

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-1157

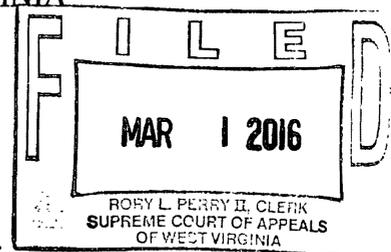
STATE OF WEST VIRGINIA ex rel.,
RAYMOND PRATT,

Petitioner,

vs.

DAVID BALLARD, Warden,
Mt. Olive Correctional Facility,

Respondent.



Appeal from the final order of
the Circuit Court of Marion County
(Circuit Court Case No. 12-C-415,
Underlying Felony No. 7216,
Prior Habeas No. 82-C-160)

PETITIONER'S BRIEF

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TO THE HONORABLE JUSTICES OF
THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITIONER'S BRIEF

The Petitioner, Raymond Pratt, by and through his counsel, Justin Gregory, presents this brief pursuant to Rules 10 and 38 of the Revised Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals. The Petitioner seeks reversal of the sentencing decision of the Circuit Court of Marion County, West Virginia, and remand of the case for sentencing based upon permissible factors consistent with law. The Petitioner contends that his sentence was determined using impermissible factors and violates constitutional provisions against double jeopardy.

The Petitioner further seeks reversal of the decision of the Circuit Court of Marion

County, dismissing his habeas petition and denying further relief. Specifically, the Petitioner challenges the court's determination that his due process argument is moot.

ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in basing its sentence on impermissible factors by considering facts that developed well after the crime was committed, the Petitioner was convicted, and the Petitioner was initially sentenced.
- B. The Circuit Court erred in holding that the Petitioner's claim of due process violations is moot, as the Petitioner is entitled to a hearing prior to the determination of the Parole Board that he is no longer eligible for parole.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is a petition for appeal of 1) the life sentence imposed by the Circuit Court of Marion County, West Virginia, following a resentencing of the Petitioner pursuant to a conviction for Armed Robbery; and 2) the ruling of the Circuit Court that the Petitioner is not entitled to a hearing prior to the determination of the Parole Board that he is no longer eligible for parole, as the issue is moot.

STATEMENT OF JURISDICTION

The West Virginia Supreme Court of Appeals has jurisdiction over this action pursuant to W. Va. Code § 58-5-1, which allows a criminal defendant to file a petition for appeal to this Court from "a final judgment of any circuit court in which there has been a conviction" W. Va. Code § 58-5-1 also provides that "[a] party to a civil action may appeal to [this Court] from a final judgment of any circuit court." The Petitioner was convicted of Armed Robbery on April 29, 1976, following a trial by jury. On January 29, 2015, the Petitioner was resentenced to life imprisonment in the West Virginia State Penitentiary. *Appendix, Pg. 35; January 29, 2015*

Sentencing Hearing Transcript, Pg. 48. On that same day, the trial court dismissed the Petitioner's habeas petition and denied any further relief. The Order sentencing the Petitioner was reentered on October 29, 2015. *Appendix*, Pg. 23–31. The Petitioner filed his timely notice of intent to appeal on November 27, 2015. Therefore, the Petitioner is entitled to petition the West Virginia Supreme Court of Appeals for an appeal.

STATEMENT OF THE CASE

On October 12, 1974, just prior to closing, two men robbed the Foodland store in Fairmont, West Virginia, taking approximately \$21,000.00 in cash, checks, and food stamps. *Appendix*, Pg. 32; *Amended Habeas Petition*, Pg. 6. Although there likely existed many possible witnesses the State could have produced, only three persons—assistant manager Charles Sayre and cashiers Mary Taylor and Patsy Warner—later testified at trial that the Petitioner participated in the robbery. *Id.*

The Petitioner was indicted by a Marion County grand jury on March 10, 1975, and charged with Armed Robbery in violation of laws of the State of West Virginia. *Id.* Prior to trial, a suppression hearing was held where Counsel for the Petitioner unsuccessfully sought to have suppressed certain evidence regarding pretrial identification of the Petitioner. *Id.* The Petitioner was then tried by jury on April 27, 1976. *Id.*

At trial, both the prosecution and the defense conceded that the robbery had taken place, leaving the sole remaining issue the identification of the perpetrators of the crime. *Id.* at 6, 7. On April 29, 1976, the jury returned its decision finding the Petitioner guilty of armed robbery of the Foodland store. *Id.* at 7. On May 24, 1976, the Petitioner was sentenced by the Circuit Court of Marion County, to life imprisonment in the West Virginia State Penitentiary. *Appendix*, Pg. 4.

