STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Milton E. Justice,
Petitioner Below, Petitioner

vs) No. 11-0321 (Mercer County 10-C-149-F)

David Ballard, Warden,
Respondent Below, Respondent

FILED
November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Milton E. Justice appeals the circuit court order denying his habeas corpus petition. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response on behalf of Warden Ballard.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner pled guilty to second degree murder, after he was involved in an altercation with another man and shot the man in the face. The victim was unarmed, and petitioner and his brother attempted to make the killing appear to be done in self defense by planting a knife. Further, Petitioner resisted arrest and attempted to flee. Prior to the guilty plea, petitioner was examined by a psychologist, who did not determine that petitioner was incompetent at the time of the crime or at the time of the trial. At petitioner's plea hearing, the circuit court questioned him extensively to determine if he was making the plea voluntarily and to what degree his mental illness affected his ability to make decisions. Petitioner was sentenced to twenty years in prison. He filed a habeas corpus petition, alleging eleven *Losh* list violations. Habeas relief was denied by the circuit court in a forty-nine page order. Petitioner appeals to this Court on two grounds, arguing that petitioner's counsel was ineffective in failing to inform the circuit court of petitioner's memory and comprehension problems, and arguing that the circuit court abused its discretion in justifying its decision, in part, by saying that petitioner "got a good deal" regarding his plea agreement.

The Court has carefully considered the merits of each of the petitioner's arguments as set forth in his petition for appeal. Finding no error in the denial of habeas corpus relief, the Court fully incorporates and adopts the circuit court's detailed and well-reasoned "Opinion Order Denying Petition for Writ of Habeas Corpus," dated January 20, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

MILTON E JUSTICE,

Petitioner,

CASE NO.: 10-C-149-F
07-F-204-F

vs.

DAVID BALLARD,
Warden, Mt. Olive Correctional Complex,

Respondent.

OPINION ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On September 17, 2010, this matter came before the Court for an Omnibus evidentiary hearing on Petitioner's petition for post-conviction habeas corpus relief brought pursuant to the provisions of West Virginia Code §53-4A-1, *et seq.*, as amended, and styled as "Omnibus Petition for Writ of Habeas Corpus Ad Subjiciendum." There appearing were the petitioner in person and by counsel, Dana McDermott, and assistant prosecuting attorney for Mercer County, West Virginia, George Sitler.

The petitioner is seeking habeas corpus post conviction relief from a determinate sentence of twenty (20) years incarceration imposed by this court upon his conviction for Murder in the Second Degree. He has identified eleven *Losh* grounds in support of his Petition: (1) involuntary guilty plea (*Losh* #6); (2) questions of mental competency at time of crime (*Losh* #7); (3) denial of counsel (*Losh* #11); (4) coerced confession (*Losh* #15); (5) unfulfilled plea bargain (*Losh* #19); (6) ineffective assistance of counsel (*Losh* #21); (7) challenges to the composition of the

grand jury or to its procedures (*Losh* #28); (8) non-disclosure of grand jury minutes (*Losh* #37); (9) claim of incompetence at time of offense as opposed to time of plea discussions; (*Losh* #39)(10) question of actual guilt upon an acceptable guilty plea (*Losh* #49); and (11) excessive sentence (*Losh* #51). The petitioner specifically and knowingly waived all other *Losh* grounds.[1]

The Court has carefully considered the Petition and Exhibits, the memorandum of law, the criminal record in its entirety, the audio and/or written transcripts of the grand jury proceedings, the plea hearing, the sentencing hearing, and the omnibus evidentiary hearing. After consulting pertinent legal authorities, the court has concluded the Petitioner failed to establish a basis for a Writ of Habeas Corpus *ad subjiciendum*. **WRIT DENIED. PETITION DISMISSED.**

I. General Findings of Fact

On or about April 1, 2007, the Mercer County Sheriff's Department began investigating the shooting death of Luther Vance Byrd by Milton Eugene Justice, and on April 24, 2007, brought Mr. Justice before Magistrate Harold Buckner for a preliminary hearing on the charge of first degree murder. William O. Huffman, attorney at law, represented Mr. Justice at the preliminary hearing. At the conclusion of said proceeding, Magistrate Buckner found that no probable cause existed for first degree murder and did not bind the case over to the grand jury. In June of 2007, the State presented the case to the Grand Jury, which returned an indictment against Milton Justice for first degree murder pursuant to West Virginia Code §61-2-1 on June 13, 2007.

On June 25, 2007, William O. Huffman filed a Motion to Withdraw as counsel in the

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[1]Petitioner's Petition incorporates the *Losh* checklist.

murder case against Mr. Justice.[2] The court granted said Motion on August 14, 2010, and appointed the Public Defender Corporation as counsel. The Court appointed Derrick Lefler as co-counsel on August 27, 2007. On September 21, 2007, Earl Hager of the Public Defender Corporation was relieved as counsel because of a conflict of interest, and William Flanigan was then appointed instead. Both Mr. Lefler and Mr. Flanigan are experienced criminal defense counsel.

The petitioner's trial was originally schedule to commence on September 26, 2007, but was continued until October 23, 2007, by motion of defense counsel. It was then continued to December 11, 2007, then February 5, 2008, and lastly to May 14, 2008. All continuances were with the consent of the defendant,

On April 7th and 12th, 2008, William Brezinski, a licensed psychologist, performed a neuropsychological evaluation of the petitioner and issued a report thereon. He concluded that the petitioner had a severely impaired level of memory functioning. However, he made no findings and drew no conclusions that the petitioner was mentally deficient in understanding the nature of his actions, in controlling his actions, or was otherwise mentally incompetent.

Shortly before trial, Mr. Justice accepted a plea bargain in which he would plead guilty to second degree murder in exchange for the State's agreement to limit the sentence Mr. Justice would receive to no more than twenty (20) years, permit Mr. Justice to "complete scheduled medical procedures[3] before sentence is imposed," and prohibit further prosecution and indictment

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[2]Mr. Huffman remained as counsel in the sexual abuse charges against Mr. Justice pending in both McDowell County and Mercer County, West Virginia.

[3]Mr. Justice's health conditions being treated at that time were advanced heart disease with stenosis and occlusion and bilateral occluded carotid arteries.

of Mr. Justice in all offenses the State of West Virginia was investigating, including embezzlement and multiple violations of the Sexual Offense Act in both Mercer County and McDowell County. On May 23, 2008, the petitioner knowingly, voluntarily, and intelligently entered his plea to second degree murder. He was sentenced on Monday, August 29, 2008, to a maximum term of twenty years in prison. The Court notes that after it sentenced the petitioner on Monday, August 25, 2008, defense counsel stated that Mr. Justice had received a call from his doctors on Friday informing him of the need to immediately follow up with something they found on his x-ray during a routine examination. Counsel stated that he had unsuccessfully attempted to contact the Court on Friday to inform it of Mr. Justice's newly scheduled appointment for August 25 at 11:30in Charleston, West Virginia. Then, relying on term 5 of the plea agreement, counsel asked that Mr. Justice be permitted to complete this medical appointment and report to the Southern Regional Jail the following day. The State opposed the motion and emphasized that the plea agreement allowed Mr. Justice to complete "scheduled medical procedures" prior to imposition of a sentence. After considering the motion, the facts, and the precise term in the plea agreement, the Court ruled that the defendant[4] had had three months since entering his plea to complete medical procedures, denied the motion, authorized the Regional Jail System to transport Mr. Justice to any medically necessary appointments, and ordered that the petitioner be taken into custody by the Department of Corrections.

Thereafter, counsel filed a Motion to Enforce Plea Agreement/Set Aside Plea Agreement on November 12, 2008, emphasizing the dire and life-dependent need for the defendant to receive medical intervention for his carotid arteries. The court heard the Motion on November

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[4]The terms "defendant" and "petitioner" both refer to Milton Justice.

