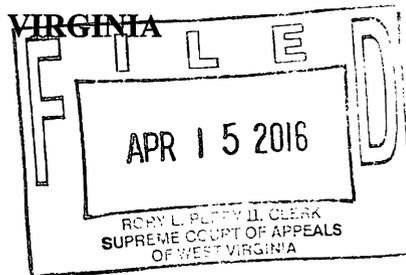


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-1157



RAYMOND PRATT,

Petitioner Below, Petitioner

vs.

DAVID BALLARD, WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,

Respondent Below, Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

COMES NOW, Respondent, David Ballard, Warden, Mt. Olive Correctional Complex, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief. This Court should affirm the Circuit Court's denial of Petitioner's *Habeas*.

I.

STATEMENT OF THE CASE

On March 10, 1975, Petitioner was indicted on the felony offense of armed robbery for the robbery of the Fairmont Community Foodland. (App. at 1-3.) Petitioner was convicted following a jury Trial. (App. at 33 at 3.)¹ Petitioner had two (2) prior convictions for armed

¹ Because Petitioner has numbered the transcript for the November 15, 1983 Resentencing Hearing as page 33 of the Appendix, but did not individually number the pages of the transcript, Respondent will cite to page 33 to indicate the November 15, 1983 Resentencing Hearing Transcript and the second number is the pinpoint citation to the page of the transcript as originally numbered.

robberies that took place in Monongalia County.² (App. at 33 at 10-2.) Petitioner also had two (2) prior felony convictions from Pennsylvania. *State v. Pratt*, 161 W. Va. 530, 545, 244 S.E.2d 227, 236 (1978). On May 24, 1976, Petitioner was sentenced to a life sentence.³ (App. at 4-5.)

On March 9, 1982, Petitioner filed a Petition for Writ of *Habeas Corpus Ad Subjiciendum*. (App. at 6.) On November 15, 1983, the Circuit Court held a Resentencing Hearing because Petitioner requested to be resentenced as part of his *Habeas*. (App. at 33 at 1-3.) The Circuit Court made it clear that the life sentence was life with mercy. (App. at 33 at 3-4.) The Circuit Court also clarified that Petitioner was to become eligible for parole after ten (10) years. (*Id.*) The Circuit Court denied a reduction of the sentence, but gave Petitioner credit for time served from the Indictment, even though he was incarcerated for the Monongalia County offense at that time. (App. at 33 at 17-8.) On November 30, 1983, the Circuit Court entered an Order resentencing Petitioner to life with parole eligibility after ten (10) years. (App. at 7-8.)

Petitioner filed an original proceeding in *Habeas Corpus* with this Court, claiming that he was denied a meaningful appeal. *Pratt v. Holland*, 175 W. Va. 756, 757, 338 S.E.2d 236, 237 (1985). Following Oral Argument in the matter, Petitioner filed an appeal claiming that, pursuant to *State v. Houston*, 166 W. Va. 202, 273 S.E.2d 375 (1980), the Court had “to give reasons for imposing the life sentence upon him.” *Pratt*, 175 W. Va. at 759, 338 S.E.2d at 238-

² Petitioner appealed those convictions and this Court reversed and remanded for a new Trial. *State v. Pratt*, 161 W. Va. 530, 547, 244 S.E.2d 227, 236 (1978). On remand, Petitioner pled guilty to both counts and was sentenced to twelve (12) years for each count, running concurrently with each other. (App. at 33 at 12.)

³ At the time of the conviction, the law permitted a sentence up to life imprisonment. (App. at 35 at 54.); W. Va. Code § 61-2-12 (1961); *see also*, *State ex rel. Vascovich v. Skeen*, 138 W. Va. 417, 76 S.E.2d 283 (1953) (holding that a “trial court has the discretion to impose a minimum sentence, or a sentence of conviction for life in the penitentiary” under the statute and holding that a life sentence for armed robbery is constitutional).

