STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia ex rel.
Roger Repass, Petitioner Below,
Petitioner

vs) No. 11-0663 (Mercer County 10-C-254)

Adrian Hoke, Warden, Huttonsville
Correctional Center, Respondent Below,
Respondent

FILED
March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Roger Repass, by counsel, Joseph T. Harvey, appeals from the circuit court's order denying his petition for post-conviction habeas corpus relief. The State of West Virginia, by counsel, Laura Young, has filed its response on behalf of respondent, Adrian Hoke, Warden.

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 of Appellate Procedure.

In February of 2004, petitioner was indicted on three counts of Delivery of Oxycontin, a Schedule II Control Substance containing Oxycodone, in violation of West Virginia Code §60A-4-401, and one count of Conspiracy in violation of West Virginia Code §61-10-31. On November 16, 2004, a hearing was held before the circuit court during which petitioner pled guilty to Count 3 of the Indictment, delivery of a Schedule II Controlled Substance, to wit, Oxycodone, pursuant to a plea agreement with the State. In return for petitioner's guilty plea, the State dismissed the other counts against petitioner in the Indictment.

On April 12, 2005, following a sentencing hearing, the circuit court entered an order first sentencing petitioner to one to fifteen years in prison for his conviction and then suspending that sentence and placing petitioner on five years of supervised probation. On August 9, 2005, a petition to revoke petitioner's probation was filed on the basis that petitioner had been arrested for grand larceny; had failed to report the arrest to his probation officer; and had failed to report to the probation department as directed. On August 22, 2005, following a hearing on that petition, the

circuit court entered an order revoking petitioner's probation and reinstating his original sentence of one to fifteen years in prison.

Thereafter, petitioner challenged his conviction through a petition for a writ of habeas corpus in which he raised several issues, including whether his various court-appointed counsel were effective and whether his guilty plea was voluntary. On September 17, 2010, an omnibus evidentiary hearing was held before the circuit court on the petition for habeas relief. On April 7, 2011, the circuit court entered a fifty-five-page order denying habeas relief.

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal, and it has reviewed the appendix record designated on appeal. Finding no error in the denial of habeas corpus relief, the Court affirms the decision of the circuit court and fully incorporates and adopts herein the lower court's detailed and well-reasoned "Order Denying the Petitioner's Petition for Writ of Habeas Corpus and Removing It from the Docket of this Court"entered on April 7, 2011. The Clerk of Court is directed to attach a copy of the same hereto.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

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

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.,
ROGER REPASS

Petitioner,

V. **Civil Action No. 10-C-254**

ADRIAN HOKE, Warden,
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

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

On September 17, 2010, this matter came before the Court, the Honorable Judge Derek C. Swope presiding, for a hearing on the Petitioner's Petition for Post Conviction Habeas Corpus Relief, brought pursuant to the provisions of Chapter 53, Article 4A, of the West Virginia Code, as amended, which was filed on his behalf by and through his court-appointed counsel, Joseph T. Harvey, Esq., on the Petitioner's Petition for Writ of Habeas Corpus *Ad Subjiciendum* and Memorandum in Support. The Petitioner and his counsel appeared. Scott Ash, Esq., Assistant Prosecuting Attorney for Mercer County, appeared on behalf of the State of West Virginia.

The Petitioner is seeking post-conviction habeas corpus relief from his indeterminate sentence of one (1) to fifteen (15) years for one count of unlawful and felonious delivery of Oxycodone to a cooperating individual. The Petitioner's sentence was suspended and he was

placed on probation for a period of five (5) years. A Petition for Probation Revocation was filed on the Probation Department on August 9, 2005, charging the Petitioner with violating his probationary contract. On August 22, 2005, the Court revoked and rescinded the Petitioner's probation and reimposed his sentence.

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 relief.

In support of the aforementioned denial, the Court makes the following General Findings of Fact and Conclusions of Law:

I. FACTUAL/PROCEDURAL HISTORY

Case No. 04-F-73: The Indictment/Counts Specific to Each Offense

A. The Indictment

By a True Bill returned in the February 2004 Term by the Mercer County Grand Jury, the Petitioner, Roger Repass, was indicted in four counts of a five (5) count Indictment for three offenses of Delivery of Oxycontin, a Schedule II Controlled Substance, containing oxycodone, and one count of Conspiracy. Roger Repass and Leslie Byrd allegedly delivered oxycontin to a confidential informant on or about July 31, 2002 and August 5, 6, and 8, 2002.

B. Counts Specific to Each Offense

Out of the four (4) count indictment, Counts 1, 2, 3,were for Delivery of Oxycontin, Schedule II Controlled Substance, containing Oxycodone and Count 5 was for Conspiracy. All counts in the indictment arise from events which allegedly occurred in July and August, 2002.

C. Pre-Trial Proceedings

On May 8, 2003, the Petitioner filed a Complaint for Writ of Prohibition in Civil Action Number 03-C-231, Roger Repass v. William J. Sadler, Prosecuting Attorney for Mercer County, and T.A. Bailey, Princeton Police Officer and David Rasnake v. William J. Sadler, Prosecuting Attorney for Mercer County, and T.A.Bailey, Princeton Police Officer, alleging that he was charged by a warrant in Magistrate Court, case number 03-F-100 and arraigned on February 19, 2003 on a charge of delivery of a controlled substance which allegedly occurred on July 31, 2002. The Petitioner demanded a preliminary hearing. Prior to that hearing, Janet Williamson, Esq., Assistant Prosecuting Attorney moved to dismiss the charge on the grounds that the "State will seek indictment", which was granted *ex parte* by Magistrate Jim Dent on April 8, 2003. The Petitioner was not given notice of this motion. In his Writ of Prohibition, the Petitioner argued that he was entitled to a preliminary hearing as a matter of **right** (emphasis in original text) if a hearing can be held prior to the return of an indictment. See Peyott v. Kopp, 428 S.E.2d 535, 537 (W.Va. 1993).

On June 10, 2003, the Court dismissed the Complaint for Writ of Prohibition with prejudice. The Court further Ordered that it would allow reinstatement of these actions if a) either plaintiff is not presented for indictment by the October term of the Grand Jury; and/or b) the plaintiffs bonds previously posted are not reinstated if either are indicted by the October term of the Grand Jury.

On February 11, 2004, the Petitioner was indicted for three counts of Delivery of Oxycontin, a Schedule II Controlled Substance, To-Wit: Oxycodone and one count of Conspiracy. The Petitioner appeared with his counsel, Tom Czarnik, Esq., for his arraignment

before the Honorable Derek C. Swope on February 17, 2004 where he pled not guilty. The Court placed the Petitioner on a $5,000.00 personal recognizance bond with general conditions. The Petitioner's trial was set for May 6, 2004.

On February 20, 2004, Mr. Czarnik filed a Motion to Dismiss for violation of the "3 term rule" and filed a five (5) page Omnibus Discovery Motion. A hearing was set for the Motion to Dismiss on April 9, 2004. He thereafter filed a Motion to Compel Discovery on April 5, 2004. The Petitioner filed a Supplemental Discovery on April 13, 2004. On April 26, 2004, counsel for the Petitioner withdrew his motion to dismiss based upon the three term rule. However, he moved the Court to dismiss based upon the writ of prohibition previously filed. Upon due consideration, the Court denied the Petitioner's Motion to Dismiss and further ordered the State to provide the Petitioner with all information regarding any consideration the confidential informant may have received by April 28, 2004. The Petitioner filed a Supplemental Request for Discovery on April 28, 2004, requesting that the State provide the Petitioner with all tapes and transcripts of all "drug buys" by Rick Tabor on behalf of the State. The Petitioner filed a Motion to Continue Trial on April 28, 2004. The Petitioner filed a Supplemental Disclosure Regarding Entrapment or Outrageous Conduct on April 29, 2004.

On May 4, 2004, the Court continued the Petitioner's trial until August 17, 2004, upon the Petitioner's waiver of this matter being continued until the June 2004 term of court, and ordered the Petitioner to provide a list of names of the audio tapes he wanted to review. The Petitioner also filed a Supplemental Discovery Request on May 5, 2004 requesting transcripts in other criminal cases. On August 17, 2004, the Court granted the Petitioner's Motion to Continue and rescheduled the trial for September 28, 2004. The State filed a Motion to Continue the trial

due to the investigating officer being out of state during the trial. On September 13, the Court continued the trial, for good cause shown, until November 12, 2004, upon the Petitioner waiving his right to a trial during this term of court.

D. Plea Agreement

A plea hearing was held on November 16, 2004, where the Petitioner plead to Count 3 of the Indictment, "Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone." The Court accepted the Petitioner's guilty plea subject to a pre-sentence investigation. The Court adjudged the Petitioner to be guilty in manner and form of the offense of "Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone" as the State in Count 3 of its Indictment herein hath alleged and by his plea he hath admitted. The Court set this matter for disposition on January 3, 2005. The Court received the pre-sentence investigation report from the Mercer County Probation Department and ordered the Petitioner to be sent to the Diagnostic and Classification Center of the Anthony Correctional Center for examination and diagnosis for a period not to exceed sixty (60) days, pursuant to W.Va. Code § 62-12-7(a). On April 4, 2005, the Court received report from the sixty (60) day evaluation and set the Petitioner's dispositional hearing for April 12, 2005.