The Petitioner's Notice of Intent to Appeal and Motion for a Free Transcript were filed

with the Circuit Court of Marion County, on June 11, 1976. *Appendix*, Pg. 32; *Amended Habeas Petition*, Pg. 7. The Court granted the Petitioner's Motion for a Free Transcript on October 26, 1976; however, because the transcript was not timely received, the time for appeal was extended on December 29, 1976. *Id.* After receiving the majority of the transcript, the Petitioner's counsel filed a Motion for Resentencing in March 1978, which was apparently granted; however, the record does not reflect that any order was ever entered regarding the resentencing. *Id.* Later, in July 1978, the remainder of the transcript was furnished to the Petitioner's counsel; however, no appeal was ever taken at that time. *Id.*

The Petitioner later obtained new counsel who, in March 1982, filed a Petition for a Writ of Habeas Corpus Ad Subjiciendum in the Circuit Court of Marion County, alleging, *inter alia*, that the Petitioner had been effectively denied his right to a meaningful appeal because he was not provided with a timely prepared transcript, and also alleging that the Petitioner was sentenced improperly and sentenced beyond the minimum without justification. *Id.*

By Order dated April 12, 1982, the Court granted in part and denied in part the Petitioner's writ. *Id.* The Court agreed that the Petitioner had been effectively denied his right to a meaningful appeal; however, because the Court found that there had been no extraordinary dereliction on the part of the State, it denied the Petitioner's request for discharge from confinement. *Id.* In an attempt to remedy the situation, the Court allowed for the Petitioner to be resentenced in order to extend the appeal period, and ordered a pre-sentence investigation. *Id.* at 7, 8. The Petitioner was resentenced on November 15, 1983, with the intention that the Petitioner be eligible for parole after serving a minimum of ten years. *Appendix*, Pgs. 7, 8. The Petitioner was given credit on the new sentence for time served on the original sentence. *Id.* In December 1984, the time for appeal was extended again, and shortly thereafter, the Petitioner

filed his second Petition for a Writ of Habeas Corpus Ad Subjiciendum. *Appendix*, Pg. 32; *Amended Habeas Petition*, Pg. 8.

After oral argument on the merits of the writ, an appeal was filed on the Petitioner's behalf in October 1985. *Id.* The Petitioner's counsel argued that the Court erred in refusing to give reasons for imposing the life sentence upon him as required by *State v. Houston*, 166 W. Va. 202, 273 S.E.2d 375 (1980). *Id.* The Court of Appeals remanded the case back to the Circuit Court of Marion County, so that a sentencing record could be developed. *Pratt v. Holland*, 175 W. Va. 756 (1985). However, the resentencing did not take place until January 29, 2015. *See Appendix*, Pg. 35.

Since the 1985 remand, the Petitioner made parole in September 1986. *Appendix*, Pg. 32; *Amended Habeas Petition*, Pg. 8. The Petitioner subsequently moved to Pennsylvania, and was later convicted of third-degree murder. *Id.* The Petitioner was sentenced and served time under the murder conviction and was later discharged. *Id.* After release, West Virginia revoked the Petitioner's parole and returned him to the state to serve the remainder of his sentence, which was life with mercy. *Id.* However, the current parole statute states that if the parole violation involves the commission of one of the enumerated felonies outlined in W. Va. Code § 62-12-18, the violator will no longer be eligible for any further release on parole. W. Va. Code § 62-12-19(c). For the Petitioner, this essentially means that his life sentence with mercy is now a life sentence without mercy.

At a hearing on January, 29, 2015, before the Circuit Court, the court resentenced the Petitioner as directed by this Court; however, it did so using impermissible sentencing factors in violation of the Petitioner's constitutional and statutory rights. *Appendix*, Pg. 35; *January 29, 2015 Sentencing Hearing Transcript* at 48. The Circuit Court further dismissed the Petitioner's

habeas petition and denied any further relief. *Id.* at 50–52.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review applicable to appeals of habeas corpus proceedings is set forth as follows:

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

Insofar as the issues raised on appeal deal with sentencing, “[this Court] reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997) (cited in *State v. McGill*, 230 W. Va. 85, 736 S.E.2d 85 (2012)).