39. The State agreed and this Court ordered remand “with directions that the reasons for imposing the life sentence be put on the record.” *Pratt*, 175 W. Va. at 759, 338 S.E.2d at 239.

However, in September of 1986, prior to the Circuit Court providing the reasons for imposing the life sentence, Petitioner was paroled. (App. at 34 at 6.)⁴ While on parole, Petitioner was convicted, in Pennsylvania, of Third Degree Murder. (*Id.*) He served twenty (20) years for the murder conviction in Pennsylvania prior to his release. (*Id.*)

Upon his release, West Virginia revoked his parole and Petitioner had Revocation Hearings. (*Id.*) The Parole Board initially determined that he would be eligible for parole at a later date, but later rescinded that determination based on West Virginia Code § 62-12-19(c) (2013). (App. at 34 at 6-7.)

On November 19, 2012, Petitioner filed another Petition for Writ of *Habeas Corpus*. (App. at 9.) On December 30, 2013, Petitioner filed an Amended Petition for Writ of *Habeas Corpus Ad Subjiciendum*. (App. at 32.) On August 6, 2014, the State filed a Response to the Amended Petition. (App. at 11-4.)

On July 7, 2014, the Circuit Court held an Omnibus Hearing in the matter. (App. at 34.) There was some question at the Omnibus Hearing as to whether or not the jury verdict form included the issue of life with mercy. (App. at 34 at 11-23.) The Circuit Court took a two (2) prong approach to the issues. (App. at 34 at 20-7.) First, the Circuit Court focused on complying with this Court’s decision in *Pratt v. Holland*, 175 W. Va. 756, 338 S.E.2d 236 (1985), requiring the reasons for the life sentence be put on the record. (*Id.*) The Circuit Court felt it was necessary to determine if the verdict form did include the issue as a predicate step in

⁴ Because Petitioner has numbered the transcript for the July 7, 2014 Omnibus Hearing as page 34 of the Appendix, but did not individually number the pages of the transcript, Respondent will cite to page 34 to indicate the July 7, 2014 Omnibus Hearing Transcript and the second number is the pinpoint citation to the page of the transcript as originally numbered.

complying. (*Id.*) Second, the Circuit Court sought to give Petitioner an opportunity to brief why Pennsylvania's Third Degree Murder statute is not the equivalent of West Virginia's Second Degree Murder statute, providing him an avenue of due process to contest the Parole Board's decision. (*Id.*)

On August 6, 2014, Petitioner's counsel submitted a Memorandum Regarding the Distinction between Third Degree Murder in Pennsylvania and Second Degree Murder in West Virginia. (App. at 15-7.) Petitioner admitted that he "cannot in good faith argue that there is a significant distinction between Pennsylvania's definition of 'third-degree murder' and West Virginia's definition of 'second-degree murder.'" (App. at 15.)

On January 29, 2015, the Circuit Court held a Sentencing Hearing to comply with this Court's decision in *Pratt v. Holland*, 175 W. Va. 756, 338 S.E.2d 236 (1985). (App. at 35 at 31-2.)⁵ Petitioner's counsel stated at the Sentencing Hearing that "this should probably be done based on the circumstances in 1983 or 1976 when he was convicted, but if there's (sic) no objections, I would like to bring it current." (App. at 35 at 35-6.) Petitioner spoke at the Sentencing Hearing and claimed that he "was young and dumb" at the time he committed the crime. (App. at 35 at 38.) As a result of that statement, the Circuit Court had the following colloquy with Petitioner:

THE COURT: Let me ask you something Mr. Pratt, and if you don't want to answer, that's fine; if you want to talk with your attorney, that's fine. I think that you're absolutely correct.

