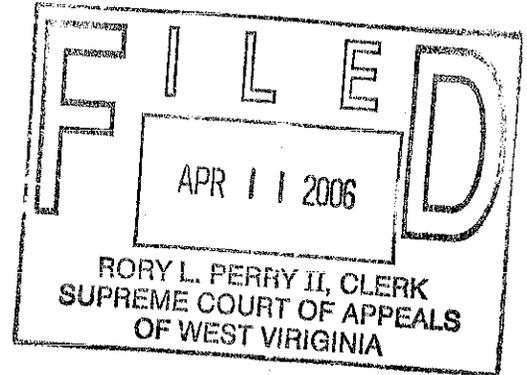


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NO. 052702

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston



**STATE OF WEST VIRGINIA EX REL.
JOHN McLAURIN,**

Appellant,

v.

**THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,**

Appellee.

**BRIEF OF THE APPELLEE THOMAS McBRIDE, WARDEN
MOUNT OLIVE CORRECTIONAL COMPLEX**

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BRIEF OF THE APPELLEE THOMAS McBride, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX

Comes now the Appellee, Thomas McBride, Warden, Mount Olive Correctional Complex, and files the following brief in response to the Petition for Appeal.

I.

PROCEEDINGS AND RULINGS BELOW

The Appellant is well known to this Court, having filed innumerable pleadings, writs and motions in this and other courts.

In the January, 1989 term of the Kanawha County, West Virginia, Grand Jury, the Appellant was charged with multiple sexual assault and kidnapping offenses arising from the rapes of three different women in Kanawha County over an 18-day period during the summer of 1988. *State v. McLaurin*, No. 89-F-60 (Circuit Court of Kanawha County). On November 28, 1989, following a

jury trial, Appellant was convicted on two counts of kidnapping and seven counts of first-degree sexual assault. He was sentenced to life imprisonment without mercy on both of the kidnapping counts and terms of 15 to 25 years on each of the sexual assault counts, all sentences set to run consecutively to each other.

On November 20, 1990, the Appellant filed his Petition for Appeal in the West Virginia Supreme Court of Appeals, which was denied on February 5, 1991.

On October 26, 1991, the Appellant filed a Petition for Writ of Habeas Corpus in the Circuit Court of Kanawha County and thereafter on November 15, 1991, filed an Amended Petition. The writ was denied by Order of the Circuit Court entered on December 23, 1991.

On December 29, 1992, the Appellant filed an original jurisdiction Petition for Writ of Habeas Corpus with the West Virginia Supreme Court of Appeals, raising the claim, *inter alia*, that the Circuit Court of Kanawha County had not granted him a hearing on his previous petitions and that he had therefore been unable to develop matters which were mixed questions of fact and law, including claims of ineffective assistance of counsel. This Petition was denied by Order entered on February 23, 1993.

On March 12, 1993, the Appellant filed a virtually identical Petition for Writ of Habeas Corpus in the West Virginia Supreme Court of Appeals, appending a memorandum of law more fully developing his claim of entitlement to an evidentiary hearing pursuant to *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981). On November 17, 1993, this Petition was denied without

prejudice in order for the Appellant to file a Petition for a Post-Conviction Habeas Corpus in conformity with the provisions of the *Zain* case.¹

On December 16, 1993, the Appellant filed his Zain petition, and the Supreme Court of Appeals promptly granted the writ, making it returnable to the Circuit Court of Kanawha County for further proceedings.

During the circuit court proceedings, the State, over the Appellant's objections, requested DNA testing. The test results came in, and were damning; DNA testing could not exclude the Appellant as the rapist in two of the cases, victims Capone and Sparks, and showed to a virtual certainty (1/3.5 million chance of error) that he was the rapist in the third case, victim Townsend.

On March 24, 1997, the circuit court denied the Appellant's Petition for Writ of Habeas Corpus. Doing a careful and thorough analysis under the framework set out in the *Zain* case, the court dismissed the three counts of the indictment which were based upon the rape of victim Capone, on the ground that the evidence at trial, excluding the Zain evidence, was insufficient to sustain a conviction. With respect to the remaining six counts of the indictment having to do with victims Sparks and Townsend, the court found that the evidence at trial, excluding the Zain evidence, was sufficient to prove guilt beyond a reasonable doubt. The court noted, but did not rely upon, the fact that DNA testing was compelling after-the-fact evidence of Appellant's guilt with respect to victim Townsend.

