Rules and the Court's orders and trial preparation, and you're only there to assist if he asks....He has primary responsibility in the case based upon his own request, unless you've changed your mind, Mr. Davis, which I would urge you to do." (Vol. 5 p.45). The dialogue regarding self-representation continued as follows:

**MS. VAN ZANT: I would certainly advise him against [self-representation].
I think I have a little bit more trial experience than Mr.
Davis, although, he does seem to be very knowledgeable and
intelligent.**

**THE COURT: He's certainly knowledgeable and articulate and that's one
of the reasons why the Court, based upon his request – We, at
length, talked about this issue previously and he indicated that's
what he wanted to do. Is it still what you want to do or do
you want Ms. Van Zant to be your counsel?**

**THE DEFENDANT: At the present time I'd like to represent myself. I know
nothing about this lady. I don't know what her track record is.
She's told me--**

THE COURT: Well, perhaps, as you develop a relationship in her role as

your standby counsel you'll change your mind. You certainly would be better served to be with counsel. At least in most instances that's the case, but you do have a constitutional right to represent yourself.

(Vol. 5 p.46)

At one point during the May 31, 2011 hearing, the defendant indicated that he had trouble making phone calls, implying that same impaired his ability to represent himself, and the Court responded by saying that was the purpose of standby counsel. (Vol. 5 p.48).

Moreover, the Ms. Van Zant stated to the Judge that:

MS. VAN ZANT: Your Honor, that is my point why he needs an attorney to represent him, not himself. He is an incarcerated individual and, yes, he has –

THE COURT: I'd like to say I wrote the constitution. I'd like to say I wrote the case saying he's got the right to do that. I did neither, but the law is crystal clear and he can represent himself, no matter how much of a bad idea that is. We can argue that until the cows come home and the law is still the same at the end of the day.

MS. VAN ZANT: Your Honor, just to clarify, my role is –

THE COURT: You are standby counsel. If he wants you to assist him he will ask for it. You are affirmatively to do nothing unless he asks for it."

(Vol. 5, p.50).

The Judge continued, stating, "[p]erhaps with time and with – as we proceed in this matter it will be enlightening that further assistance is needed, but until then it's his decision, but he has been ruled competent. He's intelligent, he's articulate and he's got a right to have

his day in court and he's got a right to represent himself." (Vol. 5 p.51). After discussion about additional discovery had ensued, Ms. Van Zant inquired of the Court as to whether the defendant needed to prepare an Order to obtain the victim's medical records. The Judge responded that, "he's representing himself. If he wants stand by help he knows it's to his immediate right." (Vol. 5 p.55). During this same hearing, the Judge later said that, "[y]ou have a duty to comply with the Rules. Again, that's one of the pitfalls I told you about." (Vol. 5 p.59). With regard to obtaining certain DNA testing, the Court observed that that "[the Petitioner had his] standby counsel and [his] former counsel here. I'm going to direct they make sure it's in your hands before you leave the courthouse today." (Vol. 5 p.68).

The next hearing in this matter was held on July 13, 2011, at which time the Court again asked the defendant if he desired to represent himself and the defendant responded "yes, sir." (Vol. 5 p.73). However, the Petitioner did bring forward his previously-filed motion to dismiss his standby counsel, Ms. Van Zant. (Vol. 5 p.76). Ms. Van Zant then advised the Judge that the Petitioner wished to retain Ms. Rumora to represent him and that the Petitioner had told Dr. Miller, during a second competency evaluation, that he did not feel that Ms. Van Zant was competent, that he did not trust her and that this required that she move to withdraw. (Vol. 5 p.77). The Petitioner went on to advise the Judge that he had trouble reaching, Ms. Van Zant, and that she would not come and visit him until he threatened her with a bar complaint. (Vol. 5 p.78). The Judge then decided that Ms. Van Zant would represent the Petitioner throughout the rest of this hearing and that "as soon as this hearing is over she's not going to be your standby counsel anymore. Ms. Sturgell is, behind you, and so that's your third lawyer. Again, standby

counsel.” (Vol. 5 p.79). The Judge went on to ask Ms. Sturgell to come forward and join the proceedings. (Vol. 5 p.79). At this point in time, the defendant was his own lead counsel and there were three separate court-appointed standby counsel present with him in the courtroom. At the end of the hearing, the Judge advised Ms. Sturgell, the Petitioner’s most recently appointed standby counsel:

COURT: He’ll have to decide what he wants you to have. Whatever he wants you to have he can let you copy it. I’m not going to order him to do anything. He’s counsel. If he wants to give it to you he can give it to you. If he don’t want to give it to you, and again, your role is standby counsel in this case, to assist him if he request you to assist him.

MS. STURGELL: I remember that.

COURT: It’s a unique role, but this is Mr. Davis’ desire, and that may well change if he hires Ms. Rumora or some other counsel, or family does.” (Vol. 5, p.92).

