STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State ex rel. Andre King,
Petitioner Below, Petitioner

vs) No. 11-0237 (Mercer County 09-C-375)

Jim Ielapi, Warden,
Respondent Below, Respondent

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

MEMORANDUM DECISION

Petitioner Andre King, by counsel, Natalie N. Hager, appeals from the circuit court's order denying his petition for post-conviction habeas corpus relief. The State of West Virginia, by counsel, Robert D. Goldberg, has filed its response on behalf of respondent, Jim Ielapi, Warden. Petitioner seeks a reversal of the circuit court's decision and other relief as the Court deems fair and just.

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.

Petitioner was convicted by a jury of two counts of delivery of a Schedule II controlled substance on May 30, 2007. Petitioner's appeal from his criminal conviction was denied by the Court on February 13, 2008. A petition and an amended petition for a writ of habeas corpus were filed, and, due to a change in habeas counsel, a second amended petition was filed on May 18, 2010. Following an omnibus hearing, the circuit court entered its January 31, 2011, "Order Denying the Petitioner's Petition for Writ of Habeas Corpus."

Petitioner now appeals the denial of his habeas corpus petition below and raises multiple issues, including ineffective assistance of pretrial counsel and trial counsel. "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 has reviewed the 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 " entered on January 31, 2011. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm.

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.
ANDRE KING,

Petitioner,

V. **CIVIL CASE NO. 09-C-375**

JIM IELAPI, Warden,
PRUNTYTOWN CORRECTIONAL CENTER,

Respondent.

ORDER DENYING THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

On August 2, 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, Tim Harvey, Esq., (styled as Second Amended Petition for Writ of Habeas Corpus, *Ad Subjiciendum*) and 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 each of the two counts of unlawful and felonious delivery of Hydromorphone to a cooperating individual. These sentences were imposed to run consecutively by the Honorable David Knight, Senior Status Judge. The sentences were enhanced pursuant to W.Va. Code § 60A-4-408, so Judge Knight sentenced the Petitioner to an indeterminate from four (4) to sixty (60) years of incarceration, i.e., two consecutive sentences of 1-15 years each, enhanced to 2-30 years each.

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. 07-F-62: The Indictment/Counts Specific to Each Offense

A. The Indictment

By a True Bill returned in the February 2007 Term by the Mercer County Grand Jury, the Petitioner, Andre Lamar King, was indicted on a four count Indictment for three offenses of Delivery of a Schedule II Controlled Substance, To-Wit: Hydromorphone, and one count of Conspiracy. Deborah Booker alleged that she had purchased and/or received illegal prescription medication from the Petitioner on September 13, 2005 and on September 15, 2005. Linda Mooney alleged that she purchased and/or received illegal prescription medication drugs on October 10, 2005.

B. Counts Specific to Each Offense

Out of the four (4) count indictment, Counts 1, 2, and 3 were for Delivery of a Schedule II Controlled Substance, and Count 4 was for Conspiracy. All counts in the indictment arise from events which allegedly occurred in September and October 2005.

C. Pre-Trial Proceedings

On October 11, 2005, a criminal complaint was filed by Sgt. Charlie Smothers pursuant

to W.Va. Code § 60A-4-401(a)(I). A jail commitment order was entered by Magistrate Rick Fowler on October 11, 2005 until a $50,000 bond was posted. The Petitioner was released on or about October 11, 2005. A preliminary hearing was set for October 17, 2005. The Petitioner failed to appear on October 17, 2005. Thereafter, Magistrate Fowler issued a capias and recommended a surety bond for $50,000. On December 12, 2005, a Motion to Dismiss Bench Warrant was granted and the hearing was re-scheduled for February 22, 2006. The Petitioner also waived his time limit of 20 days to hold his preliminary hearing on December 12, 2005. On February 22, 2006, the Petitioner waived his right to a preliminary examination.

Upon the return of the above-referenced indictment, the Circuit Clerk of Mercer County sent a written notice for the Petitioner to appear for arraignment on February 26, 2007 at 9:30 a.m. The Petitioner appeared, and Jason Grubb, Esq., was appointed as his counsel. The matter was set for trial on April 25, 2007, and the Petitioner was released on a Fifty Thousand Dollar bond.

Mr. Grubb filed a nine (9) page Omnibus Discovery Motion on March 5, 2007. He thereafter filed a Motion to Suppress Evidence on March 9, 2007 arguing that the audio and video recordings of the alleged transactions were obtained without prior authority. A suppression hearing was set for April 20, 2007 and the Petitioner waived his right to appear at such hearing. (*See*, Pre-Trial Conference Order, April 13, 2007). A suppression hearing was scheduled on April 20, 2007, but Mr. Grubb moved to be relieved as counsel due to a conflict upon disclosure of the identity of the cooperating individual. The Court relieved Mr. Grubb and appointed Michael Cooke, Esq., as counsel for the Petitioner and also permitted him to remain on bond. On April 25, 2007, the Court granted the Petitioner's Motion to Continue and rescheduled the trial

for May 30, 2007[1]. An Order for Issuance of Bench Warrant was issued by the Court when the Petitioner failed to appear at his trial at 9:30 a.m.[2]

D. Plea Agreement Negotiations

Upon review of the record in its entirety, it appears that the Petitioner decided not to accept any plea offer made by the Prosecuting Attorney (*See*, Letter from Mr. Cooke to the Petitioner, dated October 30, 2007 in criminal court file.) The Pre-Trial Conference Order also noted that plea negotiations were ongoing.

E. The Trial: Verdict/Sentencing -Guilty; 4-60 years of Imprisonment

The Petitioner's trial in the underlying criminal matter was held on May 30, 2007.

The jury returned the following verdicts:

"Guilty" of Count 1 of the Indictment; "Delivery of Schedule II Controlled Substances, To Wit: Hydromorphone."

"Guilty" of Count 2 of the Indictment; "Delivery of Schedule II Controlled Substances, To Wit: Hydromorphone."

"Not Guilty" of Count 3 of the Indictment; "Delivery of Schedule II Controlled Substances, To Wit: Hydromorphone."

"Not Guilty" of Count 4 of the Indictment; "Conspiracy."

Sentencing

Pursuant to the penalties prescribed by the West Virginia Code for the above offenses, on

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[1]The trial was originally scheduled for April 25, 2007.

[2]The Petitioner did appear for his trial but was late. (*See*, Trial Transcript, pp. 73-76 and the Order for Issuance of Bench Warrant.)

June 28, 2007, Judge Knight sentenced the Petitioner as follows:

> It is the **ORDER** and **DECREE** of this Court that the said Andre Lamar King be and is hereby adjudged guilty of the offense of "Delivery of a Schedule II Controlled Substance, To-Wit: Hydromorphone," as the State in Counts 1 and 2 of the Indictment herein hath alleged and by a jury hath been found guilty; that he 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 can send a guard for him and that he be taken from the Southern Regional Jail to the penitentiary of this State and therein confined for the indeterminate term of not less than one (1) nor more than fifteen (15) years each as provided by law for each offense of "Delivery of a Schedule II Controlled Substance, To-Wit: Hydromorphone," as the State in Counts 1 and 2 of its Indictment herein hath alleged and by a jury hath been found guilty; that these sentences run consecutively with one another; that the defendant be given credit for 33 days, this being the time he has been confined on said charge; and he be dealt with in accordance with the rules and regulations of that institution and the laws of the State of West Virginia.
> Upon motion of the State, and after due consideration of the evidence presented by the State, it is the further **ORDER** and **DECREE** of this Court that the defendant's penalty be enhanced and that the sentences herein imposed be doubled pursuant to W.Va. Code § 60A-4-408.
> It is further **ORDER** and **DECREE** of this Court that the defendant be assessed all court costs which shall be paid within (1) year of his release from the penitentiary, or his driver's license will be subject to suspension.

(*See* Disposition Order, June 28, 2007.)

The trial court placed its sentencing rationale on the record at the sentencing hearing as follows:

> I've read the presentence report a number of times. I've read all the letters and everything that was submitted, including the one from Mr. King himself, a number of times.
>
> The trial itself was unique in some features. Like, I said, I spent 20 years as prosecutor. And it was the first time I've ever heard the defendant actually confess on the witness stand. Maybe he confessed under the theory he had to transfer money to one another to have a delivery. In West Virginia law doesn't have money involved in it. So as a result, we know that one.
>
> We know the videos that we watched. We know how cautious he was. And most of them, as a matter of fact, in the eh, one of the videos as I recall in this trial he searched the CI.

Now that's an indication of a man with some experience. He's checking to see who he's dealing with and whether or not they're wired at the time. Unfortunately for him, he wasn't up to tech...up to snuff, I guess on modern technology. So as a result of, it didn't do much good.

But, eh, with the evidence he submitted in the case and with the past history that Mr. King has and I know we need...In the Court (sic) system we judge people on past history because it shows us in writing what they've done in the past.

He's a very personable young man. I don't know him. But he's been very personable during all of this case. He has a pleasant personality, he did a great job of testifying on the witness stand, except for confessing.