¹*In re An Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W. Va. 321, 438 S.E.2d 501 (1993).

On or about March 2, 1998, the Appellant filed his Petition for Appeal to the West Virginia Court of Appeals.² On July 6, 1998, the West Virginia Supreme Court of Appeals affirmed the rulings of the circuit court. *State ex rel. McLaurin v. Trent*, 203 W. Va. 67, 506 S.E.2d 322 (1998).

On a date which Appellee has not been able to ascertain, the Appellant filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on or about January 14, 1999.

On January 28, 1999, the Appellant filed an original jurisdiction Petition for Writ of Habeas Corpus in the West Virginia Supreme Court of Appeals, which was denied on April 21, 1999. This Petition for Writ of Habeas Corpus raised all of the issues which had been previously raised on direct appeal, in the initial petition for habeas corpus filed in the circuit court, and at least arguably in the petition for relief filed in the Supreme Court on December 29, 1992, which had been denied without prejudice.

On June 28, 1999, the Appellant filed a motion for relief under 28 U.S.C. § 2254, in the United States District Court for the Southern District of West Virginia. Habeas relief was denied, without prejudice, on the ground that the Appellant had failed to exhaust state court remedies by proceeding with his *Losh* hearing.³

²On its face, this petition would appear to have been untimely filed, but this issue was not raised by anyone and the Supreme Court resolved all substantive issues on the merits. Appellee believes that one or more additional pleadings must have been filed between March 24, 1997 and March 2, 1998, but has been unable to locate them.

³The State conceded that under the unique procedural facts of this case, the Appellant was entitled to a *Losh* hearing; this Court had denied his *Losh* hearing without prejudice at the same time it granted his *Zain* hearing.

On January 14, 2000, the Appellant filed a pro se petition for habeas corpus relief in the Circuit Court of Kanawha County. The case was assigned to the Honorable John Frazier, who held extensive hearings and thereafter issued the Order from which this appeal is taken. Judge Frazier granted relief on one of the Appellant's claims, vacating his kidnapping conviction and life without mercy sentence in the Sparks case.

II.

FACTS

This is not a case involving innocence. The DNA evidence that was obtained during the Zain proceedings (over the Appellant's objection, for obvious reasons) showed conclusively⁴ that John McLaurin was the rapist in the Townsend case, and did not exclude him as the rapist in the Sparks case.⁵ The Zain judge found, in a ruling upheld by this Court on appeal, there was sufficient evidence at the Appellant's trial to convict him in both Townsend and Sparks. *State ex rel. McLaurin v. Trent*, 203 W. Va. 67, 506 S.E.2d 322 (1998).

The only issue in this case that is really new is the issue of competency; the Appellant now claims, seventeen years after the fact, that he was incompetent to stand trial because of some nebulous "organic brain damage." The record demonstrates conclusively that the arraignment judge had initially granted defense counsel's motion for a psychiatric examination, which was never done because the Appellant rejected the idea of a psychiatric defense and refused to co-operate. Many months later, the defense moved for a continuance and renewed its motion for a psychiatric

⁴A 1 in 3.5 billion chance of error can fairly be deemed conclusive.

⁵It did not exclude him as the rapist in the Capone case, either, but the habeas court held that there was insufficient evidence, excluding the testimony of Fred Zain and not taking the DNA evidence into account, to convict the Appellant of Ms. Capone's rape.

examination; the motion was denied by the motions judge⁶ on the ground that it was too late, trial being less than a week away.

The organic brain damage seems to have miraculously disappeared during the ensuing years, since during the habeas hearing the Appellant's habeas counsel opposed the State's motion to have the Appellant examined by a psychiatrist and vigorously asserted – when his client wanted to participate personally in cross-examination of witnesses – that the Appellant was competent to do so.