17, 2008, and there being no objection from the State, granted the defendant a medical furlough for a period of four (4) months in accordance with the terms of his plea agreement to allow him ample time to receive whatever medical care and/or surgeries he needed. The court held a status hearing on December 18, 2008, and directed the defendant to execute medical authorizations for the release of his medical information as well as provide a list of his treating physicians and appointments. He underwent a heart catheterization on January 13, 2009, and the Court held another status hearing on March 2, 2009. At that time, counsel informed the court that the defendant had a medical appointment on March 23, 2009. The Court agreed to allow the petitioner to attend that appointment and directed the parties to return to court on March 24, 2009, for a status. On March 24, the petitioner asked to continue the furlough until after his appointment with Dr. Malik on May 4, 2009. The State opposed the request, contending that the petitioner was "milking it." Ultimately, the Court revoked the petitioner's furlough based on the extended period of time he had to get appropriate treatment and the lack of any type of record from a surgeon stating that the petitioner even needed surgery. Thus, on the 24th, Petitioner was remanded into the custody of the Department of Corrections for fulfillment of his sentence with credit given for eighty-three days served. The Court also recommended that the Department of Corrections make reasonable efforts to transport the petitioner to his scheduled medical appointment with Dr. Malik in Charleston, West Virginia, on May 4, 2009, and to provide the defendant with appropriate treatment based on the medications and care he had been prescribed by his doctors. The Department of Corrections did in fact transport the petitioner to his appointment with Dr. Malik in Charleston, West Virginia on May 4, 2009, and Dr. Malik determined that "patient does not need any surgical intervention of his carotids" and "should be followed on a yearly basis...to follow-up on the left carotid stenosis." (See, Memorandum of Law

in Support of the Release of Petitioner from Pleas and Plea Agreement, Ex. B).

Petitioner filed his Petition for Writ of Habeas Corpus on April 12, 2010. On May 15, 2010, the Court dismissed the petitioner's claim of ineffective assistance of William O. Huffman because the allegations Mr. Huffman were based solely on payment of fees, which were neither constitutional nor jurisdictional and, therefore, not reviewable in habeas corpus.

On September 19, 2010, the matter appeared before the Court for the Omnibus evidentiary hearing. Petitioner's witnesses included Phyllis Hasty, William O. Huffman, Derrick Lefler, William Flanigan, Detective Brian Murphy, Beth Carter, Janet Murphy. Documentary evidence presented to the court throughout the pendency of this matter included (1) letter from Thoracic & Cardiovascular Associates, Inc., dated July, 12, 2010; (2) Donald Lilly, M.D.'s sworn statement of November 14, 2008; (3) Neurophsychological Evaluation by William Brezinski from April 2008; (4) duplex Carotid Ultrasound results of December 2008; (5) Order dismissing sexual charges in McDowell County; (6) plea agreement; (7) Affidavit of Donald Lilly, M.D.; and (8) transcript of preliminary hearing of April 24, 2007.

II. General Standard of Review

West Virginia Code 53-4A-1 *et seq.* "clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with due diligence, discover." Syl. Pt. 1, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984). A habeas corpus proceeding is civil in nature wherein the petitioner bears the burden of proof by a preponderance of the evidence. See, *Sharon V.W. v. George B.W.*, 203 W.Va. 300, 303, 507 S.E.2d 401, 404 (1998).

III. Analysis with additional Findings of Fact specific to each Count

and Conclusions of Law

(1) **Involuntary Plea of Guilty** (Presented and decided under State law)

Count 1 of the Petition asserts that Mr. Justice's plea was involuntary because of "constant pressure and false and misleading statements from his three counsels ." West Virginia's seminal case on whether a guilty plea was given voluntarily and knowingly is *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975). In *Call*, our Court established several guidelines that trial courts should follow in ascertaining whether a defendant's plea of guilty is voluntarily and knowingly made. In addition to advising the defendant of the numerous constitutional rights he waives by pleading guilty, the trial court should recite the terms of the plea agreement and should assure itself that there is no coercion or undue pressure on the defendant to enter a plea. *Id.* Finally the trial court should inquire about the defendant's education, his history of mental illness or drug abuse, and whether he has had any opportunity to consult with friends and relatives before making his decision to plead guilty. *Id.* In the instant case, the Court fully complied with the *Call* requirements as set forth in the next several pages of this Opinion.

At the commencement of the hearing, Mr. Flanigan recited the terms of the plea agreement, and the court confirmed its accuracy with the State and with Mr. Justice. The dialogue is as follows:

COURT:	Now is it your desire to enter a plea of guilty pursuant to the plea agreement that's been submitted to the Court?
DEFENDANT:	Yes, your Honor.
COURT:	Alright. Mr. Flanigan, what is that plea agreement?

FLANIGAN:	Your Honor, the plea agreement is that Mr. Justice will enter a plea to the lesser included offense of Murder in the Second Offense [degree] that by...it's a Rule 11(E)(c)(1). It establishes a cap on the discretion of the Court for sentencing purposes of up to twenty years. The embezzlement charges and certain other matters listed in the plea agreement that are under investigation in Mercer County and McDowell County will be dismissed and not prosecuted as a result of the plea agreement.
COURT:	Okay. Um, now, Mr. Sitler, is that the plea agreement between the State and the Defendant?
SITLER:	It is, your Honor.
COURT:	Mr. Justice, is that the plea agreement between you and the State?
DEFENDANT:	Yes, sir.
...(continuing)	
COURT:	No one's promised you anything that's other than that contained in this agreement, is that correct?
DEFENDANT:	That's correct, your Honor.
COURT:	Now did Mr. Flanigan and did Mr. Lefler, did they engage in the plea bargaining process with your consent and at your request.
DEFENDANT:	Yes, your Honor.
....(continuing)	
COURT:	Okay. Do you understand that under our law that second degree murder is committed when a person basically commits a killing of another person. It is an intentional killing and that it's done with malice. Do you understand that?

DEFENDANT: Yes, your Honor.

COURT: An what separates it from first degree murder is that it's done without premeditation and deliberation. Do you understand that?

DEFENDANT: Yes, your Honor.

COURT: But it's still an intentional taking of the life of another and that it was committed with malice. Do you understand that?

DEFENDANT: Yes, your Honor

COURT: Do you understand what is meant by the offense of second degree murder?

DEFENDANT: Yes, your Honor.

(Tr. 5/27/2008 pp. 2-7).

The Court then advised Mr. Justice in detail of his Constitutional and statutory rights, including the right to present evidence on his own behalf and the right to have the State of West Virginia prove each element of the crime of second degree murder to a jury beyond a reasonable doubt before he could be convicted of anything. (Tr. 5/27/2008 pp. 9-12). Mr. Justice would be incriminating himself and admitting to having committed the offense.

COURT: Do you understand that if you enter a plea of guilty you are giving up your right against self incrimination and you are in fact incriminating yourself. Do you understand that?

DEFENDANT: Yes, your Honor. *Id.*

COURT: Do you further understand that by entering a plea of guilty you're waiving or giving up all pre-trial defects with regard to your arrest, the gathering of evidence, prior confessions, and further if you enter a plea of guilty you waive all non-jurisdictional defects in the criminal proceeding against you?(Tr.

5/27/2008 p.14)

DEFENDANT: Yes, your Honor. *Id.* at 14

COURT: Has anyone promised you leniency or a lighter sentence to get you to enter this guilty plea? *Id.* at p.17

DEFENDANT: No, sir. *Id.*

COURT: Has anyone promised you that I would place you on probation? *Id.*

DEFENDANT: No, sir. *Id.*

COURT: Have any promises been made to you whatsoever other than what is contained in the plea agreement that has been stated here in open court?

DEFENDANT: No. No, sir. *Id.* at p.18.

COURT: On the other hand, has anyone threatened you or anyone in your family or placed you in fear to get you to enter this plea of guilty? *Id.*

DEFENDANT: No, your Honor. *Id.*

COURT: Is your offer to enter this plea your own free and voluntary act, and are you entering this plea of your own free will?

DEFENDANT: My own free will.

COURT: Okay. Do you have any questions whatsoever about your proposed plea, your rights, or anything else that we went over here today?

DEFENDANT: No, your Honor.

...(continuing)

The Court also questioned Mr. Justice about mental illness.

COURT: Now Mr. Justice, have you ever had a history of a mental illness? *Id.* at p.15

DEFENDANT:	Yes, your Honor. *Id.*
COURT:	Now does that mental illness affect your ability today to understand what's going on here? *Id.*
THE DEFENDANT:	Uhh, I don't think so. *Id.*
COURT:	Do you know where you are and what you are doing? *Id.* at pp.15-16.
DEFENDANT:	Yes, your Honor. *Id.*
COURT:	Are you on any medication for that illness? *Id*
DEFENDANT:	No, your Honor. *Id.*
COURT:	Are you still suffering from any mental illness today? *Id.*
DEFENDANT:	Yes. *Id.*
COURT:	Are you seeing - *Id.*
DEFENDANT:	No. Not mental illness. *Id.*
COURT:	You're not suffering from any mental illness today? And you know where you are at and what you are doing? *Id.*
DEFENDANT:	Yes, your Honor. *Id.*
COURT:	You concur with that, Mr. Flanigan? *Id.*
FLANIGAN:	Your Honor, he's been diagnosed as having a depression and a head injury that affects memory but he appears to fully understand all the proceedings today. *Id.*

Additionally, Mr. Justice informed the Court about the extent of his education and that he could read and write. ((Tr. 5/27/2008 pp. 5-6). In response to the Court's inquiry about whether he had history of drug or alcohol abuse or had consumed either in the preceding twenty four hours, Mr.