But at the same time I look back on it. And he's involved in at least one violent crime, for which he was sentenced up to 25 years at the penitentiary. Actually served 15 years.

Eh, trafficking (sic) in drugs which is what the records shows as part of the sentence that run concurrent with that. And not just abuse of drugs, I don't know how many crimes we have called abuse of drugs. Though I'm sure we have some things we do with people that abuse drugs.

But...then the other part of it. The, eh, stuff that went on at the motel. And, eh, while the police were searching, isn't that where Palmer showed up.

Mr. Arnold: No, sir. Palmer came back to the residence.

The Court: Oh, at the residence.

Mr. Arnold: Yes, sir.

The Court: Yeah. Was it the one on Vine Street?

Mr. Arnold: No, this was on Harrison Street.

The Court: The one that was on Harrison Street. Okay. And then had a thousand, what, how many?

Mr. Arnold: He has a hundred, 100.

The Court: One hundred pills and a lot of money on him. And umm...he was a known associate (sic) believe?

Mr. Arnold: That's what the State would contend, yes, sir.

The Court: What...what the State believes.

I just believe that Mr. King is part of the problem here. He doesn't live here, he comes out of Ohio. He comes down here, with, eh, with...known as, eh, Columbus B. I believe. Something of that nature. Umm...just openly dealing.

And...and the evidence or part of the report there shows that he kind of moved into this house. And, eh, just none of it makes sense, except if you look at it from somebody that seems to be, skilled at what they're doing.

And so as a result of it, I don't believe that the Court can give much consideration to him at all. And it is the judgment of the Court, he is guilty by the jury verdicts in this case, which was on Count one and Count two of delivery of, eh, controlled substance. And I hereby, each one of them, sentence him in the West Virginia terms of one to fifteen years in the penitentiary on each charge.

I direct that they be run consecutively. Umm...I use 408...60A-4-408 for an enhancement to double the penalties. And direct that that be applied to the sentence.

Now, your just not a fit and proper subject under West Virginia law and under the facts and circumstances, as we find you at this time for probation. So, it is my judgment that you go the penitentiary of the State of West Virginia to serve this sentences (sic).

Now you're getting older every day. Someday you gotta straighten out the things you've been doing. I have sympathy for you. But not enough sympathy that I don't have for the community that we live in, either, and what you've done to it. So, just have a seat over there and they'll transport you in a few minutes.

(*See,* Disposition Transcript, June 28, 2007, at pp.19-23.)

F. Post Trial Matters

On June 28, 2007, Petitioner's counsel filed a Motion for New Trial. The key elements in the motion were the assertions that the evidence proffered by the State was insufficient to sustain a proper conviction because it did not meet the reasonable doubt standard required for criminal proceedings, and that the Southern West Virginia Regional Drug and Violent Crime Task Force

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failed to have a female officer conduct a search of the Confidential Informant before and after the Confidential Informant had unaccounted for monies during the first videotaped drug transaction which occurred on September 13, 2005.

On June 28, 2007, the trial court denied the Motion for New Trial. The Court found that the defendant received a fair trial and that the defendant admitted that he committed a crime on the witness stand. The Court further found that the Petitioner's arguments for a new trial were based more on the weight of the evidence, rather than its admissibility.

On November 13, 2007, the Court entered an Order denying the Petitioner's Motion for Reconsideration of Sentence.

On February 26, 2008, the Petitioner's counsel filed a Motion for Reconsideration of Sentence. On March 18, 2008, the Court denied the Petitioner's Motion, stating that the sentence was justified by the records in this case.

G. Appeal to the West Virginia Supreme Court of Appeals-Refused

On November 15, 2007, the Petitioner, by counsel, Michael P. Cooke, Esq., filed a Petition with the West Virginia Supreme Court of Appeals praying for an appeal from the judgment and sentence rendered upon him on June 28, 2007, in the Circuit Court of Mercer County. The Petitioner's Petition for Appeal was based on the following grounds:

1. The Task Force failed to assure to (sic) that the female C.I. did not have contraband on her person because they failed to thoroughly search the female C.I.; therefore, the evidence obtained by the C.I. in the alleged deliveries was tainted.

The Petition was refused by the West Virginia Supreme Court of Appeals on February 13, 2008.

II. THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM UNDER W.VA. CODE § 53-4A-1/PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS/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 August 25, 2009, the Petitioner filed his Petition for Writ of Habeas Corpus in the Circuit Court of Mercer County, by and through his counsel, David D. Perry, Esq. The Petitioner raised the following grounds in his Petition:

GROUND ONE

VARIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT BY ASSISTANT PROSECUTING ATTORNEY SCOTT ASH DEPRIVED MR. KING OF A FAIR TRIAL AND HIS RIGHT TO DUE PROCESS CONTAINED IN THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III, SECTION 10 OF THE WEST VIRGINIA CONSTITUTION.

GROUND TWO

DETECTIVE CHARLIE SMOTHERS IMPROPERLY TESTIFIED REGARDING OTHER CRIMES, WRONGS, OR ACTS PURSUANT TO RULE 404(b) OF THE WEST VIRGINIA RULES OF EVIDENCE WITHOUT MR. KING BEING PROVIDED PRIOR NOTICE FROM THE STATE AND WITHOUT A *MCGINNIS* HEARING BEING CONDUCTED.

GROUND THREE

THE REPRESENTATION OF MR. KING BY ATTORNEY JASON R. GRUBB DURING PRELIMINARY AND PRETRIAL PROCEEDINGS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

GROUND FOUR

THE REPRESENTATION OF MR. KING BY ATTORNEY MICHAEL P. COOKE DURING PRETRIAL PROCEEDINGS AND TRIAL CONSTITUTED INEFFECTIVE

ASSISTANCE OF COUNSEL.

GROUND FIVE

THE STATE ELICITED AND INTRODUCED PERJURED TESTIMONY FROM DEBORAH BOOKER REGARDING HER EMPLOYMENT.

Upon review of this Petition, the Court requested Mr. Perry to file an Amended Petition to reflect the new warden, Adrian Hoke, as the Respondent.

The Amended Petition

On February 2, 2010, the Petitioner, by counsel, filed the Petitioner's Amended Petition for Writ of Habeas Corpus. Counsel raised the same grounds as those raised in the original Petition for Writ of Habeas Corpus *Ad Subjiciendum*.

The Second Amended Petition

On May 18, 2010, the Petitioner, by counsel, Natalie N. Hager, Esq., filed the Petitioner's Second Amended Petition for Writ of Habeas Corpus, *Ad Subjiciendum*. Ms. Hager was substituted as counsel for the Petitioner due to Mr. Perry's retirement.[3] Counsel raised the following grounds:

GROUND ONE

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PRELIMINARY AND PRETRIAL PROCEEDINGS AS WELL AS AT TRIAL.

A. Attorney Grubb's advice that the Petitioner waive his preliminary hearing without first fully educating him of its purpose constituted ineffective assistance of counsel.

B. Attorney Grubb's failure to conduct the Petitioner's preliminary hearing within

[3]On March 4, 2010, the Court entered an Order permitting Mr. Perry to withdraw as counsel for the Petitioner due to his pending retirement and set a status hearing for April 5, 2010 to appoint new counsel. The Court entered an Order on April 5, 2010 appointing the Harvey and Janutolo Law Office.

the required twenty (20) day period under Rule 5 of the West Virginia Rule of Criminal Procedure constituted ineffective assistance of counsel.

C. The Representation of the Petitioner by Attorney Michael Cooke during pretrial proceedings and trial constituted ineffective assistance of counsel.

1. Attorney Cooke's failures to schedule and conduct a suppression hearing constituted ineffective assistance of counsel.

2. Attorney Cooke's failure to demand and receive a formal State's Answer To the Petitioner's Omnibus Discovery Motion, conduct a discovery conference, and relay the results and nature thereof to the Petitioner constituted ineffective assistance of counsel.

3. Attorney Cooke's failure to advise the Petitioner of the existence and effects of West Virginia Code § 60A-4-408 as it pertained to sentencing constituted ineffective assistance of counsel.

4. Attorney Cooke's failure to conduct an adequate and meaningful voir dire of the potential jurors in this matter constituted ineffective assistance of counsel.

5. Attorney Cooke's failure to attempt to advance a theory of defense during the Petitioner's opening statement constituted ineffective assistance of counsel.

6. Attorney Cooke's failure to fully advise the Petitioner of the nature of his right to testify in his own defense and the potential consequences of his testimony constituted ineffective assistance of counsel.

7. Attorney Cooke's failure to object to prosecutorial misconduct and other inadmissible evidence at trial constituted ineffective assistance of counsel.

GROUND TWO

THE PETITIONER WAS DENIED DUE PROCESS AND A FAIR TRIAL PURSUANT TO THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III SECTION 10 OF THE WEST VIRGINIA STATE CONSTITUTION DUE TO THE PROSECUTORIAL MISCONDUCT AT TRIAL.