MR. AYERS: I can say, you know, that I have not had any problems communicating with Mr. McLaurin. I've seen no evidence of mental illness or psychiatric problems or whatever. And if I did, I would certainly tell the Court if I had questions with respect to that and his ability to represent himself.

(Habeas Transcript, Vol. I, pp. 136-37.)

MR. AYERS: Your Honor, if I could speak to Mr. Clifford's motion. I really have to oppose that at this time. I understand the issue that we raised relative to trial counsel's failure to pursue this issue at the time of trial, but, you know, this was 15 years ago. If I felt there was any question about Mr. McLaurin's competence as a client to communicate with him or to represent himself in this proceeding, I would certainly bring it to the court's attention, because I believe that's my responsibility. I really don't feel that I can raise that issue at this time because I've really not seen any evidence of it, other than a disagreement.

(Habeas Transcript, Vol. I, pp. 140-41.)

A review of the record of Appellant's trial indicates that the trial court, Judge John Hey, conducted a scrupulously fair trial. Despite the Appellant's attempts during his habeas hearing to capitalize on Judge Hey's later problems by claiming that he (Judge Hey) was drunk during the trial, there wasn't a scintilla of evidence to support this claim and the record absolutely belies it.

⁶The Appellant's trial took place during the period of time when Kanawha County's circuit judges performed different functions on a rotating schedule. Accordingly, the Appellant's pre-trial motions were heard by Judge Zakaib, while the case was tried by Judge Hey.

A review of the habeas hearing indicates that the Appellant's primary strategy was to "play the race card" as loud and often as possible. He claimed that the selection of the grand jury was done in a way to exclude African Americans; that the prosecuting attorneys (one of whom was African American) had excluded a petit juror strictly on the basis of his race; and that Judge Hey had made racist comments during the trial. None of these claims had any evidentiary basis, and the petit juror claim was almost amusing in light of the fact that two African Americans sat on the jury and two more sat as alternate jurors.

III.

ARGUMENT

- A. THE CIRCUIT COURT DID NOT DENY THE APPELLANT DUE PROCESS OF LAW BY DENYING HIS LAST-MINUTE MOTION FOR A CONTINUANCE AND A COMPETENCY EVALUATION, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE. FURTHER, ANY ERROR (*ARGUENDO*) IN DENYING THE MOTION WAS HARMLESS, IN THAT THE COMPETENCY CHALLENGE WAS BASED ON ALLEGED "ORGANIC BRAIN DAMAGE," A PERMANENT CONDITION THAT MOST ASSUREDLY DOES NOT EXIST.**

As a threshold matter, the Appellant claims that the habeas judge was required to make specific findings and conclusions with respect to the issue of his competency to stand trial, and that the judge's findings and conclusions with respect to "a serious enough psychiatric disability to have altered the jury's verdict" were insufficient.

The State agrees that the language of the habeas judge's Order is susceptible of the interpretation that the Appellant's counsel puts on it. However, the evidence of record, and the judge's factual findings, make it clear that a remand would be a futile act; there is no possibility a fact-finder could conclude that the Appellant was incompetent at the time of his trial. As set forth

in the Appellant's brief, the claim rested on a 1975 report from the West Virginia State Penitentiary⁷ that the Appellant *might* be suffering from organic brain damage and psychological problems. However, a 1987 report indicated that the Appellant suffered from *no* gross psychopathology. Further, the lawyers' comments at the time of trial and their testimony during the habeas hearing show that their client's alleged incompetence boiled down to two things: first, he didn't want to cooperate in raising a psychiatric defense, and second, he wanted to run the show.

As the transcript of the habeas hearing clearly demonstrates, this Appellant still wants to run the show – and his habeas attorney represented to the habeas judge that he (the Appellant) was competent to do so, i.e., by cross-examining witnesses and arguing issues beyond those raised by the attorney. Thus, to believe the Appellant's claim that he was incompetent at the time of his trial, one must believe that his "organic brain damage" has miraculously healed. This strains credulity, and the habeas judge would necessarily so find on remand.

