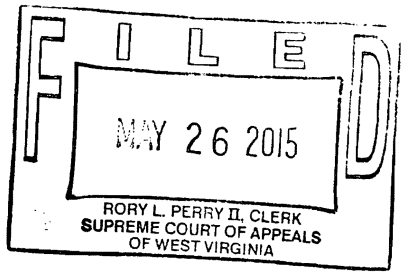

IN THE SUPREME COURT
OF
APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1141

CHRIS WADE FLEMING,
Defendant Below, PETITIONER

v. Hampshire County Case No. 13-F-4

STATE OF WEST VIRGINIA,
Plaintiff Below, RESPONDENT

PETITIONER'S REPLY BRIEF

Jonathan G Brill
Jonathan G Brill, PLLC
Attorney at Law
PO Box 932
Romney WV 26757
304-822-7110
fax 304-822-7109
jonathangbrill @gmail.com
WV State Bar ID # 11316

Lary D. Garrett
Garrett & Garrett
Attorneys at Law
PO Box 510
Moorefield WV 26836
304-538-2375
fax 304-538-6807
garrettlaw @hardynet.com
WV State Bar ID # 1343

Co-Counsel for Petitioner, Chris Wade Fleming

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STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Petitioner, Chris Wade Fleming, does not dispute the Statement of the Case as set forth in the brief filed by Respondent, the State of West Virginia. However, Petitioner would supplement Respondent's Statement of the Case regarding the hearings held in July of 2013 in the underlying criminal case.

Respondent is correct that at the July 9, 2013, hearing, no plea agreement was tendered to the court, no terms of a finalized plea agreement were discussed, and no motion or request was made to the court to consider a proposed plea. (Resp's Br. at 6). Respondent fails to mention what Petitioner believes to be the key fact from that hearing: the court had made its ruling on whether or not it would hear from the parties regarding a plea for Petitioner *sua sponte* before the hearing on July 9, 2013, commenced. The court began that hearing by informing the parties that the matter would be continued until an additional psychological evaluation could be made, and that the order doing so had already been signed. (App. Vol. I at 124.) The trial court had set the July 9, 2013 hearing for the sole purpose of allowing Petitioner to tender a finalized plea agreement to the court. (App. Vol. I at 119.) The court then proceeded to deny Petitioner the opportunity to present his agreement to the court at that time. *Id.* Counsel for Petitioner could only object to the court's ruling.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes this case should be scheduled for oral argument. It appears to be appropriate for Rule 20 argument, as it involves at least one issue of first impression and involves issues of fundamental public importance.

ARGUMENT

I. The trial court impermissibly participated in the plea bargaining process when it *sua sponte* ordered Petitioner to undergo an additional evaluation for competency and criminal responsibility.

This Court has previously stated that the Rule 11(e)(1) prohibition against judicial participation in the plea bargaining process is absolute. *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 496, 488 (1995). Respondent correctly states that at the July 1, 2013, hearing, discussions of a possible plea occurred, and that the parties had not yet reached an agreement as to the number of counts to which Petitioner would plead not guilty by reason of insanity. (Resp's Br. at 5.) Respondent also correctly states that the trial court continued the matter to July 9, 2013, for the purpose of receiving a finalized plea offer. *Id.* Respondent proceeds to cite the circuit court's ruling from October 16, 2013, wherein the court states that Rule 11 was not violated because a plea was not tendered to the court and the terms of a finalized agreement were not presented to the court at or before the July 9, 2013, hearing. (Resp's Br. at 5; App. Vol. IV at 61.) According to Respondent, because Petitioner did not present a finalized plea offer to the court at the July 9, 2013, hearing, his claim that the court interfered in the plea negotiation process must be rejected. (Resp's Br. at 5.)

Respondent fails to see that at the July 9, 2013, hearing, Petitioner was not given the opportunity to present his plea agreement to the court. The court began the July 9 hearing by informing the parties that it had already ordered that Petitioner would undergo another psychological evaluation. (App. Vol. I at 124.) At the time the court made its ruling, counsel for Petitioner did not argue with the court, but counsel did object to the court's ruling. The court knew that a plea offer would be tendered on July 9, 2013, that the parties intended to do so, and, on July 9, 2013, the parties were prepared to present the agreement to the court.

In support of its position, Respondent cites to W. Va. Code § 27-6A-2(a), which provides that if the trial court "has reasonable cause to believe" that the defendant may be incompetent to stand trial, it shall order an evaluation of the defendant's competency to stand trial. Respondent further states that *State v. Sanders*, a case relied upon by Petitioner in his argument that the court interfered in the plea negotiation process, sets forth the framework for when a circuit court is required to order an additional competency evaluation. 209 W.Va. 367, 549 S.E.2d 40 (2001). (Resp's Br. at 7.) This assessment of *Sanders* is correct. The case clearly sets forth the test for when the circuit court must order an additional competency evaluation of a defendant in order to determine if he or she is competent to stand trial.