Mr. Gregory, you know, when I reviewed the transcript, I mean, Judge Fox, the original judge in this matter made it unequivocally clear and had an order

⁵ Because Petitioner has numbered the transcript for the January 29, 2015 Sentencing Hearing as page 35 of the Appendix, but did not individually number the pages of the transcript, Respondent will cite to page 35 to indicate the January 29, 2015 Sentencing Hearing Transcript and the second number is the pinpoint citation to the page of the transcript as originally numbered. It should also be noted that the Sentencing Hearing Transcript's original numbering begins at page thirty (30).

entered that he would be eligible for parole in ten years. In fact, that's what he intended his original sentence to be. He felt, as a matter of law, if you sentence someone to life that you would be eligible for parole in ten years. So in order to make it clear, he made it life, in essence with mercy, so you would be eligible for parole in ten years.

When I'm looking at my math, Mr. Pratt, you get out -- you get the benefit of parole in September of 1986. How old are you in 1986?

DEFENDANT PRATT: Uh, 47. 47.

THE COURT: Okay. You're 47. Now, I think you should be out of the category of young and dumb when you're 47. I'm looking at the numbers, and it wasn't within a year that you were charged again with murder and eventually convicted of third-degree murder. Do you have any explanation for that?

DEFENDANT PRATT: I could stand here and say to this court that, you know, I was not guilty. The court of law found, me guilty, which I'm sorry for.

THE COURT: They actually found you guilty of first-degree but they reversed it on appeal, right?

DEFENDANT PRATT: Yes, sir.

THE COURT: And then you ultimately pled guilty to third-degree; is that correct?

DEFENDANT PRATT: That's correct.

(App. at 35 at 39-40.)

The Circuit Court focused on the Presentence Report that was originally done in the case, the recommendation in the record from the original prosecutor of fifty (50) years, the victim's statement in the record that he should spend "considerable" time incarcerated, and the arresting officer's statement that he "should spend the rest of his life in the penitentiary." (App. at 35 at 46-7.) The Circuit Court also focused on the fact that Petitioner had four (4) felonies prior to his conviction in this matter. (App. at 35 at 47-8.) The Court also focused on the fact that Petitioner was the person holding the gun during the crime. (App. at 35 at 54-6.) Based upon that

information, the Circuit Court reaffirmed the life with mercy sentence with parole eligibility after ten (10) years. (App. at 35 at 48.)

After reaffirming the sentence, the Circuit Court made observations that had the benefit of hindsight:

And let me say this, now the court even as (sic) the benefit of what happened afterwards. Knowing again you were released from parole in ten years, a man in his 40s, and within a year or so committed and was convicted of third-degree murder, which again indicates to this court that the sentence he received was a very reasonable and fair sentence and in regard to being sentence to life in prison with four violent felonies -- you know, remember in Monongalia County they sentence you as a habitual criminal, which is a recidivist and a life sentence. This was back in the late 1970s. So with that, certainly I think a life sentence was appropriate and those are the reasons for it.

I think that the PSI which has been shared with all counsel indicates that, the transcript from that sentencing hearing in 1983 indicates that, and so that's the sentence I would impose.

(App. at 35 at 48-9.)

The Circuit Court also addressed the due process as to denial of future parole issue at the Sentencing Hearing. (App. at 35 at 49-53.) Petitioner's counsel admitted at the Sentencing Hearing that he analyzed Pennsylvania's Third Degree Murder statute and compared it to West Virginia's Second Degree Murder statute and determined that there is no difference between the two (2) statutes when it comes to the elements of the crime and the Circuit Court's independent review of the matter also concluded that there was no difference. (App. at 35 at 49, 51.) Petitioner's counsel also conceded that application of West Virginia Code § 62-12-19(c) would bar Petitioner from parole eligibility. (App. at 35 at 50.)

The Circuit Court also determined that no evidence needed to be taken by the Parole Board for a determination that the two (2) statutes were the same because it is an issue of law. (App. at 35 at 51.) As such, the Circuit Court held that the "Parole Board simply followed the law declaring him to no longer be eligible for any further release on parole." (App. at 35 at 52.)

