STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State ex rel. William David Belcher,
Petitioner Below, Petitioner

vs) No. 11-0494 (Mercer County 09-C-286)

Adrian Hoke, Warden, Respondent
Below, Respondent

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

MEMORANDUM DECISION

Petitioner William David Belcher, by counsel, Derrick W. Lefler, appeals from the circuit court's order denying his petition for post-conviction habeas corpus relief. The State of West Virginia, by counsel, Thomas W. Rodd, has filed its response on behalf of respondent, Adrian Hoke, Warden. Petitioner seeks reversal of the circuit court's decision and habeas corpus relief.

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 first degree murder with a recommendation of mercy on April 8, 2008. Petitioner's appeal from his criminal conviction was denied by the Court on March 12, 2009. On June 22, 2009, petitioner filed a pro se petition for a writ of habeas corpus. Thereafter, the circuit court appointed habeas counsel. Following an omnibus hearing, the circuit court entered its February 15, 2011, "Order Denying the Petitioner's Petition for Writ of Habeas Corpus Ad Subjiciendum and Removing It from the Court's Active Docket."

Petitioner now appeals the denial of his habeas corpus petition below and raises two issues: ineffective assistance of counsel and wrongful trial bifurcation. "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 Ad Subjiciendum and Removing It from the Court's Active Docket" entered on February 15, 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

Derrick for P

11-0494

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*

William David Belcher PETITIONER,

V. Civil Action No. 09-C-286

Adrian Hoke,[1] WARDEN RESPONDENT.

HUTTONSVILLE CORRECTIONAL COMPLEX

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

On May 10, 2010, this matter came before the Court, the Honorable Judge Derek C. Swope presiding, for a hearing on the Petitioner's Petitions for Post Conviction Habeas Corpus Relief, brought pursuant to the provisions of Chapter 53, Article 4A of the West Virginia Code, as amended, which were filed by the Petitioner *pro se* and also by and through his court-appointed counsel, Derrick W. Lefler, Esq. The Petitioner filed a *pro se* Petition for Writ of Habeas Corpus on June 22, 2009. Counsel for Petitioner filed an Amended Petition for Writ of Habeas Corpus on January 20, 2010. Thereafter, counsel for Petitioner filed a Second Amended Petition for Writ of Habeas Corpus on May 7, 2010. The Petitioner and his counsel appeared at the Omnibus hearing. Scott Ash, Esq., Assistant Prosecuting Attorney, appeared on behalf of the State of West Virginia.

[1] On February 19, 2010, this Court amended the Petition to reflect the Warden as Adrian Hoke rather than Teresa Waid.

The Petitioner is seeking post-conviction habeas corpus relief from his May 17, 2004 sentence of life with mercy for the offense of First Degree Murder. The Petitioner was ordered to be confined for the remainder of his natural life as provided by law for the offense of Murder in the First Degree, and due to the jury's recommendation of mercy, the defendant will be eligible for parole in fifteen (15) years from the date of his confinement, absent a showing that he is being unlawfully detained due to prejudicial constitutional errors in the underlying criminal proceedings.

Whereupon the Court, having reviewed and considered the Petitions, the court files, the transcripts, the arguments of counsel and the pertinent legal authority, does hereby DENY the Petitioner's Petitions for Habeas Corpus relief.

In support of the aforementioned ruling, the Court makes the following GENERAL FINDINGS of FACT and CONCLUSIONS OF LAW:

I. FACTUAL/PROCEDURAL HISTORY

Case No. 03-F-128

A. The Indictment

By a True Bill returned on June 11, 2003, by the Mercer County Grand Jury, the Petitioner, William David Belcher, was indicted for the offense of Murder-First Degree. The victim was the Petitioner's girlfriend, Bernadette McCoy. The crime occurred on February 27, 2003, at the victim's home on Pisgah Road in Mercer County, West Virginia.

B. Pre-Trial Proceedings

After the shooting but prior to the action of the Grand Jury, the matter came on for arraignment pursuant to Mr. Belcher having been arrested upon the charge of murder in the First Degree on February 28, 2003. George Sitler, Esq. and Omar Aboulhosn, Esq.,[2] were appointed

[2] Now the Honorable Omar Aboulhosn.

to represent Mr. Belcher, and Mr. Belcher was directed to advise the Court by March 7, 2003 if he intended to retain private counsel. Upon a motion by Mr. Belcher's counsel, the Court ordered that the defense be provided with a copy of Mr. Belcher's statement once it was transcribed. The Petitioner's trial counsel further moved the Court to grant Mr. Belcher bond in the matter, to which the State objected. After due consideration, the Court denied the Petitioner's motion for bond, and the Petitioner was remanded to the Southern Regional Jail.

On June 23, 2003, the Defense moved for discovery of any Statement of Mr. Belcher, Mr Belcher's prior record, documents and tangible objects, reports of examinations and tests and the State's witnesses. On July 29, 2003, the Petitioner, by and through counsel George Sitler, Esq., and Omar Aboulhosn, Esq. requested a continuance of the trial, which was subsequently granted.

Defense counsel retained the West Virginia Psychiatric Services of South Charleston and the West Virginia and Process Strategies of Charleston, West Virginia to conduct forensic examinations of the Petitioner for use in the preparation and presentation of the Petitioner's case. David A. Clayman, Ph.D., of Process Strategies opined on September 26, 2003, that the Petitioner "had the factual and rational capacity to understand the proceedings against him and to participate in his defense. The only limitations would arise from his inability to read materials relevant to his case and to track highly complex concepts and actions within the courtroom. There is no indication that he should not be able to grasp these issues if they are explained to him in simplistic terms." He further found that "(t)here is no evidence that Mr. Belcher was suffering from a mental disease or defect at the time of the alleged crime such that he would have been unable to distinguish right from wrong or to conform his behavior to the law." (See report of Process Strategies; filed on March 30, 2004 as Defendant's Exhibit 1 at the hearing held on March 22, 2004.)

John D. Justice, M.D. of Psychiatric Services examined the Petitioner on behalf of his first trial counsel on May 20, 2003. He stated that "(i)n summary, it is my professional opinion, with reasonable medical certainty, that the defendant is Competent to Proceed to Trial and is Criminally Responsible for his behavior." (*See* report of Psychiatric Services; filed on March 30, 2004 as Defendant's Exhibit 2 at the hearing held on March 22, 2004).

On July 31st, 2003, the Petitioner retained private counsel, Wayne D. Inge, Esq., and asked that Mr. Inge be substituted as his counsel in place of Mr. Sitler and Mr. Aboulhosn, who were granted leave to withdraw as counsel for the Petitioner on August 1, 2003.

On November 19, 2003, the Petitioner, through counsel Mr. Inge moved to continue the trial until the next term of court, and also moved the Court to allow the Petitioner to undergo further psychological/psychiatric examinations. On November 21, 2003, the Court granted the continuance and set the trial for the February 2004 Term of Court. On December 18, 2003, Petitioner, by and through counsel Mr. Inge filed a Rule 16 Request, a Motion for Exculpatory Evidence, a Motion for Disclosure of 404(b) Evidence, a Motion for Early Disclosure of Rule 26.2 Statements, a Rule 12.2(b) Notice and a Motion for Bifurcation.

On February 27th, 2004, the Petitioner, by and through counsel Mr. Inge filed the following pleadings: A Motion in Limine Concerning Flight, a Motion in Limine Concerning Collateral Acts; a Motion to Suppress Custodial Statements; a Motion to Suppress Evidence Seized by a Warrantless Search; and a Motion in Limine Concerning the 911 Tape. On March 22, 2004, the Court ordered that the evidence that the Petitioner had a protective order against him was admissible 404(b) evidence; that the 911 audio-tape was admissible; that the firearm and shells seized during the warrantless search were in plain view and were admissible; that there is no evidence of flight in this matter; and that the Petitioner's statement to police was

freely and voluntarily given. The Court deferred ruling upon the Petitioner's Motion for Bifurcation. On April 2, 2004, the Court granted the Petitioner's motion for bifurcation with no objection by the State and ordered that the trial be bifurcated into a "guilt" phase and a "mercy" phase, and tried under the procedure set forth in footnote one of State v. Rygh, 206 W.Va. 295, 524 SE2d 447, (1999).

C. The Trial: Verdict/Sentencing: Guilty of Murder in the First Degree

The trial of this action began on April 6, 2004 and continued through April 8, 2004. The jury instructions did not contain an instruction as to the defense of diminished capacity, nor did trial counsel assert that defense at trial. On April 8, Mr. Belcher was convicted of First Degree Murder. Thereafter, at the request of the Petitioner, the bifurcated portion of the trial was conducted on the issue of mercy. At the conclusion of this portion, the jury returned a recommendation of mercy.