E. Sentencing

On April 12, 2005, Judge Swope sentenced the Petitioner as follows:

> It is **ORDERED** that the said Roger Repass is hereby **ADJUDGED** guilty of the offense of "Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone," as the State in its Indictment herein hath alleged and by his plea he hath admitted. Therefore, it is **ORDERED** that the said Roger Repass 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 Southern Regional Jail to the penitentiary of the State and therein confined for the indeterminate term of not less than one (1) nor more than fifteen (15) years as provided

by law for each offense of "Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone,"as the State in Count 3 of its Indictment herein hath alleged and by his plea he hath admitted; that the defendant be given credit for the time he has been confined on said charge; and that the defendant be dealt with in accordance with the rules and regulations of that institution and the laws of the State of West Virginia. After due consideration, it is further **ORDERED** that the aforementioned sentence be and is hereby suspended, and the defendant shall be placed upon probation for a period of five (5) years under the supervision of the probation department of this County and Court and under the general rules and regulations as established by law with the following specific conditions:

1. That the defendant pay all court costs within the probationary period or be subject to having his driver's license suspended;

2. That the defendant attend the day report center for a period of one (1) year;

3. The defendant obey all laws;

4. That the defendant refrain from consuming alcohol/drugs, frequenting places where such may be present, and associating with those who use such substances;

5. That the defendant be subject to random urinalysis for the purpose of alcohol/drug screens;

6. That the defendant seek and maintain employment;

7. That the defendant execute a consent to search;

8. That the defendant attend NA/AA meetings three times per week;

9. That the defendant submit to inpatient substance abuse treatment at Legends.

10. That the defendant be under home confinement at the residence of his mother.

The Court reserves the right to order the defendant to be a drug court participant once the drug court has been established.

Upon motion of the State, it is the ORDER and DECREE of this Court that the remaining charges contained in the Indictment pending against the Defendant be and hereby are dismissed.

(*See* Disposition Order, April 12, 2005.)

F. Post Plea Matters

The Petitioner filed a Motion to Reconsider Sentence on April 29, 2005. The Probation Department filed a Petition to Revoke Probation on August 9, 2005 for the Petitioner being arrested on a Grand Larceny charge which the Defendant failed to report. The Petitioner also failed to report to the Probation Department as directed on August 3, 2005. On August 22, 2005, the Court held a hearing on the Probation Department's Petition for Revocation of Probation. The Court thereby Ordered that the Petitioner's probation be revoked and rescinded and reimposed his penitentiary sentence to an indeterminate term of not less than one (1) year nor more than fifteen (15) years as provided by law for the offense of "Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone."

On September 19, 2008, the Petitioner filed a letter stating that he planned to filed a Petition for Habeas Corpus. On September 24, 2008, the Court appointed David C. Smith, Esq., to represent the Petitioner on the Petition at the time of filing. On December 14, 2009, Mr. Smith filed a Motion to Withdraw as Counsel. On January 6, 2010, the Court ordered that Mr. Smith be relieved as counsel for the Petitioner for good cause shown and appointed Michael Cooke, Esq., as new Habeas Corpus counsel. On April 19, 2010, Mr. Cooke filed a Motion to Withdraw as Counsel. The Court relieved Mr. Cooke as counsel due to conflicts that had arisen between Mr. Cooke and the Petitioner and appointed Joseph Harvey, Esq., as new Habeas Corpus counsel for the Petitioner.

II. THE PETITIONER'S 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

The Petitioner's Petition for Writ of Habeas Corpus under W.Va. Code §53-4A-1 for Post Conviction Habeas Corpus

On June 28, 2010, the Petitioner filed his Petition for Writ of Habeas Corpus in the Circuit Court of Mercer County, by and through his counsel, Joseph T. Harvey, Esq. The Petitioner raised the following grounds in his Petition:

GROUND ONE

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PRELIMINARY AND PRETRIAL PROCEEDINGS AS WELL AS AT THE PLEA HEARING

A. Attorney Czarnik's Failure To Investigate Why The Petitioner Was Taken (sic) His Home Confinement Bracelet Without An Order Taking Him Off Of Home Confinement Constituted Ineffective Assistance of Counsel.

B. Attorney Czarnik's Representation Of Two Co-Defendants, Who Could Have Testified Against Each Other, Violated West Virginia Rules of Professional Conduct And Constituted Ineffective Assistance of Counsel.

C. Attorney Czarnik's Failure To File For Reinstatement Of Petition For Writ Of Prohibition Constituted Ineffective Assistance of Counsel.

D. Attorneys David Smith and Michael Cooke's Failure To File A Losh List And A Habeas Corpus Petition Constituted Ineffective Assistance of Counsel.

GROUND TWO

COUNT TWO OF THE INDICTMENT WAS BASED ON INSUFFICIENT EVIDENCE.

GROUND THREE

THE PETITIONER ENTERED INTO AN INVOLUNTARY PLEA OF GUILTY BECAUSE HE WAS UNDER THE INFLUENCE OF OXYCONTIN AT THE PLEA HEARING.

GROUND FOUR

THE PETITIONER DID NOT POSSESS THE REQUISITE MENS REA TO COMMIT CONSPIRACY BECAUSE HE WAS UNDER THE INFLUENCE OF NARCOTICS AT

THE TIME OF THE CRIMINAL ACT.

At the omnibus habeas hearing, in addition to the above grounds, the Court determined the particular grounds raised by the Petitioner according to his *Losh* checklist, by going through each and every entry on the checklist on the record. Each ground is further discussed in the appropriate section below.

Requested Relief

The Petitioner requests that this Honorable Court grant his Petition for Writ of Habeas Corpus and all the relief encompassed therein.

The *Losh* Checklist

In his *Losh* Checklist, the Petitioner waived the following grounds for relief:

Waived Grounds:

Lack of trial court jurisdiction.

Unconstitutionality of statute under which conviction obtained.

Indictment showing on its face that no offense was committed.

Prejudicial pretrial publicity.

Denial of speedy trial right.

Language barrier to understanding the proceedings.

Denial of counsel.

Unintelligent waiver of counsel.

Consecutive sentence for same transaction.

Coerced confessions.

Suppression of helpful evidence by prosecutor.

State's knowing use of perjured testimony.

Falsification of a transcript by prosecutor.

Unfulfilled plea bargains.

Information in pre-sentence report erroneous.

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.

Refusal to turn over witness notes after witness has testified.

Claims concerning use of informers to convict.

Constitutional errors in evidentiary rulings.

Instructions to the jury.

Claims of prejudicial statements by trial judge.

Claims of prejudicial statements by prosecutor.

Acquittal of co-defendant on same charge.

Defendant's absence from part of the proceedings.

Improper communications between prosecutor or witness and jury.

Mistaken advice of counsel as to parole or probation eligibility.

Amount of time served on sentence, to be served, or for which credit applies.

The Petitioner asserted the following *Losh* grounds:

Asserted Grounds:

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/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.

Failure of counsel to take an appeal.

Ineffective assistance of counsel.

Claim of incompetence at time of offense, as opposed to time of trial.

Sufficiency of evidence.

Question of actual guilt upon acceptable guilty plea.

Severer sentence than expected.

Excessive sentence.

The Respondent's Response

The Response

The Respondent, by and through the Prosecuting Attorney, filed a response to the Petition for Writ of Habeas Corpus on September 13, 2010.

As to the Petitioner's assertion that the Petitioner was denied ineffective assistance of counsel due to his counsel not investigating why the Petitioner was released from home confinement without Court order, the Respondent argues that it is immaterial. The Respondent argues that this claim is wholly immaterial because: 1) the probation revocation petition was based on a joyriding charge, the failure to report the joyriding charge, and failure to make regular probation appointment; and 2) the Court indicated that the home confinement matter was not a reason it found that probation had been violated.

The Respondent next answered the assertion concerning the Petitioner's counsel representing two co-defendants. The Respondent argues that the Petitioner and co-defendant Steve Wetzel (sic) were represented by Mr. Czarnik for some time but that Mr. Wetzel (sic) hired William Akers, Esq., in May 2004. The Respondent further argues that Mr. Wetzel's (sic) case was resolved by plea on December 13, 2004 and that the Petitioner's case was resolved by plea in November, 2004. If there were any limitations imposed by the joint resolution that matter was resolved 6 months before the guilty plea.

Concerning the claim of counsel's failure to seek reinstatement of a Petition for a Writ of Prohibition, the Respondent argues that this is immaterial. The Respondent argues that trial

counsel filed a Petition for a Writ of Prohibition seeking reinstatement of the criminal proceeding against him in magistrate court in order to get a preliminary hearing. The Respondent admits that there is some incidental discovery that accrues to the benefit of the defendant in a preliminary hearing, but the question at issue is whether there is probable cause under *State v. Desper*, 173 W.Va. 494, 318 S.E.2d 437 (1984). The Respondent further argues that the Petitioner had that question answered by a subsequent Grand Jury and that he agreed that probable cause existed by his plea.

