STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Kevin F. Fortney,
Petitioner Below, Petitioner

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 11-1143** (Harrison County 08-C-58-1)

Evelyn Seifert, Warden,
Respondent Below, Respondent

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Rocco Mazzei on behalf of Petitioner Fortney, arises from the Circuit Court of Harrison County, wherein petitioner's petition for writ of habeas corpus was denied by order entered on July 13, 2011. Respondent Warden Seifert, by counsel Jacob Morgenstern, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 2006, a jury convicted petitioner of seven counts of obtaining money by false pretenses. At sentencing, the circuit court ordered petitioner to serve seven consecutive sentences of one to ten years incarceration, totaling a term of seven to seventy years incarceration. This Court denied petitioner's appeal of these convictions in March of 2007. Petitioner thereafter filed a petition for writ of habeas corpus in circuit court, which was denied. Petitioner appeals, arguing the same issues that he raised in circuit court.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

> "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." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

Our review of the record submitted on appeal, alongside the parties' arguments and the circuit court's order, shows that the habeas circuit court committed no error in factual findings nor abuse of discretion in its conclusions.[1] The appellate record indicates that the habeas court held an omnibus evidentiary hearing and, in addition to petitioner's testimony at this hearing, it reviewed transcripts from the underlying trial and the hearing on petitioner's motion for a new trial. Petitioner's arguments on appeal are all arguments he raised before the habeas circuit court, all of which the habeas circuit court addressed and analyzed in its thorough forty-five-page order denying habeas corpus relief.[2] Having reviewed the circuit court's "Order *Denying* Petition For a Writ of Habeas Corpus" entered on July 13, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

ISSUED: October 22, 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

[1] We note that although a copy of the transcript for the omnibus evidentiary hearing was included in the appellate record, the transcripts for the underlying trial proceedings, to which the habeas circuit court made numerous references in its order denying habeas relief, were not included.

[2] We note that one of petitioner's arguments concerns the trial court's ruling on his credit for time served on his sentence. In its order, the habeas circuit court made a finding that after the omnibus hearing, petitioner provided additional information concerning this matter and that the habeas circuit court would subsequently address this issue in a separate order.

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

KEVIN FORTNEY,

Petitioner,

v.

EVELYN SEIFERT, Warden,
Northern Correctional Facility,

Respondent.

Civil Action No. 08-C-58-1
Judge John Lewis Marks, Jr.

ORDER *DENYING* PETITION FOR A WRIT OF HABEAS CORPUS

Presently pending before the Court is the Petitioner's, Kevin Fortney's, February 1, 2008, "Petition Under W.Va. Code § 53-4A-1 for Writ of Habeas Corpus." The Court is also in receipt of the "State's Response to Post-Conviction Petition for Writ of Habeas Corpus," filed February 20, 2008.

After a couple appointments of counsel and subsequent conflicts of interest, the Court ultimately appointed Rocco Mazzei, Esq., to serve as Petitioner Fortney's habeas counsel. Petitioner Fortney, with the aid of his habeas counsel, Attorney Mazzei, filed his amended "Petition for Post-Conviction Writ of Habeas Corpus" and the "Checklist of Grounds for Post-Conviction Habeas Corpus Relief" on June 16, 2009. The State filed the "Respondent's Answer to Petition for Post-Conviction Writ of Habeas Corpus" on August 21, 2009.

An omnibus hearing was held August 24, 2009, at which time Petitioner Fortney appeared in person and by his counsel, Attorney Mazzei. The Respondent appeared by William R. Walker, Assistant Prosecuting Attorney for Harrison County, West Virginia. At the hearing, the Court directed the parties to submit their respective findings of fact and conclusions of law.

After reviewing the parties' filings, considering the parties' arguments, listening to testimony at the omnibus *habeas corpus* hearing, and studying pertinent legal authority, the Court is of the opinion that Petitioner Fortney's petition for a writ of *habeas corpus* should be denied for the reasons that follow, *infra*.

I. **Pertinent procedural history and findings of fact.**

(a) The September 2005 Term of the Harrison County, West Virginia, Grand Jury indicted Petitioner Fortney on one count of fraudulent schemes in violation of W.Va. Code § 61-3-24d (Count One) and eight counts of obtaining money by false pretenses in violation of W.Va. Code § 61-3-24 (Counts Two through Nine). *See* Indictment, Court File 05-F-147-1, at pages 1-6.

(b) Thomas G. Dyer, Esq., represented Petitioner Fortney during the underlying criminal case. *See* Order, Court File 05-F-147-1, at page 12.

(c) A jury trial was held on February 16 and 17, 2006, during which the Court granted Petitioner Fortney's motion for acquittal as to the charge of fraudulent schemes (Count One). The jury found Petitioner Fortney guilty of seven counts of obtaining money by false pretenses (Counts Two, Three, Four, Six, Seven, Eight, and Nine). *See* Verdict Forms and Trial Order, Court File 05-F-147-1, at pages 78-84 and pages 88-94, respectively.

(d) On April 10, 2006, Petitioner Fortney was sentenced as follows:

(1) For the felony offense of obtaining money by false pretenses as contained in Count Two of the indictment, the Court committed Petitioner Fortney to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years;

(2) For the felony offense of obtaining money by false pretenses as contained in Count Three of the indictment, the Court committed Petitioner Fortney to the custody of the West

Virginia Department of Corrections for a term of not less than one year nor more than 10 years;

(3) For the felony offense of obtaining money by false pretenses as contained in Count Four of the indictment, the Court committed Petitioner Fortney to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years;

(4) For the felony offense of obtaining money by false pretenses as contained in Count Six of the indictment, the Court committed Petitioner Fortney to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years;

(5) For the felony offense of obtaining money by false pretenses as contained in Count Seven of the indictment, the Court committed Petitioner Fortney to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years;

(6) For the felony offense of obtaining money by false pretenses as contained in Count Eight of the indictment, the Court committed Petitioner Fortney to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years; and,

(7) For the felony offense of obtaining money by false pretenses as contained in Count Nine of the indictment, the Court committed Petitioner Fortney to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years.

The Court also Ordered, *inter alia*, that the aforesaid terms of imprisonment were to be served consecutively with each other for a total sentence of seven to 70 years. However, the aforesaid sentences were to be served concurrently with the two consecutive one-year sentences that Petitioner Fortney was serving in the North Central Regional Jail on Harrison County cases 02-F-97-3 and 02-M-10-3. The Court, further, Ordered that the aforesaid sentences were to be served concurrently with the sentence that he was serving in the North Central Regional Jail and the terms of imprisonment

imposed upon him in the Marion County Circuit Court. *See* Order and Commitment Order, Court File 05-F-147-1, at pages 196-205 and page 206, respectively.

(e) The Court had severed Count Five (obtaining money by false pretenses), and Petitioner Fortney pled guilty to that charge on February 7, 2007. *See* Trial Order, Court File 05-F-147-1, at pages 88-94; Order, Court File 05-F-147-1, at pages 116-17; and Order, Court File 05-F-147-1, at pages 282-87.

(f) By the time Petitioner Fortney pled guilty to Count Five, the Court had appointed Jonathan Fittro, Esq., as substitute counsel. *See* Order, Court File 05-F-147-1, at pages 192-94.

(g) On February 7, 2007, the Court sentenced Petitioner Fortney to serve not less than one nor more than 10 years in the penitentiary to run concurrently with the sentences he was serving pursuant to the convictions on the other Counts of the indictment in this case. *See* Order and Commitment Order, Court File 05-F-147-1, at pages 282-87 and at page 288, respectively.

(h) An appeal of the underlying conviction was filed on January 17, 2007. Petitioner Fortney challenged the Court's permitting the State to use evidence of his prior convictions for obtaining money by false pretenses in Case Nos. 02-M-10-3 and 02-F-97-3 under W.Va. R. E. 404(b). *See* Docketing Statement and Petition for Appeal, Court File 05-F-147-1, at pages 241-43 and pages 259-65, respectively. The West Virginia Supreme Court of Appeals refused the petition by Order entered March 15, 2007. *See* Order, Court File 05-F-147-1, at page 289.