D. Post-Verdict Motions and Post Trial Matters

On April 29, 2004, trial counsel for the Petitioner moved the Court for judgment notwithstanding the verdict, and the Petitioner also moved to set aside the verdict and grant the Petitioner a new trial. On May 3, 2004, the Petitioner filed a motion for a new trial. This motion was denied on May 17, 2004. Judge Derek Swope sentenced Mr. Belcher to life in the penitentiary, with the possibility of parole in fifteen (15) years:

> The Court: All right. Well once again, as I told everybody, I have no discretion in this matter. I mean, the jury recommended mercy, so even if I wanted to change that, I couldn't. I have to go with what they say.
>
> So, Mr. Belcher, I'm going to sentence you to the penitentiary for the rest of your natural life, and you're eligible for parole at the end of 15 years, the jury having found that recommendation, or having

made that recommendation. *(See Transcript of Sentencing, held on May 17, 2004, at p. 14).*

E. Post-Trial Matters

On June 7, 2004, this Court appointed Mr. Inge to perfect a direct appeal to the West Virginia Supreme Court of Appeals. However, Petitioner moved the Court to Appoint New Counsel on June 28, 2005, citing a "complete breakdown in communication" between himself and Mr. Inge. The Petitioner subsequently filed a formal verified Complaint with the Office of Disciplinary Counsel against Mr. Inge on the matter of a lack of communication during the appeals process. Citing rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct, the Petitioner requested that the matter be investigated by the Office of Disciplinary Counsel of West Virginia. On November 18, 2004, the Petitioner filed a Motion for Resentencing.

On August 5, 2005, this Court set a status hearing on September 19, 2005. On September 7, 2005, Mr. Inge filed a Motion to Withdraw as counsel for Petitioner. The Petitioner moved for various forms of relief *pro se* on September 16, 2005. These included the "Defendant's *Pro Se* Motion for a New Trial," and a "Memorandum of Law and Affidavit in Support of Defendant's *Pro Se* Motion for a New Trial." The grounds for the Defendant's *Pro Se* Motion were:

1. The Defendant was denied his right to a fair and impartial trial and due process when the investigating officer was permitted by the court to act as its bailiff.
2. The Defendant was denied effective assistance of trial counsel.
    a. Counsel was ineffective in his failure to put forth any defense in behalf of the Defendant at trial such as unconsciousness (automatism), diminished capacity or voluntary intoxication.
    b. Defense counsel was ineffective by requesting to conduct the defendant's jury trial in a bifurcated setting which

deprived the accused of his constitutional right to set forth his defenses in the guilt phase to negate the degree of culpability.

c. Counsel's failure to object to the State's key investigating officer acting as the court bailiff denied the Defendant the right to a fair and impartial trial.

3. The bifurcated trial proceedings were constitutionally dificient (sic) and denied the Defendant his statutory right to a unitary trial.

The Court granted the Petitioner's Motion for Re-sentencing on September 21, 2005, for the purposes of allowing the Petitioner to perfect an appeal. The Court granted Mr. Inge's Motion to Withdraw and appointed the Public Defender's Office as appellate counsel. The Court did not rule on the Petitioner's *pro se* Motion for New Trial at that hearing. All other of the Petitioner's Motions were denied. The Court also directed the Prosecuting Attorney's Office to build a "Chinese Wall" around Assistant Prosecuting Attorney George Sitler, Esq. who was originally appointed to the case in 2003. The Court reaffirmed all of its rulings from May 17, 2004. On November 15, 2005, Gregory Ayers, Esq. with the Appellate Division of the Kanawha County Public Defender's Office, was appointed as new appellate counsel in the matter.

On December 30, 2005, the Petitioner, by Wendy A. Campbell, Esq. with the Appellate Division of the Kanawha County Public Defender's Office, requested an extension of the deadline for filing the Petition for Appeal from January 19, 2006, to March 19, 2006, pursuant to W.Va. Code 58-5-4. This Motion was granted by the Court on January 3, 2006. Ms. Campbell left the Kanawha County Public Defender's office on February 1, 2006, for new employment. According to the Public Defender's Office, the office was unable to find an attorney to replace Ms. Campbell until around April 2006. A Motion to Re-sentence the Petitioner was filed April 10, 2006, by new counsel Paula Cunningham, Esq. with the Kanawha County Public Defender's

office. This motion was granted on April 12, 2006, for the purpose of allowing the Petitioner the opportunity to file a Petition for Appeal. On August 11, 2006, an additional extension was granted, giving the Petitioner additional time to file an appeal. Ms. Cunningham, due to health issues and a heavy caseload, was unable to complete the Petitioner's appeal. No further action was taken until August 25, 2008, when the Petitioner filed a Motion for Ruling on Petitioner's *Pro Se* Motion for a New Trial and to Re-sentence Defendant for Purposes of Appeal, prepared and filed by Gregory Ayers, Esq., with the Public Defender's office, who had apparently reassumed Mr. Belcher's case.

At the hearing on the aforementioned Motion held on September 3, 2008, the Court denied Petitioner's Motion for a New Trial and resentenced the Petitioner for the purposes of appeal.

F. Appeal to the West Virginia Supreme Court of Appeals

On October 6, 2008, Mr. Belcher, through Mr. Ayers, gave notice of intent to appeal his conviction and sentence to the West Virginia Supreme Court of Appeals.

A Petition for Appeal raising the issue of ineffective assistance of counsel in regard to the lack of intoxication instruction was filed in late 2008, and was acknowledged by the Court on January 14, 2009. The issue raised on appeal was:

MR. BELCHER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE COUNSEL FAILED TO ARGUE HIS INTOXICATION NEGATED PREMEDITATION AND REJECTED THE TRIAL COURT'S PROPOSED JURY INSTRUCTION ON INTOXICATION, RESULTING IN THE JURY NOT BEING INSTRUCTED UPON, AND THUS UNABLE TO CONSIDER, HIS ONLY VIABLE THEORY OF DEFENSE.

The Petition was refused without opinion on March 12, 2009.

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

THE PETITION'S PETITION UNDER W.Va. Code 53-4A-1 FOR POST CONVICTION HABEAS CORPUS

On June 22, 2009, William David Belcher, *pro se*, filed his Petition for Writ of Habeas Corpus Ad Subjiciendum in the Circuit Court of Mercer County.[3] The following grounds were raised in the Petition:

1. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN:

   a. Counsel Failed to Put Forth Any Defense At Trial Such As Unconsciousness (Automatism), Diminished Capacity or Voluntary Intoxication.
   b. Counsel Failed to Utilize Investigative Information Gathered By Previously Appointed Counsel As Evidence And Testimony At Trial Which Would Have Established A Complete Defense To The Charges And Resulted In A Different Verdict By The Jury.
   c. Counsel Failed To Argue Intoxication Negated Premeditation And Rejected The Trial Court's Proposed Jury Instruction On Intoxication, Resulting In The Jury Not Being Instructed Upon, And Thus Unable To Consider, His Only Viable Theory Of Defense.
   d. Counsel Requested a Bifurcated Trial Which Deprived The Petitioner His Constitutional Right To Set Forth His Only Defense During The Guilt Phase Of The Proceeding.
   e. Counsel Failed To Object To the State's Key Investigating Officer Acting As The Court Bailiff During Deliberations By The Jury, Thus Depriving Him A Fair And Impartial Trial.
   f. Counsel Failed To Challenge For Cause Certain Jurors Who Had Intimate Knowledge Of The Facts Of the Case And Who Lived On Pisgah Road And were Otherwise Disqualified To Serve.
   g. Counsel Failed To Request a Change of venure [sic] or Venue Based On The Extensive Pre-Trial Publicity.
   h. Post Trial Counsel Failed To Develop The Factual Allegations Made in The Pro Se Motion For New Trial Prior To Filing The Direct Appeal To The West Virginia Supreme Court.

[3]The Habeas Corpus Petition repeated the assertions made in the Defendant's Pro Se Motion for a New Trial.

2. THE BIFURCATED TRIAL PROCEEDINGS WERE CONSTITUTIONALLY DIFICIENT [sic] AND DENIED THE DEFENDANT HIS STATUTORY RIGHT TO A UNITARY TRIAL.

3. THE PRE-TRIAL PSYCHOLOGICAL EVALUATIONS OF THE DEFENDANT'S MENTAL STATE ARE INVALID BASED UPON THE LACK OF INFORAMTION [sic] AVALIABLE [sic] TO THE EXAMINERS REGARDING THE DEFENDANT'S NUMEROUS HEAD INJURIES AND CONSUMPTION OF MIND ALTERING DRUGS AT THE TIME OF THE OFFENSE.

Requested Relief

The Petitioner requested an evidentiary hearing upon the factual issues raised within the Petition.

The Respondent's Response

The State did not respond to the initial Petition for Writ of Habeas Corpus.

THE AMENDED PETITION

The Court appointed Derrick W. Lefler, Esq., as counsel for Petitioner, to assist him in this proceeding.