Justice responded in the negative. (Tr. 5/27/2008 pp.16-17). To conclude its consideration of the *Call* requirements, the Court inquired whether Mr. Justice had discussed the plea with family or friends and provided him with the opportunity to further discuss his case with his lawyers or anyone else prior to entering the plea. (Tr. 5/27/2008 pp. 17,19). Mr. Justice informed the court he was ready to plea. Upon being so informed, the Court explained it would read the indictment and ask Mr. Justice how he plead to the lesser included offense of murder second degree, and emphasized:

> "if you want to plea guilty you need to say guilty. If you change your mind and you don't want to plea guilty that's fine. Just say not guilty or don't say anything at all. If you don't say anything at all the Court will enter a plea of not guilty on your behalf." (Tr. 5/27/2008 pp.19-20)

Thereafter, the Court read the indictment and asked Mr. Justice how he plead to the lesser included offense of murder second degree. He replied "guilty." (*Id.* at p.21).

In addition to the *Call* inquiries, the dialogue between the Court and the defendant during the execution of the written plea of guilty is also probative on the issue of the voluntariness of Petitioner's plea:

COURT:	Is that the plea agreement between you and the State of West Virginia?
DEFENDANT:	Yes, your Honor.
COURT:	Did you read over that agreement?
DEFENDANT:	Yes, this morning.
COURT:	And, uh did you go over it with Mr. Flanigan?
DEFENDANT:	Yes, your Honor.
COURT:	Do you have any questions whatsoever about any of the

matters in that agreement?

DEFENDANT: No.

COURT: Okay. Is that your signature at the bottom of the second page there?

DEFENDANT: Yes, your Honor.

COURT: Alright. The Court at this time will Order that the plea agreement be filed.

COURT: ...The next form that the Court has, Mr. Justice, is your petition to enter a plea of guilty. Do you recognize that form?

DEFENDANT: Yes, your Honor.

...(continuing)

COURT: Do you understand everything that is contained in that form?

DEFENDANT: Yes, your Honor.

COURT: Do you have any questions at all about any of the matters that's contained in that form?

DEFENDANT: No, your Honor.

....(continuing)

COURT: ...the next form that the Court has, Mr. Justice, is [t]he Defendant's Statement in Support of Guilty Plea. ...

COURT: And did you answer all the questions that is contained in that form?

DEFENDANT: Yes, your Honor.

...(continuing)

COURT: ...But they're your answers, is that right?

DEFENDANT:	Yes, your Honor.
COURT:	Now do you have, uh, do you have any questions of the Court about any of the matters that's contained in that form?
DEFENDANT:	No, your Honor.
...(continuing)	
COURT:	...Now the last form that the Court has, Mr. Justice, is your actual written plea of guilty. Do you recognize that form?
...	
DEFENDANT:	Yes, your Honor.
COURT:	And did you go over it with Mr. Flanigan?
DEFENDANT:	Yes, your Honor.
COURT:	Do you understand everything contained in that form?
DEFENDANT:	Yes, your Honor.
COURT:	Do you understand that's your actual written plea of guilty to the offense of murder second degree.
DEFENDANT:	Yes, your Honor.
COURT:	And do you understand that by virtue of your plea of guilty to that offense that the Court could send you to the penitentiary for up to 20 years?
DEFENDANT:	Yes, your Honor.
COURT:	Do you have any questions at all of the Court about any of the matters that is contained in that form?
DEFENDANT:	No, your Honor.

(Tr. 5/27/2008 pp. 21-26).

The record is devoid of evidence supporting Mr. Justice's assertion of innocence or that he plead involuntarily, and the defendant's unsupported claim is not a sufficient reason to set

aside a guilty plea. As demonstrated above, Mr. Justice was presented with multiple opportunities to assert his innocence in the charges to which he was pleading. However, he did not do so. Instead, Mr. Justice confirmed that he understood the indictment, the elements of the crime with which he was charged, and that he knew he did not have to plea guilty. The court explained each constitutional right Mr. Justice had, including the burden of proof upon the State to prove guilt beyond a reasonable doubt and Mr. Justice's right to challenge the evidence, and Mr. Justice acknowledge that he understood pleading guilty would waive each of the Constitutional rights outlined by the court. Furthermore, Mr. Justice understood that absent his affirmative statement that he was guilty, the court would enter a plea of "not guilty" on his behalf. At no time during the course of the hearing did the petitioner assert his innocence and instead answered "guilty" when asked how he plead. Lastly, and significantly, the petitioner himself stated that he plead guilty freely and voluntarily and asked the Court to accept his plea:

COURT:	Did you freely and voluntarily tender this plea of guilty to this Court?
DEFENDANT:	Yes, your Honor.
COURT:	Do you want the Court to accept your plea or reject it?
DEFENDANT:	Accept it.

(Tr. 5/27/2008, p.32). Hence, the record unequivocally establishes that despite several direct opportunities to assert his innocence or to inform the Court that he was unwillingly entering the plea because of "constant pressure and false and misleading statements from his three counsel," Mr. Justice instead knowingly and voluntarily plead guilty to Murder in the Second Degree. Relief Denied.

2. **Mental Competency at Time of Crime** (Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

The next question before the Court is whether the petitioner was mentally competent at the time he shot and killed Luther Vance Byrd. Count II of the Petition alleges that the petitioner has a history of head injuries, "extensive cardiovascular and cerebrovascular disease which has caused some oxygen starvation of the brain," and occluded carotid arteries. Mr. Justice also alleges that he suffers severe memory impairment and inability to recall and reprocess information and that "[a]t the time of the offense charged, he was startled by the decedent and was not sure of what he, the Petitioner, was doing." Though not directly phrased as such, Petitioner is asserting the defense of diminished capacity based on the aforesaid health issues.

The standard guiding review of mental incompetency, or diminished capacity, claims was articulated in the 2003 case of *State v. Joseph*, 214 W.Va. 525, 532, 590 S.E.2d 718, 725 (2003), in which the West Virginia Supreme Court of Appeals ("our Court") officially recognized the diminished capacity rule. The diminished capacity rule permits a criminal defendant to introduce expert testimony regarding a mental disease or defect that rendered him incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. Syl. pt. 3, *Joseph*, 214 W.Va. 525, 590 S.E.2d 718. In other words, a defendant may produce evidence of a mental disease or defect to negate the intent of the crime charged. In the instant case, no such rule will provide Mr. Justice with the relief he seeks.

First, the petitioner did not proffer any evidence that would trigger a viable diminished capacity argument. While he did introduce evidence at the Omnibus evidentiary hearing regarding his memory deficiencies, there was no testimony, expert or otherwise, that these deficiencies affected his mental state at the time of the crime or that such deficiencies prevented

him from forming the requisite intent to kill the victim. As stated by our Court in *State v. Simmons*, 172 W.Va. 590, 309 S.E.2d 89(1983), "[t]he existence of a mental illness is not alone sufficient to trigger a diminished capacity defense. It must be shown by psychiatric testimony that some type of mental illness rendered the defendant incapable of forming the specific intent elements. *Id.* at 600, 309 S.E.2d at 99. The record contains no evidence, and the petitioner has failed to point to or proffer any evidence suggesting that he was incompetent at the time he killed Mr. Byrd.

Second, even if Mr. Justice had been unable to form the specific intent to kill Mr. Byrd at the time of the crime, by accepting the plea bargain Mr. Justice knowingly and intelligently waived his right to present evidence to prove his innocence, which could have included evidence on any such diminished capacity defense. See, *supra,* at pp.9-13; See, Tr. 5/27/2008, pp. 9-12, 14, 15. As the record demonstrates, Mr. Justice was aware of his legal rights, including the rights to raise a defense and present evidence on his own behalf, and he knowingly and voluntarily waived any and all such rights. No relief exists on this *Losh* ground.