West Virginia Code §27-6A-1(a) provides, in relevant part, that:

Whenever a court of record . . . believes that a defendant in a felony case . . . may be incompetent to stand trial or is not criminally responsible by reason of mental illness, mental retardation or addiction, it *may* at any stage of the proceedings after the return of the indictment or the issuance of a warrant or summons against the defendant, order an examination of such defendant to be conducted by one or more psychiatrists, or a psychiatrist and a psychologist

The issue in this case is whether the court *must* order a psychiatric or psychological exam whenever there is *any* evidence to support a claim of incompetency, *regardless* of the circumstances surrounding the request. If the statute means what it says, i.e., if the court has discretion, then even

⁷The Appellant was serving time at Moundsville for the first rape of his career.

an erroneous ruling would not rise to the level of a constitutional violation cognizable in habeas corpus.

The motions judge had the following situation before him on November 7, 1989:

1. The trial was less than one week away;
2. The arraignment judge had granted a motion for a psychiatric evaluation five months earlier, but the evaluation was never done because the Appellant refused to cooperate;
3. The evidence presented in support of the motion for competency evaluation was nothing more than counsel's representation of something alleged to be in the Appellant's 14 year old prison record, specifically, a reference to possible "organic brain damage"⁸ inferred from the Appellant's performance on a standardized test; and
4. The Appellant appeared to the motions judge to have an intact reasoning process and ability to express himself.

Taking all of these facts into consideration, the judge did not abuse his discretion in denying the Appellant's renewed motion for a psychiatric examination.

State ex rel. Webb v. McCarty, 208 W. Va. 549, 542 S.E.2d 63 (2000), upon which the Appellant relies, does not require a different result notwithstanding the bright-line rule set forth in Syllabus Point 6: "When a trial judge orders a competency examination under W. Va. Code § 27-6A-1(a) (1983) (Repl. Vol. 1999), but the examination is not undertaken in the manner required by that statute, the court must grant a subsequent motion for a competency evaluation made by the

⁸On October 8, 1975, the Appellant took the Bender Visual Motor Gestalt test; according to the prison record, the test revealed perceptual difficulties often associated with organic brain damage. On November 20, 1987, a psychological evaluation update was done which indicated no gross psychopathology.

defendant and order any such examinations as are necessary to comport with W. Va. Code § 27-6A-1(a).” *Webb* was decided more than a decade after the Appellant was tried, and nothing in the opinion indicates that the Court intended for it to be applied retroactively. Additionally, although the Court’s rationale for the bright-line rule was to “. . . assur[e] that criminal defendants are not denied their due process rights. . .,” *id.*, 208 W. Va. at 554, 542 S.E.2d at 68, the Court’s holding was that the trial court had abused its discretion in refusing to allow a mental examination.

As opposed to *Webb*, which was before the Court on a pre-trial writ of mandamus, the instant case is a habeas corpus. As this Court has ruled on numerous occasions, “[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt. 2, *State ex rel. Quinones v. Rubeinstein*, No. 32661, 2005 WL 3211219 (W. Va., Nov. 30, 2005); Syl. Pt. 3, *State ex rel. Edgell v. Painter*, 206 W. Va. 168, 522 S.E.2d 636 (1999); Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). Therefore, even if this Court would conclude that Judge Zakaib abused his discretion sixteen years ago, when he denied the Appellant’s motion for continuance and renewed motion for a psychiatric examination, habeas relief would only be appropriate if the ruling denied the Appellant due process of law.⁹ Under the facts and circumstances set forth above, there was no constitutional violation.

Finally, a careful review of the trial transcript and the habeas transcripts reveals that the Appellant’s alleged difficulties in cooperating with counsel in 1989, the primary basis for counsels’ request for a psychiatric examination, were exactly the same as the difficulties he experienced at the habeas hearing, where his lawyer argued that he was competent to discharge counsel and competent

⁹This is the Appellant’s constitutional claim.

to represent himself. *See* p. 6, *infra*.¹⁰ The long and short of it is that the Appellant has always had his own ideas about how to run his defense – by playing the race card, attacking the police, and attacking the prosecutors and the judge – which may make him wrongheaded, but not incompetent. The Appellant's habeas attorney obviously had as much difficulty dealing with him as the trial attorneys had, yet the habeas attorney specifically represented to the judge that the Appellant was competent.