A hearing was held on July 21, 2011, at which time Ms. Sturgell appeared, as did Ms. Rumora, as standby counsel for the Petitioner. The Judge again advised Ms. Sturgell that she was not to take the lead regarding the representation. (Vol. 5, p.95). The Judge also permitted Ms. Sturgell to withdraw as counsel. (Vol. 5 p.96). The following exchange occurred with regard to Ms. Rumora’s representation:

THE COURT: Ms. Rumora has been retained by family members to assist?

MS. RUMORA: Yes, and, of course, Mr. Davis has signed a contract with us, indicating he still wishes to remain lead counsel and us on the sideline for legal assistance.

THE COURT: Is it you [sic] desire for Ms. Rumoa, pursuant to the

request of your family and their efforts in that regard, to act as counsel in some capacity to assist you?

THE DEFENDANT: yes, sir, co-counsel is what I call it.

THE COURT: I'll leave that up to you, except that I'm going to do my best to manage this during the course of the trial. I guess we'll have to cross the bridge as we come to it, as we have in the past with regard to – if inconsistent positions are made. It's still one person per witness, to cross examine the witnesses and make objections in that regard, as the Rules would normally call for, but we can deal with that.

MS. RUMORA: Your Honor, it's our agreement with him that he's going to do all that. We're going to assist him on the sideline, but we're going to give him direction and those kinds of things but he's going to cross examine and he's going to do direct examination and he's going to do the argument. He's going to do everything.

THE COURT: All right, I think we are good. We can go back and take care of these motions.
(Vol. 5 p.96)

Later in this hearing, the Petitioner indicated to the Court that he had asked his standby counsel to obtain Orders regarding discovery and to obtain records using said Order. (Vol. 5, p. 94-105). The Judge went on to say that the Petitioner was “giving [his] standby counsel more authority now than what's been given in the past, for whatever reason, and those reasons are your own, to Ms. Van Zant and Ms. Sturgell, and I think that's good, and hopefully that will result in orders being processed, executed and served.” (Vol. 5 p.107). The agreement between Ms. Rumora and the Petitioner is attached hereto as Appendix Volume 3, Pages 1-25.

A final pre-trial hearing was held on August 8, 2011. At that time the Petitioner

appeared *pro se* with standby counsel Ronald J. Rumora, Esquire and Marsha Webb Rumora, Esquire. This hearing was scheduled by the trial court *sua sponte* to address certain incidences of trial. During his discussion regarding opening statements, the Judge again acknowledged the Petitioner's right of self-representation, stating that, "I want to make sure you are given a full and fair opportunity to represent yourself, and I'm going to do that, particularly in light of your decision to represent yourself in this matter." (Vol. 5, p.112). During this discussion, the Judge also placed an additional burden on standby counsel when he noted that, "I would ask standby counsel to make sure they [control the defendant's witnesses]" since it was acknowledged that the defendant was in an unique position representing himself while being incarcerated. (Vol. 5, p.113-114). The Court went on, again on the eve of trial, to suggest additional ways in which standby counsel could serve the Petitioner: "[the witness] may well be here, but that's something you might want to ask standby counsel to assist you with tonight just to make sure you've got them." The Judge even advised the Petitioner how he should conduct his opening statement. (Vol. 5, p.123). During at least one point at this hearing, when the parties were discussing the appropriateness of photographs to be used as exhibits at the trial, the trial court permitted standby counsel to interpose an objection on behalf of the Petitioner despite the fact that the Petitioner was otherwise acting as lead counsel during the hearing. (Vol. 5, p.133).

(b) *Relevant facts occurring on the morning of trial*

On the morning of trial, the Judge had a discussion with the parties regarding the progression of the trial and to clear up any outstanding trial issues. During this meeting, it was

clear that the Judge was explaining to the *pro se* defendant, your Petitioner, several key and fundamental rules of evidence and procedure. For example, the Judge explained the rules governing reputation evidence of the victim (Vol. 6, p.5-6), the concept of relevant evidence and the need to lay a foundation for admission of certain evidence (Vol. 6, p.8), the concept of "opening the door," (Vol. 6, p.10), and the concept of authenticating evidence in order to have it admitted (Vol. 6, p.11-12): Even the Prosecutor advised the Petitioner regarding the rules of evidence and the elements necessary to convict on the burglary charge. (Vol. 6, p.10-11). An issue also arose during this hearing regarding the extent to which the defendant would be entitled to play certain 911 calls. The prosecutor objected to the general playing of the 911 tape. (Vol. 6, p.12). The trial court stated, "You need to talk to standby counsel. I'm in a very difficult position. You are a *pro se* litigant and I've done as much as I could to get to the line of what I'm allowed to do. I'm not allowed to give you legal advice. I'm not allowed to tell you how to try your case. I'm prohibited from doing that. On the other hand, I've done my best procedurally to keep you in the right direction as to what you must do in order to comply with the rules. That's one of the difficulties of representing yourself, but with regard to foundation matters and ways that you can get into evidence I would urge you to consult with Ms. Rumora and Mr. Rumora so they can assist you in that regard. That way you can get relevant matters into evidence. I want you to be able to fully defend yourself and fully get your evidence in. On the other hand, I've got to make sure that the Rules are complied with." (Vol. 6, p.13). Only moments later, the trial court provides the Petitioner with a very substantial warning, noting that "I cannot give you legal advice, but if you supply motive to the state thru [sic] your own