SUMMARY OF ARGUMENT

The Circuit Court of Marion County, West Virginia, abused its discretion when it sentenced the Petitioner using impermissible factors by considering facts that developed well after the crime was committed, the Petitioner was convicted, and the Petitioner was initially sentenced, which sentence also violates constitutional provisions against double jeopardy. The court considered at resentencing a conviction that took place well after the Petitioner was originally sentenced. The court further used the subsequent conviction to justify a life sentence without the possibility of parole.

The Circuit Court further erred in holding that the Petitioner’s claim of due process violations is moot, as the Petitioner is entitled to a hearing prior to the determination of the Parole Board that he is no longer eligible for parole.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary, and therefore requests that this matter be set for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, as this case involves constitutional questions regarding the validity of a court ruling.

ARGUMENT

A. The Circuit Court erred in basing its sentence on impermissible factors by considering facts that developed well after the crime was committed, the Petitioner was convicted, and the Petitioner was initially sentenced.

The general rule is that sentences imposed by the trial court—*if within the statutory limits and if not based on some impermissible factor*—are not subject to appellate review. *State v. Rogers*, 167 W. Va. 358, 360, 280 S.E.2d 82, 84 (1981).

Upon appeal to this Court, the case was remanded back to the Circuit Court of Marion County, so that a sentencing record could be developed. *Pratt v. Holland*, 175 W. Va. 756 (1985). In 2015, roughly 30 years after the remand, the Circuit Court finally resentenced the Petitioner. *See Appendix*, Pg. 35. However, in determining the appropriate sentence and providing reasons therefor, the Circuit Court considered a subsequent conviction of the Petitioner, which would not have been before the court at the original sentencing, as the subsequent conviction took place well after the original sentencing. *See Appendix*, Pg. 35; *January 29, 2015 Sentencing Hearing Transcript*. The court commented that the Petitioner had been given the benefit of the original sentence, and that—in considering the issue on remand—the court now had the benefit of the knowledge of the subsequent conviction for Third Degree Murder in Pennsylvania. *Appendix*, Pg. 35; *January 29, 2015 Sentencing Hearing Transcript* at 48.

Essentially, at the most recent sentencing hearing, the court explains that the Petitioner

was given the benefit of a life sentence because it allowed him to become eligible for parole after having served ten (10) years. *See Appendix, Pg. 35; January 29, 2015 Sentencing Hearing Transcript.* However, it seems that the court resentenced the Petitioner to life instead of a specified term of years because the life-sentence and subsequent conviction renders the Petitioner ineligible for any future release on parole. *Id.* In doing so, the court is punishing the Petitioner twice for the subsequent conviction, in violation of constitutional provisions against double jeopardy.

The Fifth Amendment to the United States Constitution provides, in part, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb” This provision applies equally to the States via the Fourteenth Amendment to the United States Constitution. *See Benton v. Maryland, 395 U.S. 784 (1956); and State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992).* Article III, Section 5 of the Constitution of West Virginia similarly provides, “[n]or shall any person, in any criminal case . . . be twice put in jeopardy of life or liberty for the same offence.” The double jeopardy provisions of both the United States Constitution and the West Virginia State Constitution have been interpreted to provide three distinct protections: 1) Protections against further prosecution where the accused has been acquitted in the same jurisdiction, 2) Protections against a subsequent prosecution where there has been a prior conviction, and 3) *Protections against multiple punishments for the same offense.* *See Syl. pt 1, Conner v. Griffith, 160 W. Va. 680, 238 S.E.2d 529 (1977).* *See also, North Carolina v. Pearce, 395 U.S. 711 (1969); and Benton v. Maryland, 395 U.S. 784 (1956).*

The Circuit Court clearly considered the subsequent conviction in resentencing the

Petitioner and, in doing so, enhanced the Petitioner's sentence, thereby punishing the Petitioner again for the Pennsylvania conviction, a conviction for which the Petitioner had previously served approximately twenty years. *Appendix*, Pg. 35; *January 29, 2015 Sentencing Hearing Transcript* at 41, 42.

The Petitioner hereby respectfully urges this Honorable Court to order that his sentence be vacated and that the matter be remanded to the Circuit Court of Marion County, for re-sentencing based upon permissible factors and consistent with the facts and circumstances of the case, and the law governing proportionate, just, and fair sentencing.

