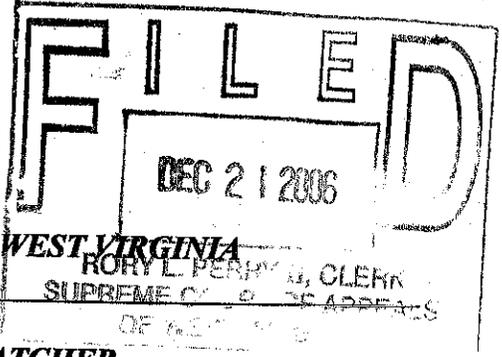


Case Number 33244



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE EX REL. FREDERICO HATCHER,**

*Appellant,*

vs.

**THOMAS MCBRIDE, Acting Warden,  
Mount Olive Correctional Complex,**

*Appellee.*

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*Appeal from the Circuit Court of Cabell County  
Hon. Dan O'Hanlon, Judge  
Case Number 06-C-0110*

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**APPELLANT'S BRIEF**

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**MEMORANDUM OF LAW**

**JURISDICTION**

This Court has jurisdiction to issue a writ of habeas corpus pursuant to W. Va. Code Section 53-4A-1. See also Rule 3 of the West Virginia Rules of Appellate Procedure.

## STANDARD OF REVIEW

The standard of review is explained in the following passage from Mugnano v. Painter, 212 W. Va. 831, 833, 575 S.E.2d 590, 592 (2002).

In Syllabus Point 1 of *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S. Ct. 1103, 47 L. Ed. 2d 312 (1976), this Court held that: "Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong." The Court has also indicated that a circuit court's final order and ultimate disposition are reviewed under the abuse of discretion standard and that conclusions of law are reviewed *de novo*. *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997).

Id.

"A prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively." Syllabus Point 4,

*Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).<sup>1</sup>

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<sup>1</sup> "West Virginia Code § 53-4A-I(b) and (c) codify the successive and abusive writ doctrines. These sections provide once the claims have been fairly and fully litigated either in the criminal trial or in a prior habeas corpus action, they may not be relitigated unless the "decision upon the merits was *clearly wrong*." See *State ex rel. Postelwaite v. Bechtold*, 212 S.E.2d 69 (W. Va. 1975) ; *State ex rel. Clevenger v. Coiner*, 155 W. Va. 853, 188 S.E.2d 773 (1972) . If there has been a prior habeas corpus action and the claims could have been but were not "intelligently and knowingly" presented, they may not be presented in a subsequent habeas corpus proceeding.

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The statutorily enacted finality rule is designed to prevent successive and abusive writs. In *Call v. McKenzie*, 220 S.E.2d 665 (W. Va. 1975), the Court observed, "[W]e have long been concerned with the increasing number of collateral attacks upon valid guilty pleas through *habeas corpus* proceedings. While a defendant is entitled to due process of law, he is not entitled to appeal upon appeal, attack upon attack, and *habeas corpus* upon *habeas corpus*."

The statute creates a rule analogous to *res judicata*. It is interesting to note and emphasize that *any prior proceedings* where the claims were or could have been litigated will bar a subsequent *habeas corpus* action. The prior proceeding need not necessarily be a *habeas corpus* action.

The statute attempts to make it difficult, without application of *res judicata* or waiver, to file more than one challenge to claims actionable in a *habeas corpus* proceeding. Fortunately, the West Virginia cases have been flexible, if not liberal, in applying waiver or *res judicata*.

In *Call v. McKenzie*, *supra*, the court suggested that the way to prevent successive writs is to correctly do the first one. Specifically, the court stated, "[t]here must be some end to litigation, and the proper way to effect this salutary result is to do everything right the first time." In *Losh v. McKenzie*, 277 S.E.2d 606 (W. Va. 1981), the Court, with great sensitivity to the rights of society and those of the defendant, made sweeping suggestions and recommendations that would permit a reviewing court gracefully to apply the doctrine of *res judicata*. In *Losh*, the court noted that "[r]ules of finality which prevent consideration of the merits of a post-conviction claim should be applied with caution. Furthermore, it is more reasonable to apply some of the artificial rules concerning the finality of judgments when the petitioner has been represented by competent counsel familiar with artificial rules than when the petitioner appears *pro se* since he is unfamiliar with those rules. While we do not believe that a prisoner is entitled to *habeas corpus* upon *habeas corpus*, *Call v. McKenzie*, *supra*, we will not invoke *res judicata* principles until the prisoner has had a full and fair opportunity with the assistance of counsel to litigate all issues at some stage of the proceedings. Those issues, such as incompetency of counsel, of which he would have been unaware at trial, must be litigated in a collateral proceeding."

Similarly, the court in *Gibson v. Dale*, 319 S.E.2d 806 (W. Va. 1984) stated that "our post-conviction *habeas corpus* statute, W. Va. Code § 53-4A-1 *et seq.* (1981 Repl. 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."

Failure to appeal a circuit court's evidentiary ruling precludes the raising of the issue subsequently file *habeas*. See *State v. Linkous*, 355 S.E.2d 410 (W. Va. 1987).

The statutory waiver provision, however, may be applied only when the record demonstrates that an omnibus hearing was conducted in the prior *habeas corpus* action. *Gibson v. Dale*, *supra*.

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Even then, in order to show a knowing and intelligent waiver of grounds not asserted, the record of the prior omnibus hearing must show that counsel interrogated and discussed with the petitioner every potential ground for relief in habeas corpus and explained the conclusive effect of the final decision on subsequent applications for habeas corpus relief. The court before which the omnibus hearing is conducted has a duty to "inquire on the record whether counsel discussed all grounds which might apply to petitioner's case and whether petitioner was advised by his counsel about the grounds and intentionally waives them" and to "enter a comprehensive order which addresses not only the grounds actually litigated, but the grounds waived as well." Cleckley, Franklin, Handbook on Criminal Procedure, 2-XXII B, (2004).

## STATEMENT OF THE CASE

The alleged facts in the case involve Mr. Hatcher and other individuals allegedly robbing a pizza delivery person of pizza and leaving a **minor laceration** on the pizza delivery person. A jury convicted Mr. Hatcher of aggravated robbery in 1996. Subsequently, the circuit court sentenced Mr. Hatcher for both the aggravated robbery (212 years) and a murder conviction (life without mercy) at the same sentencing on August 13, 1996. This sentencing occurred after the circuit court permitted the chief judge to testify, in front of the jury, at the sentencing phase of the murder trial and introduce evidence including Mr. Hatcher's juvenile record and the judge's personal impressions of Mr. Hatcher.

In the companion case (number 32977) that is currently set to be argued on September 6, 2006, the facts are as follows. On October 22, 1995, Mark Vernatt, died after being shot three times with a .457 Magnum revolver while he was working as an employee of the Convenient Food Mart in Huntington, West Virginia. Ultimately, three individuals, Frederico Hatcher, Shawn Tabor, and Mike Walker were arrested for the murder of Mark Vernatt.

Mark Vernatt's murder was a case that the media followed avidly. Ultimately, the media coverage made it impossible for Frederico Hatcher to have a fair trial in the Sixth Circuit of the State of West Virginia. See Pre-trial Hearing, 4/2/1996, pp. 23-24.

At the time of the murder trial, Mr. Hatcher had completed tenth grade primarily by attending "LD and BD" classes. See Habeas Hearing Transcript, 05/23/2005, p. 74. Mr. Hatcher had been going to Prestera Mental Health Center for treatment from the time he was six (6) years-old until he turned eighteen (18) years-old. Id. at 75. During his pre-trial incarceration and trial, Mr. Hatcher was using drugs. Id. at 85-86.

The State ended up having a bifurcated murder trial with Frederico Hatcher as the defendant. At Frederico Hatcher's trial, both Shawn Tabor and Mike Walker testified against Frederico Hatcher basically testifying that Frederico Hatcher killed Mark Vernatt by firing the

first two of three shots during a robbery of beer from the convenience store. See Trial Transcript, pp. 288-299, 340-341

Interestingly, they had given earlier conflicting statements. Indeed, Shawn Tabor's first statement put the entire blame for the murder of Mark Vernatt on Mike Walker, not Frederico Hatcher. Shawn Tabor's first statement is quoted in the following passage.

Question: Nobody said anything?

Answer: I heard a gunshot and the guy moan, and I went to turn around to take off and I had the beer in my hand and then it was, they shot twice, two more times.

Question: Who did?

Answer: Mike.

Question: Did you see Mike actually shoot the gun?

Answer: He shot once, I saw him shoot one round. I didn't see him shoot the first two.

Question: Was [*sic*] there three bullets all he had then?

Answer: Yes.

Question: Where was Fred standing when Mike did all of this?

Answer: Right there at the door.

Statement of Shawn Tabor, 10/24/1995.

Mike Walker testified that he fired the final shot, because Frederico Hatcher told him to do it, and he is afraid of Frederico Hatcher. Mike Walker testified that he is afraid of Frederico Hatcher, because Frederico Hatcher threatened to harm either Mike Walker or Mike Walker's sister, Kim Walker. See Trial Transcript, pp. 289-290.<sup>2</sup>

<sup>2</sup>Despite his fear of Frederico Hatcher, Mike Walker ended up requesting to be Frederico Hatcher's cellmate at Mount Olive Correctional Center after the murder trial. Indeed, Mike Walker and Frederico Hatcher were cellmates together living in an efficiency cell as roommates for around two (2) years until Mike Walker was subsequently transferred to Huttonsville Correctional Center. See Habeas Hearing Transcript, 05/23/2005, pp. 76-84.

After the jury returned a verdict of felony murder, the State presented its evidence on the issue of mercy. In an unprecedented move, the State called Judge Alfred E. Ferguson to testify about his opinion of Frederico Hatcher during the second phase of the trial. The State did not list Judge Ferguson as a witness until it filed a praecipe for witnesses a little more than three (3) hours before the mercy phase.

Not only did Judge Ferguson testify as to his opinion of Frederico Hatcher, but also, Judge Ferguson testified about the contents and nature of Frederico Hatcher's juvenile petitions. See Transcripts, pp. 28-38. Specifically, Judge Ferguson testified about the contents and nature of Mr. Hatcher's dismissed and adjudicated juvenile petitions. Id. Part of Judge Ferguson's testimony is in the following passage.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

\*\*\*\*\*

Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Transcript, pp. 27-39. Throughout his testimony, Judge Ferguson was repeatedly referred to as "Judge" by the prosecuting attorney. Mr. Hatcher was sentenced for both the robbery and the murder at the same hearing by the same judge would allow Judge Ferguson to testify.

### PROCEDURAL HISTORY

This case was tried in 1996. On August 13, 1996, the Court sentenced Mr. Hatcher for both the robbery and the murder convictions. For the aggravated robbery conviction, the Court sentenced Mr. Hatcher to 212 years reasoning that Mr. Hatcher would likely live fifty-three (53) more years and multiplied fifty-three (53) by four (4) to get one-hundred-twelve (212) years.

Mr. Hatcher appealed his conviction, and the Court refused his appeal. Mr. Hatcher filed a habeas petition, and the circuit court denied his habeas petition. Subsequently, the West Virginia Supreme Court of Appeals refused his petition.

In the companion case (number 32977), a jury convicted Mr. Hatcher of first degree murder on June 27, 1996. Through a bifurcated proceeding, Mr. Hatcher received a sentence of life "without mercy." On August 13, 1996, the Court sentenced Mr. Hatcher to life without mercy for first degree murder and a consecutive sentence of two-hundred-and-twelve (212) years for an unrelated aggravated robbery conviction for theft of a pizza. Mr. Hatcher filed appeals for both the first degree murder conviction and the aggravated robbery charge<sup>3</sup>, and the West Virginia Supreme Court of Appeals refused both appeals.

Mr. Hatcher filed a habeas petition for the first degree murder charge on December 22, 1998. On May 23, 2005, the Circuit Court of Cabell County held a habeas hearing based upon Mr. Hatcher's twice-amended petition. On May 27, 2005, the Court entered an order denying Mr. Hatcher's petition for writ of habeas corpus. Therefore, Mr. Hatcher filed a notice of intent to appeal on June 6, 2005 and filed an appeal with this Court in August 2005.

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<sup>3</sup>Mr. Hatcher's first habeas petition for the aggravated robbery charge was adjudicated ending with a final disposition of a refusal for appeal entered by the West Virginia Supreme Court of Appeals on or about October 6, 1999 in case number 992681.

This companion case is now in its eighth (8<sup>th</sup>) calendar year, and ten (10) calendar years have passed since the underlying trial. On January 24, 2006, the Court heard the oral presentation on the motion docket. Subsequently, the Court granted the writ of habeas corpus for appeal as to assignment of error number one (1) in an order dated January 26, 2006. The Court issued an opinion on November 22, 2006, in Case 32977, and affirmed the lower court. Mr. Hatcher filed a Petition for Rehearing in Case 32977. The Petition for Rehearing is currently pending with the Court.

## ASSIGNMENTS OF ERROR

Since Mr. Hatcher's first habeas petition, newly discovered evidence exists; and/or, a change in the law, favorable to the applicant, which may be applied retroactively. Mr. Hatcher's habeas counsel was ineffective during the omnibus habeas corpus proceedings and violated Mr. Hatcher's federal and state constitutional rights.

- I. Recent Court decisions indicate that the length of Mr. Hatcher's two-hundred twelve (212) year sentence is disproportionate to his punishment. In light of these recent cases and even cases occurring at the same time as his case, the Court should grant this habeas not only for cruel and unusual punishment; but also, habeas counsel should have more vigorously pursued these issues. Therefore, Mr. Hatcher's state and federal constitutional rights were violated including his eighth and sixth amendment rights.
- II. Mr. Hatcher's habeas counsel was ineffective during the omnibus habeas corpus proceedings and violated Mr. Hatcher's federal and state constitutional rights.
- III. Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial statements made by a Circuit Judge.
  1. The Circuit Judge's testimony violated the Code of Professional Conduct and the Judicial Cannons.
    - a. Judges should not testify as character witnesses.
    - b. The Judge's testimony created an actual conflict and an appearance of a conflict.
    - c. The Circuit Judge testified in an area where he had no expertise.

2. The Circuit Judge's testimony created a problem of future dangerousness when the Circuit Judge testified in an area where he had no expertise and when the Circuit Judge revealed his mental thought processes for forming opinions in cases involving Mr. Hatcher.
3. Other jurisdictions, both federal and state, have ruled that testimony from a judge is prejudicial.

## ARGUMENT

- I. Recent Court decisions indicate that the length of Mr. Hatcher's two-hundred twelve (212) year sentence is disproportionate to his punishment. In light of these recent cases and even cases occurring at the same time as his case, the Court should grant this habeas not only for cruel and unusual punishment; but also, habeas counsel should have more vigorously pursued these issues. Therefore, Mr. Hatcher's state and federal constitutional rights were violated including his eighth and sixth amendment rights.**

The extraordinary length in sentencing leads to cruel and unusual punishment, because Mr. Hatcher's sentence of 212 years clearly shocks the conscience and is disproportionate to the crime of aggravated robbery. The West Virginia Supreme Court of Appeals uses the following tests to determine whether cruel and unusual punishment.

"The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality [*sic*] challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981): 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. *Id.* at 272, 304 S.E.2d at 857.

State v. Taylor, 211 W. Va. 246, 250, 565 SE2d 368, 372 (2002)(citing State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983).

For example, the following recent cases listed below indicate that the Court would find Mr. Hatcher's 212 year sentence to be disproportionate to his punishment.

- **In 2003, the West Virginia Supreme Court of Appeals needed only to go through the first test to find that a disproportionate sentence shocked the consciousness of the court.** State v. David W., 214 W. Va. 167, 175-176; 588 S.E.2d 156, 166-167 (2003) (per curiam). "In this instance, we do not need to look beyond the first test. We find the sentences imposed upon the appellant in this case so offensive that they shock the conscience of this Court. By ordering the appellant to serve the majority of his sentences consecutively, the trial court effectively imposed multiple life sentences upon him. Although the offenses committed by the appellant are heinous and repulsive, the trial court's sentencing order cannot be upheld.

This Court is certainly mindful of the fact that the sentences imposed by the trial court were within the statutory limits. Furthermore, the trial court's decision to make the sentences consecutive as opposed to concurrent was authorized by statute. *See W. Va. Code § 61-11-21* (1923). Nonetheless, excessive penalties, even if authorized by statute, cannot transgress the proportionality principle of *Article III, Section 5 of the West Virginia Constitution*. By imposing a total sentence of 1,140 years to 2,660 years in prison upon the appellant in this case, the trial court violated the proportionality

principle and abused its discretion. Therefore, we remand this case to the trial court for resentencing within its discretion.” Id.

- **In 1999, the Court found that a sentence of forty (40) years for one count of aggravated robbery was disproportional.** State ex rel Becton v. Hun, 205 W. Va. 139,145-146; 516 S.E.2d 762, 768-769 (1999). “Accordingly, we reverse the lower court's decision and remand this case solely for the purpose of conducting a new sentencing hearing, wherein the lower court will consider the State's recommendation of a ten-year sentence in exchange for the Appellant's conviction of one count of aggravated robbery, prior to resentencing the Appellant. We recognize that once the State has made its recommendation of a ten-year sentence, the trial court is not bound by that recommendation as sentencing under the aggravated robbery statute is within the sound discretion of the trial court. See *State v. Phillips*, 199 W. Va. 507, 514, 485 S.E.2d 676, 683 (1997) (recognizing that “the legislature has provided circuit courts with broad, open-ended discretion in sentencing individuals for the offenses of aggravated robbery”); *Syl. Pt. 4, State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982) (“Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible [sic] factor, are not subject to appellate review.”). While the trial court has discretion regarding the new sentence to be imposed, we caution the lower court that it cannot impose a greater sentence than the original sentence it previously imposed. See generally *Syl. Pt. 1, in part, State v. Gwinn*, 169 W. Va. 456, 288 S.E.2d 533 (1982) (“Upon a defendant's conviction at retrial following

prosecution of a successful appeal, imposition by the sentencing court of an increased sentence violates due process and the original sentence must act as a ceiling above which no additional penalty is permitted."). Id.

- In 2004, the West Virginia Supreme Court of Appeals entered an opinion denying a petitioner's second habeas petition. Markley v. Coleman, 215 W. Va. 729; 601 S.E.2d 49 (per curiam)(2004). However, the Court, focusing on how the petitioner's allegations of ineffective assistance of habeas counsel may have affected other issues, dismissed it without prejudice stating, "We affirm the circuit court's order dismissing the appellant's second habeas corpus petition. We further find that the circuit court's dismissal of the appellant's petition is without prejudice, and the appellant may re-file his petition." Id. at 215 W. Va. 55, 601 S.E. 2d 735.
- The Court as recently as twelve (12) years ago found a shoplifting sentence of one year to be cruel and unusual punishment. State v. Lewis, 191 W. Va. 635, 640; 447 S.E.2d 570, 575 (1994). "While this case does not involve a general recidivist statute such as *West Virginia Code § 61-11-18*, the rationale stated in *Bordenkircher* is equally [\*\*\*18] applicable here in that statutes such as *West Virginia Code § 61-3A-3(c)* are specific recidivist statutes. See Ansell v. Commonwealth, 219 Va. 759, 762, 250 S.E.2d 760, 762 (1979). Thus, notwithstanding the mandatory nature of the penalty enhancing language of *West Virginia Code § 61-3A-3(c)*, this Court is still required to consider the gravity of the offense in determining whether the penalty imposed comports with the proportionality principle. "Without intending to minimize

the criminal aspect of shoplifting and its attendant costs to society, we cannot, with a clear collective conscience, conclude that Appellant deserves to be imprisoned for a minimum of one year for failing to pay for \$ 8.83 worth of groceries. Accordingly, we hold that prior to the 1994 amendments, *West Virginia Code § 61-3A-3(c)* (1981) was unconstitutional in that it violated the cruel and unusual proscription of the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution by imposing a disproportionate sentence to the crime committed by expressly prohibiting probation and implicitly prohibiting alternative sentencing. *Id.*

- In 1993, the Court found that a sentence of life for a recidivist breaking and entering was cruel and unusual punishment. See State v. Davis, 189 W. Va. 59; 427 S.E.2d 754 (1993). The Court based its decision on the following fact pattern cited from the case.

On November 16, 1989, following a jury trial, the defendant, Dwayne Junior Davis, was found guilty of breaking and entering a retail business located in an isolated area of Parkersburg, West Virginia. The entry occurred late on the evening of September 1, 1988, after the business had closed for the day. The evidence adduced during the trial showed that a total of about \$ 10.00 was taken from an office area of the business and from a small change box in the building. No one, other than the defendant, was in the building at the time of the breaking and entering, and there was no use, or threat of use, of violence against any person involved in the commission of the crime.

After the defendant was found guilty, the State of West Virginia filed a recidivist information indicating that he had previously been convicted of two other felonies. The first was for grand larceny by receiving stolen property. The defendant had plead guilty to that charge and had received a one-to-ten-year sentence in the State penitentiary. The second felony involved the breaking and entering of another business located in Parkersburg, West Virginia. At the time of that other breaking and entering, the business was closed and no one was present other than the defendant.

Id. at 189 W. Va. 59, 69, 427 S.E. 2d 754, 755.

- In 1981, the Court found that it did not have enough information to determine whether a Petitioner's sentence of forty (40) years for armed robbery was disproportionate to his co-defendants, so the Court reversed and remanded the case. See Smoot v. McKenzie, 166 W. Va. 790; 277 S.E.2d 624 (1981).

Mr. Hatcher was sentenced to 212 years for an aggravated robbery involving a minor facial laceration to the victim. The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

**II. Mr. Hatcher's habeas counsel was ineffective during the omnibus habeas corpus proceedings and violated Mr. Hatcher's federal and state constitutional rights.**

The Circuit Court erred when it denied Mr. Hatcher's claim of ineffective habeas counsel and did not allow Mr. Hatcher to have a hearing and have his counsel, who reportedly lives in West Virginia, come to testify about this issue.

In 1995, the West Virginia Supreme Court of Appeals, in the Miller decision written by Justice Cleckley, adopted the two-prong Strickland test provided by the United State Supreme Court for assessing the efficiency of counsel. In the following passage from Miller, Justice Cleckley describes the standard for assessing the efficiency of counsel.

"The standard for assessing the efficiency of counsel was announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Strickland requires the defendant to prove two things: (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. When assessing whether counsel's performance was deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. To demonstrate prejudice, a defendant must prove there is a "reasonable probability" that, absent the errors, the jury would have reached a different result. 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Our recent cases have made it clear that we have accepted Strickland as part of our constitutional jurisprudence. In *Wickline v. House*, 188 W. Va. at 348, 424 S.E.2d at 583, we stated "our cases thus hold that a defendant who asserts a claim of ineffective assistance of counsel must prove (1) that his legal representation was inadequate, and (2) that such inadequacy prejudiced his case. Much the same standards are found in Strickland[.]" We now make it explicit, in the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland. Thus, it is necessary for us to review the defendant's claims under the Strickland standard."

State v. Miller, 194 W. Va. 3, 32-34, 459 SE2d 114, 126 (1995).

Likewise, in Cronic, the United States Supreme Court has discussed the constitutional right under the Sixth Amendment to effective counsel. See United States v. Cronic, 466 U.S. 648 (1984). In that case, the Court discussed how one must point out ineffective assistance of counsel by looking specifically at the case and the errors allegedly made by counsel.

Mr. Hatcher's habeas counsel was ineffective in many ways. For example, Mr. Hatcher had the same habeas counsel in the companion murder case. His counsel filed an amended petition and moved out of town. Then, Mr. Hatcher had another counsel for three (3) years during which the case was inactive. When this counsel came on the case, this counsel ended up having to file another amended petition, and after nine (9) years, Mr. Hatcher had a habeas hearing.

Likewise, in Mr. Hatcher's robbery habeas case, his counsel filed an amended petition, left town, and did not contact Mr. Hatcher as to the status of the case. Mr. Hatcher's former counsel failed to raise or vigorously defend him on several issues including vigorously objecting to Judge Ferguson's and Judge Egnor's obvious conflict of interest at the robbery sentencing. Mr. Hatcher's former counsel failed to raise and pursue issues, and Mr. Hatcher's counsel did not adequately represent him at his habeas hearing for the robbery habeas. This issue is to a degree now, that Mr. Hatcher's sentencing is under full review by the West Virginia Supreme Court in the companion case. Obviously, Mr. Hatcher's federal and state constitutional rights to effective counsel and due process were violated.

**III. Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial statements made by a Circuit Judge.**

While the Court affirmed the lower court in case number 32977, Mr. Hatcher has filed a Petition for Rehearing in case number 32977. The Petition for Rehearing is currently pending before this Court.

"Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and infeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

W. Va. Const. Art. III.

At Mr. Hatcher's bifurcated sentencing hearing, in an extremely unusual occurrence, Circuit Judge Alfred Ferguson testified about Mr. Hatcher. A little more than three hours before the bifurcated sentencing hearing, Prosecutor Chiles filed a Praecipe for Witnesses listing Judge Ferguson as a witness. Clearly, Judge Ferguson's testimony, especially his testimony of Mr. Hatcher's juvenile records, was not pertinent to the jury's task. Even if the Court would find that Judge Ferguson's testimony was pertinent to the task, Judge Ferguson was certainly not the only possible source of this information. Moreover, Judge Ferguson testified about his *opinion* of Mr. Hatcher.

Without a cautionary instruction and over the objections of Mr. Hatcher's counsel, the Court allowed testimony about Mr. Hatcher's sixteen (16) juvenile files (twelve (12) of which were dismissed) (Sentencing Transcript p. 28) on Mr. Hatcher since he was ten (10) years-old (Sentencing Transcript, 27-41). Specifically, Judge Ferguson testified about Mr. Hatcher's prior adjudicated juvenile delinquencies, Mr. Hatcher's prior juvenile charges which were subsequently dismissed, and Mr. Hatcher's dealings with Judge Ferguson since 1980. Sentencing Transcript, pp. 27-39. Judge Ferguson gave the following impression of Mr. Hatcher during the hearing, "Frederico, my impression of him is anything you say to him just goes right through him. He's a kid that never shows any emotion. It's like me trying to talk to that wall to try to tell him something." See Sentencing Transcript, p. 39. Moreover, over the objections of Mr. Hatcher's counsel, Judge Ferguson offered the following testimony.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

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Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Transcript, pp. 27-39.

Even Mr. Hatcher's trial lawyers have testified that Judge Ferguson was expressing his opinion of Mr. Hatcher. First, Mr. Spurlock, a trial lawyer for more than thirty (30) years<sup>4</sup>, testified that Judge Ferguson testified to his opinion of Mr. Hatcher. See Habeas Hearing Transcript, 05/23/2005, p. 15. Second, when Mr. Oliverio was asked whether Judge Ferguson was expressing his opinion about Mr. Hatcher, Mr. Oliverio responded, "It certainly sounds like it."

**1. The Circuit Judge's testimony violated the Code of Professional Conduct and Judicial Cannons.**

Judge Ferguson's testimony regarding Mr. Hatcher's character was very damaging to his case. First, Judge Ferguson was giving testimony in an area where he has no expertise. Therefore, this testimony presents the problem of future dangerousness. Second, according to Canons One (1), Two (2), and Three (3) of the Code of Judicial Conduct, judges should not testify as character witnesses.<sup>5</sup> Third, Judge Ferguson, who has at times served as the Chief

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<sup>4</sup>See Habeas Hearing Transcript, 05/23/2005, p. 32.

<sup>5</sup>That is, a judge should not testify as a character witness for good character or bad character.

Circuit Judge, has the most seniority out of the circuit judges in this county. His seniority creates an actual conflict and an appearance of a conflict when he testifies at a sentencing hearing that is presided by a less tenured judge.

**a. Judges should not testify as character witnesses.**

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

West Virginia Professional Conduct, Cannon 2 A.

A Circuit Judge who has been on the bench for over twenty (20) years, who testifies that some people cannot be rehabilitated and that he knew Mr. Hatcher was the murderer<sup>6</sup> does not show impartiality. When a Circuit Judge makes such statements he/she is testifying about character and showing partialness and giving personal opinions. A Circuit Judge who testifies about his rulings in prior cases<sup>7</sup> shows his mental process in making decisions.

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

**b. The Circuit Judge's testimony created an actual conflict and an appearance of a conflict.**

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<sup>6</sup>See Sentencing Transcript, pp. 27-39

<sup>7</sup>See Sentencing Transcript, pp. 27-39

Judge Ferguson, who has at times served as the Chief Circuit Judge, has the most seniority out of the circuit judges in this county. His seniority creates an actual conflict and an appearance of a conflict when he testifies at a sentencing hearing that is presided by a less tenured judge, such as the trial judge, Judge Egnor. Judge Ferguson's testimony is fraught with his personal opinions of Mr. Hatcher and suggests that the act of Judge Egnor allowing this testimony constitutes a personal conflict of interest for the trial court. Both judges appeared to have negative personal opinions and conflicts with Mr. Hatcher which interfered with their abilities to be judges. For example, throughout his testimony, Judge Ferguson was referred to as "Judge" by the prosecuting attorney.

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

**c. The Circuit Judge testified in an area where he had no expertise.**

In the case at hand, Circuit Judge Egnor allowed the State to have Circuit Judge Ferguson testify without a cautionary instruction. As Justice Cleckley has opined, a Circuit Judge testifies as a normal person not as an expert witness.<sup>8</sup> *1-6 Handbook on Evidence for West Virginia Lawyers* § 6-5 (2005).

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<sup>8</sup>Part of Judge Ferguson's testimony that would make a jury think that he is testifying as to his opinion and also his "expertise" is in the following passage.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

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Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Transcript, pp. 27-39.

It should be noted that Rule 605 is limited only to trials in which the judge is presiding. A witness is not disqualified merely because s/he is an active judicial officer. Judges should be called as witnesses with caution, but the court concluded that judges are not *per se* disqualified. In cases where a judge is called, it would be appropriate to give a cautionary instruction advising the jury that a judge's testimony is not entitled to greater weight merely because s/he is a judge.

Id.

In the case at hand, the jury could have easily determined that Judge Ferguson testified as an expert witness. First, the jury most likely considered Judge Ferguson's experience as a judge. Indeed, throughout his testimony, Judge Ferguson was referred to as "Judge" by the prosecuting attorney. Second, the jury most likely considered the fact that Judge Ferguson had, at that time, been a judge for over twenty (20) years, often serving as Chief Judge over the trial judge, Judge Egnor. Third, the trial court gave no cautionary instruction regarding Judge Ferguson's testimony.

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

2. **The Circuit Judge's testimony created a problem of future dangerousness when the Circuit Judge testified in an area where he had no expertise and when the Circuit Judge revealed his mental thought processes for forming opinions in cases involving Mr. Hatcher.**

If this Court will to allow Judge Ferguson's testimony, then future judges could be compelled to testify to character and even mental thought process. For example, in the case at hand, the Circuit Judge testified directly to his mental processes in forming his opinions of Mr.

Hatcher and also in his approximately twenty (20) prior rulings on Mr. Hatcher's sealed juvenile cases. (The Court actually dismissed approximately sixteen (16) of Mr. Hatcher's juvenile cases.)

The Court has already addressed this issue in a similar case. In State ex rel Kaufman, the Court ruled the following. See State ex rel. Kaufman v. Zakaib et al, 207 W. Va. 662, 535 S.E.2d 727 (2000). "Judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts." Id. at Syl. Pt. 3.

In fact, other states have cited Kaufman, further holding that the scope of judicial privilege is absolute. The following passage from a recent Illinois case discusses Kaufman. In the case of State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 535 S.E.2d 727 (W. Va. 2000)

(Kaufman), the West Virginia Supreme Court held that judicial officers may not be compelled to testify regarding their mental processes used in formulating official judgments or the reasons that motivate them in their official acts. Kaufman, 535 S.E.2d at 735. Although the Kauffman Court did not speak in terms of an absolute or qualified privilege, it noted that the scope of the privilege is limited to communications relating to a judge carrying out his or her official duties. Kaufman, 535 S.E.2d at 735 ("The Court is mindful that this protection from discovery proceedings has its limits, and those limits are that a judge must be acting as a judge, and that it is information regarding his or her role as a judge that is sought"). By addressing the scope of the privilege as opposed to balancing the need for disclosure of the information against the degree of intrusion upon the court's right to confidentiality, we believe that the Kaufman Court was analyzing a privilege it considered to be absolute in nature.

Thomas v. Page, et al., 361 Ill. App. 3d 484, 493-494; 837 N.E.2d 483, 492-493 (2005).

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

**3. Other jurisdictions, both federal and state, have ruled that testimony from a judge is prejudicial.**

The adjudication of the issue of a judge testifying is limited. However, several cases appear to follow the Frankenthal test. See U.S. v. Frankenthal, 582 F.2d 1102 (7<sup>th</sup> Cir. 1978). Recently, the Circuit used the Frankenthal test in Roth. This test is described in the following passage.

"As set forth above, Judge Rosenwasser may not be compelled to testify regarding his mental processes; however, there are limited circumstances where a judge's factual testimony is so essential that the general prohibition against judicial testimony may be compromised. The Seventh Circuit has developed an analysis to be applied when determining whether such "limited circumstances" exist. In United States v. Frankenthal, 582 F.2d 1102 (7th Cir. 1978), the Seventh Circuit allowed the introduction of judicial testimony because the judge "possessed factual knowledge that was highly pertinent to the jury's task, and he was the only possible source of testimony on that knowledge." *Id.* at 1108. However, in reaching its decision, the Frankenthal Court cautioned that "calling a judge to give testimony in any proceeding is a very delicate matter." *Id.* at 1107. In fact, the judge's testimony was only permitted because the judge was only required to give "brief, strictly factual testimony." *Id.* at 1108 (emphasis added).

This Court recognizes that Frankenthal is a Seventh Circuit decision; however, the logic of Frankenthal is persuasive and in the absence of any controlling Second Circuit precedent, this Court chooses to adopt that court's reasoning. Accordingly, this Court finds that a judge may only be required to testify if he (1) possesses factual knowledge,

(2) that knowledge is highly pertinent to the jury's task, and (3) is the only possible source of testimony on the relevant factual information.

In order for judicial testimony to be required, the testimony must relate to the judge's factual knowledge--not his mental processes. With respect to the case at bar, there is no question that Judge Rosenwasser has factual knowledge regarding the Antonio Bryant case; however, the two questions that must be resolved are (a) whether that knowledge is highly pertinent to the jury's task in this case and (b) whether Judge Rosenwasser is the only possible source of testimony on that knowledge. This Court finds (1) that Judge Rosenwasser's testimony is not highly pertinent to the jury's task in this case and (2) that there are two other possible sources for the factual information that Judge Rosenwasser is being asked to testify about."

U.S. v. Roth, 332 F. Supp 2d 565, 568 (2d. Cir. 2004).

The United States Supreme Court has cautioned against judges testifying. In the following passage, the Court discusses that adverse testimony from a judge can take away a defendant's right to testify. "It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. *Hicks v. United States*, 150 U.S. 442, 452; *Allison v. United States*, 160 U.S. 203, 207, 209, 210." *Quercia v. U.S.*, 289 U.S. 466, 470, 53 S. Ct. 698, 699, 77 L. Ed. 1321, 1325 (1993).

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

CONCLUSION

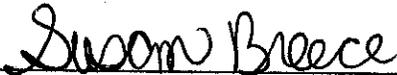
For all the foregoing reasons, Mr. Hatcher requests relief from this Court. The errors in this case are clearly wrong and egregious, and the Court clearly abused its discretion and violated Mr. Hatcher's state and federal constitutional rights. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

Wherefore, your Appellant, respectfully requests the following relief:

1. A hearing;
2. That the Court reverse the Appellant's conviction for the charges in this petition;
3. That the Court expunge the Appellant's criminal record to show no conviction and no arrest for the charges in this petition;
4. That the Court release the Appellant from his confinement, or in the alternative, set a bond;
5. That the Court grant any further relief that it deems necessary.

RESPECTFULLY SUBMITTED,  
FREDERICO HATCHER  
APPELLANT

By Counsel:

  
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CERTIFICATE OF SERVICE

I, Susan Breece, counsel for the Appellant Fred Hatcher, do hereby certify that I served a true and accurate copy of the foregoing **Appellant's Brief** upon Assistant Prosecutor Jane Husted, Cabell County Courthouse, 750 Fifth Avenue, Huntington, WV 25701, and Darrell McGraw, Attorney General, State Capitol Complex, Building 1, Room E-26, Charleston, WV 25305, by depositing the same into the USPS first, certified class mail and mailing it to the Assistant Prosecutor, Cabell County Courthouse, 750 Fifth Avenue, Huntington, WV 25701 and the Attorney General, State Capitol Complex, Building 1, Room E-26, 1900 Kanawha Blvd. E., Charleston, WV 25305 on this 21<sup>st</sup> day of December in the year 2006.

Susan Breece  
Susan Breece/WV Bar #7963