Additionally, the Respondent argues that Writs of Prohibition cannot be used to prevent a prosecuting attorney from seeking an indictment from a Grand Jury. Therefore, trial counsel's actions or inactions regarding a refiling for the Writ is immaterial.

The Respondent argues that the previous Habeas Corpus counsel's failure to file a *Losh* List is immaterial. The Respondent admits that the failure of the previous habeas counsel to fulfill their responsibilities is regrettable, but has no bearing on the guilty plea entered by the Petitioner in 2004, or the subsequent revocation.

The Respondent addresses the Petitioner's claim that the quantum of evidence support Count 2 of the indictment is immaterial. The Respondent argues that the Petitioner plead guilty to Count 3 of the Indictment and Count 2 was dismissed. If waiver should ever apply in Habeas proceedings it should apply when a defendant takes the benefit of the bargain and then wants to parse out the evidence of a dismissed count.

The Respondent argues that the Petitioner should be collaterally estopped from impeaching the answers given under oath at the time of his guilty plea. The Respondent argues that the Petitioner should not now be permitted to impeach his own answers with any

self-serving evidence. The Respondent argues that the Petitioner entered into a guilty plea in open court where the judge, the bailiff, and counsel all observe the defendant looking for signs that he/she may not be fit to enter a plea. The Respondent further argues that Petitioner could have requested to have his plea set aside upon his return from the 60 day evaluation at Anthony when the Petitioner was allegedly clean and sober.

III. 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 SE2d 782 (2003).[1] "The sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by the due process of law." Id. at Syl. Pt. 2. "A habeas corpus petition is not a substitute for a writ of error[2] 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

---

[1] *See also* Syl. Pt. 4, Click v. Click, 98 W.Va. 419, 127 SE2d 194 (1925).

[2] A writ of error is a writ issued by an appellate court to the court of record where a case is tried, requiring that the record of the trial be sent to the appellate court for examination alleged Writ of error. Dictionary. com. Random House, www.http://dictionary.reference.com/browse/writ of error.

> 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 relief[.]

220 W.Va. 79, 640 S.E.2d 142 (2006); W.Va. Code § 53-4A-1(a)(1967)

Our post-conviction habeas corpus statute, W.Va. Code §53-4A-1(a) *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, discover." Syl. Pt. 1, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).[3]

"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).

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).

---

[3]*See also Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

In *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984), the West Virginia Supreme Court of Appeals held that:

> (a) habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the Petitioner an adequate opportunity to demonstrate his entitlement to relief. Syl. Pt. 5.

"Whether denying or granting a petition for relief for writ of habeas corpus, the circuit court must make adequate findings of fact 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).

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 the pleadings filed in this action, the transcript of the Omnibus Habeas Corpus hearing, the Court file and transcripts in the underlying criminal action, and the applicable case law. The Court believes that the issues to resolve in this matter are:

(1) Whether counsel was ineffective in his handling of the Petitioner's preliminary and pretrial proceedings as well as at the plea hearing?

(2) Whether sufficient evidence existed to indict the Petitioner?

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

(4) Whether the Petitioner had the mental capacity at the time of the alleged crimes to form the specific intent to commit these crimes?

The Petitioner failed to argue or produce evidence on his claim of a question of actual guilt upon an acceptable guilty plea, failure of counsel to take an appeal, severer sentence and

excessive sentence and these grounds are forever waived.

THE PETITIONER'S CLAIMS

CLAIM A:

The Petitioner was denied effective assistance of counsel at the preliminary and pretrial proceedings as well as at the plea hearing.

The Petitioner's Argument. The Petitioner argues that he was denied effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, and Article Three Section of the West Virginia State Constitution guaranteeing a criminal defendant the right to effective counsel. The Petitioner specifically argues the following:

> Attorney Czarnik's Failure To Investigate Why The Petitioner Was Taken (sic) His Home Confinement Bracelet Without An Order Taking Him Off Of Home Confinement Constituted Ineffective Assistance Of Counsel.

The Petitioner argues that Mr. Czarnik failed to investigate why Jackie Houchins removed his home confinement bracelet without this Court's order to do so and contends that this alleged failure to investigate rises to ineffective assistance of counsel. The Petitioner further argues that during the probation revocation hearing that it became clear that Mrs. Houchins removed the Petitioner's home confinement bracelet although he had not been removed from home confinement by the Court. The Petitioner argues that every reasonable attorney would have attempted to find out why his client's home confinement bracelet was removed. The Petitioner contends that he could have believed that he was off home confinement, since his bracelet was removed.

The Petitioner argues that his counsel's failure to delve into the circumstances

surrounding the Petitioner's home confinement bracelet removal meets the first prong of the Strickland/Miller test of ineffective assistance of counsel. The Petitioner further argues that the second prong of the Strickland/Miller test is satisfied because Mr. Czarnik failed to explore the reason behind Ms. Houchins' action and explained the situation to the Petitioner, then the Petitioner would had never left his house. The Petitioner further argues that his entire probation revocation stemmed from him leaving the house and all of the alleged consequences.

Attorney Czarnik's Representation Of Two Co-Defendants, Who Could Have Testified Against Each Other, Violated West Virginia Rules of Professional Conduct And Constituted Ineffective Assistance of Counsel.

The Petitioner contends that Mr. Czarnik represented his co-defendant, Steven Weitzel, at the same time and the same offense. The Petitioner further contends that in Count Three of the Indictment, the Petitioner and Steven Weitzel were charged with "Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone" that allegedly occurred on August 6, 2002. In Count Five of the indictment the Petitioner, Steven Wietzel and two other co-defendants, Leslie Bird and Anthony Matherly, were charged with conspiracy that allegedly occurred between July 31 and August 8, 2002. The Petitioner argues that all of the defendants had precise knowledge about each other's involvement in the case, and could have testified against each other if this matter had gone to trial.

The Petitioner recognizes that Rule 1.7 of the West Virginia Rules of Professional Conduct allows for representation of multiple clients if the lawyer reasonably believes that his representation of these clients will not be adversely affected and the clients consent to such representation after consultation. However, the Petitioner further argues that all of these charges and allegations are tightly intertwined and that it would have been impossible to adequately

represent one defendant without acting adversely against his co-defendant.

Attorney Czarnik's Failure To File For Reinstatement Of Petition For Writ Of Prohibition Constituted Ineffective Assistance of Counsel.

The Petitioner contends that Mr. Czarnik's failure to file for reinstatement of his Petition for Writ of Prohibition constituted ineffective assistance of counsel. The Petitioner argues that on or about May 8, 2003, Mr. Czarnik filed a Complaint for Writ of Prohibition. In the Writ, the Petitioner alleged that he was charged by a warrant in the Mercer County Magistrate Court and arraigned on February 19, 2003. The Prosecuting Attorney, Janet Williamson, Esq., moved to dismiss the case on April 8, 2003, seeking an indictment, which was granted. The Petitioner argues that this dismissal denied him a preliminary hearing and the Petitioner sought to prohibit the State from submitting the case to the Grand Jury until it could be reinstated on the Magistrate court docket and until a preliminary hearing was held. The Petitioner argues that this Honorable Court dismissed the consolidated complaints for writs of prohibition on May 30, 2003 and quotes the Court as stating that it would allow reinstatement of these cases if "a. Either the Plaintiff is not presented for indictment by the October Term of the Grand Jury; and/or; b. The Plaintiff's bonds previously posted are not reinstated if either are indicted by the October term of the Grand Jury."

The Mercer County Grand Jury indicted the Petitioner on February 11, 2004 and was therefore, indicted in the February term instead of the October 2003 term. The Petitioner argues that because Mr. Czarnik did not file a petition for reinstatement of he Complaint for Writ of Prohibition, that the Petitioner was indicted by the Grand Jury on February 11, 2004.

The Petitioner argues that this inaction is clearly deficient under the objective standard of reasonableness, pursuant to the Strickland/Miller test. The Petitioner contends that but for

Mr. Czarnik's failure to seek reinstatement of the Complaint for Writ of Prohibition, the result of the proceeding would have been different. The Petitioner argues that had Mr. Czarnik sought to reinstate the Complaint for Writ of Prohibition before the Petitioner was indicted, the Court would have reinstated said complaint in accordance with the Court's June 10, 2003 Order. The Petitioner further argues that in the Court's order, this Court specifically stated that it would allow reinstatement of this action if the Petitioner were not indicted by (sic) October 2003 term. The Petitioner contends that Mr. Czarnik first filed a motion based on the three term rule on February 20, 2004, then withdrew it, and moved to dismiss the matter based upon the previously filed Complaint for Writ of Prohibition on April 26, 2004. The Petitioner argues that Mr. Czarnik moved to dismiss based on said complaint on April 26, 2004, which was after the Petitioner was indicted by the Grand Jury in the February 2004 term.

The Petitioner argues that Mr. Czarnik missed the window of opportunity wherein he could have sought reinstatement of the Petitioner's Complaint for Writ of Prohibition and may have prevented the indictment from taking place before the magistrate court case could be reinstated and a preliminary hearing held. The Petitioner further contends that Mr. Czarnik either neglected or decided to forgo filing a petition to reinstate the complaint, and such irreparable failure to act resulted in the Grand Jury returning an indictment against the Petitioner. The Petitioner argues that based upon the foregoing, Mr. Czarnik was ineffective in his representation of the Petitioner.