In his Amended Petition for Writ of *Habeas Corpus* filed January 20, 2010, by counsel Derrick W. Lefler, Esq. Mr. Belcher asserted the following grounds for relief:

1. Petitioner was denied effective assistance of counsel at trial in the following respects:

   a) Trial counsel failed to assert available defenses supported by the evidence, of unconsciousness, "automatism," diminished capacity or involuntary intoxication.

   b) Counsel's request of a bifurcated trial deprived petitioner of his constitutional right to a unitary trial and deprived petitioner of access to his viable defense in the guilt phase of the bifurcated trial.

   c) Counsel failed to object to the State's investigating officer acting as the court bailiff during deliberations.

d) Trial counsel failed to challenge for cause jurors who improperly served and should have been disqualified based upon their intimate knowledge of facts of the case and residence in proximity to the crime scene.

2. Post trial counsel failed to develop and present factual allegations before the circuit court in support of petitioner's *pro se* motion for new trial.
3. The bifurcated trial proceeding denied the defendant his right to a unitary trial.
4. The court permitted the State's primary investigating officer to act as court bailiff during deliberations, placing said officer in charge of the jury thus depriving petition [sic] a fair and impartial trial.

Requested Relief

The Petitioner requested that the Court grant him an evidentiary hearing, and that the Court reverse the conviction and order a new trial.

The Respondent's Response

On May 19, 2010, the State filed the "State's Response to Amended Petition and Memorandum in Support Thereof."

The Losh checklist

The Losh Checklist was filed on February 10, 2010.

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

- Trial court lacked jurisdiction
- Statute under which conviction obtained was unconstitutional
- Indictment shows on face no offense was committed
- Prejudicial pretrial publicity
- Denial of right to speedy trial
- Involuntary guilty plea
- Mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate
- Incapacity to stand trial 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 sentences for same transaction
- Coerced confessions
- Suppression of helpful evidence by prosecutor
- State's knowing use of perjured testimony
- Falsification of transcript by Prosecutor
- Unfulfilled plea bargains
- Information in pre-sentence report erroneous
- Double jeopardy
- Irregularities in arrest
- Excessiveness or denial of bail
- No preliminary hearing
- Illegal detention prior to arraignment
- Irregularities or errors in arraignment
- Challenges to the Composition of the Grand jury or its Procedures
- Failure to provide copy of indictment to defendant
- Defects in Indictment
- Improper venue
- Pre-indictment delay
- Refusal of continuance
- Refusal to subpoena witnesses
- Prejudicial joinder of defendants
- Lack of full public hearing
- Non-disclosure of grand jury minutes
- Refusal to turn over witness notes after witness has testified
- Claims concerning use of informers to convict
- Constitutional errors in evidentiary rulings
- Claims of prejudicial statements by prosecutor
- Sufficiency of evidence
- Acquittal of co-defendant on same charge

- Defendant's absence from part of the proceedings
- Questions of Actual Guilt upon an acceptable guilty plea
- Severer sentence than expected
- Excessive sentence
- Mistaken advice of counsel as to parole or probation eligibility
- Amount of time served on sentence, credit for time served

The Petitioner asserted the following Losh grounds:

- Mental competency at time of trial
- Ineffective assistance of counsel
- Claim of incompetence at time of offense, as opposed to time of trial
- Improper communications between prosecutor or witness and jury[4]
- The standard called for when bifurcating a trial was not met[5]

THE SECOND AMENDED PETITION

On May 7, 2010, the Petitioner, by Mr. Lefler, filed his Second Amended Petition for Writ of Habeas Corpus. The Petitioner also filed a memorandum in support of his Second

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[4] Although this ground was asserted in the Losh Checklist, the Petitioner withdrew this ground as lacking the factual support necessary to substantiate this claim at the May 2010 Omnibus Habeas hearing:

Mr. Lefler: Yes, sir. I think Number 48 speaks of improper communication between the jury and a witness and we had asserted that in our petitions. My subsequent investigation into that would indicate that, and I've spoke about this to Mr. Belcher that the evidence would not substantiate that—that ground and would ask to modify the Losh list with the waiver of that particular issue.

The Court: All right. Again, so that I understand. That's where I think Mr. Thomas was the Bailiff?

Mr. Lefler: Yes, sir.

The Court: And you left and your client made an allegation that—

Mr. Lefler: There was some concern that - - that one of the officers involved in the [sic] was - - ended up serving as bailiff. And in communication with the State they provided information that's satisfactory to verify that that was not the case.

The Court: All right. Mr. Belcher, is that correct? Do you give that up?

The Petitioner: Yes, Your Honor.

[5] Although this ground is not in the standard Losh list, the grounds outlined in Losh are not exhaustive, but are merely illustrative. Therefore, Petitioner was able to assert this ground at the Omnibus Habeas hearing held in May, 2010.

Amended Petition. The Second Amended Petition basically reasserted the grounds pled in the Amended Petition.

THE OMNIBUS HABEAS CORPUS HEARING

On May 10, 2010, the Court held the Omnibus Habeas Corpus hearing. Scott A. Ash, Esq., Assistant Prosecuting Attorney, appeared on behalf of the State. Mr. Lefler, appeared on behalf of the Petitioner, who was also present in person.

Lydia Belcher, Donald Sizemore, David C. Smith, Esq., and the Petitioner testified at the omnibus hearing.

Ms. Belcher, the Petitioner's former and current wife, testified that she had been married to the Petitioner, then divorced before the crime occurred. She subsequently remarried the Petitioner after his conviction. She testified that she found liquor bottles at his residence on the day of the crime. She also testified that on the day of the crime the Petitioner called her and told her that he had shot someone.

Donald Sizemore, a private investigator hired by Mr. Sitler and Mr. Aboulhosn, testified about obtaining possession of various liquor bottles from Ms. Belcher which she testified to finding at the Petitioner's residence on the date of the crime. He also testified about the efforts that were made to determine how much liquor was missing from those bottles.

The Petitioner testified about his physical history to include injuries, the pain medication he used, his alcohol use, and what he did on the day of the crime. He also testified about his discussions with Mr. Inge about his defense at trial.

David C. Smith, Esq. testified as an expert witness on the issue of the viability of an intoxication defense, to include offering an instruction to the jury on this defense. (*See* Transcript of Omnibus Habeas corpus hearing, pp. 25-98).

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 S.E.2d 782 (2003).[6] The issue presented in a Habeas Corpus proceeding is "whether he is restrained of his liberty by due process of law." Id. at Syl. Pt. 2. "A Habeas Corpus petition is not a substitute for writ of error[7] in that ordinary trial error not involving constitutional violations will not be reviewed." Id. at Syl. Pt. 3.

The Availability of Habeas Corpus Relief

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

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

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[6] See also Sy. Pt. 4, Click v. Click, 98 w. Va. 419, 127 S.E. 194 (1925).

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

Our post conviction Habeas Corpus statute, W.Va. Code 53-4A-1 *et seq.*, "clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction Habeas Corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with reasonable diligence, discover." Syl. Pt. 1, Gibson v. Dale, 173 W.Va. 681, 319 S.E.2d 806 (1984). At subsequent Habeas Corpus hearings, any grounds raised at a prior Habeas Corpus hearing are considered fully adjudicated and need not be addressed by the Court. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Yet, some limited exceptions apply to this general rule: "[a] prior omnibus Habeas Corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however an applicant may still petition the court on the following grounds: (1) ineffective assistance of counsel at the omnibus Habeas Corpus hearing; (2) newly discovered evidence; (3) or, a change in the law, favorable to the applicant, which may be applied retroactively." Syl. Pt. 4, Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).[8]

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

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

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

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

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

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

The Court has carefully reviewed all of the pleadings filed in this action, the transcript of the Omnibus hearing, the Court file in the underlying criminal action, and the applicable case law. Before reviewing each factor, the Court finds that while the grounds of failure to challenge certain jurors for cause and failure to request a change of venue were raised in the pleadings they were not briefed or argued by the Petitioner or his counsel. Therefore, these grounds are forever waived. The Court believes that the key issues to resolve in this matter are:

(1) Whether trial counsel was ineffective, to include whether a specific inquiry was made as to the Petitioner's mental status and potential defenses.

(2) Whether post-trial counsel failed to develop and present factual allegations before the circuit court in support of petitioner's *pro se* motion for a new trial; and

(3) Whether the bifurcated trial proceeding denied the defendant his right to a unitary trial.

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:

PETITIONER'S CLAIM 1 (a-d): PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN THE FOLLOWING RESPECTS:[9]

a) Trial counsel failed to assert available defenses supported by the evidence, of unconsciousness, "automatism," diminished capacity or involuntary intoxication.

b) Counsel's request of a bifurcated trial deprived petitioner of his constitutional right to a unitary trial and deprived petitioner of access to his viable defense in the guilt phase of the bifurcated trial.

c) Counsel failed to object to the State's investigating officer acting as the court bailiff during deliberations.[10]

d) Trial counsel failed to challenge for cause jurors who improperly served and should have been disqualified based upon their intimate knowledge of facts of the case and residence in proximity to the crime scene. (Not presented by the Petitioner, and thus abandoned.).