3. **Coerced Confession(s)**[5] (Decided under State and Federal law, though Petitioner did not specify under which law he makes this claim)

The petitioner claims that his confession was coerced because, being "physically weak having undergone both heart bypass and hernia surgery shortly before the plea discussions" (1) his counsel coerced him to plea, (2) William Flanigan incorrectly advised Petitioner that he had been indicted on a sexual offense in McDowell County, West Virginia, and (3) William Huffman, who represented him on the sexual charges, charged a retainer fee that Petitioner now

[5] Please note, for clarity in the Order, the Court is addressing this count out of the chronological order set forth in the Petition.

believes was unearned. The right to be free from coercion arises under the Fifth Amendment of the *Constitution* of the United States, which creates the fundament right against self-incrimination, or, stated another way, a person has the absolute right not to be compelled to answer questions. U.S.C.A. Const. Amend. 5. This right "is fully applicable during a period of custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". *See Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. "[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's free will to resist and to compel him to speak where he would otherwise not do so freely." *Id.* at 467, 86 S.Ct., at 1624. A statement is not "compelled" or coerced within the meaning of the Fifth Amendment if an individual knowingly, voluntarily, and intelligently waives his Constitutional right against self-incrimination. *Id.* at 444, 86 S.Ct at 1612 (1966).

Following these guidelines, the Court finds that Mr. Justice was not coerced into pleading guilty, and, therefore, no constitutional violation occurred. The Fifth Amendment right applies to custodial interrogations by law enforcement, *not* to conversations with counsel no matter the nature or tenor thereof. *See Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. Therefore, by its very nature, counsel could not have violated the petitioner's Fifth Amendment right.

Even if it was possible for a lawyer to unconstitutionally coerce his client into pleading guilty, Petitioner presented no evidence of coercion at the Omnibus evidentiary hearing during

which he called all three of his former lawyers as witnesses. William Huffman, who represented Mr. Justice in the charges of sexual assault prior to the murder of Mr. Byrd, provided little substantive testimony other than stating he had discussed the plea agreement with Mr. Justice in May of 2008, and he had no recollection of Janet Murphy (Petitioner's sister)[6] telling him Petitioner did not want to plea. Further, Mr. Huffman was not counsel in the murder charge against Mr. Justice, played no role in defending the petitioner against the murder charge, and had little to no role in the plea bargaining process at issue. Derrick Lefler testified that he did not recall shouting at Mr. Justice, though he did have a frank discussion with Mr. Justice and had probably used blunt language. However, he had ultimately left the decision whether to plea up to the petitioner. Mr. Lefler also testified to having advised Petitioner to take the plea because the plea presented a very favorable resolution limiting Petitioner's exposure in a case where he shot an unarmed man at close range, lied to police, and fabricated evidence for a self-defense claim. Likewise, William Flanigan testified that he never forced or coerced Mr. Justice into taking the plea. The Court does not find that frank discussions qualify as coercion, and Petitioner has pointed to no legal authority, or factual basis, even remotely suggesting that the aforesaid conduct is coercive, much less unconstitutionally so.

Moreover, even if the law was such that counsels' conduct could be deemed to have been unconstitutionally coercive in the petitioner's decision to accept the plea bargain, the petitioner

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[6]The Petitioner's sisters, Beth Carter and Janet Murphy, provided testimony purportedly probative on the issue of coercion in which they discussed having had fee disputes with Mr. Huffman. As previously decided by this Court in the May 15, 2010, Order dismissing all claims based on fee disputes, such disputes do not implicate a constitutional or jurisdictional right and are not reviewable in habeas corpus. The Court declines to accept the petitioner's invitation to bootstrap the fee dispute arising during Mr. Huffman's representation of Petitioner in the allegations of sexual misconduct into proof of coercion in the totally unrelated murder charge.

knowingly and intelligently waive his constitutional rights to challenge illegally obtained confessions or evidence. During the plea hearing, this Court advised and inquired of Mr. Justice as follows:

COURT: Do you understand that you have the right to move or ask this Court to suppress any illegally obtained evidence or any illegally obtained confessions in your case?

DEFENDANT: Yes, sir.

COURT: Now, do you further understand that by entering a plea of guilty you waive or give up all pre-trial defects with regard to your arrest, the gathering of evidence, prior confessions, and further if you enter a plea of guilty you waive all non-jurisdictional defects in the criminal proceeding against you?

DEFENDANT: Yes, sir.

COURT: Now, Mr. Justice, do you understand that if you plea guilty you waive or give up each of the rights that I have just outlined to you?

DEFENDANT: Yes, sir.

COURT: Has anyone promised you leniency or a lighter sentence to get you to enter this guilty plea?

DEFENDANT: What did you say? I didn't hear you?

COURT: Has anyone promised you leniency or a lighter sentence to get you to enter this guilty plea?

DEFENDANT: No, sir.

> COURT: Has any promises whatsoever been made to you other than the plea agreement or that has been stated here in open court?
>
> DEFENDANT: No, sir, they haven't.

(Tr. 5/27/2008 pp.17-21). Thus, regardless of whether Mr. Justice's Fifth Amendment right was initially violated by the purported actions of counsel, the petitioner chose to accept a plea bargain instead of proceeding to trial. In so doing, Mr. Justice knowingly, voluntarily, and intelligently waived the right to contest any illegally obtained confession or evidence by entering a plea of guilty.

4. **Denial of Counsel**[7] (Presented and decided under Federal and State law)

The Court next addresses Petitioner's claim that he was denied the fundamental right to counsel because his lawyers coerced him to plead guilty. The Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution both guarantee to the criminally accused the right to counsel. *State ex rel. Humphries v. McBride* 220 W.Va. 362, 647 S.E.2d 798 (2007). As previously articulated by our Court,

> [a] person serving a sentence in a penitentiary, who seeks relief by habeas corpus on the ground that the appointment by the court of an alleged incompetent attorney to conduct his defense in a criminal proceeding amounts to a denial of his right to the assistance of counsel, guaranteed by Article III, Section 14, of the Constitution of this State and by the Sixth Amendment to the Constitution of the United States, has the burden of establishing by proof that the appointment of such counsel constituted a denial of his constitutional right to the assistance of counsel.

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[7]Erroneously number as "II" in Petition.

State ex rel. Robison v. Boles, 149 W.Va. 516, 142 S.E.2d 55 (1965) citing *State ex rel. Clark v. Adams*, 144 W.Va. 771, 111 S.E.2d 336, 82 A.L.R.2d 868, certiorari denied, 363 U.S. 807, 80 S.Ct. 1242, 4 L.Ed.2d 1149) ("[t]o justify a writ of habeas corpus on the ground of incompetency of counsel an extreme case must exist and it must appear that there has been much more than inadequacy of representation by counsel chosen by the defendant").

The record of the plea hearing demonstrates that petitioner himself stated under oath that counsel did not threaten him or otherwise coerce him into pleading guilty. He also stated that he was fully satisfied with his counsel and that he pleaded guilty of his own free will.

COURT: Have any promises been made to you whatsoever other than what is contained in the plea agreement that has been stated here in open court?

DEFENDANT:No. No, sir.

COURT: On the other hand, has anyone threatened you or anyone in your family or placed you in fear to get you to enter this plea of guilty?

DEFENDANT:No, your Honor.

COURT: Is your offer to enter this plea your own free and voluntary act, and are you entering this plea of your own free will?

DEFENDANT:My own free will.

COURT: Okay. Do you have any questions whatsoever about your proposed plea, your rights, or anything else that we went over here today?

DEFENDANT: No, your Honor.

(Tr. 5/27/2008, pp. 17-18.)

COURT: Alright. Now, Mr. Justice, are you satisfied with the manner in which Mr. Flanigan and Mr. Lefler has represented you in this case?

DEFENDANT: Yes, your Honor.

COURT: Do you feel like there is anything they have failed to do in representing you?

DEFENDANT: No, your Honor.

COURT: Did they do anything in your case you did not want them to do?

DEFENDANT: No, your Honor.

COURT: Do you have any complaints at all about the manner in which they have represented you in this case?

DEFENDANT: No, your Honor.

COURT: Have you understood all of my questions?

DEFENDANT: Yes, your Honor.

COURT: Have you understood all of the matters I have explained to you today?

DEFENDANT: Yes, your Honor.

COURT: Have all your answers been truthful?

DEFENDANT: Yes, your Honor.

COURT: Did you freely and voluntarily tender this plea of guilty to this Court?

DEFENDANT: Yes, your Honor.