The Petitioner also alleges as ineffective assistance of counsel the following claim:

> Attorneys David Smith And Michael Cooke's Failure To File A Losh List And A Habeas Corpus Petition Constituted Ineffective Assistance of Counsel.

The Petitioner argues that his previous counsel, David Smith, Esq., and Michael Cooke,

Esq., withdrew from his case months after being appointed to represent him and failed to do any work on his behalf, such as a *Losh* list and a Petition for Writ of Habeas Corpus, *Ad Subjiciendum*. The Petitioner argues that Mr. Smith filed an Appellate transcript request for the Petitioner's November 16, 2004 plea hearing, in April and May, 2009, that he failed to file anything else on the Petitioner's behalf. The Petitioner argues that the next filing made by Mr. Smith was his Motion to Withdraw as Counsel based on three reasons: 1) that the Law Firm of Smith & Scantlebury, L.C., was about to dissolve; 2) that Mr. Smith had not received a plea hearing transcript; and 3) that his law partner, Phillip Scantlebury, was going to be practicing with Mr. Czarnik, the Petitioner's former attorney. The Petitioner contends that even if these reasons were legitimate reasons to allow Mr. Smith to withdraw from representation, Mr. Smith had not performed any work on the Petitioner's case for over a year prior to filing the motion to withdraw. The Petitioner contends that he did not even know if he still had an attorney to represent him.

The Petitioner argues that Mr. Smith's performance was ineffective under the Strickland/Miller test because of the failure to represent the Petitioner is any manner other than request a transcript. The Petitioner argues that but for Mr. Smith's unprofessional errors in handling the Petitioner's habeas corpus case, the result of the proceeding would have been different. The Petitioner argues that had Mr. Smith filed a petition and handled his case in a zealous manner then the Petitioner would have already had his omnibus hearing.

The Petitioner similarly contends that Michael Cooke, Esq., was ineffective in representing him upon review of his itemized statement of legal services. The Petitioner argues that this Court set a filing deadline of March 12, 2010 for the Petitioner's habeas corpus petition

but that instead of filing the habeas corpus petition that Mr. Cooke filed a Motion to Withdraw on April 18, 2010. The Petitioner argues that Mr. Cooke's performance was deficient under an objective standard of reasonableness because he failed to do any work whatsoever in preparing the Petitioner's habeas corpus petition, and because he had let the deadline to file such petition lapse, and only then filed a motion to withdraw from the case. The Petitioner further argues that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. The Petitioner ultimately contends that had Mr. Cooke been effective in representing the Petitioner, the Petitioner's habeas corpus petition would have been before this court, and the Petitioner would have had his omnibus hearing on April 30, 2010.

Respondent's Answer. See Section II, above.

Claim A: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim A:

(1) The Court **FINDS** that the West Virginia Supreme Court of Appeals stated the test to be applied in determining whether counsel was effective in *State v. Miller*:

> 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. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), syl. pt. 5.

(2) The Court **FINDS** that the West Virginia Supreme Court of Appeals has also stated that:

> Where counsel's performance, attacked as ineffective

> arises from occurrence 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, Syllabus point 21, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

(3) The Court **FINDS** that the West Virginia Supreme Court of Appeals has also 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 following testimony from the Probation Revocation hearing:

> COURT: Now there was a petition to revoke his probation based on violation of State law and failure to report an arrest and failure to appear at the probation department for a report.
>
> (*See*, Probation Revocation Hearing, p.3)
>
> By George Sitler, Esq., to Neva Repass:
>
> Q: Ms. Repass, please state your name for the record.
>
> A: Neva Repass.
>
> Q: And you are the mother of the respondent, Roger Repass. Is that right?

A: Yes.

Q: Now, on the 26th of July, did you make a complaint to the West Virginia State Police about a stolen vehicle?

A: Yes, I did.

Q: Okay. And you made that complaint because Roger had taken your car on the 22nd?

A: Yes, sir.

Q: Did he have permission to take the car?

A: No, sir.

Q: Now, four days lapsed between the time he had taken the car and the time you made the complaint. Why the delay?

A: I kept hoping he'd come home and bring the car back.

Q: Did you see Roger any time after he took the car before you talked to the police?

A: No, sir.

(*See*, Probation Revocation Hearing Transcript, pp.12-13)

It was further stated that:

By Mr. Sitler to Kimberly Moore, Probation Officer:

Q: Did you file a petition that we're here on today to revoke his probation?

A: Yes.

Q: Why did you file the petition?

A: I received a phone call from Neva Repass on July 21st–22nd stating that her son had taken her car the day prior, and that he had been gone for a couple of days and that before leaving, he had borrowed some money.

Following her phone call on the 22nd, I received a message that he had been arrested for grand larceny. I filed a petition based on violation of Rule No. 1, having violated a federal, state or local law, and failure to report the arrest to me.

Q: So Mr. Repass did not report his arrest on this charge to you?

A: No.

Q: Did Mr. Repass give you any reason for her opinion that Roger had taken her car?

A: No, she didn't give me any reason. She just reported that he had taken her car, borrowed some money and had not come home yet.

Q: Okay. Did you direct Mr. Repass to report to you at the probation office? Or did he have a monthly report date?

A: He had a monthly report date.

Q: Okay. And was that August 3rd?

A: Yes, it was.

Q: And did he report on August 3?

A: No, he failed to report on that date.

Q: Okay. And he's never told you about this arrest?

Q: No.

(*See*, Probation Revocation Hearing, pp.19-20)

The testimony continued as follows:

By Mr. Sitler to Roger Repass, Petitioner:

Q: Did you call your probation officer from the magistrate court?

A: No.

Q: Did you call your magistrate–did you call your probation officer after you left magistrate court?

A: No, sir.

Q: Did you call your probation officer from Princeton Community Hospital?

A: No, sir.

Q: Did you attempt to call your probation officer from jail?

A: Yes, sir.

(*See*, Probation Revocation Hearing, p. 31)

The Petitioner further testified that:

By George Sitler to Roger Repass:

Q: Mr. Repass, were you on home confinement when this happened?

A: No, sir.

Q: Was not Rule No. 10 of the probation contract that you be on home confinement at your mother's?

A: At this given point, I hadn't been on home confinement for a month because Jackie had come out and taken it off of me. Now she stated that she was coming back at some point to put it back on me, but she never did. And I called her when I was in Bluefield Jail and explained what happened to her. She had already taken the home confinement off of me for at least a month already.

Q: So Ms. Houchins released you from home confinement all together. She didn't just take the unit off.

A: No, she didn't release me all together on paper work. She released me as far as taking off my ankle bracelet.

Q: So she removed your electronic ankle bracelet but still indicated that you would be on home confinement?

A: She didn't say any way as far as that was concerned. She just said if I had any problems to make sure I called.

Q: Did your probation officer ever relieve you from the terms of being

on your home confinement?

MR. CZARNIK: Your honor, I object. It's irrelevant. In the petition, that is not really stated.

THE COURT: Well. You're right. It's irrelevant on the petition, but I still want to know the answer to that, because I'm flipping through right here and I see I put him on home confinement April 12th. I want to find out why she's cut off his home confinement bracelet. I mean, I want to get to the bottom of that. Were they out of bracelets or something?

So you can answer that, but I'm not going to consider that on the issue of whether you violated your probation. Why did she cut your bracelet off? (Emphasis added)

THE WITNESS: She never would give any reason. I've been to the hospital several times for my heart and the last time she came out, Your Honor, she took it off my ankle and she never did come back and put it back on.

THE COURT: There's only one person who can let you off home confinement.

THE WITNESS: That's you.

THE COURT: That's right. And I don't see that I've ever done that.

(*See*, Probation Revocation Hearing, pp. 43-46)

(5) The Court FINDS that the Petitioner's revocation was not revoked due to the removal of the home confinement bracelet but due to the Petitioner's violation of his probation for the grounds stated at the hearing as follows:

THE COURT: Well, I find by a preponderance of the evidence that he violated his probation. I mean, that is the most ridiculous story I think in 27 years I've heard come off this witness stand. I mean, it's –well, that's enough to be said about it.

His mother loaned him the car to go for a limited trip on the same road, which was wrong. He's on home confinement, but that's not an issue in this case. That's not what they alleged. But we need to have a discussion about this home confinement situation, about why he got taken off it. I want you to find that out, Ms. Moore. Why they took off his bracelet; why they haven't signed him up yet. What's going on down there? I mean, it's April that I did this. And idle hands are the devil's playground.

So he leaves out there, he goes to Bluefield, sees people he doesn't really know, loans them the car, and then, you know, when did the beating take place? He's basically held against his will for days because they borrowed the car. That just–you know, I'm dumb but I'm not stupid. I didn't come down with the last drop of rain. That's laughable. Absolutely laughable.

I find he didn't report it to the police. He had time to go past the police department. He didn't report it to the probation department. He had time to run all over town over there with this bloody bandana around his head, but couldn't get a hold of his probation officer; couldn't let his family know where he was.

