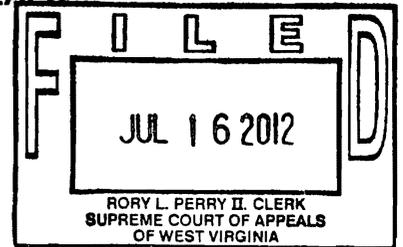

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

Plaintiff Below/Respondent,

vs.

Appellate Docket Number 11-1496



DARRELL K. DAVIS,

Defendant Below/Petitioner.

SUMMARY RESPONSE TO PETITION FOR APPEAL

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PROCEEDINGS BELOW

The Petitioner was charged by Mingo County Circuit Court Indictment J11-F2 with First Degree Murder, a violation of West Virginia Code § 61-2-1; Kidnapping, a violation of West Virginia Code § 61-2-14a; First Degree Arson, a violation of West Virginia Code § 61-3-1(a); Burglary, a violation of West Virginia Code § 61-3-11(a); and Malicious Assault, a violation of West Virginia Code 61-2-9(a) [Transcript Vol. 1, Pg. 11].

On May 23, 2011, the trial court authorized the Petitioner's court-appointed counsel, Diana Carter Wiedel, to withdraw from representing the Petitioner because the Petitioner deliberately refused to cooperate in the representation and confirmed that irreconcilable differences existed in the attorney-client relationship [Transcript Vol. 1, Pg. 33-35].

Similarly on July 13, 2011, the trial court authorized the Petitioner's succeeding court-appointed counsel, Susan J. Van Zant, to withdraw as the Petitioner's counsel because the Petitioner refused to cooperate in the representation and threatened to file a complaint against Van Zant with the West Virginia Office of Disciplinary Counsel [Transcript Vol. 1, Pg. 77-79].

Yet again on July 21, 2011, the Petitioner's subsequent court-appointed counsel, Kathryn Cisco-Sturgell, was authorized to withdraw as the Petitioner's counsel after the Petitioner privately retained Rumora & Rumora, L.C., to represent the Petitioner in a hybrid counsel structure [Transcript Vol. 1, Pg. 96].

In the middle of closing arguments on August 11, 2011, the Petitioner became argumentative with the trial court and attempted to sabotage the jury trial by feigning a fainting incident in the presence of the jury [Transcript Vol. 4, Pg. 49-51]. After multiple

medical tests by emergency medical technicians and a physician confirmed that there was no medical condition that would have caused the Petitioner's charade in the courtroom, the Petitioner's hybrid counsel, Ronald J. Rumora, gave the Petitioner's closing argument [Transcript Vol. 4, Pg. 51-53, 57-58, 63-64].

The Petitioner was convicted of all charges. With respect to the First Degree Murder and Kidnapping convictions, the petit jury recommended life without mercy [Transcript Vol. 4, Pg. 94].

On September 12, 2011, the Petitioner was sentenced to confinement in a state correctional facility for a definite term of life without mercy in connection with the First Degree Murder [Count I] and Kidnapping [Count II] convictions. The Petitioner was further sentenced to confinement in a state correctional facility for a definite term of ten (10) years in connection with the First Degree Arson [Count III] conviction; an indefinite term of not less than one (1) year nor more than fifteen (15) years in connection with the Burglary [Count IV] conviction; and an indefinite term of not less than two (2) years nor more than ten (10) years in connection with the Malicious Assault [Count V] conviction. The trial court directed that the Kidnapping [Count II] conviction sentence run consecutively with the First Degree Murder [Count I] conviction sentence and the remaining [Count III, IV and V] conviction sentences run concurrently with the Kidnapping [Count II] conviction sentence [Transcript Vol. 4, Pg. 105-106].

STATEMENT OF FACTS

On or about July 31, 2010, the Petitioner broke and entered a cabin owned by Lokie Newsome at Newsome Ridge, Mingo County, West Virginia. [Transcript Vol. 2, Pg. 135]. The Petitioner's estranged wife, Lara Davis, and Gary Newsome were asleep

together in bed when the Petitioner shouted "Wake up!" and shot Gary Newsome in the forehead [Transcript Vol. 2, Pg.136-137 and 168]. The Petitioner then shot Lara Davis in the abdomen and battered Lara Davis in the back of her head with a rifle [Transcript Vol. 2, Pg. 137-139]. The Petitioner thereafter carried a wounded, battered and bleeding Lara Davis to the Petitioner's Jeep [Transcript Vol. 2, Pg. 141]. After setting the cabin on fire, the Petitioner drove a circuitous route initially toward Williamson [WV], then into Kentucky, before ultimately ending up at a cousin's residence several hours away near Flemingsburg, Kentucky [Transcript Vol. 2, Pg. 141-144]. During the trip, the Petitioner refused Lara Davis' pleas to take Lara Davis to a hospital and told Lara Davis that the Petitioner "didn't think he'd be able to let [her] live or something like that." [Transcript Vol. 2, Pg. 143]. Lara Davis was finally afforded medical treatment for her life-threatening injuries after the Petitioner's cousin persuaded the Petitioner to let Lara Davis be taken to a hospital [Transcript Vol. 2, Pg. 144]. Lara Davis received extensive emergency medical treatment, including, but not limited to, multiple blood transfusions, surgeries and head staples [Transcript Vol. 2, Pg. 144 and 146].

