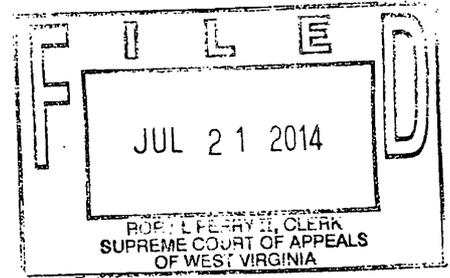

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0086

STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,

v.

JASON W. HOLSTEIN,
Defendant below,
Petitioner.



SUMMARY RESPONSE

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I.

STATEMENT OF THE CASE

The State of West Virginia, Respondent (hereinafter, “State”), agrees with the facts as asserted by Jason W. Holstein, (hereinafter, “Petitioner”), inasmuch as they directly reference the Joint Appendix. The State wishes, however, to clarify and recognize the following lines of questioning as set forth by the Circuit Court of Kanawha County, West Virginia, for purposes of establishing Petitioner’s capacity to enter into a plea deal.

During the plea hearing, the Circuit Court asked Petitioner if he understood he was charged with committing the felony offenses of burglary, attempted robbery and murder, to which Petitioner responded affirmatively. (Joint Appendix [hereinafter, “J.A.”] at 12.) The Circuit Court asked about Petitioner’s education, and Petitioner responded that he had obtained a high school diploma and was going to “barber college to get a trade in the field of barbering.” (J.A. at 13.) Petitioner informed the Circuit Court that he had read, reviewed and discussed the plea agreement with his attorney before signing the document. (J.A. at 13-14.) His attorney, Tom Price, Esq., affirmed that Petitioner had done so. (*Id.*) The Circuit Court asked Petitioner if he understood that he was waiving the right to a jury and a presumption of innocence by engaging in a plea deal, to which Petitioner affirmatively responded. (J.A. at 15-16.) Petitioner recognized that engaging in a plea agreement was solely his decision. (J.A. at 16.)

Petitioner explicitly responded to Circuit Court’s questioning about hospitalization for mental health issues by stating: “No, ma’am. Never.” (J.A. at 17.) Petitioner stated that he had never been “housed or contained” for drug addiction, but had received outpatient therapy beginning on September 2008 and lasting for six weeks. (*Id.*) Upon the Circuit Court’s

questioning of whether Petitioner was presently under the influence of drugs or alcohol, Petitioner stated that he was not. (*Id.*)

Petitioner stated that he was taking prescription medication in the form of “Catapres, . . . 50 milligrams of Elavil, . . . 30 milligrams of Remeron, and . . . 300 milligrams of Neurontin.” (J.A. at 18.) Petitioner was to take Catapres, which is blood pressure medication, and Neurontin, which is used to treat a “burning and tingling sensation” in Petitioner’s feet, twice daily, and Elavil, used to regulate Petitioner’s sleep, and Remeron, an antidepressant and sleeping pill, exclusively in the evenings. (*Id.*) Petitioner also revealed that he was bipolar, and was under the care of a psychiatric physician. (*Id.*) Upon the Circuit Court questioning Mr. Price whether Petitioner appeared lucid, Mr. Price answered affirmatively. (J.A. at 19.) Mr. Price informed the Circuit Court that Petitioner had always appeared lucid, had been “very active in the defense of his case,” had always been oriented as to time and place, and had been able to effectively recall past events. (J.A. at 20.) Further, the Circuit Court explicitly informed Petitioner that “it makes no difference as far as your sentencing for this offense whether you are convicted by virtue of a jury’s finding or by virtue of [the] Court accepting [his] plea,” to which Petitioner agreed. (*Id.*) Finally, the Circuit Court asked Petitioner if he had been intimidated into making such a plea, to which Petitioner responded that he had not. (J.A. at 37.)

At the plea hearing, the State identified and the Court agreed that Petitioner and the other two co-defendants were charged and had pled to First Degree Murder, Felony Murder, for the murder of David Scarbro during the commission of a burglary and/or attempted robbery. (J.A. at 40-42.)

II.

SUMMARY OF THE ARGUMENT

The Circuit Court of Kanawha County, West Virginia, appropriately questioned Petitioner during his plea hearing in accordance with the specifications set forth in *Call v. McKenzie*, and established that Petitioner entered into his plea knowingly, voluntarily, and intelligently. Petitioner stated the he was aware that he was waiving specific constitutional rights when making his plea, and informed the Court that he was not under the effects of drugs or alcohol during the proceeding. Further, Petitioner revealed no indication that he was incompetent as a result of his prescription medication, a sentiment to which his attorney personally attested.

