

BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Nos. 33100 and 33101

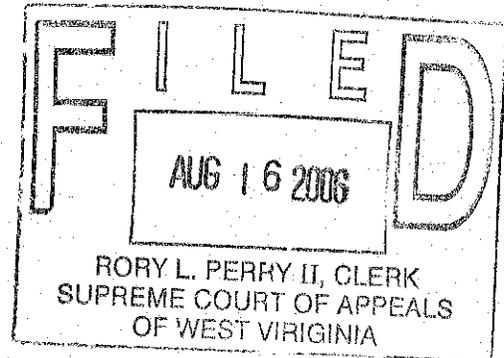
CORNELL F. DAYE,

Appellant,

v.

**STATE OF WEST VIRGINIA,
THOMAS McBRIDE, Warden
Mount Olive Correctional Complex,**

Appellee.



APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF

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APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF

I.

Kind of proceeding and nature of ruling below

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

When Appellant Cornell F. Daye was convicted of possession of crack cocaine with intent to deliver, a second or subsequent offense, the trial court initially sentenced him to serve 2 to 30 years in prison, which is an enhanced sentence under W.Va.Code §60A-4-408. This sentence enhancement statute, which is the only specific sentence enhancement provision included in the

Uniform Controlled Substances Act, permits a trial court, in its discretion, to double the sentence for a second or subsequent offense. Pursuant to this September 26, 2001 sentencing order, Appellant remained in jail and began serving this sentence.

A few days after Appellant began satisfying the sentence imposed, the State filed a motion to "correct" this initial sentence, asserting that in addition to the sentence enhancement under W.Va.Code §60A-4-408, Appellant also was subject to the sentence enhancement under W.Va.Code §61-11-18. In fact, the State contended that this second enhancement, increasing Appellant's sentence to life, was mandatory.

Following a hearing, the trial court granted this motion and increased Appellant's sentence to life, although he has never been convicted of any violent offense. All three convictions resulting in Appellant's life sentence were for possession of crack cocaine with intent to deliver. Thus, the critical issue raised in this case is whether the trial court's actions in increasing Appellant's sentence to life was constitutional under these facts.

Procedurally, the present appeal is from the summary dismissal of Appellant's *pro se* petition for habeas corpus, based upon an order entered by the Honorable Judge John Hutchison on June 9, 2005. Despite the fact that Appellant is serving a life sentence and he is not a lawyer, the trial court refused to appoint counsel to assist Appellant in developing a record in support of his claims for habeas corpus relief. After summarily dismissing the habeas corpus petition, the trial court then refused to appoint counsel to represent Appellant in this appeal.

Without any assistance from a lawyer, Appellant did file a *pro se* petition for appeal with this Court, which was granted on May 26, 2006. In this Court's order, present counsel was appointed to represent Appellant.

In light of the procedural history in this case, not only does this case involve very compelling constitutional issues with respect to Appellant's life sentence, it also raises critical issues regarding when a trial court should refuse to appoint counsel in a habeas corpus case and when summary dismissal of a habeas corpus petition is appropriate. Appellant respectfully submits that his life sentence should be set aside, based upon this Court's decisions and the arguments presented in this appeal.¹

II.

Statement of facts

In the June 9, 2005 order summarily denying all habeas corpus relief, the trial court made several findings of fact. The following is the relevant chronology, based upon the trial court's findings and other relevant orders and pleadings in the record before this Court.

¹The record in this appeal provided to appointed counsel consists of orders and pleadings from case numbers 00-F-36 and 04-C-431. Other than one hearing transcript, the remaining transcripts of the trial and hearings held in case number 00-F-36 were not included. Since the Court granted the appeal based upon the existing record, Appellant's counsel has limited the issues in this appeal to those that can be decided as a matter of law, without reference to the underlying trial transcript. Thus, although Appellant's *pro se* petition for appeal raises several additional issues, those issues are dependent upon references to the trial transcript.

Appellant is concerned that the Court may deem this failure to raise the other issues asserted in his *pro se* appeal as a waiver of those claims. As noted in the introduction, Appellant was not provided counsel either to assist him in the habeas corpus action or in his petition for appeal. Consequently, the factual and legal record is inadequate to address these other issues on the merits and Appellant may very well have additional viable claims that should have been raised, but were not due to Appellant not having counsel.

Thus, by not raising any additional issues in this appeal, Appellant wants the Court to understand that he is not waiving any issues. As the Court will see in Section IV(C) of this brief, in the event the Court does not find the constitutional grounds asserted to be dispositive, then Appellant respectfully asks this Court to refrain from addressing any of these other issues and to appoint present counsel to assist him in developing a proper habeas corpus record. This procedure would permit Appellant to ensure that all of the appropriate claims are raised and would avoid Appellant suffering the waiver or resolution of any other issue on appeal.

On August 25, 1999, Appellant was arrested in Raleigh County, West Virginia for possession of crack cocaine. (Finding No. 2). On January 10, 2000, the grand jury indicted Appellant in case number 00-F-36, for possession of crack cocaine with intent to deliver, second offense, based upon the August 25, 1999 arrest. (Finding No. 2).² At the time this offense allegedly occurred, Appellant was on probation for an earlier guilty plea to a charge of possession of crack cocaine with intent to deliver entered in case number 99-IF-69.³ (Finding No. 2).

On July 10, 2001, the trial court entered an order permitting the State to amend the indictment to change the statutory citation from W.Va.Code §60A-4-406 to W.Va.Code §60A-4-408.⁴ On August 20 and 21, 2001, Appellant was tried in case number 00-F-36. The jury convicted

²West Virginia Code §60A-4-406, is not a statute defining a crime, but rather is one explaining how parole eligibility may be affected, if a person convicted of violating W.Va.Code §60A-4-401, does so either by distributing a controlled substance to a minor or within one thousand feet of a school. Depending on the specific crime committed, the person is rendered ineligible for parole under W.Va.Code §60A-4-406, for three or two years. In the underlying criminal case, case number 00-F-36, there was no evidence that Appellant distributed any controlled substance, there was no minor involved, and the alleged possession of crack cocaine did not occur within one thousand feet of any school.