B. THE CIRCUIT COURT DID NOT DENY THE APPELLANT DUE PROCESS OF LAW BY DENYING HIS MOTION TO SEVER THE SEXUAL ASSAULT CHARGES, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE. FURTHER, ANY ERROR (*ARGUENDO*) IN DENYING THE MOTION WAS HARMLESS, AS THERE WAS STRONG PHYSICAL EVIDENCE IN THE *SPARKS* CASE AND STRONG EYEWITNESS IDENTIFICATION EVIDENCE IN THE *TOWNSEND* CASE.¹¹

The habeas judge's findings of fact, which are not clearly erroneous, are as follows:

Although there were some dissimilarities between the three sexual assaults there were sufficient similarities and other factors connecting Petitioner to the crimes to constitute a common scheme, plan or design.

In this case, the three victims were all assaulted within less than a three week span of time. J.T. and B.S. were attacked within two days of one another. J.T. and C.C. were both in downtown Charleston when they were attacked. C.C. and B.S. were both kidnapped in parking lots when they attempted to get into their cars, and were forced to drive to isolated spots, where the assaults occurred. In each case, the assailant attempted to prevent the victim from seeing his face. B.S. and C.C. were threatened with a gun, and J.T. threatened with a knife. The crimes all occurred within a short time after petitioner's release from prison on an earlier rape conviction. All three identified their assailant as a black man. The assailant made remarks to B.S. and C.C. which were nearly identical. There were other similarities among the assaults as well.

¹⁰The habeas judge, sensing that nothing good would come of self-representation, engineered a compromise where the Appellant acted as co-counsel on his own behalf.

¹¹As noted earlier in this brief, the Zain judge dismissed the Capone case on the ground that once the serological evidence was set aside, there was insufficient evidence to convict.

B.S. was able to identify the Petitioner as her assailant. Furthermore, two maids saw the Petitioner near the time and at the motel where J.T. was sexually assaulted. Finally, Petitioner's blood sample contained factors consistent with the seminal fluid in all three cases.

Opinion\ Order of July 8, 2005, p. 11.

Not mentioned by the judge was that DNA testing conducted during the Appellant's *Zain* proceeding conclusively showed him to be the rapist in Townsend, and he could not be excluded as the rapist in Sparks.

Although the Appellant contends that none of these facts show that "... the *modus operandi* ... is sufficiently distinctive to constitute a signature ...," *State v. McDaniel*, 211 W. Va. 9, 13, 560 S.E.2d 484, 488 (2001), every fact-finder who's looked at this case over the past sixteen years – and that includes the jury – has concluded that there was indeed a recognizable *m.o.* in the Townsend, Sparks and Capone cases.

In Syl. Pt. 3, *State v. Hatfield*, 181 W. Va. 106, 380 S.E.2d 670 (1988), this Court held that "[e]ven where joinder or consolidation of offenses is proper under the West Virginia Rules of Criminal Procedure, the trial court *may* order separate trials pursuant to Rule 14(a) on the ground that such joinder or consolidation is prejudicial. The decision to grant a motion for severance pursuant to W. Va. R. Crim. P. 14(a) is a matter within the sound discretion of the trial court." (Emphasis supplied.)

In this case, the habeas court correctly concluded that the trial judge had not abused his discretion in denying the Appellant's motion to sever. And assuming *arguendo* that the judge should have severed the cases, which may have been a safer course of action, the only possible prejudice to the Appellant was his conviction in the Capone case, where the evidence was significantly weaker

than it was in the Townsend and Sparks cases. But the Capone conviction was long ago thrown out by Judge Canady, in the Appellant's *Zain* proceedings, so any is harmless beyond question. In the Townsend case, there was strong eyewitness testimony from two individuals who saw the Appellant lurking around the location from which the victim was abducted, right before the abduction occurred; and in the Townsend case, the victim testified that the abductor/rapist dropped a prescription bottle at the scene of the crime. The bottle was found by the police, and (in what the defense attorneys characterized as a big coincidence) was clearly marked "John McLaurin."