A. Assistant Prosecuting Attorney Scott Ash improperly interjected his personal opinion regarding the credibility of a State's witness, Sergeant Smothers, in violation of the Petitioner's constitutional right to a fair trial and due process.

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B. Attorney Ash improperly interjected his personal opinion and argument in the State's opening statement resulting in prejudice and in violation of the Petitioner's constitutional right to a fair trial and due process.

GROUND THREE

THE PETITIONER WAS DENIED DUE PROCESS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE III SECTION 10 OF THE WEST VIRGINIA STATE CONSTITUTION DUE TO THE JUDICIAL MISCONDUCT.

GROUND FOUR

THE PETITIONER WAS DENIED DUE PROCESS BY FAILURE TO INDICT BEFORE THE SECOND TERM OF COURT PURSUANT TO W.VA. CODE § 62-2-12.

GROUND FIVE

THE PETITIONER'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE.

GROUND SIX

SERGEANT CHARLIE SMOTHERS IMPROPERLY TESTIFIED REGARDING OTHER CRIMES, WRONGS OR ACTS PURSUANT TO RULE 404(b) OF THE WEST VIRGINIA RULES OF EVIDENCE WITHOUT PROVIDING THE PETITIONER PROPER NOTICE FROM THE STATE AND WITHOUT A *MCGINNIS* HEARING BEING CONDUCTED.

A. Detective Smothers' testimony regarding the reasons the Petitioner wanted a "blunt" and how he would use it constituted 404(b) evidence of other crimes, wrongs or acts and was inadmissible.

B. Sergeant Smothers' testimony regarding the Petitioner traveling to Columbus to obtain illegal drugs constituted 404(b) evidence of other crimes, wrongs or acts and was inadmissible.

GROUND SEVEN

THE EVIDENCE OBTAINED BY THE CONFIDENTIAL INFORMANT WAS TAINTED BECAUSE THE SOUTHERN WEST VIRGINIA TASK FORCE FAILED TO

THOROUGHLY SEARCH THE CONFIDENTIAL INFORMANT AND ENSURE THAT SHE DID NOT HAVE CONTROLLED SUBSTANCES ON HER PERSON BEFORE SHE ENTERED INTO THE ALLEGED DRUG TRANSACTION.

GROUND EIGHT

THE STATE ELICITED AND INTRODUCED PERJURED TESTIMONY FROM DEBORAH BOOKER REGARDING HER EMPLOYMENT AT PRINCETON COMMUNITY HOSPITAL AND OUTBACK STEAKHOUSE.

GROUND NINE

A SENTENCE OF FOUR TO SIXTY YEARS IN THE PENITENTIARY IS EXCESSIVE AND DISPROPORTIONATE TO THE CHARACTER AND DEGREE OF THE OFFENSE PURSUANT TO THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION AND WEST VIRGINIA STATE CONSTITUTION ARTICLE III, SECTION 5.

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

The *Losh* Checklist

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

Lack of trial court jurisdiction.

Unconstitutionality of statute under which conviction obtained.

Indictment showing on its face that no offense was committed.

Prejudicial pretrial publicity.

Involuntary guilty plea.

Mental Competency at time of crime.

Mental Competency at time of trial/plea, cognizable even if not asserted at proper time, or if resolution not adequate.

Incapacity to stand trial/enter into plea due to drug use.

Language barrier to understanding the proceedings.

Denial of counsel.

Unintelligent waiver of counsel.

Failure of counsel to take an appeal.

Consecutive sentence for same transaction.

Coerced confessions.

Suppression of helpful evidence by prosecutor.

Unfulfilled plea bargains.

Information in pre-sentence report erroneous.

Ineffective assistance of counsel.

Double jeopardy.

Irregularities in arrest.

Excessiveness or denial of bail.

Illegal detention prior to arraignment.

Irregularities or errors in arraignment.

Challenges to the composition of grand jury, or to its procedures.

Defects in indictment.

Improper venue.

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.

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

Constitutional errors in evidentiary rulings.

Instructions to the jury.

Acquittal of co-defendant on same charge.

Defendant's absence from part of the proceedings.

Improper communications between prosecutor or witness and jury.

Question of actual guilt upon an acceptable guilty plea.

Mistaken advice of counsel as to parole or probation eligibility.

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

Asserted Grounds: the Petitioner asserted the following Losh grounds:

Denial of speedy trial.

State's knowing use of perjured testimony.

Ineffective assistance of counsel.

No preliminary hearing.

Failure to provide copy of indictment to defendant.

Pre-trial delay.

Claims concerning the use of informers to convict.

Claims of prejudicial statements by trial judge.

Claims of prejudicial statements by the prosecutor.

Sufficiency of evidence.

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 Second Amended Petition for Writ of Habeas Corpus on June 22, 2010.

As to the Petitioner's assertion that the Petitioner's conviction was tainted by improper conduct on the part of the prosecuting attorney, the State responded that Mr. Ash's comments do not rise to the level of egregious conduct. The State further responds in that Mr. Ash could not remember Charlie Smothers' name during *voir dire*, although he had known Mr. Smothers for twenty years and made a reference to the length of time as a self-deprecating joke. The State further argues that this issue was not raised directly on appeal and is therefore, waived in a subsequent habeas corpus review. Additionally, the State cites *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995) as providing guidance for a claim of prosecutorial misconduct.

The State next answered the assertion concerning the Petitioner's denial of effective

counsel. The State argues that the Petitioner's counsel acted reasonably and that the Petitioner's assertions have no merit. The State further argues that the Petitioner's counsel testified at the omnibus hearing stating that the Petitioner failed to provide him with any information about alleged witnesses, thus making it impossible for his counsel interview them. Finally, the State asserts trial counsel hired a private investigator to assist with the Petitioner's case but that the lack of cooperation from the Petitioner handicapped it in locating these people.

Concerning the claim of bad acts pursuant to Rule 404(b) of the West Virginia Rules of Evidence, the State argues the testimony about a "blunt" cigar was unsolicited and an irrelevant diversion, and that the hypothetical uses for a cigar had no material impact on the jury's verdict.

Finally, as to the Petitioner's claim that Deborah Booker's employment had an effect on the jury's verdict, the State argues that her employment is irrelevant to the verdicts in this case. The State further argues that the Petitioner clearly appears in the video recordings of the transactions for which he was convicted.

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).[4] "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

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

law." Id. at Syl. Pt. 2. "A habeas corpus petition is not a substitute for a writ of error[5] in that ordinary trial error not involving constitutional violations will not be reviewed." *Id.* at Syl.Pt.3.

The Availability of Habeas Corpus Relief

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

> [1] Any person convicted of a crime and [2] incarcerated under sentence of imprisonment therefore who contends [3] that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or [4] that the court was without jurisdiction to impose the sentence, or [5] that the sentence exceeds the maximum authorized by law, or [6] that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or 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).[6]

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[5] 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.

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

"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 discqvered 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).

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 hearing, the Court file in the underlying criminal action, and substantial portions of

the transcript of the pre-trial hearings and the trial, and the applicable case law.

This Court must further determine whether the trial court made any other error in its rulings that unfairly prejudiced the Petitioner.

Accordingly, this Court now answers the following questions:

Claim A: The Petitioner was denied effective assistance of counsel at the preliminary and pretrial proceedings as well as at trial.

The Petitioner's Argument:

The Petitioner argues that the Petitioner's counsel was ineffective based on Mr. Grubb's waiver of a preliminary hearing, Mr. Grubb's failure to conduct a preliminary hearing within the required twenty (20) day period under Rule 5 of the West Virginia Rules of Criminal Procedure, Mr. Cooke's failure to schedule and conduct a suppression hearing, Mr. Cooke's failure to demand and receive a formal State's answer to the Petitioner's Omnibus Discovery Motion, conduct a discovery conference and relay the nature of the results thereof to the Petitioner, Mr. Cooke's failure to advise the Petitioner of the existence and effects of West Virginia Code § 60A-4-408 as it pertained to sentencing, Mr. Cooke's failure to conduct an adequate and meaningful *voir dire* of the potential jurors, Mr. Cooke's failure to advance a theory of defense during opening statements, Mr. Cooke's failure to fully advise of the nature of his right to testify and the potential consequences of such testimony, and Mr. Cooke's failure to object to prosecutorial misconduct and other inadmissible evidence at trial.

The 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 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):

> (a) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is 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.
>
> (b) 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).
>
> (c) Further, the West Virginia Supreme Court of Appeals has held that:
>
> [i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court ask 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.

(2) 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 L.Ed 2d 387 (1970), that a preliminary hearing is not a constitutionally mandated proceeding. *See also*, *Guthrie 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*.

(3) The Court finds that the Petitioner is not constitutionally mandated to receive a preliminary hearing. The Court further finds that the Petitioner waived his preliminary hearing. Therefore, the Court finds and concludes that this claim is without merit.