THE PETITIONER'S ARGUMENT

(a) Trial counsel failed to fully investigate and assert available defenses supported by the available evidence, of unconsciousness, "automatism", diminished capacity, or voluntary intoxication:

At the time of the offense conduct William David Belcher was prescribed Oxycontin 40 mg, 3 times per day. For several weeks prior to February 27, 2003, following a fall on ice, Mr. Belcher had been taking Oxycontin in excess of the prescribed amount. In addition, on the date of the offense Mr. Belcher had been drinking liquor. Two liquor bottles of Crown Royal, an empty "fifth" and a pint bottle with approximately 1/3 of its constitute were missing, were found in his home after he shot

[9]The Court has merged the *pro se* assertions of Petitioner into The Amended and Second Amended Petitions filed by counsel.

[10]See footnote 3, above.

Ms. McCoy. Mr. Belcher also has a prior history of significant head injury with loss of consciousness, and post concussion syndrome.

Trial testimony from Mr. Belcher indicated his recollection of the events of February 27, 2003 were significantly impaired due to his consumption of Oxycontin and alcohol. Sgt. Beasley, the lead investigator in this case, testified that although Mr. Belcher did not appear to him to be under the influence when he talked to him several hours after the shooting, he did note the odor of alcohol on and about Mr. Belcher's person.

Mr. Belcher's original appointed counsel, George Sitler and Omar Aboulhosn undertook to explore the impact of Mr. Belcher's Oxycontin and alcohol consumption on his culpability and any potential defenses. Mr. Belcher's subsequently retained trial counsel, Wayne Inge did not significantly explore these options further.

In addition, at trial, the Court was prepared to offer an instruction relating to the defense of voluntary intoxication. Such would have instructed the jury that if it found Mr. Belcher's intoxication to be such that he was unable to form the requisite intent to commit first-degree murder, it could find him guilty of second-degree murder. However, trial counsel declined the court's instruction and specifically eschewed the defense of voluntary intoxication.

Trial counsel's failure to fully explore defenses arising from Mr. Belcher's consumption of Oxycontin and alcohol, such as unconsciousness, automatism, or diminished capacity denied him effective assistance of counsel as guaranteed in the 6th and 14th Amendments to the United States Constitution, and Article III of the West

Virginia Constitution. See Strickland v. Washington 466 U.S. 688 (1984); Syllabus Pt. 5, State v. Miller, 459 S.E. 2d 114 (W.Va. 1995).

Trial counsel's failure to assert the defense of voluntary intoxication, and the refusal of the courts instruction as to voluntary intoxication denied Mr. Belcher effective assistance of counsel, as guaranteed in the 6th and 14th Amendments to the United States Constitution, and Article III of the West Virginia Constitution. See Strickland v. Washington 466 U.S. 688 (1984); Syllabus Pt. 5, State v. Miller, 459 S.E. 2d 114 (W.Va. 1995).

(b) Counsel's request for a bifurcated trial deprived Petitioner of his constitutional right to a unitary trial and deprived petitioner access to his viable defenses in the guilty phase of the bifurcated trial:

Prior to trial, trial counsel moved the court to bifurcate Mr. Belcher's trial between the issues of culpability and penalty. Trial counsel's assertion in seeking bifurcation was that there was mitigating evidence relevant to the penalty phase, should Mr. Belcher be convicted, that would be inadmissible in a unitary trial. Trial counsel described such evidence as evidence of Mr. Belcher's mental health, physical health, social/family history, employment history, evidence of lack of criminal history, evidence of his behavior while confined, and evidence of his reputation in the community. The court granted trial counsel's motion and a bifurcated trial was conducted.

In the guilt phase of the case, where trial counsel did not proffer the full range of available evidence as to Mr. Belcher's consumption of Oxycontin and alcohol, and did not assert a defense of intoxication, and refused the court's instructions as to the same trial, counsel did utilize the evidence of mental health, physical health, social/family

history, employment history, lack of criminal history, evidence of his behavior while confined as well as his reputation in the community. The penalty phase of the bifurcated trial presented little, if any, new or additional evidence from that prosecuted in the guilty phase of the trial.

Trial counsel's assertion that bifurcation was necessary, or even desirable, was erroneous. Bifurcation presented no benefit to the defendant. In practical effect bifurcation did nothing more than deny defendant the opportunity for presenting all available defenses.

A defendant is constitutionally entitled to a unitary trial. The forfeiture of that right for no benefit, calls in to question the legitimacy of trial counsel's trial strategy. See State ex rel Daniel V. Legursky, 465 S.E.2d 416, 403 (W.Va. 1995)

(c) Counsel failed to object to the state's investigating officer acting as the court bailiff.

On the 2nd day of trial the court's bailiff was forced to leave to care for his wife who had potentially suffered a heart attack. The court announced the bailiff's departure and the need to replace the bailiff with a sheriff's deputy, Sgt. Beasley, the lead investigating officer, as temporary bailiff. Counsel for defendant did not object. The service of a key witness for the state in a criminal trial as bailiff is a violation of a defendant's constitutional rights to due process and trial by a fair and impartial jury under the 6th and 14th Amendments of the United States Constitution, and Article III of the West Virginia Constitution. Syllabus Pt. 3, State v. Kelly, 451 S.E.2d 425 (W.Va. 1994).

(d) Trial counsel failed to challenge for cause jurors who improperly served and should have been disqualified based upon their intimate knowledge of facts of the case and residence in proximity to the crime scene.

THE RESPONDENT'S ANSWER

The State contends that any defense of diminished capacity and/or voluntary intoxication would have been futile. The State points to the findings of psychologist Dr. David Clayman and psychiatrist Dr. John Justice to show that the possible defenses that trial counsel, Mr. Inge, had available to him would have been unhelpful to the Defendant, citing Dr. Clayman's statement of "contraindications of 'the supposed influence of Oxycontin and alcohol' at page 16 of his report and Dr. Justice notes test scores 'highly suggestive of malingering' at page 12 of his report." The State contends that "even if a greater emphasis would have been made of the diminished capacity defense, any new and more accommodating expert would have been subject to impeachment from the reports in the State's and the Court's files.

The State points out the fact that trial counsel, Mr. Inge, did speak with the Petitioner and did interview witnesses. The issue of intoxication was discussed and testimony of drinking and prescription drug use was elicited from the Petitioner at trial. This, the State contends, shows that "trial counsel had not failed to investigate the defense." The State argues that the decision not to pursue the defense was not an omission or failure to consider, instead it was a tactical or strategic decision. Thus, the State argues, trial counsel was not unreasonable in attempting a strategy that did not include voluntary intoxication as a defense.

Trial counsel was faced with an almost impossible task: early psychological and psychiatric examination gave lie to a diminished capacity or voluntary intoxication defense. The police who interviewed Petitioner shortly after the shooting described him as "not intoxicated." Even if the evidence of intoxication were more convincing, juries are assumed not to like it. Even Petitioner's expert witness David Smith, Esq., readily conceded that requesting the intoxication instruction would not equate to a reason probability of different outcome. Petitioner must show that reasonable probability before he would be entitled to any relief. Strickland v. Washington, 466 U.S.668, 104 L.Ed2d 674 (1984); State v. Miller, supra.

A review of Petitioner's testimony at trial does not establish intoxication. His memory is very good (two cars in the driveway; wooden door open but screen door closed; rang the door bell 4 or 5 times; specific questions ask by the victim; specific curse words the victim directed at him) except when inconvenient questions are ask (sic). Petitioner wanted to use mitigating "facts" about the shooting to advance his defense and there was nobody else who could testify as to them. Severe intoxication would have impeached Petitioner's own testimony and there would be no witness who could support a claim of "sudden provocation" and left no reason for the jury to consider voluntary manslaughter.

Eschewing an intoxication defense to further a claim for voluntary manslaughter may, in hindsight, be a "bridge too far", but it was a strategic decision and not out of the realm of what might be chosen by a reasonably qualified defense attorney faced with the same dismal set of facts.

CLAIM 1: FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Court now makes the following specific findings of fact and conclusions of law regarding Claim 1:

1) The Court finds that the Petitioner's trial strategy was to further a claim of voluntary manslaughter by having the Petitioner testify that he was provoked by the victim.