So he–I did find that he stole the car, but (sic) but a preponderance of the evidence and he didn't report it. And so he's violated his probation.

(*See*, Probation Revocation Hearing, pp. 51-53)[4]

(*See*, Order entered August 22, 2005 revoking the Petitioner's probation)

---

[4]The Court notes that during the Petitioner's Probation Revocation hearing, the Petitioner testified that he drove the car over to Bluefield and meet up with some people who "conned" him into loaning them his mother's car. They refused to return the car to him while he was being held hostage, beaten, shot at, and threatened to not contact the police. (See Omnibus Habeas Corpus transcript, passim).

(6) The Court FINDS that Mr. Czarnik's representation was not ineffective on the issue of not investigating why the Petitioner's home confinement bracelet was removed because probation was revoked due to the Petitioner's joyriding charge, failure to report his arrest to probation and failure to report to his regular probation appointment.

(7) The Court FINDS that this inaction does not meet the second prong of *State v. Miller*, in that there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), syl. pt. 5.

(8) The Court FINDS that the result of the probation revocation would have been the same regardless of his counsel's performance on this issue.

(9) The Court **FINDS** and **CONCLUDES** that the Petitioner's claim of ineffective assistance of counsel based upon a removal of a home confinement bracelet is without merit.

(10) The Court FINDS that the Petitioner claims that Mr. Czarnik's representation of two co-defendants violates the West Virginia Rules of Professional Conduct and constitutes ineffective assistance of counsel.

(11) The Court FINDS that Rule 1.7 of the West Virginia Rules of Professional Conduct provides general guidelines for representation of multiple clients:

> (a) A lawyer shall not represent a client if the representation of that client will be will directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the representation with the other client; and
>
> (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(12) The Court FINDS that the Petitioner testified to the following at his Habeas Corpus Omnibus Hearing:

By Mr. Harvey to the Petitioner:

Q: Do you know who represented Steven Whitsel (sic)?

A: Thomas Czarnik.

Q: He represented the both of you?

A: At first, yes, sir.

Q: On the same indictment?

A: Yes, sir.

Q: Did you know he was–he was doing that?

A: Yes, sir.

Q: Okay. Did he explain to you that there could possibly be a conflict of him doing that?

A: No, sir, not at first he did not.

Q: Okay. He –he never explained to you that it could come down where you might have to testify against Mr. Whitsel (sic)?

A: That was–that was explained to me way after, well close to wherever the plea bargain was already signed and everything. But he did explain that to me and finally he said that he couldn't

represent my–my girlfriend.

(*See*, Omnibus Habeas Corpus Hearing, pp. 16-17)

He further testified that:

To the Petitioner by the Prosecuting Attorney:

Q: Did Mr. Czarnik represent you prior to the indictment?

A: After I was arrested me and my mother, then we went and spoke to him, yes, sir.

Q: And in fact, how many of the co-defendants did Mr. Czarnik–how many of those did he at first represent?

A: A Ms. Bird, which was my girlfriend at that time, and basically I was, you know, I was having spend a lot of time with her in her home. My best friend, Steven Whitsel (sic) and I'm thinking that's all the clients that he chose.

Q: And sometime after the indictments came down, Mr. Czarnik moved to get out of those other cases, didn't he?

A: Well, it went on for a good while before he even, you know, actually finally said that it was going to be a conflict between interest and then finally Mr. Whitsel (sic) had to go and get another attorney.

Q: Okay. Is there–there is a notice of –need to get out of the case, need to withdraw that Mr. Czarnik filed in April of 2004 about two months after the indictment.

A: Yes, sir.

Q: Does your memory–does that purport with your memory?

A: I –I can't even remember exactly to be honest with you if I said yes. I may be saying something wrong so I'm just letting you know. My memory is real hazy.

Q: Mr. Czarnik was representing you at the time of the plea about six and seven months later–

A: Yes, sir.

Q: And did he solely represent you during the six or seven months?

A: Yeah. Yes, sir.

(*See*, Omnibus Habeas Corpus Hearing, pp. 46-47)

Mr. Czarnik further testified that:

To Mr. Czarnik by the Prosecuting Attorney:

Q: One other thing I wanted to ask you. Common representation of the defendant and a co-defendant.

A: Um-hum.

Q: That occurred in this case, is that correct?

A: Yes, for a short period.

Q: And at some point you had made a motion to withdraw as counsel for a co-defendant?

A: Whitsel, (sic) I think.

Q: Um-hum. Without going into exactly why that is, what was the grounds you assert to the Court for having to get out?

A: Well, when–my recollection is all three of them, and Ms. Bird was Mr. Repass's (sic) girlfriend I believe at that time, came in together. And I'd had some contact with Roger before that is the reason why they came in and my recollection is Mr. Whitsel (sic) denied having anything to do with it. That is was all a mistake that he might be charged. And there–it seemed unclear as to what the nature of the charges might be against Ms. Bird. And then they dropped the indictment rather than have a prelim and it sat there. When the indictments came out I advised Mr. Whitsel (sic) and Ms. Bird they had to get another lawyer.

Q: Did you--

A: So, really, other than talking to them and both of them denying involvement I did nothing for them.

Q: But when you undertook representation of all three of them even if it were rather limited in the other two co-defendants, did you discuss possible difficulties and limitations with, with Mr. Repass?

A: I'm sure I did but I cannot tell you exactly because it was apparent at some point even though they were denying that they had any involvement in this that there could arise a conflict and Roger was first in the door so he's the one I kept.

MR ASH: Okay. No further questions.

THE COURT: Any questions at all?

MR. HARVEY: No, sir.

Additionally, to Mr. Czarnik by the Court:

THE COURT: And as far as your joint representation that ended April of '04, is that correct?

MR. CZARNIK: The –after the preliminary was–the warrants were dismissed without a preliminary hearing, we heard nothing further until the indictment came out with all of their names on it, that was the next contact and I advised her and Whitsel (sic) that they had to get another attorney.

THE COURT: Do you know whatever happened to Mr. Whitsel's (sic) case?

MR. CZARNIK: I think he went to Bill Akers and entered a plea but I'm not sure.

THE COURT: Did you even–did you do anything to negotiate anything for Mr. Whitsel (sic)?

MR. CZARNIK: No.

THE COURT: Did you do anything while you were presenting Mr. Whitsel (sic) or during that period of time that even affect him–

MR. CZARNIK: No, sir.

THE COURT: –Mr. Repass?

MR. CZARNIK: Since Mr. Whitsel (sic) was denying he had anything to do with it.

(*See*, Habeas Corpus Omnibus Hearing, pp. 91-92)

(13) The Court FINDS that Mr. Czarnik represented Defendant Weitzel[5] and Ms. Bird for a very limited time and advised them to seek other representation.

(14) The Court FINDS that Mr. Czarnik's brief and very limited representation of the other defendants did not effect the outcome of the Petitioner's guilty plea as Mr. Czarnik testified that he did not have any substantive representation of Mr. Whitsel (sic) or Ms. Bird.

(15) The Court **FINDS and CONCLUDES** that Mr. Czarnik was not ineffective in his representation of the Petitioner due to his briefly representing the co-defendants.

(16) The Court **FINDS and CONCLUDES** that the Petitioner's claim of ineffective assistance of counsel based upon briefly representing co-defendants and the Petitioner is without merit.

(17) The Court FINDS that the Petitioner claims that Mr. Czarnik's failure to file a Writ of Prohibition constituted ineffective assistance of counsel.

(18) The West Virginia Supreme Court of Appeals has consistently recognized that a preliminary hearing is not a constitutionally mandated proceeding. That was recognized in Syl. Pt. 1, *Lycans v. Bordenkircher*, 159 W.Va. 137, 222 S.E.2d 14 (1975) (*overruled* on other grounds by *Thomas v. Leverette*, 166 W.Va. 185, 273 S.E.2d 364 (1980)). The United States Supreme Court held in *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26

---

[5]The Court notes that the proper spelling of the co-defendant's name is Steven Weitzel.

L.Ed 2d 387 (1970), that a preliminary hearing is not a constitutionally mandated proceeding. *See also*, *Gurthie v. Boles*, 261 F.Supp. 852 (N.D.W.Va. 1967), *Gibson v. McKenzie*, 163 W.Va. 615, 259 S.E.2d 616 (1979), *State ex rel. Rowe v. Ferguson*, 165 W.Va. 183, 268 S.E.2d 45 (1980), *Desper v. State*, 173 W.Va. 494, 318 S.E.2d 437 (1984), *Peyatt v. Kopp*, 189 W.Va. 114, 428 S.E.2d 535 (1993) and Rule 5.1 of the West Virginia Rules of Criminal Procedure. Moreover, a preliminary hearing may be waived under syl. pt. 3 of *Lycans*.

(19) The Court FINDS that the Petitioner is not constitutionally mandated to receive a preliminary hearing.