(Tr. 5/27/2008, pp. 31-32). Therefore, there is no evidence from either the Omnibus hearing or the plea hearing supporting Petitioners claim that he was denied counsel, that his counsels' performance was unsatisfactory or inadequate, or that the actions of his counsel violated his constitutional right to counsel. Furthermore, the Petitioner had two (2) experienced trial counsel. Counsel was able to negotiate for the Petitioner, in the Court's opinion, a favorable plea agreement with the State, limiting the Petitioner's exposure the murder charge to a twenty year sentence and no exposure to a litany of other possible charges. Relief denied.

5. **Unfulfilled Plea Bargain** (Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

Petitioner next contends that the State breached the underlying plea agreement. Specifically, he argues that he needed surgery on his carotid arteries but never received it because he was incarcerated in violation of the plea agreement. The West Virginia Supreme Court of Appeals has recognized that "[a]s a matter of criminal jurisprudence, a plea agreement is subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled." *State ex rel. Brewer v. Starcher,* 195 W.Va. 185, 192, 465 S.E.2d 185, 192 (1995). Such agreements require "ordinary contract principles to be supplemented with a concern that the bargaining and execution process does not violate the defendant's right to fundamental fairness[.]" *State v. Myers,* 204 W.Va. 449, 458, 513 S.E.2d 676, 685 (1998). Our

Court made clear in syllabus point 4 of *Myers* that "[w]hen a defendant enters into a valid plea agreement with the State ..., an enforceable 'right' inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." *See State ex rel. Gray v. McClure*, 161 W.Va. 488, 492, 242 S.E.2d 704, 707 (1978). Thus, "when a plea rests in any significant degree on a promise or agreement ... so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971).

The Court finds that the State fulfilled its obligations contained in the plea agreement. The plea term at issue stated that "Milton E. Justice shall be permitted to complete scheduled medical procedures before sentencing is imposed." (Plea Agreement, p. 1). Thus, the State's obligation under the plain language of the plea was to allow Mr. Justice to complete *scheduled medical procedures* prior to sentencing. Contrary to counsel's assertions, it was not a blanket agreement for Mr. Justice to complete any and all medical procedures that might be necessary. In this case, Mr. Justice had three months between the time of entering his plea on May 27, 2008, and the time of his incarceration on August 25, 2008, which the Court determined gave him ample opportunity to set up and complete any necessary medical procedures.[8] Additionally, to the extent that Petitioner argues he should have been permitted to attend the last-minute follow-up appointment with Dr. Malik in Charleston immediately following his sentencing, said appointment was not a "scheduled medical procedure" and, therefore, not included in the plain

[8]Petitioner had approximately twenty-five months between the time of indictment and the date of his sentencing/incarceration during which he was not incarcerated.

language of the plea agreement.[9] The record before the Court contains no evidence that the petitioner had any out-standing "scheduled medical procedures" at the time he was sentenced and taken into custody.

Furthermore, even if the State should not have opposed the petitioner attending the medical appointment on August 25, 2008, and even if the Court should have permitted it, on November 17, 2008, the Court cured any error or breach of the plea agreement by granting the petitioner a four-month medical furlough during which he could attend to all of his medical needs including appointments and medical procedures that were not scheduled prior to his sentencing. Our Court has held that "there are two possible remedies for a broken plea agreement-specific performance of the plea agreement or permitting the defendant to withdraw his plea. A major factor in choosing the appropriate remedy is the prejudice caused to the defendant." Syl. Pt. 8, *State v. Brewer*, 195 W.Va. 185, 465 S.E.2d 185 (1995).

In the instant case, specific performance was the proper remedy if indeed any remedy was required. Again, the evidence before the Court at sentencing was that the petitioner had a medical evaluation, not a scheduled procedure. Only upon Petitioner's subsequent motion to set aside the plea agreement did it come to light that the August 25th appointment was a surgical pre-screening evaluation for carotid artery surgery and that thirteen days prior to his sentencing his

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[9]After being sentenced, the defendant relied on term 5 of the plea agreement for his request that he be permitted to attend the doctor's appointment in Charleston and report to the Southern Regional Jail the following day. The State opposed the motion, arguing that the new appointment was not within the purview of the plea agreement. After considering the motion, the facts, and the precise term in the plea agreement, the Court ruled that the defendant had three months to complete medical procedures, denied the motion, and authorized the Regional Jail System to transport Mr. Justice to any medically necessary appointments.

cardiologist had deemed him sufficiently recovered from a heart bypass to undergo the surgery on his carotid artery. Upon learning this information, the Court granted a four-month medical furlough even though said procedure technically was not encompassed within the plea agreement. During the four-month furlough, Petitioner underwent surgery on January 13, 2009. Thereafter, on March 2, 2009, Petitioner asked the Court to extend his furlough until after his medical appointment on March 23 for clearance to undergo additional surgery. The Court granted the request and convened another status hearing on March 24. At that time, the Court revoked the furlough finding that there was no medical report from a surgeon stating that additional surgery was required. Nonetheless, to accommodate the petitioner even further, the Court recommended that the Department of Corrections make all reasonable efforts to transport the petitioner to his appointment scheduled with his surgeon, Dr. Malik, in Charleston, West Virginia on May 4, 2009. Significantly, Dr. Malik determined that "patient does not need any surgical intervention of his carotids" and recommended yearly follow-up instead of surgery on his carotid arteries. (See, Memorandum of Law in Support of the Release of Petitioner from Pleas and Plea Agreement, Ex. B). Thus, the petitioner's own evidence nullifies his argument that he is serving a "death sentence" because he has been denied necessary medical care.

The Court finds no breach of the plea agreement by the State because it fulfilled its obligations thereunder. The Court also finds that the petitioner received far more time and leniency in obtaining medical care than that which he bargained for in his plea agreement. Relief Denied.

6. **Ineffective Assistance of Counsel** (Presented and decided under State and Federal Law)

Next, Mr. Justice alleges that his three lawyers provided ineffective assistance because they "failed to safeguard the Petitioner's rights with regard to incriminating statements, as described in III. Coerced Confessions (*Losh* #15). This satisfies the second prong of ineffective assistance of counsel argument as described by Strickland, that the counsel's [sic]this malfeasance prejudiced the defendant's case or may caused [sic] the outcome of the case to be different, regardless of whether that malfeasance comprised affirmative acts or acts of omission. It must be noted that this malfeasance was **intentional.**" (Petition, pp. 10, 11) Petitioner further alleges that he "told his counsels [sic] that he did not want to take a plea, but they continued until finally they wore him down. The Petitioner was physically weak as he had not yet finished convalescing from heart bypass surgery and had recently had hernia surgery." (Petition, p. 11).

The West Virginia Supreme Court of Appeals set forth the standard of review for ineffective assistance of counsel in Syl. Pts. 5 and 6, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995):

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

As recently as October of 2010 in *State v. VanHoose*, –S.E.2d– , 2010 WL 4025096, the West Virginia Supreme Court articulated that "[i]n deciding ineffective ... assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Miller,* 194 W. Va. 3, 459 S.E.2d 114 (1995),[10] but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Syl. pt. 5, *State ex rel. Daniel v. Legursky,* 195 W. Va. 314, 465 S.E.2d 416 (1995); *See also*, Syl. pt. 3, *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Thus, failure to meet one prong defeats a claim of ineffective assistance.

Bearing in mind that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," the facts of this case make it clear that counsels' performance was by no means deficient under the above standards, and that even if it were, the petitioner suffered insufficient prejudice to warrant setting aside the plea. *See,* Syl. *pt.* 2, *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In the instant case, both prongs of the *Strickland-Miller* test fail.

a. Objective Standard of Reasonableness

The first inquiry is whether the allegations of counsel intentionally failing to protect Petitioner's Fifth Amendment right against self-incrimination and forcing him to take a plea agreement that he did not want constitutes an objectively deficient performance.[11] The Court

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[10] The two-prong test is hereinafter referred to as the *Strickland-Miller* test.

[11]The Court notes that the petitioner identified the specific conduct, i.e., counsels' failure to safeguard his Fifth Amendment right, which he alleges satisfies the second prong of *Strickland* and *Miller* test (hereinafter referred to as"*Strickland*"). However, no where does he identify the manner in which counsel purportedly violated the requisite first prong of *Strickland.* Since

concludes that counsel cannot be legitimately accused of rendering a deficient performance based on the failure to safeguard a Constitutional right which had not, in fact, been violated. The allegations in this Count reiterate the contentions in Count III entitled "Coerced Confessions," which the Court deemed meritless. As discussed in Count III, *supra*, the Fifth Amendment right against self-incrimination applies to custodial interrogations by law enforcement, *not* to conversations between a defendant and his counsel no matter the nature or tenor thereof, and, therefore, it was not legally possible for counsel to have coerced Mr. Justice into pleading guilty in violation of a Constitutional right. Likewise, in the instant Count, because counsel could not themselves have violated Petitioner's Fifth Amendment Right against self-incrimination, no violation of a Constitutional right occurred, and Petitioner's claim for deficient performance fundamentally fails.