SUMMARY RESPONSE TO ASSIGNMENT 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.

STANDARD OF REVIEW

1. "A judge's decision to allow an accused to exercise his right to self-representation is reviewed under an abuse of discretion standard."
Syllabus Point 8, State v. Surber, 228 W.Va. 621, 723 S.E.2d 851 (2012).

GUIDING PRECEDENT

2. “The Sixth Amendment as made applicable to the States by the Fourteenth guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so.” Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
3. “The right of self-representation is a correlative of the right to assistance of counsel guaranteed by Article III, Section 14 of the West Virginia Constitution.” Syllabus Point 3, State v. Surber, 228 W.Va. 621, 723 S.E.2d 851 (2012); Syllabus Point 7, State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983).
4. “A defendant in a criminal proceeding who is mentally competent and *sui juris* has a constitutional right to appear and defend in person without the assistance of counsel, provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial.” Syllabus Point 5, State v. Surber, 228 W.Va. 621, 723 S.E.2d 851 (2012); Syllabus Point 7, State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983).
5. “The determination of whether an accused has knowingly and intelligently elected to proceed without the assistance of counsel depends on the facts and circumstances of the case. The test in such cases is not 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." Syllabus Point 6, State v. Surber, 228 W.Va. 621, 723 S.E.2d 851 (2012); State v. Sheppard, 172 W.Va. 656 at 671, 310 S.E.2d 173 at 188 (1983).

6. "A trial court is not, however, required to follow Sheppard as though it were a sacrosanct litany, and the failure to make inquiry as to any particular topic does not make a reversal of a conviction inevitable." State v. Sandor, 218 W.Va. 469 at 478, 624 S.E.2d 906 at 915 (2005).
7. The competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard to stand trial: whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680 125 L.Ed.2d 321 (1993).

ARGUMENT POINTS

8. Based upon the totality of facts and circumstances, the trial court did not abuse its discretion by permitting the Petitioner to proceed with a hybrid counsel structure.
9. Based upon the totality of facts and circumstances, the Petitioner's argument that there was no Sheppard colloquy is tenuous and unfounded.
10. The Petitioner knowingly, competently, intelligently and understandingly

waived the right to primary assistance of counsel.

11. The Petitioner knowingly, competently, intelligently and understandingly elected to proceed with a hybrid counsel structure.

CORROBORATING POINTS

12. The Petitioner was found competent to stand trial by Rosemary L. Smith, Psy.D., and Ralph S. Smith, Jr., M.D. [Transcript Vol. 1, Pg. 19-21].
13. Bobby Miller, M.D., found the Petitioner competent to stand trial and waive the right to counsel. Moreover, Dr. Miller opined to a reasonable degree of psychiatric certainty that the Petitioner knowingly and intelligently waived the right to counsel [Transcript Vol. 3, Pg. 12, 16].
14. Dr. Miller further opined that the Petitioner exhibited a rational and factual understanding of the proceedings [Transcript Vol. 1, Pg. 73-74].
15. Dr. Miller further opined that the Petitioner's competence extended to those capacities necessary for self-representation [Transcript Vol. 1, Pg. 74].
16. The Petitioner understood the nature and role of all participants [Transcript Vol. 1, Pg. 74].
17. The Petitioner was advised of the applicable statutory penalties [Transcript Vol. 1, Pg. 6, 12].
18. The Petitioner was cognizant of the applicable statutory penalties [Transcript Vol. 1, Pg. 19 and Vol. 2, Pg. 63].
19. The trial court warned the Petitioner at the onset that the decision to represent himself was an "ill-advised" decision [Transcript Vol. 1, Pg. 36].