³On April 1, 1999, Judge Kirkpatrick entered an order in case number 99-IF-69, accepting Appellant's March 22, 1999 guilty plea to possession of crack cocaine with intent to deliver. (Finding No. 1). Appellant disputes this finding because the April 1, 1999 order actually states that Appellant entered a "PLEA of GUILTY to POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: 'CRACK' COCAINE," with no reference to any "intent to deliver." If Appellant had been appointed counsel for his underlying habeas corpus proceeding, the inconsistency between the finding made by the trial court in the present case and the language used in the April 1, 1999 order could have been developed. In that same order, Appellant's sentence was suspended and he was placed on two years probation, with a special term that he serve four months in the Southern Regional Jail. (Finding No.1). Previously, on March 28, 1997, Appellant entered a guilty plea in case number 97-F-16 to possession of crack cocaine with intent to deliver.

⁴West Virginia Code §60A-4-408, is not a statute defining the elements of a crime, but rather is the specific sentence enhancement mechanism available in the Uniform Controlled Substances Act. Specifically, W.Va.Code §60A-4-408(a) provides, in relevant part: "Any person convicted of

Appellant of possession of crack cocaine, with intent to deliver, second or subsequent offense. (Finding Nos. 14 and 15).

The day after the jury returned its verdict, the State filed an information, pursuant to W.Va.Code §61-11-19, noting that Appellant had been convicted the day before of an offense punishable by confinement in the penitentiary, and further noting that the State had knowledge of two prior convictions of possession of a controlled substance with intent to deliver in case numbers 99-IF- 69 and 97-F-16.

On September 6, 2001, a hearing was held to address the issues raised by the State in the information. At this hearing, Judge Hutchison presided, instead of Judge H. L. Kirkpatrick, III, who had been the judge during the trial of 00-F-36. Judge Hutchison explained to Appellant that if he admitted he was the person convicted of the crimes in 99-IF-69, 97-F-16, and 00-F-36, “you **could be** sentenced to a period of life in the penitentiary, with possibility of parole.” (Emphasis added). (Tr. at 9). Following this colloquy, which also included some other explanations regarding possible sentences, Appellant admitted that he was the person convicted in the three cases cited. (Tr. at 11).

On this same date, Judge Hutchison entered an order finding that Appellant “knowingly, voluntarily and understandingly appreciates the ramifications of an admission and accepts the defendant’s admission in open court that he is one and the same person to have been convicted of felony charge in 00-F-36-K in the Circuit Court of Raleigh County, West Virginia.” Judge Hutchison further found that Appellant “knowingly, voluntarily and understandingly appreciates the ramifications of an admission and accepts the defendant’s admission in open court

a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.”

that he is one and the same person to have been convicted of felony charges and sentenced to the penitentiary in cases 99-IF-69-K & 97-F-16 in the Circuit Court of Raleigh County, West Virginia.” Finally, Judge Hutchison held that “the Clerk of this Court shall note in case no. 00-F-36-K that the defendant has acknowledged in open [court] after being duly cautioned that he is the same person as alleged in Information 01-IF-158-H.” (Finding No. 16).

On September 26, 2001, Judge Kirkpatrick entered an order, pursuant to W.Va.Code §60A-4-408, sentencing Appellant to a term of not less than 2 nor more than 30 years for the conviction in 00-F-36 of possession of crack cocaine with intent to deliver, second or subsequent offense, to be served consecutively with the sentence in 99-IF-69. Although the trial court found the State had met its burden of proving the elements under W.Va.Code §61-11-18, the trial court declined to enhance Appellant’s sentence as a habitual offender. (Finding No. 18). Once Appellant was sentenced, he remained in jail and began serving time pursuant to this 2 to 30 year sentence.

On October 2, 2001, the State filed a motion, pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure, to correct the sentencing order, arguing that a life sentence was mandatory under W.Va.Code §61-11-18, and that a life sentence under these facts was constitutional. (Finding No. 19). The State also asserted that the 2 to 30 year sentence entered, pursuant to W.Va.Code §60A-4-408, was an illegal sentence. On October 11, 2001, following a hearing on this same date, Judge Kirkpatrick entered an order denying the post-trial motions and “correcting” the sentence to confine Appellant to the penitentiary for life. (Finding No. 21). This substantial increase in Appellant’s sentence was imposed, despite the fact that Appellant already had begun serving time pursuant to the original 2 to 30 year sentence.

In his appeal, Appellant challenged this life sentence, but in an order entered March 11, 2003, this Court denied Appellant’s appeal by a vote of 3 to 2. On May 25, 2004, Appellant filed

a *pro se* habeas corpus petition. (Finding No. 22). On June 9, 2005, Judge Hutchison issued an opinion order summarily denying all habeas corpus relief, based upon the *pro se* habeas corpus petition filed by Appellant. In the June 28, 2005 order, Judge Hutchison denied Appellant's request to have counsel appointed for appeal.

III.

Issues Presented

A.

Whether the trial court erred in holding it was proper for Appellant to have his sentence increased to life because:

1. This Court repeatedly has held that once a defendant begins serving a sentence, trial courts have no authority or jurisdiction to increase the sentence, under double jeopardy principles;

2. Only the specific sentence enhancement under W.Va.Code §60A-4-408, can be applied where the defendant has multiple convictions under the Uniform Controlled Substances Act; and

3. Rule 35(a) only permits a trial court to correct an illegal sentence?

B.

Whether the trial court erred in concluding that Appellant's life sentence, under the habitual offender statute, was constitutionally proportional, where all three convictions were for nonviolent offenses--possession of a controlled substance with intent to deliver?

C.

Whether the trial court erred in refusing to appoint counsel for Appellant to represent him in the underlying habeas corpus action and in summarily dismissing the petition where Appellant raised a number of very credible issues warranting habeas corpus relief?

IV.

Argument

A.

The trial court erred in holding it was proper for Appellant to have his sentence increased to life because:

1. This Court repeatedly has held that once a defendant begins serving a sentence, trial courts have no authority or jurisdiction to increase the sentence, under double jeopardy principles;

2. Only the specific sentence enhancement under W.Va.Code §60A-4-408, can be applied where the defendant has multiple convictions under the Uniform Controlled Substances Act; and

3. Rule 35(a) only permits a trial court to correct an illegal sentence

(1).