efforts then that can be utilized in an adverse fashion against you....And one other thing I generally need to tell you and I've told you from the beginning of the magistrate from right on thru [sic], you've got a right to remain silent. Now you are representing yourself. Any statement that you make out there, even though it's an unsworn statement, in opening statements those jurors are going to be hearing that. I'm going to let you say what you want as long as it's appropriate opening statements, but I just wanted to caution you in that regard that you may say things that are adverse to you, including supplying motive and other matters." (Vol. 6, p.16). In response to this warning from the trial court, the Petitioner stated, "I kind of understand what you're saying." (Vol. 6, p.16). The Judge continued, "In most cases people are represented by lawyers and then they can come back later and alleged[sic] ineffective assistance of counsel. You're not going to be able to come back later if you are convicted later and allege ineffective assistance of counsel because you are your own counsel.

THE DEFENDANT: Yes, sir;

THE COURT: I hope you have ability to be effective, and that's my concern." (Vol. 6, p.16).

Later during the meeting, the trial court advised the petitioner that he could introduce statements made by the victim Lara Davis "thru[sic] her," to which the petitioner responded, "Thru[sic] her?" (Vol. 6, p.20).

(c) *Relevant facts occurring at trial*

During the trial, numerous instances arose wherein it appeared that the trial court was giving the Petitioner advice on how to proceed with his case. Specifically, the trial court

provided non-objectionable questions to the Petitioner while he was performing cross-examination (Vol. 6, , p.92), explained how to handle objections from opposing counsel (Vol. 6, p.120 & Vol. 7, p.166), explained when a witness would be subject to recall (Vol. 6, p.167) and guidance regarding how the Petitioner should behave in front of the jury (Vol. 6, p.171). At one point, the trial court actually encouraged the Petitioner to “take your best shot at cross examination now and we’ll see whether or not this was not addressed already and whether there is a necessity of bringing him back.” (Vol. 7, p. 33). At other times during the trial, the Judge was providing *ad hoc* instructions to standby counsel. (Vol. 6, P. 100). The trial court instructed the Petitioner to consult with his standby counsel at one point during the Petitioner’s case-in-chief on matters regarding the proper handling of witnesses. (Vol. 7, p.75 and Vol. 7, p.112). During a particularly difficult examination of a law enforcement officer, the trial court permitted the standby counsel to interject an argument on behalf of the Petitioner. (Vol. 7, p.89). In fact, as the trial went on, the standby counsel was permitted greater latitude to advance arguments on behalf of the Petitioner. (See Generally Vol. 7, p.169).

At times, it was apparent that the Petitioner was not competently able to represent himself, including his statement to the trial court, in the presence of the jury, when he stated, “You don’t know how hard this is. I’ll tell you what. I’ll just rest at this time and see if I can get my bearings together.” (Vol. 6, p. 167). Importantly, it was clear that the Petitioner was unaware of the proper scope of testimony when he called forensics expert A.K. Gill with the West Virginia State Police Crime Lab to present evidence that could have been easily obtained from other sources; as a result of the extraordinary miscalculation by the Petitioner, and the

failure of the Petitioner to make appropriate objections, Ms. Gill was permitted to testify that the blood found on the Petitioner's clothing confiscated after his arrest was consistent with blood from the deceased. (Vol. 6, p.179). In this same regard, late in the trial the Petitioner stated to the Judge that, "I'm new to this, so you could throw a bat at my head and I wouldn't know you did it" and "I'm getting over my head here. You tell me. Do we have Mr. Mines to call?" (Vol. 7, p.169).

The State also elicited testimony at trial from Dr. Bobby A. Miller, II. Dr. Miller was permitted, without objection, to give testimony to the jury regarding the Petitioner's competency to represent himself in this matter. (Vol. 7, p.10-16) Dr. Miller was also permitted, without objection, to explain how the Petitioner's competency was viewed in light of Supreme Court cases and how the jurisprudence dictates that the Petitioner is competent not only to stand trial, but to represent himself in this trial. Id. During the Petitioner's cross-examination of Dr. Miller, he voluntarily chose to give testimony regarding his decision to represent himself. While the appropriateness of this "testimony" is beyond the scope of this appeal, it is worth noting what was said. The Petitioner advised the jury, the Judge, opposing counsel, the witness – Dr. Miller, and anyone in the courtroom that he had chosen to represent himself because he did not believe that the court-appointed counsel, of which he included Ms. Van Zant despite the fact she was always appointed as "standby counsel," had been successful in prevailing in these types of cases and that they would not work for him. (Vol. 7, p.20).