(4) The Court finds that under syl. pt. 2, *State v. Harr*, 156 W.Va. 492, 194 S.E.2d 652 (1973) a suppression hearing entails the following:

> "A hearing on the admissibility of evidence allegedly obtained by an unlawful search contemplates a meaningful hearing, at which both the state and the defendant should be afforded the opportunity to produce evidence and to examine and cross-examine witnesses."

(5) The Court finds that the Petitioner's counsel reviewed the audio/video recording of the Petitioner and determined that a suppression hearing was not necessary because it was properly obtained according the following testimony of Mr. Cooke:

> Q: And did you obtain an audio/video recording?
>
> A: Yes.

Q: Did you move to suppress any of this evidence?

A: No, based on my analysis of the evidence, it was properly obtained.

Q: Okay. What–do you remember watching some of the videos?

A: Somewhat, yes.

Q: Would it be a accurate statement if I said Mr. King was not identified in two of the video tapes?

A: The first one involving Ms.–Ms. Booker, I would agree with that. The third video which was the charges I believe Mr. King was acquitted on, that was a very fuzzy vague video, and I don't think you could see him on that one either.

Q: But you didn't move to suppress those videos?

A: No. They were–they were based upon my–my opinion and analysis of case law and the proper rules, they were collected–that evidence was collected properly.

Q: Did you analyze whether it was reliable evidence?

A: It appeared to be an accurate depiction of what occurred.

Q: Did you analyze whether the–where (inaudible), would that be more prejudicial or probative?

A: Well, it seemed to me it would be a benefit to him that their–that the State was presenting, you know, we're charging Mr. King with this drug transaction and here's our evidence, but he's not on the tape. So it seemed to me it would be beneficial.

(*See*, Omnibus Habeas Corpus Hearing Transcript, pp. 36-38).

(6) The Court finds that the Petitioner's counsel's trial strategy to not suppress videos that were arguably vague does not rise to the level of ineffective assistance of counsel.

(7) The Court finds that a discovery conference was not requested or held in the Petitioner's criminal case. *See*, West Virginia Trial Court Rule 32.03, West Virginia

Rules of Criminal Procedure Rule 16.

(8) The Court finds that the Petitioner's counsel did not request the trial court to make a ruling on the Petitioner's Omnibus Discovery motions.

(9) The Court finds that the Petitioner's silence at the trial level constitutes a waiver of his objections. *See*, *State v. Moran*, 168 W.Va. 688, 285 S.E.2d 450 (1981), *State v. McKinney*, 178 W.Va. 200, 358 S.E.2d 596 (1987).

(10) The Court finds that the standard for determining prejudice in discovery matters involves a two-pronged analysis: "(1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." See, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994) citing State *v. Miller*, 178 W.Va. 618, 624, 363 S.E.2d 504, 510 (1987).

(11) The Court finds that the Petitioner was not surprised of a material fact.

(12) The Court finds that the Petitioner was not hampered in his preparation and presentation of his case.

(13) The Court **FINDS and CONCLUDES** that the Petitioner was not prejudiced by the failure to disclose any exculpatory evidence or discovery which would have assisted his case.

(14) The Court **FINDS and CONCLUDES** that it has not been presented with any fact or issue which could have been learned in discovery that was prejudicial to the Petitioner.

(15) The Court **FINDS and CONCLUDES** that the Petitioner has failed to prove by a preponderance of the evidence that he has met either prong under *Rusen v. Hill*.

(16) The Court **FINDS and CONCLUDES** that the Petitioner's counsel did not fail to

discover any material facts which hampered the preparation and presentation of his case.

(17) The Court **FINDS and CONCLUDES** that the discovery issue does not rise to the level of ineffective assistance of counsel.

(18) The Court finds that *voir dire* was defined in *West Virginia Human Rights Commission v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349 (1975):

> *Voir Dire* examination is designed to allow litigants to be informed of all relevant and material matters that might bear on possible disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily. Such examination must be meaningful so that the parties may be enabled to select a jury competent to judge and determine the facts in issue without bias, prejudice or partiality. As said in State v. Stonestreet, 112 W.Va. 688, 166 S.E. 378 (1932), quoting from State v. Lohm, 97 W.Va. 652, 125 S.E. 758 (1924), "Another requisite of a fair trial is a fair jury."

(19) The Court finds that the *voir dire* was very short and does not appear to have generated much information which could have assisted the Petitioner in selecting a jury.

(20) The Court finds that the Petitioner was indicted on three separate counts of Delivery of a Schedule II Controlled Substance, To-Wit: Hydromorphone and one count of Conspiracy to Deliver a Schedule II Controlled Substance, To-Wit: Hydromorphone.

(21) The Court finds that not withstanding the inadequacy of the *voir dire*, the jury reached a fair verdict based on the evidence available to it.

(22) The Court **FINDS and CONCLUDES** that any inadequacy of *voir dire* does not rise to the level of ineffective assistance of counsel.

(23) The Court finds that Trial Court Rule 42.04 (a) states the following concerning opening statements:

> At the commencement of the trial in a criminal action, the State and the defendant may make non-argumentative opening statements as to their theories of the case and the manner in which they expect to offer their evidence. If the trial is to a jury, unless the court directs otherwise the opening statements shall be made immediately after the jury is impaneled. If the trial is to the court, the opening statements shall be made immediately after the case is called for trial. The court, on request by the defendant, may defer the opening statement for a defendant until the time for commencing presentation of that defendant's direct evidence. Opening statements shall be subject to time limitations imposed by the court. If the action involves more than one defendant, the court after conferring with the parties to the action, shall determine the order and time of the opening statements.

(24) The Court finds that Judge Knight instructed the jury as to the purpose of opening statements as follows:

> Counsel will presently make their opening statements in which they will tell us what they believe the evidence will show. The opening statements are neither arguments nor evidence and should not be considered as such. You should give... you should give the lawyers for each side your indiv...indiv...your undivided attention because what they have to say will simplify your task of relating the testimony of each individual witness to the total of all the evidence offered during the trial.
>
> (*See*, Trial Transcript, pp. 27-28).

(25) The Court **FINDS and CONCLUDES** that the opening statement serves as a guide for the jury of what a party intends to prove through their evidence but that it is not evidence in itself.

(26) The Court **FINDS and CONCLUDES** that although the Petitioner's counsel did not conduct a lengthy opening statement, failure to make an adequate opening is not a basis for habeas corpus relief.

(27) The Court **FINDS and CONCLUDES** that any inadequacy of the opening statement does not rise to the level of ineffective assistance of counsel.

(28) The Court finds that a criminal defendant must be made aware of his right to testify

or remain silent as set forth in *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988):

> (1) A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right. syl. pt. 7.

(29) The Court finds that during the trial, the trial Court held a bench conference with the Petitioner and counsel informing him of his right to testify and his right not to testify according to the following testimony:

> MR. COOKE: I'd like to call Mr. King.
>
> THE COURT: Okay. Come up to the Bench first.
>
> MR. ASH: Certainly sir.
>
> THE COURT: Come up to the bench first.
>
> BENCH CONFERENCE:
>
> THE COURT: Mr. King, you don't have to testify unless you want to.
>
> THE DEFENDANT: I want to. I want my part to be....I want my story to be heard.
>
> THE COURT: I'm going to explain some of your rights, if that's okay.
>
> THE DEFENDANT: Okay.
>
> THE COURT: You don't have to testify?
>
> THE DEFENDANT: Okay.
>
> THE COURT: If you do testify, you'll be treated like any other witness.

THE DEFENDANT: All right.

THE COURT: You won't be treated different because you're on trial.

THE DEFENDANT: Right. I understand.

THE COURT: You've discussed this with your lawyer?

THE DEFENDANT: Yes.

THE COURT: And that's want (sic) you want to do.

THE DEFENDANT: Yes.

THE COURT: Okay.

(*See*, Trial Transcript, pp. 113-114).

(30) The Court finds that Michael Cooke testified at the Petitioner's Omnibus Habeas Corpus hearing regarding the Petitioner's desire to testify during the trial as follows:

> Q: (by Joe Harvey, Esq.) What–how did you handle Mr. King to try to testify?
>
> A: I–well, generally, I will discuss– I will tell folks that they have the option to testify if they so choose. They also have the option or right to remain to silent.
>
> With Mr. King, it wasn't a –I didn't need to have that discussion with him. Mr. –Mr. King was probably one of the most adamant individuals about testifying and telling their side of the case to the jury that–that I've ever experienced. He–he absolutely wanted his day in court. He wanted his day in court. He wanted to testify. He actually, I would describe him as being eager to testify.
>
> We–we did have a plea offer on the table, which I mentioned to him, and he–he had no interest. He–he wanted, he wanted–he wanted his day in court, he wanted to testify, he wanted to tell the jury his side of what happened.
>
> Q: So you didn't even explain to him he didn't have to?

A: Yes, I told him that he didn't have to, but he was adamant about testifying.

Q: Okay. Did you describe to him the consequences of if he chose to testify?

A: I told him that he would be, you know, that he would be cross–cross-examined and that, you consideration by the jury or it could be disregarded.