In response, Petitioner's counsel stated that "I understand it's black-and-white Your Honor" and that "[i]t's pretty clear." (App. at 35 at 53.) Petitioner's counsel merely claimed that Petitioner should have gotten to argue before the Parole Board the issue about Pennsylvania's Third Degree Murder statute and West Virginia's Second Degree Murder statute, even though he admits that they are the same and that any argument before the Parole Board would not have mattered. (*Id.*) The Circuit Court also questioned whether the Parole Board issue was even within its jurisdiction and the State argued that it was not. (App. at 35 at 50-4.)

On February 13, 2015, the Circuit Court issued an Order Denying Further Relief and Dismissing Petition. (App. at 18-22.) In the Order, the Circuit Court clearly made Findings of Fact regarding the basis for the sentence. (App. at 20.) All five (5) bases listed are focused on the record as it was at the time of the initial sentencing and does not focus upon Petitioner's subsequent criminal activity. (*Id.*) The Circuit Court also made Conclusions of Law. (App. at 20-1.) One (1) of the conclusions is that Petitioner's admission that there is no difference between Pennsylvania's Third Degree Murder statute and West Virginia's Second Degree Murder statute makes his due process argument moot. (App. at 21.)

On October 29, 2015, the Circuit Court issued a Re-Entry of Order Denying Further Relief and Dismissing Petition. (App. at 23-31.) The Re-Entry Order is exactly the same as the initial Order, but was entered to permit Petitioner to appeal. (*Compare* App. at 18-22, *with* App. at 23-31.) This appeal followed.

II.

SUMMARY OF THE ARGUMENT

The Circuit Court based Petitioner's sentence on: the severity and violent nature of the offense, Petitioner's criminal history of at least three (3) other armed robberies, the absence of

serious mitigating factors, community sentiment at the time, including the victim's and arresting officer's statements, and on the original Court's intent to give Petitioner the benefit of parole after ten (10) years. The Circuit Court did not base the sentence on Petitioner's Pennsylvania murder conviction.

Additionally, Petitioner failed to raise Double Jeopardy claims before the Circuit Court and should be barred from raising such claims now. Nonetheless, Double Jeopardy does not apply because the Circuit Court did not base the sentence on Petitioner's Pennsylvania murder conviction and the sentence is the same as the original sentence and the same as the resentencing at the first *Habeas*, both of which occurred prior to Petitioner's Pennsylvania murder convictions.

Finally, Petitioner is not entitled to a due process Hearing on the issue of whether Pennsylvania's Third Degree Murder statute is the same as West Virginia's Second Degree Murder statute for four (4) reasons. First, Petitioner admits that the two (2) statutes are the same, that the Parole Board's legal analysis is correct, and that a Hearing would not make any difference as to the outcome. Requiring a Hearing now would be a waste of time and resources. Second, the issue is a pure matter of law and no evidence or witnesses are needed. Third, the Circuit Court provided a forum for Petitioner to argue the issue, giving Petitioner due process. Fourth, because Petitioner does not contest the Parole Board's decision, there is no live controversy, making this issue moot. Any further action would produce no more than an advisory opinion. As such, this Court should affirm the Circuit Court's denial of Petitioner's *Habeas*.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and the Appendix. The decisional process would not be aided by oral argument. This matter is appropriate for a Memorandum Decision.

IV.

ARGUMENT

Petitioner asserts two (2) assignments of error: [1] error to base the sentence on facts developed well after the crime was committed and [2] error to hold that the due process claim regarding the Parole Board's determination was moot. Pet'r's Br. at 3. Petitioner's claims are without merit.