Next, guided by Syllabus Points 5 and 6 of *Miller*, 194 W. Va. 3, 459 S.E.2d 114, the Court considers the underlying record and the evidence produced during the Omnibus hearing. A review of the plea hearing transcript and the Ominibus evidentiary hearing establish that Mr. Justice was satisfied with his counsel and that he knowingly and voluntarily plead guilty to Murder Second Degree. Specifically, during the plea hearing the Court asked the petitioner the following questions:

> COURT: And did you go over these different...these two indictments with your attorneys?
>
> DEFENDANT: Yes, your Honor.

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satisfaction of each prong is necessary to succeed on an ineffective assistance of counsel claim, the Court will presume that Petitioner intends the allegations in this Count to also demonstrate violation of the first prong.

COURT: And did they explain the elements of the offenses that have been charged against you in these two indictments?

DEFENDANT: Yes, your Honor.

COURT: And specifically did they explain to you the elements of the crime of second degree murder, the charge that you've indicated that you want to plea guilty to?

DEFENDANT: Yes, your Honor

. . . . (continuing)

COURT: Now, Mr. Flanigan, how many conferences have you had with Mr. Justice, and to what extent have you gone over this matter with him, particularly with respect to his Constitutional rights and the elements of the crime the State would have to prove?

FLANIGAN: Your Honor, I've probably met with Mr. Justice close to ten times over the course of time that we've been representing him. The pla agreement resulted from a couple of conferences and the last conference where the details were worked out I read the, uh, plea form and questions relating to his constitutional rights. Explained the process. I wrote down the answers that he gave me. I read them back to him to make sure they were his answers. I believe he fully understands the constitutional rights he has to not plead guilty and proceed to trial if he believed that to be in his interest.

COURT: Are you satisfied with the discovery responses of the State?

FLANIGAN: We are, you Honor.

COURT: Okay. Now, Mr. Justice, is what Mr. Flanigan just said correct?

DEFENDANT: Yes, your Honor.

COURT: Do you agree with all of the statements that he just made?

DEFENDANT: Yes, your Honor.

(Tr. 5/27/2008, pp. 6-8)

Additionally, the Court questioned Mr. Justice at the plea hearing about the legal representation he received, and Mr. Justice unequivocally and under oath stated that he was fully satisfied with his counsel.

COURT: Alright. Now, Mr. Justice, are you satisfied with the manner in which Mr. Flanigan and Mr. Lefler has represented you in this case?

DEFENDANT: Yes, your Honor.

COURT: Do you feel like there is anything they have failed to do in representing you?

DEFENDANT: No, your Honor.

COURT: Did they do anything in your case you did not want them to do?

DEFENDANT: No, your Honor.

COURT: Do you have any complaints at all about the manner in which they have represented you in this case?

DEFENDANT: No, your Honor.

COURT: Have you understood all of my questions?

DEFENDANT: Yes, your Honor.

COURT: Have all your answers been truthful?

DEFENDANT: Yes, your Honor.

(Tr. 5/27/2008, pp. 30-,32).

Thus, despite the direct opportunity to inform the Court of the purported malfeasance which Petitioner alleges in his Petition, at no time did he advise the Court that his counsel had forced him to plea guilty. At no time did Petitioner advise the Court that his lawyers took advantage of his purportedly "weakened" physical state and caused him to involuntarily plea guilty, and at no time did Petitioner advise the Court that he was dissatisfied with his counsel in any way whatsoever. Instead, the dialogue between the Court and Mr. Justice confirms that when directly presented with the opportunity to voice complaints about his counsel, their actions and/or inactions, and their representation of him, Mr. Justice truthfully and indisputably testified that he was satisfied with the legal representation he received. Other than Petitioner's unsubstantiated assertions, the facts in evidence do not satisfy the first prong of *Strickland.*

(2) There is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different.

In addressing the second prong of the *Strickland-Miller* test, the Court fully incorporates its discussion on the first prong and in the section entitled "Denial of Counsel," *supra.* Based thereon, the Court concludes that counsel made no unprofessional errors. At the same time, the Court concludes that had this case gone to trial, there is a reasonable probability that the outcome

would likely have been different, though not in favor of the petitioner. Even assuming counsel had coerced and brow-beat Mr. Justice into accepting the plea agreement at issue herein and even assuming his counsel in the pending sexual charges and investigations, which were *not* a part of the underlying indictment at issue herein, the evidence Petitioner produced at the Omnibus hearing was decidedly against the petitioner and demonstrated the favorableness of the plea.

First and foremost, the Court addresses the allegations against William O. Huffman, Esq. for ineffective assistance. On May 14, 2010, the Court summarily dismissed the ineffective assistance of counsel claim against Mr. Huffman because the allegations in the Petition concerned Mr. Huffman's retainer fee, which is neither a constitutional nor a jurisdictional issue, and, therefore, not a claim reviewable in habeas corpus. Though it had dispositively ruled on this issue in May, the petitioner nonetheless continued to make the same argument throughout this habeas proceeding. For the same reasons as previously stated, the Court declines to address the payment of Mr. Huffman and denies all relief thereon.

Next, the petitioner contends that he would have prevailed in the sexual charges against him, and that all three of his lawyers wrongly used the term in the plea agreement dismissing the sexual misconduct charges and terminating the investigation of other such charges as leverage to coerce Mr. Justice into pleading guilty. (See, Petition p. 8). Presumably to prove his assertion that the sexual charges were meritless, Petitioner called Phyllis Hasty, a registered play therapist who had treated the alleged victim of Mr. Justice's sexual misconduct, as his first witness at the Omnibus hearing. The ensuing examination of Ms. Hasty was a prime example of the wisdom behind the old adage advising lawyers not to ask a question unless they know the answer. The

evidence adduced from Ms. Hasty was like sinking nails into the proverbial coffin.[12]

> DM[13]: Uhm, the reason I brought you here is I am do a little probing. Uhm, the purpose of this is Habeas Corpus proceeding is our plea agreement that um, Mr. Justice, my client and on my left, of sometime back...and there seems seems to have been a number of allegations made against him, uh, some were, uh, allegations of some degree of sexual assault or abuse or misconduct. And, uhm, one such individual, someone you describe I guess as his step-granddaughter, Sierra Malry. You have some familiarity with her?
>
> PH: Yes.
>
> DM: Uhm, have you worked with her much if anything as a play therapist?
>
> PH: I worked with her on two different occasions. She was first brought to me in March of '06 and I saw her uh approximately 7 or 8 times.
>
> DM: uh. Ok.
>
> PH: And then she came back in 2007 and I saw her uhm another 5 times or so.
>
> DM: So you saw her quite a bit actually.
>
> PH: Yes.
>
> DM: Uhm. . .in dealing with her and any problems she might have had...did she ever seem to have some issues with being subjected to sexual

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[12]The Court has transcribed the following testimony from the audio recording of the Omnibus hearing in order to illustrate the evidence it heard. No formal transcript has been requested or prepared. The testimony of Phyllis Hasty at the Omnibus hearing begins on the audio recording at 9:41:26 a.m. and terminates at 9:52:15 a.m. The testimony set forth herein begins at approximately 9:43:41 a.m. and ends at 9:52:15 a.m.

[13] "DM" identifies habeas counsel, Dana McDermott. "PH" identifies the witness, Phyllis Hasty. "GS" identifies the Assistant Prosecuting Attorney, George Sitler.

misconduct?

PH: Uh, yes, she did.

DM: And was there any indication of who it might have been?

PH: Uh, yes. She very clearly stated that it was her step-grandfather, Milton Justice.

DM: Oh. She actually said that?

PH: Yes, sh...she said that repeatedly.

DM: About how old was she when she, uh, said that?

PH: Well the first time she would have been nine, and the second time she was almost eleven.

DM: Ah. So she was consistent over that period of time.

PH: Yes. And it...she was able to give a lot more details the second time she came back. She had matured, and she was more outgoing. The first time she came she was very shy, and it was very difficult for her to talk about it, but she did.

DM: Huhn. She gave more details the next time...the second time?