The Appellant contends that even if it was proper for the trial court to go forward with the trial on all three crimes, the court erred in refusing to give the jury Defendant's Instruction No. 8: "The Court instructs the jury that you are to make no presumption of the defendant's guilt of the offenses of kidnapping and sexual assault on C.C. or J.T. because of evidence offered in the case of B.S. The evidence offered by the State in support of the offenses charged as to each such victim must separately prove such offenses against such victim beyond a reasonable doubt. If you find that the evidence offered to prove the offenses charged is insufficient to prove that John McLaurin was the perpetrator of the offenses against J.T. or C.C., you just find the accused not guilty of all six counts."

That this was harmless error is beyond question under the facts and circumstances of the case. The proffered instruction acknowledges, albeit implicitly, that the evidence in the Sparks case was strong enough for conviction; the "evil" sought to be remedied was the possibility of spillover prejudice in the Townsend and Capone cases. But the Townsend case was also a strong case on its own merits – that pill bottle was no coincidence, as the jury found – and we now know conclusively,

from the DNA testing in the *Zain* proceeding, that the Appellant was the rapist. That leaves the Capone case, which has long since been dismissed.

And in any event, this wasn't a collateral crimes situation; it was a case where the Appellant committed three "signature" crimes in a short period of time. The "signature" was key evidence, and absolutely proper notwithstanding that it was prejudicial; all evidence that tends to show guilt can be characterized as prejudicial.

C. THE HABEAS COURT CORRECTLY CONCLUDED THAT THE APPELLANT COMMITTED TWO SEPARATE SEXUAL ASSAULTS ON VICTIM TOWNSEND, AND COULD THEREFORE BE CONVICTED AND PUNISHED SEPARATELY FOR EACH ASSAULT.

The Appellant's third argument is a triumph of chutzpah. The trial transcript demonstrates, and the habeas judge found, that:

In the J.T. case, the victim testified that her assailant had sexual intercourse with her while she was on her hands and knees. He then stopped and ordered her to turn over, and assaulted her again while he was lying on her back. These were treated as two separate counts of sexual assault.

The Appellant claims that there was no "elapsed time" between the two assaults, i.e., that "[o]ne act of vaginal sexual intercourse immediately followed the other." (Appellant's Brief at 37, emphasis in original.) Therefore, the argument goes, the Appellant's conviction for two counts of sexual assault violates the rule in *State v. Woodall*, 182 W. Va. 15, 385 S.E.2d 253 (1989), which requires "conclusive evidence of elapsed time between separate violations. . . ."

To the victim of a brutal rape, the time it takes to follow the perpetrator's order to change positions so that the rape can begin anew is surely "elapsed time" within the meaning of *Woodall*. Indeed, it must feel like an eon. The habeas judge was absolutely correct in concluding that the Appellant's double jeopardy claim failed.

D. THE HABEAS JUDGE'S FAILURE TO ADDRESS THE ISSUE OF EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING SHOULD NOT NECESSITATE A REMAND, AS THE ISSUE IS MERITLESS UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Let us review the facts that existed at the time of the Appellant's sentencing.

He had previously served concurrent sentences of 10-20 years for rape and 25 years for robbery by violence. The prosecuting attorney had dropped additional rape and robbery charges because of the Appellant's youth; "[the prosecutor] thought that there was still hope for [the Appellant's] rehabilitation." Trial Transcript, Vol. III, p. 904.

While in the penitentiary, the Appellant pled guilty to felony assault on another inmate and was sentenced to 2-10 years to run consecutive to the rape and robbery sentence he was serving.

The Appellant was released from prison in June, 1988, and committed three brutal rapes within 90 days of his release.

The Appellant's file from the Moundsville penitentiary, which was provided to the sentencing judge, bore a bright orange sticker on the front stating "Special Attention. Check file before any disposition." When the file was opened, there was another orange sticker: "Threatening inmate."