B. The Circuit Court erred in holding that the Petitioner's claim of due process violations is moot, as the Petitioner is entitled to a hearing prior to the determination of the Parole Board that he is no longer eligible for parole.

The Due Process Clauses of the United States and West Virginia constitutions apply when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process the court must inquire into the nature of the individual's claimed interest. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979).

The United States Supreme Court, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), enunciated certain minimum due process requirements that must be afforded in parole revocation. Included in those rights are the right to disclosure of the evidence against him, the right to the opportunity to be heard, the right to present witnesses, the right to present evidence, and the right to confront and cross-examine adverse witnesses. *Morrissey*, at 489. As discussed *infra*, these rights were not afforded to the Petitioner when the Parole Board made a final decision concerning his parole eligibility without hearing.

Following his release from his incarceration in Pennsylvania, the Petitioner's parole was revoked by the Parole Board. *Appendix*, Pg. 32; *Amended Habeas Petition*, Pg. 12. At his final

revocation hearing, the Parole Board indicated that the Petitioner would be eligible for parole in July 2010; however, by memorandum dated October 4, 2007, the Petitioner was informed by the Parole Board that he was ineligible for further parole consideration. *Id.* The Parole Board explained that the reason for the Petitioner's ineligibility was because he had been convicted of 3rd Degree Murder in Pennsylvania, which, according to the Parole Board, "is the same as West Virginia's 2nd Degree Murder." *Id.* Under West Virginia Code Section 62-12-19(c), when a parolee is convicted of murder under West Virginia law or an offense with the same essential elements in another jurisdiction, the parolee "shall be returned to the custody of the division of corrections to serve the remainder of his maximum sentence, during which remaining part of his sentence he shall be ineligible for further parole." W. Va. Code § 62-12-19(c). The October 4, 2007 Memorandum referenced a memorandum from John Boothroyd to the Parole Board, dated September 28, 2007. *Appendix*, Pg. 32; *Amended Habeas Petition*, Pg. 13. In the September 28, 2007 Memorandum, Mr. Boothroyd explains the difference between murder and voluntary manslaughter. *Id.* He quotes *State v. Leonard*, 619 S.E.2d 116 (W. Va. 2005), and states that "[t]he distinguishing feature between murder and manslaughter is that murder comes from the wickedness of the heart, and manslaughter, where voluntary, arises from the sudden heat of passion[]' due to gross provocation." *Id.* (bracketing in original). Mr. Boothroyd explains that the "terms wickedness of the heart and depravity of the heart are interchangeable," and therefore concludes that the Petitioner is no longer eligible for parole. *Id.* Mr. Boothroyd makes this interpretation on his own and without the participation of the Petitioner; however, the fact remains that the Petitioner is entitled to a hearing.

Parole eligibility is an expected liberty interest; the revocation of such demands a certain level of due process. The Petitioner has a substantial interest in the continued opportunity to be

released on parole and into society as opposed to remaining in prison for the remainder of his life. This is true even though his liberty interest is subject to the reasonable discretion of the Parole Board. A parole eligible inmate may potentially be released to spend the remainder of his sentence beyond the prison walls, where he would be free to, *inter alia*, enjoy a wholesome and fulfilling life. On the other hand, a prisoner sentenced to life, *without mercy*, is confined for life to a generally unwholesome environment and severely restricted in his every act.

Against the substantial interests of the Petitioner in continued expectations of liberty through release must be weighed the governmental interests in summary adjudication, that is, the determination, *without the Petitioner's participation*, that Third Degree Murder in Pennsylvania is analogous to Second Degree murder in West Virginia. A significant number of State and Federal courts, relying primarily upon *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mempa v. Rhay*, 389 U.S. 128 (1967), have recognized that the deprivation of freedom suffered by a person whose probation or parole is revoked is such a grievous loss that due process standards must be applied to the revocation proceedings.

The substantial interest of a parolee facing revocation has been characterized by the Tenth Circuit Court of Appeals, in *Murray v. Page*, 429 F.2d 1359, 1361–62 (10th Cir. 1970), as follows:

The interest of the individual parolee is obviously very great. He has been found guilty of a crime, deemed worthy of rehabilitation and consequently given the privilege of parole. Parole revocation therefore terminates a valued, if conditional, liberty; personal freedom—whether classified as a grace, privilege or as constructive custody—has been unalterably rescinded.