2) The Court finds that trial counsel was faced with a serious dilemma, namely, how to address the following issues:

(a) The fact that the Petitioner had a domestic violence order against him concerning the victim that was still in place at the time of the shooting *(See Trial Transcript of April 7, 2004 at pp. 4-9);*

(b) The fact that the Petitoner drove from his home in McDowell County to the victim's home in Princeton on the day of the shooting *(See Trial Transcript of April 7, 2004 at p. 242);*

(c) The fact that he made an incriminating statement to Sergeant Paul Hill of the Princeton Police Department while being transported to the Princeton City Jail after he turned himself in on the day of the crime *(See Trial Transcript of April 6, 2004 at p. 74);*

(d) The fact that the Petitioner pushed the victim to the ground, which caused her to strike her head and become dazed *(See Trial Transcript of April 7, 2004 at p. 43);*

(e) The fact that the Petitioner admitted pushing the victim to the floor, and shooting her at least twice while she was on

the ground *(See State's Exhibit 20, Statement of Petitioner, introduced at Trial on April 6, 2004);*

(f) The fact that the Petitioner did not appear to be under any influence of alcohol or other controlled substance to Detective Beasley after the shooting *(See Trial Transcript of April 6, 2004 at p. 128);*

(g) The fact that the victim's daughter testified that the Petitioner proclaimed "I come up to kill you" at the victim's home on the day of the murder *(See Trial Transcript of April 7, 2004 at p. 41);*

(h) The fact that the Petitioner checked the victim's phone on the day of the shooting to see if she had spoken with her ex-husband *(See Trial Transcript of April 7, 2004 at p. 42);*

(i) The fact that the Petitioner told the victim's daughter that he would kill her first and make the victim watch *(See Trial Transcript of April 7, 2004 at p. 42)*;

(j) The fact that the Petitioner remembered at least some details of the incident, which would tend to negate that he was so severely intoxicated or incapacitated at the time of the offense as to be able to form the requisite intent *(See Trial Transcript of April 7, 2004 at pp. 204-210);*

(k) The fact that the Petitioner admitted that he shot the victim *(See Trial Transcript of April 7, 2004 at pp. 158-9);*

(l) The fact that the Petitioner called his ex-wife just after the crime and admitted shooting someone *(See Trial Transcript of April 7, 2004 at p. 123).*

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

> [i]n the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), Syl. Pt. 5.

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

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

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

> [i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995) Syl. Pt.6.

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

> No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his attorney and to assist in the preparation of his defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him. Syl. Pt. 1

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

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

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

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

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

> Importantly, since the right not to be tried while mentally incompetent is subject to neither waiver nor forfeiture, a trial court is not relieved of its objection to provide procedures sufficient to protect

> against the trial of an incompetent defendant merely because no formal request for such has been put forward by the parties . . . In other words, a trial court has an affirmative duty to employ adequate procedures for determining competency once the issue has come to the attention of the Court, whether through formal motion by one of the parties or as a result of information that becomes available in the cause of criminal proceedings.

In the Sanders decision, the Court confirmed its process for determining whether a broad inquiry into a defendant's mental competency is constitutionally required:

> Evidence of irrational behavior, a history of mental illness or behavioral abnormalities, previous confinement for mental disturbance, demeanor before the trial judge, psychiatric and lay testimony bearing on the issue of competency, and documented proof of mental disturbance are all factors which a trial judge may consider in the proper exercise of his (or her) discretion (to order an inquiry into the mental competence of a criminal defendant.) Sanders, Syl. Pt. 6, *following* Syl. Pt. 5, State v. Arnold, 159 W. Va. 158, 219 S.E.2d 922 (1975).

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

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

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

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

12) The Court finds that the West Virginia Supreme Court of Appeals stated on the defense of automatism in State v. Hinkle, 200 W. Va. 280, 489 S.E.2d 257 (1996) that:

> Unconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt. (syl. p. 2)
>
> An instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime. (syl. p. 3)

13) The Court finds that the West Virginia Supreme Court of Appeals held on the issue of diminished capacity in State v. Joseph, 214 W. Va. 525, 590 S.E.2d 718 (2003) that:

> The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense

> charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense. (syl. p. 3)

14) The Court finds that the West Virginia Supreme Court has addressed the issue of intoxication in State v. Keeton, 166 W. Va. 77, 272 S.E.2d 817 (1980):

> Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication. (syl. p. 2)
>
> Intoxication to reduce an unlawful homicide from murder in the first degree, must be such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation. syl. pt. 3, citing Syl. Pt. 4, State v. Burdette, 135 W. Va. 312, 63 S.E.2d 69 (1950).
>
> Where there is evidence in a murder case to support the defendant's theory that his intoxication at the time of the crime was such that he was unable to formulate the requisite intent to kill, it is error for the trial court to refuse to give a proper instruction presenting such a theory when requested to so. (syl. pt. 4)

15) The Court finds that Mr. Aboulhosn and Mr. Sitler sent the Petitioner for an evaluation on the issue of his competency to stand trial and on the issue of criminal responsibility by John Justice, M.D.

16) The Court finds that the State of West Virginia had the Petitioner evaluated by David Clayman, Ph.D. on the same issues.

17) The Court finds that Dr. Clayman made the following findings in his report:

(a) That he thoroughly reviewed numerous accounts of the Petitioner's medical history. *(See Process Strategies Report, "Documents Reviewed"at pp 1-2)*

(b) That he was aware of Mr. Belcher's claim of excessive use of oxycontin. *(See Report at p. 5;* and that it played a part in "the instant offense." *See Report at p. 7)*

(c) That the Petitioner claimed that he had "no recall of the events leading up to the shooting. 'Don't even remember leaving my hour or driving my truck. Most of the memories are of the next morning when a big black man tried to get me a cigarette...that's when I came to the realization.' He went on to claim, 'What I know is what guys in jail told me...that I hurt somebody...told me it was Bernadette.'" *(See Report at p. 8)*

(d) That the Petitioner claimed to have been drinking and had no memory of the events. *(See Report at p. 9)*

(e) That "in spite of his claims of intellectual deficits and memory problems, Mr. Belcher was able to give a cogent recounting of his background history in great detail." *(See Report at p. 14)*

(f) That the Petitioner contended that has no recollection of the events and blames his actions on the combined use of oxycontin and alcohol. *(See Report at p. 14)*

(g) That Dr. Clayman was very aware of the Petitioner's claims of chronic pain from injuries sustained on the job. *(See Report at p. 14)*

(h) That "after leaving the residence, Mr. Belcher apparently made a call to 911 stating that he had shot someone. 'After the

> defendant was read his rights, the defendant admitted to shooting Bernadette McCoy.' Such behavior clearly indicates his understanding that he had committed a crime. This is further contradiction of the supposed influence of oxycontin and alcohol." *(See Report at p. 16)*

18) The Court finds that Dr. Justice made the following findings in his report:

(a) That Dr. Justice reviewed numerous records of the Petitioner, including those of Dr. Faheem (his psychiatrist for 6 years), medical records of Southern Regional Jail, approximately 8 inches of medical records regarding the Petitioner's worker's compensation injury, Wythe Associates Medical Records, Records of Raleigh General Hospital, Records of Adnan Silk, M.D., and Prescription records of the defendant from 7/8/99 through 2/4/03.[11] *(See Psychiatric Services Report at pp. 2-14)*

(b) That Dr. Justice was specifically aware of the Petitioner's claim of overuse of oxycontin at the time of the crime. *(See Report at p. 7)*

(c) That the Petitioner called the crime "an accident." *(See Report at p. 8)*

(d) That the Petitioner told Dr. Justice the following:

> " 'I never went for it, the accident happened before I could, they are still up there.' Regarding the defendant's account of the alleged crime, he stated, 'I don't know, I was at home in my house cooking, I don't remember leaving my house – nothing about this I remember, the

[11]Dr. Justice could not obtain the records of Welch Emergency Hospital. The Court has reviewed the records introduced by the Petitioner of the Omnibus hearing and makes findings concerning them below.

only thing that I can tell you is the following morning a colored man offered me a cigarette – I though it was a dream, a bad dream. The only thing I can tell you is what people told me, Lydia told me I was running around looking for a cop, I told her I was looking for one as I think I had done something wrong – she told me to call 911 – that's what she told me – she said that I called her at work.' He stated, 'Yes, I was drinking but I don't get drunk, I had went to the store and bought cigarettes – I think I went home, drank some whiskey, that's all I know, I only remember taking a drink.' " *(See Report at pp. 8-9)*

(e) That the Petitioner also told Dr. Justice that "I took extra oxycontin for a couple of days – maybe a total of five." *(See Report at p. 9)*

(f) That the Petitioner's M-FAST test was "highly suggestive of an attempt to malinger psychopathology. On this test, he endorsed extreme symptoms, rare combinations of symptoms, and reported difficulties that were inconsistent with his observed behavior. The relevance of the defendant's results on this test indicates that his subjective presentation cannot simply be taken at face value. He is likely to endorse symptoms above and beyond that which he is experiencing (noting that he is suffering from clinical depression and generalized anxiety) for secondary gain purposes." *(See Report at p. 12)*