Q: How did you prepare him to testify?

A: We had a –I don't know if–before the trial, we had a rather lengthy telephone conversation. It may have been more than one, but I do remember rather lengthy phone conversation about testifying and what he was going to say and this and that.

Q: Do you recall actually rehearsing his testimony or anything like that?

A: Specifically, I don't remember that, no.

(*See*, Omnibus Hearing Transcript, pp. 47-48).

(31) The Court finds that the Petitioner wanted to testify during the trial and was aware of the *Neuman* rights presented to him by the Court.

(32) The Court **FINDS and CONCLUDES** that there is no ground for habeas corpus relief available to the Petitioner on the issue of his decision to testify.

(33) The Court **FINDS and CONCLUDES** that the other issues raised by counsel as to ineffective assistance of counsel are addressed hereinafter.

(34) The Court **FINDS and CONCLUDES** that the Petitioner has failed to demonstrate that it was reasonably probable that the results of the proceeding would have been different, but for counsel's performance.

(35) The Court **FINDS and CONCLUDES** that the Petitioner's claims of ineffective

assistance of counsel made in Claim A are without merit.

Claim B: **The Petitioner was denied due process and a fair trial pursuant to the 14th Amendment of the United States Constitution and Article III section 10 of the West Virginia State Constitution due to the prosecutorial misconduct at trial.**

The Petitioner's Argument:

The Petitioner's argues that the Assistant Prosecuting Attorney improperly interjected his personal opinion regarding the credibility of a State's witness, Sergeant Smothers, because he referred to knowing the witness for twenty years and that he didn't look like a police officer.

The Petitioner further argues that Mr. Ash's statements of his personal relationship with Sgt. C.J. Smothers bolstered his credibility and that these statements are highly improper under *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

The Respondent's Response. *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's argument is basically that the prosecutor made improper statements during his examination of Sergeant Smothers regarding the length of time that he had known the witness.

(2) The Court finds that the Petitioner further argues that the prosecutor made improper statements during his opening statement.

(3) The Court finds that during the opening statement, the Petitioner maintains that the State improperly conveyed to the jury that the Petitioner was a notorious drug dealer as opposed to the State saying what the evidence would show.

(4) The Court finds that the Petitioner further maintains that the improper characterization of the Petitioner being a drug dealer immediately prejudiced the jury and denied him a fair trial.

(5) The Court **FINDS** and **CONCLUDES** that the West Virginia Supreme Court has held that a conviction "will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly manifest justice." The Court has long held that "[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of the case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." *State v. Davis*, 205 W.Va. 569, 519 S.E.2d 582 (1999).

(6) During his opening statement, the prosecutor stated that following: "He was dealing Hydromorphone which is also known as Dilaudid or 'K-4'..."

He further stated: "No one will confuse this with a Star Wars production but you will be able to clearly see that on September 13th the defendant, Andre King, came to a vehicle driven by Ms. Booker, transacted business in her vehicle..."

"You can see Mr. King very clearly on the video. And you can tell that the temperature is turned up insofar as he actually attempts to search her for a wire at that time..."

"In October he was selling drugs out of the house on Harrison Street right here in the city of Princeton..." *See* Trial Transcript, pp. 29-31.

(7) Defense counsel did not object to the above statements during opening

statements. The Court further finds that the jury was instructed by the Court that "opening statements are neither arguments nor evidence and should not be considered as such." *See* Trial Transcript p. 28. This instruction was given prior to the opening statements.

(8) Based on review of the opening statement, the **FINDS** and **CONCLUDES** that the Prosecutor did not make any improper statements concerning the Petitioner which would have prejudiced him from the beginning of the trial.

(9) The Court **FINDS and CONCLUDES** that the Petitioner's claim of prosecutorial misconduct made in Claim B is without merit.

Claim C: **The Petitioner was denied due process pursuant the 14th Amendment of the United States Constitution and Article II Section 10 of the West Virginia State Constitution due to the (sic) judicial misconduct.**

The Petitioner's Argument:

The Petitioner argues that the Honorable Judge Knight was prejudiced against the Petitioner because he was from Columbus and not the Princeton area. The Petitioner cites the following statements by Judge Knight during sentencing to support his argument:

THE COURT: What..what the State believes.

I just believe that Mr. King is part of the problem down here. He doesn't live here, he comes out of Ohio. He comes down here, with, eh, with...known as, eh, Columbus B. I believe. Something of that nature. Umm...just openly dealing.

And...and the evidence or part of the report there shows that he kind of moved into this house. And, eh, just none of makes sense, except if you look at it from somebody that seems, to be, skilled at what they are doing.

And so as a result of it, I don't believe that the Court can give much consideration to him at all. And it is the judgment of this Court, he is

guilty by jury verdicts in this case, which was on Count One and Count Two of delivery of, eh, controlled substance. And I hereby, each one of them, sentence him in the West Virginia terms of one to fifteen years in the penitentiary on each charge.

I direct that they be run consecutively. Umm..I also use 480...60A-4-408 for an enhancement to double the penalties. And I direct that be applied to the sentence.

(*See*, Disposition Transcript, pp. 22-23).

The Respondent's Response. The Respondent did not directly respond to this claim.

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 above-referenced comments from the Court were made during the sentencing hearing and not during the trial before the jury.

(2) The Court finds that no witness testified during the Omnibus Hearing held on August 2, 2010, to support the claim of judicial misconduct.

(3) The Court **FINDS and CONCLUDES** that the real test for a prejudicial statement is its effect on the jury. *See*, *Adams v. Cline Ice Cream Co.*, 101 W.Va.35, 131 S.E.2d 867 (1926).

(4) The Court **FINDS and CONCLUDES** that the Petitioner has failed to prove his claim of judicial misconduct by Judge Knight during the trial by a preponderance of the evidence, as there were no witnesses, evidence, or testimony in support thereof at the habeas hearing.

(5) The Court finds that these factors are totally permissible to be used by

Judge Knight in sentencing the Petitioner. *See*, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009), *State v. Goodnight*, 169 W.Va. 287 (1982), *State v. Rogers*, 167 W.Va. 358, 280 S.E.2d 82 (1981).

(6) The Court **FINDS and CONCLUDES** that the Petitioner's claim of judicial misconduct made in Claim C is without merit.

Claim D: The Petitioner was denied due process by failure to indict before the second term of court pursuant to W.VA. (sic) Code § 62-2-12.

The Petitioner's Argument:

The Petitioner argues that the Petitioner was arrested on October 11, 2005 but was not indicted by the Grand Jury until February 14, 2007. Petitioner further argues that pursuant to W.Va. Code § 62-2-12, he should have been indicted by the end of the February 2006 term. The Petitioner states that he remained in the State's custody through four terms of court, beginning in October 2005 through October 2006. The Petitioner argues that he should have been released before the end of the second term of court for failure to indict.

The Respondent's Response. The Respondent did not directly respond to this claim.

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 that W. Va. Code § 62-2-12, states the following:

> A person in jail, on a criminal charge, shall be discharged from imprisonment if he be not indicted before the end of the second term of court, at which he is held to answer, unless it appear to the court that material witnesses for he State have been enticed or kept away, or are prevented from attendance by sickness or inevitable accident, and except also that, when a person in jail, on a charge of having committed an indictable offense, is not indicted by reason of insanity at the time of committing the act,

> the grand jury shall certify that fact to the court; whereupon the court may order him to be sent to a state hospital for the insane, or to be discharged.

(2) The Court finds that the Petitioner was arrested on October 10, 2005. (*See*, Criminal Court File, Criminal Complaint dated 10-11-05, filed 3-15-06).

(3) The Court finds that the Petitioner was arraigned on October 11, 2005. (*See*, Criminal Court File, dated 10-11-05, filed 3-15-06).

(4) The Court finds that the Petitioner was committed to jail on October 11, 2005. (*See*, Criminal Court File, Jail Commitment Order dated 10-11-05, filed 3-15-06).

(5) The Court finds that a bond of $50,000 was posted by professional bondsman, Ratcliffe Bonding on October 11, 2005 and the Petitioner was released on October 11, 2005. (*See*, Criminal Court File, Criminal Bail Agreement, dated 10-11-05, filed 3-15-06).

(6) The Court finds that the Petitioner was not imprisoned for longer than two terms.

(7) The Court finds that even if this statute applied the relief granted for violation of the two term rule is release from commitment to jail and not a ban to prosecution of the underlying offense.

(8) The Court **FINDS and CONCLUDES** that the State has not violated W.Va. Code § 62-2-12.

(9) The Court **FINDS and CONCLUDES** that the Petitioner's claim of failure to indict before the second term of court made in Claim D is without merit.

Claim E: **The Petitioner's conviction was based on insufficient evidence.**

The Petitioner's Argument:

The Petitioner argues that the video did not capture the alleged September 15, 2005 drug transaction and that the Prosecutor kept repeating that the video recordings from the wire worn by the confidential informant were not "Hollywood quality." The Petitioner further argues that Detective Smothers conceded that the camera failed to show that a drug transaction had transpired. The Petitioner further argues that due to the lack of clarity of the video and the Smothers' testimony that reasonable doubt exists regarding the Petitioner's guilt.