(i) On February 1, 2008, Petitioner Fortney filed his initial petition for writ of habeas corpus and raised the following grounds: (a) ineffective assistance of counsel (including failure to investigate, failure to interview state witness, failure to

subpoena cell phone and land-line phone records, failure to call expert witnesses, "failure to retain Grand Jury transcripts," "prejudicial and actual conflict of interest," "prejudicing the minds of the jury via exhibits," failure to object during closing arguments, tainted State's witness, failure to prepare defendant for cross-exam, and denial of right to appeal); (b) the State's use of Rule 404(b) evidence (the State introduced evidence of Petitioner Fortney's prior convictions to demonstrate intent, motive, or plan); (c) denial of the right to appeal; (d) prosecutorial misconduct, *viz.*, improper statements to the jury, vouched for State witnesses, inflammatory remarks to jury, unprofessional conduct during closing arguments and at sentencing hearing; (e) jury selection (Jurors Grisso and Cogar should have been struck for cause); (f) excessive sentence (his conviction was obtained by a violation of the protections against Double Jeopardy and "multiplicity"); and (g) erroneous jury instructions on reasonable doubt, fraudulent schemes, larceny, Rule 404(b), and others. Petition, Court File 08-C-58-1, at pages 1-7.

(j) Petitioner Fortney's June 16, 2009, amended petition alleged the following grounds for relief:

(1) insufficient evidence existed at trial to convict Petitioner Fortney of obtaining money by false pretenses;

(2) the trial court erred by permitting the State to use evidence of Petitioner Fortney's prior convictions of obtaining money by false pretenses in Case Nos. 02-M-10-3 and 02-F-97-3 under W.Va. R. E. 404(b);

(3) ineffective assistance of trial counsel for failing to investigate, failing to develop defenses, prejudicing the defendant at trial by use of harmful exhibits and inadmissible evidence, failure to object to there being no jury instructions on lesser-included offenses, failure to strike juror Sam Sheets, failure to utilize defendant's records and receipts, failure to call an expert witness concerning acceptable

business practice of co-mingling customer funds, failure to develop and file a motion for change of venue because of pre-trial publicity, failure to sequester the State's investigator or to have the investigator testify first at trial, failure to interview and subpoena defendant's 25 employees for trial, failure to obtain Grand Jury transcript, failure to cross-examine each of the seven customers relevant to their failures to give the defendant notice under W.Va. Code 46A-6-106, failure to strike Juror Grisso as biased, and failure to prepare the defendant for cross-examination;

(4) the trial court's failure to order a new trial based upon the *voir dire* responses of jurors, Sam Sheets and Alicia (Leisha) Swiger;

(5) that defendant's sentence was excessive;

(6) that the prosecutor referred to defendant as a "scam artist" at trial; and,

(7) that the defendant did not receive proper credit for time served in the sentencing order.

(k) A review of the "Checklist of Grounds for Post-Conviction Habeas Corpus Relief," filed pursuant to Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981), and as confirmed by Petitioner Fortney and his counsel upon the record in this matter at the time of the August 24, 2009, omnibus hearing, reveals that Petitioner Fortney has waived the following grounds:

(1) trial court lacked jurisdiction;

(2) statute under which conviction obtained unconstitutional;

(3) indictment shows on face no offense was committed;

(5) denial of right to speedy trial;

(6) involuntary guilty plea;

(7) mental competency at time of crime;

(8) mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate;

(9) incapacity to stand trial due to drug use;

(10) language barrier to understanding the proceedings;

(11) denial of counsel;

(12) unintelligent waiver of counsel;

(13) failure of counsel to take an appeal;

(14) consecutive sentence for same transaction;

(15) coerced confessions;

(16) suppression of helpful evidence by prosecutor;

(17) State's knowing use of perjured testimony;

(18) falsification of a transcript by prosecutor;

(19) unfulfilled plea bargains;

(20) information in pre-sentence report erroneous;

(22) Double Jeopardy;

(23) irregularities in arrest;

(24) excessiveness or denial of bail;

(25) no preliminary hearing;

(26) illegal detention prior to arraignment;

(27) irregularities or errors in arraignment;

(28) challenges to the composition of Grand Jury or its procedures;

(29) failure to provide copy of indictment to defendant;

(30) defects in indictment;

(31) improper venue;

(32) pre-indictment delay;

(33) refusal of continuance;

(35) prejudicial joinder of defendants;

(36) lack of full public hearing;

(37) non-disclosure of Grand Jury minutes;

(38) refusal to turn over witness notes after witness has testified;

(39) claim of incompetence at time of offense, as opposed to time of trial;

(40) claims concerning use of informers to convict;

(43) claims of prejudicial statements by trial judges;

(46) acquittal of co-defendant on same charge;

(47) defendant's absence from part of the proceedings;

(48) improper communications between prosecutor or witnesses and jury;

(49) questions of actual guilt upon an acceptable guilty plea;

(50) severer sentence than expected; and,

(52) mistaken advice of counsel as to parole or probation eligibility.

See Losh Checklist, Court File 08-C-58-1, at pages 122-26 and at pages 127-31.

(l) Petitioner Fortney has characterized the issues he wishes the Court to address in the following 10 areas:

(1) prejudicial pre-trial publicity (Losh Checklist No. 4);

(2) ineffective assistance of counsel (Losh Checklist No. 21);

(3) refusal to subpoena witnesses (Losh Checklist No. 34);

(4) Constitutional errors in evidentiary rulings (Losh Checklist No. 41);

(5) instructions to the jury (Losh Checklist No. 42);

(6) claims of prejudicial statements by prosecutor (Losh Checklist No. 44);

(7) sufficiency of evidence (Losh Checklist No. 45);

(8) excessive sentence (Losh Checklist No. 51);

(9) amount of time served on sentence, credit for time served (Losh Checklist No. 53); and,

(10) that the Court failed to order a new trial or that the defendant was denied a fair trial when the Court denied his motion for a new trial based upon the *voir dire* answers of the jury foreman, James ("Sam") Sheets (Losh Checklist No. 54).

Id. Furthermore, Petitioner Fortney certified by signing the Losh Checklist that he waived all grounds that were not initialed by him, and Attorney Mazzei certified by signing that Petitioner Fortney knowingly, intelligently, and voluntarily, after having consulted with counsel, waived the grounds not initialed for purposes of that proceeding and all future State habeas corpus proceedings. Id.

(m) At the August 24, 2009, omnibus habeas hearing sworn testimony was elicited from Petitioner Fortney. Pertinent portions of his testimony are set forth within the body of this Order. Petitioner Fortney called no other witnesses on his behalf.

(n) Admitted at the hearing, as "Petitioner's Exhibit 1," was a list of 46 customer ("client") names containing dates, counties, and job status. (Petitioner Fortney refers to this list as "The 47 Names.") *See* List, Court File 08-C-58-1, at page 165.

(o) Petitioner Fortney's petition for a writ of habeas corpus encompasses three areas: (1) insufficiency of the evidence, (2) the improper admission of Rule 404(b) evidence, and (3) the purported ineffective assistance of trial counsel.

Petitioner Fortney believed that the first two areas were questions of law and that evidence should be adduced at the omnibus hearing on the ineffective assistance of counsel.

(p) **Prejudicial Pre-trial Publicity (Losh Checklist No. 4)**

The Court finds that Petitioner Fortney has failed to put forth any specific evidence in support of his claim that prejudicial pre-trial publicity played a part in his convictions. During the omnibus hearing, Petitioner Fortney testified that the pre-trial publicity of his case was "brutal," but did not offer any other evidence, documentary or otherwise, in support of his contention. At the omnibus hearing, Petitioner Fortney failed to submit any documentary evidence in support of this particular claim; that is, no newspaper articles, no videotaped news reports, or anything of that nature, were submitted for the Court's consideration. Further, a review of the underlying criminal Court File 05-F-147-1 discloses that no motion for a change of venue was ever filed prior to trial and the post-trial motions and the defendant's *pro se* letters to the Court do not address the issue of prejudicial pre-trial publicity.