20. The trial court cautioned the Petitioner against proceeding with a hybrid counsel structure at least eleven (11) different times [Transcript Vol. 1, Pgs. 35-36, 40-41, 45-46, 50-51, 56, 63, 107].
21. The trial court explicitly warned the Petitioner at the onset that the Petitioner would be required to comply with all technical rules of procedural, substantive and evidentiary law [Transcript Vol. 1, Pg. 36-37].
22. On at least twenty (20) occasions, the Petitioner was either advised by the trial court that the Petitioner would be required to comply with all technical rules of procedural, substantive and evidentiary law or otherwise instructed by the trial court on how to comply with certain technical rules of procedural, substantive and evidentiary law [Transcript Vol. 1, Pg. 36, 40, 41, 45, 58-60, 82, 88-89, 97, 104-107, 111 and Vol. 2, Pg. 13, 16, 19, 22].
23. While the trial court did not engage in a protracted question and answer session as suggested by the Petitioner, the trial court nevertheless substantially complied with the requirements of Sheppard by cautioning the Petitioner against self-representation, informing the Petitioner that compliance with court rules and procedures would be mandatory and repeatedly urging the Petitioner to get assistance from the Petitioner's hybrid counsel when needed.
24. The trial court had a comprehensive forensic psychiatric/psychological report from Rosemary L. Smith, Psy.D., and Ralph S. Smith, Jr., M.D., as well as an additional forensic psychiatric report from Bobby Miller, M.D., confirming the following:

- the Petitioner's mental status was unimpaired;
 - the Petitioner was of average intelligence;
 - the Petitioner understood the dynamics of the Petitioner's legal situation [Transcript Volume 1, Pg. 19-20, 73-74].
25. The Petitioner deliberately and repeatedly refused to cooperate in good faith with trial counsel [Transcript Vol. 1, Pg. 33-35, 77-79].
 26. Nevertheless, the trial court attempted to accommodate the Petitioner by appointing three (3) different competent lawyers to represent and/or legally assist the Petitioner [Transcript Vol. 1, Pg. 79].
 27. Even after the Petitioner retained private counsel of the Petitioner's own choosing, the Petitioner still elected to proceed with a hybrid counsel structure [Transcript Vol. 1, Pg. 95-96 and Appendix Vol. 3].
 28. The Petitioner gave more authority to the Petitioner's privately retained counsel evidencing that the Petitioner was mindful of the complexities and consequences of the Petitioner's circumstances [Transcript Vol. 1, Pg. 107].
 29. The Petitioner's appellate counsel correctly acknowledges that the Petitioner's level of legal aptitude was irrelevant, yet erroneously attempts to bootstrap perceived deficiencies in the Petitioner's trial performance to support the argument that the Petitioner did not knowingly, competently, intelligently and understandingly elect to proceed with a hybrid counsel structure.

30. It is abundantly clear from the totality of the record that the Petitioner was cognizant of and willing to relinquish the Petitioner's right to primary assistance of counsel, despite being aware of the consequences and challenges thereof.
31. Proceeding with a hybrid counsel structure was in fact a component of the Petitioner's injudicious strategy to manipulate the system, create an appeal and/or habeas corpus issue and otherwise sway the outcome of the legal proceedings [Transcript Vol. 3, pg. 22-23].

SUMMARY RESPONSE TO ASSIGNMENT OF ERROR #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.

STANDARD OF REVIEW

32. "A judge's decision to allow an accused to exercise his right to self-representation is reviewed under an abuse of discretion standard." Syllabus Point 8, State v. Surber, 228 W.Va. 621, 723 S.E.2d 851 (2012).

GUIDING PRECEDENT

33. "It is the obligation of an indigent criminal defendant to exert good faith efforts to cooperate with his court-appointed counsel and any objection which is made to a court-appointed counsel which is not made in good faith need not be accepted by the trial court and, therefore, the defendant proceeds at his own peril if he continues to be uncooperative with his court-appointed counsel." Syllabus Point 4, Watson v. Black, 161 W.Va. 46, 239 S.E.2d 664 (1977).

ARGUMENT POINTS

34. The trial court did not abuse its discretion by authorizing the Petitioner's court-appointed counsel to withdraw as the Petitioner deliberately and repeatedly refused to cooperate with court-appointed counsel and confirmed that irreconcilable differences existed between the Petitioner and court-appointed counsel.
35. The Petitioner's Assignment of Error #2 was rendered effectively moot when the Petitioner retained private counsel of the Petitioner's own choosing prior to trial.

CORROBORATING POINTS

36. The Petitioner deliberately and repeatedly refused to cooperate with court-appointed counsel [Transcript Vol. 1, Pg. 33-35, 77-79].
37. Nevertheless, the trial court attempted to accommodate the Petitioner by appointing three (3) different competent lawyers to represent and/or legally assist the Petitioner [Transcript Vol. 1, Pg. 79].
38. Despite the obvious absence of any good faith effort by the Petitioner to cooperate with thrice court-appointed counsel, the trial court exhibited enduring patience and reasonable discretion under the circumstances in attempting to accommodate the Petitioner.
39. The Petitioner ignores the pivotal fact that the Petitioner retained private counsel of the Petitioner's own choosing prior to trial.
40. Even after the Petitioner retained private counsel of the Petitioner's own choosing, the Petitioner still elected to proceed with a hybrid counsel

structure [Transcript Vol. 1, Pg. 95-96 and Appendix Vol. 3].