(20) The Court FINDS that the following testimony was presented on the issue of the Writ of Prohibition:

> By Mr. Harvey to Mr. Czarnik:
>
> Q: Now, do you recall getting into Mr. Repass's (sic) case prior to indictment?
>
> A: Yes, I did.
>
> Q: Okay. Did you have a preliminary hearing in this case?
>
> A: No. Wwen (sic) we showed up for the preliminary hearing, the State dismissed over my objection in which I, in looking at the record it looks like it later became the subject of the Writ of Prohibition that you were talking about.
>
> Q: Okay. That Writ, that was designed to prohibit the State from indicting Mr. Repass prior to–
>
> A: Yes, I –
>
> Q: –his having a preliminary hearing?
>
> A: I rarely given up a preliminary because as the State calls it, it may be a

fishing expedition. Secondly, it gives me an idea what the State's case is and third sometimes the charges do not stand up or it becomes apparent on a later indictment that they may be guilty of a somewhat lesser offense.

Q: So you filed that petition and that petition was deserved?

A: Yes, I felt the State had no good reason to dismiss other than to avoid a a preliminary hearing.

Q: Now that petition, that Writ, it was dismissed, correct?

A: Yes. All right, I'm looking at a record. I think the Judge had told them that they should indict by a certain time, which they did not do, so it came up again, I think.

Q: Okay. Did you ask–so did–I believe the Court's ruling was that he had to be indicted in the October term or the Court would reinstate it, is that correct?

A: That's what I understand from the file, yes.

Q: So he wasn't indicted until February?

A: Correct.

Q: Did you ever reinstate the Writ?

A: Yes, I did. I think.

Q: Okay. What–what happened?

A: Well, there's been an argument that has never been decided by the Supreme Court first of all. I think there was some contact about the meaning of three term rule, which is actually three plus one.

We were in–in –I made that motion and realized that we weren't in the plus one category. I believe at that time we were in the three. Even if the Court had bought my argument that presentment as used in the statute meant that when he got arraigned before the magistrate. So I renewed, went with renewed Writ of Prohibition with regard to not having had a preliminary hearing and I believe the Court's ruling was that, you know, indictment cured that or going on–

Q: (Inaudible)--

A: Right.

(*See*, Habeas Corpus Omnibus Hearing, pp. 79-82)

(21) The Court FINDS that there is no reasonable probability that but for counsel not filing the Writ of Prohibition that result of the proceedings would have been different.

(22) The Court **FINDS and CONCLUDES** that the claim of counsel failing to file for Petition of Writ of Prohibition rising to the level ineffective assistance of counsel is without merit.

(23) The Court FINDS that David Smith, Esq., and Michael Cooke, Esq., were appointed Habeas Corpus counsel for the Petitioner.

(24) The Court FINDS that Mr. Smith and Mr. Cooke did not file a Petition for Writ of Habeas Corpus or a *Losh* checklist for the Petitioner.

(25) The Court FINDS that prior counsel's failure to file is harmless error as the Petitioner received his Omnibus Hearing on September 17, 2010.

(26) The Court FINDS that the Petitioner was not prejudiced by Mr. Smith and Mr. Cooke both withdrawing from his case as he now is now represented by Mr. Harvey.

(27) The Court FINDS that there is no reasonable probability that prior counsel's failing to file a Petition for Writ of Habeas Corpus the result of the proceedings would have different.

(28) The Court **FINDS and CONCLUDES** that the Petitioner's claim of prior counsel failing to file for Petition for Writ of Habeas Corpus rising to the level ineffective assistance of counsel is without merit.

(29) The Court **FINDS and CONCLUDES** that all claims of ineffective assistance of counsel on all grounds are without merit.

CLAIM B: COUNT TWO OF THE INDICTMENT WAS BASED ON INSUFFICIENT EVIDENCE.

The Petitioner's Argument. The Petitioner argues that the police report does not indicate that the Petitioner ever delivered the contraband to the confidential informant. Instead, while the report states that the Petitioner accepted the money from the confidential informant, the Petitioner argues that it is clear that the Petitioner was gone during the alleged delivery of oxycontin due to Anthony Matherly delivering the pill to the CS and Byrd then gave the money to Matherly. The Petitioner argues that Leslie Byrd and Anthony Matherly were directly involved in the alleged drug transaction, and that the Petitioner was absent from the scene. The Petitioner argues that the Grand Jury charged the Petitioner with three counts of delivery of a controlled substance and one count of conspiracy. The Petitioner specifically, argues that in Count Two, the Grand Jury indicted the Petitioner along with his co-defendants, Leslie Byrd and Anthony Matherly, as follows:

> **COUNT 2: the Grand Jury further charges**, that on or about the 5th day of August 2002, in the County of Mercer, State of West Virginia, ROGER REPASS, LESLIE M. BYRD and ANTHONY R. MATHERLY, committed the offense of "Delivery of Oxycontin, a Schedule II Controlled Substance containing Oxycodone, against the peace and dignity of the State.

The Petitioner further argues that the police report does not indicate that the Petitioner ever delivered the contraband to the confidential informant. Instead, while the report states that the Petitioner accepted the money from the confidential informant, it is clear that the Petitioner was gone during the alleged delivery of oxycontin:

At approximately 4:59 pm the CS arrived at the residence of Roger Repass and gave him

the money.

At approximately 5:10 pm the CS left the residence of Roger Repass en-route back to meet Lieutenant Harmon and the u/s officer.

At approximately 5:18 pm the CS returned to his residence and met Lieutenant Harmon and the u/s officer.

At approximately 5:42 pm the CS left our location en-route back to Roger Repass's [sic] residence to get the oxycontin pill while Lieutenant Harmon and the u/s officer followed to do surveillance.

At approximately 5:49 pm the CS arrived at the residence of Roger Repass and spoke with Leslie Byrd. Byrd stated that Roger had left and they waited for a while but he did not return. Byrd then called Anthony Matherly and *Matherly delivered the pill to the CS and Byrd then gave the money to Matherly.*

The Petitioner argues that the police report is clear that Leslie Byrd and Anthony Matherly were directly involved in the alleged drug transaction, and that the Petitioner was absent from the scene. The transcript of the alleged transaction is also clear that the Petitioner was absent from the scene. The transcript of the alleged transaction is also clear that the Petitioner was not the one who delivered the contraband to the confidential informant:

Bailey: The time right now is 6:42 pm. Same date [August 5, 2002] we're back at the uh...ci's residence uh...received the evidence which is a tan pill marked oc on one side 40 on the other uh...and a cigarette wrapper, tell me what happened...

CI: Well, when I got there she try to say Boo [Petitioner] had left but that she had to call her brother cause his brother knew the guy that he was getting it from. And so, her brother is Anthony Byrd. And he then went after it in a red pickup truck and I put the license number on the tape and the make of the truck and the model and the tags, and then I waited around fer [sic] seems like forever about twenty, twenty-five minutes and she said that Boo wouldn't be bringing it back that her brother would be bringing it back, but I gave Boo the money and then her brother Anthony came back and put the cigarette celophance in my hand.

Bailey: *So you got the pill from.*

CI: *Anthony Matherly.*

The Petitioner argues that based on the foregoing, it is clear that Anthony Matherly, and not the Petitioner, delivered the oxycontin to the confidential informant. In fact, the Petitioner was not even present at the scene at that time.

The Petitioner further argues that West Virginia Code § 60A-4-401 defines delivery an individual must manufacture, deliver, or possess with intent to manufacture or deliver a Schedule II controlled substance as follows: "(a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this subsection with respect to: (1) a controlled substance classified in Schedule I or II, which is a narcotic drug, is guilty of a felony". WVA. Code § 60A-4-401(a)(i).

The Petitioner contends that according to the statutory language and the language of the indictment, to be charged with crime of delivery of schedule II controlled substance, an individual must manufacture, deliver or possess with intent to manufacture or deliver a Schedule II controlled substance. The Petitioner argues that on August 5, 2002, Anthony Matherly possessed and delivered oxycontin to the confidential informant. The confidential informant, himself, conceded that he received contraband from Anthony Matherly that day. The Petitioner argues that because Anthony Matherly delivered the oxycontin and not himself that count two of the indictment was based on insufficient evidence.

Respondent's Answer. See Section II, above.

Claim B: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim B:

(1) The Court FINDS that the Petitioner rested on his brief on this claim during the

Habeas Corpus Omnibus Hearing.

(*See*, Habeas Corpus Omnibus Hearing Transcript, p. 95)

(2) The Court FINDS that the sufficient evidence existed to indict the Petitioner.

(3) The Court FINDS that Petitioner plead to Count Three of the Indictment and Count Two was dismissed.

(4) The Court **FINDS and CONCLUDES** that the claim of insufficient evidence is without merit.

CLAIM C: THE PETITIONER ENTERED INTO AN INVOLUNTARY PLEA OF GUILTY BECAUSE HE WAS UNDER THE INFLUENCE OF OXYCONTIN AT THE PLEA HEARING.