Double jeopardy precludes the imposition of an increased sentence

Appellant asserts the trial court should not have been permitted to increase his sentence to life after he had begun serving the initial 2 to 30 year sentence. In *Sellers v. Broadwater*, 176 W.Va. 232, 342 S.E.2d 198 (1986), and several other cases, this Court consistently has held under double jeopardy principles, a trial court is prohibited from increasing a sentence in a criminal case after the defendant has begun serving that sentence. The trial court rejected habeas corpus relief on this ground by holding it had the authority, under Rule 35(a), to correct and increase the initial sentence.

In Syllabus Point 1 of *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977), this Court explained the three different circumstances where the prohibition against subjecting a person to double jeopardy are implicated:

The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.

See also Gibson v. Legursky, 187 W.Va. 51, 415 S.E.2d 457 (1992); *State v. Sayre*, 183 W.Va. 376, 395 S.E.2d 799 (1990).

In the present case, punishing Appellant twice for the same offense is the double jeopardy violation triggered under these facts. The Court has made it clear that the habitual offender sentence is intended to be the actual sentence for the felony conviction triggering the habitual offender statute, as explained in Syllabus Point 1 of *Gibson*:

In applying the recidivist life penalty, the trial court does not impose a separate sentence for the last felony conviction, but upon the jury's conviction in the recidivist proceeding it imposes a life sentence on the last felony conviction. In order to establish a life recidivist conviction, another felony must be proven beyond those for which the defendant has been previously sentenced.

Thus, in the present case, Appellant initially was sentenced to serve 2 to 30 years in prison, based upon his third conviction for possessing crack cocaine with the intent to deliver. Pursuant to the trial court's sentencing order, which remanded him to jail, Appellant began serving that sentence, which was enhanced under the Uniform Controlled Substances Act. Appellant's double jeopardy rights were violated when the trial court subsequently sentenced Appellant to serve a life sentence, which was a second sentence for the same crime.

This Court repeatedly has found a double jeopardy violation under these same facts. In *Sellers*, the trial court accepted the defendant's guilty plea and entered an order sentencing and fining the defendant, but suspending the penalties and placing the defendant on probation, with a

number of conditions. This defendant followed the conditions of this order, which required him to undergo testing and multiple counseling sessions.

The victim's mother, who previously had agreed to this plea bargain, later noted her objection to the plea bargain and sent a long letter to the trial court asking for a jury to decide the defendant's guilt. The trial court set aside the original sentencing order and scheduled a new trial date. In granting a writ of prohibition to this defendant, this Court held in Syllabus Point 1 of *Sellers*:

A criminal court may, for certain purposes, set aside a judgment by an order entered during the same term at which the order set aside was spread upon the records of the court; however, in criminal cases where the judgment has been satisfied in whole or in part this power is limited to those cases in which the trial court reduces the penalty imposed, and cases in which the penalty is increased are treated as cases subjecting the accused to double jeopardy.

See also State ex rel. Hill v. Parsons, 194 W.Va. 688, 461 S.E.2d 194 (1995); *State ex rel. Roach v. Dietrick*, 185 W.Va. 23, 404 S.E.2d 415 (1991); *State ex rel. Roberts v. Tucker*, 143 W.Va. 114, 100 S.E.2d 550 (1957); *State ex rel. Williams v. Riffe*, 127 W.Va. 573, 34 S.E.2d 21 (1945); *see also* F. Cleckley, *Handbook on West Virginia Criminal Procedure*, p. II-303 (2d ed. 1993) (“[W]here imprisonment has begun in satisfaction of a valid sentence, the trial court is without jurisdiction, even during the same term of court, to set aside such valid sentence and impose an additional or increased sentence.”).

Sellers, *Roberts*, and *Williams* are controlling in the present case and require the original 2 to 30 year sentence to be reinstated and the life sentence to be set aside. In *Roberts*, the trial court accepted the defendant's guilty plea, sentenced the defendant, and the defendant served

a few days pursuant to this sentence, but then escaped from the jail. Following the escape, the trial court set aside the original sentencing order and increased the sentence from 10 to 30 years. This Court held that double jeopardy principles precluded the trial court from increasing the defendant's sentence, which he already had begun to serve.

In *Williams*, the defendant entered a guilty plea to second degree murder, was sentenced by the trial court, and began serving that sentence. After the victim's family objected to the plea agreement, the trial court set aside the original sentencing order and scheduled the case for trial. This Court held that it is "thoroughly established that where imprisonment has begun in satisfaction of a sentence, that sentence cannot be increased." 127 W.Va. at 578, 34 S.E.2d at 23. Although the petition for a writ of prohibition was denied, the Court made it clear that if the trial court's purpose was to subject the defendant to an increased sentence, such a sentence would be barred under double jeopardy.

In the present case, Appellant was sentenced to serve 2 to 30 years in prison, pursuant to the original sentencing order issued on September 26, 2001. Appellant was serving that sentence when the State filed its motion to correct the sentence. Thus, when the trial court increased Appellant's sentence to life in the October 11, 2001 order, under double jeopardy principles, the trial court exceeded its jurisdiction in increasing Appellant's sentence.

(2).

W.Va. Code §60A-4-408, is the only sentence enhancement available in this case.

In a related argument that the trial court failed to address, Appellant asserted he was subjected to double jeopardy and denied effective assistance of counsel⁵ where his court appointed lawyer failed to argue it was improper to enhance Appellant's sentence twice--first, under W.Va.Code §60A-4-408, and second, under W.Va.Code §61-11-18. Where a person has been convicted of multiple violations of the Uniform Controlled Substances Act, the **only** applicable sentence enhancement is the specific enhancement under W.Va.Code §60A-4-408.

To date, this Court has not addressed this specific issue. However, other jurisdictions addressing their equivalent to W.Va.Code §60A-4-408, and W.Va.Code §61-11-18, have concluded either that this specific enhancement, rather than the more general habitual offender statute, is the only one available in a case where the defendant has been convicted of multiple offenses under the Uniform Controlled Substances Act. *See Ex Parte Chambers*, 522 So.2d 313 (Ala. 1987)⁶; *Lloyd v. State*, 139 Ga.App. 625, 229 S.E.2d 106 (1976); *State v. Loudermilk*, 221 Kan. 157, 557 S.E.2d 1229 (1976); *People v. Fetterley*, 229 Mich.App. 511, 583 N.W.2d 199 (1998); *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980); *State v. Heyward*, 90 N.M. 780, 568 P.2d 616 (1977); *Blunt v. State*, 743 P.2d 145 (Ct.Crim.App.Okla. 1987); *Buff v. State*, 538 P.2d 1117 (Ct.Crim.App.Okla. 1975); *State v. Ray*, 166 Wis.2d 855, 481 N.W.2d 288 (1992). Consequently, the more general habitual offender statute, W.Va.Code §61-11-18, is inapplicable in a case involving only violations of the Uniform Controlled Substances Act.