The Respondent's Response. The Respondent did not directly respond to this claim.

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

(1) The Court finds that it is the function of the jury to weigh the testimony at trial and to make credibility determinations. *See*, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

(2) The Court **FINDS and CONCLUDES** that the jury weighed the proof/evidence that was before it and determined that the Petitioner was guilty of two counts of Delivery of a Schedule II Controlled Substance, To-Wit: Hydromophone and not guilty of one count of Delivery of a Schedule II Controlled Substance, To-Wit, Hydromophone and not guilty of one count of Conspiracy.

(3) The Court finds that the Petitioner argues that the following testimony was insufficient for a conviction:

Sgt. Smothers: Of course, you don't actually see the transaction take place

because of the location of the camera. It would have been, you know, a really unnatural act to have captured the actual hand-to-hand transaction on the camera.

(*See*, Trial Transcript, p. 41).

(4) The Court finds that the Petitioner further argues the videotape did not capture the alleged drug exchange on September 13, 2005 between the Petitioner and Ms. Booker.

(5) The Court finds that the Petitioner further argues that the alleged drug transaction on September 15, 2007[7] (sic) was very unclear and did not capture the alleged drug transaction, resulting in charges filed against the Petitioner.

(6) The Court finds that the following testimony of Deborah Booker describes the drug transaction in detail and that was the video tape at issue:

State: Ma'am, let me direct your attention back to September 13, 2005. Were you active as a cooperating individual with the police at that time?

Ms. Booker: Yes.

State: On that date, were you asked to go to Vine Street, near Princeton, West Virginia?

Ms. Booker: Yes.

State. Tell the jury how it is that you met up with police that day?

Ms. Booker: Well, I had met up with them like down the street from there. And, uh, they had give me money and I called him to buy something. And then I went to Vine Street to a girl named Julie Bell's house and that's where purchased.

State: Okay. You said you called him. Who did you call?

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[7]The Court notes that the alleged drug transaction the Petitioner refers to occurred on September 15, 2005.

Ms. Booker: Hun?

State: Who did you call?

Ms. Booker: "B." Andre.

State: Okay. The defendant?

Ms. Booker: King. Yeah.

State: That's here today.

Ms. Booker: Yeah.

State: Had you had...did you know him prior to September 13, 2005?

Ms. Booker: Yes.

State: How is it that you knew him then?

Ms. Booker: Uhm, well, I was strung out on drugs and he was dealer part of the time when he was in town.

State: Did you, uh, did the police ask you to wear a wire?

Ms. Booker: Yeah.

State: And how did that, where did that go on you?

Ms. Booker: Uh, on a shirt. Button on a shirt.

State: What did you do that day?

Ms. Booker: What did I do that day?

State: You said that you took some money, you made a call to him. What happened then?

Ms. Booker: Uh, I went up to the residence and I purchased some dilaudid.

State: Do you remember how many dilaudid that you bought?

Ms. Booker: I think it was two.

State: Okay. And, uh, that's been what? Nearly two years ago?

Ms. Booker: Two years ago, yes.

State: What did you do after you purchased the dilaudid?

Ms. Booker: Uh, I drove back to Charlie. And I give him what I had bought. And he took the recorder and then I left.

State: Did you, uh, did you repeat this again some later date?

Ms. Booker: Yeah.

State: About September 15th sound about right? 2005? A couple of days later?

Ms. Booker: Yeah.

State: Could you tell the jury what you did that day?

Ms. Booker: Basically I did the same thing. I met them down the street and went to the same residence on Vine Street and I brought...bought some dilaudid and then I took it back to the Drug Task Force.

State: Okay. Were you wearing a camera? A wire on that day also?

Ms. Booker: Yes. It was on a button up shirt.

State: And what did you do with that after you made the purchase of the drug?

Ms. Booker: I gave it straight back to Charlie.

State: Ma'am, who is it that you on September 13th, 2005 and two days later on the 15th, who is it that you purchased these dilaudid from?

Ms. Booker: Andre King.

(*See*, Trial Transcript pp.81-84)

(7) The Court finds that the following testimony of Andre King on cross-examination also describes the drug transaction that occurred on September 15,

2005:

State: Now, I'm right your testimony on September 15, 2005, this last disk that we just watched, you in fact gave you some K-4 dilaudids to Ms. Booker, is that correct?

Mr. King: No, sir.

State: Isn't it your testimony that you said that if you came across some, and so you got her some?

Mr. King: Yes. If I came across some, I got her some. Yeah, I gave her some that day-

State: Okay. So-

Mr. King: -Some I had. It wasn't like we was selling them to her or anything. I owed her that.

State: So, you delivered K-4 Dilaudids to her on September 15th?

Mr. King: No. I never. I owed her. I owed her. I was paying back a debt that I owed her.

State: Maybe it's a semantic problem. You had some K-4 Dilaudids in your hand and you gave them to her, is that correct?

Mr. King: Yeah. I gave them to her. I did not accept any money from her or none of those things. So that's not....I don't...I wouldn't say that would be dealing. That's just like if I had a Tylenol in my pocket and you had a headache and you said give a Tylenol so that means I was dealing then.

State: So, it is basically a happenstance that on the 15th she called up and you had some pills and she came over and you gave them to her?

Mr. King: Yeah, because she had gave me some oxycotin (sic) before when I was around here before. And she told me, you know what I'm saying, that I owed her for them. So that was all right. She didn't want no money.

State: How many pills did you give her on the 15th?

Mr. King: It was like two pills. I didn't owed her nothing but two pills.

State: So these things are $25 a piece, right?

Mr. King: I don't know. I didn't pay her for them like that.

State: Now on the tape it looks like you give her a big old hug on the 15th, is that right?

Mr. King: Yeah. We was cool.

State: Because you were close?

Mr. King: Right.

State: But immediately thereafter you're asking her to lift her shirt up, aren't you?

Mr. King: Yeah, because-Let me ask you this question. I understand what you're trying to get to.

The Court: No. Just answer the question.

Mr. King: Okay. Oh. Yes. I asked her to lift up her shirt.

The State: And that's because you're looking to see if she's wearing a wire, aren't you?

Mr. King: Yes.

The State: And, in fact, you basically accuse her of that, aren't you?

Mr. King: Yeah. Because she never acted like that before.

(*See*, Trial Transcript, pp. 120-123)

(8) The Court **FINDS and CONCLUDES** that in light of the Petitioner's and Deborah Booker's testimony that a jury could reasonably conclude beyond a reasonable doubt that a drug transaction had occurred.

(9) The Court **FINDS and CONCLUDES** that the videotape was additional evidence for the jury to consider but there was sufficient evidence to sustain the

verdict without it.

(10) Therefore, The Court **FINDS and CONCLUDES** that sufficient evidence existed to convict the Petitioner of two counts of Deliver of a Schedule II Controlled Substance, To-Wit: Hydromorphone.

(11) The Court **FINDS and CONCLUDES** that the Petitioner's claim of insufficient evidence to support his conviction made in Claim E is without merit.

Claim F: **Sergeant Smothers improperly testified regarding other crimes, wrongs, acts pursuant to Rule 404(b) of the West Virginia Rules of Evidence without providing the Petitioner proper notice from the State and without a *McGinnis* hearing being conducted.**

The Petitioner's Argument:

The Petitioner argues that Rule 404(b) evidence is sensitive in nature and has a high tendency of resulting in prejudice and that the West Virginia Supreme Court of Appeals has extensively fashioned safeguards regarding its admission. *See*, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The Petitioner argues that Sgt. Smothers improperly testified regarding the Petitioner's desire for a "blunt" in response to a question by Mr. Cooke:

> ATTORNEY COOKE: Okay. Didn't she stop at an Exxon station?
>
> DETECTIVE SMOTHERS: Now, wait a minute. Yes. She did. Yes. She did. I'm sorry.
>
> ATTORNEY COOKE: Okay.
>
> DETECTIVE SMOTHERS: And the reason she had done what was in an earlier telephone conversation that she had with Mr. King, he had told her that he wanted her to bring her what they call a blunt.
>
> And a blunt is simply a cigar that they use to hollow out and put marijuana in

instead of tobacco. Or mix the marijuana with the tobacco. And to be honest with you, I've never been able to see how they do it without tearing the cigar up but most people seem to be able to do-

(Trial Transcript, May 30, 2007, p.55, Exhibit I).

The Petitioner argues that the above exchange falls within 404(b) evidence of an another crime, wrong, or act and was not responsive to the question posed. The Petitioner further argues that there was never any notice of 404(b) evidence provided by the State nor was there a *McGinnis* hearing held to determine admissibility of the testimony regarding the illegal drug use not at issue at the trial. The Petitioner argues that the admission of this testimony without prior notice from the State, without a pre-trial hearing, and without a curative jury instruction was clearly prejudicial to the Petitioner and warrants a reversal of his conviction. The Petitioner further argues that Mr. Cooke was ineffective in failing to object to Sgt. Smothers' opinion/theory testimony as unresponsive to the question asked, thus failing to preserve this ground for appeal.