Respondent further states that *Sanders* does not stand for the position that the circuit court must be presented with new evidence or a change of circumstances before it may order another psychological evaluation. (Resp's Br. at 8.) This assessment of this Court's holding in *Sanders* is incorrect and it in direct conflict therewith. In *Sanders*, this Court stated as follows:

> when a competency hearing has already been held and defendant has been found competent to stand trial. . .a trial court need not suspend proceedings to conduct a second competency hearing **unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of that finding.** [Emphasis added.]

209 W.Va. at 378. While trial courts are not absolutely prohibited from ordering additional evaluations, it seems clear that they must be presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of a prior evaluation before it can suspend proceedings so that another evaluation can be completed.

In the present case, the trial court was not presented with any new evidence or a change in circumstances that would warrant the court suspending the proceedings and ordering an additional evaluation. The trial court also was not presented with a situation which fell under the

Court's holding in *Sanders*, where the trial court would be required to order an additional evaluation.

Furthermore, even if the court did have legitimate concerns about Petitioner's competency to stand trial, it had no reason to further order that Petitioner undergo an additional examination for criminal responsibility. At the time the court ordered the additional evaluation, the State had no objection to Gregory Trainor's evaluation. Moreover, the prosecuting attorney admitted that he believed the State could not prove that Petitioner was sane at the time the offenses occurred. (App. Vol. I at 118.) The State had not pursued hiring an additional evaluator to support its side of the case. In effect, the trial court gave the State its expert witness and the evidence upon which the State later used as the basis to revoke its plea offer. Had the court not interfered in the plea process, Petitioner would have tendered a valid, signed plea agreement to the court on July 9, 2013.

In the present case, the court directly injected itself into the plea negotiation process. While the court may have not literally joined in the bargaining between the parties, the court clearly interfered in that bargaining. A plea agreement does not need to be finalized before the court's interference is deemed impermissible. In fact, Rule 11 and the cases cited herein and in Petitioner's Brief clearly provide that any interference or direct participation in the process is impermissible and constitutes an abuse of discretion.

II. The trial court erred when it denied Petitioner's motion for a Rule 11 hearing.

Petitioner's only opportunity to tender his signed plea agreement to the trial court prior to counsel filing Petitioner's motion for Rule 11 hearing was July 9, 2013. When the trial court ordered that Petitioner undergo an additional psychological examination, it denied Petitioner the chance to present his signed plea agreement. When Petitioner made his motion for a Rule 11

hearing in the fall of 2013, following the completion of Dr. Adamski's evaluation and report, Petitioner was requesting the opportunity to present the plea agreement he had signed on July 9, 2013, to the court. Petitioner should have been allowed to present his signed plea on July 9, 2013, but the court's interference in the plea bargaining process denied him the very opportunity he should have been afforded at the July 9, 2013, hearing.

In the county in which Petitioner was tried, the practice is that the parties and the court set the matter for a plea hearing, just as the parties did in this case on July 1, 2013. The court then hears the plea at that set date. In the present case, the court was supposed to hear Petitioner's plea on July 9, 2013. The court then denied Petitioner the opportunity to present his signed plea agreement to the court on the very day it had set a hearing for that purpose.

As a practical matter, motions for Rule 11 hearings are never filed. Instead, the parties simply advise the court that a plea agreement has been or will be reached, and that a Rule 11 hearing is necessary. In fact, counsel for Petitioner has plead hundreds of clients guilty in circuit court and never filed a motion for a Rule 11 hearing until this case on October 3, 2013. (App. Vol. 4 at 43-56.)

Respondent states that circuit court found that Rule 11 was not violated because the plea was neither tendered to the court nor were the terms of a finalized agreement discussed before the court on or before July 9, 2013. (Resp's Br. at 10.) Both the circuit court and Respondent fail to recognize that Petitioner was not given the opportunity to tender the plea agreement that he signed on July 9, 2013 to the court. The court took that opportunity away from Petitioner when it ordered that he undergo an additional psychological evaluation. The Rule 11 hearing requested by Petitioner was the only opportunity he had to present his plea agreement to the court, and once again, the court denied Petitioner any opportunity to present that agreement to the court.

III. The State failed to prove beyond a reasonable doubt that Petitioner was sane at the time the underling criminal conduct occurred.