⁵Clearly, the imposition of an illegally enhanced sentence also implicates Appellant's rights under the due process and cruel and unusual punishment provisions in the West Virginia and United States Constitutions.

⁶This holding subsequently was addressed by the Alabama legislature, as noted in *Stokes v. State*, 555 So.2d 254 (Ct.Crim.App.Ala. 1989), which amended the relevant statutes to permit a life sentence enhancement for a drug offense.

In *Chambers*, the Alabama Supreme Court noted that the sentence enhancement under the Uniform Controlled Substances Act was permissive, while the enhancement under the habitual offender act was mandatory. This observation equally is true in the present case, where W.Va.Code §60A-4-408, is written in the permissive—"may be imprisoned for a term up to twice the term otherwise authorized"—whereas the sentence enhancement under W.Va.Code §61-11-18(c), is written in mandatory language—"the person shall be sentenced to be confined in the state correctional facility for life." If the State's theory, that it was mandatory for Appellant to be sentenced to life once the two prior convictions had been established, then the Legislature's clear intent to give trial courts discretion, under W.Va.Code §60A-4-408, to double the sentence where the defendant's prior offenses also involved controlled substances violations, would be rendered completely meaningless.

The State's argument, carried to its logical conclusion, is that where a defendant, convicted of a felony, has had two prior felony convictions, it is mandatory that a life sentence be imposed, even where all of the convictions involved violations of the Uniform Controlled Substances Act. Under this absurd logic, any sentence imposed, pursuant to W.Va.Code §60A-4-408, automatically would be an illegal sentence. Since W.Va.Code §60A-4-408, was adopted **after** W.Va.Code §61-11-18, the Legislature presumptively must have intended to treat repeat offenses under the Uniform Controlled Substances Act differently than other criminal charges. Appellant respectfully submits that the rules of statutory construction require this Court to give meaning and effect to W.Va.Code §60A-4-408, and to reject the State's assertions in this regard.

The enhancement that is specific to the Uniform Controlled Substances Act takes precedent over the more general habitual offender statute. This well established rule of statutory construction was summarized by this Court in Syllabus Point 1 of *UMWA by Trunka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984):

The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.

See also Syllabus Point 3, *State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696 (1986).

Furthermore, this Court in Syllabus Point 1 of *Justice v. Hedrick*, 177 W.Va. 53, 350 S.E.2d 565 (1986), noted the strict interpretation required in applying this penal statute:

“Habitual criminal proceedings providing for enhanced or additional punishment on proof of one or more prior convictions are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner.” Syl. pt. 2, *Wanstreet v. Bordenkircher*, [166] W.Va. [253], 276 S.E.2d 205 (1981), quoting *State ex rel. Ringer v. Boles*, 151 W.Va. 864, 871, 157 S.E.2d 554, 558 (1967).

An example of this Court applying these general rules of statutory construction is *State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696 (1986). In *Turley*, this Court was faced with interpreting two different statutes addressing the issue of probation—W.Va.Code §25-4-1, applying to youthful offenders, and W.Va.Code §62-12-2, the general probation statute. Because the defendant in *Turley* was subject to the youthful offender act, the more specific probation statute applicable to youthful offenders was controlling over the more general probation statute.

Since penal statutes must be strictly construed against the State and in favor of the defendant, a strict reading of the two sentence enhancing statutes—W.Va.Code §60A-4-408, and W.Va.Code §61-11-18—further supports the argument that only the sentence enhancement in the Uniform Controlled Substances Act is available where the defendant has been convicted of prior offense under that Act. Consequently, in the present case, once the trial court decided that an enhancement was appropriate, the trial court was required to impose the specific sentence

enhancement under W.Va.Code §60A-4-408, rather than the general sentence enhancement under W.Va.Code §61-11-18.

(3).

Trial court improperly used Rule 35(a) to "correct" a legal sentence

The trial court asserted that Rule 35(a) somehow avoided the constitutional and jurisdictional concerns noted above. Rule 35(a) does provide a limited mechanism for a trial court to correct an "illegal sentence." An illegal sentence includes "sentences in excess of the statutory maximum, or otherwise unauthorized by statute, sentences that did not conform to the oral pronouncement of sentence, or sentences that were ambiguous with respect to the time and manner of service."⁷ C. Wright, N. King, and S. Klein, 3 Federal Practice and Procedure: Criminal 3rd §582 (2004). Appellant respectfully submits that there was nothing illegal about the enhanced sentence initially imposed by the trial court. Doubling Appellant's sentence, under W.Va.Code §60A-4-408, was consistent with that statute and the jury's verdict. Thus, the fact that the trial court initially chose not to impose a life sentence, under W.Va.Code §61-11-18, does not render the initial sentence illegal.

The trial court's decision to increase Appellant's sentence, after Appellant already had begun serving the initial sentence, was premised on the State's argument that the imposition of a life sentence was **mandatory** under W.Va.Code §61-11-18. This assertion by the State is incorrect for four reasons. First, the sentence imposed originally was not illegal. Therefore, the trial court had

⁷Today, the federal version of Rule 35 differs greatly from the West Virginia version due to the sentencing guideline system adopted in federal courts. However, the definition of illegal sentence quoted is based upon the original version of Rule 35, from which the West Virginia rule was modeled.

no jurisdiction, under Rule 35, to vacate the original sentence and impose a life sentence. *See, e.g., Downing v. People*, 895 P.2d 1046 (Col. 1995)(If the sentence imposed is not illegal or void, Rule 35(a) does not permit a trial court to increase the sentence).⁸

Second, a trial court has an obligation **not to impose** a life sentence if the trial court determines that such a sentence would be constitutionally disproportionate. In the September 26, 2001 order, the trial court simply noted that although the State had met its burden under W.Va.Code §61-11-18, "The Court, however declines to enhance the sentence of the defendant as an habitual offender." Thus, one explanation for the trial court's decision not to impose a life sentence in the original sentencing order correctly could have been based upon this constitutional impediment.