PH: Yes.

DM: Is it possible she might have been coached?

PH: Uhm...no. Absolutely not. That's what helped me the second time. Uhm...when I work with a child there's always the question of being coached. And your always looking for that. And the first time she was so shy and she just basically just told me the facts, and when, uhm, I'm just

told the facts, I'm always looking for that and suspicious because what I ask [inaudible] is how do you know she wasn't coached...and ....I feel confident when they're not coached is when they can give me some sort of detail a grown up would never come up with. Some kind of feeling of fear or anxiety, uh, shame, that just is overwhelming that some grown up cannot coach those kinds of feelings and things. And when she came back the second time, she talked a lot about the family history, and she talked a lot about, uhm, one of the incidents...uhm...when he touched her and she stated that... uhm...they [inaudible] think that was the time of the... when they were caught in the flood and they were all sl...her and her brother and her grandfather were sleeping on the floor and she woke up at one point, and he said do you want to come over here and hug with me. And she said no, but she went and did it anyway. And then he put his arm around her, and she said he pretended to be sleeping, that he was... that he pretended to be snoring while he had his hand down her pants fondling her. A grown up's not going to come up with the kind of detail of pretending to be snoring...

DM: I understand. I understand . Now as you are quite confident...

PH: yes.

DM: about the statements about what she may have ...okay, uhm, I think that's all I have.

COURT: Mr. Sitler.

GS: Ms. Hasty, when you worked with Sierra Mowdy, did she uh, did she give you indications of where these incidents took place?

PH: Yes. The f...one incident was in, uhm, McDowell County in July 02 or 03 when we had that big flood, really think it was July, and then she mentioned... uhm, and that was i believe at his trailer, and then she mentioned it happened, uhm, several times in...at ...uhm...i believe the grandparents' house, which, uh, was in Mercer county.

GS: Ok....So her statements to you, uhm, gave rise to charges in two different counties.

PH: yes.

GS: And in the course of your work with Sierra, did you speak with any of her family members to try to get some background on Sierra's situation?

PH: Yes...uhm....I....the first time I didn't have as much time with her mother, but the second time I spent a lot more time talking to her mother and also then her biological father.

GS: uh huh.

PH: and...got a better picture on the family dynamics.

GS: uh huh.

PH: its one of the things that was strange to me was how much contact they had with the Justices when, uh, even after this happened and there was an allegation by the mother that he had touched her inappropriately when she was a child. So it was very strange ...

GS: So Sierra's mother thought these allegations were credible because it was consistent with her own experience?

PH: Yes.

GS: Ok. Uhm, but Sierra's mother was still in close contact with Mr. Justice.

PH: Yes, there was a period that she was rather dependent on, uhm, her parents. They actually lived with them for a period, and uhm...Sierra's mother had a lot of problems when she was younger, and...so she...resorted to use their help even though she had bad feelings about the father.

GS: Now, you work with a lot of families that have been subjected to sexual abuse, don't you?

PH: Yes.

GS: Now, some would find it very unusual that, uh, Sierra's mother, although she had been molested as a child, that she would entrust the care of her daughter to Milton Justice, to her father, who had molested her.

PH: Absolutely.

GS: Is... is that an extraordinary thing in your experience?

PH: No, it's not extraordinary because there's a cycle and, uh, very often someone like Sierra's mother has been damaged by that that damage goes then to her psychy as an adult. They usually do have problems. She had drug problems at one point. Uh, it can enter into their judgment. It's also...their family. You want to...you want to think good about your family. So I think she went through a period of "well, that was along time ago, I haven't seen any signs of that. It's okay." And so she let down her guard there uh [inaudible] (9:51:10).

GS: Was there anything about the uh sessions that you had with Sierra that would give you reason to doubt these allegations?

PH: No. The first time I saw her I was...I...as I stated before...I wasn't ...i wasn't...satisfied...that I hadn't gotten those feeling things that was going to help me be really confident. Uhm, I had no reason *not* to believe her. She was, she was so shy and quiet. She was just giving me so little, that I wanted to hear more. And then when she came back the second time, she was older and more confident and comfortable with me ...and then i became very confident that, uhm, this was her story that she was telling, and that it was not coached.

GS: Thank you Ms. Hasty. I don't have any further questions.

DM: I don't have any further questions.

End Audio of Omnibus Hearing (9:52:15 a.m.).

Phyllis Hasty's testimony effectively portrayed how very favorable the plea agreement was for the petitioner. [14] Based upon the evidence and the record before the Court, the Court finds not even a scintilla of evidence suggesting that the sexual charges against Mr. Justice were meritless or improperly used by counsel to coerce Mr. Justice to plea guilty to Second Degree Murder.

In regard to the other claims that "under pressure from false sexual offense charges and weakened by many health problems, the Petitioner was forced to confess to the killing and to take a plea by his own defense counsel who robbed him of a number of his constitutional rights...,"[15] the Court refers to its discussion in Count III, *supra*, and concludes that the Petitioner has not shown that his decision to enter a plea of guilty resulted from ineffective assistance of counsel, coercion, or anything other than his own free will.

(3) Conclusion of Ineffective Assistance of Counsel Claims

The petitioner has failed to adduce evidence supporting either prong of the *Strickland-Miller* test: there is no evidence of deficient performance and there is no evidence that any of the three lawyers committed unprofessional errors that would have resulted in a different outcome to his case. Nor is there evidence of prejudice against the petitioner. Instead, the Petitioner has

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[14]The Court recognizes that Ms. Hasty was one voice out of many that would have been heard during a criminal investigation and/or prosecution of the sexual misconduct allegations. Because even without Ms. Hasty's testimony the evidence and record in the instant matter are insufficient to warrant habeas corpus relief, the Court expressly states and concludes that its rulings in this Order would have been the same had Phyllis Hasty not testified. In other words, the outcome of the proceeding would not have been different had Petitioner not called Ms. Hasty as a witness. See, *Strickland, supra; Miller, supra.*

[15]Petition p. 9.

shown the effectiveness of his lawyers in negotiating a plea agreement in which the sexual misconduct charges and investigations were completely dismissed. Furthermore, if the sexual misconduct allegations were, in fact, meritless, Mr. Justice was not under any obligation to accept the plea and was present with multiple opportunities to back out of pleading guilty. Lastly, even had petitioner presented evidence supporting either prong of *Strickland-Miller* , Mr. Justice's own sworn testimony at the plea hearing establishes that he plead guilty knowingly and voluntarily and approved of the legal representation he received.

7. **Challenges to the Composition of the Grand Jury or to its Procedures** (Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

AND

8. **Non-Disclosure of GrandJury Minutes** [16] (Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

Counts 7 and 8 both pertain to the underlying Grand Jury proceeding, and the petitioner presented no evidence or argument on either issue at the Omnibus evidentiary issue, so the Court will address Counts 7 and 8 together. Count 7 alleges that the Mercer County Prosecutor's Office "has been known to testify at Grand Jury proceedings and make legal conclusions for members of the Grand Jury, i.e., go beyond giving legal advice/illumination. A copy of the transcript of the Grand Jury proceeding of June 13, 20087, is needed for this *Losh* issue." (Petition at p.11) Count 8, though it is presented as "Nondisclosure of Grand Jury Minutes," is actually challenging the evidence proffered to the Grand Jury. The petitioner's brief statement grounds suggests that improper evidence was presented at the Grand Jury proceeding in which Mr. Justice was indicted

[16]Erroneously number as "VII" in Petition.

because the magistrate conducting the preliminary hearing found no probable cause. Like Count 7, Petitioner requested a copy of said Transcript to investigate whether a claim existed.[17]

The questions herein presented are (1) whether the petitioner has any grounds for habeas relief based on the Grand Jury composition or procedure, and (2) whether Petitioner is entitled to relief based on evidence presented to the Grand Jury. The standard for reviewing grand jury proceedings is set forth in the single syllabus point of *Barker v. Fox,* 160 W.Va. 749, 238 S.E.2d 235 (1977), which states "[e]xcept for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency." Syl. pt. 1, *State v. David D. W.,* 214 W.Va. 167, 588 S.E.2d 156 (2003); syl. pt. 6, *State v. Layton,* 189 W.Va. 470, 432 S.E.2d 740 (1993); *State ex rel. Pinson v. Maynard,* 181 W.Va. 662, 383 S.E.2d 844 (1989); *See also, State v. Grimes,* 2009 WL 3855953 (2009); *See generally,* Vol. 1, F.D. Cleckley, *Handbook on West Virginia Criminal Procedure,* ch. 10, § F. 2. a. (2nd. ed. Michie 1993). As mentioned above, other than the initial inclusion of these two Counts in the Petition, no evidence, no argument, no legal authority has been presented on either *Losh* ground. Mere allegation without more is insufficient for relief in habeas corpus, and the petitioner fails to meet his burden of proof. Accordingly, the court denies the Petition on Counts 7 and 8.