It was not until after the state rested that the trial court again advised the Petitioner that

he did not have to testify. (Vol. 7, p.55). Ultimately, the Petitioner decided not to testify on his own behalf, despite having given factual testimony at various points throughout the trial. (Vol. 7, p.174).

At the time for closing argument, the State objected to the Petitioner's argument two times immediately. (Vol. 8, p. 48-49). The Judge asked for a bench conference, at which time the Petitioner indicated that he felt ineffective as his own counsel and then almost immediately suffered from a medical emergency. (Vol. 8, p.51). The Judge ordered that the Petitioner be examined by onsite EMT, and then subsequently had him taken to the Emergency Room. (Vol. 8, p. 52). While the defendant was at the Emergency Room, but still on the record, the trial court went to great lengths to explain the relevant Sixth Amendment considerations that were prompted by the bench conference immediately proceeded the Petitioner's medical emergency. (Vol. 8, p. 56-62). The trial court then brought the jury out and explained to the Petitioner, in the presence of the jury, what the Sixth Amendment guaranteed to him regarding participation in his own trial. (Vol. 8, 63-65). After conference with standby counsel, it was determined that Ms. Rumora would give the closing argument to the jury.

Following the trial, the jury found the Petitioner guilty on all counts and he was subsequently sentenced to two, consecutive life sentences, *inter alia*. In thanking the jury for its service, the trial court stated, "...ladies and gentlemen of the jury, let me advise you at this time that we sincerely appreciate your conscientious attention throughout this case. This has been an unusual case in that this is the first time in the history that a case has been done in the

manner that we've done this, so it was a difficult process for everyone.” (Vol. 8, p.98).

II. LEGAL ARGUMENT

i. The trial court erred by permitting the Petitioner to represent himself when he was charged with several felonies, thereby depriving the Petitioner of his constitutional right to assistance of counsel.

The Petitioner did not knowingly and intelligently waive his right to assistance of counsel. A person accused of a crime is entitled to the right of assistance of counsel. See generally Sixth and Fourteenth Amendments to the Constitution of the United States of America; see also Article III, section 14 of the West Virginia Constitution. It has been said by the Supreme Court of Appeals of West Virginia that, “the right of self-representation is a correlative of the right to assistance of counsel guaranteed by [the West Virginia Constitution].” State v Surber, No. 11-0361, January, 2012 (not yet published). (citing State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983). In fact, “it has long been recognized in [West Virginia] that an accused has a constitutional right to defend himself in a criminal proceeding without the assistance of counsel. State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983)(citing State v. Yoes, 67 W.Va. 546, 68 S.E. 181 (1910)). However, per the United States Supreme Court, the right of an accused to represent himself without the assistance of counsel is not an absolute right. State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983)(discussing the implicit holding of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)).

Since a defendant's exercise of the right of self-representation requires the waiver of a

fundamental constitutional right, it must be done so “knowingly and intelligently.” State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983). In this context, the test is not based on the wisdom of the accused’s decision to represent himself or its effect upon the expeditious administration of justice, but, rather, whether the defendant is aware of the dangers of self-representation and clearly intends to waive the rights he relinquishes by electing to proceed *pro se*. State v Surber, No. 11-0361, January, 2012 (not yet published). As the United States Supreme Court has said, “a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, **so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’**” Faretta v. California 422 U.S. 806, 95 S.Ct. 2525 (1975) (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed.268 (1942))(emphasis added). In this case, it cannot be said that the Petitioner was made aware of the dangers and disadvantages of self-representation and therefore his decision was not made knowingly and intelligently. The trial court erred in permitting the Petitioner to represent himself.

The trial court’s decision to permit the accused to represent himself is reviewed for abuse of discretion. State ex rel. Powers v. Boles, 149 W.Va. 6, 138 S.E.2d 159 (1964).

The case law makes it clear that the “preferred procedure” is for the trial court to warn the accused of the dangers and disadvantages of self-representation and to make inquiries to assess whether the accused’s choice is knowing, intelligent and voluntary. State v. Sandor, 624 S.E.2d 906 (2005). In a footnote located in this Court’s opinion in State v. Sandor, the

Court noted *The Benchbook for U.S. District Court Judges* (“Benchbook”), a guide for questions that a federal judge can ask to “convey the disadvantages the defendant likely will suffer if he proceeds pro se.”¹ *Id.* at 914.

¹ 1. Have you ever studied law? 2. Have you ever represented yourself in a criminal action? 3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]? 4. Do you understand that if you are found guilty of the crime charged in Count I the court must impose ____ [Ask defendant a similar question for each crime with which he or she may be charged in the indictment or information]? 5. Do you understand that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another? 6. Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will affect your sentence if you are found guilty? (FN – would not be relevant inquiry) 7. Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case. 8. Are you familiar with the Federal Rules of Evidence? 9. Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules? 10. Are you familiar with the Federal Rules of Criminal Procedure? 11. Do you understand that those rules govern the way a criminal action is tried in federal court? [Then say to the defendant something to this effect] 12. I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself. 13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer? 14. Is your decision entirely voluntary? [If the answers to the two preceding questions are yes, say something to the following effect:] 15. I find that

In addition to the guidance provided by the *The Benchbook*, our West Virginia cases have delineated the specific issues to be addressed by the trial court.² See *State v. Sandor*, 624 S.E.2d 906 (2005), (citing *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985)).