Thus, although a prisoner does not have a constitutional right to parole, once he is paroled he cannot be deprived of his freedom by means inconsistent with due process. The minimal right of the parolee to be informed of the charges and the nature of the evidence against him and to

appear and be heard at the revocation hearing is inviolate. Summary deprivation of this right is manifestly inconsistent with due process and is unconstitutional. These due process requirements are no less applicable to situations where the issue is raised as to whether a prisoner remains eligible for parole after revocation.

The aforementioned position that due process requires a hearing upon the revocation of probation or parole has bolstered great support throughout the judicial community. The Task Force on Corrections of the President's Commission on Law Enforcement and the Administration of Justice once declared the following:

[T]he need to insure that coercive decisions vitally affecting the lives of offenders are not made through prejudice, on the basis of inadequate or incorrect information, or without rational relation to their purposes or justifications, requires significantly greater safeguards than now exist in most correctional systems.

President's Commission on Law Enforcement and Administration of Justice, Corrections 13 (1967).

The Task Force recommended that all decisions that potentially affect conditional liberty be rendered only after a hearing, as it is entirely inconsistent with our system of government to grant uncontrolled and unquestioned power to any official, especially when great liberty interests are at stake. *Id.* The fact that a person has been convicted of a crime should not mean that he has forfeited all constitutional rights of due process. For certain decisions—such as decisions to revoke probation or parole—offenders should be accorded the basic elements of due process: notice, representation by counsel, and opportunity to present evidence and to confront and cross-examine opposing witnesses. *Id.* at 83, 84.

The aforementioned due process requirements ensure that the parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Because of this,

expectations of certain freedoms control—to an extent—the behavior and rehabilitation of the prison population. Further expectations of fairness, impartiality, and informed process tend to guide the rehabilitation. Hardly any circumstance could with greater effect impede progress toward the desired end than a belief by the prisoner that the machinery of the law is arbitrary, technical, too busy, or impervious to facts. *Fleming v. Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946).

It must be recognized that the need for fairness and equality is as dire in parole eligibility determinations as it is in all other faucets of the law. It is fundamentally unfair to take away the expectation of parole from prisoners under conditions that encourage arbitrary actions by failing to afford even the most minimal protections of due process. “[O]ur constitutional scheme does not contemplate that society may commit law breakers to the capricious and arbitrary actions of prison officials.” *Sostre v. McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971) (*en banc*). As the Second Circuit Court of Appeals stated in *United States ex rel. Bey v. Connecticut State Board of Parole*, 443 F.2d 1079 (1971):

Chief Justice Burger has recently commented on the seeming effectiveness with which “typical” prison systems in this country “brutalize and dehumanize” inmates. One certain way to increase a prisoner’s sense of resentment and to discourage his will eventually to return to a normal life would be to deny him basic safeguards essential to the fundamental fairness of a decision to deprive him of the liberty he gained upon parole release. (internal citations omitted).

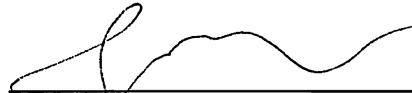
Certain issues surrounding the Petitioner’s sentencing and parole eligibility clearly lack the necessary “fairness” element. The above interpretation of the West Virginia statute that calls for the Petitioner’s ineligibility was made without adherence to the above-mentioned due process requirements set forth by the United States Supreme Court. The Petitioner was not afforded a hearing on the matter, he was not offered the opportunity to be heard and present witnesses for himself, he was not afforded the opportunity to present evidence, and he was not afforded the opportunity to confront and cross-examine adverse witnesses. Instead, Mr. Boothroyd

unilaterally determined that murder in the third degree in Pennsylvania is equivalent to murder in the second degree in West Virginia: The Petitioner was denied due process.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court is asked to reverse the sentencing decision of the Circuit Court of Marion County, and remand the case for resentencing consistent with law, to find that the Petitioner's due process rights have been violated and that he is entitled to a hearing prior to a determination that he is no longer eligible for parole, to uphold the United States and West Virginia constitutions, and to provide such other relief that this Honorable Court finds just and necessary.

**Respectfully Submitted,
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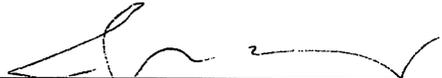
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Respondent.

CERTIFICATE OF SERVICE

I, Justin Gregory, hereby certify that on the 29th day of February, 2016, I served a true and correct copy of the foregoing "Petitioner's Brief" along with the attached "Appendix" upon the following by first-class mail:

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