Third, as occurred in this case and as argued above, once the trial court imposed an enhanced sentence, under W.Va.Code §60A-4-408, which is the specific enhancement under the Uniform Controlled Substances Act, any additional enhancement would be inappropriate.

Fourth, at the critical September 6, 2001 hearing, where Judge Hutchison filled in for Judge Kirkpatrick, he advised Appellant that if he admitted being the same person convicted of two prior felonies, "you **could be** sentenced to a period of life in the penitentiary, with possibility of parole." (Tr. at 9). Thus, Appellant was advised by Judge Hutchison, prior to admitting that he had two prior felonies, that whether or not he received a life sentence was discretionary with the trial court. If Judge Hutchison had advised Appellant that the trial court had a mandatory obligation to

⁸This Court has never been faced with the question of whether an illegal sentence can be increased by the trial court under Rule 35(a). Where the sentence is illegal, courts have held in certain circumstances that Rule 35(a) permits the trial court to correct the sentence, even if it results in an increase, without necessarily violating double jeopardy or due process principles. *See, e.g., United States v. Contreras-Subias*, 13 F.3d 1341 (9th Cir. 1994). However, because there was nothing illegal about the initial sentence imposed against Appellant, under W.Va.Code §60A-4-408, these cases are inapposite.

sentence Appellant to life, once the two prior felony convictions were admitted, Appellant very well may have chosen a different strategy and required the State to prove his identity before a jury.

Rule 35(a) cannot and does not override the well established constitutional right against double jeopardy recognized by this Court in *Sellers, Roberts, and Williams* nor can it be applied where the sentence imposed was legal. While a sentence may be corrected under Rule 35, this Court's holdings make it clear that any change in a sentence, where the defendant has begun serving time under that original sentence, can only be a decrease, rather than an increase, in the length of the sentence.

B.

The trial court erred in concluding that Appellant's life sentence, under the habitual offender statute was constitutionally proportional because all three convictions were for nonviolent offenses--possession of a controlled substance with intent to deliver

In addressing Appellant's argument that his life sentence was unconstitutional, the trial court held:

The Court agrees with Daye to the extent he states that the recidivist statute does not apply to crimes against property. However, the Court has reviewed *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998), and agrees with the State that felony drug offenses should be considered crimes of violence. A sentence of life for a defendant who has been convicted three times or more of crimes considered crimes of violence is not disproportionate. Mr. Daye has been convicted of four felonies⁹ and thus the sentence he is currently serving is

⁹Appellant assumes that by "four felonies," the trial court is referring to his three convictions of possession of a controlled substance with intent to deliver in West Virginia and the one conviction of possession of a controlled substance in Florida. While the Florida conviction is a Class III felony under Florida law, an equivalent conviction in West Virginia would be a misdemeanor. In *Syllabus Point 3 of Justice v. Hedrick*, 177 W.Va. 53, 350 S.E.2d 565 (1986), this Court held:

appropriate according to the laws of West Virginia. Therefore, this Court refuses to alter, change or reconsider the sentence imposed. (Conclusion No. 14).

This Court has developed a substantial body of cases determining whether the sentence imposed under the habitual offender act is disproportionate to the crimes committed which prompted the sentence enhancement. Article III, Section 5 of the West Virginia Constitution provides, in relevant part, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. **Penalties shall be proportioned to the character and degree of the offence.**" (Emphasis added). Thus, unlike the Eighth Amendment to the United States Constitution, the West Virginia Constitution specifically and explicitly requires sentences or penalties to be in proportion to the character and degree of the crime committed.¹⁰ Syllabus Point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

The pivotal decision addressing the proportionality requirement guaranteed under Article III, Section 5 of the West Virginia Constitution is *Wanstreet v. Bordenkircher*, 166 W.Va.

Whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, *W.Va.Code*, 61-11-18, -19 [1943], depends upon the classification of that crime in this State.

¹⁰The United States Supreme Court has found there is an implicit proportionality principle that must be read into the Eighth Amendment. However, the United States Supreme Court has applied this proportionality principle in a very narrow fashion, particularly in noncapital cases. See, e.g., *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). Justices Scalia and Thomas do not believe that the Eighth Amendment includes any proportionality principle and only supported the result in *Ewing* because five members of the Court upheld the life sentence under California's three strikes law. The end result is the pronouncements by the United States Supreme Court in the Eighth Amendment area are not very helpful, particularly since the West Virginia Constitution explicitly contains a proportionality provision and this Court has a long line of cases applying this constitutional requirement.

253, 276 S.E.2d 205 (1981). In *Wanstreet*, following the defendant's conviction for forging a check, the State proceeded to have him sentenced to life as a habitual offender, based upon his prior convictions for driving a car without a license, arson of a barn, and forgery of another check. In finding this sentence to be unconstitutionally disproportionate under these facts, this Court held in Syllabus Points 4 and 5:

4. While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

5. In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

In analyzing whether a life sentence as a habitual offender is constitutionally proportionate to the character and degree of the crime, this Court noted, 166 W.Va. at 533, 391 S.E.2d at 212, that particular emphasis is placed upon the third conviction which triggered this enhancement:

When we analyze a life recidivist sentence under proportionality principles, we are in effect dealing with a punishment that must be viewed from two distinct vantage points: first, the nature of the third offense and, second, the nature of the other convictions that support the recidivist sentence. This duality is occasioned by the fact that the punishment for the third felony conviction is an automatic life sentence regardless of the nature of the penalty for the underlying third felony....

We do not believe that the sole emphasis can be placed on the character of the final felony which triggers the life recidivist sentence since a recidivist statute is also designed to enhance the penalty for persons with repeated felony convictions, *i.e.*, the habitual offenders.

However, for purposes of proportionality, the third felony is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence.

In Syllabus Point 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981), some of the foregoing discussion in *Wanstreet* was adopted as a holding of this Court:

The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to other underlying convictions. **The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person** since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute. (Emphasis added).

See also Syllabus Point 2, *State v. Housden*, 184 W.Va. 171, 399 S.E.2d 882 (1990).