While the cases make it clear that these specific questions, and areas of inquiry, may not be mandatory, it is equally obvious that the trial court has a duty to engage in some dialogue with the accused. Here, when the Petitioner first advised the trial court on May 23, 2011, that he wished to represent himself, the trial court accepted this request without engaging in the requisite dialogue. No colloquy can said to have occurred. Rather, the trial court promptly recognized the fact that the accused had a right of self-representation, that the accused was

the defendant has knowingly and voluntarily waived his right to counsel. I therefore permit the defendant to represent himself [herself].

² 1.To ascertain if the defendant is cognizant of and willing to relinquish his right to assistance of counsel; 2. To insure that the accused is aware of the nature, complexity and seriousness of the charges against him and of the possible penalties that might be imposed; 3.To warn the accused of the danger and disadvantages of self-representation. (e.g. that self-representation is almost always detrimental and that he will be subject to all the technical rules of evidence and procedure, the same as if he had been represented by counsel); 4.To advise the defendant that he waives his right to refuse to testify by going outside the scope of argument and testifying directly to the jury. 5. To make some inquiry into the defendant's intelligence and capacity to appreciate the consequences of his decision.

adjudged to be competent, and granted the court-appointed attorney's motion to withdraw. This was the last date on which this indigent Petitioner had court-appointed counsel to represent him against these very serious charges brought by the State. Every attorney that appeared with the accused throughout the remaining proceedings was designated by the trial court as "standby counsel," and from that point forward, the trial court very clearly held the accused responsible for all aspects of his defense.

The Petitioner submits that the trial court should have, on May 23, 2011, asked him a series of questions designed to determine if he was truly appreciative of the constitutional rights which he was seeking to waive. While it cannot be said that the trial court encouraged the accused to represent himself, he surely did not ask any questions of the nature contemplated by the *The Benchbook*, or by Sandler. Rather, the trial court stated as follows:

THE COURT: Well, she'll be standby counsel. You can do that. I'd caution you against that. If you want to do that, that's fine. Ms. Van Zant will be your standby counsel in this case to assist you, to answer questions that you might have.

In other words, I want to respect your right to make that decision, although I think it's an ill-advised decision. You certainly can do that, but you'll have to comply with all the court rules, all the discovery rules and all the other matters. Do you understand that? (Vol. 5, p. 25-26).

The Judge again raised the issue during the May 23, 2011 hearing, noting that "[w]hat you're saying now gives prime examples of why you need assistance. It's very difficult for you to get subpoenas requested, issued and the like while incarcerated, and counsel can do those things for you." (Vol. 5, p.41).

Other than these three statements, the Court did not otherwise warn the accused of the "dangers and disadvantages of self-representation." These statements lack the depth

contemplated by the authorities that have suggested an appropriate dialogue between trial court and accused in this context. Certainly, taken as a whole, they do not comprise the “preferred procedure” contemplated by this Court. For these reasons, your Petitioner humbly submits that the trial court erred in failing to provide a detailed colloquy regarding the dangers and disadvantages of self-representation.

In the absence of a detailed colloquy, otherwise described in our jurisprudence as “the preferred procedure,” the knowledge and intelligence required to waive the constitutional right of assistance of counsel can be shown from the totality of the circumstances. State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983). This Court has stated that in the absence of a colloquy, the appellate courts must examine the record and determine whether the totality of the circumstances of the case and the background of the accused [indicates] whether the accused’s decision was constitutionally fair.” State v. Sandler, 175 W.Va. 572, 336 S.E.2d 535 (1985). Here, neither the Petitioner’s background, nor the totality of the circumstances of this case, indicates constitutional fairness. Rather, it appears that the trial court relied on the competency evaluation to establish that the Petitioner knowingly and intelligently waived his constitutional right to assistance of counsel. The trial court failed to advise the Petitioner that self-representation is “almost always detrimental,” as contemplated by the cases. The trial court did not advise the Petitioner until the morning of trial that the waiver of his right to assistance of counsel would preclude an appeal on the basis of ineffective assistance of counsel. It was not until the morning of trial that the trial court first advised the Petitioner that he would have to fashion his opening statement in a manner so as not to compromise his right not to testify. It

does not appear from the record that the trial court ever advised the Petitioner that he might, in closing argument, go outside the scope of argument and find himself testifying to the jury (which, incidentally, did in fact occur while the Petitioner was permitted to question the witnesses on both direct and cross examination). No inquiry was ever made by the trial court regarding the Petitioner's educational background, or his background representing himself in criminal matters. The trial court did not ever inquire as to the Petitioner's familiarity with the governing rules of evidence or procedure; but instead insisted upon the Petitioner acting in conformity with those rules. After the Petitioner first advised the trial court that he was going to represent himself on May 23, 2011, the trial court never asked the Petitioner about his understanding or awareness of the potential penalties associated with his prosecution. There was never any discussion as to whether the Petitioner understood that he might be convicted of lesser-included offenses, or that he might be convicted of some offenses and not others, or that there might be possible defenses that can be raised against the charges brought.

