

BEFORE THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

No. 33668

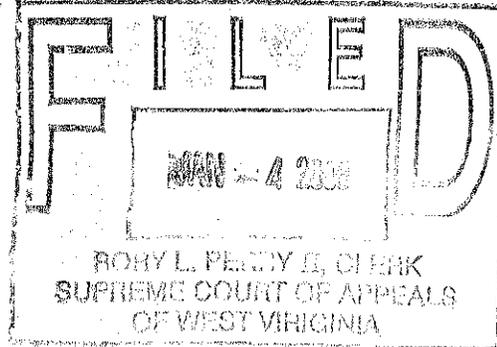
**STEPHEN WESTLEY HATFIELD,**

Appellee,

v.

**HOWARD PAINTER,** Warden of  
Mount Olive Correctional Complex,

Appellant.



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*APPEAL FROM THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA*

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**APPELLEE'S BRIEF**

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*APPEAL FROM THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA*

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**APPELLEE'S BRIEF**

*No principle is more firmly enmeshed in Anglo-American criminal justice than the prohibition against subjecting a mentally incompetent defendant to trial. The United States Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." ...This Court has likewise reiterated that "[i]t is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent.... (Citations omitted)—State v. Sanders, 209 W.Va. 367, 377, 549 S.E.2d 40, 50 (2001).*

**I.**

**Introduction**

*To the Honorable Justices of the*

*West Virginia Supreme Court of Appeals:*

Appellee Stephen Westley Hatfield's conviction of one count of first degree murder and two counts of malicious wounding violates this most basic principle of law—a person who is

mentally incompetent cannot be subjected to trial. Not only was Appellee subjected to a guilty plea proceeding at a time when his treating mental health professionals as well as his lawyer had determined he was mentally incompetent, he was sentenced to life without mercy, the harshest sentence available under West Virginia law. To date, Appellee has been incarcerated for more than nineteen years. Assuming the Court actually meant what it said in *Sanders*, then the decision by the trial court to set aside Appellee's convictions because there was far too much evidence of his lack of mental competency has to be affirmed. Any other result would be a complete mockery of this fundamental legal principle.

On February 27, 1989, when Appellee Stephen Westley Hatfield entered a guilty plea to one count of first degree murder and two counts of malicious wounding:

1. Two of his treating psychiatrists had determined that Appellee was not mentally competent at that time to go to trial;
2. The two treating psychiatrists and the one treating psychologist had determined that Appellee lacked the mental competency to commit the crimes charged;
3. Appellee's counsel had advised Appellee as well as the trial court that Appellee lacked the mental competency to enter the plea and was doing so contrary to the advice of his counsel as well as his treating psychiatrists; and
4. Before and after this guilty plea, Appellee made several attempts at suicide.

Despite all of this substantial evidence raising very serious questions about Appellee's mental competency, both at the time of the crime and at the time of the guilty plea hearing, **it is undisputed that Appellee was never afforded a full evidentiary hearing to address Appellee's mental competency.** Thus fundamental failure to provide Appellee with this evidentiary hearing, required under general due process principles, multiple decisions by this Court and the United States

Supreme Court, as well as W.Va.Code §27-6A-1 through -9, prompted the Honorable Jay M. Hoke to enter an order on January 31, 2005, granting Appellee's petition for habeas corpus relief, adopting in full the findings of fact and conclusions of law proposed by Appellee, setting aside Appellee's convictions, and requiring that Appellee be examined by a psychiatrist and a psychologist to determine if Appellee presently had the mental competency to stand trial. Pursuant to this order and a more detailed order entered March 14, 2005, Appellee was examined by a psychiatrist and a psychologist.

After reviewing the reports issued by the examining psychiatrist and psychologist, Judge Hoke entered an order on September 13, 2005, finding Appellee presently to be competent to stand trial. In this order, Judge Hoke further noted:

That following the Court's determination herein made, the Court does hereby further find that it has resolved the *habeas corpus* issues originally presented and processed; correspondingly, the Court does further find that this Court, which was appointed as a Special Judge to preside in this *habeas corpus* action, has completed its duties in this case and has no authority to take any further action.