In rejecting Appellant's argument on this claim, the trial court failed to cite or distinguish the only prior decisions from this Court addressing whether a person convicted of possession of a controlled substance with intent to deliver constitutionally can be sentenced to life as a habitual offender. In *State v. Deal*, 178 W.Va. 142, 358 S.E.2d 226 (1987), the defendant, as in the present case, was convicted of possession of a controlled substance with intent to deliver. The State then proceeded to establish, under W.Va.Code §61-11-18, that the defendant had two prior convictions, one for unlawful wounding and the other for grand larceny. Based upon the State's proof, the trial court sentenced this defendant to life as a habitual offender.

In reversing the life sentence, this Court held:

The appellant's most recent conviction [for possession of a controlled substance with intent to deliver] involved no violence or threat of violence to the person. He did have one previous conviction of a violent felony in 1969. The record, however, shows that in the 16

years that followed, the appellant demonstrated no propensity toward violent or severe crimes. We do not believe the facts in this case warranted imposition of the ultimate punishment available in this jurisdiction.

In *State ex rel. Boso v. Hedrick*, 182 W.Va. 701, 391 S.E.2d 614 (1990), the defendant was convicted of night-time burglary, which triggered the habitual offender act because he had been convicted previously of delivery of a controlled substance and breaking and entering. In deciding that a life sentence under these facts was disproportionate, this Court held, 182 W.Va. at 709, 391 S.E.2d at 622:

Neither delivery of a controlled substance nor breaking and entering is per se a crime of violence. Furthermore, the night-time burglary was committed in an unoccupied dwelling. There is nothing in the record to indicate that any weapons were used in these crimes or that there was a threat of violence to any person.

Under federal sentencing guidelines, a crime of violence is defined in Section 4B1.2 as “any offense under federal or state law punishable by imprisonment for a term exceeding one year that—(I) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The possession of a controlled substance with the intent to deliver is not treated as a crime of violence under the federal sentencing guidelines. *See, e.g., United States v. Arrellano-Rice*, 799 F.2d 520 (9th Cir. 1986); *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1986); *United States v. Diaz*, 778 F.2d 86 (2nd Cir. 1985); *United States v. Wells*, 623 F.Supp. 645 (S.D.Iowa 1985); *United States v. Bushey*, 617 F.Supp. 292 (D.C.Vt. 1985).¹¹

¹¹Federal sentencing guidelines consistently make a distinction between crimes of violence and controlled substances offenses. For example, to qualify as a career offender, the defendant must

In the present case, Appellant was convicted on three separate occasions of possessing crack cocaine with intent to deliver. There is no evidence that there was any act of violence associated with any of these convictions nor did the trial court make any findings of fact to suggest that violence was involved. Of course, since Appellant was convicted of three possessory offenses, it is difficult to surmise how a person merely possessing a controlled substance, where no weapons or threats were involved, could ever be deemed to have engaged in a crime of violence.

In making this argument, Appellant does not wish to minimize the many personal and social problems associated with the possession of illegal drugs. However, the analysis used by this Court in case after case in deciding whether the nature of the crimes warrant a life sentence under W.Va.Code §61-11-18, is whether the offenses “involve actual or threatened violence to the person.” Where a person possesses controlled substances with intent to deliver, there simply is no actual or threatened violence associated with that crime, absent a specific finding to that effect in a particular case. Appellant respectfully submits that when the present case is compared to *Wanstreet*, *Deal*, and *Boso*, to be consistent with these cases, the only conclusion possible is that a life sentence for three convictions of possession of a controlled substance with intent to deliver clearly is disproportionate to the character and degree of these crimes.

Another factor for the Court to consider in analyzing the character and nature of controlled substances crimes is that often people convicted of possessing illegal drugs, such as crack cocaine, have developed a very real physical and mental addiction to the use of that drug. While a number of programs are available to assist such people in conquering their addiction, absent

be convicted of either a crime of violence or a controlled substances offense and must have at least two prior convictions of either a crime of violence or a controlled substances offense. *See, e.g., United States v. Collins*, 412 F.3d 515, 520 (4th Cir. 2005).

successful and appropriate treatment, an addict very likely will engage in the same illegal activity. From a more general public policy viewpoint, does it make more sense for the criminal justice system to encourage a drug addict to obtain drug counseling and treatment in an effort to address the addiction and discourage future criminal activity or simply to lock up the addict, who has three or more drug possession offenses, in the penitentiary for life?

In addition to *Wanstreet*, *Deal*, and *Boso*, this Court has decided a number of cases examining whether the life sentence imposed under the habitual offender act was met West Virginia's proportionality standard. All of the cases in this area demonstrate that only if violence or the threat of violence is involved, the enhanced life sentence is constitutionally proportionate to the crime. *State v. Davis*, 189 W.Va. 59, 427 S.E.2d 754 (1993)(Life sentence reversed where defendant convicted of breaking and entering had prior convictions for grand larceny and breaking and entering); *State v. Jones*, 187 W.Va. 600, 420 S.E.2d 736 (1992)(Life sentence upheld where defendant convicted of making kidnaping threats had prior convictions for possession of a firearm by a felon, grand larceny, burglary, and grand larceny); *State v. Housden*, 184 W.Va. 171, 399 S.E.2d 882 (1990)(Life sentence upheld where defendant convicted of burglary and grand larceny had prior convictions for sodomy, breaking and entering, grand larceny, burglary, and grand larceny); *State v. Oxier*, 179 W.Va. 431, 369 S.E.2d 866 (1988)(Life sentence upheld where defendant convicted of breaking and entering had prior breaking and entering convictions as well as one for grand larceny); *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980)(Life sentence upheld where defendant convicted of breaking and entering had two prior breaking and entering convictions); see also *State v. Lewis*, 191 W.Va. 635, 447 S.E.2d 570 (1994)(Mandatory minimum sentence for third offense shoplifting reversed because it was disproportionate). No such violence or threat of violence is present in this case.

The *Rodoussakis* decision relied upon by the trial court has nothing to do with the question of whether the possession of a controlled substance, with intent to deliver, constitutes a crime of violence for purposes of this cruel and unusual punishment analysis. In *Rodoussakis*, the defendant asserted that the felony murder rule was inapplicable where a person, who consumed drugs provided by the defendant, dies of a drug overdose. In rejecting this argument, the Court first noted that W. Va. Code §61-2-1, specifically provides that first degree murder can include those cases where a person dies in the in connection with “a felony offense of manufacturing or delivering a controlled substance as defined in article four [§60A-4-401 *et seq.*], chapter sixty-A of this code.” Thus, the felony offense of delivering a controlled substance that results in someone’s death can support a felony murder conviction. Other than making this point, there is no discussion in *Rodoussakis* as to whether possession of a controlled substance with intent to deliver should be treated as a crime of violence.