When a criminal defendant raises the issue of sanity, he must show by a preponderance of the evidence that at the time the criminal conduct occurred, "a mental disease or defect [caused] the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law." *State v. Flournoy*, 232 W.Va. 175, 180, 751 S.E.2d 280, 285 (2013), *quoting* Syl. Pt. 2, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976), *overruled on other grounds, State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). At trial, Petitioner provided sufficient evidence to overcome the presumption of sanity by a preponderance of the evidence. Defense experts testified that Petitioner's tactical approach on the officers' position, his ability to drive his jeep at a high rate of speed with pinpoint precision, and his sudden snap back to reality are indicative of someone suffering from a PTSD induced flashback or blackout. (App. Vol. III at 78-82, 118.) Based upon that evidence, the burden fell on the State to prove Petitioner's sanity beyond a reasonable doubt.

Dr. Adamski failed to address or explain how any of the above mentioned facts supported the his assertion that Petitioner was sane at the time he committed the offenses. It was Dr. Adamski's opinion that Petitioner's PTSD diagnosis was irrelevant, and Petitioner behaved the way he did on September 3, 2012, because he was intoxicated and angry. (App. Vol. III at 181.) Aside from these allegations by Dr. Adamski, the State failed to produce a single piece of evidence supporting Dr. Adamski's position Petitioner was behaving in a manner consistent with someone under the influence of alcohol. Not a single witness testified that Petitioner's speech was slurred, that his other motor functions were in any way impaired, or that he exhibited any other visible signs of someone who was intoxicated. As stated above, the evidence tends to show

that Petitioner's behavior and motor functions were those of someone who was not under the influence of alcohol.

Respondent cites counsel for Petitioner's statement on July 9, 2013, that counsel was familiar with Dr. Adamski, had used him in that past, and that counsel believed that Dr. Adamski was a good psychiatrist. (App. Vol. 1 at 124; Resp's Br. at 6.) These comments by counsel were gratuitous and should not affect Petitioner's substantive trial rights.

Moreover, counsel for Petitioner did not know, nor could have anticipated that Dr. Adamski would go off half-cocked regarding Petitioner's combat infantry badge. Believing erroneously that Petitioner lacked a combat infantry badge, Dr. Adamski stated three times in his report that Petitioner was not in combat, was seeking undeserved valor, and was malingering. (App. Vol. IV at 127-143.) After discovering the truth about Petitioner's combat history, Dr. Adamski made no changes to his report. Furthermore, Dr. Adamski was argumentative and evasive during cross-examination, admitted to contacting the prosecuting attorney for information, and giving the prosecuting attorney updates on the status of Petitioner's evaluation. Dr. Adamski never contacted counsel for Petitioner for any reason. At trial, Dr. Adamski practically admitted that he was working for the State, rather that being impartial. Last, Dr. Adamski summarily dismissed the Veterans Affairs records as irrelevant. (App. Vol. III at 183.) Those records contained months worth of valuable information regarding Petitioner's progress and treatment for his PTSD at the VA hospital.

Because the State failed to sufficiently rebut the testimony of the defense's experts, and failed to produce any evidence Petitioner acted as someone under the influence of alcohol would, it failed to prove beyond a reasonable doubt that Petitioner was sane at the time he engaged in the underlying criminal conduct. Based upon this evidence, no rational trier of fact could have found

that Petitioner was sane beyond a reasonable doubt. Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Therefore, the trial court erred when it allowed the verdicts of guilty to stand. Petitioner now respectfully requests that this Court reverse his conviction.

CONCLUSION

For the reasons set forth above and in Petitioner's Brief, the judgment of the Circuit Court of Hampshire County, West Virginia must be reversed.

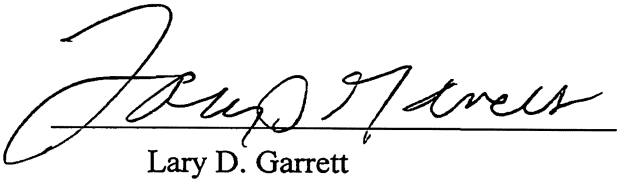
Respectfully submitted on this the 23rd day of May, 2015.

CHRIS WADE FLEMING
Petitioner by Counsel

LARY D. GARRETT
Garrett & Garrett
Attorneys at Law
P.O. Box 510
Moorefield, WV 26836
Ph: 304-538-2375
Fax: 304-538-6807
garrettlaw@hardynet.com
WV State Bar ID# 1344
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, Lary D. Garrett, hereby certify that I served the foregoing *Petitioner's Reply Brief* upon the State of West Virginia by mailing a true copy thereof to its Assistant Attorney General, Derek A. Knopp, at his office address of 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail, postage prepaid, on this the 23rd day of May, 2015.



Lary D. Garrett