This order was the final order entered in the habeas corpus action.

For reasons not apparent in the record or in Appellant's brief, Appellant chose to wait until July 13, 2007 to file an appeal in this case, more than twenty-two months after this final order was entered. Appellee respectfully submits that Appellant's appeal should be rejected because Judge Hoke merely reaffirmed all of the case law issued by the United States Supreme Court and this Court providing due process to criminal defendants who are not mentally competent to stand trial, and because this Court lacks jurisdiction to decide this case, based upon Appellant's failure to comply with the mandatory appeal period.<sup>1</sup>

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<sup>1</sup>Along with APPELLEE'S BRIEF, Appellee has filed a separate APPELLEE'S MOTION TO DISMISS BASED UPON UNTIMELINESS OF APPELLANT'S PETITION FOR APPEAL.

## II.

### A more complete summary of the procedural history

#### A.

#### *This Court's decisions in Hatfield I and Hatfield II*

Because Appellant failed to include a docketing statement and failed to attached the actual final order in this case, both of which are mandated by Rule 4 of the West Virginia Rules of Appellate Procedure, Appellee must provide this Court with a more complete explanation of the procedural posture of this case, with the relevant orders attached.

Appellee originally was convicted of one count of first degree murder and two counts of malicious wounding on **February 27, 1989**, based upon a guilty plea. For these crimes, Appellee was sentenced to life without the possibility of parole and a term of not less than two nor more than ten years on each of the two malicious wounding charges, with a finding that they were committed with a firearm, all sentences to be served concurrently. Appellee's initial guilty plea was addressed by this Court in *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991), hereinafter sometimes referred to as *Hatfield I*. As a result of *Hatfield I*, where the Court, in light of the reports from mental health professionals as well as Appellee's multiple suicide attempts, had concerns over Appellee's competency to enter a guilty plea, the case was remanded for further proceedings consistent with the opinion. This Court also held in the mandate order issued "that said judgment be, and same is hereby, set aside, reversed and annulled. AND this case is remanded to the Circuit Court of Wayne County for further development according to the principles stated and directions given in the written opinion aforesaid, and further according to law; all of which is ordered to be certified to the Circuit Court of Wayne County."

On December 19, 1996, pursuant to the procedure required by *Hatfield I*, the trial court took evidence from Appellee's counsel and engaged in a colloquy with Appellee. During this colloquy, Appellee explained that he was not pleading guilty and that he wanted a jury trial. Based upon this colloquy, the trial court concluded, "I find nothing here today that should cause a different result than we had at the time this man entered his plea, and accordingly, I am going to, once again, determine that the plea was freely and voluntarily made at a time when the defendant was fully competent to enter it, and will ratify the sentence imposed at the time sentenced was imposed in this case." (December 19, 1996 Tr. at 30-31). As a result, the original convictions were upheld and the same sentences imposed.

These renewed convictions were appealed to this Court. In *State v. Hatfield*, 206 W.Va. 125, 522 S.E.2d 416 (1999), hereinafter sometimes referred to as *Hatfield II*, three members of this Court affirmed the trial court's actions in a *per curiam* opinion following the remand required by *Hatfield I*. The Court explained, in footnote 4, that the mandate order issued following *Hatfield I*, "is simply incorrect and the discrepancy went unnoticed until it was brought to the Court's attention by the Appellee." This "correction" in *Hatfield II* of a prior mandate order that had been issued in *Hatfield I* by a unanimous Court not only is unprecedented, but also contradicted the actual holding in *Hatfield I*, as explained by former Justice Richard Neely, who was on this Court at the time *Hatfield I* was decided and who filed an affidavit in support of the rehearing petition filed following the *Hatfield II* decision.