(q) **Ineffective Assistance of Counsel (Losh Checklist No. 21)**

(1) The Court finds that Petitioner Fortney was not rendered ineffective assistance of counsel.

(2) In subsection 3(a) of his supplemental petition, Petitioner Fortney contends that trial counsel was ineffective for not obtaining and using at trial Petitioner Fortney's phone records documenting the many and various calls and communications to his customers, which he claims would have gone directly to the issue of his intent. Regardless of whether trial counsel had obtained phone records and

used the same at trial, a review of the two-volume trial transcript reveals that defense counsel questioned the victims (witnesses for the State) about Petitioner Fortney's calls to them (his customers) in order to adduce evidence that Petitioner Fortney did not intend to obtain money by false pretenses. Defense counsel attempted to demonstrate at trial that Petitioner Fortney had merely "bitten off more than he could chew" as far as the amount of construction work that he attempted to complete. In addition to questioning the State's witnesses, Petitioner Fortney, himself, testified as to his regularly maintaining contact with his customers. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at pages 402, lines 10-24, through page 403, lines 1-5. Assuming that trial counsel had obtained Petitioner Fortney's actual phone records, the same may have been cumulative evidence and, quite possibly, prejudicial to the defense.

(3) In subsection 3(b) of his supplemental petition, Petitioner Fortney claims that trial counsel failed to develop and use at trial the defense that the non-performance of the construction contracts was because of Petitioner Fortney's incarceration on March 2, 2005, and that he lacked the intent to defraud his customers. A review of the trial transcripts reveals that defense counsel did elicit from Melissa Halpenny, a victim and State's witness, that she was aware that Petitioner Fortney was in jail and was not in a position in the spring of 2005 to complete a construction job for her. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at page 185, lines 7-23. Defense witness, Paul Wood, testified that Petitioner Fortney ran out of time before "he got in trouble" and could not finish the job. Id. at page 378, lines 12-18. Defense witness, Dave McQuain, also testified that Petitioner Fortney's work on his particular project stopped because Petitioner Fortney became incarcerated. Id. at page 333, lines

1-7. Defense witnesses George Harrison, Petitioner Fortney's construction crew supervisor, testified that he worked for Petitioner Fortney until Petitioner Fortney was put in jail. Id. at pages 338, lines 12-14, through page 339, lines 1-2 Moreover, Petitioner Fortney testified at trial concerning his March 2005 incarceration and his resultant inability to finish the construction jobs. Id. at page 404, lines 10-24, through page 405, lines 1-10; page 455, lines 2-3; page 465, lines 7-8; page 469, lines 13-17; page 470, lines 4-9; page 471, lines 14-24; and page 472, lines 10-11. Petitioner Fortney also testified that law enforcement told him not to return to the jobs. Id. at page 405, lines 18-22; and page 416, line 24, through page 417, lines 1-11.

(4) In subsection 3(c) of his supplemental petition, Petitioner Fortney argues that the demonstrative aid prepared by defense counsel identifying Petitioner Fortney's customers and jobs contained prejudicial information and harmed his defense. Defense counsel distributed the chart (Defendant's Exhibit No. 1) to the jury prior to Petitioner Fortney's testimony at trial. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at page 383, lines 5-24, through page 384, lines 1-10. Petitioner Fortney also claimed that the State used the demonstrative aid on cross-examination, which prejudiced his defense.

The Court believes that defense counsel's preparation and use of a chart (marked as Petitioner's Exhibit No. 1 at the August 24, 2009, omnibus habeas hearing), was intended to aid in Petitioner Fortney's defense at trial. The chart listed client names, dates that the contracts were entered into, the counties in which the work was to have occurred, and the status of each job. A review of the chart reveals that nine of the 46 jobs (almost 20 percent) were completed, and the other jobs were either incomplete or in varying degrees of completion. Obviously, this chart was prepared to support the

defense's theory that Petitioner Fortney had "bitten off more than he could chew" in terms of construction projects and that he had not intended to defraud anyone.

Moreover, Petitioner Fortney testified at trial that he worked with defense counsel to prepare the chart of his 46 customers. Id. at page 390, lines 14-23. Petitioner Fortney also admitted to the assistant prosecuting attorney that Petitioner Fortney and defense counsel prepared the chart together. Id. at page 458, lines 18-24, through page 459, lines 1-3.

(5) In subjection 3(d) of his supplemental petition, Petitioner Fortney contends that defense counsel failed to develop and use evidence regarding Count Nine (Patricia Ann Gizzi). Specifically, Petitioner Fortney wanted to demonstrate that although he had received $17,500 from Patricia Gizzi, he performed substantial labor and had significant material costs that nearly equaled or exceeded her down payment. Petitioner Fortney also alleged that defense counsel failed to do the same for Count Seven (Kenneth Haslebacher) and Count Two (Melissa Halpenny).

A reading of the trial transcripts reveals that, on cross-examination, defense counsel questioned Patricia Ann Gizzi, victim and State's witness, about the work Petitioner Fortney had either completed or almost completed for her. Defense counsel inquired "as to the cost or the value of the materials and labor, that had been provided by Mr. Fortney to complete the work that was, in fact, completed." *See* Trial Transcript, Volume One, Court File 05-F-147-1, at page 255, lines 2-8. Ms. Gizzi responded, "Not much." Id. Petitioner Fortney also testified at trial that he had put more into the Gizzi job than was paid for. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at page 401, lines 2-23.

Kenneth Haslebacher testified on direct examination that Petitioner Fortney had agreed on January 10, 2005, to fully refund the money for the work and materials that Petitioner Fortney had not completed or purchased. *See* Trial Transcript, Volume One, Court File 05-F-147-1, at page 167, lines 14-23. But, Mr. Haslebacher never received the money. Id. On cross-examination, defense counsel elicited testimony that Petitioner Fortney had successfully completed a painting project for Mr. Haslebacher's wife. *See* Trial Transcript, Volume One, Court File 05-F-147-1, at page 169, lines 19-23. Defense counsel also attempted to elicit testimony that Petitioner Fortney was willing to purchase materials for the Haslebacher project and to perform the contract but that Petitioner Fortney was "in over [his] head with a bunch of jobs", among other things. Id. at page 170, at lines 8-15 and 20-24, and page 171, at lines 1-17.

Melissa Halpenny testified that she entered into a contract with Petitioner Fortney to put a retaining wall between her and her neighbor's properties for the total amount of $3200. *See* Trial Transcript, Volume One, Court File 05-F-147-1, at page 177, lines 5-24, through page 179, lines 1-19. Ms. Halpenny had paid Petitioner Fortney $2000, and he did not complete the job. Id. at page 179, lines 20-24, through page 180, lines 1-5. In fact, his workers had done maybe half of the work required just to put in a footer. Id. at page 180, lines 7-24, through page 182, line 1. She then had to hire another contractor to complete the work. Id. at page 183, lines 7-8, Defense counsel was able to elicit that Petitioner Fortney was unable to complete the Halpenny job in early March of 2005 because he was incarcerated. Id. at page 185, lines 7-23.

Frankly, the Court cannot find that defense counsel failed to develop (and rehabilitate) the above evidence. Defense counsel took every opportunity to cast the facts in the light most favorable to Petitioner Fortney, *i.e.* that Petitioner Fortney had

merely bitten off more work than he could chew, that he was not evading his customers, and that other circumstances prevented him from finishing the contracted-for jobs. Moreover, the overwhelming evidence adduced at trial revealed that Petitioner Fortney had done little or no work after having been paid to do so.

(6) In subsection 3(e) of his supplemental petition, Petitioner Fortney argues that defense counsel improperly introduced inadmissible evidence of convictions in Monongalia County, West Virginia, through the testimony of Jane Robinson. Defense counsel called Jane Robinson, probation officer, to the stand, and she testified that Petitioner Fortney had paid a large amount of restitution to previous customers for prior convictions against him in an attempt to illustrate that Petitioner Fortney was making amends to his previous customers and that had no intent to defraud anyone. It was obvious from Ms. Robinson's testimony that there were other cases against Petitioner Fortney for conduct similar to that charged in the instant case. The Court cannot understand how the mere reference to location (a "Mon County" case) was prejudicial to Petitioner Fortney. Besides, Petitioner Fortney testified, himself, at trial about his 2002 and 2003 Harrison County convictions, the Monongalia County case against him, the fact he was paying restitution and had paid approximately $44,000, and that he was making payments until his incarceration in March 2005. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at page 393, lines 7-24, through page 394, lines 1-8. Petitioner Fortney also claimed at trial that he pled guilty on previous charges because of the mistaken advice of counsel. Id. at page 477, lines 18-23. Petitioner Fortney even testified at trial that he returned three customers' money. Id. at page 396, lines 19-24, through page 397, line 1.