Despite failing to give warnings, the trial court did address the issue of self-representation numerous times pre-trial, on the morning of trial and throughout the trial. On any of these occasions, or at any other time, the trial court was in a position to make the relevant inquiries regarding the extent of the Petitioner's knowledge and intelligence in the context of the waiver of important constitutional rights.

The trial court explicitly and implicitly approved of the Petitioner's decision to represent himself, and held the Petitioner's request for self-representation as sacrosanct.

While this Court has previously stated that the appropriate test in this regard does not

contemplate the wisdom of the accused's decision to *pro se*, it is worth noting that the Petitioner attempted bravely to defend himself in this case. At times, he did perform an effective cross examination. However, the record clearly indicates that the Petitioner proceeded without coherently advancing any theory, despite the availability of several defense theories. It is likewise obvious from the totality of the record that the Petitioner was simply unable to effectively to prepare for his representation, which should have been known to the trial court that denied him bail. In fact, at nearly every pre-trial hearing, the Petitioner advised the trial court that he was having difficulty preparing his defense. The trial court repeatedly advised the Petitioner that this was the purpose of standby counsel, which is addressed in detail below, despite having previously advised the Petitioner that he was fully responsible for his defense.

The record also reflects that the Petitioner failed to understand the significance of key witnesses and this led to disastrous results during the trial. With regard to A.K. Gill, a DNA expert with the West Virginia State Police Lab, which the State had indicated that they did not intend to call to testify, the Petitioner called her as a witness to prove a point which she could not provide any relevant evidence regarding. After failing to elicit any useful testimony from her, the Petitioner chose not to ask her anymore questions and the State was able to elicit incriminating testimony that the victim's blood was on the Petitioner's pants when they were seized by Kentucky law enforcement and submitted to the West Virginia State Police Lab for analysis. It is clear that not only was the decision to call Ms. Gill under these circumstances a strategic error by the Petitioner, but that the Petitioner failed to properly understand in any meaningful way the relevance of evidence, and the proper mechanism for presenting relevant

evidence to the jury. The pre-trial conduct of the Petitioner should have put the trial court on notice that this trial result might obtain and an inquiry into the Petitioner's true understanding of the rules governing his defense should have ensued.

It cannot be said from this record that the Petitioner knowingly and intelligently waived his right to assistance of counsel. There was no colloquy regarding the dangers and disadvantages of self-representation. The accused has no background in legal training and does not have a history of representing himself, particularly against charges as serious as those present in the instant case. The totality of the circumstances indicate that the trial court failed to inquire into any of the relevant factors and instead placed undue weight on the competency evaluations of the Petitioner, which were ordered or requested for the purpose of determining whether the Petitioner was competent to stand trial and to assist his attorneys in the preparation of his defense. There is a substantial distinction between being competent to stand trial and assist your attorney in the preparation of your defense and being able to conduct all aspects of a jury trial wherein you are accused of multiple felonies carrying life sentences without mercy. Because it is clear from the record that the Petitioner was never advised of all of the issues that he needed to consider regarding his purported waiver of constitutional rights, he did not do so knowingly and intelligently and the trial court abused its discretion by allowing him to proceed *pro se*. This abuse of discretion constitutes reversible error.

ii. The trial court erred by allowing the Petitioner's court-appointed attorney to withdraw absent good cause and thereby denied the Petitioner his constitutional right to assistance of counsel.

The Petitioner was denied effective assistance of counsel when the trial court permitted his court-appointed counsel to withdraw without good cause and in the absence of an inquiry into the Petitioner's "recommendation" for her withdraw.

On May 23, 2011, the trial court granted the Petitioner's court-appointed attorney's Motion to Withdraw as counsel for the Petitioner and by so doing, denied the defendant of the assistance of counsel. Between at least January 20, 2011 and May 23, 2011, Ms. Wiedel was a court-appointed counsel for the indigent Petitioner. During this time, Ms. Wiedel filed motions on behalf of the Petitioner, and advanced those motions and provided other representation at numerous pre-trial hearings. During a competency evaluation, the Petitioner stated that he was dissatisfied with the services of Ms. Wiedel. At the next hearing, Ms. Wiedel was permitted to withdraw during the following exchange:

"THE COURT: You are having issues – attorney/client issues with Ms. Wiedel?

THE DEFENDANT: Yes, ma'am – yes, sir;

THE COURT: And you believe those issues have resulted in irreconcilable differences between you and Ms. Wiedel with regard to the manner in which you wish to defend your case?

THE DEFENDANT: Yes, sir.