A. **Petitioner's Sentence Was Not Based Upon Any Impermissible Factors.**

Petitioner's sentence is not reviewable. "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 10, *State v. Payne*, 225 W. Va. 602, 605, 694 S.E.2d 935, 938 (2010) (quoting Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982)); *State v. Slater*, 222 W. Va. 499, 507-08, 665 S.E.2d 674, 682-83 (2008) (stating that "[w]e deem it generally to be the better practice to decline to review sentences that are within statutory limits and where no impermissible sentence factor is indicated").

Petitioner suggests that the Circuit Court based the sentence on impermissible factors in this case. Pet'r's Br. at 8-10. Petitioner contends that the Circuit Court's sentence was based on his Third Degree Murder Conviction in Pennsylvania while he was on parole from his conviction for Armed Robbery in this matter. Pet'r's Br. at 8. Petitioner is incorrect. Everything in both

the Sentencing Hearing Transcript and in the Order demonstrates that the Circuit Court relied only on the items in the record from the initial procedures. (App. at 18-31, 35.)

The only statement that was made by the Circuit Court regarding his Pennsylvania conviction was a statement made after the Court noted that it intended on applying the life with mercy sentence. (App. at 35 at 48-9.) The purpose of that statement was to explain that the prior judge had attempted to be fair in sentencing to allow for parole and that Petitioner's argument that he was young and dumb when he committed the crime was not credible because he committed Third Degree Murder in his 40s. (*Id.*) The record is clear, that the Circuit Court did not rely on the facts of the Pennsylvania murder in sentencing Petitioner. The Circuit Court based the sentence on the severity and violent nature of the offense, the Petitioner's criminal history of at least three (3) other armed robberies, the absence of serious mitigating factors, the community sentiment at the time, including the victim's and arresting officer's statements, and upon the original Court's intent to give Petitioner the benefit of parole after ten (10) years. (App. at 20.) As such, the Circuit Court did not base its decision on any impermissible factor.

Petitioner goes on to make an argument that his sentence violated Double Jeopardy. Pet'r's Br. at 9-10. This error is not properly before this Court as Petitioner never raised a claim of Double Jeopardy before the Circuit Court to give the Circuit Court the opportunity to rule on the matter. *See State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996) (stating that "[o]rdinarily, a defendant who has not proffered a particular claim or defense in the trial court may not unveil it on appeal"). “ ‘ “One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result” in the imposition of a procedural bar to an appeal of that issue.’ ” *State v.*

LaRock, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (citations omitted). As such, this Court should disregard Petitioner's assertion altogether.

However, even if this Court were to consider Petitioner's Double Jeopardy argument, it is without merit. Petitioner was resentenced to the exact same sentence that he was originally given back on May 24, 1976 and at his resentencing during his first *Habeas* matter on November 30, 1983. (App. at 4-5, 7-8.) Petitioner's life sentence is the same as it was before he even committed the murder in Pennsylvania. As such, it cannot be a violation of Double Jeopardy. Moreover, as noted *supra.*, the only argument Petitioner can even make to assert Double Jeopardy is that the Circuit Court based the sentence on the Pennsylvania murder rather than on the West Virginia Armed Robbery and the record belies such an argument. Petitioner's sentence was for his conviction of Armed Robbery and not for the murder that he committed in Pennsylvania.

Therefore, because the Circuit Court based Petitioner's sentence on the severity and violent nature of the offense; because the Circuit Court based Petitioner's sentence on Petitioner's criminal history of at least three (3) other armed robberies; because the Circuit Court based Petitioner's sentence on the absence of serious mitigating factors; because the Circuit Court based Petitioner's sentence on community sentiment at the time, including the victim's and arresting officer's statements; because the Circuit Court based Petitioner's sentence on the original Court's intent to give Petitioner the benefit of parole after ten (10) years; because Petitioner failed to raise a Double Jeopardy claim before the Circuit Court; because Petitioner's sentence is the same as the original sentence given on May 24, 1976; because Petitioner's sentence is the same as the resentence given on November 30, 1983; and because the Circuit

Court did not base the sentence on Petitioner's subsequent murder conviction from Pennsylvania, this Court should affirm the Circuit Court's denial of Petitioner's *Habeas*.