Appellant respectfully submits that his life sentence under these facts clearly is unconstitutionally disproportionate and must be set aside.

C.

The trial court erred in refusing to appoint counsel for Appellant to represent him in the underlying habeas corpus action and in summarily dismissing the petition because Appellant raised a number of very credible issues warranting habeas corpus relief

Appellant sought to have counsel appointed to assist him with his habeas corpus petition. However, the trial court denied this request and when presented with the *pro se* habeas corpus petition, summarily dismissed it without scheduling any hearing on the issues raised.

Appellant respectfully submits the failure to appoint counsel severely prejudiced Appellant in developing and preserving the claims asserted in his habeas corpus petition. As a result,

some of the issues raised are not developed or argued properly and there may be several legitimate issues yet to be raised. With all of the procedural hurdles inherent in any habeas corpus action, the lack of a proper record on Appellant's claims may be an impediment to any future action for post-conviction relief.

Consequently, in this brief, Appellant has focused on the two issues that can be decided by the Court on the existing record as a matter of law. In the event the Court decides that Appellant is not entitled to relief on the foregoing grounds, then Appellant respectfully moves this Court **not to address** any other issues initially raised in Appellant's *pro se* appeal,¹² to appoint counsel for him, and to remand this case to the Circuit Court of Raleigh County so that Appellant can make a proper record on the other valid issues in his case.

The writ of habeas corpus is one of the most remarkable remedies available in our jurisprudence. One of the greatest tragedies that can occur in the criminal justice system is depriving a person of his liberty for a crime he did not commit. Without the availability of habeas corpus relief, the crushing loss of liberty suffered by people wrongly convicted may never be addressed. Thus, habeas corpus actions have righted many wrongs in this State, from freeing the innocent to providing a wide variety of relief to inmates whose invaluable constitutional rights were violated.

¹²Appellate counsel wants to make sure the Court understands that by not including any additional arguments, Appellant is not in any way knowingly and intelligently waiving any issues. In reviewing the record, counsel has determined that some claims should have been argued differently, some claims should have been omitted, and some new claims should be considered and possibly asserted. In light of this inadequate record, it would not be to Appellant's advantage to assert arguments that are not supported by the fact or law. In other words, before any court addresses any remaining issues Appellant may raise, he should be given the benefit of appointed counsel to assist him in developing the right arguments and an appropriate record. Present appellate counsel would accept such an appointment, in the event the Court's rulings on the two legal issues previously briefed are not dispositive.

Historically, this Court consistently has supported and expanded habeas corpus rights in an effort to eliminate injustice.

In numerous decisions, this Court has recognized that the Post-Conviction Habeas Corpus Act, W. Va. Code §53-4A-1 through -11, was intended to liberalize, rather than restrict, the application of a writ of habeas corpus. Syllabus Point 1, *Adams v. Circuit Court*, 173 W.Va. 448, 317 S.E.2d 808 (1984); *State ex rel. Ridenour v. Leverette*, 165 W.Va. 770, 271 S.E.2d 612 (1980); Syllabus Point 2, *State ex rel. Burgett v. Oakley*, 155 W.Va. 276, 184 S.E.2d 318 (1971). Furthermore, this Court has recognized that generally, a prisoner is entitled, as a matter of right, to one omnibus habeas corpus hearing in which every possible issue should be raised by the inmate. In Syllabus Point 1 of *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984), this Court held:

Our post-conviction habeas corpus statute, W.Va.Code §53-4A-1 *et seq.* (1981 Replacement Vol.), 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.

In Syllabus Point 1 of *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), this Court outlined what should be addressed in such an omnibus hearing and clearly contemplates that in most cases, the inmate should be represented by counsel to ensure that the issues are fully developed and that any issues not raised are knowingly and intelligently waived:

An omnibus habeas corpus hearing as contemplated in W.Va.Code, 53-4A-1 *et seq.* (1967) occurs when: (1) an applicant for habeas corpus **is represented by counsel** or appears *pro se* having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon **advice of counsel** unless he knowingly and intelligently waived his right to counsel; and (4) the trial court

drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. (Emphasis added).

One practical point made in *Losh* that should be emphasized to trial courts is that the failure to appoint counsel to assist an inmate in a habeas corpus proceeding simply means that the inmate has the ability to file another habeas corpus action because the lack of counsel makes it impossible for the trial court to find that the inmate knowingly and intelligently waived any grounds not asserted.¹³ Thus, the efficiency sought to be established by *Gibson* and *Losh*, where an inmate ordinarily has the right to an omnibus habeas corpus hearing, is lost where the trial court permits the inmate to proceed *pro se* in his habeas corpus action.

This Court has supplemented and superceded, in part, the Post-Conviction Habeas Corpus Act, when it adopted the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia in 1999. These rules provide ample authority for a trial court to appoint counsel to an inmate seeking habeas corpus relief.

Rule 4(b) requires a trial court to promptly review a habeas corpus petition and if upon this initial review “the court determines that the petitioner **may have grounds for relief** but the petition, as filed, is not sufficient for the court to conduct a fair adjudication of the matters raised in the petition, the court **shall appoint an attorney** to represent the petitioner’s claims in the matter, provided that the petitioner qualifies for the appointment of counsel under Rule 3(a).” (Emphasis added). Rule 6 permits the appointment of counsel where the petition was filed in good faith and

¹³Although the trial court concluded there is a presumption that any issues not raised constitutes a knowing and intelligent waiver of such claims (Conclusion No. 3), the trial court fails to note this holding in *Losh* requiring that such waivers are available only where the inmate has counsel or has made a knowing and intelligent waiver of counsel on the record.

the trial court deems that appointment of counsel is warranted. Rule 7 provides that counsel may be appointed to assist in developing discovery in the case.

The Act and these Rules are designed to permit an inmate at least to have one thorough collateral attack on his conviction, in which, in most cases, he receives advice of counsel. Drafting a proper habeas corpus petition is very challenging for even the most experienced lawyer because there are a number of procedural issues and hidden pitfalls that must be considered and anticipated. The failure to be aware of these technical issues can result in the waiver of a valid claim or the dismissal on the merits of a claim that otherwise is supported by the case law.