(7) In subsection 3(f) of his supplemental petition, Petitioner Fortney claims that defense counsel failed to object to there being no lesser-included offense instructions for misdemeanor violations, especially as concerns Counts 2, 7, and 9, where Petitioner Fortney claims he partially performed the contracts.

A review of the Court file reveals that an "Instruction No. 2" was submitted that included the offense of grand larceny; however, the Court omitted the offense of grand larceny from the instruction and gave the instruction as amended. Further, counsel for the State and defense counsel discussed the propriety of instructions on lesser-included offenses at trial:

> THE COURT: Let's go on the record with these instructions. The Court will give State's Instruction Number 1 on each count of the indictment that the jury's going to consider. That's Counts 2, 3, and 4, and 6, 7, 8, and 9.
>
> MR. REYNOLDS: That was State's 2, correct, Your Honor? State's 1 was not given. Or do you want them--that renumbered?
>
> THE COURT: State's 1 was what?
>
> MR. REYNOLDS: State's 1 was not given. We discussed back in chambers--
>
> THE COURT: Oh, okay.
>
> MR. REYNOLDS: --that was the--
>
> THE COURT: You're right.
>
> MR. REYNOLDS: --that was for Count 1.
>
> THE COURT: You're right. This is State's 2. I'm sorry. And this instruction just deals with the offense charged in the indictment, no lessor [sic] offenses. We discussed that, I believe, informally.
>
> Mr. Reynolds, do you request that the Court give a lessor [sic] included instruction with respect to any of the charges contained in any of the counts in the indictment?

MR. REYNOLDS: No, Your Honor, I don't. The reason being that there's really been no evidence from any witness that any of any of [sic] the work completed or any of the amounts taken from any of any of the victims was less than $1,000 dollars.

The only--I mean, a vast majority of them, there was absolutely no work done, and I specifically asked Ms. Halpenny, and Ms. Gizzi about the amount of work that was done, and the value of it, and they both testified that the value of the work that was not done was at least $1,000 dollars in both cases.

THE COURT: Well, and I don't think there's any--really any evidence to the contrary in that regard. Mr. Dyer, what's your position on this?

MR. DYER: Your Honor, I have no objection to deleting [sic] the opportunity for a finding of a misdemeanor on each and every one of these counts.

I don't recall there being any specific evidence to support a misdemeanor finding with respect to any of the counts. And frankly, we would otherwise not prefer--make that option available to the jury anyway.

THE COURT: Well, it would appear to the Court that based upon the evidence, that the jury can either return a verdict of guilty on a felony charge that's contained in each of these counts, or a verdict of not guilty.

The amounts that were testified to were all in excess of $1,000 dollars, and that being the amount obtained by the alleged false pretense.

The only question that I thought might have been even close was the--which one was that, Mr. Reynolds?

MR. DYER: Gizzi.

MR. REYNOLDS: Ms. Gizzi or Halpenny?

THE COURT: No.

MR. REYNOLDS: It was Halpenny, Count 2.

THE COURT: Halpenny. And even Mr. Fortney testified that the work that was done there--my recollection, my notes reflect it was about $700 to $900 dollars, which would still make the amount that was obtained from her without any work being done in excess of $1,000 dollars. And the fact that neither one of you request a lessor [sic] included instruction, the Court will not give one.

I'll give State's Instruction Number 2 as submitted, then. The Court will give Defendant's Instruction Number 1, Defendant's 2 as amended.

I'll give that one instruction I prepared on the prior convictions and similar conduct. And I'll give State's 3, which is--as amended.

And then I'll give the general charge to the jury and I made some minor changes to that. Made sure that it included the paragraph on the fact that the defendant did testify and he's a competent witness.

I deleted under credibility the intoxication of any witness at the time of the events concerning which they testified, because I don't think there's any evidence of that. And I think everything else is pretty much as prepared.

So, any objection to the charge, Mr. Reynolds or Mr. Dyer?

MR. DYER: I have no objection, Your Honor.

MR. REYNOLDS: I have no objection to it, Your Honor, because it's normally--pretty standard. I'm just looking for a copy of it, and I don't see it here real quick. I know you--

THE COURT: I don't know if you have--

MR. REYNOLDS: --handed it to us in there, but I don't know if I took my copy or not.

THE COURT: I don't think I have an extra copy of the charge. I'll let you look at it, if you want. We can take a short recess, if you want to make a copy?

MR. REYNOLDS: Yes, I would like to, Your Honor.

THE COURT: Any objection with respect to the other instructions that the Court intends to give, Mr. Reynolds?

MR. REYNOLDS: No objections, Your Honor.

THE COURT: Or the amendments to those instructions?

MR. REYNOLDS: No objection to them as we discussed them.

THE COURT: Mr. Dyer?

MR. DYER: No objections, Your Honor.

See Trial Transcript, Volume Two, Court File 05-F-147-1, at page 482, lines 11-24, through page 486, lines 1-19.

During the Court's reading of the instructions to the jury, the Court and counsel modified "Instruction Number 2" as a result of the following discussion:

> THE COURT: . . .The Court instructs you, ladies and gentlemen, that the offense charged in each count of the indictment in this case is obtaining money by false pretenses.
>
> One of two verdicts may be returned by you under these counts of the indictment. They are guilty of obtaining money by false pretenses and not guilty.
>
> Obtaining money by false pretenses is committed when any person obtains from another person by any false pretense, token, or representation with the intent to defraud money, which may be the subject of a larceny.
>
> Grand larceny is the unlawful and felonious stealing, taking, and carrying away of a [sic] personal property of another worth the value of $1,000 dollars or more, without the owner's consent and with the intent to permanently deprive the owner of his property.
>
> Let me see counsel here a second.
>
> ---
>
> (Bench conference with counsel.)
>
> THE COURT: I think that's confusing.
>
> MR. REYNOLDS: Okay, just take it out.
>
> MR. DYER: You're confusing them.
>
> MR. REYNOLDS: And the grand larceny part?
>
> MR. DYER: I mean, it's considered to be a larceny, and is punnishable [sic] as a larceny, but it is not the same as--
>
> MR. REYNOLDS: Well, the reason we put it in, is because, in order for him to be found guilty of the felony, it has to be--

THE COURT: You don't need that.

MR. REYNOLDS: Okay. Okay.

THE COURT: Do you want me to say, larceny is the unlawful felonious stealing, taking, and carrying away of a [sic] personal property of another person?

MR. REYNOLDS: Okay.

MR. DYER: Fine with me.

MR. REYNOLDS: Okay.

THE COURT: With the intent to permanently deprive the owner of the property. I don't--do we need this in here?

MR. DYER: I don't think we do.

THE COURT: I'm going to take it out.

MR. REYNOLDS: Okay.

THE COURT; Okay.

MR. REYNOLDS: Alright.

THE COURT: I'm going to read this over again.

MR. REYNOLDS: Alright.

THE COURT: I'm going to read it over.

(Bench conference concluded.)

THE COURT: Okay. Now, I read something there that really isn't applicable to this case, ladies and gentlemen. So, disregard my last three paragraphs of instruction on this instruction[.]

Id. at page 498, lines 22-24, through page 501, lines 1-2.

Ultimately, the Court finds that Petitioner Fortney was not entitled to any instructions on lesser-included offenses based upon the evidence adduced at trial and because his counsel made the strategic decision to decline them.

(8) In subsections 3(g) and 3(h) of his supplemental petition, Petitioner Fortney claims that defense counsel failed to strike James ("Sam") Sheets, a juror who later became jury foreman, after learning during *voir dire* that Mr. Sheets knew State's witness and alleged victim, Alicia Swiger. Petitioner Fortney also claimed that defense counsel failed to move to strike Mr. Sheets for cause, who then became the jury foreman.