B. Petitioner Is Not Entitled To A Due Process Hearing Where He Admits That The Parole Board's Application Of Law Is Correct, Where The Issue Is A Matter Of Law, Where The Circuit Court Provided Him A Due Process Forum To Contest The Matter, And Where The Issue Has Become Moot Due To The Absence Of A Live Controversy.

Petitioner claims that the Parole Board was required to give him a Hearing on the purely legal determination of whether Pennsylvania's Third Degree Murder statute is the same as West Virginia's Second Degree Murder statute for the purposes of applying West Virginia Code § 62-12-19(c) (2013). Pet'r's Br. at 10-5. Petitioner is incorrect for four (4) reasons.

First, there is no actual dispute regarding the two (2) statutes. Petitioner has admitted that the two (2) statutes are the same and that the Parole Board's legal counsel's analysis is correct. (App. at 15-7, 35 at 49-53.) There can be no denial of a right to argue that the statutes are not the same, when you concede that they are the same. Any such Hearing would be pointless and a waste of resources. That is especially true where Petitioner's counsel has admitted that a Hearing would not change have mattered. (App. at 35 at 53.)

Second, the issue of whether the two (2) statutes are the same is a matter of law and not a matter of fact. As such, there is no evidence to be adduced or any witnesses that need to be called. Petitioner cites to *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972), for his argument. Pet'r's Br. at 10. However, *Morrissey* is inapposite. *Morrissey* also involved a parole revocation. *Morrissey*, 408 U.S. at 472-73, 92 S. Ct. at 2596. However, unlike in this case, where Petitioner had Hearings on his parole revocation, the defendant in *Morrissey* never had a Parole Revocation Hearing. *Id.* Petitioner argues that the rights provided by *Morrissey* include: "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.” Pet’r’s Br. at 10. In *Morrissey*, the revocation was based on information that the defendant had violated his parole “by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insurance company after a minor accident, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer.” *Morrissey*, 408 U.S. at 473, 92 S. Ct. at 2596. Here, there is no question that Petitioner had a Parole Revocation Hearing and was able to contest the factual assertions that Petitioner was convicted of Third Degree Murder in Pennsylvania.

Petitioner merely claims that he was entitled to a Hearing before the Parole Board before the Parole Board could make a legal determination that Pennsylvania’s Third Degree Murder statute was the same as West Virginia’s Second Degree Murder statute. Pet’r’s Br. at 10-5. Nothing in *Morrissey* creates a requirement that a purely legal determination, with no factual dispute, requires another Hearing. There would be no point to such a Hearing because there is no evidence to be gathered and no witnesses to be examined or cross-examined.

The only thing that a Parole Board had to do is compare the two (2) states statutes to see if the elements are the same or not. Moreover, Petitioner even concedes that the two (2) states statutes are the same and that the Parole Board’s legal counsel correctly advised them regarding the matter. (App. at 35 at 49, 51-3.) Petitioner would have this Court remand the case to the Circuit Court with instructions to Order the Parole Board to hold a Hearing to make a legal determination of whether Pennsylvania’s Third Degree Murder statute is the same as West Virginia’s Second Degree Murder Statute. At that Hearing, Petitioner’s counsel would entirely concur with the Parole Board’s counsel’s analysis and the Parole Board would end up making

the exact same legal decision that it made originally. The end result would be no more than a colossal waste of time and resources.