For example, all of the claims ought to be federalized, so that the inmate has the option of filing a federal habeas corpus action, in the event no relief is obtained in state court. In recent years, two of the most significant criminal law decisions issued by the United States Supreme Court based upon state court convictions—*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2533, 159 L.Ed.2d 403 (2004), and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)—would not have been issued, if the lawyers in those state court cases had failed to federalize their claims by asserting that their client's rights under the United States Constitution also had been violated.

The issues raised must be stated as violations of constitutional rights, rather than as abuses of discretion by the trial court. Arguing that a constitutional right was violated, rather than asserting that a mere trial error was committed, requires an understanding of the rights guaranteed under the West Virginia and United States Constitutions as well as entails legal research to support the claims raised.

Often the collateral issues raised in a habeas corpus action cannot be resolved absent the development of an additional record. Repeatedly, this Court has noted that “ineffective assistance of counsel claims raised on direct appeal are presumptively subject to dismissal.” *State v. Miller*, 197 W.Va. 588, 611, 476 S.E.2d 535, 558 (1996). “Such claims should be raised in a collateral proceeding rather than on direct appeal to promote development of a factual record sufficient for effective review.” *Id.* See also *City of Philippi v. Weaver*, 208 W.Va. 346, 540 S.E.2d 563 (2000); *State ex rel. Nazelrod v. Hun*, 199 W.Va. 582, 486 S.E.2d 322 (1997); *Bayles v. Hedrick*, 188 W.Va. 47, 422 S.E.2d 524 (1992); *State v. Wickline*, 184 W.Va. 12, 399 S.E.2d 42 (1990); *State v. England*, 180 W.Va. 342, 376 S.E.2d 5548 (1988).¹⁴ It is advantageous to the inmate for the petition to make it clear that at least some of the claims will require discovery and the development of a record in addition to the one developed in the original trial or proceeding.

One significant issue that poses a real hidden danger for a *pro se* habeas corpus litigant is the strict time period available for an inmate convicted in state court to seek federal habeas corpus relief. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) forces inmates convicted in state court to initiate federal habeas corpus relief within a year after the final state court proceedings have been exhausted. See generally 28 U.S.C. §2244(d). For example, a pending Rule 35 motion for reduction of sentence filed on behalf of an inmate in state court has been held **not to extend** this one-year limitations period under the AEDPA. *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001).

¹⁴The trial court in this case failed to provide Appellant with the opportunity to develop any factual issue on his ineffective assistance of counsel claim, noting simply that this claim “is a constant contention of inmates.” (Conclusion No. 4).

Also, federal habeas corpus relief from a state court conviction can only be sought based upon those claims argued and ruled upon in state court. Any new issue raised for the first time in a federal habeas corpus petition can result in its dismissal.

Expecting an untrained inmate to draft a viable habeas corpus petition without a lawyer is asking too much. Although the trial court correctly noted this Court has held counsel need not be appointed in all habeas corpus actions, in practice, such appointments should occur more often than not.

This Court has approved the appointment of counsel for incarcerated inmates who were proceeding *pro se* in a number of cases. See, e.g., *White v. Haines*, 217 W.Va. 414, 423, 618 S.E.2d 423, 432 n.20 (2005) (The Court lists several prior decisions where appointment of counsel was deemed appropriate). In *White*, this Court appointed counsel on remand, in part, based upon the complexity of the issues raised: "Moreover, the named respondents have raised a defense of qualified immunity which is a somewhat nebulous and complex legal theory for even the best litigator to advance or respond to, much less someone who has not been formally trained in the law." *Id.* As noted above, Appellant in the present case raised several serious and meritorious issues of constitutional complexity that could only be developed adequately with the assistance of counsel.

In the present case, there were at least three objective factors that should have convinced the trial court that Appellant needed to have counsel appointed. First, Appellant is sentenced to life, which is the longest sentence available in West Virginia other than a life without mercy sentence. If the State is going to deprive an inmate of his liberty for that extended period of time, then surely the court system should provide this inmate with counsel to ensure that the conviction and sentence are appropriate under the law.

Second, the appeal filed by Appellant from the underlying conviction was denied by this Court on a 3 to 2 vote, which at least superficially demonstrates that reasonable jurists legitimately disagreed on whether or not his case was worthy of a more thorough appellate review. The denial of the appeal also means there is no definitive ruling on at least the issues raised in the appeal. This Court made it clear in the Syllabus of *Smith v. Hedrick*, 181 W.Va. 394, 382 S.E.2d 588 (1989), that the denial of an appeal does not bar an inmate from raising the same issues in a subsequent habeas corpus petition:

This Court's rejection of a petition for appeal is not a decision on the merits precluding all future consideration of the issues raised therein, unless, as stated in Rule 7 of the West Virginia Rules of Appellate Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted.¹⁵

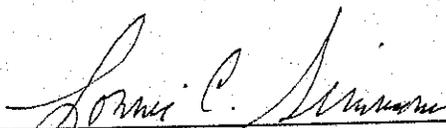
Third, Appellant's *pro se* habeas corpus petition cited cases decided by this Court that are on point and that would require habeas corpus relief. *Sellers*, *Roberts*, and *Williams* clearly require that habeas corpus relief be granted to Appellant and, to use the standard adopted by this Court in Rule 4(b), would support the conclusion that Appellant "may have grounds for relief." Furthermore, this Court's decisions addressing the unconstitutionality of a life sentence under the habitual offender statute where the offenses were nonviolent, particularly the *Deal* decision, would require habeas corpus relief if applied to Appellant. In other words, Appellant's *pro se* habeas corpus petition was not a casual recitation of some broad legal concepts slapped together, but rather

¹⁵Trial court's repeatedly dismiss grounds asserted in a habeas corpus action because the same grounds had been raised in the initial appeal from the conviction, which appeal was denied by this Court. To the extent this Court uses this case to address some procedural issues common in habeas corpus cases, this Court's holding in *Smith* bears repeating.

Certificate of Service

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **APPELLANT'S BRIEF** was served on counsel of record on the 16th day of August, 2006, through the United States Postal Service, postage prepaid, to the following:

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