9. Claim of Incompetence at Time of Offense as Opposed to Time of Plea[18] [19]

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[17]On April 12, 2010. On April 20, 2010, the Court entered the Order granting Petitioner's request and directing the court reported, Veronica Byrd, to prepare and mail a copy of said transcript to Dana McDermott, counsel for Milton Justice.

[18]Erroneously number as "VIII" in Petition.

[19]Erroneously number as "VI" in Petition.

(Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

Petitioner's next claim arises pursuant to number 39 on the *Losh* list: incompetence at time of offense as opposed to time of trial. The Court notes that Petitioner entered a plea of guilty instead of presenting his case to a trier of fact, and his counsel herein has modified the instant claim to read "claim of incompetence at time of offense as opposed to time of plea" instead of "at time of trial." In the instant count, Petitioner asserts that "by his own statements did not know what was really happening except that someone suddenly charged his truck while he, the Petitioner was sitting in it. The Petitioner was not really aware of what was happening and was not in control of his own actions." Given that this *Losh* claim closely parallel's *Losh* list number 7, which challenges mental competency at time of crime, the Court incorporates its findings of fact and conclusions of law set forth, *supra,*[20] and hereby denies relief for the same reasons.

Additionally, though Petitioner points to an April 2008 "Neurophsychological Evaluation" conducted by William A. Brezinski, MA, and a Duplex Carotid Ultrasound report from December 10, 2009, in support of his contention, the Court finds no merit thereto. First, the Mr. Brezinski performed his evaluation and report one and one-half months prior to Petitioner entering a plea of guilty. Hence, Petitioner and his counsel were both of aware of the contents of the report. Had there been any defense based thereon, it could have been raised prior to the plea and/or Petitioner could have refused to enter a plea. Second, Mr. Brezinski's report does not state that Petitioner was mentally incompetent at the time of the crime so as to prevent him from forming an intent to kill. Instead, the report documented that Petitioner had a severely impaired memory; it in no way insinuated that said impaired memory diminished Petitioner's capacity to

[20]See, pp.14-16.

form specific intent, impair his ability to understand the nature of his action, or otherwise impair Petitioner's ability to control his behavior. Indeed, Mr. Brezinski reported that Mr. Justice had intact cognitive abilities with intellectual functioning within the "low average" range consistent with his educational and occupational background. Third, the ultrasound report Petitioner referred to related solely to the condition of his carotid arteries; it contained no information even remotely related to Petitioner's mental competence. Lastly, by accepting the plea bargain, Petitioner knowingly and intelligently waived his right to present evidence to prove his innocence, which could have included evidence that he was incompetent at the time of the crime.

The Court denies *habeas corpus* relief on this ground.

10. Question of Actual Guilt upon an Acceptable Guilty Plea[21] (Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

Next, the Petitioner contends that there was a question of actual guilt upon his acceptance of the plea because he may have acted in self-defense and, therefore, was not guilty of murder. On the plea forms signed by the Petitioner, the Petitioner acknowledged that he believed himself to be guilty and voluntarily tendered his plea to the Court with the request that it be accepted. Furthermore and as expounded by the Court at length in this Opinion Order, the record contains an extensive dialogue between the Court and the petitioner about his plea, his constitutional rights, his right to be tried by jury, and his right to present a defense. It also demonstrates that the Petitioner throughly discussed the contents of the plea agreement with counsel, understood the same, and that he chose to plead guilty with full understanding of the consequences of the plea. Additionally, upon inquiry by the Court, the petitioner asked this Court to accept his plea of

[21]Erroneously number as "IX" in Petition.

guilty. The State summarized the evidence it would presented if the case went to trial, and the Court found sufficient evidence to support Petitioner's plea to murder in the second degree. For these reasons, the Court finds the instant ground to be without merit.

11. **Excessive Sentence**[22] (Petitioner does not specify under which law he presents this claim. The Court decides it under State and federal law)

The petitioner alleges that the Court violated both State and Federal Constitutional law by imposing an impermissibly harsh sentence disproportionate to the character and degree of the underlying offenses. Article III, Section 5 of the West Virginia Constitution contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution and requires that "[p]enalties shall be proportioned to the character and degree of the offence." Syl. pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980). In its interpretation of this provision, the West Virginia Supreme Court has recognized that "punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience of and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syl. pt. 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). Our Court further explained the *Cooper* test as follows:

> The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a

[22]Erroneously number as "X" in Petition.

> disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981):
>
> In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Cooper, 172 W.Va. at 272, 304 S.E.2d at 857. In 1996, the West Virginia Supreme Court clarified the objective test, stating that "a disproportionality challenge should be resolved by more objective factors which include the consideration of the nature of the offense, the defendant's past criminal history, and his proclivity to engage in violent acts." *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009) *citing, State v. Broughton,* 196 W.Va. 281, 292, 470 S.E.2d 413, 424 (1996) (internal citation omitted).

Before analyzing the proportionality of Mr. Justice's sentence, the Court notes that the rules regarding disproportionate sentences are generally limited to sentences that have no maximum limit provided by statute. "[W]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. Pt. 4 *Wanstreet v. Bordenkricher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). Mr. Justice's sentence for second degree murder does not fall into this category, as it has the statutorily

established maximum punishment of 40 years in the penitentiary.[23] This alone merits denial of relief on this ground. Nonetheless, the court will consider both the subjective and objective factors of *Cooper* and its progeny.

1. ***The Subjective Test***

The twenty-year sentence imposed upon Mr. Justice does not shock the conscience of this court or of society because of the severe impact of Mr. Justice's crimes. The statements presented during the sentencing hearing by Mr. Byrd's sisters and Mr. Justice's sister, which portrayed significant emotional and psychological impact, do not begin to describe the devastation and life-long impact the murder of Mr. Byrd will have on all families impacted by this crime. As such, based on review of the subjective factors, the sentence imposed upon the petitioner is not shocking to the conscience.

2. ***The Objective Test***

Likewise, the twenty-year sentence is not disproportionate to the nature of the offenses and is significantly less than the forty-year term of incarceration the Court could have imposed if the petitioner was convicted by jury.

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[23] W.Va. Code § 61-2-3:

Murder of the second degree shall be punished by a definite term of imprisonment in the penitentiary which is not less than ten nor more than forty years. A person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of ten years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two, whichever is greater.

3. *Conclusion on Disproportionate Sentence*

The nature of the murder resulted in extensive personal trauma to many people and the testimony and emotional and psychological upheaval the court witnessed at Mr. Justice's sentencing makes this Court confident in concluding that the offense has resulted in a continuing and significant loss of enjoyment of life for many of Mr. Byrd's and Mr. Justice's family members. The court believes that Mr. Justice is sincerely remorseful for his action, but the need and requirement for retribution still remains. In light of all the above, the sentence of twenty years in the penitentiary is proportionate to the crime committed. Therefore, no violation of state or Federal constitutional law exists, and Petitioner is not entitled to habeas corpus relief.

XII. Mistaken Advice of Counsel as to Parole or Probation Eligibility[24]

Petitioner knowingly, intelligently, and voluntarily waived this issue, which he had previously reserved on the Losh list.

RULING

1. Therefore, it is hereby **ORDERED, ADJUDGED** and **DECREED** by this Court that the Habeas Corpus Petition and the relief prayed for therein is hereby **DENIED.**

2. The petitioner has knowingly, intelligently, and voluntarily waived all *Losh* issues not addressed herein.

3. The Clerk of this Court is directed to forward a copy of this Order to the following agencies or individuals:

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[24]Erroneously number as "XI" in Petition.

Milton E. Justice, Petitioner
Mount Olive Correctional Complex

Dana McDermott, Counsel for Petitioner
3396A Winchester Avenue
Martinsburg, WV 25405-2451

Scott Ash, Prosecuting Attorney
Mercer County Prosecutor's Office
Princeton, West Virginia 24740

This matter, having accomplished the purpose for which it was instituted, it is hereby **ORDERED** dismissed and omitted from the docket of this Court.

Dated this the 19 day of January, 2011.

Judge William J. Sadler, Ninth Circuit