The Petitioner's Argument. The Petitioner argues that his guilty plea was involuntary due to the fact that he was under the influence of oxycontin at the plea hearing and did not fully comprehend the nature and consequences of his guilty plea agreement. The Petitioner argues that his record evidences that he had been under the influence of narcotics for an extended period of time. The Petitioner further contends that his record evidences the fact that he was sent to the Anthony Correctional Center for a sixty day (60) day pre-sentence evaluation and was diagnosed with Polysubstance Dependence and Depressive Disorder NOS under Axis I. The Petitioner argues that although he informed the court that he understood Rule 11 of the West Virginia Rules of Criminal Procedure that his polysubstance dependence disorder clouded his mind and the use of oxycontin preventing him from comprehending the rights he was waiving and the possible sentence he could receive if he pled guilty. The Petitioner contends that he was out on bond and under the influence of oxycontin at the time of the hearing which caused him to be prejudiced in taking the plea because he was not aware of the consequences of taking the plea, and therefore,

his plea was involuntary.

Respondent's Answer. See Section II, above.

Claim C: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim C:

1) The Court **FINDS** that the following colloquy occurred at the Petitioner's plea hearing:

> COURT: All right have you taken, consumed, or used any alcohol or drugs, or anything in the last forty-eight hours, that affects your ability to understand what you're doin' here today?
>
> REPASS: No sir.
>
> (*See*, Plea Hearing Transcript, pg. 5)

2) The Court further **FINDS** that the following colloquy occurred between the Court, the Petitioner and his counsel:

> COURT: Now, Mr. Repass, do you have any history of mental illness, alcohol, or drug addiction or any problem like that, that affects your ability to understand what you're doin' here today?
>
> REPASS: No sir.
>
> COURT: Okay. Mr. Czarnik, isn't this sort of an anti-intoxication, diminished capacity, or any type defense like that? (sic-insanity, intoxication, diminished capacity)
>
> MR. CZARNIK: No, Your Honor, I would note that Mr. Repass has had various prescriptions to which he's habituated and do not affect this hearing.
>
> (*See*, Plea Hearing Transcript, pg. 20)

3) The Court **FINDS** that the Petitioner testified to the following at his plea hearing:

> COURT: Have you understood all the matters I've explained to you today?

REPASS: Yes sir.

COURT: Have all of your answers been truthful?

REPASS: Yes sir.

(*See*, Plea Hearing Transcript, pg. 31)

4) The Court further **FINDS** that the Court referred to the Petitioner's plea forms during his plea hearing in the following:

THE COURT: Did you go over that letter with your attorney, Mr. Czarnik?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand that's your contract or deal and plea with the State?

THE DEFENDANT: Yes sir.

THE COURT: Okay is that your signature on the second page there?

THE DEFENDANT: Yes sir.

THE COURT: All right we'll go ahead and make that part of the court file. The next thing I'm gonna give you is the petition to enter a plea of guilty, it's the front and back of an 8 by 11 white piece of paper, I want you to look at that, have you seen that form before sir?

THE DEFENDANT: Yes sir.

THE COURT: Did you go over that form with your attorney, Mr. Czarnik?

THE DEFENDANT: Yes sir.

THE COURT: Do you have any questions about anything in that form?

THE DEFENDANT: No sir.

THE COURT: If you had any questions about it did he answer and explain them to your satisfaction?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand the meaning of that form and all of your rights and what you are giving up?

THE DEFENDANT: Yes sir.

THE COURT: Okay. Now when you all filled that out did you write answers down or did Mr. Czarnik write 'em down for you?

THE DEFENDANT: I wrote 'em down.

THE COURT: Those are your answers, you all went through it and you wrote the answers down?

THE DEFENDANT: Yeah.

THE COURT: Did you sign the bottom line on the second page?

THE DEFENDANT: Yes sir.

THE COURT: All right make that part of the court file. The next thing I'm giving you is the Defendant's Statement in Support of Guilty Plea, it's a front and back two pieces of paper and the front of a third so it's five pages long, it's an orange paper and it's 8 ½ by–8 ½ by 11 paper in size, got 73 questions, have you seen that form before?

THE DEFENDANT: Yes sir.

THE COURT: Did you go over that form with your attorney, Mr. Czarnik?

THE DEFENDANT: Yes sir.

THE COURT: Did you have any questions about that form?

THE DEFENDANT: No.

THE COURT: If you had any questions did he answer and explain 'em to your satisfaction?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand everything in that form are all your rights and what you are givin' up?

THE DEFENDANT: Yes sir.

THE COURT: And I guess when you went through that with him you wrote down your answers in your handwriting, is that correct?

THE DEFENDANT: Yes sir.

THE COURT: Did you sign the bottom of each of those five pages?

THE DEFENDANT: Yes sir.

THE COURT: I'll make that part of the court file. The next thing I'm gonna give you is the Attorney's Statement in Support of a Guilty Plea, Mr. Czarnik signed that so I'll make that part of the court file. The last is the actual Plea of Guilty, it's a front and back of an 8 by 11 white piece of paper, again have you seen that form before sir?

THE DEFENDANT: Yes sir.

THE COURT: Did you go over that with your attorney, Mr. Czarnik?

THE DEFENDANT: Yes sir.

THE COURT: Did you have any questions about anything in that form?

THE DEFENDANT: No sir.

THE COURT: If you had any questions about it did he answer it and explain it to your satisfaction?

THE DEFENDANT: (No audible response).

THE COURT: Did he answer it and explain it to your satisfaction?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand everything in that form, all your rights and what you're giving up?

THE DEFENDANT: Yes sir.

THE COURT: Okay. Now, again when you went through that you told him the answers and you wrote your answers down, is that correct?

MR. CZARNIK: I wrote 'em down.

THE COURT: And you wro–uh Mr. Czarnik wrote the answers but they're your answers, is that right?

THE DEFENDANT: Yes sir.

THE COURT: Did you sign the front of that form?

THE DEFENDANT: Yes sir.

(See Plea Hearing Transcript, pp. 24-28)

5) The Court FINDS that the Defendant's Statement in Support of Guilty Plea inquired of the following:

Q. 22: "Have you been under the influence of any drugs or alcohol or other stimulants while completing this questionnaire?"

A. 22: "No."

Q. 25: "Are there any words in the Indictment that you do not understand?"

A. 25: "No."

Q. 27: "Is your recollection impaired in any way?"

A. 27: "No."

Q. 69: " Do you know and understand that your decision to plead guilty is final and that your plea may not be withdrawn for any reason after its is accepted?"

A. 69: "Yes."

Q. 70. "Have you truthfully and fully answered all of these questions?"

A. 70. "Yes."

Q. 71. "Knowing and understanding all of these things, do you still desire to plead guilty?"

A. 71. "Yes."

(See, Defendant's Statement in Support of Guilty Plea)

6) The Court **FINDS** the Petitioner voluntarily pled to the instant offense and answered that he was not under the influence of drugs at the time of his plea.

7) The Court **FINDS** that if the Petitioner was under the influence of drugs at the time of his plea, then he has falsely testified under oath about a material issue.

8) The Court **FINDS** that under WVA. Code § 61-5-1, perjury is defined as:

> (a) Any person who is under oath or affirmation which has been lawfully administered and who willfully testifies falsely regarding a **material** matter in a trial of any person, corporation or other legal entity for a felony, or before any grand jury which is considering felony indictment, shall be guilty of the felony offense of perjury. (Emphasis added). *See also*, *State v. Crowder*, 146 WVA. 810, 123 S.E.2d 42 (1961).

9) The Court **FINDS** that "material" is defined as:

> Of such a nature that knowledge of the item would affect a person's decision-making process; significant; essential. *See*, *Black's Law Dictionary.*

10) The Court **FINDS** that the Petitioner testified to the following at his Omnibus Habeas Corpus hearing:

Q: Now, as a result of these charges you–you decided to plea–to make a plea bargain?

A: Yes, sir.

Q: Okay. Mr. Czarnik had you plea to one count, correct?

A: Yes, sir.

Q: And when you made that plea you had to come in front of a Judge, correct?

A: Yes, sir.

Q: Okay. And he went over your rights with you?

A: Yes, sir.

Q: Were you using drugs at that time?

A: Yes, sir.

Q: You were using them at the time that you pled?

A: Yes, sir.

Q: Do you remember what you've been using before you come in?

A: Pain medications, Oxycodone.

Q: Was this medication prescribed to you?

A: Yes, sir. And some of it–some of it I had gotten on the streets, too.

Q: Okay. Were you taking it as prescribed or were you abusing it?

A: I was taking as prescribed like I said at first and then things got worse and–

Q: I mean at the plea hearing.

A: At the plea hearing, no.

Q: Okay. Were you able to understand what was going on at the plea hearing?

A: I was hazy. There was some things that I understand but it's sort of like a blur to me.

Q: Okay. But you–you told the judge that you weren't under the influence, correct?

A: Yes, sir.

(*See*, Omnibus Hearing Transcript, pp. 11-12)

11) The Court **FINDS** that the Petitioner admitted that he was guilty of the charge and that he lied to the Court regarding using drugs during the plea hearing during the following testimony at the Omnibus Habeas Corpus hearing:

Q: Did you–did you request to withdraw your plea at the time when you realized–when you were sober and you realized this was not the thing to do?