(g) That Dr. Justice found that :

> It is my professional opinion, with reasonable medical certainty, that the defendant was not legally insane at the time of the alleged crime. The defendant did not suffer from a mental disease or defect to extent that he lacked substantial capacity to

appreciate the criminality (wrongfulness of his conduct) or to conform his conduct to the requirements of the law. Specifically, Mr. Belcher was not receiving nor on psychiatric medication on or around the time of the alleged crime. During initial evaluation at the Southern Regional Jail he did not believe that he required psychiatric medication nor express thoughts, feelings or behaviors reflective of acute psychiatric impairment. It is well understood that voluntary ingestion of alcohol or excessive narcotic medication abuse or intoxication does not preclude criminal nor express responsibility. There is no evidence within the sources of information of thoughts, feelings, or behaviors indicative of a psychiatric illness, disease, or defect that would have precluded his understanding of wrongfulness or his ability to control his behavior to the requirements of the law at the time of alleged crime. In fact, witness statements of the victim's daughter indicate progressive behavior, actions, and threats that are inconsistent with an irresistible impulse and that indicate probable jealousy and the presence of rage or anger. This may be relevant with regard to accompanying a "heat of passion" mental health consideration particularly with regard to disinhibition by voluntary alcohol and narcotic intoxication and lack of reported violence history; however, this favors lack of insanity and rather criminal responsibility for the defendant's behavior.

Mr. Belcher further demonstrated knowledge of wrongfulness as

> evidenced by the phone call to his ex-wife and subsequently calling 911 to report the alleged crime. The statements of Lydia Belcher indicate that the defendant initially recalled his behavior on or around the time of the alleged crime. There is further indication as discussed by the defendant that Mr. Belcher believed that the petition or restraining order obtained by the victim may have been for the purpose of controlling his financial resources. *(See Report at pp. 14-15)*

(l) That Dr. Justice also opined that:

> Information that may assist the Trier of fact includes the potential that voluntary intoxication of alcohol and/or narcotics may have disinhibited Mr. Belcher, reflected in hostility, rage, and poor judgment on or around the time of the alleged crime. It is unlikely, in my professional opinion, that he was in a state of amnesia at the time of the alleged crime, and his allegations of selective memory loss (on or around the time of the alleged crime) are inconsistent with a known medical or psychiatric condition to explain such phenomenon. *(See Report at p.16)*

19) The Court finds that the Welch Emergency Hospital records introduced by the Petitioner at the Omnibus hearing show that on September 23, 2002, the Petitioner went to the emergency room, stating that he had taken two (2) oxycontin pills in the morning and several on the previous night, that he denied suicidal ideation, and that he was discharged as stable. *(See Welch Emergency Hospital records, admitted as Petitioner's Exhibit 2 at Omnibus Habeas Corpus hearing of May 10, 2010).*

20) The Court finds that these records also reflect that he was overheard telling a visitor he tried this morning and got caught, but that upon specific inquiry by Dr. Leo he

denied wanting to harm himself. *(See Petitioner's Exhibit 2).*

21) The Court finds that each examiner found the Petitioner to be competent to stand trial and criminally responsible, and that the defenses suggested by the Petitioner did not have merit.

22) Therefore, the Court finds and concludes that Petitioner's Claim 1 (a-d) is without merit.

PETITIONER'S CLAIM 2: POST TRIAL COUNSEL FAILED TO DEVELOP AND PRESENT FACTUAL ALLEGATIONS BEFORE THE CIRCUIT COURT IN SUPPORT OF PETITIONER'S *PRO SE* MOTION FOR A NEW TRIAL

THE PETITIONER'S ARGUMENT

Following the trial of this matter, and trial counsel's post-trial motions, William David Belcher filed an expanded *pro se* motion for a new trial along with an extensive memorandum in support of such motion. Following the filing of the *pro se* Motion for New Trial, appellate counsel was appointed. In addition, the court scheduled a hearing on Mr. Belcher's *pro se* motion. Such hearing was an opportunity for new counsel to present evidence in order to develop the record as to the substance of those matters asserted in the *pro se* motion for a new trial, and subsequently assert such issues on appeal, especially those relating to ineffective assistance of counsel and the utilization of defense witnesses as the court bailiff would have been appropriate appeal issues with sufficient factual development. However, subsequent counsel failed to undertake such factual development.

THE RESPONDENT'S RESPONSE

The State did not specifically address this ground in its response.

CLAIM 2: FINDINGS OF FACT AND CONCLUSION OF LAW

The Court now makes the following findings of fact and conclusions of law regarding Claim 2:

1) The Court finds that the Petitioner's *pro se* motion for a new trial is basically a reassertion of the matters raised in this habeas corpus proceeding.

2) The Court finds that the Petitioner has abandoned his assertions concerning the primary investigating officer serving as the bailiff for a portion of this trial. (See Claim 4, below).

3) The Court finds that the other grounds in such motion are addressed in the discussion of Claims 1 and 3, above and below.

4) The Court finds that there are no additional facts which would give rise to granting the Petitioner a new trial based on these grounds.

5) The Court finds and concludes that the matters raised in Claim 2 are without merit.

PETITIONER'S CLAIM 3: THE BIFURCATED TRIAL PROCEEDING DENIED THE DEFENDANT HIS RIGHT TO A UNITARY TRIAL

THE PETITIONER'S ARGUMENT

Bifurcated Trial Denied Defendant a Unitary Trial

A criminal defendant has a constitutional right to the unitary trial provided under West Virginia Code §2-3-15. The court's bifurcation of Petitioner's trial denied that right. As stated previously, Petitioner avers trial counsel's request for bifurcation constituted ineffective assistance of counsel. However, when presented with the issue, the trial court, applying the appropriate authority, should have denied trial counsel's request.

The West Virginia Supreme Court of Appeals set forth the appropriate test to determine the propriety of bifurcation in State v. LaRock, 470 S.E.2d 613, 634 (W.Va. 1996). LaRock set forth a six part test for determining the propriety of bifurcation. In making the determinations to bifurcation the court did not apply the test called for by LaRock, and as a result failed to recognize that defense counsel's motion, did not begin to satisfy the requirements for bifurcation. Most prominently trial counsel failed to explain or exhibit the manner in which Mr. Belcher would have been prejudiced by a unitary trial. Under any circumstances, the significant of shifting of the trial process must require strict compliance with the law allowing such a shift.

Additionally, Petitioner asserts a more fundamental and significant challenge to the bifurcation of his trial. The recent West Virginia Supreme Court decision in State v. McLaughlin, 2010 WL 2346249 (W.Va. June 8, 2010) notwithstanding, Petitioner asserts that he is entitled to a unitary trial and that the bifurcated proceeding permitted by the court was inherently prejudicial to petitioner and denied him his right to a fair trial as guaranteed by the West Virginia and United States constitutions.

This issue was pointedly addressed by Justice Ketchum in his dissent in McLaughlin, in which he noted that with a bifurcated proceeding a defendant such as Mr. Belcher is denied the protections of a unitary trial envisioned under W.Va. Code §62-3-15.

> My practical experience taught me that one juror could shift the verdict from a lifetime-in-prison murder verdict, to a verdict of

> murder with mercy where the defendant had a shot at release in the future "Under a bifurcated system, where separate juries are adjudicating guilt and the penalty, that leverage by the defendant is largely lost. The second, penalty-phase jury begins knows the defendant is guilty of murder, and the only question they must unanimously resolve is whether the defendant is entitled to mercy. The defendant begins this second phase essentially judicially stripped of his or her constitutional "benefit of the doubt" , which is exactly the opposite of what is supposed to occur under W.Va. Codes §62-3-15 McLaughlin, 2010 WL 2346249 at page 12-13.

The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to secure "that 'justice shall be done'" in all criminal prosecutions. United States v. Agurs, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed2d 342 (1976) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed2d 1314 (1935).

The denial of such a fundamental aspect of petitioner's right to a fair trial demands relief.

THE RESPONDENT'S RESPONSE

It is clear that State Supreme Court of Appeals does not believe that criminal defendants have a right to a unitary trial. In the recent case of State ex rel. Dunlap v. McBride, Case No. 34808, decided march 4, 2010, the High Court reviewed a matter in which the trial court had granted the State's motion for a bifurcated trial over the objection of the defense. The Court found no error.

This novel question of the possible right to a unitary trial was not raised at trial or in the appeal and so should not be considered in this proceeding. Losh v. McKenzie, 277 S.E.2d 606 (W.Va. 1981)

CLAIM 3: FINDINGS OF FACT AND CONCLUSION OF LAW

> The Court now makes the following findings of fact and conclusions of law regarding Claim 3:

1) The West Virginia Supreme Court of Appeals first discussed bifurcation in a criminal murder trial in State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (W.Va. 1977) when it held that:

> (t)he right to a bifurcated trial lies within the sound discretion of the trial court. Bragg, syl. Pt. 3.