During *voir dire*, Sam Sheets, venire person, advised the Court that one of the victims and State's witnesses, Alicia Swiger, was an acquaintance of his from college. *See* Trial Transcript, Volume One, Court File 05-F-147-1, at pages 36, lines 3-6. Although Mr. Sheets was not a close and personal friend, he advised that he would speak with Ms. Swiger if he saw her. Id. at lines 7-12. Mr. Sheets also advised the Court that he did not have any ongoing type of relationship with Ms. Swiger, did not visit in each other's homes or anything like that, and did not visit with each other or get together. Id. at lines 13-21. The Court also made inquiry of Mr. Sheets as follows:

> THE COURT: Let me ask you this. The fact that you know who she is and she may--she's alleged to be a victim in this case, and may be called as a witness as well, based upon that do you feel that you would have any difficulty in being fair and impartial in this case?
>
> MR. SHEETS: No, I wouldn't.
>
> THE COURT: Do you think that would cause you to lean in favor of one side or the other or be against one side or the other?
>
> MR. SHEETS: No.

THE COURT: And could you set your knowledge of her aside, in other words not let it enter into your decision in this case in anyway, but if you're on this jury decide this case solely on the evidence that you will hear during the trial and the law that the Court will instruct you on?

MR. SHEETS: Yes, sir.

THE COURT: Okay, and can you weigh and consider her testimony by the same rules that you're to weigh and consider the testimony of anybody who testifies in this case?

MR. SHEETS: Yes, sir.

Id. at lines 22-24 and page 37, lines 1-19. In addition, defense counsel, during his *voir dire* of the venire panel, asked Sam Sheets about his familiarity with Alicia Swiger. Id. at page 101, at lines 13-16. Mr. Sheets had attended West Virginia Business College in Nutter Fort and had graduated in December 2005. Id. at page 101, lines 17-24. Ms. Swiger was still attending college there. Id. at page 101, line 24, and page 102, line 1. Mr. Sheets denied having any knowledge of her or relationship with her prior to that. Id. at page 102, lines 2-4. Defense counsel moved to strike Jurors Reeder and Cogar for cause, and the Court granted defense counsel's motion. Id. at page 104, lines 20-24, through page 106, lines 1-6. After the parties exercised their peremptory strikes, the Circuit Clerk called the names of the jurors to be empanelled for the trial of this case. Id. at page 110, 1-24, through page 114, lines 1-4. Sam Sheets was empanelled as the first juror to hear the underlying criminal case. Id.

During the inquiries made of Juror Sheets by the Court and counsel for the parties, the Court had the opportunity to observe Juror Sheets' demeanor and believed Juror Sheets' statements to be credible, truthful and not indicative of any bias or other reason for disqualification. This particular ground is also addressed in subsection (y), *infra*.

(9) In subsection 3(i) of his supplemental petition, Petitioner Fortney claims that defense counsel failed to utilize Petitioner Fortney's records and receipts documenting purchases of materials, which would bolster the defense's case on the lack of criminal intent. However, Petitioner Fortney presented the Court with no documentary or other evidence at the August 24, 2009, omnibus habeas hearing in support of this contention.

(10) In subsection 3(j) of his supplemental petition, Petitioner Fortney claims that defense counsel "failed to provide the 47 names on said chart to be used at trial for the Court to use during voir dire." Although not all of the names of Petitioner Fortney's 46 customers on the demonstrative aid were disclosed to the jury, certain Harrison County customers who ultimately testified at trial for the State were disclosed to the jury during the Court's *voir dire*. Specifically, Kenneth Haslebacher, Melisa Halpenny, William Riley, Alicia Swiger, Jeff Strange, Jean Haught, and Patricia Gizzi were disclosed to the jury as potential witnesses. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, pages 24, lines 16-24, through page 38, lines 1-6. Further, Paul Cathal, Dave McQuain, David Hall, Robert Longstreth, Paul Wood, and Richard Summers, who were listed as customers on defense counsel's demonstrative aid, were also disclosed to the jury as potential defense witnesses. (Mr. Summers did not testify at trial.) *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at page 75, lines 22-24, through page 78, lines 1-8. Other than a conclusory statement of ineffectiveness in this particular regard, Petitioner Fortney has not produced any evidence to support his ground. In addition, Petitioner Fortney did not call his former trial counsel, Thomas G. Dyer, Esq., as a witness at the omnibus habeas hearing to explore this issue.

(11) In subjection 3(k) of his supplemental petition, Petitioner Fortney claims that defense counsel failed to utilize the services of an expert witness at trial to testify to the appropriateness of co-mingling customer funds in the home contracting business. However, the issue of whether Petitioner Fortney had co-mingled customer funds was not an element of the crime of fraudulent schemes, W.Va. Code. 61-3-24d, or obtaining money by false pretenses, W.Va. Code § 61-3-24. Therefore, the Court cannot find that defense counsel erred by not adducing expert testimony on this particular issue.

(12) In subsection 3(l) of his supplemental petition, Petitioner Fortney alleged that defense counsel failed to develop and file a motion for a change of venue on the underlying criminal case because of the "substantial pretrial publicity" in the local newspaper and local news stations. But, Petitioner Fortney has failed to put forth any evidence in support of his claim, as previously stated in subsection (p), *supra*.

(13) In subsection 3(m) of his supplemental petition, Petitioner Fortney claimed that defense counsel failed to sequester one of the investigators, Detective Pat McCarty of the Harrison County Sheriff's Department, or require him to testify first. Detective McCarty was a representative for the State and was not required to be sequestered. In addition, Detective McCarty's testimony was not crucial to the State's case. Although Deputy McCarty testified in large part to Petitioner Fortney's prior bad acts, or Rule 404(b) evidence, tending to show motive, intent, etc., seven victims testified for the State. Because Deputy McCarty testified as to prior bad acts, defense counsel no doubt knew what Deputy McCarty would say at trial. As it is, Petitioner Fortney did not call his former trial counsel, Thomas G. Dyer, Esq., as a witness at the omnibus habeas hearing to explore this ground.

(14) In subsection 3(n) of his supplemental petition, Petitioner Fortney argues that defense counsel failed to interview and subpoena his 25 employees for trial to establish that he had an on-going enterprise and "not a one man fraud operation," which evidence would have negated any criminal intent. Despite Petitioner Fortney's assertion, defense counsel did call as witnesses at trial a couple of Petitioner Fortney's workers, *i.e.* Scott Green and George Harrison, to testify as to the "legitimacy" of Petitioner Fortney's construction business, among other things. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, at page 305, lines 18-24, through page 326, lines 1-7, and at page 337, lines 18-24, through page 348, lines 1-9, respectively. To call any more witnesses on the legitimacy of Petitioner Fortney's business would be cumulative and probably inadmissible. Besides, Petitioner Fortney testified to his business set-up and that he had eight to 15 men working on different projects at a time. Id. at page 384, lines 12-24, through page 390, lines 1-10.

(15) In subsection 3(o) of his supplemental petition, Petitioner Fortney contends that defense counsel failed to obtain the Grand Jury transcript and review it prior to trial. It does not appear from a review of the record that defense counsel obtained a Grand Jury transcript; however, the Court cannot determine whether defense counsel's failure to obtain a transcript was ineffective because Petitioner Fortney did not call his former trial counsel, Thomas G. Dyer, Esq., as a witness at the omnibus habeas hearing.

(16) In subsection 3(p) of his supplemental petition, Petitioner Fortney contends that defense counsel failed to cross-examine the State's witnesses on their failure to give him a 20-day notice under W.Va. Code § 46A-6-106, permitting him the opportunity to correct or pay for any problems. He believes that testimony on this

issue would have negated any criminal intent. The Court notes that W.Va. Code § 46A-6-106(b) [2005] (the "cure offer" provision) concerns civil actions brought under the West Virginia Consumer Credit and Protection Act, not criminal actions. West Virginia Code § 46A-6-106(b) [2005] provides that a civil action may not be brought under that section until the consumer has informed the seller or lessor in writing and by certified mail of the alleged violation and provided the seller or lessor 20 days from receipt of the notice of violation to make a cure offer. Whether any of the victims gave Petitioner Fortney the opportunity to tender a cure offer has no relevance in the context of the underlying criminal action. That being said, the Court recalls defense counsel inquiring of the victims, the State's witnesses, as to Petitioner Fortney's attempts to make things right throughout the trial.