A: Well, to be quite honest with you I–I had said–mentioned something about on the lines I didn't know if I had made the right decision to Mr. Czarnik several times. And, I also, you know, –I had a lot of regret because there was a lot–I understand I pled guilty and **I was guilty of this charge that I, you know, that they got me on.** You know, I'm in no denial of that whatsoever, which I've pulled five years of now, close to now on the one to fifteen. But, during that period when I come back from the Anthony Center my mind was clear and I had actually regretted because then I started thinking, you know, I'm–I'm on a one to fifteen and they sort of – they told us the regulations and rules in the Department of Corrections. They told me I was on a seven-and-a-half year discharge. And, you know, it sort of hurt me, yes, it did. (Emphasis added)

Q: When you came back from sentencing, you were clean and sober?

A: Yes, sir.

Q: The Judge, did he ask you if you want–had anything to say at the time?

A: You know, I–I can't-I think he did ask me if I had anything to say. I can't–

Q: And did you–

A: –for sure

Q: And did you tell him at that time that you wanted to withdraw your plea?

A: No, sir, I sure didn't.

Q: Did you tell him that you had lied to him previously and you were actually stoned at the time that you entered the plea?

A: No, sir. I sure didn't.

(*See*, Omnibus Habeas Hearing Transcript, pp. 49-50)

Q: The-when you–you swore to tell the truth today. You pretty much swore the same oath at the time that you entered the guilty plea, didn't you?

A: Yes, sir, I did.

Q: And what you're telling the Court today is that you lied under oath during that time as to your sobriety?

A: Absolutely, sir, I did.

(*See*, Omnibus Habeas Corpus Transcript, p. 52)

THE COURT: Well, I'll tell you what it says then. It's where your lawyer ask (sic) you if you'd been using any drugs or alcohol and you knew what you were doing at the time, and you did say that you'd use it 24 hours before that but you
knew what you were doing when you filled out that form. Flip the page, there. See where I put that sticky. Right through down there?

THE RESPONDENT(sic)[6]: Yes, sir.

THE COURT: If you can't read it, but I asked all of that. He asked you all of that. So you lied to your lawyer, is that right?

THE RESPONDENT(sic): Yes, sir. At that given time I was untruthful.

THE COURT: And you lied to me too?

THE RESPONDENT (sic): Yes, sir, I did.

(*See*, Omnibus Habeas Corpus Transcript, p. 63)

THE COURT: Did you answer him that you were guilty of this anyway? I mean, is that what I heard? Did you tell Mr. Ash that you were guilty?

THE RESPONDENT (sic): Yes, sir, I don't deny that.

(*See*, Omnibus Habeas Corpus Transcript, p. 65)

12) The Court **FINDS** that the Petitioner had an opportunity to withdraw his plea at his sentencing hearing but failed to do so.

13) The Court **FINDS** and **CONCLUDES** that the Petitioner committed perjury

---

[6]The Court notes that the Petitioner is inadvertently referred to as "Respondent" throughout the Omnibus Habeas Corpus transcript.

during his omnibus habeas corpus hearing.

14) The Court **FINDS** and **CONCLUDES** that the Petitioner admitted at his Omnibus Habeas Corpus hearing that he was guilty of his convicted offense.

15) The Court **FINDS** and **CONCLUDES** that the Petitioner's claim of entering into an involuntary plea is without merit.

CLAIM D: THE PETITIONER DID NOT POSSESS THE REQUISITE MENS REA TO COMMIT CONSPIRACY BECAUSE HE WAS UNDER THE INFLUENCE OF NARCOTICS AT THE TIME OF THE CRIMINAL ACT.

Petitioner's Argument. The Petitioner argues that he lacked the requisite mental state to commit delivery of controlled substance as charged in Count Three of the indictment. Counts One, Two and Four of the indictment charge the Petitioner and his co-defendants, with "unlawful and felonious delivery of Oxycontin to a confidential informant, against the peace and dignity of the State." The Petitioner further argues that Count Five of the Indictment charges the Petitioner and his co-defendants with "unlawfully and feloniously conspiring wit (sic) another to deliver a Schedule II Controlled Substance, to-wit: Oxycodone, against the peace and dignity of the State." The Petitioner argues that to commit the delivery of schedule II controlled substance and conspiracy, the Petitioner had to decide to unlawfully and feloniously delivery (sic) to the confidential informant, and, at the same time, to conspire with his co-defendants, Steven Wietzel, Leslie Byrd, and Anthony Matherly, to commit the same. The Petitioner argues that due to being under the influence of narcotics at the time of the commission of the crime, that he did not have the capacity to form such mindset due to being under the influence of narcotics at the time of the commission of the crime.

Respondent's Answer. See Section II, above.

Claim D: Findings of Fact and Conclusions of Law. The Court makes the following specific findings of fact and conclusions of law regarding Claim D:

1) The Court **FINDS** the Petitioner may have been voluntarily intoxicated through the use of narcotics during the times of criminal acts.

2) The Court **FINDS** that the Petitioner relies on a diminished capacity defense for Claim D.

3) The Court **FINDS** that the West Virginia Supreme Court of Appeals recognized a diminished capacity defense in *State v. Joseph*, 214 WVA. 525, 590 S.E.2d 718 (2003), Syl. Pt. 3:

> 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 from 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 charge, but does not preclude a conviction for a lesser included offense.

4) The Court **FINDS** that a diminished capacity defense allows " a defendant to offer evidence of his mental condition with respect with his capacity to achieve the mens rea or intent required for commission of the offense charged." *Id.*

5) The Court **FINDS** that the diminished capacity defense applies when the Defendant has a mental disease or defect, such as the defendant in *Joseph*, who suffered from a brain injury.

6) The Court **FINDS** that West Virginia Supreme Court of Appeals has allowed evidence of voluntary intoxication to show that a defendant was incapable of forming the required

mental state for first degree murder. *See, State v. Keeton*, 166 WVA. 77, 82-83, 272 S.E.2d 817, 820 (WVA. 1980).

7) The Court **FINDS** that in *State v. Myers* , 159 WVA. 353, 222 S.E.2d 300 (1976), the West Virginia Supreme Court Appeals held that:

> "When a defendant in 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 given an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case."

8) The Court **FINDS** 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 WVA. 752, 260 S.E.2d 295 (1979).

9) The Court FINDS that the following plea colloquy with the Petitioner on the issue of his competency occurred during the plea hearing:

> THE COURT: Now, Mr. Repass, do you have any history of mental illness, a alcohol, or drug addiction or any problem like that, that affects your ability to understand what you're doin' here today?
>
> THE DEFENDANT: No sir.
>
> THE COURT: Okay. Mr. Czarnik, isn't this sort of an anti-intoxication, diminished capacity, or any type defense like that? (sic-insanity, intoxication, diminished capacity)
>
> THE COURT: No, Your Honor, I would note that Mr. Repass has had various prescriptions to which he's habituated and do not affect this

hearing.

(*See*, Plea Hearing Transcript, p. 20)

10) The Court **FINDS** that evidence of diminished capacity does not establish a complete defense but allows for a defendant to negate intent in a crime such as a first degree murder case.

11) The Court **FINDS** that the Petitioner pled guilty to delivery of a controlled substance; to-wit; oxycodone.

12) The Court further **FINDS** that diminished capacity provides for the possibility of a conviction of a lesser included offense.

13) The Court **FINDS** that conspiracy includes the following elements pursuant to WVA. Code § 61-10-31:

> It shall be unlawful for two or more person to conspire (1) to commit any offense against the State or (2) to defraud the State, the state or any county board of education, or any county or municipality of the State, if, in either case, one or more of such persons does any act to effect the object of the conspiracy.

14) The Court **FINDS** that conspiracy does not have lesser included offenses.

15) The Court **FINDS** that the Petitioner pled guilty to one count of delivery of a controlled substance, to-wit: oxycodone and not conspiracy.

(16) The Court **FINDS** that a criminal defendant is presumed sane and that if sanity and the ability to stand is an issue then the Petitioner's counsel is required to request a hearing.

(17) The Court **FINDS** that the Petitioner showed no indication to his counsel or this Court that he was not competent to stand trial, or criminally responsible for his acts.

18) Therefore, the Court **FINDS and CONCLUDES** that the Petitioner's claim of not

possessing the requisite mens rea to commit conspiracy because he was under the influence of narcotics is without merit.

RULING

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

1. That the Petition for Writ of Habeas Corpus sought by the Petitioner is hereby **DENIED** and this action is ordered **REMOVED** from the docket of this Court.

2. The Court appoints Joseph T. Harvey, Esq., to represent the Petitioner on any appeal of this ruling.

3. This is a final order. The Circuit Clerk is directed to distribute a certified copy of this Order to Joseph T. Harvey, Esq., at 1605 Honaker Avenue, Princeton, WV 24740, to Scott Ash, Esq., Prosecuting Attorney of Mercer County, West Virginia at 120 Scott Street, Suite 200, Princeton, WV 24740, and to the Petitioner at Huttonsville Correctional Center, Huttonsville, WV 26273.

ENTER: This the 7th day of April, 2011.

Derek C. Swope, Circuit Judge

THE FOREGOING IS A TRUE COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 7 DAY
OF April 20 11
DATED THIS 8 DAY OF April
20 11

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