SUMMARY RESPONSE TO ASSIGNMENT OF ERROR #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.

STANDARD OF REVIEW

41. Issues regarding the trial court's broad discretion in defining the scope of representation of standby counsel appear to be reviewed under an abuse of discretion standard. See State v. Powers, 211 W.Va. 116, 563 S.E.2d 781 (2001).

GUIDING PRECEDENT

42. 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. Syllabus Point 2, State v. Powers, 211 W.Va. 116, 563 S.E.2d 781 (2001).

ARGUMENT POINTS

43. The trial court repeatedly advised the Petitioner and hybrid counsel of hybrid counsel's scope of representation.
44. The trial court specifically advised the Petitioner and hybrid counsel that hybrid counsel had the duty to assist the Petitioner as follows:
 - preparing court documents [motions, orders, subpoenas, etc.];
 - complying with technical rules of procedural, substantive and evidentiary

law;

- obtaining professional services [psychiatric, investigative, etc.]; and
- otherwise assist the Petitioner as requested.

45. The Petitioner's Assignment of Error #3 was rendered effectively moot when the Petitioner retained private counsel of the Petitioner's own choosing prior to trial.

CORROBORATING POINTS

46. The Petitioner and hybrid counsel were advised of hybrid counsel's scope of representation and/or the specific duties at least twenty (20) times prior to trial [Transcript Vol. 1, Pg. 35-37, 41, 45, 48, 50-51, 55-56, 61, 63, 75, 82, 84, 90, 92, 105, 107, 114, 116 and Vol. 2, Pg. 13].
47. Any miscomprehension about hybrid counsel's scope of representation and specific duties was proximately caused by the Petitioner's deliberate and repeated refusal to cooperate in good faith with appointed trial counsel [Transcript Vol. 1, Pg. 33-35, 77-79].
48. The Agreement between the Petitioner and privately retained hybrid counsel specifically outlined the scope of representation [Appendix Vol. 3].

CONCLUSION

The Petitioner is a narcissist that determined the Petitioner could defend himself "at least as well" as the Petitioner's court-appointed and privately retained lawyers. Moreover, the Petitioner calculated that only the Petitioner could manipulate the Petitioner's estranged wife [surviving victim] into testifying falsely in the Petitioner's favor at trial. When the Petitioner's methodical and unscrupulous strategy failed, the

Petitioner became belligerent and desperately attempted to sabotage the trial during closing arguments.

Based upon the totality of facts and circumstances, the trial court did not abuse its discretion by allowing the Petitioner to proceed with a hybrid counsel structure. The trial court substantially complied with the requirements of Sheppard by cautioning the Petitioner against self-representation, informing the Petitioner that compliance with the technical rules of procedural, substantive and evidentiary law would be mandatory and urging the Petitioner to get assistance from the Petitioner's hybrid counsel when needed. In summary, the Petitioner knowingly, competently, intelligently and understandingly waived the right to primary assistance of counsel and elected to proceed with a hybrid counsel structure.

Further, the trial court did not abuse its discretion by authorizing the Petitioner's court-appointed counsel to withdraw as the Petitioner deliberately and repeatedly refused to cooperate with court-appointed counsel and confirmed that irreconcilable differences existed between the Petitioner and court-appointed counsel. Despite the obvious absence of any good faith effort by the Petitioner to cooperate with thrice court-appointed counsel, the trial court exhibited enduring patience and reasonable discretion under the circumstances in attempting to accommodate the Petitioner. Most cogent of all, the Petitioner still elected to proceed with a hybrid counsel structure even after the Petitioner retained private counsel of the Petitioner's own choosing.

Further, the trial court did not abuse its discretion by failing to advise the Petitioner and court-appointed counsel of the scope of representation. In fact, the trial court specifically advised the Petitioner and hybrid counsel that hybrid counsel had a duty to

assist the Petitioner in preparing court documents; complying with technical rules of procedural, substantive and evidentiary law; obtaining professional services; and otherwise assist the Petitioner as requested. Even more compelling, the Petitioner entered into an engagement agreement with privately retained hybrid counsel that specifically outlined the scope of representation.

Ultimately, proceeding with a hybrid counsel structure was a component of the Petitioner's injudicious strategy to manipulate the system, create an appeal and/or habeas corpus issue and otherwise sway the outcome of the legal proceedings.

WHEREFORE, the Respondent respectfully requests that this Honorable Court deny the relief requested and affirm the judgment below.

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By Counsel


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Defendant Below/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing
“**Summary Response to Petition for Appeal**” was served via United States Mail upon
the following party:

Steve A. Baker, Esq.
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Dated the 12th day of July, 2012.


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