(17) In subsection 3(q) of his supplemental petition, Petitioner Fortney argues that defense counsel failed to strike Juror Grisso "after she indicated potential bias and potential prejudice to contractors based on her experience with a local contractor and by her mother, juror Grisso even went so far as saying she had been following petitioner's case for the past year[.]" At trial, the Court, the assistant prosecuting attorney, and defense counsel had made inquiry of Juror Grisso about her knowledge of the underlying criminal case and her ability to be fair and impartial. Juror Grisso claimed to know about the charges against Petitioner Fortney from reading the local newspaper and no other source. *See* Trial Transcript, Volume One, Court File 05-F-147-1, at page 83, lines 6-24, through page 92, lines 1-13. During the questioning of Juror Grisso, the Court had the opportunity to observe her demeanor and believed her statements to be credible, truthful and not indicative of any bias or other reason for disqualification.

(18) In subsection 3(r) of his supplemental petition, Petitioner Fortney claimed that defense counsel failed to prepare him to testify and for cross-examination. Petitioner Fortney did not call his former trial counsel, Thomas G. Dyer, Esq., as a witness at the omnibus habeas hearing, and the Court believes that Petitioner Fortney has failed to carry his burden of proof on this issue.

(r) **Refusal to Subpoena Witnesses (Losh Checklist No. 34)**

Petitioner Fortney raised the refusal to subpoena witnesses in subsections (q)(2), (q)(5), (q)(9), (q)(11), and (q)(14) of the ineffective assistance of counsel category, *supra*.

(s) **Constitutional Errors in Evidentiary Rulings (Losh Checklist No. 41)**

Petitioner Fortney claims that the Court erred by permitting the State to use evidence of prior convictions under W.Va. R. E. 404(b). On the first day of trial, the Court heard arguments of counsel concerning the State's Motion to Use 404(b) Evidence. The Court directed counsel for the State not to bring any such evidence in its opening or its case-in-chief. The Court held its ruling on said motion in abeyance. The Court further directed counsel for the State to advise the Court prior to attempting to introduce prior convictions. *See* Trial Order, Court File 05-F-147-1, at pages 88-94. After the State's witnesses testified relative to the charges against Petitioner Fortney, the Court granted the State's Motion to Admit 404(b) Evidence for the following reasons: "1. The evidence goes to show defendant's intent; 2. The evidence if properly offered would show the intent of the defendant; 3. The Court believes such evidence was probative to show intent; and 4. The probative value of such evidence outweighed any unfair prejudice to the defendant." Id. at page 90. "The Court informed the parties that it

would give a cautionary instruction for the jury to only consider 404(b) evidence as proof of motive, plan and intent." Id. *See* Trial Transcript, Volume One, Court File 05-F-147-1, at page 125, lines 14-24, through page 131, lines 1-23. The Court also elaborated on its decision to permit this 404(b) evidence to show intent, motive, and plan in Trial Transcript, Volume One, Court File 05-F-147-1, at page 213, lines 3-24, through page 215, lines 1-22. The Court also gave a cautionary instruction. Id. at page 264, lines 9-24, and page 265, at lines 1-13.

(t) **Instructions to the Jury (Losh Checklist No. 42)**

Petitioner Fortney raised defense counsel's failure to insist upon lesser-included offense instructions in subsection (q)(7) of the ineffective assistance of counsel heading, *supra.*

(u) **Claims of Prejudicial Statements by Prosecutor (Losh Checklist No. 44)**

Petitioner Fortney claims that the assistant prosecuting attorney made a prejudicial statement to the jury when he referred to Petitioner Fortney as a "scam artist," but the Court finds nothing improper about the prosecutor's remarks. The Court has reviewed the closing arguments of defense counsel and Scott Reynolds, Assistant Prosecuting Attorney. *See* Trial Transcript, Volume Two, Court File 05-F-147-1, beginning at page 512, lines 17-24, through page 540, lines 1-18. In his closing, defense counsel stated, *inter alia*, "If this were a scam, if this were some global effort to cheat these people out of their money, nobody would've got any work done." Id. at page 529, lines 13-15. In arguing that Petitioner Fortney lacked the necessary intent to "scam" the victims, Attorney Dyer stated, "[t]his [criminal] statute is for scam artists. People who come into the neighborhood, who come to town, play upon unsuspecting

individuals. [Clarification added.]" Id. at page 532, lines 6-8. The prosecutor, in his rebuttal argument, merely capitalized upon defense counsel's statements when he stated, among other things, "Mr. Dyer says that this statute was intended for scam artists. Frankly, I would agree with that. I think it is for scam artists." Id. at page 535, lines 18-21, in part. In rebutting defense counsel's argument that Petitioner Fortney was "just like every other contractor out there," the prosecutor stated, "Well, Ladies and Gentlemen, he's not. He is the scam artist that Mr. Dyer was--was talking to you about." Id. at page 537, lines 19-20.

(v) **Sufficiency of Evidence (Losh Checklist No. 45)**

The Court finds that Petitioner Fortney's argument on this ground must fail. At the trial of the underlying criminal case, the defense moved for a judgment of acquittal on the second day of trial on February 17, 2006. *See* Trial Order, Court File, 05-F-147-1, at pages 88-94. The Court granted defense counsel's motion as to Count One of the Indictment (fraudulent schemes), but denied the motion as to Counts Two, Three, Four, Six, Seven, Eight, and Nine (obtaining money by false pretenses.) Count Five, obtaining money by false pretenses, was severed and would be tried separately. Id. The Court denied the remainder of defense counsel's motion for a judgment of acquittal because the Court felt sufficient evidence had been presented; more evidence had been presented than simply non-performance; the State had established the times the jobs were to be completed; the State had established the number of jobs to be performed by the defendant; there were other transactions of similar character and similar representations; prior convictions of the defendant; and efforts made by the defendant after accepting money from the victims, to-wit: (a) the defendant would not show up; (b)

the victims' attempts to contact the defendant; and (c) the defendant's attempts to get more money from the victims. Id.

Frankly, the evidence convicting Petitioner Fortney of his crimes was overwhelming. The State called seven victims who testified as to the defendant's obtaining money by false pretenses, and the witnesses gave damning evidence against Petitioner Fortney.

(w) **Excessive Sentence**
(Losh Checklist No. 51)

The sentences imposed by the Court for Petitioner Fortney's convictions in the underlying case are not excessive and, in fact, mirror the language contained in W.Va. Code § 61-3-24(a)(3) [1994], which provides, in pertinent part:

> If the value of the money, goods or other property is one thousand dollars or more, such person is guilty of a felony, and, upon conviction thereof, ***shall be imprisoned in the penitentiary not less than one year nor more than ten years,*** or, in the discretion of the court, be confined in jail not more than one year and be fined not more than two thousand five hundred dollars. [Emphasis added.]

On Counts Two, Three, Four, Six, Seven, Eight, and Nine, the Court ordered that the defendant be committed to the custody of the West Virginia Department of Corrections for a term of not less than one year nor more than 10 years. By Order entered July 18, 2006, the Court, *inter alia*, ruled:

> It was further ORDERED that the aforesaid terms of imprisonment shall be served **consecutively** with each other for a total sentence of seven to seventy (7-70) years. However, the aforesaid sentences shall be served concurrently with the two consecutive one-year sentences that the defendant is currently serving in the North Central Regional Jail on Harrison County cases 02-F-97-3 and 02-M-10-3. **However, the aforesaid sentences are to be served concurrently with the sentences in 02-F-97-3 and 02-M-10-3 as of this date forward.** It is further ORDERED that the aforesaid sentences are to be served concurrently with the sentence the defendant is currently serving in the North Central Regional Jail and the terms of imprisonment imposed upon

the defendant in the Circuit Court of Marion County, West Virginia. [Emphasis in original.)