2) The West Virginia Supreme Court has also held in State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996) that:

> Although it virtually is impossible to outline all factors that should be considered by the trial court, the court should consider when a motion for bifurcation is made:
>
> (a) whether limiting instructions to the jury would be effective;
>
> (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits;
>
> (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa;
>
> (d) whether either party can demonstrate unfair prejudice or disadvantage by bifurcation;
>
> (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes;
>
> (f) whether bifurcation unreasonably would lengthen the trial.

3) In State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (W.Va. 1999), the Supreme Court stated that:

> FN1. If the jury renders a verdict convicting a defendant of first degree murder, and recommends mercy, the defendant is sentenced to life imprisonment, but is eligible for parole consideration in 15 years. If mercy is not

recommended, the defendant is not eligible for parole. W.Va. Code, 62-3-15 (1965). In State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), this Court authorized the discretionary bifurcation of a murder trial into a "guilt phase" and a "mercy phase," as a matter of trial management procedure. We also recognized that "[i]t may well be true that unitary trials are adequate and appropriate in most cases."

We observe that there is nothing in LaRock that creates, merely by bifurcating a murder trial, a qualitative change in or a substantive expansion of the scope or type of evidence that the prosecution may put on against a defendant-as compared to that evidence that would be admissible in a unitary trial. Stated another way, discretionary trial-management bifurcation does not itself alter or expand the scope of admissible prosecutorial evidence to include evidence that has been historically inadmissible in murder cases in this State. (Because bifurcation is a matter of trial court discretion, such an expansion could raise, *inter alia*, equal protection and due process issues, if one defendant were tried in a bifurcated proceeding with relaxed evidentiary limitations-as opposed to another defendant, who is tried in a unitary proceeding.

We recognize, of course, that the evidentiary opportunities that a defendant may have in a mercy phase, as a result of bifurcation, may in turn affect the evidentiary limitations of the prosecution in rebuttal or impeachment. However, the opportunity for prosecution rebuttal or impeachment in a bifurcated mercy phase is not authorization for the prosecution to use unfairly prejudicial, extraneous, remote, or inflammatory evidence-even in rebuttal or impeachment. *See* note 2 *infra*. We also observe that the availability of discretionary trial-management bifurcation in a West Virginia murder case does not mean that the body of case law that has developed in capital punishment jurisdictions around death-penalty/sentencing-phase proceedings is now applicable to the trial of West Virginia murder cases.

> We do not believe that conceptually there is any separate or distinctive "burden of proof" or "burden of production" associated with the jury's mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding. In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on-and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no-mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination. We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

4) The Court finds that in June 2010, the West Virginia Supreme Court of Appeals stated in State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289 (W.Va. 2010) that:

> The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 40 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence. (syl. pt. 7)

5) The Court finds that the McLaughlin court also held that:

> In the mercy phase of a bifurcated first degree murder proceeding, the defendant will ordinarily proceed first; however, the trial court retains the inherent authority to conduct and control the bifurcated mercy proceeding in a fair and orderly manner. (syl. pt. 8)

6) The Court finds that McLaughlin also holds that:

> (t)he provisions of West Virginia Code §62-3-15 (2005) do not require that the jury that decides the guilt phase of a first degree murder case must also be the same jury that decides the mercy phase of the case. (syl. pt. 6)

7) The Court finds that in the instant case, this court allowed bifurcation at the request of the Petitioner, with no objection from the State.

8) The Court finds that at trial this Court advised the State that it was limited in the presentation of evidence to the restrictive bounds set by Rygh and not to the more open rule of McClaughlin.

9) The Court finds that in the case at bar, the State called the victim's daughter as its only witness during the mercy - no mercy phase. She testified as follows:

BY MR. SADLER:

Q. Once again, would you please state your name.

A. Courtney McCoy.

Q. And Bernadette McCoy was your mother?

A. Yes.

Q. How old, again, was your mother when she passed away?

A. Forty-six.

Q. How old are you, Courtney?

A. Nineteen.

Q. Do you have any brothers or sisters?

A. Yes, one.

Q. And what's his name?

A. Matthew McCoy.

Q. And how old is Matthew?

A. Twenty-eight.

Q. And was he - - he is also Bernadette's son. Is that correct?

A. Yes.

Q. Did your mother have any brothers or sisters?

A. One.

Q. And who is that?

A. Nick Harmon.

Q. Did she - - so she had one brother?

A. Yes.

Q. Did she have any sisters?

A. No.

Q. Is your mother's father living?

A. No.

Q. Your mother's mother is, though. Is that correct?

A. Yes.

Q. What's her name?

A. Mattie Marno.

Q. And how old - - you don't know how old your grandmother is?

A. No.

Q. Okay. She lives here locally?

A. Uh-huh, yes.

Q. What type of relationship did your mother have with Mattie?

A. A great one. I mean, it was always good. We always got along.

Q. Okay. You testified previously that your mom and dad had been divorced. Is that correct?

A. Yes.

Q. After your mom and dad divorced, who raised you?

A. My mom.

Q. Okay. Did your dad live local?

A. For a little while, but then he moved to Tennessee.

Q. Okay. Now you live - - you and your mother lived together there by yourself. Is that correct?

A. Yes.

Q. Where do you live now?

A. The same place, Pisgah Road.

Q. Who do you live with?

A. By myself.

Q. Okay. You indicated before that your mother had worked at Welch Emergency Hospital?

A. Yes.

Q. She worked in the laboratory?

A. Uh-huh.

Q. How long had she done that?

A. Fifteen, 20 years. A long time.

Q. Did she go to school to learn how to do that?

A. Uh-huh.

MR. SADLER: Okay. That's all of the questions I have, Your Honor.

THE COURT: Any cross examination?

MR. INGE: No, sir. Your honor.

THE COURT: Thank you. You can step down.

(See Trial Transcript of April 8, 2004 at pp. 58-61).

10) The Petitioner testified during bifurcation as follows:

BY MR. INGE:

Q. Could you state your name, please.

A. William David Belcher.

Q. Mr. Belcher, some of the things I'm going to ask your about we touched on yesterday, and I don't want to go into them today, because the jury can remember that. A couple of things I do want to go into a little bit more detail. You suffered an accident at work sometime in 1991?

A. Yes, sir.

Q. And by whom were you employed at that time?

A. Charcliff mining.

Q. Speak up a little bit.

A. Charcliff Mining.

Q. Okay. And prior to that, had you been employed in the coal industry?

A. All my life, yeah. I started when I was 14 years old. I went to work at U. S. Steel when I was 18 years old.

Q. Okay. But once from the time you started working in the coal industry did you work on a regular basis except for stoppages from that point on?

A. Yes, sir.

Q. Okay. And at the time you were injured, who much was you working?

A. We was working seven days a week.

Q. Okay. How did the accident happen?

A. SHA had an endloader red tagged and the mechanics couldn't get to it and at quitting time the boss told me to bring it into the pit area.

Q. Was this evening shift?

A. Night shift.

Q. Night shift?

A. Night shift.

Q. Okay.

A. And it had a valve bent in on it and I didn't know it. I was tramming the loader in and the bucket dropped all at once and drove me up into the top of it and through the windshield.

Q. Okay. And did you lose consciousness?

A. Yes, I did.

Q. Okay. And when you woke up was there anyone around?

A. No, sir. Them guys had don't quit and left and didn't even know I was injured.

Q. Okay. And so how did you get yourself home?

A. Well I generally get from where I was at home within 25 minutes. I think I got home about 9 o'clock. I lost my left and stuff and it was hard for me to drive.

Q. Yeah, but you got home safely?

A. Yeah. Yes, I did.

Q. Did you ever work again?

A. No, sir. I did not

Q. Okay. As far as the injuries that you suffered there, could you just briefly describe what injuries you suffered.

A. Well I had two discs in my back ruptured, and three in my neck was ruptured.

Q. Okay. And did you - - so did you suffer any injuries to your head we well?

A. I was treated by Dr. Faheem. He said I had an injury.

Q. Okay. As far as Dr. Faheem is concerned, who is he?

A. He is a - - for anxiety, nerves.

Q. He is a psychiatrist?

A. Yes.

Q. Okay. And how long were you under the care of Dr. Faheem?

A. Oh, about six years.

Q. Okay. Prior to this injury did you ever have a need to see a psychiatrist?

A. Yes, but when I quit seeing him I thought I could just do it myself, you know.

Q. Okay. Ultimately, how long did it take for you to have surgery on your neck and back?

A. Dr. Silk did my back surgery.

Q. Dr. Silk in Beckley?

A. Yes, sir. I had to wait a year before I could get my neck surgery done. The back had to heal to keep from dropping and messing up the neck is what he said. So it was 12 months before I could get my neck fixed.