Likewise, the Circuit Court was well within its discretion in sentencing Petitioner to life imprisonment without the possibility of parole, regardless of the less-severe sentences given to Petitioner's co-defendants. Most recently, in *State v. Robey*, this Court held that disproportionate sentences amongst co-defendants are not unconstitutional, and may be based upon prior convictions, potential for recidivism and a defendant's level of participation in the crime. Petitioner in this case has numerous past convictions, a high potential for recidivism, and he is believed to have personally committed the act of murder during commission of the underlying burglary. Therefore, this Court must deny Petitioner's appeal.

III.

ARGUMENT

- A. **The Circuit Court of Kanawha County, West Virginia, Properly Questioned the Petitioner in Accordance with the Specifications Set Forth in *Call v. McKenzie*, and Petitioner Knowingly, Voluntarily and Intelligently Entered into His Plea of First Degree Murder, Felony Murder**

According to Syl. Pts. 3-5, *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1977), respectively, a trial court, in accepting a plea agreement from an accused, shall question the accused as to his understanding of the constitutional rights he will waive upon the court accepting his plea agreement, whether the accused was intimidated into accepting the plea agreement, and whether the accused, based upon his education, mental state, and history of drug or alcohol abuse, is able to knowingly and intelligently enter into such an agreement. The guidelines set forth in *Call* promote “the law of this jurisdiction that, prior to receiving a plea of guilty, the court should see that it is freely and voluntarily made by a person of competent intelligence with a full understanding of its nature and effect.” *State v. Hatfield*, 186 W. Va. 507, 512, 413 S.E.2d 162, 167 (1991) (citing *Riley v. Ziegler*, 161 W. Va. 290, 292, 241 S.E.2d 813, 815 (1978)).

Here, the Circuit Court clearly operated within the specifications set forth in *Call*, and as illustrated by the transcripts of Petitioner’s plea hearing, obtained more than sufficient answers to illustrate that Petitioner entered into his plea agreement knowingly, voluntarily and intelligently. As for Petitioner’s contention that the Circuit Court erred in choosing not to question Petitioner of effects of his medication, Petitioner stated that he was not under the influence of any drugs or alcohol, indicated that his medications were not narcotics, indicated that he only took his sleeping and/or bipolar medications once at night, and admitted to the Court that he was both competent to enter his plea and knowledgeable of the constitutional rights he would waive. Therefore, this Court must deny Petitioner’s appeal.

B. Petitioner’s Sentencing of Life Imprisonment Without the Possibility of Parole is Within the Sound Discretion of the Circuit Court of Kanawha County, West Virginia, and is Proper Given the Crime for Which Petitioner was Convicted and His Past Convictions

Here, Petitioner asserts that his own sentence of life without mercy is disproportionate based solely upon the sentences received by his co-defendants, who received less severe sentences. In *State v. Robey*, 233 W. Va. 1, 754 S.E.2d 577 (2014), this Court held that sentencing orders are reviewed under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands. *Robey*, Syl. Pt. 1. Further, this Court held that “[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review. *Id.*, Syl. Pt. 2. Finally, disparate sentences amongst co-defendants are not *per se* unconstitutional, and courts may consider each co-defendant’s involvement, prior records, rehabilitative potential, and lack of remorse. *Id.*, Syl. Pt. 3.

This case is all but perfectly analogous to *State v. Robey*, wherein this Court held that a criminal defendant who had received a life sentence without the possibility of parole after pleading to felony murder following a burglary/murder was constitutional despite his co-defendants receiving less-severe sentences, specifically after finding that the defendant had a high likelihood of recidivism. First and foremost, Petitioner pled guilty to First Degree Murder, Felony Murder, which, under W. Va. Code § 61-2-2, carries a penalty of life imprisonment. Further, as specified in Petitioner’s own Statement of the Case, the Court weighed Petitioner’s eight (8) prior convictions for robbery/burglary, Petitioner’s high potential for recidivism, and the likelihood that Petitioner was the trigger man, based upon the testimony of Petitioner’s co-defendants, in sentencing Petitioner to life without the possibility of parole. Taking into account the factors espoused in *Robey*, the Circuit Court was well within its discretion to sentence the Petitioner to life without the possibility of parole. Similarly, this Court must affirm the Circuit Court’s sentencing and deny Petitioner’s appeal.

IV.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Kanawha County, West Virginia, should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA

Respondent, By counsel,

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CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the State of West Virginia, Respondent, hereby verify that I have served a true and accurate copy of Respondent's "Summary Response" upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 21st day of July, 2014, addressed as follows:

Sam Marsh, Esq.
Marsh Law Office
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Counsel for Petitioner



SHANNON FREDERICK KISER