See Order and Commitment Order, Court File 05-F-147-1, at pages 196-205 and at page 206.

After Petitioner Fortney pled guilty to Count Five of the Indictment on February 7, 2007, the Court sentenced him to serve "not less than one (1) year nor more than ten (10) years in the penitentiary to run concurrently with the sentences he is presently serving pursuant to his convictions of [sic] the other counts of the Indictments in this case." *See* Order, Court File 05-F-147-1, at pages 282-87.

(x) **Amount of Time Served on Sentence, Credit for Time Served (Losh Checklist No. 53)**

Petitioner Fortney contends that he did not receive proper credit for time served in the sentencing order. Specifically, he states that he was jailed on March 2, 2005, on a probation violation in 02M-10-3 and 02F-97-3 by Probation Officer Fawcett. On March 2, 2005, Detective McCarty served the defendant with a felony arrest warrant for obtaining money by false pretenses in the Haslebacher matter later charged in Count Seven of the indictment. Petitioner Fortney argues that the sentencing order sentenced him on April 10, 2006, to seven, one to 10-year sentences, all consecutive, but with an effective sentence date of the same day, April 10, 2006, instead of March 2, 2005, when Detective McCarty arrested him on Count 7.

Since the August 24, 2009, omnibus hearing, Petitioner Fortney has provided the Court with additional information on this ground in the form of a "Motion Requesting Correction of Sentence," which was filed with the Court on June 8, 2011, in Case No. 05-F-147-1. The Court will address this issue in a subsequent Order in Case No. 05-F-147-1.

(y) **The Court failed to order a new trial/denial based upon the *voir dire* answers of Juror Sheets**

Subsection (q)(8), *supra*, addresses this ground in part, and the Court hereby incorporates subsection (q)(8) by reference into the discussion of this particular ground, as if the same had been more fully set forth herein. In addition to the Court's and counsel's queries during *voir dire* at the trial of the underlying case, the Court also heard the testimonies of Alicia Swiger, victim and State's witness, and James ("Sam") Sheets, a juror, at the April 10, 2006, hearing on Petitioner Fortney's March 13, 2006, motion for a new trial based, in part, upon a biased jury. *See* Motion, Court File 05-F-147-1, at pages 95-98. In addition, on April 6, 2006, Petitioner Fortney purportedly wrote a letter to the Court stating, among other things, that Sam Sheets had "first hand information of every facet of [his] case before it was tried in court and before it was presented to the jury" and that Mr. Sheets and Leisha Swiger "discussed [his] case on a daily basis during their student/mentor arrangement at WV Business College[.]" *See* Letter, Court File 05-F-147-1, at pages 143-46. After hearing the testimonies of Mr. Sheets and Ms. Swiger at the April 10, 2006, hearing, the Court found that no evidence existed that Mr. Sheets was biased; that no evidence existed that Mr. Sheets had any prior knowledge of this case; that the defendant's April 6, 2006, letter to the Court said that the juror was fully aware of and had information of every facet of the case and that defendant was aware of it; and that the defendant did not make a motion to strike Juror Sheets, did not use one of his preemptory strikes, nor did he use any of his six strikes. *See* Order, Court File, at pages 196-205, and April 10, 2006, Hearing Transcript, at pages 42, lines 20-24, and page 59, lines 6-20. Defense counsel even conceded that there was no evidence that Mr. Sheets had any knowledge of at least one of the Counts of the

Indictment. Id. at page 42, lines 20-24, through page 44, lines 1-5. In fact, the Court emphasized during the hearing that the test of whether a juror is disqualified is not whether they know something. "[T]hat's not the test as to whether they're qualified, whether they know something, or hear something, or they've seen something. They can even form an opinion, as I understand the law. The test is whether they can set that aside, if they have formed an opinion, and decide the case solely on the evidence and the law." Id. at page 51, lines 22-24, through page 52, lines 1-4. Defense counsel admitted that the Court accurately recited the standards that the defendant would need to address and the defendant's burden with respect to bringing this issue before the Court. Id. at page 52, lines 13-16. Further, the Court took a recess so that the defendant could review the April 6, 2006, letter because defense counsel represented to the Court that the defendant's father had typed the letter, signed the defendant's name to it, and forwarded the letter to the Court without the defendant seeing a copy of the letter. *See* Order, Court File 05-F-147-1, at pages 196-205.

II. **Conclusions of law.**

(a) The change of venue statute, W.Va. Code § 62-3-13 [1923], provides that a court may, on the petition of the accused and for good cause shown, order the venue of the trial of a criminal case in such court to be removed to some other county.

(b) "To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests upon defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of

the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Syl. Pt. 2, State v. Wooldridge, 129 W.Va. 448, 40 S.E.2d 899 (1946).

(c) "The 'good cause' which an accused must show to be entitled to a change of venue on the ground of prejudicial pretrial publicity is the existence of a present, hostile sentiment against him, arising from the adverse publicity, which extends throughout the county in which the offense was committed, and which precludes the accused from receiving a fair trial in that county." Syl. Pt. 3, State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983).

(d) "Widespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial." Syl. Pt. 1, State v. Gangwer, 169 W.Va. 177, 286 S.E.2d 389 (1982).

(e) The Court concludes that Petitioner Fortney has failed to prove that prejudicial pre-trial publicity kept him from receiving a fair trial. Here, no motion for a change of venue was ever filed in the underlying criminal case. Assuming *arguendo* that such a motion had been filed, Petitioner Fortney would have had to have demonstrated good cause for venue to be changed. Even if there were widespread pre-trial publicity, Petitioner Fortney may not have been entitled to a change of venue. As it is, Petitioner Fortney failed to produce any evidence in support of this claim.

(f) "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." Syl. Pt. 1, State ex. rel. Daniel v. Legursky, 195 W.Va. 316, 465 S.E.2d 416 (1995) (citing Syl. Pt. 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995)). Further, "[i]n deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of Strickland v. Washington (citations omitted) and State v. Miller (citations omitted), but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Syl. Pt. 5, Legursky, 195 W.Va. at 316.

(g) "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." Syl. Pt. 6, Miller, 194 W.Va. at 3.

(h) The petitioner's burden in this regard is heavy, as there is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Miller, 194 W.Va. at 15 (quoting Strickland, 466 U.S. at 689).

(i) "In other words, we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a 'wide range.' The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask

whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.'" Miller, 194 W.Va. at 16.

(j) "The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation." Syl. Pt. 3, Legursky, 195 W.Va. at 316.

(k) "In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices. Syl. Pt. 4, Legursky, 195 W.Va. at 314.

(l) "Effective trial counsel typically prepares for a criminal defense by asking questions such as: (1) What is the objective of the defense? (2) What is the trial strategy to reach that objective? (3) How does one implement that strategy?" Miller, 194 W.Va. at 16.

(m) As to the first prong of Strickland, the Court concludes that defense counsel's, Thomas G. Dyer, Esq.'s, performance was not deficient under an objective standard of reasonableness. Because Petitioner Fortney cannot meet his burden on even the first prong, the Court need not address the second Strickland prong. The Court further concludes a reasonable defense lawyer would have acted, under the circumstances, as Petitioner Fortney's defense counsel acted in the underlying criminal case.

In addition, the Court concludes that trial counsel's investigation was adequate and reasonable, which enabled defense counsel to make informed, strategic decisions about how best to represent Petitioner Fortney at the time. As a result, the Court concludes that Petitioner Fortney has failed to prove that he received ineffective assistance of trial counsel.

(n) Syllabus Point 4, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) states:

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

(o) "Although it is established in this jurisdiction that the giving of an erroneous instruction raises a presumption of prejudice, it is an equally well established rule that this Court will not reverse a criminal conviction because of an

erroneous instruction where it clearly appears from the record that no prejudice has resulted." Syl. Pt. 2, State v. Mason, 162 W.Va. 297, 249 S.E.2d 793 (1978).

(p) "'The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' Syllabus Point 1, *State v. Louk,* 169 W.Va. 24, 285 S.E.2d 432 (1981)." Syl. Pt. 1, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982).