THE COURT: Then I'm going to sustain the motion. Ms. Wiedel will be allowed to withdraw. The Court is going to appoint Susan Van Zant to represent you in this matter.

THE DEFENDANT: I'm going to represent myself, if you don't mind, sir.

THE COURT: Well, she'll be standby counsel. You can do that. I'd caution you against that. If you want to do that, that's fine. Ms. Van Zant will be your standby counsel in this case to assist you, to answer questions that you might have.

Prior to this exchange, the Petitioner said that he recommended that Ms. Wiedel be permitted to withdraw.

On its face, the record shows that the trial court abused its discretion by allowing Ms. Wiedel to withdraw as counsel, thereby permitting the Petitioner to proceed *pro se*, while simultaneously appointing another court-appointed attorney to serve as standby counsel. The only basis provided by the Petitioner supporting withdrawal was that irreconcilable differences between the Petitioner and Ms. Wiedel had arisen with regard to the manner in which the defense was to be conducted. Particularly since the result of the decision to grant Ms. Wiedel's motion to withdraw was to permit the Petitioner to proceed *pro se*, the trial court's inquiry failed to address the good faith nature of the Petitioner's statements during the competency evaluation and his "recommendation" that Ms. Wiedel be permitted to withdraw, consistent with Watson v. Black. Watson v. Black, 161 W.Va. 46, 239 S.E.2d 664 (1977). This Court reluctantly noticed in Watson that "there will be occasions on which there is such a sharp clash of personalities between court-appointed lawyer and client that fair representation will require the replacement of appointed counsel. An indigent criminal defendant (who obviously has a higher likelihood of being incarcerated pending trial than persons who are not indigent) is entitled to a lawyer who is solicitous of his concerns and who will willingly and graciously accommodate him in the doing of such thing as the client feels are in his best interest..." However, the indigent criminal defendant has a duty to cooperate with his court-appointed counsel and failure to do so is at his own peril. *Syl. Pt. 4*, Watson v. Black, 161 W.Va. 46, 239 S.E.2d 664 (1977). It is axiomatic that the trial court has a duty to advise an accused of their

right to counsel, and to appoint an attorney to defend the indigent. State v. Blosser, 158 W.Va. 164, 207 S.E.2d 186 (1974); State v. Thomas, W.Va., 203 S.E.2d 445 (1974). Moreover, while the indigent defendant may elect self-representation knowingly and intelligently, the trial court is empowered to deny the defendant this right, or revoke this right, if it concludes that the defendant did not knowingly and intelligently make the waiver. And, even if the indigent criminal defendant chooses not to participate in his defense, the court-appointed lawyer may be instructed by the trial court, in its discretion, to proceed with the defense. See generally United States v. West, 877 F.2d 281 (4th Cir. 1989). There was also a duty of the trial court to determine “good cause” for permitting withdrawal. Matheny v. Farley, 66 W.Va. 680, 66 S.E. 1060 (1910).

Accordingly, the decision to permit withdrawal of court-appointed counsel without a detailed inquiry into the circumstances regarding the request, and without ascertaining whether the defendant’s acquiescence was made knowingly and intelligently, and in good faith, was an abuse of discretion by the trial court. The trial court, if it determined that the Petitioner did not knowingly and intelligently waive his constitutional rights, would have been justified in requiring Ms. Wiedel to remain in her capacity as lead counsel, and to put the indigent defendant in the position of either cooperating with Ms. Wiedel, despite Petitioner’s lack of confidence in her. At that point, the Petitioner’s decision not to cooperate with Ms. Wiedel would have been done at his own peril. Because the trial court has the duty to safeguard the Constitution and to insure that indigent criminal defendants who come before it are fully knowledgeable and intelligent in their decisions to waive fundamental constitutional rights, the

court abused its discretion in permitting Ms. Wiedel to withdraw without appointing a competent replacement, did not inquire further into the circumstances surrounding her request or the Petitioner's acquiescence to same. Since the trial court's granting of the motion to withdraw on May 23, 2011 left the Petitioner without effective assistance of counsel, contrary to the Sixth Amendment to the United States Constitution, and is an abuse of the trial court's discretion, it constitutes reversible error.

iii. The trial court erred by appointing standby counsel to participate in the defense of the Petitioner without articulating the scope of the representation of standby counsel.

The trial court erred by appointing standby counsel to assist the Petitioner without articulating the scope of the representation expected of the standby counsel, and thereby denied the Petitioner of his right to effective assistance of counsel. The trial court's failure to provide clarity as to the scope of the representation of standby counsel appointed to assist the Petitioner must be reviewed under an abuse of discretion standard. State v. Powers, 211 W.Va. 116, 563 S.E.2d 781 (2001).