The Petitioner argues that Sgt. Smothers' testimony regarding the Petitioner traveling to Columbus to obtain illegal drugs constituted 404(b) evidence of other crimes, wrongs, or acts was inadmissible. The Petitioner argues that at trial, Detective Smothers offered his opinion of why no drugs were found when the Petitioner was taken into custody. The Petitioner offers the following testimony from the trial:

ATTORNEY COOKE: Okay. Did you search the room where he was staying?

DETECTIVE SMOTHERS: Myself and Sergeant Compton did.

ATTORNEY COOKE: Did you find anything?

DETECTIVE SMOTHERS: There was a sum of money that was taken.

ATTORNEY COOKE: Okay.

DETECTIVE SMOTHERS: Didn't find any drugs which would be normal, you know, when drugs run low, then you go back to Columbus and you reup. Or restock, resupply.

(Trial Transcript, May 30, 2007, p.57, Exhibit J.)

This Petitioner argues that this evidence was offered by Sgt. Smothers and not in response to a question asked by Mr. Cooke on cross-examination. The Petitioner argues that there was never any notice of 404(b) evidence offered by the State and there was no evidentiary hearing held to determine admissibility of evidence that dealt with illegal drugs use not at issue at trial. The Petitioner argues that admission of this testimony without prior notice, a *McGinnis* hearing, and a curative instruction to the jury, was clearly prejudicial to the Petitioner and warrants reversal of his conviction.

The Respondent's Response. The Respondent asserts that this testimony was an unsolicited and irrelevant diversion, and the hypothetical uses for a cigar had no material impact on the jury's verdict.

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

(1) The Court finds that Rule 404(b) of the West Virginia Rules of Evidence states the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon reasonable notice in advance of trial, or during trial if the court shall provide pretrial notice in advance of trial, or

> during trial if the court excuses pretrial notice on good cause shown, or the general nature of any such evidence it intents to introduce at trial.

(2) The Court finds that prior to admitting 404(b) evidence, the Court must conduct an *in camera* hearing to determine whether, by a preponderance of the evidence, the acts or conduct occurred and the defendant committed those acts. *See, State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

(3) The Court determines that the acts or conduct occurred, the Court must then determine the relevancy of the evidence under Rules 401 & 402 and conduct a Rule 403 balancing test. *See*, Rule 403 of the West Virginia Rules of Evidence, *Taylor v. Cabell Huntington Hosp.*, 208 W.Va. 128, 538 S.E.2d 719 (2000).

(4) If the Court determines that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purposed for which the evidence has been admitted. A limiting instruction should be given at the time the evidence is offered and repeated in the general jury charge. *See*, *Taylor v. Cabell Huntington Hosp.*, 208 W.Va. 128, 538 S.E.2d 719 (2000).

(5) It is not enough to cite or mention the litany of possible uses listed in the evidentiary rule governing admissibility of such evidence; the specific and precise purpose for which the evidence is offered must be clearly exhibited in the record and that specific purpose must be told to the jury in the Court's instructions. *State v. Johnson*, 210 W.Va. 404, 557 S.E.2d 811 (2001).

(6) Based upon a review of the record, the Court **FINDS and CONCLUDES** that the Trial Court did not conduct an *in camera* hearing to determine whether,

by a preponderance of the evidence, the Petitioner had used drugs. Sgt. Smothers' testimony regarding the blunt occurred during cross-examination and was offered by the witness and not from counsel. The Petitioner's counsel did not object and the Court heard no argument regarding this issue. (*See,* Trial Transcript, p.55).

(7) The Court finds that during the Petitioner's testimony on direct examination he stated the following:

> Q: Now. And there in 2005, September through October, when these events happened you were using pretty heavily, weren't you?
>
> A: Yeah. I was using Oxycotin (sic)...Oxycotin (sic) then.
>
> Q: Okay. Now, uh, when, un, on the, uh, the 13th of September that was the first drug transaction that you've been charged with making. Uh, when, uh, that, uh, when Ms. Booker brought you a blunt what...what happened there?
>
> A: Earlier that day she had called me and I had talked for a minute. She asked me if I was back. I had owed her a couple of dollars or whatever. And uh, I told her, you know, grab me a blunt. She all wanted to see, you what I'm saying. So then she came up there. Brought me a blunt she held back then.
>
> And, you know, I see a computer saying like I'm doing a drug buy and when she had been up to give me back my change from the money I'd gave her earlier and the dude that bring me a blunt shell.
>
> Q: Okay. So you didn't sell any-
>
> A: Naw.
>
> (*See*, Trial Transcript, pp. 116-117).

(8) The Court finds that the Petitioner testified to asking Ms. Booker to bring him a blunt, and that she did so.

(9) The Court finds that this evidence was presented by the Petitioner at trial to

explain the events between Booker and him.

(10) The Court **FINDS and CONCLUDES** that the Petitioner's claim of improper 404(b) evidence being admitted at trial without notice and a *McGinnis* hearing made in Claim F is without merit.

Claim G: **The evidence obtained by the confidential informant was tainted because the Southern West Virginia Task Force failed to thoroughly search the confidential informant and ensure that she did not have controlled substances on her person before she entered into the alleged drug transaction.**

The Petitioner argues that Deborah Booker, a notorious drug addict, was utilized as a confidential informant but was not properly searched prior to the purchase of hydromorphone. The Petitioner argues that because of Ms. Booker's drug use that she could have had hydromorphone pills on her person prior to going the residence on Vine Street and or allegedly meeting with the Petitioner in her car. The Petitioner argues that because the confidential informant was not thoroughly searched prior to the alleged drug transaction, any evidence presented by her to the Task Force was tainted and could not be considered admissible at trial. The Petitioner further argues that admitting this evidence at trial violated his due process rights, and resulted in his conviction of Counts One and Two of the Indictment.

The Respondent's Response. The Respondent did not directly respond to this claim.

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

(1) The Court finds that the search of Ms. Booker on September 13, 2005 was discussed during Sgt. Smothers' direct testimony as follows:

Q: What did you do then?

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A: Well, we, uh, met with Ms. Booker. Her vehicle was searched. Her person was searched as possible for a man to search a woman. Uh-

Q: This was on September 13th, is that correct?

A: On September 13th, this was around one o'clock in the afternoon.

Q: Who else was present with you?

A: Uh, that day there was Sergeant Centeno was with me. And also, uh, I believe Deputy Iafolla, let me check and make certain.

Q: Okay. Are those gentlemen-

A: Yes, Deputy Iafolla that works with the Task Force, he's from McDowell County. Sergeant Centeno is a State Trooper that is actually the coordinator over the Task Force.

Q: So Ms. Booker was searched, is that correct?

A: Yes.

(*See*, Trial Transcript, pp. 38-39).

(2) The Court finds that the search of Ms. Booker on September 15th was discussed during Sgt. Smothers' direct testimony as follows:

Q: Sergeant, let me focus your attention on September 15th. Uh, the date charged in Count Two of the indictment. Did you meet with Ms. Booker that day?

A: Yes, I did.

Q: Do you recall...was there anyone else with you?

A: That particular day Sergeant Centeno was with me.

Q: Did you in fact hook her with a camera again as you had on the 13th?

A: Yes, we did.

Q: Did you in fact give her money again as you had the 13th of September?

A: Yes, we gave her $200.

Q: What did you all do then?

A: Okay. We followed the exact same procedure. She was searched. The vehicle was searched. Uh, gave her money. The recorder was placed with her exactly in the same way and proceed to 207 Vine Street.

(*See*, Trial Transcript, pp. 44-45).

(3) The Court finds Sgt. Smother's direct testimony regarding the search of Ms. Booker was cross-examined by Mr. Cooke in the following exchange:

Q: Now. Well, let's talk a little bit about the September 13th transaction. Uh, the, uh, the cooperating individual, uh, when...when you and the other officer had fitted her up with a camera and everything. She didn't go directly to the Vine Street residence, did she?

A: Uhm...I'm not aware of an (sic) stops that she made along he way.

Q: Okay. Didn't she stop at an Exxon station?

A: Now, wait a minute. Yes. She did. Yes, she did. I'm sorry.

Q: Okay.

A: And the reason she had done that was in an earlier-I'm glad that you reminded me of that. In an earlier telephone conversation that she had had with Mr. King, he had told her that he wanted her to bring her what they call a blunt.

Q: And a blunt is simply a cigar that they use to hollow out and put marijuana in instead of tobacco. Or mix the marijuana with the tobacco. And to be honest with you, I've never been able to see how they do it without tearing the cigar up but most people seem to be able to do-

Q: Okay. So now...now, when you had searched her and you indicated in your report and through testimony that Mr.- through questions Mr. Ash had asked you- you had searched the cooperating individual before the transaction started?