The Appellant acknowledged at sentencing that ". . . I'm no more than a product of my society, you know, my environment. *And if I am violent, I can accept that violence. I can accept me being a violent person. I can accept that I may have to be locked out of this society forever.*" (Trial Transcript, Vol. III, p. 909.)

In light of all this, is there anything defense counsel could have said that could reasonably have been expected to mitigate the Appellant's sentence?

This case is not like *United States v. Cronin*, 466 U.S. 648 (1967), characterized by this Honorable Court as holding that "... a denial of counsel where prejudice is presumed occurs where a defendant 'suffered the equivalent of a complete absence of counsel.'" *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 325, 465 S.E.2d 416, 427 (1995). It is certainly true that the defense counsel didn't make any argument or present any evidence at the sentencing, and at the habeas hearing, counsel was asked why.¹²

Q: Mr. Miller, I'd like to move on to sentencing. Do you recall presenting any evidence on Mr. McLaurin's behalf at sentencing with respect to mitigation, anything on his behalf?

A: I don't recall that we presented any. I recall that the sentencing was a very tense time. Mr. McLaurin was very bitter about having been convicted and was threatening to have words with the sentencing judge, and we were concerned that that might impact on the sentencing.

Now, I believe that I filed a motion for a 60 day presentencing study. I always did in these cases.

Q: You did. And the Court denied it.

A: That is undoubtedly so.

Q: But you don't recall presenting anything in addition?

A: Well, other than the -- I would have -- I would have probably referred to the psychiatric problems, as reflected in his prison records. *But my recollection is Mr. McLaurin was very vehement that that not be done.* He was hostile to the idea of a psychiatric evaluation. And he was very fearful of being branded as a looney by inmates at -- by his fellow inmates at the state penitentiary.

Q: Well, but now you convinced Mr. McLaurin before trial, at least a week before trial, to undergo psychiatric evaluation?

A: True.

¹²Co-counsel, Mr. Earles, had absolutely no recollection of even being at the sentencing, let alone why he did or didn't do anything.

- Q: His position obviously had changed. So sentencing was after that. So the record reflects you didn't present any prison psychological records at sentencing.
- A. If that's what the record reflects, then we didn't do it. But we would have -- there had to have been a good reason for it. *And I'm sure it was something that Mr. McLaurin was insisting on because he had very positive ideas of what was and was not going to be done.*

(Trial Transcript, Vol. II, pp. 67-69, emphasis supplied.)

It is apparent from a review of the sentencing transcript, and the testimony given at the habeas hearing, that defense counsels' hands were tied by the Appellant himself. Further, it is apparent that this five-time loser, whose prison records were replete with warnings that he was a violent man and a likely repeat offender, was going to get a "long ball" sentence no matter what anyone said or did at the sentencing.

Finally, and significantly, there wasn't a scintilla of evidence at the habeas proceeding as to what evidence or argument could have been made on the Appellant's behalf in mitigation of his sentence. This failure of proof is fatal to the Appellant's claim, which is meritless in any event.

IV.

CONCLUSION

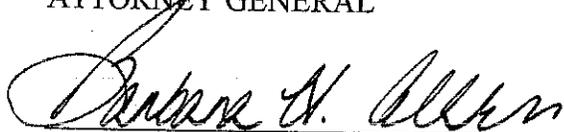
For all of the reasons set forth in this Brief and apparent on the face of the record, the judgement of the habeas court should be affirmed. This Appellant has had his day in court, many times over, and this case should be put to rest.

Respectfully submitted,

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
Appellee,

By counsel.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

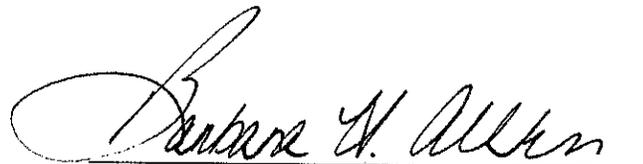
A handwritten signature in cursive script, appearing to read "Barbara H. Allen", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee Thomas McBride, Warden, Mount Olive Correctional Complex* was mailed to counsel for Appellant by depositing the same in the United States mail, with first-class postage prepaid, on this 11th day of April, addressed as follows:

Gregory L. Ayers, Esq.
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