On May 23, 2011, the trial court granted Ms. Wiedel's Motion to Withdraw, ruled that the Petitioner was permitted to represent himself because he knowingly and intelligently waived his right to assistance of counsel, and appointed Ms. Susan Van Zant, Esquire to serve as standby counsel for the Petitioner. At this time, the trial court did not articulate with any specificity the role of standby counsel. Between May 23, 2011 and July 13, 2011, Ms. Van Zant served in the capacity as standby counsel. At no time was her role defined, despite her

multiple requests for more information about the scope of her representation. *See supra*. In fact, it appears at times on the record that Ms. Van Zant was frustrated with the lack of clarity concerning her role in the case as standby counsel. *See supra*.

The notion of “standby counsel” was discussed in Faretta v. California, 422 U.S. 806 (1975). In our West Virginia jurisprudence, a significant statement regarding the trial court’s handling of standby counsel was made in State v. Powers by this Honorable Court:

“Trial courts can easily remedy the confusion surrounding the differing roles apparently filled by standby counsel by exercising their supervisory powers to specifically define or restrict the duties of standby counsel whenever such counsel is appointed.... Given the lack of clarity over what, exactly, is the role of standby counsel, we find it is of the utmost importance that, which appointing standby counsel, trial courts do in fact define, precisely, the role counsel is expected to assume. Furthermore, trial courts should clearly inform counsel and the defendant of that role. Accordingly, we hold that when a circuit court appoints standby counsel to assist a criminal defendant who has been permitted to proceed *pro se*, the circuit court must, on the record at the time of the appointment, advise both counsel and the defendant of the specific duties standby counsel should be prepared to perform.”

From the first hearing wherein standby counsel was appointed, May 23, 2011, until the closing argument to the jury, it was unclear when and what role standby counsel would play. *See Supra*. It is worth noting that multiple standby counsels were appointed by the trial court to represent the Petitioner – concededly after the Petitioner had expressed some doubt about their

abilities – before the Petitioner ultimately retained the services of counsel of his choosing about three weeks prior to trial.

To be clear, the Petitioner is not here raising the contention that the court-appointed standby counsel provided ineffective assistance of counsel, although he does not hereby waive his right to later bring forward that contention. Rather, it was the trial court's failure to clearly inform counsel and the defendant of the role of standby counsel that created confusion in the defense of these serious charges, including serious delays in discovery, the failure to obtain certain discovery that should have been readily available in light of the trial court's rulings, the failure to secure the attendance of certain witnesses, and ultimately the failure of the defendant to present a coherent defense. *See Supra*. It is difficult to say, and unnecessary for this appeal, whether the failures were the result of an ineffective standby counsel, or the result of the lack of clarity on the role of standby counsel.

CONCLUSION

The Petitioner's conviction should be overturned and this matter should be remanded to the Circuit Court of Mingo County for further proceedings wherein the Petitioner shall be required – even against his will – to surrender to representation by competent counsel. The trial court abused its discretion by permitting the Petitioner to proceed *pro se*. The record reflects no detailed inquiry at any stage, and totality of the circumstances dictate that the Petitioner did not knowingly and intelligently waive his right to counsel. The trial court further abused its discretion by permitting the Petitioner's court-appointed counsel to withdraw on May 23, 2011. This error deprived your Petitioner of rights guaranteed to him by the United States

Constitution, the West Virginia Constitution; rights which have been repeatedly ensured by this Honorable Court. The charges against the Petitioner were serious, proscribed penalties including life without mercy, and it was clear that incarceration interfered with his ability to assist his court-appointed counsel, let alone proceed as lead counsel. The trial court's decision to permit the Petitioner's court-appointed counsel, concurrent with his request to proceed *pro se*, operated to deprive the Petitioner of effective assistance of counsel. The trial also abused its discretion on May 23, 2011, when it appointed standby counsel without articulating the scope of standby counsel's representation. As the matter proceeded pre-trial, different standby counsels were appointed, but important clarification as to the scope of their representation never came. This led to confusion between the Petitioner and his standby counsel, as demonstrated clearly in the record, and effected the Petitioner's already limited ability to defend himself against these most serious charges. The failure to clarify, on the record, the scope of the representation of standby counsel constituted error sufficient for reversal of the verdict.

Each of these three assignments of error should be reviewed under an abuse of discretion standard. In each instance, the trial court abused its discretion. Had the trial court not erred in its handling of the issues, or any single one of them, upon which this appeal is basis, the result at trial may have been substantially different. It may not have been. That of course is not the relevant inquiry. The inquiry is, simply put, did the trial court commit error and does that error constitute reversible error. Because the trial court's abuse of discretion deprived the Petitioner of constitutionally guaranteed rights, under well-settled law, reversible error was committed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

v.

APPELLATE DOCKET NUMBER:
11-1496(J11-F-2)

DARRELL K. DAVIS
Petitioner.

CERTIFICATE OF SERVICE

I, Steve A. Baker, counsel for Petitioner, Darrell K. Davis, do hereby certify that service of the attached Petitioner's Brief was made upon the State of West Virginia by mailing a true and correct copy in the U.S. Mail, postage prepaid and properly addressed to:

Mingo County Prosecuting Attorney
75 E. 2nd Ave. #201
Williamson WV 25661

This 30th day of May, 2012.



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