To the extent that Petitioner spends much time explaining the memorandum that the Parole Board's legal counsel provided regarding the two (2) statutes, Petitioner has conveniently left out his complete and total agreement with Mr. Boothroyd's analysis. (App. at 15-7, 35 at 49, 51-3.) It is disingenuous for Petitioner to suggest that he "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." Pet'r's Br. at 14. Petitioner has not suggested what witnesses he would have presented at such a Hearing. *See* Pet'r's Br. Would he have called a legal expert to testify that the two (2) states laws were the same? Petitioner has not suggested what evidence he would have presented. *See* Pet'r's Br. It appears that the only "exhibits" to the proposed Hearing would have been the two (2) statutes. Petitioner has not suggested how he would have cross-examined adverse witnesses. *See* Pet'r's Br. Would the Parole Board have been required to put on a legal expert to testify that the two (2) states laws were the same? If so, what cross-examination questions would exist for Petitioner when he agrees with the Parole Board's legal counsel on the subject? If such a Hearing were required of the Parole Board, it would be a waste of time and resources. Had Petitioner been denied a Parole Revocation Hearing regarding the factual issue of whether he had been convicted of Third Degree Murder in Pennsylvania, then Respondent would admit that Petitioner was denied due process. However, that is simply not the case here.

To the extent that Petitioner waxes poetic about the need for due process for persons who have been paroled and then had that parole revoked, Respondent wholeheartedly agrees that

Parole Revocation Hearings are important protections for a person who has been paroled and then had that parole revoked. However, Respondent asserts that the key to those rights lies in *Morrissey* to ensure that the facts are developed regarding the basis for the revocation. Respondent disagrees that a due process Hearing is required for a straight up determination of law as to whether one (1) state's law is the same as another state's law. This is especially true here, where Petitioner admits that the laws are the same.

Third, to the extent that Petitioner claims that he was denied due process, the Circuit Court's review of the issue was a process that allowed Petitioner to argue the law. The Circuit Court permitted briefing on the subject and considered and decided the issue regarding the two (2) state's laws. As such, the Circuit Court's actions provided Petitioner with a due process review of the Parole Board's determination.

Fourth, as the Circuit Court held, because Petitioner has conceded that there is no dispute that the two (2) statutes are the same, the issue has become moot. (App. at 21, 35 at 49-53.) Absent a dispute, there is no controversy for this Court to decide. This Court has long held that it will not issue advisory opinions:

This Court will not decide abstract issues where there is no controversy. "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes." *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)." Syl. pt. 2, in part, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991). *Accord State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W. Va. 525, 533 n.13, 514 S.E.2d 176, 184 n.13 (1999) (recognizing that "this Court cannot issue an advisory opinion with respect to a hypothetical controversy"); *State ex rel. West Virginia Deputy Sheriff's Ass'n, Inc. v. Sims*, 204 W. Va. 442, 445, 513 S.E.2d 669, 672 (1998) (reiterating that "this Court has held that we are not a body that gives advisory legal opinions").

State v. Whittaker, 221 W. Va. 117, 133, 650 S.E.2d 216, 232 (2007). Any claim Petitioner has regarding the need to argue the two (2) statutes are different ended the moment that Petitioner's counsel admitted that the two (2) statutes are effectively the same. No live controversy exists as

to the Parole Board's application of law. As such, the issue is moot and any decision where there is no controversy would be no more than an advisory opinion.

Therefore, because Petitioner admits that the two (2) statutes are the same; because Petitioner admits that the Parole Board's legal counsel's analysis is correct; because Petitioner admits that a Hearing would not make any difference; because the issue regarding the statutes is a matter of law and not a matter of fact; because no evidence or witnesses are needed to make the purely legal determination; because requiring a Hearing would be a waste of time and resources; because the Circuit Court provided an opportunity for Petitioner to have due process to argue the issues of law; and because this Court has held that issues are moot where there is no live controversy and that advisory opinions will not issue, this Court should affirm the Circuit Court's denial of Petitioner's *Habeas*.

V.

CONCLUSION

For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

DAVID BALLARD, WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,
Respondent Below, Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

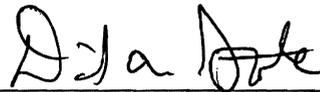


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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 15th day of April, 2016, addressed as follows:

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