**B.**

***Following Hatfield II, habeas corpus action filed, convictions set aside, and final order entered on September 13, 2005***

Following *Hatfield II*, Appellee filed a habeas corpus action challenging the validity of his convictions. On **January 31, 2005**, after the development of the record on the relevant issues, the trial court entered an order setting aside Appellee's conviction for one count of first degree murder and two counts of malicious wounding. At the time this order was entered, the trial court had noted in the order that whether or not Appellee presently was mentally competent to go to trial needed to be decided before the habeas corpus action could be concluded. Thus, the January 31, 2005 order was interlocutory and was not a final appealable order.

In this order, the trial court adopted in full the proposed findings of fact and conclusions of law offered by Appellee. This Court has recognized that trial courts may adopt in full findings of fact proposed by one of the parties and such findings will be evaluated, not by focusing on who proposed the findings, but whether the findings are supported in the record and accurately reflect existing law. *Kalwar v. Liberty Mutual Insurance Co.*, 203 W.Va. 2, 7, 506 S.E.2d 39, 44 (1998); *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 214, 470 S.E.2d 162, 168 (1996). Since all of the proposed findings were supported by citations to the record and to the various reports issued, the trial court had every right to incorporate by reference these these findings and conclusions into the January 31, 2005 order.

Although Appellee's convictions were set aside, based upon the January 31, 2005 order, the trial court concluded that before finalizing the habeas corpus action and setting a new trial for Appellee, a determination had to be made with respect to Appellee's present mental competency

to go to trial. On **September 13, 2005**, after Appellee had been examined by a psychiatrist and a psychologist appointed by the trial court, the trial court entered a detailed order, pursuant to W.Va.Code §27-6A-1 through -9, finding Appellee presently had the mental competency to go to trial and assist his counsel. As specifically noted in this order, once Appellee's present mental competency had been determined, the trial court had completed its duties in *Hatfield v. Painter*, Civil Action No. 00-C-204. Thus, if Appellant wanted to challenge the trial court's decision to set aside Appellee's convictions, he was obligated to file such appeal by **January 13, 2006**, which is four months after the final order had been entered

**C.**

*On November 17, 2005, Appellant files a motion seeking to have the trial court make findings of fact and conclusions of law in support of the January 31, 2005 order, despite the undisputed fact that the trial court already had made such findings and conclusions*

On or about **November 17, 2005**, rather than filing a timely appeal, Appellant filed a motion, pursuant to Rule 52 of the West Virginia Rules of Civil Procedure, seeking to have the trial court provide supplemental findings of fact in support of the **January 31, 2005** order. This motion was filed, despite the undisputed fact that the trial court previously had adopted the findings and conclusions proposed by Appellee.

In this motion, Appellant claimed not to have known of the existence of the **January 31, 2005** order until around October 1, 2005. The **January 31, 2005** order specifically ordered the Clerk to "mail a certified copy of this **ORDER** to all counsel of record." Counsel for Appellee checked with the Wayne County Clerk's office to determine what record was maintained in that office to show that orders were sent to counsel of record. In the file, a notation was made that on

**February 3, 2005**, the **January 31, 2005** order was served on Wayne County Prosecuting Attorney James H. Young, Jr., as well as Appellee's counsel, Lonnie C. Simmons, and David Tyson. It is the understanding of Appellee's counsel that a box is maintained in the Clerk's office for Prosecutor Young and that often orders are left in that box by employees in the Clerk's office. Thus, while technically there may not be a record that a copy of this order was mailed to Wayne County Assistant Prosecuting Attorney Thomas M. Plymale at his private law office in Huntington, the record clearly demonstrates that the **January 31, 2005** order was served on counsel for both parties.

As for the claim that Appellant's counsel was not made aware of the **January 31, 2005** order until October 1, 2005, the record reveals several references either to this order or to the ruling setting aside Appellee's convictions. In the **March 14, 2005** order, entitled "Order for Initial Forensic Examinations to Determine Competency and/or Criminal Responsibility," this Court specifically referred to the January 31, 2005 order: "WHEREAS, in the January 31, 2005 Order, this Court ordered that Petitioner Stephen Westley Hatfield, be examined at the Mount Olive Correctional Complex as soon as the necessary arrangements can be made, to be examined by one or more psychiatrists, or a psychiatrist and a psychologist, to determine whether or not Petitioner presently is mentally competent to stand trial, examination pursuant to West Virginia Code §27-6A-1(a) through 9.'" Unless Appellant's counsel also asserts that he was not aware of this order, clearly he was on notice of the **January 31, 2005** order through this March order.