Q. Okay. And as far as the neck surgery, do you have a scar there on the lower part of your right neck?

A. Right there. I have a large scar on my hip where they took the bond to fuse my neck.

Q. Were those surgeries successful?

A. The surgeries took away a lot of headaches and pain, but I always had pain, always had pain in my legs and back, neck, headaches in the base of the skull, back of the head.

Q. Okay. And how did you deal with that pain?

A. Well I started pain medication.

Q. Okay. Was this under doctor supervision?

A. Dr. Silk wrote me pain medication when I was under his care, yes.

Q. Okay. And you basically continued to take pain medication ever since?

A. Yes.

Q. Okay. Later on, I think around the year 2000, were you considering having surgery again on your neck?

A. Yes, sir. I had another disc rupture in my neck, and I was seeing Dr. Kropac, and he done an MRI on it and told me it needed fixed. So I got the okay to have it done at Roanoke, but I had no way to get to Roanoke by myself or anything to have that surgery done. So I started stronger medication.

Q. And what doctor prescribed that medication?

A. Dr. Rodney Brodnik.

Q. Okay. And what was that medication?

A. It was Oxy's 40.

Q. Oxycontin?

A. 40's, yes.

Q. Okay. And you began taking that medication sometime in the year 2000?

A. Yes, I did, sir.

Q. And was this medicine closely supervised?

A. Yes, it was.

Q. Okay. You have to submit to drug testing from time to time?

A. Yes, I had to sign a contract before I could even get medication that I wouldn't abuse it or distribute it, you know, sell it.

Q. Okay.

A. Yeah.

Q. And you continued on that Oxycontin according to your doctor's orders all of the way up until February 27th, 2003?

A. Yes.

Q. Now on the week or so prior to February 27th, 2003, had you suffered any other physical injuries?

A. Besides the ones that I had?

Q. In addition to. Had you fallen?

A. Yes, I did. We had the ice storm. I was going to the basement to put - - take the ashes out and put some coal in on the fire, and had an ice storm that day, but the next morning is when I fell. It had rained that night and frozen, and I fell backwards across my walk and caused me to have terrible pain in the back of my neck and head.

Q. Okay. And did you attempt to do anything there to deal with that pain?

A. I stayed at home about six days and took medication.

Q. Okay. Did you take any more of your medication than you were supposed to?

A. Yes, I did.

Q. And how much more did you take?

A. I was taking two at a time instead of one at a time.

Q. Okay. And how many days did you do that before February 27th?

A. Two days.

Q. Okay. Now I think in - - when we listened to the tape-recorded statement that Detective Beasley took

from you later in the evening on February 27th, you were talking about what you were doing on the 27th. You were eating - - or you were cooking but you weren't eating. What was that all about?

A. I was just was in a stage there that I couldn't rest and I could not eat for pain. And every way I laid down it would hurt even worse, so I was more or less up doing a lot of smoking, doing a lot of smoking and taking pills.

Q. Smoking cigarettes?

A. Yes.

Q. Okay. No you were arrested on, you know, probably 5:30 or 6 o'clock on February 27th, 2003. Where have you been ever since?

A. Sir?

Q. After you were arrested in the early evening February 27th, 2003, where have you been ever since?

A. I've been in the Regional Jail.

Q. Okay. During that entire period of time that you have been there, have you been written up for any infractions?

A. No, sir.

Q. You don't expect the quality of care that you have got in the jail and will get in the penitentiary to be as good as the quality of care you got when you were before February 27th now, do you?

A. No, sir.

Q. Okay. How soon after you got there did you go see the medical staff at Southern Regional Jail?

A. As soon as I realized what I had to do. I have never been there before. I didn't know what to do. You have to fill out a request to get stuff, and you have to fill out a medical paper before you get it. And I didn't know, so I kept telling them I needed to see a doctor. They said "well you have got to - - got to fill a medical out," you know, and I had no idea

what they were talking about. It was about two weeks before I got to see a doctor.

Q. But ultimately, you figured it out and submitted a request?

A. Yes, I had a guy fill me out one.

Q. Okay. Did you receive any medication?

A. No, sir. I did not.

Q. Okay. How long did that go? How long did you go without medication?

A. I went without medication all of the way through.

Q. Okay. At some point it stopped, or at some point you started getting medication?

A. Yes, Advil and anxiety medication.

Q. Okay. And so since that time you have been receiving treatment for your pain, and that's Advil?

A. Just Advil, yes.

Q. And you have been receiving nerve medicine?

A. Yes.

Q. And basically, you see the doctor now?

A. About every three months, I think. It calls for like a 90-day checkup.

Q. Yeah. But the quality of care you're receiving now is better than it was?

A. Better than nothing, yes.

Q. Sure. You're ready to leave Southern Regional Jail?

A. Yes.

Q. You're ready to get on with the penitentiary?

A. Yes.

(See Trial Transcript of April 8, 2004 at pp. 62-71).

11) The Court finds that trial counsel moved to bifurcate the Petitioner's trial between the issues of culpability and penalty. Trial counsel asserted as reason for this motion that certain mitigating evidence relevant to the penalty phase existed, and that this mitigating evidence would not be admissible at a unitary trial. The mitigating evidence, according to the trial counsel, was evidence of Mr. Belcher's mental health, physical health, social/family history, employment history, evidence of lack of criminal history, evidence of his behavior while confined, and evidence of Mr. Belcher's reputation in the community.

12) The Court finds that the Petitioner called three character witnesses, *(See Transcript of April 7, 2004)* testified as to his being under the influence of drugs and alcohol, *(See Trial Transcript of April 7, 2004 at p. 235)* of his behavior while confined, of his work history and injuries and of his use of oxycontin on the day of the crime (see above).

13) The Court finds that trial counsel's decision to bifurcate the trial into a guilt phase and a mercy phase was a tactical decision, and not objectively unreasonable.

14) The Court finds that trial counsel's decision to bifurcate the trial was not damaging to the Petitioner, as the Petitioner received mercy by the jury.

15) The Court finds and concludes that in the instant case, the Petitioner benefited from the rulings on evidence made by the Court restricting the presentation of evidence by the State in the mercy phase and accordingly it is without merit.

CLAIM 4: THE COURT PERMITTED THE STATE'S PRIMARY INVESTIGATING OFFICER TO ACT AS COURT BAILIFF, PLACING SAID OFFICER IN CHARGE OF THE JURY THUS DEPRIVING PETITIONER OF A FAIR AND IMPARTIAL TRIAL

The Court makes the following findings of fact and conclusions of law regarding Claim 4:

(1) The Court FINDS that the Petitioner waived this ground at the May 10, 2010 hearing, Mr. Lefler and the Petitioner did not assert this ground and in fact waived this ground:

Mr. Lefler:	Yes, sir. I think Number 48 speaks of improper communication between the jury and a witness and we had asserted that in our petitions. My subsequent investigation into that would indicate that, and I've spoke about this to Mr. Belcher that the evidence would not substantiate that—that ground and would ask to modify the Losh list with the waiver of that particular issue.
The Court:	All right. Again, so that I understand. That's where I think Mr. Thomas was the Bailiff?
Mr. Lefler:	Yes, sir.
The Court:	And you left and your client made an allegation that—
Mr. Lefler:	There was some concern that - - that one of the officers involved in the [sic] was - - ended up serving as bailiff. And in communication with the State they provided information that's satisfactory to verify that that was not the case.
The Court:	All right. Mr. Belcher, is that correct? Do you give that up?
Petitioner:	Yes, Your Honor

(See Omnibus Hearing transcript at pp 19-20).

2) Therefore, the Court finds that this ground is hereby waived by the Petitioner and cannot be asserted at any time hereafter.

IV. RULING

Wherefore, for the reasons set forth in the foregoing opinion, the Court order and adjudges as follows:

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

2) The Court appoints Derrick Lefler, Esq., to serve as counsel for the Petitioner should he choose to appeal this ruling.

3) The Circuit Clerk is directed to distribute a certified copy of this Order to Derrick Lefler, Esq., at his address of 1345 Mercer Street, Princeton, West Virginia, 24740; to the Petitioner, William David Belcher at the Huttonsville Correctional Center, P.O. Box 1, Huttonsville, West Virginia, 26273; and to Scott A. Ash, Esq., Prosecuting Attorney of Mercer County, West Virginia, at his address of 120 Scott Street, Princeton, West Virginia, 24740.

Entered this the 16th day of February, 2011.

Derek C. Swope

DEREK C. SWOPE, JUDGE

THE FOREGOING IS A TRUE COPY OF A DOCUMENT ENTERED IN THIS OFFICE ON THE 15th DAY OF February 20 11
DATED THIS 15th DAY OF February 20 11

JULIE BALL, CLERK OF THE CIRCUIT COURT OF MERCER COUNTY WV

BY Ingrid S. Fox
HER DEPUTY