(q) "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Id. at Syl. Pt. 2.

(r) The Court concludes that its instructions were correct statements of the law and supported by the evidence. The Court, further, concludes that the instructions, reviewed as a whole, sufficiently instructed the jury so that the jury understood the issues involved and was not misled by the law. Moreover, Petitioner Fortney was not entitled to lesser-included offense instructions based upon the evidence at trial.

(s) "'The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so

doing he must not abandon the quasi-judicial role with which he is cloaked under the law.' Syl. pt. 3, State v. Boyd, W.Va., 233 S.E.2d 710 (1977)." Syl. Pt. 1, State v. Critzer, 167 W.Va. 655, 280 S.E.2d 288 (1981).

(t) "'An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom.' Syllabus, State v. Moose, 110 W.Va. 476, 158 S.E. 715 (1931)." Id. at Syl. Pt. 2.

(u) "It is improper for a prosecutor in this State to "(A)ssert his personal opinion as to the justness of a cause, as to the credibility of a witness ... or as to the guilt or innocence of the accused ...." ABA Code DR7-106(C) (4) in part." Id. at Syl. Pt. 3.

(v) Even "[i]ntemperate statements of a prosecuting attorney in the trial of a criminal case, based upon facts introduced in evidence during such trial, or induced by remarks of counsel for the defendant, which present to the jury inferences or conclusions deducible from such facts, but which are not prejudicial to any right of the defendant or do not result in manifest injustice to such defendant, will not justify reversal of a judgment of conviction entered upon a verdict of guilty when such verdict is fully supported by competent evidence in the case." Syl. Pt. 7, State v. Lewis, 133 W.Va. 584, 57 S.E.2d 513 (1949).

(w) "It is not every improper remark of a prosecuting attorney that is prejudicially erroneous. We can not put prosecuting attorneys in a strait jacket. They are human, and like most people will, in the heat of argument, make statements and arguments in which, in cooler moments they would not indulge. We can not justify

the reversal of cases merely because a prosecuting attorney will sometimes use language which the situation does not entirely justify. He is permitted to argue on inferences. The holdings of this Court which stress that a prosecuting attorney should be fair, are not, we think, meant to discourage zeal and vigor in the prosecution of persons charged with crime. And on this point the discretionary rulings of the trial court will not be interfered with unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." State v. Simon, 132 W.Va. 322, 339-40, 52 S.E.2d 725, 734 (1949) (internal citations omitted).

(x) The Court concludes that the assistant prosecuting attorney's remarks in closing were not prejudicial, but merely zealous advocacy.

(y) "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. Pt. 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). Further, the analysis of the sufficiency of the evidence after a verdict of guilty is not whether the jury could have viewed facts differently or how a jury should interpret the evidence, but whether after review of all of the evidence viewed in the light most favorable to the

State, the jury could find guilt beyond a reasonable doubt. Id. *See also* State v. Hutchinson, 215 W.Va. 313, 599 S.E.2d 736 (2004).

(z) The Court concludes, and the underlying criminal record in Case No. 05-F-147-1 supports, that sufficient evidence existed to convict Petitioner Fortney of a total of eight counts of obtaining money by false pretenses.

(aa) "The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." W.Va. R. Crim. Pro. 33 [1995].

(bb) "'A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of.' Syllabus Point 7, in part, *State v. Johnson,* 111 W.Va. 653, 164 S.E. 31 (1932)." Syllabus, State v. Rush, 224 W.Va. 554, 687 S.E.2d 133 (2009).

(cc) The Court concludes that Petitioner Fortney is not entitled to a new trial.

(dd) West Virginia precedent provides that "[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. Pt. 3, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981) (internal citation omitted). "[T]he fact remains that the jurors' answers on voir dire demonstrate that they were able to make the unqualified assertion that they could determine the issues based solely on the evidence." Id. at page 835. "Having some knowledge of the case does not automatically disqualify a juror, as the United States Supreme Court has stated in *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589, 594-95 (1975):

> "Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> "'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' [*Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 756 (1961)]"

Id. Further, Syl. Pt. 4, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996), provides:

> The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

(ee) "Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Id. at Syl. Pt. 5. Moreover, "[t]he challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for caused. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." Syl. Pt. 6, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

(ff) The Court concludes that Juror James ("Sam") Sheets was not disqualified from serving on the jury at the trial of the underlying criminal matter.

(gg) "The question as to which witnesses may be exempt from a sequestration of witnesses ordered by the court lies within the discretion of the trial

court, and unless the trial court acts arbitrarily to the prejudice of the rights of the defendant the exercise of such discretion will not be disturbed on appeal." Syl. Pt. 4, State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

(hh) "'It is within the judicial discretion of the trial court to permit a witness for the state, who is familiar with the facts on which the prosecuting attorney relies to establish the guilt of the accused, to be present in court during the trial to aid him in conducting the examination of other witnesses.' Point 5, syllabus, State v. Hoke, 76 W.Va. 36 (84 S.E. 1054)." Id. at Syl. Pt. 1.

(ii) "The rule with regard to excluding police officers from a sequestration of witnesses is that it is not error to do so if the testimony of such police officers is not crucial to the state's case and not prejudicial to the defendant." Id. at Syl. Pt. 6.

(jj) The Court concludes that Detective Pat McCarty of the Harrison County Sheriff's Department, as a representative of the State, was properly permitted to sit at counsel table.

(kk) The applicable statutes for the issuance of a writ of habeas corpus are West Virginia Code § 53-4A-1 *et. seq.*

(ll) The Court concludes that the hearings conducted in this matter constituted omnibus hearings. Therefore, Petitioner Merritt has waived and is prevented from asserting any other grounds in a future Petition for Writ of Habeas Corpus. The Court observes:

> An omnibus hearing as contemplated in W.Va. Code 53-4A-1 et. seq. occurs when: (1) an applicant for habeas corpus is represented by counsel or appears pro se, having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds

> not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel; and (4) the trial court drafts a comprehensive order including findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding.

Syl. Pt., 1, Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981). In applying the standard to the instant case, the Court notes that Rocco Mazzei, Esq., has represented Petitioner Fortney throughout these habeas corpus proceedings. Second, the Court inquired into each standard ground for relief and cautioned Petitioner Fortney at the outset of the hearings that any grounds not raised in these proceedings would be deemed waived. Third, Petitioner Fortney has expressly set forth on the record his waiver of certain grounds. Petitioner Fortney's waiver of any potential grounds is also implied because he chose not to present any further evidence and not to proffer any evidence concerning the grounds for written habeas corpus relief. Finally, the within Order rules upon on the merits of the grounds presented at the hearings as well as in the initial, amended, and second amended petitions for habeas corpus.

(mm) "[P]etitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. Pt. 1, in part, State ex rel. Scott v. Boles, 150 W.Va. 453, 147 S.E.2d 486 (1966).

(nn) The Court concludes that Petitioner Fortney has failed to prove his allegations by a preponderance of the evidence. Consequently, the Court believes that Petitioner Fortney's petition for a writ of habeas corpus should be denied.

III. **Rulings.**

For all of the foregoing reasons, it is, therefore, accordingly **ORDERED** that Petitioner's, Kevin Fortney's, initial and amended petitions for a writ of habeas corpus, filed February 1, 2008, and June 16, 2009, respectively be and the same are hereby **DENIED.**

The Court **ADVISES** the parties that the issue of any correction of sentence, as referenced in section I(x) above, will be addressed in a subsequent Order in Case No. 05-F-147-1.

The Circuit Clerk is **DIRECTED** to send certified copies of this Order to the following:

Rocco Mazzei, Esq.
427 West Pike Street
Clarksburg, WV 26301
Counsel for Petitioner

Harrison County Prosecuting Attorney
301 West Main Street, Suite 201
Clarksburg, WV 26301

The Circuit Clerk is, further, **DIRECTED** to remove this case from the Court's docket.

ENTER: July 13, 2011

The Hon. John Lewis Marks, Jr., Chief Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 13 day of June, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix Seal of the Court this 14 day of June, 2011.

Donald L Kopp II

Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia