

Case Number 33244

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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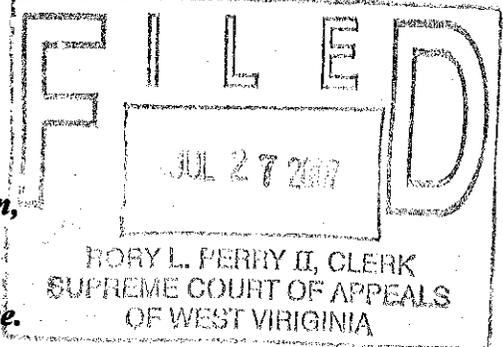
**STATE EX REL. FREDERICO HATCHER,**

*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 REPLY BRIEF**

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Cleckley, Franklin, *Handbook on Evidence for West Virginia Lawyers*, (2005).

## 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).

## 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

## 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. This Court denied, in a 5-0 vote, the State's motion to dismiss this action as improvidently granted.

### 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.

## 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).**
- **In 1999, the Court held that a thirty (30) year sentence for aggravated robbery involving a defendant committing a robbery at a convenience store taking \$1,300.00 in cash and using a gun during the robbery. See State v. Mann, 205 W. Va. 303, 518 S.E.2d 60 (1999).**

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 purse 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.**

The trial court sentenced Mr. Hatcher for the unrelated charges of robbery and murder convictions at the same hearing. At Mr. Hatcher's bifurcated sentencing hearing in the murder trial, in an extremely unusual occurrence, Circuit Judge Alfred Ferguson testified about Mr. Hatcher. Mr. Hatcher's position, which has already been fully briefed in his appellate brief, is that this testimony, while offered for the purpose of the bifurcated murder trial, obviously affected the court in its sentencing on the unrelated robbery charge. 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

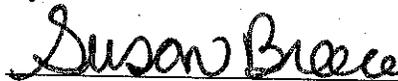
For all the foregoing reasons, Mr. Hatcher requests relief from this Court. The errors in this case are clearly wrong and egregious, and the Court clearly abused its discretion and violated Mr. Hatcher's state and federal constitutional rights. Therefore, Mr. Hatcher respectfully requests that this honorable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



Susan Breece / WV Bar #7963

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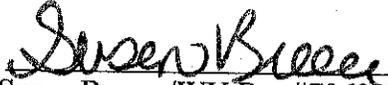
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CERTIFICATE OF SERVICE

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 Reply 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, 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 27<sup>th</sup> day of July in the year 2007.

  
Susan Breece/WV Bar #7963