Furthermore, the fact that the trial court ordered this psychiatric and psychological evaluation of Appellee to determine whether he presently was mentally competent to go to trial should have been another indication to Appellant's counsel that Appellee's convictions had been set aside by the trial court and a new trial ordered. In the reports issued by David A. Clayman, Ph.D,

and Mark N. Casdorff, D.O, on **July 12, 2005**, and **August 23, 2005**, respectively, which were sent to all counsel of record, including Appellant's counsel, both experts note that Appellee's convictions had been set aside, thus prompting the need for this evaluation. Finally, in the **September 13, 2005** order, which was the final order entered in the habeas corpus action, the trial court begins the order by noting, "On January 31, 2005, this Court entered an order granting Appellee Stephen Westley Hatfield's motion for summary judgment on ground one of his habeas corpus petition, setting aside Appellee's conviction for one count of first degree murder and two counts of malicious wounding, and ordering a psychiatric examination of Appellee by a psychiatrist and psychologist, pursuant to West Virginia Code §27-6A-1 through 9."

**D.**

*Supplemental order issued on March 16, 2007, and Appellant files his appeal on July 13, 2007, despite the fact that Appellant previously had failed to file any timely motion to toll the appeal period from the final September 13, 2005 order*

On **March 16, 2007**, the trial court issued **SUPPLEMENTAL ORDER: GRANTING MOTION FOR SUMMARY JUDGMENT**. In this **SUPPLEMENTAL ORDER**, the trial court repeated the findings and conclusions previously adopted by reference in the **January 31, 2005** order and discussed two more cases issued by this Court—*State v. Sanders*, 209 W.Va. 367, 549 S.E.2d 40 (2001), and *State v. McCoy*, 219 W.Va. 130, 632 S.E.2d 70 (2006).

Appellant attached this March 16, 2007 **SUPPLEMENTAL ORDER** to his petition for appeal, which first was filed on July 13, 2007, and then refiled, after making certain corrections to the format, on July 25, 2007.

### III.

#### Argument

##### A.

***SUBSTANTIVE ISSUE: The trial court's ruling setting aside Appellee's convictions is fully supported by all of the psychiatrists, psychologists, and counselors, who actually treated Appellee, and by the undisputed fact that Appellee never had a proper competency hearing prior to his initial guilty plea***

On the merits of the issues raised, the trial court had no choice other than to set aside Appellee's convictions. Soon after his arrest, Appellee was treated by various mental health professionals, who examined Appellee over an extended period of time. These mental health professionals include Dr. Johnnie L. Gallemore, Jr., who is a psychiatrist and a professor of psychiatry at the Marshall University School of Medicine, Dr. Herbert C. Haynes, a psychiatrist and the Medical Director for the Mental Health Unit at St. Joseph's Hospital in Buckhannon, West Virginia, and Earnest Watkins, M.A., a licensed psychologist. During the habeas corpus proceeding, the trial court had all of the relevant medical records reviewed by Dr. Delano H. Webb, a psychiatrist in Huntington, West Virginia, and asked Dr. Webb to provide an opinion for the trial court.

Dr. Gallemore and Dr. Haynes had expressed their opinions, prior to the original February 27, 1989 guilty plea hearing, that Appellee lacked the mental competency to go to trial. Dr. Gallemore, Dr. Haynes, and Mr. Watkins had expressed their opinions, prior to the original February 27, 1989 guilty plea hearing, that Appellee was not criminally responsible at the time of the crime. During the habeas corpus proceeding, Dr. Webb issued a report for the trial court, concluding that Appellee lacked the mental capacity to go to trial at the time of the guilty plea hearing and lacked the required mental competency at the time of the crime.

The only conflicting opinion offered by any health care professional prior to the February 27, 1989 guilty plea hearing was a short unverified letter from Dr. Ralph S. Smith, Jr. Dr. Smith had examined Appellee for a few hours and concluded in his letter, "My forensic evaluation of your client was completed October 21, 1988. It is my opinion that Mr. Hatfield is competent to stand trial. I am presently reviewing my records to determine whether or not he is criminally responsible. My full report will follow." Thus, at the time of the guilty plea hearing, Dr. Smith had not made any final determination regarding whether or not Appellee was criminally responsible.

As found by the trial court in this habeas corpus action, Appellee was never afforded an evidentiary hearing on these mental competency issues, where the various mental health professionals could testify under oath and be subjected to cross-examination. Where there is reason to believe that a criminal defendant may not be mentally competent, it is mandatory that a full evidentiary hearing be held on the question of the defendant's competency. Syllabus Points 1, 2, and 3 of *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976); *Drope v. Missouri*, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975); *Pate v. Robertson*, 383 U.S. 375, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966); see also *State ex rel. Kessick v. Bordenkircher*, 170 W.Va. 331, 294 S.E.2d 134 (1982); *State v. Swiger*, 175 W.Va. 578, 336 S.E.2d 541 (1985).

In the conclusions adopted by reference by the trial court in its January 31, 2005 order, which are repeated in the March 16, 2007 **SUPPLEMENTAL ORDER**, the trial court provided the following analysis, based upon cases decided by this Court as well as the United States Supreme Court:

The West Virginia Supreme Court, following decisions issued by the United States Supreme Court based upon the United States Constitution, long has held that it is a violation of due process to

convict a mentally incompetent person of a crime. In Syllabus Points 1, 2, and 3 of *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976), the West Virginia Supreme Court held:

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

2. Under the provisions of W.Va. Code, 27-6A-1, as amended, a trial court has reason to believe that a defendant in a criminal case may be incompetent to stand trial and orders a mental examination of the defendant, **the defendant is entitled as a matter of right to a full evidentiary hearing on the question of his competency.**

3. In making any of the findings required by W. Va. Code, 27-6A-1, as amended, a trial court may not simply adopt as its own the recommendations of medical experts, but rather, based on an examination of the totality of the evidence, it should make an independent determination as to whether the defendant is competent to stand trial. (Emphasis added).

In *Milam*, 159 W.Va. at 697-98, 226 S.E.2d at 438-39, the West Virginia Supreme Court explained the due process principles under the United States Constitution requiring certain procedures to ensure that a criminal defendant is mentally competent:

The Supreme Court of the United States has held that the conviction of an accused when he is legally incompetent violates due process and that State procedures must be adequate to protect this right. *Pate v. Robertson*, 383 U.S. 375, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966). The standards enunciated in *Pate* require a trial court to examine the accused's demeanor, his history of prior mental problems and similar factors in order to determine whether a mental examination should be conducted and a hearing held

to determine the accused's competency. These principles were further developed in *Drope v. Missouri*, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975). In *Drope*, the Supreme Court gave definition to the procedural aspects for determining the mental capacity of an accused to stand trial. The Court indicated that a statutory procedure was constitutionally adequate to protect the defendant's due process right not to be tried while legally incompetent if the statute: (1) provides that a judge shall on motion or on his own initiative order a psychiatric examination whenever he has reasonable cause to believe that the accused has a mental disease which affects his fitness to proceed; (2) specifies the necessary contents of a report of psychiatric examination; **(3) requires the trial court to conduct a hearing if there is a conflict in opinion in the reports of the psychiatric examiners;** and (4) authorizes the trial court to hold a hearing on its own motion. (Emphasis added).

The trial court concluded, based upon the holdings in *Milam*, *Pate*, and *Drope*, "With this conflict in the opinions issued by the experts and this history of suicide attempts, the trial court was required, consistent with due process principles, 'to conduct a full evidentiary hearing,' where the various experts would testify under oath and be subjected to cross-examination."

Appellant suggests Appellee's counsel had failed to request a competency hearing. This suggestion that this mandatory competency hearing somehow could be waived by a defendant's counsel was summarily dismissed by this Court in *Sanders*, 209 W.Va. at 377, 549 S.E.2d at 50:

Importantly, since the right not to be tried while mentally incompetent is subject to neither waiver nor forfeiture, a trial court is not relieved of its obligation to provide procedures sufficient to protect against the trial of an incompetent defendant merely because no formal request for such has been put forward by the parties....In other words, a trial court has an affirmative duty to employ adequate procedures for determining competency once the issue has come to the attention of the court, whether through formal motion by one of

the parties or as a result of information that becomes available in the course of criminal proceedings.

Appellant attempts to distinguish *Sanders* by noting the defendant in that case had demonstrated certain psychotic tendencies. While the defendant in *Sanders* may very well have been suffering from different psychiatric problems than Appellee, nevertheless, Appellant's suggestion that a criminal defendant would have to appear psychotic or visibly disturbed in front of a trial court before a full evidentiary hearing is required is not supported by any law any where.

Appellant next argues the trial court engaged in a colloquy with Appellee, prior to the original guilty plea, and that somehow this colloquy was sufficient to determine Appellee's mental competency, despite all of the contrary reports from psychiatrists who actually had examined and treated Appellee over a period of time. If this were true, then all of the decisions from this Court, where convictions were set aside because the trial court failed to hold a full evidentiary hearing on the defendant's mental competency, would be rendered meaningless. Clearly, where there are reports from psychiatrists explaining that the defendant lacks the mental competency to go to trial, simply having a discussion between a trial judge and the defendant is not sufficient to establish the defendant's mental competency.

In conjunction with this argument, Appellant also suggests the trial court's admitted failure to hold a full evidentiary hearing on Appellee's mental competency should be treated as harmless error. Appellant assumes that a trial judge, who is not a professionally trained psychiatrist or psychologist, somehow has the ability to discern whether a defendant appearing before him is suffering from a mental or psychiatric condition. Obviously, not every psychiatric problem suffered by an individual necessarily will manifest itself in such a way that the condition can be deduced by

a trial judge engaging in a colloquy with that individual. Lots of people with serious psychiatric conditions may appear on the surface to be rational human beings. To suggest that a trial judge somehow has this magical ability to make a medical determination regarding a defendant, when that same defendant already has been treated by two psychiatrists who concluded, based upon their medical training and expertise, that the defendant was not mentally competent to go to trial, is ludicrous. Clearly, the only way to resolve the fundamental question regarding the mental competency of Appellee either to go to trial or at the time of the crime is to have a full evidentiary hearing, where these mental health professionals can testify and be cross-examined.

At least in *Sanders*, the trial court did have the benefit of some testimony from a mental health professional regarding the defendant's mental competency. However, due to the fundamental and critical importance of this issue, this Court found this more limited hearing to be insufficient to meet the requirements under existing case law for a full evidentiary hearing on the defendant's mental competency.

Appellee is not aware of any decision by this Court where the failure of a trial court to hold a full evidentiary hearing on a defendant's mental competency, where there exists evidence from mental health professional's questioning such competency, has been deemed to be harmless error. In fact, in case after case, this Court has reversed convictions based upon the inadequacy of the procedure used to determine competency.

In *Milam*, the failure of the trial court to hold an evidentiary hearing on the defendant's mental competency, where there were conflicting reports on his competency, was found by this Court to require a reversal of the conviction and a remand for an appropriate competency hearing. In *Morris v. Painter*, 211 W.Va. 681, 567 S.E.2d 916 (2002), a psychiatrist for the State

had found the defendant to be competent to go to trial, while a psychiatrist and a psychologist who had evaluated the defendant found him to be incompetent. The trial court accepted the conclusion of the State's psychiatrist and did not hold an evidentiary hearing on the competency issue. This Court found the procedures followed by the trial court to be so inadequate that it addressed this failure under the plain error doctrine.

In *State ex rel. Kessick v. Bordenkircher*, 170 W.Va. 331, 294 S.E.2d 134 (1982), habeas corpus relief was granted because the trial court failed to hold a full evidentiary hearing on the issue of mental competency prior to accepting a guilty plea. See also *State v. Swiger*, 175 W.Va. 578, 336 S.E.2d 541 (1985)(Trial court erred in finding defendant competent to stand trial in light of contrary psychological evidence).

There is nothing "harmless" about permitting a person, who was not mentally competent at the time, to enter a guilty plea that resulted in a life without mercy sentence. The overwhelming weight of the evidence on this issue supports Appellee's assertion that he was not mentally competent to enter a guilty plea on February 27, 1989. Because the trial court at that time had received conflicting opinions on this issue, the trial court was required to make a full record on the issue of Appellee's mental competency by permitting these various psychiatrists and psychologists to testify. Appellee's arguments were further corroborated through this habeas corpus proceeding, where another psychiatrist, who reviewed the records, also concluded that Appellee was not mentally competent at the time of his guilty plea and also was not mentally competent at the time of the crime. The only evidence in the extensive record before this Court concluding otherwise is a one paragraph letter from Dr. Smith.

Under *Sanders, Milam, Morris, Kessick, and Swiger* as well as the United States Supreme Court decisions cited and relied upon by this Court therein, the trial court in this habeas corpus action correctly and appropriately set aside Appellee's convictions based upon the gross inadequacies of the procedure followed by the trial court in determining Appellee's mental competency to enter a guilty plea. There is nothing in either *Hatfield I* or *Hatfield II* to refute the fundamental holding by the trial court in this habeas corpus action that Appellee never had a full evidentiary hearing to address the issue of his mental competency. Consequently, Appellee respectfully submits the trial court's decision to set aside his convictions was mandated by this Court's decisions, by United States Supreme Court precedents, by federal and state due process principles, and should not be affirmed by this Court.

**B.**

***PROCEDURAL ISSUE: Appellant failed to file any motion to toll the appeal period, therefore, his petition for appeal, filed almost two years after the final order entered by the trial court in the habeas corpus proceeding, is barred under Rule 3 of the West Virginia Rules of Appellate Procedure***

Rule 3 of the Appellate Rules of Procedure requires an appeal to be filed within four months after the issuance of the circuit court's final order. Here, the September 13, 2005 Order specifically provided:

That following the Court's determinations herein made, the Court does hereby further find that it has resolved the *habeas corpus* issues originally presented and processed; correspondingly, the Court does further find that this Court, which was appointed as a Special Judge to preside in this *habeas corpus* action, has completed its duties in this case ***and has no authority to take any further action.***

(emphasis added). Under the express terms of the Order, this was a final decision from the lower court and the appeals period began to run that day. The appeal period can be tolled, where an

appropriate and timely motion is filed. In the present case, Appellant failed to file any timely motion to toll the appeal period, consequently, the appeal was filed more than four months after the final order.

The filing of a motion, under Rule 52, the rule relied upon by Appellant, does not toll the appeal period. Rule 52(b) does specifically provide that a motion seeking an amendment of an order for additional findings or conclusions can be made within ten days of the order and can be combined with a motion under Rule 59. A timely motion filed under Rule 59 does have the effect of tolling the appeal period. Syllabus Point 4, *McCormick v. Allstate Insurance Co.*, 194 W.Va. 82, 459 S.E.2d 359 (1995); Syllabus Point 7, *James M. B v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995). Thus, if Appellant wanted to challenge the trial court's ruling to set aside Appellee's convictions, he was required to file a Rule 52 motion within ten days after the September 13, 2005 order was issued.<sup>2</sup> However, Appellant did not file any motion until November 17, 2005, well after the time limit set forth in the rules. Since the motion was not filed within the mandatory ten day period of time, Appellant's motion has to be treated as a rule 60(b) motion, which does not toll the running of the time for an appeal. Syllabus Point 2, *Gaines v. Drainer*, 169 W. Va. 547, 289 S.E. 2d 184 (1982)(per curiam); Syllabus Point 1, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E. 2d 85 (1974). Accordingly, Appellant's appeal was due by January 13, 2006; a far cry from Appellant's actual filing date of July 13, 2007.<sup>3</sup>

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<sup>2</sup> Since the September 13, 2005 order was the final order fully adjudicating the issues raised in the habeas corpus action, this order was appealable and provided Appellant with his first opportunity to appeal the trial court's decision setting aside Appellee's convictions.