A: Yes.

Q: Now did that search include an inventory of any cash or anything that she may have?

A: Well, we knew she had enough money to stop and get what she needed to at the Exxon Station.

Q: Oh, okay.

A: That had actually slipped my mind.

(*See* Trial Transcript pp. 54-55).

(3) The Court finds that Ms. Booker was searched in the same manner on both September 13 and September 15, 2005 when she was working as an confidential informant with the Southern West Virginia Task Force.

(4) The Court **FINDS and CONCLUDES** that the jury heard evidence of Ms. Booker's searches and weighed the credibility of Sgt. Smothers' testimony.

(5) The Court **FINDS and CONCLUDES** that the Petitioner has failed to prove that the the search was tainted and not a proper search.

(6) The Court **FINDS and CONCLUDES** that the Petitioner's claim of tainted evidence admitted at trial due to an improper search made in Claim G is without merit.

Claim H: The State elicited and introduced perjured testimony from Deborah Booker regarding her employment at Princeton Community Hospital and Outback Steakhouse.

The Petitioner's Argument:

The Petitioner argues that the State introduced perjured testimony at trial because Deborah Booker testified that she was employed at Princeton Community Hospital and Outback Steakhouse at the time of the trial, lied on the witness stand:

> MR. ASH: Let me ask you, are you working?
>
> MS. BOOKER: Yes, sire.
>
> MR. ASH: Where are you working at?
>
> MS. BOOKER: I work at Princeton Community Hospital in the lab. I'm a Phlebotomus (sic). And I work at the Outback Steakhouse, part time.
>
> (*See*, Trial Transcript, p. 79).

The Petitioner alleges that Ms. Booker was not working and therefore, her testimony is perjured. The Petitioner's counsel contacted Rob Harbaugh, the manager of the Outback Steakhouse, regarding Ms. Booker's employment and Mr. Harbaugh stated that she had never been employed there. The Petitioner's counsel also contacted Janet Horne of the Human Resources Department of Princeton Community Hospital and Ms. Horne stated that Ms. Booker had never been employed there. The Petitioner argues that her perjured testimony at trial violated the Petitioner's constitutional right to due process and a fair trial.

The Respondent's Response. The Respondent argues that it had no reason to know whether Ms. Brooks worked at the Outback Steakhouse or Princeton Community Hospital. The Respondent further argues that the issue is immaterial to the verdicts in this case. The Respondent cites to *State ex rel Warren D. Franklin v. McBride*, 2009 WL 325536 (W.Va.) Syl. Pt. 2,

> "In order to obtain a new trial on a claim that prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, **and** (3) the false testimony had a material effect on the jury verdict." (Emphasis Added).

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

(1) The Court finds that the three requirements under *State ex rel Warren D. Franklin v. McBride* are conjunctive and that all three requirements must be met before a new trial may be held under the claim of a prosecutor presenting false testimony.

(2) The Court finds that the Petitioner and the State agreed that the hospital records of Princeton Community Hospital did not show that Deborah Booker was an employee during the relevant time period.

(3) The Court finds that it appears that Ms. Booker was not truthful or was mistaken in her testimony regarding her employment with the Princeton Community Hospital.

(4) The Court finds that the Petitioner failed to show that the Prosecutor knew or should have known that the testimony was false.

(5) The Court finds that Rob Harbaugh did not testify regarding Ms. Booker's employment at the Outback Steakhouse during the Omnibus Habeas Corpus proceeding held on August 2, 2010.

(6) The Court finds that no documentary evidence was presented during the Omnibus Habeas Corpus proceeding regarding Ms. Booker's employment with Outback Steakhouse.

(7) The Court finds that it cannot consider the allegation that Ms. Booker did not work

at the Outback Steakhouse during the relevant time frame.

(8) The Court finds that under the W.Va. 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 W.Va.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 testimony regarding Ms. Booker's employment had no material effect on the jury verdict as her employment has no bearing to the drug transactions.

(11) The Court **FINDS and CONCLUDES** that the Petitioner has failed to prove that Ms. Booker's alleged perjured testimony was intentionally elicited by the Prosecutor in this matter under *Franklin*.

(12) The Court **FINDS and CONCLUDES** that Ms. Booker's false testimony regarding her employment with Princeton Community Hospital was immaterial to the outcome of the Petitioner's trial; and that the Petitioner's claim of perjured testimony being admitted at trial made in Claim H is without merit.

Claim I: **A sentence of four to sixty years in the penitentiary is excessive and disproportionate to the character and degree of the offense pursuant to the Eighth Amendment of the United States Constitution and West Virginia State Constitution Article III Section 5.**

The Petitioner's Arguments:

The Petitioner argues that his sentence is repugnant to the principles of the Eighth Amendment of the United States Constitution and the West Virginia State Constitution Article III Section Five. The Petitioner argues that his counsel failed to inform him of the existence of the sentence enhancement statute for second and subsequent drug offenses, he did not realize that he could be sentenced to four to sixty years in prison. The Petitioner argues that had he been advised of the potential sentence prior to going to trial, the Petitioner would have considered a possible plea offer, if any. The Petitioner further argues that due to his ineffective counsel, he received an excessive and disproportionate sentence.

The Respondent's Response. The State did not directly respond to this claim.

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

(1) The Court finds that the Petitioner was sentenced to two consecutive sentences of one to fifteen years in the penitentiary by the Honorable David Knight on June 28, 2007. Pursuant to W.Va. Code § 60A-4-408, the Petitioner's sentence was enhanced for second or subsequent offenses.

(2) The Court finds that W.Va. Code § 60A-4-408 states the following:

> (a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, or both. When a term of imprisonment is doubled under section 406, such term of imprisonment shall not be further increased for such offense under this subsection (a), even though such term of imprisonment is for a second or subsequent offense.
>
> (b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana,

depressant, stimulant, or hallucinogenic drugs.

(3) The Court finds that W.Va. Code § 60A-4-408 provides for a an imprisonment for twice the term otherwise authorized. Therefore, a sentencing judge could within his discretion, increase the sentence two times the authorized amount.

(4) The Court finds that in *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008), the West Virginia Supreme Court of Appeals affirmed W.Va. Code § 60A-4-408 as being constitutional under both the Federal and State Constitution, specifically Syllabus Point 4 which states:

> "West Virginia Code §60A-4-408 (1971), which permits sentencing enhancement for certain repeat drug offenders based solely on the fact of a pervious drug conviction , does not violate the due process protections found in Article III § 10 of the West Virginia Constitution."

The *Rutherford* Court found that W.Va. Code § 60A-4-408 requires only a finding of fact of a prior conviction in order to enhance a defendant's sentence and under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), it meets its constitutional due process standards.

(5) The Court finds that the United States Supreme Court found that a vast difference existed between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant has a right to a jury trial and the right required by the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof. The U.S. Supreme Court concluded that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to the jury and proved beyond a reasonable doubt."

(6) The Court finds that the W.Va. Code § 60A-4-408 provides a greater, and discretionary, enhancement in any case involving a repeat drug offender. The court finds that the judge, not the prosecuting attorney, makes the enhanced sentencing decision under this drug offense statute.

(7) The Court finds that the Honorable David Knight did not abuse his direction in sentencing the Petitioner under W.Va. Code § 60A-4-408 and *Rutherford*.

(8) The Court **FINDS and CONCLUDES** that the trial court's sentence was within statutory limits and was not based on unpermissible factors. *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (W.Va. 1982) at syl. pt. 4., *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

(9) The Court **FINDS and CONCLUDES** that the trial court did not abuse its discretion in ordering these sentences. The trial court recited the factors it used in imposing these sentences on the record during the sentencing hearing held on June 28, 2007. (*See*, disposition transcript, June 28, 2010, pp. 19-23.)

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

(11) The Court also finds and concludes that, while constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by or

where there is a life recidivist statute. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981) at syl. pt. 4. The sentences in this action are not of either type.

(12) The Court finds and concludes that these sentences are not disproportionate to the crimes for which they were imposed.

(13) The Court **FINDS and CONCLUDES** that the Petitioner's claim of excessive sentence made in Claim I 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 Natalie N. Hager, Esq., to represent the Petitioner on appeal of this ruling.

3. That this is a final order. The Circuit Clerk is directed to distribute a certified copy of this Order to Natalie N. Hager, Esq., at 1605 Honaker Avenue, Princeton, WV 24740, to Scott Ash, Esq., at 120 Scott Street, Suite 200, Princeton, WV 24740, and to the Respondent at Huttonsville Correctional Center, Huttonsville, WV 26273.

ENTER: This the 31st day of January, 2011.

THE FOREGOING IS A TRUE COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 31st DAY
OF January 20
DATED THIS 1st DAY OF February
20 11

JULIE BALL, CLERK OF THE
CIRCUIT COURT OF MERCER COUNTY WV
BY Ingrid S. Fox 57
HER DEPUTY

Derek C. Swope, Judge

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