STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

James Wayne Lowe,
Petitioner Below, Petitioner

vs) No. 11-0546 (Mercer County 10-C-368)

David Ballard, Warden,
Respondent Below, Respondent

FILED
November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James Wayne Lowe appeals the circuit court's order denying his petition for writ of habeas corpus following an omnibus hearing. The respondent warden has filed a response.

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 five counts of first degree sexual assault and one count of third degree sexual assault. The circuit court sentenced petitioner to fifteen to twenty-five years on the five counts of first degree sexual assault and one to five years for the one count of third degree sexual assault. The circuit court then suspended the sentences as to three of the five counts of first degree sexual assault and the one count of third degree sexual assault. The circuit court ordered that petitioner was to be placed upon probation for five years following his service of consecutive fifteen to twenty-five year terms as to the remaining two counts of first degree sexual assault. Petitioner filed the instant petition for habeas corpus relief and an omnibus hearing was held. Following this hearing, the circuit court denied the petition for habeas corpus in an eighty-four page order. Petitioner now seeks a reversal of the circuit court's decision, alleging six assignments of error.

Those assignments of error are: 1)Whether the failure of his trial counsel to request a competency hearing and further competency evaluation, and his failure to file a writ of mandamus to order the circuit court to rule on the issue of criminal responsibility prior to

sentencing constituted ineffective assistance of counsel; 2) Whether the petitioner, who alleges that he was diagnosed with schizophrenia, major depression, a personality defect and borderline intellectual functioning, could form the requisite *mens rea* at the time of the criminal act; 3)Whether the petitioner's plea was involuntary based upon the petitioner's allegations that the circuit court did not fully educate him of the nature and consequences of his plea agreement and because the petitioner alleges that he suffered from effects of his anti-depression medication at the time he entered into the plea agreement; 4)Whether the petitioner never received the benefit of his plea bargain because the trial court considered allegedly impermissible evidence in imposing his sentence; 5) Whether a sentence of thirty to fifty years in the penitentiary is excessive and disproportionate to the character and degree of the offense pursuant to the Eighth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution; and 6) Whether the petitioner was denied his Fifth Amendment right against self-incrimination when he alleges that he was coerced into giving a statement by threats from police officers.

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[1] and adopts the circuit court's detailed and well-reasoned "Order Denying the Petitioner's Petition for Writ of Habeas Corpus ad Subjiciendum and Removing it from the Court's Active Docket," dated March 24, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 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

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[1] The Court has redacted certain references within the circuit court's order which would reveal the identities of some of the victims in this case in line with its practice in regard to sensitive matters.

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

STATE OF WEST VIRGINIA, *ex rel.*

JAMES WAYNE LOWE, **PETITIONER,**

v. **Civil Action No. 10-C-368-DS**

DAVID BALLARD, WARDEN, **RESPONDENT.**

MT. OLIVE CORRECTIONAL COMPLEX,

ORDER DENYING THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM AND REMOVING IT FROM THE COURT'S ACTIVE DOCKET

On October 21, 2010, this matter came before the Court, the Honorable Derek C. Swope presiding, for a hearing on the Petitioner's Petition for Writ of Habeas Corpus ad Subjiciendum, brought pursuant to the provisions of Chapter 53, Article 4A of the West Virginia Code, as amended, filed on Mr. Lowe's behalf by and through his Court appointed counsel, Natalie N. Hager, Esq. The Petitioner and Joe Harvey, Esq., his counsel appeared. Timothy D. Boggess, Esq., Prosecuting Attorney of Mercer County, West Virginia, appeared on behalf of the State of West Virginia.

The Petitioner is seeking post-conviction Habeas Corpus relief from his May 22, 1995 plea agreement, in which Petitioner was sentenced to not less than fifteen (15) nor more than twenty-five (15) years for each of the five (5) counts of first degree sexual assault,[1] and not less than one (1) nor more than five (5) years on one (1) count of third degree sexual assault. These

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[1]The sentence for a conviction of first degree sexual assault is fifteen to thirty-five years. This was the sentence in 1995,and remains the sentence today. See W. Va. Code Ann. §61-8B-3 (1995). However, prior to 1991, the maximum sentence was twenty-five years, rather than thirty-five years. The Petitioner apparently pled to Counts that had occurred in the 1980's, , prior to the change in the law. As a result, the Petitioner was properly sentenced to fifteen to twenty-five years on these counts.

sentences were imposed to run consecutively by the Honorable Judge John R. Frazier. The effect of the Court's sentence in this case is that the Petitioner must serve a minimum of thirty (30) years in the penitentiary, and a maximum of fifty (50) years before he is eligible for release upon a period of probation of five (5) years after serving his sentence, absent a showing that he is being unlawfully detained due to prejudicial constitutional errors, in the underlying criminal proceedings.

Whereupon, the Court, having retired and considered the Petitions, the State's response, the Court files, the transcripts, the arguments of counsel, and the pertinent legal authorities, does hereby DENY the Petitioner's Petition for Habeas Corpus.

In support of the aforementioned ruling denying relief, the Court makes the following General Finding of Fact and Conclusions of Law:

I. FACTUAL/PROCEDURAL HISTORY

Case No. 95-F-03: The Indictment/Counts Specific to Each Offense

A. The Indictment

By a True Bill returned in February 1995 by the Mercer County Grand Jury, the Petitioner, James W. Lowe, was indicted in a twenty-five (25) count indictment for the offenses of First Degree Sexual Assault, Sexual Abuse by a Custodian or Guardian and Third Degree Sexual Assault.

B. Counts Specific to Each Offense

Out of the twenty-five (25) count indictment, nineteen (19) counts were for Sexual Assault in the First Degree, namely, Counts 1, 2, 5, 6, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, and 24; four (4) counts were for Sexual Abuse by a Custodian or Guardian, namely, Counts 3, 4, 7, and 8; and two counts were for Sexual Assault in the Third Degree, namely, Counts 16 and 25.

C. Pre-Trial Proceedings

The Petitioner was arrested on or about November 28, 1994, and transported to the Southern Regional Jail in Beaver, West Virginia, by C. S. Myers and John M. Bailey with the Bluefield Police Department. The Court appointed Tracy Burks, Esq. to represent Mr. Lowe. On February 1, 1995, the Petitioner, by and through counsel, Tracy Burks, Esq. filed a Motion for

Mental Status Evaluation to determine whether the Petitioner was competent to stand trial and to determine the Petitioner's criminal responsibility at the time of the alleged offenses. The Honorable John R. Frazier granted the Petitioner's Motion for Mental Status Evaluation on February 6, 1995.

A psychiatric and psychological evaluation took place on March 6, 1995,[2] at the Charleston Psychiatric Group, Inc. Drs. Ralph S. Smith, Jr., M.D., and Rosemary L. Smith, Psy.D. conducted the evaluation, which consisted of a clinical psychiatric interview, mental status examination, Structured Interview of Reported Symptoms, and psychological testing. In the evaluation report dated March 6, 1995, the report made findings that Mr. Lowe's "common sense knowledge base was poor, and his social judgment in contrived situations was marginal...96.8% of the population functions intellectually better than he...he scored in the educably [sic] mentally retarded range [on the spelling subtest]...feelings of unreality are present." However, Drs. Ralph and Rosemary Smith opined that Petitioner was found competent to stand trial and that he was criminally responsible at the times of the alleged crimes.

On February 15, 1995, the Petitioner was indicted on the twenty-five (25) counts set out above. The Trial was set for May 25, 1995. On April 12, 1995, without holding a hearing on the competency evaluation, Judge Frazier *sua sponte* concluded that the Defendant was competent to stand trial. This conclusion was based upon his consideration of the psychiatric report from the Charleston Psychiatric Group. Judge Frazier made no finding as the whether the Petitioner was criminally responsible for the alleged criminal acts. The Petitioner's trial attorney, Mr. Burks, took no action to challenge Judge Frazier's decision.

D. Plea Agreement

Petitioner entered a guilty plea to five counts of Sexual Assault in the First Degree (Counts 12, 13, 14, 22 and 23) and one count of Sexual Assault in the Third Degree (Count 25) on May 22, 1995. The remaining counts were dismissed. The counts pled to involved two

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[2]There is an apparent error in the Petitioner's brief, which states that Judge Frazier ordered the psychological examination on the same date that the Defendant had the evaluation in Charleston. Instead, from the evaluation report, it seems that the evaluation took place on March 6, 1995, not February 6, 1995.

victims, [redacted][3]

At the plea hearing Judge Frazier asked if Mr. Burks explained to the Petitioner his right to appeal the Court's decision on competency, to which Mr. Burks replied, "Your Honor, I'll be honest, I don't know if I went over the part about the challenging, but I informed him of the results..."[4]

The Court:	Do you agree with the results?
The Defendant:	Well, I'm going to say – I might get in trouble for saying it – but that doctor down in Charleston don't know his - - [sic] from a hole in the ground.
Mr. Burks:	He didn't like the doctor too well, Your Honor. I don't think he disagree [sic] too much with - - we didn't - - about the competency part.[5]

During the plea hearing the Petitioner appears to have been under the influence of prescription medication, specifically, Nortiptyline 100 mg, an anti-depressant:

The Court:	I take it, you've been in jail now, for how long, Mr. Lowe?
The Defendant:	175 days, today, sir.
The Court:	Almost six months, then?
The Defendant:	Yes, sir.
The Court:	And I take it, during that time, you haven't used any illegal drugs?
The Defendant:	No, sir. They've got me on some kind of generic nerve pill but, as you can see, it does not work.
The Court:	I can see you're having some reaction to it. I take it that doesn't interfere with your thinking though, your mind or anything; you know where you are and what's going on?

[3]Due to the sensitive matters in this case, the Court adheres to the common practice of using initials instead of the names of the young victims.

[4]Transcript, 5/22/1995 at page 32:12-14.

[5]Transcript, 5/22/1995 at page 32:15-21.

The Defendant: Sometimes.[6]

The Court accepted the Defendant's plea on May 22, 1995.

E. Sentencing Hearing

At the sentencing hearing on June 26, 1995, Judge Frazier asked the Petitioner a series of questions pertaining to the plea agreement. Judge Frazier also explained the nature of the sentence, stating at some points that the sentence for each of the counts of First Degree Sexual Abuse would be up to thirty-five years, and alternatively, stating that the sentence would be at most twenty-five years:[7]

> So, it is the judgment of this Court that as to each one of these sexual assault charges, that's Counts 12, 13, 14, 22nd and 23rd Counts, that you be sentenced to the penitentiary of this State for an indeterminate term of not less than fifteen nor more than thirty-five years. . . the effect of what I'm doin' [sic] here is to - - sentence you to the penitentiary for at least thirty years but nor more than fifty years, and if I said thirty-five years before, I meant twenty-five on each of the sexual assault first degree charges; that those are to run consecutively; one to five on the sexual assault to run consecutively; I'm gonna [sic] suspend Counts 14, 22nd, 23rd and 25 and direct that once you serve the thirty year - - thirty to fifty year sentence - - that's correct isn't it - - fifty year sentence that you be returned and placed on probation at that time for that period of time. That will get you into the latter part of your sixties, if you're still living at that time, and hopefully there would not be any further danger to the - - - to the community.[8]

The Court also permitted testimony from alleged victims of the Petitioners' at the sentencing hearing. However, the victims who testified were not the victims of the crimes to which the Petitioner pled guilty.

F. Sentencing Order

Pursuant to the penalties prescribed by the West Virginia Code for the above offenses, on June 26, 1995, Judge Frazier sentenced the Petitioner as follows:

> This matter came on this day for disposition, there being present in Court Charles W. Pace, Assistant Prosecuting Attorney for the State of West Virginia, and the

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[6]Transcript 5/22/1995; pg. 33, 17-24; 34.

[7]See Footnote 1.

[8]Transcript, 6/26/1995 at page 28.

Defendant being led to the bar of the Court in custody of the Sheriff; came also Tracy P. Burks, counsel for Defendant, the Defendant having heretofore entered a plea to the criminal offense of Sexual Assault - 1st Degree and Sexual Assault - 3rd Degree as the State in Counts 12, 13, 14, 22, 23 and 25 of the indictment and was adjudicated guilty of said offenses; and the Court having received the presentence investigation report from the Probation Department ordered the same filed, and after considering said report, hearing testimony and the statements of counsel and defendant, the Court finds that the Defendant is not a fit and proper person for probation because (1) there is a substantial risk that the Defendant will commit another crime during any period of probation or conditional discharge; (2) probation or conditional discharge would unduly depreciate the seriousness of the Defendant's crime; (3) public good would not be served by placing the Defendant on probation, and (4) public good would be served by the Court imposing a sentence of incarceration; it is the judgment of the Court that the Defendant, James Wayne Lowe is guilty in manner and form of Sexual Assault - 1st Degree and Sexual Assault - 3rd Degree, as contained in Counts 12, 13, 14, 22, 23, and 25 of the indictment, and the Court inquired of the Defendant is there was anything he had to say why the Court should not proceed to pronounce judgment against him and nothing being offered or alleged in delay of judgment, it is, therefore, ORDERED that James Wayne Lowe be taken from the bar of this Court to the Southern Regional Jail and therein confined until such time as the Warden of the penitentiary can conveniently send a guard for him and that he be taken from the jail to the penitentiary of this State and therein confined for the indeterminate term of not less than fifteen (15) nor more than twenty-five (25) years on each of Counts 12, 13, 14, 22 and 23, on the charge of sexual assault -1st degree as contained in the indictment; it is further ordered that the Defendant be confined for an additional indeterminate term of not less than one (1) nor more than five (5) years for Count 25 on the charge of sexual assault - 3rd degree as contained in the indictment, said sentences to run consecutively; it is further Ordered that Counts 14,, 22, 23, and 25 of the indictment be, and the same are hereby suspended and the Defendant is hereby placed on probation for a period of five (5) years after serving his remaining sentence for Counts 12 and 13 of the indictment. It is further ordered that the Defendant receive credit of seven (7) months on said sentence for Count No. 12 of the indictment.

Whereupon, counsel for the Defendant moved that the Defendant be placed under security while incarcerated, which motion is granted. The Court further recommends that the Defendant receive treatment for sex offenders.

On motion of the State, it is Ordered that the remaining nineteen counts contained in the indictment be dismissed.

G. Post-Trial Matters

On October 18, 1995, the Petitioner filed a motion for reconsideration of his sentence, which was denied by Judge Frazier on December 19, 1995.

H. Appeal to the West Virginia Supreme of Appeals – Refused

On October 23, 1995, the Petitioner, by and through counsel, filed an appeal with the West Virginia Supreme Court of Appeals. The Petitioner's appeal was based on the following grounds:

(1)That the Circuit Court erred in basing Petitioner's sentencing on impermissible factors;
(2)That the Circuit Court erred by refusing to consider Petitioner's suitability for probation; and
(3)That the Circuit Court erred by sentencing Petitioner disproportionately to the character and degree of the offense.

The appeal was refused by the West Virginia Supreme Court of Appeals on June 12, 1996.

I. <u>The Petitioner's Pro Se Petition under W. Va. Code §53-4A-1 for Post Conviction Habeas Corpus</u>

On or about March 14, 2000, the Petitioner, *pro se*, filed his first Petition for Writ of Habeas Corpus, which was summarily dismissed by the Circuit Court. On or about November 20, 2001,the Petitioner, *pro se*, filed his second Petition for Writ of Habeas Corpus.

The Circuit Court appointed Bill Huffman, Esq. to represent Petitioner in these proceedings. Mr. Huffman subsequently withdrew as counsel. On or about July 8, 2002, the Circuit Court appointed Steven Mancini, Esq., to represent the Petitioner on his second writ of Habeas Corpus.

2. <u>The Amended Petition</u>

On October 30, 2002, the Petitioner, by and through counsel Steven Mancini, Esq., filed an amended petition for Writ of Habeas Corpus. Counsel raised the following grounds:

(A) THAT PETITIONER, AS DEFENDANT IN THE ORIGINAL TRIAL COURT PROCEEDING, SHOULD HAVE BEEN AFFORDED THE OPPORTUNITY FOR A SEXUAL OFFENDER EVALUATION PRIOR TO SENTENCING, AND THAT THE TRIAL COURT DID NOT CONSIDER PETITIONER'S ELIGIBILITY FOR PROBATION

(B) THAT THE TRIAL COURT IMPERMISSIBLY CONSIDERED, IN SENTENCING PETITIONER, FACTORS EXTRINSIC TO THE CHARGES UPON WHICH PETITIONER HAS PLED GUILTY

(C) THAT THE TRIAL COURT FAILED TO DECIDE ONE OF THE ISSUES IN PETITIONER'S AMENDED PETITION; TO WIT, THAT THE LANGUAGE IN THE TRIAL COURT'S AMENDED COMMITMENT ORDER DID NOT SUPPORT CONSECUTIVE SENTENCING

3. Losh Checklist for the First Habeas Corpus

Waived Grounds:

In the Losh Checklist filed by Mr. Mancini, the Petitioner waived the following grounds for relief:

- Lack of trial-court jurisdiction
- Unconstitutionality of statute under which conviction obtained
- Indictment showing on its face that no offense was committed
- Prejudicial pre-trial publicity
- Mental competency at time of crime
- Language barrier to understanding the proceedings
- Denial of counsel
- Unintelligent waiver of counsel
- Failure of counsel to take an appeal
- Consecutive sentence for the same transaction
- State's knowing use of perjured testimony
- Falsification of a transcript by prosecutor
- Double jeopardy
- Irregularities in arrest
- Excessiveness or denial of bail
- No preliminary hearing
- Illegal detention prior to arraignment
- Irregularities or errors in arraignment
- Challenges to the composition of grand jury, or to its procedures
- Defects in indictment
- Prejudicial joinder of defendants

- Lack of full public hearing
- Claim of incompetence at time of offense, as opposed to time of trial
- Claims concerning use of informers to convict
- Instructions to the jury
- Claims of prejudicial statements by trial judge
- Claims of prejudicial statements by prosecutor
- Sufficiency of evidence
- Acquittal of co-defendant on same charge
- Defendant's absence from part of the proceedings
- Improper communications between prosecutor or witness and jury

Asserted Grounds

Mr. Mancini asserted the following Losh grounds and indicated that the following were still being investigated:

- Denial of speedy-trial right. Still being investigated.
- Involuntary guilty plea. Still being investigated.
- Mental competency at time of trial/plea, cognizable even if not asserted at proper time, or if resolution not adequate. Still being investigated.
- Incapacity to stand trial/enter into plea due to drug use. Still being investigated.
- Coerced confessions. Still being investigated.
- Suppression of helpful evidence by prosecutor. Still being investigated.
- Unfulfilled plea bargains. See second ground in *pro se* petition.
- Information in pre-sentence report erroneous. See first and second ground in *pro se* petition.
- Ineffective assistance of counsel. Still being investigated.
- Failure to provide copy of indictment to defendant. Still being investigated.
- Improper venue. Still being investigated.
- Pre-trial delay. Still being investigated.

- Refusal of continuance. Still being investigated.
- Refusal to subpoena witnesses. Still being investigated.
- Non-disclosure of Grand Jury minutes. Still being investigated.
- Refusal to turn over witness notes after witness has testified. Still being investigated.
- Constitutional errors in evidentiary rulings. Still being investigated.
- Questions of actual guilty upon an acceptance of guilty plea.
- Severer sentence than expected. See third ground in *pro se* petition.
- Excessive Sentence. See third ground in *pro se* petition.
- Mistaken advice of counsel as to parole or probation eligibility. Still being investigated.
- Amount of time served on sentence, to be served or for which credit applies. See third ground in Amended Petition.

J. <u>The February 28, 2003 Habeas Hearing</u>

At the February 28, 2003 Habeas hearing, the Court asked Mr. Mancini if he had given the Petitioner an opportunity to go over the <u>Losh</u> checklist:

Mr. Mancini:	Uh, I just, I went through this with Mr. Lowe and then I filled it out on my own.
The Court:	Did he sign it?
Mr. Mancini:	No, I signed it.[9]

Additionally, it was admitted that Mr. Mancini did not explain the <u>Losh</u> list to the Petitioner, nor did Mr. Mancini meet with the Petitioner prior to the Habeas hearing at the Mt. Olive Correctional Facility. At the hearing, Judge Frazier addressed the grounds of "impermissible factors in sentencing, failure to consider probation, and disproportionate sentencing."

On September 11, 2003, Judge Frazier denied the Petitioner's Writ of Habeas Corpus, addressing the three grounds raised at the Habeas hearing. Petitioner appealed the order, by and

[9]Transcript, 2/28/2003

through counsel, Mr. Mancini, to the West Virginia Supreme Court of Appeals on August 23, 2004. On September 1, 2004, the petition was refused.

II. THE PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM UNDER W. VA. CODE §53-4A-1/LOSH CHECKLIST/RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Amended Second Petition for Writ of Habeas Corpus, Ad Subjiciendum

On August 18, 2009, the Petitioner, by and through counsel Natalie Hager, Esq., filed an amended second petition for Writ of Habeas Corpus, *ad subjiciendum*. The Petitioner argued:

(1) THE DOCTRINE OF *RES JUDICATA* DOES NOT APPLY TO THE PRESENT PETITION FOR WRIT OF HABEAS CORPUS, *AD SUBJICIENDUM*, BECAUSE PRIOR LOSH LIST WAS SUBMJITTED TO THE COURT WITHOUT PETITIONER'S KNOWLEDGE, CONSENT AND SIGNATURE AND BECAUSE THE COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO THE GROUNDS RAISED IN PETITIONER'S PREVIOUS PETITIONS

(2) ASSISTANCE OF COUNSEL PROVED TO BE INEFFECTIVE AT THE TRIAL LEVEL AS WELL AS DURING PREVIOUS HABEAS CORPUS PROCEEDING

(3) THE PETITIONER, WHO WAS DIAGNOSED WITH SCHIZOPHRENIA, MAJOR DEPRESSION, A PERSONALITY DEFECT AND BORDERLINE INTELLECTUAL FUNCTIONING, COULD NOT FORM THE REQUISITE MENS REA AT THE TIME OF THE CRIMINAL ACT

(4) THE PETITIONER'S PLEA WAS INVOLUNTARY BECAUSE THE CIRCUIT COURT DID NOT FULLY EDUCATE HIM OF THE NATURE AND CONSEQUENCES OF HIS PLEA AGREEMENT AND BECAUSE THE PETITIONER SUFFERED FROM EFFECTS OF HIS ANTI-DEPRESSANT MEDICATION AT THE TIME HE ENTERED INTO THE PLEA AGREEMENT

(5) THE PETITIONER NEVER RECEIVED THE BENEFIT OF HIS PLEA BARGAIN BECAUSE THE TRIAL COURT CONSIDERED IMPERMISSIBLE EVIDENCE IN IMPOSING HIS SENTENCE

(6) A SENTENCE OF THIRTY TO FIFTY YEARS IN THE PENITENTIARY IS EXCESSIVE AND DISPROPORTIONATE TO THE CHARACTER AND DEGREE OF THE OFFENSE PURSUANT TO THE WEST VIRGINIA STATE

CONSTITUTION, ARTICLE III, SECTION 5

(7) THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN HE WAS COERCED INTO GIVING A STATEMENT BY THREATS FROM POLICE OFFICERS

State's Response to Amended Second Petition: Respondent's Memorandum in Opposition to Petition for Writ of Habeas Corpus

The State responded to the motion from the Petitioner on December 3, 2009. The State argued that the Petitioner's counsel at the Habeas stage was effective, because the actions of Mr. Mancini appear reasonable and that Mr. Mancini is a competent and experienced attorney. Further, the State argued that the Petitioner cannot show that his Habeas petition would have been granted without the alleged errors by Habeas counsel. The State did not respond to any of the Petitioner's other contentions, except to say they are beyond the scope of the proceedings.

The Losh Checklist for the Second Habeas Corpus

Waived Grounds:

On August 18, 2009, by and through Petitioner's new counsel, Natalie N. Hager, Esq., the Petitioner waived the following grounds:

- Lack of trial-court jurisdiction
- Unconstitutionality of statute under which conviction obtained
- Indictment showing on its face that no offense was committed
- Prejudicial pre-trial publicity
- Denial of speedy trial right
- Language barrier to understanding the proceedings
- Denial of counsel
- Unintelligent waiver of counsel
- Failure of counsel to take an appeal
- Consecutive sentence for the same transaction
- Suppression of helpful evidence by prosecutor
- State's knowing use of perjured testimony
- Falsification of a transcript by prosecutor

- Double jeopardy
- Irregularities in arrest
- Excessiveness or denial of bail
- No preliminary hearing
- Illegal detention prior to arraignment
- Irregularities or errors in arraignment
- Challenges to the composition of grand jury, or to its procedures
- Failure to provide copy of indictment to defendant
- Defects in indictment
- Improper venue
- Pre-trial delay
- Refusal of continuance
- Refusal to subpoena witnesses
- Prejudicial joinder of defendants
- Lack of full public hearing
- Non-disclosure of grand jury minutes
- Claims concerning use of informers to convict
- Instructions to the jury
- Sufficiency of evidence
- Acquittal of co-defendant on same charge
- Defendant's absence from part of the proceedings
- Improper communications between prosecutor or witness and jury

Not Waived/Not Yet Asserted

The following grounds were not waived but not yet asserted by Petitioner:

- Involuntary guilty plea
- Mental competency at time of crime
- Mental competency at time of trial/plea, cognizable even if not asserted at proper time, or if resolution not adequate.
- Incapacity to stand trial/enter into plea due to drug use.

- Unfulfilled plea bargains
- Claims of incompetence at time of offense, as opposed to time of trial
- Information in pre-sentence report erroneous
- Ineffective assistance of counsel
- Constitutional errors in evidentiary rulings.
- Claims of prejudicial statements by Trial Judge
- Claims of prejudicial statements by prosecutor
- Questions of actual guilty upon an acceptance of guilty plea
- Severer sentence than expected
- Excessive Sentence
- Mistaken advice of counsel as to parole or probation eligibility

The Hearing on the issue of Ineffective Assistance of Habeas Counsel

On January 25, 2010, a hearing was held before this Court on the issue of whether the Petitioner had received effective assistance of counsel at the prior Omnibus Habeas petition. George Sitler, Esq., appeared on behalf of the State, and Joseph Harvey, Esq., and Henry L. Harvey, Esq., appeared on behalf of the Petitioner. Petitioner James Lowe also appeared, although he did not testify. The only person to testify was Mr. Mancini, Petitioner's prior Habeas counsel. During questioning, Mr. Mancini testified that he had not reviewed the Losh checklist with the Petitioner:

> Mr. Mancini: As far as the Losh list, I prepared that on my own. I prepared that without consulting with Mr. Lowe other than to have reviewed his pleading...[10]

Mr. Mancini also indicated that he had not met with Petitioner to review the list:

> Mr. Harvey: You never met with Mr. Lowe and went over that list?
>
> Mr. Mancini: I don't believe so.[11]

Additionally, it was indicated that Petitioner did not sign his own Losh checklist, instead,

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[10]Summary of Taped Transcript, 1/25/10

[11]Summary of Taped Transcript, 1/25/10

Mr. Mancini signed his own name to the list:

> The Court: And, so he didn't sign it, then, you signed it?
>
> Mr. Mancini: That's what it states in the position - - the petition - - then I'm almost for sure that's accurate.[12]

Ruling on Habeas Corpus Petition

On June 25, 2010, the Circuit Court of Mercer County, West Virginia, granted the Petitioner the opportunity to file a new Omnibus Petition for Writ of Habeas Corpus, having found that the Petitioner's counsel at the previous Habeas Corpus proceeding was ineffective. The Court gave the State of West Virginia thirty (30) days from the entry of that order to request the appropriate relief from the West Virginia Supreme Court of Appeals. The State did not file an appeal or such other relief.

III. THE NEW OMNIBUS HABEAS CORPUS PETITION FILED PURSUANT TO THE COURT'S ORDER OF JUNE 25, 2010 IN CIVIL ACTION NO. 09-C-212/LOSH

CHECKLIST/STATE'S RESPONSE

Omnibus Habeas Corpus Petition for Writ of Habeas Corpus, ad subjiciendum

On July 29, 2010, the Petitioner filed his Petition for Writ of Habeas Corpus ad Subjiciendum by his counsel, Natalie N. Hager, Esq. The Petitioner argued:

(A) ATTORNEY TRACY BURKS' FAILURE TO REQUEST A COMPETENCY HEARING AND FURTHER COMPETENCY EVALUATION, AND HIS FAILURE TO FILE A WRIT OF MANDAMUS TO ORDER THE COURT TO RULE ON THE ISSUE OF CRIMINAL RESPONSIBILITY PRIOR TO SENTENCING CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

(B) THE PETITIONER, WHO WAS DIAGNOSED WITH SCHIZOPHRENIA, MAJOR DEPRESSION, A PERSONALITY DEFECT AND BORDERLINE INTELLECTUAL FUNCTIONING, COULD NOT FORM THE REQUISITE MENS REA AT THE TIME OF THE CRIMINAL ACT

[12]Summary of Taped Transcript 1/25/10

(C) THE PETITIONER'S PLEA WAS INVOLUNTARY BECAUSE THE CIRCUIT COURT DID NOT FULLY EDUCATE HIM OF THE NATURE AND CONSEQUENCES OF HIS PLEA AGREEMENT AND BECAUSE THE PETITIONER SUFFERED FROM EFFECTS OF HIS ANTI-DEPRESSANT MEDICATION AT THE TIME HE ENTERED INTO THE PLEA AGREEMENT

(D) THE PETITIONER NEVER RECEIVED THE BENEFIT OF HIS PLEA BARGAIN BECAUSE THE TRIAL COURT CONSIDERED IMPERMISSIBLE EVIDENCE IN IMPOSING HIS SENTENCE

(E) A SENTENCE OF THIRTY TO FIFTY YEARS IN THE PENITENTIARY IS EXCESSIVE AND DISPROPORTIONATE TO THE CHARACTER AND DEGREE OF THE OFFENSE PURSUANT TO THE WEST VIRGINIA STATE CONSTITUTION ARTICLE III SECTION 5

(F) THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN HE WAS COERCED INTO GIVING A STATEMENT BY THREATS FROM POLICE OFFICERS

The State's Response to the Petition for Writ of Habeas Corpus

The State responded to the Petition for Habeas Corpus on November 22, 2010. The State argued that Petitioner's trial counsel was effective, and that the Petitioner failed to prove any shortcoming of counsel that would have produced a different outcome. It also argued that there was no evidence provided which demonstrated that the Petitioner was not criminally responsible at the time of the act. It further argued that the Petitioner's plea was voluntarily made, that the Petitioner did receive the benefit of his plea bargain, that the Court did not consider impermissible factors in sentencing him, and that his sentence was not disproportionate. Finally, it argued that the Petitioner did not produce any evidence on the issue of an involuntary confession, and that this issue was waived by the entry of a guilty plea.

The Losh Checklist

On July 29, 2010, the Petitioner, by and through counsel, Natalie N. Hager, Esq. filed his Losh checklist:

COMES NOW the Petitioner, James Wayne Lowe, by and through counsel,

Natalie N. Hager, and files the following comprehensive list of grounds specified in Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981), which might be considered sufficient for habeas corpus relief.

Petitioner has marked, with an "X", each ground considered *inapplicable* to Petitioner's convictions, and therefore, waived. As to grounds not waived, the Petitioner has identified the applicable ground in his *pro se* habeas petition, or in the Amended petition, or has indicated that said claim is still being investigated.

INAPPLICABLE:

X	(1)	Lack of trial court jurisdiction.
X	(2)	Unconstitutionality of statute under which conviction obtained.
X	(3)	Indictment showing on its face that no offense was committed
X	(4)	Prejudicial pretrial publicity.
X	(5)	Denial of speedy trial right.
__	(6)	Involuntary guilty plea.
__	(7)	Mental competency at time of crime.
__	(8)	Mental competency at time of trial/plea, cognizable even if not asserted at proper time, or if resolution not adequate.
__	(9)	Incapacity to stand trial/enter into plea due to drug use.
X	(10)	Language barrier to understanding the proceedings.
X	(11)	Denial of counsel.
X	(12)	Unintelligent waiver of counsel.
X	(13)	Failure of counsel to take an appeal
X	(14)	Consecutive sentence for same transaction.
__	(15)	Coerced confessions.
X	(16)	Suppression of helpful evidence by prosecutor.
X	(17)	State's knowing use of perjured testimony.
X	(18)	Falsification of a transcript by prosecutor.
__	(19)	Unfulfilled plea bargains.
__	(20)	Information in pre-sentence report erroneous.

__	(21)	Ineffective assistance of counsel.
X	(22)	Double jeopardy.
X	(23)	Irregularities in arrest.
X	(24)	Excessiveness or denial of bail.
X	(25)	No preliminary hearing.
X	(26)	Illegal detention prior to arraignment.
X	(27)	Irregularities or errors in arraignment.
X	(28)	Challenges to the composition of grand jury, or to its procedures.
X	(29)	Failure to provide copy of indictment to defendant.
X	(30)	Defects in indictment.
X	(31)	Improper venue.
X	(32)	Pre-trial delay.
X	(33)	Refusal of continuance.
X	(34)	Refusal to subpoena witnesses.
X	(35)	Prejudicial joinder of defendants.
X	(36)	Lack of full public hearing.
X	(37)	Non-disclosure of Grand Jury minutes.
X	(38)	Refusal to turn over witness notes after witness has testified.
__	(39)	Claim of incompetence at time of offense, as opposed of time of trial.
X	(40)	Claims concerning use of informers to convict.
__	(41)	Constitutional errors in evidentiary rulings.
X	(42)	Instructions to the jury.
__	(43)	Claims of prejudicial statements by trial judge.
X	(44)	Claims of prejudicial statements by prosecutor.
__	(45)	Sufficiency of evidence.
X	(46)	Acquittal of co-defendant on the same charge.
X	(47)	Defendant's absence from part of the proceedings.
X	(48)	Improper communications between prosecutor or witness and jury.

__ (49) Question of actual guilt upon an acceptable guilty plea

__ (50) Severer sentence than expected.

__ (51) Excessive sentence.

X (52) Mistaken advice of counsel s to parole or probation eligibility.

X (53) Amount of time served on sentence, to be served, or for which credit applies.

The Omnibus Habeas Corpus Hearing

On October 21, 2010, the Petitioner's Omnibus Habeas Corpus hearing was held. Timothy D. Boggess, Esq., Prosecuting Attorney of Mercer County, West Virginia, appeared on behalf of the State, and Joseph Harvey, Esq., appeared on behalf of the Petitioner. The Petitioner attended in person. The Court reviewed the Losh checklist with the Petitioners. The Petitioner called Tracy Burks, Esq., and himself as witnesses. Mr. Burks testified that he was appointed to represent the Petitioner as his trial counsel. He testified about arranging for a mental evaluation for the Petitioner, and about its findings. He testified that he believed the Petitioner answered appropriately when he spoke with him. He also testified about reviewing the possible sentences facing the Petitioner. He testified that he believed the Petitioner to be competent.

The Petitioner testified that he had a history of mental illness and that he only remembered bits and pieces of the plea hearing. He doesn't remember discussing Dr. Smith's report with Mr. Burks. He has difficulty reading. He testified that he didn't understand that he was facing 76 to 130 years in jail. He testified about his misuse of alcohol at the time of the crime. He didn't understand a lot but was afraid to express his fears to the trial judge. He testified that he has written two sexual offender programs while he has been incarcerated. He testified that he did not recall giving a statement to the police at the time of his arrest.

At the conclusion of the evidence, the Court left the evidence open so that the State could supplement it with testimony from Detective Scott Myers of the Bluefield Police Department. The State did not do that.

IV. DISCUSSION

Habeas Corpus Defined

Habeas Corpus is a "suit wherein probable cause therefore being shown a writ is issued which challenges the right of one to hold another in custody or restraint." Syl. Pt. 1. State ex rel. Crupe v. Yardley, 213 W. Va. 335, 582 S.E.2d 782 (2003).[13] The issue presented in a Habeas Corpus proceeding is "whether he is restrained of his liberty by due process of law." Id. At Syl. Pt. 2. "A Habeas Corpus petition is not a substitute for writ of error[14] in that ordinary trial error not involving constitutional violations will not be reviewed." Id. At Syl. Pt. 3.

The Availability of Habeas Corpus Relief

In State ex rel. McCabe v. Seifert, the West Virginia Supreme Court of Appeals delineated the circumstances under which a post-conviction Habeas Corpus hearing is available, as follows:

> (1) Any person convicted of a crime and
> (2) Incarcerated under sentence of imprisonment therefore who contends
> (3) That there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State or both, or
> (4) That the court was without jurisdiction to impose the sentence, or
> (5) That the sentence exceeds the maximum authorized by law, or
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may without paying a filing fee, file a petition for a writ of Habeas Corpus Ad Subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief. 220 W.Va. 79m 640 S.E.2d 142 (2006); W.Va. Code §53-4A-1(a)(1967)(Repl. Vol. 2000).

Our post conviction Habeas Corpus statute, W.Va. 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 reasonable diligence,

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[13]See also Syl. Pt. 4, Click v. Click, 98 W. Va. 419, 127 S.E. 194 (1925).

[14]A writ of error is a writ issued by an appellate court to the court of record where a case was tried, requiring that the record of the trial be sent to the appellate court for examination of alleged errors.

discover." Syl. Pt. 1, Gibson v. Dale, 173 W. Va. 681, 319 S.E.2d 806 (1984). At subsequent Habeas Corpus hearings, any grounds raised at a prior Habeas Corpus hearing are considered fully adjudicated and need not be addressed by the Court. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Yet, some limited exceptions apply to this general rule: "[a] prior omnibus Habeas Corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however an applicant may still petition the court on the following grounds: (1) ineffective assistance of counsel at the omnibus Habeas Corpus hearing; (2) newly discovered evidence; (3) or, a change in the law, favorable to the applicant, which may be applied retroactively." Syl. Pt. 4, Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).[15]

A Habeas Corpus proceeding is civil in nature. "The general standard of proof in civil cases is preponderance of the evidence." Sharon B.W. v. George B.W., 203 W.Va. 300, 303, 507 S.E.2d 401, 404 (1998).

The West Virginia Supreme Court of Appeals has articulated the way for a Circuit Court to review Habeas Corpus petitions: "Whether denying or granting a petition for a writ of Habeas Corpus, the circuit court must make adequate findings of facts and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined." Coleman v. Painter, 215 W.Va. 592, 600 S.E.2d 304 (2004).

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[15]On June 16, 2006, the West Virginia Supreme Court of Appeals held that a fourth ground for Habeas relief may exist in cases involving testimony regarding serology evidence. To summarize, the Court held as follows:

> A prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime serologist, other than a serologist previously found to have engaged in intentional misconduct, offered evidence may bring a petition for writ of Habeas Corpus based on the serology evidence even if the prisoner brought a prior Habeas Corpus challenge to the same serology evidence and the challenge was finally adjudicated.

In re Renewed Investigation of State Police Crime Laboratory, Serology Div, 633 S.E.2d 762, 219 W.Va. 408 (2006).

FINAL LIST OF GROUNDS ASSERTED FOR ISSUANCE OF A WRIT OF HABEAS CORPUS, AND THE COURT'S RULINGS THEREON

The Court has carefully reviewed all of the pleadings filed in this action, the Habeas Corpus Petition filed by Ms. Hager, the State's response, the testimony developed at the Omnibus Habeas Corpus hearing, the plea and sentencing hearing transcripts, the underlying criminal file, and the applicable case law. The Court believes that the issues to resolve in this matter are:

(1) Whether trial counsel was ineffective in his handling of the Petitioner's criminal responsibility/competency;

(2) Whether the Petitioner had the mental capacity at the time of the alleged crimes to form a specific intent to commit these crimes;

(3) Whether the Petitioner's plea was involuntary;

(4) Whether the plea bargain was unfulfilled due to the trial court considering impermissible factors;

(5) Whether the Petitioner's sentence was excessive and disproportionate; and

(6) Whether the Petitioner's statement to the police was coerced.

The Petitioner failed to argue or produce evidence on his claim of a question of actual guilt upon an acceptable guilty plea, and this ground is forever waived.

THE PETITIONER'S CLAIMS

CLAIM A:

ATTORNEY TRACY BURKS' FAILURE TO REQUEST A COMPETENCY HEARING AND FURTHER COMPETENCY EVALUATION AND HIS FAILURE TO FILE A WRIT OF MANDAMUS TO ORDER THE COURT TO RULE ON THE ISSUE OF CRIMINAL RESPONSIBILITY PRIOR TO SENTENCING CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

THE PETITIONER'S ARGUMENT

The Sixth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, and Article Three Section Fourteen of the West Virginia State Constitution guarantee a criminal defendant the right to effective counsel. U.S.C. Amend, VI and XIV; W. Va. Const. Amend. Art. III §14. The threshold question in analyzing effectiveness of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having product a just result". Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). In Strickland, the United States Supreme Court adopted a test that requires a defendant who claims ineffective assistance of counsel to prove two components. First, the defendant must demonstrate the deficiency of his counsel's performance. Defense counsel must make errors so grievous as to deprive the defendant of his Sixth Amendment right to counsel. Id. Second, the defendant must prove that counsel's actions prejudiced him thus denying him a fair trial. Id. The appropriate test for prejudice is showing the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Id. At 694, 2068. Such reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome". Id. "The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Id.

The proper standard for evaluating counsel assistance in criminal cases is that of "reasonably effective assistance". Id. Hence, a defendant claiming ineffective assistance of counsel must prove that "counsel's representation fell below an objective standard of reasonableness". Id. At 688, 2064. Counsel for a criminal defendant has basic duties to his client: duty of loyalty, duty to avoid conflicts, duty of care, duty to consult his client, and duty to keep his or her client informed of important stages and developments of that client's case. Id. At 688, 2065. Such duties are not meant to be exhaustive; instead, counsel's performance is evaluated objectively in the realms of all surrounding circumstances. Id. Thus, courts must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct". Id. At 690, 2066. It is also essential to examine

counsel's communications with his client to see client's influence on counsel's decisions in a particular case. Id.

West Virginia has adopted the two-prong test announced in Strickland. In fact, Justice Cleckley essentially paraphrased the two components of this test in Syllabus point 5 of State v. Miller, 194 W. Va. 3, 45o S.E.2d 114 (1995): "(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". Justice Cleckley further emphasized that in examining ineffective assistance of counsel claims, courts must "at the same time refrain [] from engaging in hindsight or second-guess[ing] trial counsel's strategic decisions". Syl. pt. 6. Instead, courts should focus on whether counsel's actions were in accord with the actions of a "reasonable lawyer . . . under the circumstances". Id.

In the case at bar, the Petitioner contends that his trial attorney's failure to request a competency hearing and further competency evaluation, and his failure to file a Writ of Mandamus to order the court to rule on the issue of criminal responsibility constituted ineffective assistance of counsel.

West Virginia Code §27-6A-1 and §27-6A-2 deal with psychiatric and psychological Evaluations of criminal defendants for the purpose of determining competency to stand trial and/or take a plea of guilty. Pursuant to W. Va. Code §27-6A-1(d), "[i]f the court of record orders or if the defendant or his counsel on his behalf within a reasonable time requests a hearing on such findings, a hearing in accordance with section two of this article shall be held by the court of record within ten days of the date such finding or such request has been made". W. Va. Code §27-6A-1(d).

On April 12, 1995, without holding a hearing on the competency evaluation, Judge Frazier, *sua sponte*, concluded that "the Defendant has the rational understanding as well as factual understanding of the proceedings against him, and the Court also finds that the Defendant is capable of participating substantially in his defense and understands the nature and consequences of a criminal trial and/or plea". Order, 4/12/1995 (Exhibit E). The Court made no finding of criminal responsibility. The Petitioner's trial attorney, Tracy Burks, failed to file a motion, pursuant to W. Va. Code §27-6A-1(d) and §27-6A-2, as amended, for a hearing on the

findings of the court in regard to the Petitioner's competency to stand trial. Mr. Burks also failed to file a writ of mandamus with the West Virginia Supreme Court to order the circuit court to rule on criminal responsibility. The Petitioner was under the influence of anti-depressant at the time of commission of the crimes, and hence a finding had to be made prior to sentencing whether he was criminally responsible for his actions at the time of the crime. However, Mr. Burks failed to pursue that avenue of argument, and essentially ignored the fact that the trial court chose to forgo ruling on criminal responsibility. Mr. Burks did not demand an explanation from the court as to the reason why the court consciously decided to only rule on the issue of competency. Instead, when asked if Mr. Burks explained to the Petitioner his right to challenge the Court's decision on competency, Mr. Burks replied, "Your Honor, I'll be honest, I don't know if I went over the part about the challenging, but I informed him of the results and –". Transcript, 5/22/1995 at page 32: 12-14 (Exhibit G). When the Petitioner was asked if he agreed with the results of the psychiatrists' findings that he was competent to stand trial and/or enter a guilty plea, the Petitioner, in his own words, expressed disagreement with the doctors' decision:

The Court: Do you agree with the results?

The Defendant: Well, I'm going to say – I might get in trouble for saying it – but that doctor down in Charleston don't know his -- from a hole in the ground.

Mr. Burks: He didn't like the doctor too well, Your Honor. I don't think he disagree too much with – we didn't – about the competency.

Transcript, 5/22/1995, page 32: 15-21 (Exhibit G). Despite the fact that the Petitioner clearly disagreed with the doctors' findings, Mr. Burks chose to forgo challenging the competency evaluation, without even informing the Petitioner of his right to do so. Taking into consideration the Petitioner's history of being sexually abused by several family members and friends, as well as his extensive record of mental health treatment and evaluations at Southern Highalnds and Southwest Virginia Mental Health Institute, the outcome of the Petitioner's case could have been different, had Mr. Burks chosen to subpoena witnesses from Southern Highlands and Southwest Virginia Mental Health Institute to demonstrate that the Petitioner was clearly unable to make an informed decision in taking a guilty plea. By the same token, Mr. Burks also could have inquired

into criminal responsibility and the Petitioner's mental state at the time of the crimes. Moreover, Mr. Burks could have subpoenaed Drs. Smith who evaluated the Petitioner for the purposes of the criminal proceedings, and questioned them at length about their reasoning in finding the Petitioner competent despite an extensive list of signs and symptoms that pointed to incompetency. Finally, Mr. Burks could have also requested a competency and criminal responsibility evaluation of the Petitioner at the time of the commission of the crime. However, Mr. Burks not only failed to inform the Petitioner of his right to challenge the competency hearing, but also he clearly ignored the Petitioner's disagreement with doctors' findings, and failed to challenge the competency evaluation. Such failure is ineffective assistance of counsel. Therefore, Mr. Burks' performance was deficient under an objective standard of reasonableness; and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, to-wit; the Petitioner would have been found incompetent to stand trial/take a guilty plea, and had Mr. Burks requested a competency evaluation at the time of the commission of the crime and had Mr. Burks filed a Petitioner for a Writ of Mandamus requesting the West Virginia Supreme Court to order the trial court to rule on the issue of criminal responsibility, the Petitioner could have been sent to a mental health facility to receive appropriate medical treatment instead of incarceration.

THE RESPONDENT'S ANSWER

The Respondent *denies* that Petitioner was not afforded effective assistance of counsel. The Petitioner argues that he was not afforded effective assistance of counsel during various stages of the pre-trial and plea in this matter. The Petitioner produces a litany of reasons of why his counsel was ineffective. None of these assigned reasons have merit. The Supreme Court of Appeals have announced the test to be applied in determining whether counsel is ineffective. In State v. Miller, in syllabus points five and six, the Supreme Court said:

> 5. 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.

> 6. 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.
>
> State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The petitioner claims that his counsel was ineffective because he did not pursue the issue of the petitioner's criminal responsibility after a competency hearing wherein the petitioner was found by a Psychologist and Psychiatrist to be competent and criminally responsible. The evaluations conducted by Drs. Smith and Smith found the petitioner to be both competent and criminally responsible. After the evaluation, the Court ruled that the petitioner was competent to stand trial. The Court did not address the issue of criminal responsibility in its ruling even though that issue was addressed in the competency evaluation conducted by Drs. Smith and Smith when they both found that the petitioner was criminally responsible.

Petitioner now argues that trial counsel should have filed a Writ of Mandamus to have the Court address the issue of Criminal Responsibility. As Tracy Burks testified at the Habeas hearing, he did not feel that he had a good faith basis to contest the finding made by Drs. Smith and Smith. Furthermore, West Virginia Code §27-6A-3(d) states [i[f at any point in the proceedings the defendant is found competent to stand trial, the court of record shall forthwith proceed with the criminal proceedings. That is exactly what Judge Frazier did in the underlying case. The issue of criminal responsibility would be an issue to be determined by the trier of fact. It would be presented at the time of the trial, giving the trier of fact the opportunity to find the defendant not guilty by reason of mental illness. If one is found not guilty by reason of mental illness or defect, then that person is subject to jurisdiction of the Court for the maximum time the person could have possibly been incarcerated on the underlying offenses. The indictment in the petitioner's case could have subjected the petitioner to the Court's jurisdiction for hundreds of

years. In looking at the case from this perspective, it is plain to see that Tracy Burks made a strategic decision to limit the petitioner's overall exposure to both prison and any other alternatives. As previously stated, Mr. Burks had no reason to question the petitioner's criminal responsibility at the time the ruling on his competency was made. For these reasons, it is clear that Mr. Burks representation of the petitioner did not rise to the level of ineffective assistance of Counsel.

The Petitioner has also failed to produce even a scintilla of evidence that but for the errors complained of, that the results of the proceedings would have been different. The issues raised by the petitioner are nothing more than second guessing trial strategy.

The Petitioner has a heavy burden in order to prove ineffective assistance of counsel and he fails to meet this burden. The actions of defense counsel appear reasonable. His counsel was a competent and experienced attorney. Furthermore, the petitioner cannot show, but for these alleged errors, he would have been found not guilty. Accordingly, the petitioner received effective assistance from his counsel.

CLAIM A: FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Court finds that the West Virginia Supreme Court of Appeals has stated that the test to be applied in determining whether counsel was effective is found in State v. Miller, specifically:

> [i]n 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 results of the proceeding would have been different. State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995), Syl. Pt. 5.

(2) The West Virginia Supreme Court of Appeals has further held that:

> [w]here a counsel's performance, attacked as ineffective arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of the accused. State ex. rel. Humphries v. McBride, 220 W. Va. 362, 645 S.E.2d 798 (2007) Syl. Pt. 5, in accord, Syl. Pt. 21, State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974).

(3) Additionally, the West Virginia Supreme Court of Appeals has held that:

> [i]n 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. State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995) Syl. Pt. 6.

(4) The Court finds that, at the request of Petitioner's trial counsel, the Petitioner was evaluated by Rosemary L. Smith, Psy. D. And Ralph S. Smith, Jr., M.D. of the Charleston Psychiatric Group, Inc. On February 6, 1995.

(5) The Court finds that as a result of this evaluation, Drs. Smith opined as follows:

> It is our opinion that Mr. Lowe is competent to stand trial. We base this on the fact that he appears to understand the role and function of courtroom participants, the adversary process, can consult with his lawyer, and has the ability to assist in his own defense. He knows there is a proceeding against

> him, and could cooperate. He knows what his situation is, and has sufficient memory and control of his mental faculties to rationally assist in his defense.
>
> It is further our opinion that Mr. Lowe was criminally responsible at the time of the alleged crimes because although he had a mental disorder, Major Depression, and a personality defect, and Borderline Intellectual Functioning, these did not rise to the level of mental disease or defect which would have led to a substantial incapacity to appreciate the wrongfulness of his conduct, or which would have prevented him from confirming his conduct to the requirements of the law. It appears from witness statements that he has a long history of this type of behavior with multiple victims. (*See* report of Charleston Psychiatric Group at p. 11)

(6) The Court finds that W. Va. Code §27-6A-3 states that:

> Within five days of the receipt of the qualified forensic evaluator's report and opinion on the issue of competency to stand trial, the court of record shall make a preliminary finding on the issue of whether the defendant is competent to stand trial and if not competent whether there is a substantial likelihood that the defendant will attain competency within the next three months. If the court of record orders, or of the state or defendant or defendant's counsel within twenty days of receipt of the preliminary findings requests, a hearing, then a hearing shall be held by the court of record within fifteen days of the date of the preliminary finding, absent good cause shown for a continuance. If a hearing order or request is not filed within twenty days, the preliminary findings of the court become the final order.

It further states that:

> The court of record pursuant to a preliminary finding or hearing on the issue of a defendant's competency to stand trial and with due consideration of any forensic evaluation conducted pursuant to sections two and three of this article shall make a finding of

> fact upon a preponderance of the evidence as to the defendant's competency to stand trial based on whether or not the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether he or she has a rational as well as a factual understanding of the proceedings against him or her.

(7) The Court finds and concludes that Petitioner's trial counsel had no good faith basis to pursue a Writ of Mandamus or any other remedy related to the Petitioner's competency to stand trial or criminal responsibility.

(8) The Court finds and concludes that Petitioner's trial counsel's decision not to challenge this finding by requesting a hearing and/or filing a writ of mandamus was a matter of trial strategy and was not objectively unreasonable, given the fact that Petitioner's trial counsel would have had to impeach his own expert witnesses.

(9) The Court finds and concludes that there is not a reasonable probability that the results of the proceeding would have been different, but for this alleged error on the part of Petitioner's trial counsel.

(10) Therefore, the Court finds and concludes that the Petitioner's claim that attorney Tracy Burks' failure to request a competency hearing and further competency evaluation and his failure to file a writ of mandamus to order the Court to rule on the issue of criminal responsibility prior to sentencing constituted ineffective assistance of counsel is without merit.

CLAIM B:

THE PETITIONER, WHO WAS DIAGNOSED WITH SCHIZOPHRENIA, MAJOR DEPRESSION, A PERSONALITY DEFECT AND BORDERLINE INTELLECTUAL FUNCTIONING COULD NOT FORM THE REQUISITE

MENS REA AT THE TIME OF THE CRIMINAL ACT

THE PETITIONER'S ARGUMENT

Under West Virginia common law, a diminished capacity defense based on a mental illness or defect is available to criminal defendants to introduce expert testimony on that mental disease or defect that rendered the defendant incapable to form the requisite mental state at the time of the criminal act. State v. Joseph, 214 W. Va. 525, 590 S.E.2d 718 (2003). In that case, the defendant was convicted of first degree murder by the Kanawha County jury, with recommendation of mercy. On appeal, he contended that the trial judge erred in excluding expert testimony that would prove the defendant's diminished capacity at the time of the commission of the crime. Id. At 527, 720. Several years prior to the crime, the defendant was involved in a motorcycle accident, which left him with a crush injury to his left frontal scull [sic]. Id. At 528, 721. Hence, at trial, the defendant sought to introduce evidence of diminished capacity based on his brain injury. Id. The defendant wanted to call a doctor of osteopathy, who treated him at Sharpe Hospital after his hospitalization for threatening behavior and substance abuse following a DUI arrest. He also wished to offer testimony of his psychiatrist and a forensic psychologist. Id. After hearing the doctors' testimony *in camera*, the circuit court decided that the testimony of these three doctors was not enough to establish a defense of diminished capacity and excluded their testimony. The West Virginia Supreme Court reversed the trial court's decision and held that "the diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged". Id. At 532, 725.

Similarly, in the case at bar, the Petitioner lacked the requisite mental state to commit the crimes due to his diminished capacity. As evidenced from the

medical report prepared by Donald Barker from Southern Highlands Mental Health Center and dated September 20, 1992, the Petitioner appeared to be "a chronic paranoid schizophrenic, although under the DMS-III nomenclature he may have been diagnosed as having 'simple schizophrenia'". (Exhibit D). Mr. Barker based his observation, in part, on the Petitioner's persistent auditory and visual hallucinations: "The client claims he sees lights in the sky – red balls. He also sees people, hears voices, and talks back to them. He claims he hears his father's voice calling him or a dead uncle. (Father died when the client was 5-6 years old). He feels that a 'bunch of drunks' who date his cousin 'are out to get him because he objects to their [sic] seeing her". Id. At page 4. The records further indicate that the Petitioner was hospitalized at Southwest Virginia Mental Institute in Marion, Virginia on two different occasions for mental health evaluation. Id. Mr. Baker [sic] reported that the Petitioner "just gets 'wild things on my mind', usually suicidal in nature". Id. On February 20, 1992, Mr. Baker [sic] further noted that the last suicidal attempt was in early February – hence a very recent event. Id.

The medical records from Southwest Virginia Mental Health Institute in Marion, Virginia, reveal that the Petitioner was a patient there in 1983 and then again in 1990. During his stay he continuously threatened to commit suicide, and was diagnosed with Antisocial personality disorder, as well as Borderline intellectual functioning. Id.

Finally, the criminal responsibility/competency evaluation performed by Drs. Rosemary and Ralph Smith indicated that the Petitioner suffered from a mental disorder, Major Depression, a personality defect, and a Borderline Intellectual Functioning. Competency Evaluation at page 11 (Exhibit D). Despite the fact that Drs. Smith found the Petitioner criminally responsible for his actions and thought him to be malingering, they noted that "[t]he results of Reys and Dot Counting test did not support malingering for memory loss or lack of cooperation'. Id. At page 10. Moreover, in their evaluation report of the Petitioner dated March 6, 1995, Drs. Smith made the following observations about his condition: 1) "His

common sense knowledge base was poor, and his social judgment in cont rived [sic] situations was marginal'; 2) "His body hygiene was poor due to noticeable body odor"; 3) "96.8% of the population functions intellectually better than he"; 4) "On the Spelling subtest he scored in the educably mentally retarded range, which is more or less commensurate with the cognitive functioning"; 5) "The Visual Perception Developmental age was 9"; 6) Emotional alienation and withdrawal, as well as disrupted and confused thinking, are suggested"; and 7) "Feelings of unreality are present". Id.

Therefore, based on the foregoing and also the Petitioner's allegation that he was taking a "nerve pill", which made him "black out", the Petitioner was incapable of forming the requisite mens rea for commission of the crime.

THE RESPONDENT'S ANSWER

The petitioner next claims that he could not form the requisite mens rea at the time of the criminal act due to being diagnosed with schizophrenia, major depression, a personality defect, and borderline intellectual functioning. Clearly, the petitioner failed to establish any evidence that these above listed deficiencies prevented him from knowing what he was doing when he committed these crimes. No evidence has been presented from any mental health providers or doctors to indicate that the petitioner was unaware of what he was doing. To the contrary, the only evidence available are the evaluations conducted by Drs. Smith and Smith. In those evaluations, the Doctors found that the petitioner was competent and that he knew right from wrong. This was confirmed by the petitioner's own testimony when he testified at the habeas hearing that he had a job, lived on his own, took care of his mother, and managed his own finances.

Additionally, the Courts will give instructions in jury trials to explain to jurors what has to be proven in reference to intent. The Court advises the jury that intent can be shown by and established by the fact that one intends that which is

the immediate and necessary consequences of his actions. In the present case, there has been no evidence to conclude that the petitioner did not know right from wrong, nor did they establish that he did not intent to commit the acts to which he confessed to committing and to which he pled guilty.

The petitioner also ignores the fact that by entering into a plea agreement, and entering a plea before the Circuit Court Judge, that he is waiving all pretrial defects and defenses. Judge Frazier reviewed this with the petitioner at length at the plea hearing and must have been satisfied with the petitioner's answers and responses to his questions. Judge Frazier was always very thorough in reviewing a defendant's rights and on many occasions, if the Judge had concerns or questions as to whether or not the defendant understood the process or questioning, would stop the proceeding and either make sure the defendant was competent to understand or he would have it set for trial if he felt counsel had not fully reviewed with the defendant all his constitutional rights. Judge Frazier would not take a plea from someone who did not understand what was going on in the courtroom. Furthermore, Judge Frazier was in the best position to judge the petitioner's mental state during the pretrial activity, the entering of the plea and the sentencing. As discussed previously, a habeas corpus proceeding does not allow the Court to substitute its judgment for the judgment made by the trier of fact. The trier of fact is in the best position to observe the actions of the defendant and participate in the dialogue in making a finding with respect to one's competency to enter a plea or to know if the defendant understands the proceedings. In this case, it is clear that Judge Frazier felt the petitioner knew what he was doing, that he understood the nature of the proceedings and the charges against him, as well as the consequences and benefits of entering into the plea agreement with the State.

It is clear based on the Court's review of the petitioner's rights as well as Tracy Burks testimony regarding his review of the petitioner's rights and his testimony that he had no reason to believe that the petitioner did not understand the process, that this was a knowing and intelligent waiver of any claims regarding

pretrial defects and defenses including any claim regarding the petitioner's criminal responsibility.

For these reasons, this argument is without merit and must fail.

CLAIM B: FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) In State v. Myers, 159 W. Va. 353, 222 S.E.2d 300 (1976), the West Virginia Supreme Court of Appeals held that:

> "When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case."

(2) As to the burden of proof when a criminal defendant claims lack of criminal responsibility, the West Virginia Supreme Court of Appeals has held that:

> "There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense." Syl. Pt. 2, State v. Milam, 163 W. Va. 752, 260 S.E.2d 295 (1979).

(3) The Court finds that the West Virginia Supreme Court of Appeals held on the issue of diminished capacity in State v. Joseph, 214 W. Va. 525, 590

S.E.2d 718 (2003) that:

> "The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense. (syl. p. 3)"

(4) The Court finds that Judge Frazier entered into the following colloquy with Petitioner on this issue during the plea hearing:

The Court: Knowing all that, you still want to go ahead?

The Defendant: Yes, sir.

The Court: Okay. I can't recall, was there a competency - -

Mr. Burks: Yes, sir.

The Court: - - motion in this case?

Mr. Burks: Yes, there was.

The Court: We've previously ruled on that?

Mr. Burks: Yes.

The Court: You understood, Mr. Lowe, that you had a right to challenge that ruling finding you competent to stand trial?

The Defendant: Yes, sir.

The Court: You went over that with him?

Mr. Burks: Your Honor, I'll be honest, I don't know if I went over the part about the challenging, but I informed him of the results and - -

The Court: Did you agree with the results?

The Defendant: Well, I'm going to say – I might get in trouble for saying it – but that doctor down in Charleston don't know his – from a hole in the ground.

Mr. Burks: He didn't like the doctor too well, Your Honor. I don't think he disagreed too much with - - we didn't - - about the competency part.

The Court: Well, just quite blunt with you, counsel, do you feel that he's incompetent?

Mr. Burks: No, Your Honor, I do not. I feel like he's aware of what's going on, and capable of entering into this plea, and he is competent.

The Court: Apparently you had some doubts about it. As you went through, you just wanted, because of the seriousness of this, to cover that issue?

Mr. Burks: Yeah, that is correct, Your Honor, due to some prior reports, I wasn't sure, and I thought we'd be better safe, to at least have him, you know, examined before we - -

The Court: But you knew of no grounds to appeal the ruling finding him competent?

Mr. Burks: No, that's correct; I had no grounds to appeal that finding.

The Court: And you don't believe that there's any issue regarding his criminal responsibility?

Mr. Burks: No, Your Honor, I do not.

The Court: I take it, you've been in jail now, for how long, Mr.

Lowe?

The Defendant: 175 days, today, sir.

The Court: Almost six months, then?

The Defendant: Yes, sir.

The Court: And I take it, during that time, you haven't used any illegal drugs?

The Defendant: No, sir. They've got me on some kind of generic nerve pill but, as you can see, it does not work.

The Court: I can see you're having some reaction to it. I take it that that doesn't interfere with your thinking, though, your mind or anything; you know where you are and what's going on?

The Defendant: Sometimes.

The Court: Do you, now?

The Defendant: Yes, sir, I know I'm up herein Princeton, and in the courthouse.

Mr. Burks: Your Honor, if I may, I inquired if he was on medication when we went over the forms. He told me he was on nerve medicine; he told me he understood what we were doing as we were going over the forms.

The Court: Obviously you're not under the influence of alcohol and haven't been?

The Defendant: No, sir; I'm a recovering alcoholic.

The Court: Okay, very good. (*See* transcript of plea hearing at pp. 31-34)

(5) The Court finds that while the Petitioner was standing before him, at the

plea hearing, that Judge Frazier made the following finding:

> The Court: But do you need more time to talk to someone about his plea, or do you want to go ahead with it?
>
> The Defendant: Go ahead and do it.
>
> The Court: Okay. The Court – before I get too far away from this question of his mental state – finds that he's reaffirmed my earlier rulings that he's competent to stand trial, and I didn't make any ruling with regard to criminal responsibility, but there doesn't appear to be any doubt about that. And the Court further finds that he is in a proper mental state.
>
> He's, obviously, a little nervous, as you might expect anybody appearing before the Court – a little emotional there about his mother. But, other than that, I think he's been responding very intelligently, and responsively.
>
> Do you disagree with any of that, Mr. Burks?
>
> Mr. Burks: No, Your Honor, I do not. (*See* transcript of plea hearing at pp. 35-36)

(6) The Court finds that at the conclusion of the plea colloquy, Judge Frazier read the pertinent charges of the indictment to the Petitioner, who entered a plea of guilty to them. Thereafter, Judge Frazier had the Petitioner concur on the record with the facts which supported the guilty plea:

> Mr. Lowe, the next stage of these proceedings is for me to determine whether there's a basis for your plea -- basis in fact; that is, a factual basis for your pleas. And we've previously gone over what the offenses are, what constitutes them, and you've entered your plea. I want to -- but I want to satisfy myself before I go further and consider these sentences, that you, in fact, did something that constitutes these offenses.
>
> So the ways we handle that is have the prosecutor to give me an outline of his evidence, and I want you to listen to it and you can,

then, either agree or disagree with that. And, of course, I'll be inquiring of counsel about the same matter. The Prosecutor will also give me the basis for the plea agreement. Mr. Smith.

Mr. Smith: If it please the Court, the evidence would be that over a period of years, as indicated by the various counts, and beyond, really, the ones being pled to here, that Mr. Lowe would visit in the home of [redacted] That he would - - he started - - apparently had a propensity for the young children, and started by making contact with his hands, and on occasion, digital penetration, and then oral sex. He had apparently, also, with the – let's see, I think with [redacted] – had sexual intercourse with the penis to the vagina.

These two ladies have given us statements, and will testify to the conduct, and the similarity creates a pattern. Further evidence in those cases would be that when [redacted] at a very early age, she was found by an older sister, [redacted] and that they were – Mr. Lowe and this child – under a blanket, and that he had - - actually was making contact, perhaps penetration, at this time.

The sister told her not to do that again. It turns out that there would be evidence of lustful disposition in that, because that older sister actually had experience with Mr. Lowe, but that was in the state of Virginia. All of this, and with the very frank statements of the witnesses here, as to the conduct.

As far as the other charges that we are dismissing, in regard to the children of [redacted] I've discussed this matter with her, and she is satisfied for the pleas to these charges.

The Court: So those are separate children, not just several charges here.

Mr. Smith: They're separate children; they're separate charges, separate chilren, they - - and different - - it was the - -

Mr. Burks: That's a custodial situation, Your Honor.

Mr. Smith: - - children of [redacted] that had taken up a relationship with Mr. Lowe – [redacted] had – and apparently he would serve as a babysitter from time to time. But, considering

their young age, I discussed this matter, and she was, quite frankly, delighted that her children would not have to testify.

And the fact that there would be the total of six charges, with sufficient latitude in the Court, we feel, to design an appropriate disposition in this sentencing, and case for Mr. Lowe as would be appropriate. And with out – my discussions with the victims' mother, this is why we decided to go this way.

The Court: Well, thank you for that outline. First of all, Mr. Lowe, with regard to the State's evidence did you hear what the prosecutor states would be their evidence?

The Defendant: Yes, sir.

The Court: Is that true?

The Defendant: Yes.

The Court: Are you entering a plea here, because you are, in fact, guilty of the sexual assault of these children?

The Defendant: Yes, sir.

Mr. Burks: Mr. Burks, having investigated the case, and knowing everything that you do about it, do you believe that there's a factual basis for his plea?

Mr. Burks: Yes, Your Honor, I do. I wanted to add, that the reason these specific counts, Mr. Lowe, after a discussion with him – I don't remember the specific date, because some of these matters, obviously, as the Court is aware, were several years ago – but, based on Mr. Lowe's, what he told me and he's just told the Court, that's why these counts were pled to. But he can't remember the specific date or anything like that.

The Court: And, I take it, some of the other ones, with the [redacted] children, were kind of double charges?

Mr. Burks: Some were custodial. I think the first degree assault on those children as well.

The Court: Plus the child sexual abuse by a guardian?

Mr. Burks: That's correct, which Mr. Lowe - -

The Court: How many children are involved here, we had the three - -

Mr. Burks: Four, Your Honor. But we would point out that Mr. Lowe – and that's another reason for this agreement – denies involvement with those other two children, Your Honor. Again, I think, based on his - - what he told me, and that's why he's pleading to the counts involving the [redacted] children.

The Court: The three [redacted] children. There was only one child - -

Mr. Burks: Two [redacted] children, and Ms. - [redacted] and [redacted] who belongs to [redacted].

The Court: So he's only admitting to the [redacted] children?

Mr. Burks: Yes, Your Honor.

The Court: Aren't there three [redacted] children?

Mr. Burks: I think there's - -

Mr. Smith: Only two charges, Your Honor.

Mr. Burks: Two charges.

The Court: [redacted] and [redacted] -

Mr. Burks: [redacted]

The Court: And then, who are the others?

Mr. Burks: [redacted] and [redacted]

The Court: Yes, I have that in the juvenile case, okay. Okay. The Court finds, from the representations here that there is a basis in fact for Mr. Lowe's plea. (*See* transcript of plea hearing at pp. 43-47)

(7) The Court finds that the Petitioner also admitted the acts necessary to support his guilty plea and acknowledged his participation in the crime when he answered Question 45 from the Defendant's Statement in Support of Guilty Plea as follows:

> 45. Describe briefly your participation in the crime.
>
> I had sex with [redacted] and [redacted]
>
> *See* "Defendant's Statement In Support Of Guilty Plea" at Question No. 45, p. 3.

(8) The Court finds and concludes that the Petitioner satisfied the court of his ability and capacity to plead guilty and agreed to a factual basis of guilt sufficient to support his plea.

(9) The Court finds and concludes that the claim that the Petitioner, who was diagnosed with schizophrenia, major depression, a personality deficit and borderline intellectual functioning could not form the requisite mens rea at the time of the criminal act is without merit.

CLAIM C:

THE PETITIONER'S PLEA WAS INVOLUNTARY BECAUSE THE CIRCUIT COURT DID NOT FULLY EDUCATE HIM OF THE NATURE AND CONSEQUENCES OF HIS PLEA AGREEMENT AND BECAUSE THE PETITIONER SUFFERED FROM EFFECTS OF HIS ANTI-DEPRESSANT MEDICATION AT THE TIME HE ENTERED INTO THE PLEA AGREEMENT

THE PETITIONER'S ARGUMENT

Rule 11 of the West Virginia Rules of Criminal Procedure governs

procedure and guidelines for taking guilty pleas to ensure that criminal defendants are fully informed of the nature and consequences of their plea agreements. There are several ways where a habeas corpus petitioner may be successful in challenging a guilty plea conviction based on the violation of Rule 11 procedure: 1) Constitutional or jurisdictional error; 2) complete miscarriage of justice; or 3) proceeding inconsistent with the rudimentary demands of fair procedure. Syl. pt. 1, State ex rel. Farmer v. Trent, 209 W. Va. 789, 551 S.E.2d 711 (2001) (citing Syl. pt. 10, State ex rel. Vernatter v. Warden, 207 W. Va. 11, 528 S.E.2d 207 (1999), internal citation marks omitted). Further, "the petitioner must also demonstrate that he was prejudiced in that he was unaware of the consequences of his plea, and, if properly advised, would not have pleaded guilty". Id.

Rule 11 mandates that, first, a trial court must not accept a guilty plea from a defendant "without first, . . . addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement". W. Va. R. Crim. P. 11 (d). The trial court must inform the defendant of, and determine that the defendant understands, the following information:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) If the defendant is not represented by an Attorney, that the defendant has the right to be represented by an Attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that the defendant has the right to be tried by a jury and at that trial the right to the assistance

of counsel, the right to confront and cross-examine adverse witnesses, the right against compelled self-incrimination, and the right to call witnesses; and

(4) That if a plea of guilty or nolo contendere is accepted by the court, there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false swearing.

Imperatively, when establishing whether a criminal defendant entered into his plea agreement knowingly and voluntarily, 'a trial court should spread upon the record the defendant's education, whether he consulted with friends or relatives about his plea, any history of mental illness or drug use, the extent he consulted with counsel, and all other relevant matters which will demonstrate to an appellate court or a trial court proceeding in habeas corpus that the defendant's plea was knowingly and intelligently made with due regard to the intelligent waiver of known rights". White v. Haines, 215 W. Va. 698, 704, 601 S.E.2d 18, 24 (2004) (citing Call v. McKenzie, 159 W. Va. 191, 220 S.E.2d 665 (1975), internal citation marks omitted). Moreover, the trial court must then inquire whether the defendant's willingness to plead guilty stems from discussions between prosecutor and the defendant, or the defendant's counsel. Id. If the trial court accepts the plea agreement, "the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement". W. Va.

R. Crim. P. 11(e)(3).

In State ex rel. Gill v. Irons, the West Virginia Supreme Court granted writ of prohibition and reversed and remanded the case back to the trial court after holding that the petitioner could not intelligently waive his constitutional rights and enter a plea of guilty where the court misinformed him of the possible sentence that could be imposed. 207 W. Va. 199, 530 S.E.2d 460 (2000) (per curiam). In that case, the petitioner, Gill, was indicted by the Grand Jury of Summers County for five counts of malicious assault upon a police officer, one count of wanton endangerment involving a firearm, and two counts of attempted murder. Id. at 200, 461. Subsequently, Gill was offered a plea agreement wherein if he pled guilty to one count of malicious assault on a police officer, wanton endangerment involving a firearm, and two counts of attempted murder, the remaining charges would be dismissed. Id. However, the prosecutor reserved the right to comment on all sentencing matters and recommend to the court that Gill be sentenced consecutively on all charges. Id.

At the plea hearing, the judge completed a full and thorough Rule 11 inquiry, by going over every count to which Gill would be pleading guilty, and explaining the rights Gill would be waiving by entering the plea, and the possible terms of incarceration for each offense. Id. At 200-201, 461-462. In explaining the worse possible sentence to Gill, the judge commented, "'[I]f my arithmetic is correct, the worse sentence that could be imposed upon you, that is if I sentence you consecutively, if I make your sentences run back to back, if I totaled it up, it would be a minimum of 6 years and a maximum of 30 years'." Id. The judge also added that Gill would not be eligible for parole for at least 6 years. Id. Subsequently, during the sentencing hearing, the judge informed the petitioner that the sentence would be "about six and a half years in the penitentiary if you go there and do what you're supposed to . . . a minimum of six and a half years in the state penitentiary and a maximum of 30 years". Id. The judge then sentenced the petitioner, by order, to 3 to 15 years on the malicious assault count, 5 years on the

wanton endangerment count, and 1 to 5 years on each of the two attempted murder counts. All these sentences were ordered to run consecutively. Effectively, Gill received a sentence of not less than ten nor more than thirty years of incarceration. Id. In his Petition for Writ of Prohibition, Gill argued that the circuit court violated the terms of the plea agreement, and prayed for the West Virginia Supreme Court to prohibit the enforcement of the sentencing order and require that the circuit court sentence Gill to a minimum of six years, instead of a minimum of ten years. Id.

While the West Virginia Supreme Court found that the circuit court did not breach the terms of the plea agreement, it held that Gill did not enter into said plea agreement knowingly and voluntarily due to being misinformed of his potential sentence. Id. At 202, 463. The Court emphasized its prior holding that "[w]hen a trial court explains the maximum possible sentence provided by law to a defendant, such explanation must be accurate and not confusing, misleading or coercive". Id. (Citing Riley v. Ziegler, 161 W. Va. 290, 241 S.E.2d 813 (1978), internal citation marks omitted). Accordingly, the West Virginia Supreme Court ordered that the conviction based on the plea be voided and remanded the case to the trial court with instructions to afford Gill an opportunity to reconsider his plea. Id.

Similarly, in State v. Cabell, the West Virginia Supreme Court held that in accepting the defendant guilty plea, the trial court, which failed to inform the defendant that he would have no right to withdraw the guilty plea if the court did not accept the recommended sentence, failed to comply with the requirements of Rule 11 of the West Virginia Rules of Criminal Procedure requiring that the terms of the plea agreement be placed on the record. 176 W. Va. 272, 342 S.E.2d 240 (1986). In that case, the appellant was charged with five felonies: burglary by breaking and entering, burglary by entering without breaking, aggravated robbery, malicious wounding, and attempted murder. Id. At 273. On the day before trial, the appellant entered into a plea agreement pleading guilty to aggravated robbery and burglary. The agreement specifically stated that in return for the pleas of

guilty, the prosecutor would seek dismissal of the three remaining counts and would recommend a thirty-year sentence on the aggravated robbery charge. While the trial court explained that it was not bound by the prosecutor's recommendation at sentencing, it failed to advise the appellant, pursuant to Rule 11, that if the court decided not to accept said sentencing recommendation, the appellant would still have no right to withdraw his guilty pleas. Id. At sentencing, the court decided to forgo the prosecutor's sentencing recommendation, and sentenced the appellant to sixty years for the aggravated robbery charge and one to fifteen years for burglary, to run consecutively with the aggravated robbery sentence. Id. The appellant sought to withdraw his guilty pleas, arguing, in part, that the trial court failed to follow the requisites of Rule 11. The circuit court denied his motion for withdrawal of guilty pleas, and the appellant sought relief with the West Virginia Supreme Court. The West Virginia Supreme Court agreed that the trial court did not comply with the mandate of Rule 11 in failing to inform the appellant that he had no right to withdraw his guilty plea even if the court chose to forgo the prosecutor's sentencing recommendation, and reserved the appellant's convictions, remanding the case to trial court with the instructions that the appellant "be given opportunity to either plead guilty anew or to grant specific performance so that the sentence comports with the reasonable understanding and expectations of the defendant as to the sentence for which he bargained". Id. At 277, 243-244.

The case at bar is similar to Gill and Cabell. The Petitioner entered into a plea agreement with the State wherein he agreed to plead guilty to counts 12, 13, 14, 22, 23 and 25 in exchange for dismissal of the remaining counts. At the plea hearing, the Honorable Judge Frazier asked the Petitioner a series of questions, which dealt with voluntariness of his plea agreement. The Judge then explained to the Petitioner that if he plead to counts 12, 13, 14, 22, 23 and 25, although he could receive no less than fifteen to twenty-five years on the first degree sexual assault convictions, and not less than one nor more than five years on the third degree sexual assault convictions, the Petitioner could receive up to seventy-six (76) years

on his guilty plea. Transcript, 5/22/1995 (Exhibit G). However, because the Petitioner pled to give counts of first degree sexual assault, each bearing a sentence of fifteen to twenty five years, and one count of third degree sexual assault, bearing a sentence of one to five years, his maximum sentence could be seventy-six (76) to 130 years. Just as the trial court in Gill informed the petitioner that his maximum sentence could be six to thirty years, while, in reality, it was ten to thirty years, Judge Frazier misinformed the Petitioner about his possible maximum sentence, thus making the plea agreement completely involuntary, and hence, null and void. To re-iterate, "[w]hen a trial court explains the maximum possible sentence provided by law to a defendant, such explanation must be accurate and not confusing, misleading or coercive". Gill, 207 W. Va. At 202, 530 S.E.2d at 563. Judge Frazier's explanation of the Petitioner's maximum possible sentence was far from accurate. In fact, it was confusing and misleading, because instead of advising the Petitioner that he could be sentenced to a maximum of 130 years, Judge Frazier told him that the maximum sentence could be seventy-six years of incarceration. Hence, akin to the facts in Gill, the Petitioner in the case at bar entered into his plea of guilty while being completely misinformed and misguided about his maximum sentence.

Not only did the judge mislead and misinform the Petitioner about his sentence at the plea hearing, but also Judge Frazer [sic] completely confused the Petitioner about his possible sentence at the sentencing hearing held on June 26, 1995. Specifically, after considering the testimony of witnesses and the information in the pre-sentencing report, Judge Frazier commented that the correct sentence for first degree sexual assault was fifteen (15) to thirty-five (35) years instead of fifteen (15) to twenty-five (25) years as previously noted. Transcript, 6/26/1995 at page 15 (Exhibit J). A few minutes later, Judge Frazier modified this sentence, stating that the correct sentence for a first degree sexual assault was, in fact, fifteen (15) to twenty-five (25) years of incarceration. Id. At page 24. After correcting himself, Judge Frazier then pronounced the sentence as follows:

> So, it is the judgment of this Court that as to each one of these sexual assault charges, that's Counts 12, 13, 14, 22nd and 23rd Counts, that you be sentenced to the penitentiary of this State for an indeterminate term of *not less than fifteen nor more than thirty-five years*. . . The effect of what I'm doin' here is to - - sentence you to the penitentiary for a least thirty year but nor more than fifty years, and if I said thirty-five years before, I meant twenty-five on each of the sexual assault first degree charges; that those are to run consecutively; one to five on the sexual assault to run consecutively; I'm gonna suspend Counts 14, 22nd, 23rd and 25 and direct that once you serve the thirty year - - thirty to fifty year sentence - - that's correct, isn't it - - fifty year sentence that you be returned and placed on probation at that time for that period of time. That will get you into the latter part of your sixties, if you're still living at that time, and hopefully there would not be any further danger to the - - to the community.

Id. at page 28. Not only did Judge Frazier continuously mislead the Petitioner as to the nature of his sentence, but also he never advised the Petitioner, correctly, of the nature of his sentence; that in effect his sentence was not less than 76 years and nor more than 130 years; and that after suspension of counts 14, 22, 23 and 25, his sentence amounted to thirty (30) to fifty (50) years, and that if he violated the terms of his probation, he would face an addition sentence of not less than 46 years nor more than 80 years in the penitentiary. Mr. Burks, the Petitioner's trial attorney, also added to the confusion of the Petitioner's potential maximum sentence:

> Mr. Burks: Yes, sir, I explained, like you did, told him at worst, he could get 76 years, or explained if he ran concurrent, what could happen then.

Transcript of 5/22/1995 hearing at p. 10: 4-6 (Exhibit G). Not only was the plea involuntary due the Judge Frazier informing and misleading the Petitioner as to the nature and consequences of his possible sentence at the plea hearing, and then, against at the sentencing hearing, but the plea was also involuntary because the Petitioner was under the influence of an anti-depressant at the time of the proceedings, which deemed him incompetent to understand the nature of the proceedings initiated against him and to adequately assist his attorney in his defense. Specifically, prior to incarceration, the Petitioner had been in treatment for his serious mental health issues at the Southwest Virginia Mental Health Institute an Southern Highlands Mental Health Center in Charleston, Kanawha County, West Virginia. The medical records indicate that, due to being sexually abused as a child, the Petitioner was prescribed anti-depressant medication, which, according to the Petitioner, made him forgetful and caused him to "space out" on multiple occasions. For example, when asked at the plea hearing if he was under the influence of any drugs, the Petitioner replied as follows:

The Court: I take it, you've been in jail now, for how long, Mr. Lowe?

The Defendant: 175 days, today, sir.

The Court: Almost six months, then?

The Defendant: Yes, sir.

The Court: And I take it, during that time, you haven't used any illegal drugs?

The Defendant: No, sir. They've got me on some kind of generic nerve pill but, as you can see, it does not work.

The Court: I can see you're having some reaction to it. I take it that doesn't interfere with your thinking, though, your mind or anything; you know where you are and what's going on?

The Defendant: Sometimes.

Transcript 5/22/1995, p. 33: 17-24; 34: 1-7 (Exhibit G). Here, the Petitioner clearly indicated that he was not always aware of his surroundings due to effects of

the nerve pill he was taking. The medication he was taking at the time was called Nortiptyline 100 mg. Competency Evaluation at page 5 (Exhibit D). Moreover, the Petitioner was found competent to enter into a plea agreement with the State by the Charleston Psychiatric Group despite their findings and observations of a clearly mentally incompetent individual. See findings *supra*. Drs. Smith basically did not believe the Petitioner's allegations that he had been hospitalized in a mental health center located in Smyth County, Virginia, and they surmised that he grossly exaggerated his symptoms, and hence, was able to understand the nature of the proceedings, stand trial, and consult with his attorney.

Without awarding the Petitioner a hearing to challenge the psychiatric report or even adviising him of such right, Judge Frazier entered an order and decided, *sua sponte*, that the Petitioner was competent to stand trial and enter a plea of guilty. In fact, it is clear from the record that the Petitioner did not understand the nature of the psychiatric report or what it meant to be found competent to stand trial at all:

The Court: Okay. I can't recall, was there a competency - -

Mr. Burks: Yes, sir.

The Court: - - motion in this case?

Mr. Burks: Yes, there was.

The Court: We've previously ruled on that?

Mr. Burks: Yes.

The Court: You understand, Mr. Lowe, that you had a right to challenge that ruling finding you competent to stand trial?

The Defendant: Yes, sir.

The Court: You went over that with him?

Mr. Burks: Your Honor, I'll be honest, I don't know if I went over the part about the challenging, but I informed him of the results and - -

The Court: Do you agree with the results?

The Defendant: Well, I'm going to say – I might get in trouble for saying it – but that doctor down in Charleston don't know his – from a hold in the ground.

Mr. Burks: He didn't like the doctor too well, Your Honor. I don't think he disagreed too much with - - we didn't - - about the competency part . . .

Transcript, 5/22/1995, pages 31:24, 32:1-24 (Exhibit G). There was nothing in the Petitioner's words to indicate that he agreed with the findings of the psychiatrist and psychologist, who evaluated him, and there was nothing in the transcript to indicate that the Petitioner was informed of his right to challenge the same. The Petitioner was under the influence of an anti-depressant, in addition to his already diminished mental capacity and incompetency to comprehend the proceedings against him. Accordingly, by failing to notify the Petitioner of the nature and consequences of his plea, and then the nature of his sentence, Judge Frazier effectively violated the Petitioner's due process rights, especially since, in addition to Judge Frazier misleading information, the Petitioner was incompetent to understand the proceedings against him or to adequately consult with his counsel. Therefore, the Petitioner's plea was involuntary for the foregoing reasons, under Gill and Cabell.

THE RESPONDENT'S ANSWER

The Petitioner next claims that his plea was involuntary because the Court did not educate him of the nature and consequences of the plea. This argument is also without merit. In reading the transcript it is clear that the Court was very thorough in its review of the petitioner's constitutional rights and consequences of plea. The Court went to great lengths to make sure the petitioner was educated and understood not only the consequences of the charges against him, but also the

elements of the offenses for which the petitioner was pleaing. Through all these conversations on the record, the Court acknowledged that the petitioner answered appropriately and seemed to understand what he was doing. The Court gave the petitioner ample opportunity to ask questions if he was unsure as to any element of the crime or the consequences of the same.

There was some confusion with respect to the sentence for the sexual assault in the first degree offenses. The allegations arose from offenses that had been committed years earlier. Subsequent to the offenses being committed and prior to the indictment, the legislature enhanced the penalty for first degree sexual assault. The new penalty was an indeterminate sentence of not less than 15 nor more than 35 years in the penitentiary. The old penalty was an indeterminate sentence of not less than 15 nor more than 25 years. The petitioner received the benefit of having the lesser sentence. The Court reviewed these sentences with the petitioner. The petitioner now alleges that he was not fully apprized of the consequences. Again the transcript is clear on this matter.

Judge Frazier never advised the Petitioner that the maximum sentence he could receive was 76 years, but in fact got into a discussion with the petitioner regarding consecutive versus concurrent sentencing. The Judge advised the petitioner that if ran these sentences consecutively, that the petitioner would at least have to serve 76 years. He never described this as the maximum, only explained the consequence of a consecutive sentence. The Court fully advised the petitioner of all the rights petitioner listed in his petition as being required including the fact that the Court advised him that if he got a bad sentence he could not complain about it at a later date, claiming pretrial defects. The petitioner acknowledged that he understood.

Reading the transcript, it is also clear that the petitioner did know what he was doing and understood where he was. The petitioner tried to leave the impression that he did not know what was happening this day because he was under the influence of nerve medication. He even cited excerpts from the

transcript to support this notion. The petitioner was somewhat misleading in citing this part of the transcript because he did not cite the complete dialogue between the petitioner and the Judge. The petitioner left off where the Court had inquired if the medication interferes with his thinking or his mind; whether he knows where he is and what he is going. The petitioner answered "sometimes" and the excerpt stops. The very next question by the Court was "Do you now?" to which the petitioner responded, "Yes sir. I know I'm up here in Princeton, and in the courthouse." Transcript p. 34. (Attached to the Response) Mr. Burks went on to explain to the Court that he also inquired of the petitioner while they were filling out the plea forms and the petitioner advised that he was on nerve medication, but that he understood what they were doing as they went over the forms. Tr. p. 34.

In looking at the totality of the circumstances as well as a review of the transcript, it is clear that the petitioner was educated as to the elements of the law that would have to be proven to convict him and educated as to the consequences of the charges for which he was entering a plea. Furthermore, the maximum penalty of incarceration actually received by the petitioner is well within the range of possible sentences the Court could impose, and was still less than the 76 years discussed by the Court during the plea hearing when they were reviewing concurrent versus consecutive sentences. The petitioner cannot claim he was prejudiced by receiving a lesser penalty of incarceration than was discussed by the Court during the plea hearing. He fully understood that he could receive 76 years if the sentences were to run consecutively. Therefore, for all these reasons, this argument too is without merit.

CLAIM C: FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) On the issue of competency to stand trial, the West Virginia Supreme Court of Appeals held in State v. Milam, 159 W. Va. 691, 226 S.E.2d 433 (1976), that:

> No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the

> person is unable to consult with his attorney and to assist in the preparation of his defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him. Syl. Pt. 1

(2) The West Virginia Supreme Court of Appeals has also held that:

> It is a fundamental guarantee of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent. State v. Hatfield, 186 W. Va. 507, 413 S.E.2d 162 (1991), Syl. Pt. 6, *following* State v. Cheshire, 170 W. Va. 217, 292 S.E.2d 628 (1982). Syl. Pt. 1

(3) The West Virginia Supreme Court of Appeals has also found that:

> When a trial judge is made aware of a possible problem with defendant's competency, it is abuse of discretion to deny a motion for a psychiatric evaluation. State v. Hatfield, *supra* at Syl. Pt. 2, *citing* Syl. Pt. 4, in part, State v. Demastus, 165 W. Va. 572, 270 S.E.2d 649 (1980).

(4) As the West Virginia Supreme Court of Appeals has held in State v. Sanders, 209 W. Va. 367, 549 S.E.2d 40 (2001):

> Importantly, since the right not to be tried while mentally incompetent is subject to neither waiver nor forfeiture, a trial court is not relieved of its objection to provide procedures sufficient to protect charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense. (syl. p. 3)

(5) The Court finds that Judge Frazier thoroughly reviewed the Petitioner's rights with him at the time that he entered his guilty plea:

> The Court: Okay. Counsel has handed me the plea forms required by this Court. Can you outline for me, on the record, Mr. Burks, when those forms were gone

over and completed by Mr. Lowe?

Mr. Burks: Yes, sir. We went over those forms about ten days ago. The white forms, I had typed; I read them to him. The orange form – as Mr. Lowe said, he has some trouble with reading – he requested that I read them and, after I read them to him, I recorded his response on the orange form.

The Court: When was this, again; I'm sorry, I - -

Mr. Burks: It was about ten days ago, over at the Regional Jail, Your Honor. And then he - - like I said, any questions he had, I would answer, and then, also, I would record his responses on the orange form, after I read the question to him.

The Court: At that time, did you think that he was under the influence of alcohol or drugs?

Mr. Burks: No, Your Honor.

The Court: Now, before I accept the plea, I'm going to take some time here and go over certain matters with you to satisfy myself, Mr. Lowe, that this is a knowing and intelligent action on your part; by that, I mean, you know what you're doing you know what could happen to you, you know what - - where you've put yourself as far as these pleas.

The Defendant: Yes, sir.

Mr. Burks: Your Honor, I'd also like to add, when we went over the plea forms, I did go over the elements of the offenses with him.

The Court: From the statute, you mean sexual assault first degree; sexual assault third degree - -

Mr. Burks: And I - -

The Court: - - some of the definitions?

Mr. Burks: - - even the custodial, even though he wasn't pleading to that, I went over the elements.

The Court: Okay. In addition, I'll be going over your rights once again with you, Mr. Lowe, to make sure that I'm satisfied that you know them. You appear - in the few minutes I've been interacting with you - to be intelligent and responsive, and I'm sure you understand those. But I'm required to go over them again with you in open court. I'll also be advising you of certain matters to make sure that this is an act of yours that's freely and voluntarily entered into.

The Defendant: Okay.

The Court: And all this, of course, is for your benefit, not for mine, to make sure that, you know, this is the right thing, that you want to go forward with this. So, if you'd just relax, again, to the extent you can. If you have any questions, as we move through this, you feel free to interrupt me.

How far have you gone in school?

The Defendant: Up until about the middle of eighth grade.

The Court: Now, you've indicated you have a little trouble reading and writing; is that correct?

The Defendant: Yes, sir.

The Court: I take it you've taken that into consideration, counsel?

Mr. Burks: Yes, sir. I read - - we read up the documents, I - - everything pertinent to this case, I've read to him, or tried to read to him.

The Court: The most important thing, of course, is this document that charges you with the crimes; did you go over that with him?

Mr. Burks: Yes, I have, Your Honor. (*See* plea hearing transcript

at pp. 10-13)

and further:

The Court: Is your offer to enter these pleas, Mr.. Lowe, completely voluntarily and of your own free will?

The Defendant: Yes, sir.

The Court: This is what you want to do?

The Defendant: (Nods head)

The Court: You've got very able counsel here, in Mr. Burks; very experienced, very competent, very conscientious, and I'm sure he's gone over the entire case, given you the strengths and weaknesses, maybe even given you his advice as to whether to plead or not plead. But in the end, you're the one that has to make the decision; do you understand that?

The Defendant: Yes, sir.

The Court: You're the one who may be doing a lot of time. So, is this what you want to do?

The Defendant: Yes, sir.

The Court: Okay. Counsel, approximately how many conferences have you had with Mr. Lowe, and to what extent is he aware of the evidence against him, in order to plead guilty to these serious offenses?

Mr. Burks: Your Honor, we've met approximately six, seven times, throughout several months; I can't remember the exact amount. And we've discussed -- I gave him copies of the disclosure material the State sent us, and we've talked about what was contained in that. And he's aware of what the State would try to put on as evidence at the trial.

The Court: Do you think that you've been able to discover and accumulate all the evidence that may be used against

him?

Mr. Burks: Yes, sir.

The Court: And all the evidence, through your own investigations, of the supporting defenses he had?

Mr. Burks: Well, we've discussed what a possible defense would be, and I discussed with him, due to the ages of the children and other factors, that what - - on these counts he's pleading to, would probably not count as too much of a defense.

The Court: Do you think you've had sufficient time to review all this with him, and for him to make a decision one way - -

Mr. Burks: Yes, sir.

The Court: - - or the other?

Mr. Burks: Yes, sir.

The Court: Do you agree with that, Mr. Lowe?

The Defendant: Yes, sir.

The Court: Anybody rushed you into anything here?

The Defendant: No, sir.

The Court: You've indicated, in these plea forms, that you understand your various rights, particularly your constitutional rights; and do you understand that by entering these pleas you're waiving those rights, or giving those up?

The Defendant: (Nods head) (*See* plea hearing transcript at pp. 21-23)

Additionally, Judge Frazier discussed the following:

The Court: Okay. Do you understand, that by pleading guilty, all of these rights that Mr. Burks and myself have gone over with you would not apply, and you would be giving those up, which means waiving those, and would not be able to raise those in the future?

The Defendant: Yes, sir.

The Court: Likewise, by entering the plea, you waive all pretrial defects – or alleged defects – with regard to your case, which could include the arrest, the gathering of evidence, prior confessions and so forth. Do you understand that?

The Defendant: (Nods head)

The Court: What I'm trying to say at this point, Mr. Lowe, is if you enter a plea and you come back later and you're sentenced, you can't come back at a later time and say "Well, the confession they took from me was illegal; the evidence that they gathered was improper." You simply won't be able to raise that at a later time. Do you understand that?

The Defendant: Yes, sir.

The Court: What I'm trying to emphasize here, and I'm sure it tends to be a little long, is the fact that once you enter this plea, and you're sentenced, it's virtually final at that time? If you get 75 years, you won't be able to come back here at a later time and say, Judge, my confession was illegal; the police, you know, violated my rights in other regards; the grand jury process was wrong. You, simply, won't be able to raise that; do you understand that?

The Defendant: Yes.

The Court: There's always, of course, the ability to challenge a conviction through habeas corpus, but that's always very, very limited and narrow, relating to, generally, effectiveness of counsel, and whether the Court gave

you the proper sentence under the statute. And those challenges are rarely successful. Do you understand that?

The Defendant: Yes, sir.

The Court: So what I'm trying to tell you, before you actually enter the plea here, is that once you enter it, it's virtually final, and you simply have to pretty much accept whatever sentence you get.

The Defendant: Yes, sir.

The Court: Knowing all that, you still want to go ahead?

The Defendant: Yes, sir. (*See* plea hearing transcript at pp. 30-31)

(6) The Court finds that the transcript of the plea hearing clearly demonstrates that Judge Frazier thoroughly reviewed all of the Petitioner's rights with him and completely met the obligations incumbent upon him under Rule 11 of the West Virginia Rules of Criminal Procedure.

(7) The Court finds that Petitioner's trial counsel also testified that the Petitioner was not effected by his medications at the time of his plea:

Q Okay. At the time of the plea, do you feel he understood what he was pleading to and the consequences of it?

A Yes. And the Judge asked me and I did. And like I said, even though he had some mental health issues and I went over some stuff with James, he answered appropriately and as I do with all of my clients, if I felt like there was an issue I would stop the interview or come back on another day if I felt like medication was affecting him at that point or anything. And I think that we talked about that during the plea hearing as well.

Q So you were aware that he was on medication?

A Right. I always ask and the Judge does too and I do also. Yes.

Q And from your observations you didn't think that was affecting him?

A I didn't during the interview because you know, I can't remember verbatim what was said but if I did I would have stopped. But I mean I always asked them. And then I'll ask them as the Judge was is that affecting you understanding what I'm going over with you.

Q But now he was in jail the whole time that you've known Mr. Lowe he's been in jail?

A I don't believe James ever got out because he was never able to make bond.

Q So you - - if they started giving you that medication in jail, then you never really knew him off that medication?

A That's correct. No, I think he was on - - yeah, I think he's been incarcerated the whole time since his arrest. (*See* Transcript of Habeas Corpus Hearing at pp. 40-41)

and further

Q Mr. Burks, I want to ask you a question that I was trying to figure out earlier and I couldn't do it but maybe you can. How many plea hearings did you have in front of Judge Frazier?

A My bare estimates say hundreds but - -

Q But that maybe off but there was a bunch?

A Yes.

Q How many times did you see Judge Frazier in the courtroom when he starts going over somebody's constitutional rights when he actually stops a plea and told them we need to come back another day if he though they were not understanding?

A Well, I know he would do that if - - well any judge if they thought there was a problem. But I mean he inquires always do you understand what is going on. If you're on medication does that affect - -

Q Have you ever known him not to do that?

A No.

Q Did he do that with James?

A Yes.

Q And so he was - -

A Because the issue of medication came up.

Q He was convinced that James Long - - or James Lowe knew what he was doing?

A Yes.

Q All the time you met with him and I don't expect you to tell us how many times you met with him because I know it's been a long time.

A I don't remember.

Q Did he ever give you any indication that he didn't understand what you all were doing?

A Not that I can recall but I can't remember our - - you know verbatim what our conversations are. I know as far as the ones he pled to at times he would say well I don't know that I can remember what I did there. That's what he told Dr. Smith up in Charleston in regards to the actual charge against him.

Q Right.

A But when I went over the plea and the elements, which I stated on the record to Judge Frazier, he seemed to understand what he was charged with, and what my role

was, the judge's role, and the Court's role was.

Q And again spanning your nineteen-and-a-half-years of being at the Public Defender, if you were going over something with a client and you did not feel they were understanding or grasping what you were talking about, what would you do?

A I - - well, when it's happened I stop.

Q I mean - -

A Or if I felt like we're coming to Court and they're under the influence I would say - - I would just go close to the Judge and say we can't do this or - - but just have to try to do it on another day or inquire why. What's going on here, you know. (*See* Transcript of Omnibus Habeas Corpus Hearing at pp. 44-47)

(8) The Court finds that Petitioner's trial counsel thoroughly reviewed the standard plea documents used in this Circuit with the Petitioner before his plea, and that such forms fully and completely explained the Petitioner's rights to him. (*See* standard plea forms in Petitioner's underlying criminal action file 95-F-3)

(9) The Court finds that the Petitioner's signed a plea bargain letter dated May 9, 1995 and filed in the Circuit Clerk's Office on May 22, 1995 which clearly stated that the Petitioner faced potential imprisonment of not less than fifteen nor more than twenty-five years on each of five counts of sexual assault in the first degree, and potential imprisonment of not less than one nor more than five years on one count of sexual assault in the third degree. (*See* plea letter of record in the Petitioner's underlying criminal action file 95-F-3)

(10) The Court finds that these sentences were clearly set out in the plea documents filed in the underlying criminal action, particularly on the Plea

of Guilty, the Petition to Enter Plea of Guilty at Question 7, and on the Defendant's Statement in Support of Guilty Plea at Questions 12 and 13. (*See* plea documents of record in the Petitioner's underlying criminal action file 95-F-3)

(11) The Court finds that the Petitioner was sentenced to thirty to fifty years in the penitentiary, well under the potential sentence which he faced on these pleas.

(12) The Court finds and concludes that the claim that the Petitioner's Plea was involuntary because the Circuit Court did not fully educate him of the nature and consequences of his plea agreement and because the petitioner suffered from effects of his anti-depressant medication at the time he entered into the plea agreement is without merit.

CLAIM D:

THE PETITIONER NEVER RECEIVED THE BENEFIT OF HIS PLEA BARGAIN BECAUSE THE TRIAL COURT CONSIDERED IMPERMISSIBLE EVIDENCE IN IMPOSING HIS SENTENCE

THE PETITIONER'S ARGUMENT

The West Virginia Code and Rule 32 of the West Virginia Criminal Procedure outline the guidelines for contents of presentencing reports and victim testimony, hence, giving trial courts a road map of what evidence should be considered and reviewed prior to sentencing a criminal defendant. Specifically, pursuant to the Victim Protection Act of 1984 found, in part, in W. Va. Code §61-11A-2(b) (1984), "the court shall permit the *victim* of the crime to appear before

the court for the purpose of making an oral statement for the record . .. Any such statement, whether oral or written,, shall relate solely to the facts of the case and the extent of any injuries, financial losses and loss of earnings directly resulting from the crime *for which the defendant is being sentenced"*. (Emphasis added). For the purposes of this sectional, "victim" is defined as "the person who is a victim of a felony, the fiduciary of a deceased victim's estate or a member of a deceased victim's immediately family". W. Va. §61-11A-2(a).

In the case at bar, the Petitioner pled to Counts 12, 13, 14, 22, 23, and 25 of the indictment. These counts involved two girls, [redacted] However, [redacted], the mother of [redacted], whose counts were dismissed by the trial court, as part of the plea agreement, was allowed to address the court at length on the day of sentencing. She stated that while she knew nothing about the alleged incidents, which involved her daughter [redacted], she was a victim of sexual abuse herself. She stated that [redacted] was in foster care, in part, because she had "assaulted" the girl. She further blamed the Petitioner for "my mental state of mind at that time". Transcript, 6/26/1995, p. 6-9 (Exhibit).

The allocution of [redacted]'s mother was certainly impermissible and highly prejudicial evidence considered by the court. She was not the actual *victim* of the crime, nor was she the fiduciary of a deceased victim's estate or a member of a deceased victim's immediate family as described in W. Va. Code § [sic] W. Va. Code §61-11A-2(a). Hence, in considering her allocution and testimony, the court necessarily looked at counts of the indictment involving [redacted], who was not the victim of the counts plead to by the Petitioner.

In addition to considering impermissible and highly prejudicial oral testimony during sentencing, the trial court also erred in considering at the presentencing report, which included evidence in violation of case law and the West Virginia Constitution, such as "misinformation or as unfounded assumption concerning facts or importance". United States v. Powell, 487 F.2d 325 (4h Cir. 1973); Unites [sic] State v. Bernard, 757 F.2d 1439 (1985); *Handbook on West*

Virginia Criminal Procedure, Ch. XXI, sec. 5E1a, b, p. II-320 *et seq.* West Virginia Code provides that a preliminary investigation report shall include the following information:

> [T]he offender's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, the names, relationship, ages and condition of those dependent upon him for support and such other facts as may aid the court in determining the propriety and conditions of his release on probation. No person convicted of a felony or of any offense described in article eight-b or eight-d, chapter sixty-one of this code against a minor child may be released on probation until this report shall have been presented to and considered by the court. The court may in its discretion request such a report concerning any person convicted of a misdemeanor. The presentence report of any person convicted of an offense, described in said articles or section twelve, article eight of said chapter, may include a statement from a therapist, psychologist or physician who is providing treatment to the child.

Rule 32(b)(4)-(5) (1996) of the West Virginia Rules of Criminal Procedure also outlines te guidelines for the contents of a presentencing report:

> (4) *Contents of the Presentence Report.* The presentence report must contain
>
> > (A) information about the defendant's history and characteristics, including information concerning the defendant's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, the names, relationships, ages and condition of those dependent upon the defendant for support and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence, determining the propriety and conditions of release on

probation, or determining correctional treatment;

(B) a victim impact statement, pursuant to Chapter 61, Article 11A, Section 3 of the West Virginia Code of 1931, as amended, unless the court orders otherwise, if the defendant, in committing a felony or misdemeanor, caused physical, psychological or economic injury or death of the victim; and

(C) any other information required by the court.

(5) *Exclusions.* The presentence report much exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

For purposes of the above-stated rule, the term "victim" is defined as "any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by (A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or (b) one or more family members or relatives designated by the court if the victim is deceased or incapacitated". W. Va. R. Crim. Pl 32 (f)(1). An example of presentencing report content can be found in Cooper, wherein the presentencing report included statements by the defendants, victim, arresting officers, family, prior criminal records, family information, educational and social histories, and an evaluation and recommendation by the probation officer that the defendant receive a minimum sentence without probation. Cooper, 172 W. Va. At 270, 304 S.E.2d at 855.

In sentencing the Petitioner, the court considered over-sweeping evidence, which involved victims outside of the Petitioner's plea agreement, stating that "[i]n

this case, in my opinion, five or six children's lives have been seriously affected by Mr. Lowe's conduct . . ." Transcript 6/26/1995, page 25 (Exhibit J). Judge Frazier further indicated that "[f]irst of all, he [Mr. Lowe] has pled guity to the [redacted] family, didn't plead to the [redacted] or [redacted] children. However, the Court believes, in - - in looking at the entire picture here, that he was involved with the [redacted] and [redacted] children". Id. At page 17. The court then proceeded to describe the alleged crimes against [redacted] In detail, considering this evidence in its sentencing decision. Id. at pages 17-18. Judge Frazier also considered information in the presentencing report that included sexual abuse allegations made by two other girls, who never appeared in court, never executed victim impact statements, and who were not victims in any of the counts pleaded to by the Petitioner. These children were [redacted]. Id. at pages 18-20.

Hence, in sentencing the Petitioner, the trial court considered highly inflammatory, prejudicial and impermissible evidence, and consequently, arrived at an excessive sentence, which was disproportionate to the character and degree of the offenses as discussed in Section V.

THE RESPONDENT'S ANSWER

The issue was addressed in a prior ruling by Judge Frazier. I know that the Court in this case at bar has said that these issues will not be considered res judicata, but I feel that Judge Frazier accurately stated the appropriate la with respect to this issue. I will recite some of this findings as they are appropriate to this issue.

In the case below the Court did not consider impermissible factors at the petitioner's sentencing. According to West Virginia law, "[a] trial judge has broad discretion to impose a sentence if it is within statutory limits and not based on some impermissible factor." *State v. Rogers*, 280 S.E.2d 82 (W. Va. 1981). Furthermore, the West Virginia Supreme Court held that:

> The judge in determining the character and extent of punishment is not limited to considering only information which would be admissible under the adversary circumstances of a trial. While it must exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials (*People v. Crews*, 38 Ill.2d 331, 231 N.E.2d 451), the court is not confined to the evidence showing guilt, for that issue has been settled by the plea. The rules of evidence showing guilt, for that issue has been settled by the plea. The rules of evidence which ordinarily obtain in a trial where guilt is denied do not bind the court in its inquiry. It may look to the facts of the (crime), and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and, as was said in *People v. Popescue*, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199, the judge should know something of the life, family, occupation and record of the person about to be sentenced.

State v. Houston, 273 S.E.2d 375 at 378 (W. Va. 1980).

Obviously, based on the *Houston* case, it is permissible for the court to inquire into such matters as the petitioner's general moral character, his habits, his social environments, his abnormal or subnormal tendencies, etc. These factors are all relevant to the information received by the Court below. Furthermore, the Court was aware of the allegations against other victims just by reading of the indictment. If the Court can separate that from other factors then certainly the Court can consider factors that meet the criteria outlined in *Houston.* In his previous order Judge Frazier stated "[t]he crimes admitted to by Petitioner were very serious in nature and the Court sentenced the Petitioner based on the severity of these crimes and all other relevant and permissible factors."

Finally, it is important to note that the sentence imposed by Judge Frazier was well within the statutory limits for the crimes the petitioner committed. It is the legislature that regulates the duration and limits on punishments. It is the Courts role to enforce the laws within the limits set forth by the legislature. In the present, the sentencing was well within the statutory requirements. For these

reasons, this issue also is without merit and relief should be denied.

CLAIM D: FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The West Virginia Supreme Court of Appeals has stated that:

> "[t]he judge in determining the character and extent of punishment is not limited to considering only information which would be admissible under the adversary circumstances of a trial. While it must exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials (***208** People v. Crews, 38 Ill. 2d 331, 231 N.E.2d 451), 'the court is not confined to the evidence showing guilt, for that issue has been settled by the plea. The rules of evidence which ordinarily obtain in a trial where guilt is denied do not bind the court in its inquiry. It may look to the facts of the (crime), and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and, as was said in People v. Popescue, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199, the judge should know something of the life, family, occupation and record of the person about to be sentenced.'" State v. Houston, 166 W. Va. 202, 273 S.E.2d 375 (1980), citing People v. Adkins, 41 Ill. 2d 299 297, 300-01, 242 N.E.2d 258, 260-61 (1968).

(2) The Court further stated that "(t)hese guidelines are not materially different than those that are contained in W. Va. Code 62-12-7, relating to the pre-sentence report." Id. at 208, p. 378

(3) The Court finds that the Petitioner was charged with twenty five counts involving serious crimes against minors and was allowed to plead guilty to six (6) of them in exchange for the dismissal of the remaining nineteen (19)

counts.

(4) The Court finds that the trial court was within its discretion in considering the factors set forth during the sentencing hearing on June 26, 1995. These include crimes involving other victims, which constitute other facts which tend to aggravate or mitigate the offense. They go to his moral character, his tendencies, his inclination to commit crime, and the stimuli which motivate his conduct. (*See* transcript of sentencing hearing of June 26, 1995 at pp. 15-28) See also State v. Grimes, 226 W. Va. 411, 701 S.E.2d 449 2009, Statate v. Goodnight, 169 W. Va. 287(1982), and State v. Rogers, 167 W. Va. 358, 280 S.E.2d 82 (1981).

(5) The Court finds and concludes that the claim that the Petitioner never received the benefit of his plea bargain because the trial court considered impermissible evidence in imposing his sentence is without merit.

CLAIM E:

A SENTENCE OF THIRTY TO FIFTY YEARS IN THE PENITENTIARY IS EXCESSIVE AND DISPROPORTIONATE TO THE CHARACTER AND DEGREE OF THE OFFENSE PURSUANT TO THE WEST VIRGINIA STATE CONSTITUTION ARTICLE III, SECTION 5

THE PETITIONER'S ARGUMENT

The Eighth Amendment of the United States Constitution and Article Three Section Five of the West Virginia Constitution mandates that "[penalties should be proportionate to the character and degree of the offense". U.S.C.A. Amend VIII; W. Va. Const. Art. III §5. Indeed, West Virginia common law dictates that while a trial judge's broad discretion in imposing a sentence "must be tempered by W. Va.

Const. Art. III §5, supra, requiring sentences to be proportional to the character and degree of the offense". State v. Cooper, 172 W. Va. 266, 271 304 S.E.2d 851, 855 (1983) referring to Syl. pt. 8, State v. Vance, 164 W. Va. 216, 262 S.E.2d 423 (1980)). See also, Syl. pt. 8, State v. Davis, 189 W. Va. 59, 427 S.E.2d 754 (1993).

In State v. Buck, the West Virginia Supreme Court held that a sentence of seventy-five (75) years imposed upon a defendant, who was convicted of aggravated robbery, was excessive. 173 W. Va. 243, 314 S.E.2d 406 (1984). In that case, the defendant, along with another individual, came into a store in Job, West Virginia, and asked the store owner for soft drinks. Id. at 244, 408. As the store owner proceeded to get them soft drinks, the defendant, who was the instigator of this robbery, struck him on the head and robbed him of $1,210.12 Id. at 244, 247, 408, 411. The co-defendant plead guilty to grand larceny and was sentenced to one year in jail. Following a trial and a conviction of aggravated robbery, the defendant was sentenced to seventy-five years in the penitentiary. On appeal, the West Virginia Supreme Court viewed this sentence is [sic] excessive, despite the fact that the defendant was the instigator of the robbery and that he struck the victim. Id. In arriving at its decision, the West Virginia Supreme Court reasoned that the defendant would have received a lesser sentence if he had actually killed the victim. Id. At 245, 408-409. The court compared the seventy-five year sentence to life imprisonment, and noted that under a life sentence, the defendant would be eligible for parole in ten years unless the jury had declined to recommend mercy. However, under his seventy-five year sentence, the defendant would not be eligible for parole for twenty-five years. Id. Hence, finding this sentence disproportionate to the character and degree of the offense charged, the West Virginia Supreme Court remanded the case back to trial court for re-sentencing.[16]

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[16]In Buck, the defendant actually appealed his case on two occasions, arguing excessive and disproportionate sentence. On the first remand, the circuit court essentially ignored the West Virginia

Similarly, in State v. Cooper, the West Virginia Supreme Court found the defendant's sentence to be disproportionate to the character and degree of the crime committed, and remanded the case back to the trial court for re-sentencing. 172 W. Va. 266, 304 S.E.2d 851 (1983). In that case, the defendant, William Cooper, was convicted of robbery and sentenced to forty-five (45) years in a penitentiary. Id. On appeal, the defendant challenged the proportionality of his sentence under West Virginia Constitution, Article III, Section 5. Id. at 268, 852. The victim in that case had been knocked unconscious and robbed of his wallet, which contained a small amount of cash and several credit cards. Despite the violent nature of the crime, the West Virginia Supreme Court concluded that the forty-five year sentence was "offensive to a system of justice in which proportionality is constitutionally required" and remanded the case for re-sentencing. Id. at 272, 274, 856, 859.

In the case at bar, the Petitioner was sentenced to two consecutive sentences of fifteen to twenty-five years in a penitentiary. Effectively, the Petitioner was sentenced to incarceration for the period of thirty to fifty years. The Petitioner was over thirty years old at the time of sentencing to-wit, almost thirty-two years of age. West Virginia Code §62-12-13a provides that "[w]hen the prisoner has received an indeterminate sentence, the minimum sentence shall be considered as an eligibility date for parole consideration but does not confer in the prisoner the right to be released as of that date". Hence, he must serve thirty years in prison before becoming eligible for parole. He will be over sixty years of age at that time. Therefore, this sentence is disproportionate to the degree and character of the offense, as follows: Had the Petitioner been convicted of murder in the first degree and sentenced to life with recommendation of mercy, he would have been eligible for parole in twenty-five years. W. Va. Code §61-3-2. However, there was no homicide involved in this case. Moreover, the trial court denied the

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sentencing proceeding. Id. at 248, 411. (Footnote No. 4 from pleading)

Petitioner a probation evaluation, notwithstanding its finding that the Petitioner may have been sexually abused as a child. In fact, as discussed in detail *supra*, the trial court, in sentencing the Petitioner, sentenced him on the entire twenty-five count indictment instead of only six counts plead to by the Petitioner. In doing so, the trial court considered impermissible evidence, such as hearsay statements and allocutions of an unauthorized individual.

Accordingly, based on the foregoing, the Petitioner's sentence of thirty to fifty years in prison is disproportionate to the character and degree of the offense, and is repugnant to the principles of the West Virginia State Constitution Article III Section 5.

THE RESPONDENT'S ANSWER

The Respondent contends that the sentence imposed by the Court below is not excessive or disproportionate. As previously stated, it is the legislature that sets forth the duration and length of sentences. The legislature makes these determinations based on society's view against certain types of offenses.[17] Clearly from looking at the statutes regarding sexual assault and sexual offenses involving children, it is clear to see that the legislature intended to protect the children in our society by imposing lengthy sentences on those who violate these laws. The sentences imposed by Judge Frazier were no where near the maximum sentence he could have imposed and were well within his discretionary limits of the sentence he did impose. From reading the transcript, it is clear that the Judge considered this to be a very serious crime and intended to both punish the defendant (petitioner) and protect society at the same time. The offenses that the petitioner admitted to were not isolated incidents but, in fact, were ongoing activities that the petitioner found himself taking advantage of due to the circumstances in which he

[17]The severity of this type of offense is further evidenced by the legislature actually increasing the amount of time one can serve for violations of the sexual assault statute. (Footnote 2 from pleading)

would find himself. He was abusing the trust placed in him to protect and care for these children. Based on these facts, the petitioner's sentence is not excessive or disproportionate.

CLAIM E: FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Court re-adopts the findings of fact and conclusions of law set forth concerning Claim D, above, as is fully set forth hereinafter.

(2) The Court finds and concludes that the trial court's sentence was within statutory limits and was not based on impermissible factors. State v. Goodnight, 169 W. Va. 366, 287 S.E.2d 504 (W. Va. 1981) at syl. Pt. 4, State v. Sugg, 193 W. Va. 388, 456 S.E.2d 469 (1995).

(3) The Court finds and concludes that sentences which are within the statutory limits are not entitled to statutory review. State v. Koon, 190 W. Va. 632, 440 S.E.2d 442 (1993).

(4) The Court finds and concludes that, while 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 or where there is a life recidivist statute. Wanstreet v. Bordenkircher, 166 W. Va. 523, 276 S.E.2d 205 (1981). at syl. Pt. 4. The sentences in this action are not of either type.

(5) The Court finds and concludes that the trial court did not abuse its discretion in ordering these sentences. The trial court recited the factors it used in imposing these sentences on the record during the sentencing hearing held on June 26, 1995. (*See*, disposition transcript, June 26, 1995,

pp. 15-28)

(6) The Court finds and concludes that the claim that a sentence of thirty to fifty years in the penitentiary is excessive and disproportionate to the character and degree of the offense pursuant to the West Virginia State Constitution Article III, Section 5 is without merit.

CLAIM F:

THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN HE WAS COERCED INTO GIVING A STATEMENT BY THREATS FROM POLICE OFFICERS

THE PETITIONER'S ARGUMENT

The Fifth Amendment of the United States Constitution offers protection against self-incrimination by providing that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . ." U.S.C.A. Const. Amend V; W. Va. Const. Art. III §5. When it comes to evaluating whether a defendant's statement was voluntary, the main inquiry is "whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker". Syl. pt. 7, State v. Bradshaw, 193 W. Va. 519, 457 S.E.2d 456 (1995). Furthermore, while the West Virginia Supreme Court continues to give trial courts deference concerning factual findings of voluntary confessions, it specifically reserves *de novo* review of legal conclusions to itself. State v. Farley, 192 W. Va. 247, 253, 452 S.E.2d 50, 53 (1994). However, in cases where a trial court rules that a confession was voluntary without inquiring into the totality of the circumstances of that case, such ruling will be upheld on appeal "but only if a reasonable review of the evidence clearly supports voluntariness". Id. (Referring to United State v.

Carter, 569 F.2d 801 (4th Cir.), and United States v. Lewis, 528 F.2d 312 (4th Cir.).

Ultimately, the West Virginia Supreme Court adopted a voluntariness standard in Farley that stands for the proposition that while "representations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession . . ., [i]n determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances", thus making no single factor decisive. Id. at 258, 61. The factors to be examined may involve defendant's youth, intelligence, lack of education and advice of the constitutional rights to the defendant, the manner and length of questioning, the use of food or sleep deprivation, and the length of detention. Id. In analyzing these factors, it is important to assess "the factual circumstances surrounding the confession, . . . the psychological impact on the accused, and . . . the legal significance of how the accused reacted". Id. (Referring to Culombe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860 (1961)).

State v. Hilliard is an excellent example of inadmissible confessions given as a direct consequence of police coercion. 173 W. Va. 456, 318 S.E.2d 35 (1984). In that case, the appellant testified at both *in camera* hearing and at trial that when the police officer pulled him behind the truck, the officer held up a long, black flashlight and said "[Y]ou better tell me who took this car [or] I'm going to knock your head off'. Id. The appellant did not immediately answer who stole the car, but was handcuffed, placed in the backseat of a cruiser beside the officer who just threatened him, where another police officer read him his *Miranda* rights. The appellant confessed as soon as he received his *Miranda* warnings. The trip from the scene to the courthouse took about ten to fifteen minutes, and the officer, who had threatened him, took the appellant to the courthouse. The appellant then signed a waiver of rights and gave a written statement. Id. at 457, 36.

In its opinion, the West Virginia Supreme Court the general rule on statement admissibility citing Syllabus point 5 of State v. Starr, 158 W. Va. 905, 216 S.E.2d 242 (1975): "The State must prove, at least by a preponderance of the

evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case". Id. at 458, 37. To determine whether a statement was voluntarily made, the trial court must hold an *en* [sic] *camera* hearing prior to admitting the statement into evidence. Id. The Court also noted that "[e]ven prior to *Miranda*, it was universally recognized that a coerced confession was inadmissible". Id. (Citing State v. Goff, 289 S.E.2d 473, 476 (W. Va. 1982). While the state did not even attempt to introduce the statements in the cruiser, the crucial issue in this case was whether there existed a "break in the causative link running between" the confession, which took place in the cruiser, and the one taken by the police about forty-five minutes later. The West Virginia Supreme Court held that such causative link existed despite the forty-five minutes between the two statements. Id. In making its decision, the West Virginia Supreme Court relied on its prior holding in State v. Williams, 249 S.E.2d 758 (W. Va. 1980) where "Justice Neely emphasized that despite the fact that the confessions involved had taken place over a three day period, the subsequent confessions were not independent of or distinct from the original; the defendant suffered from a mental disability; the defendant's detention was uninterrupted; he was repeatedly interrogated without a lawyer present; the same officers were present at each of the confessions; and the concessions appeared cumulative". Id. at 459, 38. The Court reasoned that in Hilliard, the appellant was threatened by a police officer, was forced to sit next to that police officer in the cruiser, and was forced to give a statement at the courthouse with the threatening police officer in the vicinity. Hence, the West Virginia Supreme Court held that all of the appellant's confessions were involuntarily made. Id. at 459-460, 39-40.

In the case at bar, when the Petitioner was arrested on or about November 28, 1994, he was subsequently transported to Southern Regional Jail in Beaver, West Virginia, by C. S. Myers and John M. Bailey with the Bluefield State Police. The Petitioner contends that during the trip to the jail, C. S. Myers and John M.

Bailey repeatedly threatened the Petitioner that they would "pull over and beat the fire out of me", and that Officer Bailey also informed him that his mother and family would "pay for it" if he didn't confess his crimes. Subsequent to these threats, the Petitioner gave a statement to the police. Just as in Hilliard, the Petitioner was riding in the same cruiser as the officers, who threatened him. Naturally, he was very apprehensive of them carrying out their threats toward himself as well as his family. In addition, the Petitioner, just like the defendant in Williams, who had a mental illness, suffered from mental impairments, as evidenced by his medical records. Hence, his statement given subsequent to the threats made by C. S. Myers and John M. Bailey were the direct result of their threats to "pull over and beat the fire out of [him]" and to hurt his mother and the rest of his family. Therefore, based on the foregoing, the Petitioner's statement was involuntarily made, and use of such statement against him in the proceedings violated his Fifth Amendment right against self-incrimination.

THE RESPONDENT'S ANSWER

The Respondent denies that the petitioner was coerced into giving a statement to law enforcement officers. It is well established law in a Habeas Corpus proceeding, the petitioner has the burden of proving the allegations in the petition and the Losh checklist. In the present, the petitioner did not produce a scintilla of evidence to support this allegation. In the petition, it was alleged that the police officers made threats to the petitioner on his way to the Southern Regional Jail. This is absolutely false. The police had already gotten a statement from the petitioner prior to him being transported to the Southern Regional Jail.

Furthermore, the petitioner waived all pretrial defects when he entered into the plea agreement and pled before the Court. During the plea hearing, the Court reviewed with the petitioner that he was waiving certain defects, if any, by entering into the plea. Giving a statement to the Police was one the items specifically mentioned in the plea hearing, so this was certainly known to the petitioner at the

time the plea was entered and he chose to continue and enter the plea. The Court further advised that he would not be able to complain about these issues at a later date if he received a sentence greater than he anticipated. The Court made the petitioner very aware that the plea was final. For these reasons, this argument too must fail.

CLAIM F: FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Court finds that Judge Frazier clearly advised the Petitioner that by pleading guilty he was waiving the right to raise pre-trial deficiencies, specifically addressing coerced confessions. (*See* transcript of plea hearing at pp. 29-31)

(2) The Court finds that the Petitioner testified as follows at the Omnibus Habeas Corpus proceeding:

Q Sir, when you were arrested do you recall giving a statement to the police?

A No, sir, I sure don't.

Q Okay. So you don't recall giving a statement?

A No, sir.

Q You don't recall anything surrounding the statement?

A No, sir.

Mr. Harvey: Okay. Thank you. That's all I have.

The Court: Any questions about that?

Mr. Boggess: No, sir. (*See* Transcript of Omnibus Habeas Corpus hearing at p. 103)

(3) The Court finds and concludes that the Petitioner has abandoned the claim that he was denied his Fifth Amendment Right Against Self-Incrimination when he was coerced into giving a statement by thereto from police officers, and further finds and concludes that he waived any such issue when he entered his plea of guilty. Accordingly, this claim is without merit.

RULING

Wherefore, for the reasons set forth in the foregoing opinion, the Court hereby **ORDERS** and **ADJUDGES** as follows:

(1) That the Petitioner for Habeas Corpus ad Subjiciendum is hereby **DENIED** and this action is **REMOVED** from the docket of this Court.

(2) The Court appoints Natalie N. Hager, Esq., to serve as counsel for the Petitioner should be choose to appeal this ruling.

(3) This is the final order. The Circuit Clerk is directed to distribute a certified copy of this Order to Natalie N. Hager, Esq., at 1605 Honaker Avenue, Princeton, West Virginia, 24740; to Scott A. Ash, Esq., Prosecuting Attorney of Mercer County, West Virginia, at 120 Scott Street, Suite 200, Princeton, West Virginia, 24740; and to the Petitioner at the Mt. Olive Correctional Complex, 1 Mountainside Way, Mt. Olive, West Virginia, 25185.

Entered this the 24th day of March, 2011.

Derek C. Swope
DEREK C. SWOPE, JUDGE

THE FOREGOING IS A TRUE COPY OF A DOCUMENT ENTERED IN THIS OFFICE ON THE 24 DAY OF March 20 11
DATED THIS 24 DAY OF March 20 11

JULIE BALL, CLERK OF THE CIRCUIT COURT OF MERCER COUNTY WV
BY Carla S Ball HER DEPUTY