Compliance with the time periods in which to file appeals is essential to furnishing this Court with jurisdiction. Appellant's failure to timely file an appeal means that this Court has no jurisdiction to now hear the matter. *West Virginia Dept. of Energy v. Hobet Mining and Construction Company*, 178 W. Va. 262, 264, 358 S.E. 2d 823, 826 (1987)(failure to file a timely appeal presents a jurisdictional infirmity precluding the Court from accepting the appeal). Under Rule 3 of the Rules of Appellate Procedure, when a petition for appeal is filed more than four months after the final ruling, and the appeal time is not tolled, this Court will not consider the appeal. *See, e.g., Cronin v. Bartlett*, 196 W.Va. 324, 472 S.E.2d 409 (1996)(Once this Court realized the appeal petition had been filed about eight days too late, the appeal was dismissed as improvidently granted).

The time period in which to file an appeal in this matter was not tolled through Appellant's November 17, 2005 motion as said motion was filed more than ten days after the Court's September 13, 2005 Order. Accordingly, jurisdiction is barred here by Appellant's untimely Rule 59 motion. As this Court stated in Syllabus Points 2 and 3 of *Blankenship v. Estep*, 201 W.Va. 261, 496 S.E.2d 211 (1997):

2. The requirement of Rule 59(b) of the Rules of Civil Procedure that a motion for a new trial shall be served not later than ten days after entry of the judgment is mandatory and jurisdictional. The time required for service of such a motion cannot be extended by the court or by the parties. (quoting, Syllabus Point 1, *Boggs v. Settle*, 150 W. Va. 330, 145 S.E. 2d 446 (1965)).

3. To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction. (quoting, Syllabus Point 3, *State ex rel. v. Bosworth*, 145 W. Va. 753, 117 S.E. 2d 610 (1960)).

Under this rationale, this Court in *Blankenship* found a trial court is without jurisdiction to hear untimely filed motions under Rule 59. Accordingly, there can be no tolling of the time in which to file an appeal in this matter as the lower court lacked jurisdiction to even entertain a Rule 59 motion.

Instead of following proper procedures set forth in the Rules, Appellant waited until November 17, 2005, to file a motion under Rule 52. When that motion was filed, the time to appeal the September 13, 2005 order continued to run. Although Appellant had not received any ruling on his Rule 52 motion by January 13, 2006, his right to appeal expired on that date. The same result has been recognized by this Court in the various cases addressing whether a motion for reconsideration should be treated as a motion, under Rule 59, or under Rule 60. Where the motion is filed within ten days, this Court treats such motions as a Rule 59 motion, where the appeal period is tolled. However, any motion for reconsideration filed more than ten days after the final order is treated as a Rule 60 motion, which does not toll the appeal period. *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 229, 539 S.E.2d 478, 489 (2000)(A motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled and does not toll the four month appeal period for appeal to this court.)(internal citations omitted); *See also, James M. B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995). As the period to file an appeal was not tolled, and as Appellant failed to file the appeal within four months of entry of the judgment appealed from, the appeal is untimely, and there is no jurisdiction for this Court to hear the matter.

Finally, Appellant argues the appeal period should be extended as he did not learn of the January 31, 2005 order until October 1, 2005. Even assuming Appellant was not aware of the **January 31, 2005** order until **October 1, 2005**, notwithstanding numerous references to the Order

throughout subsequent Orders and correspondence, the motion cannot be treated as a Rule 59 motion.

Rule 59 specifically provides that any such motion must be filed “not later than 10 days after entry of judgment.” Here, by Appellant’s own admissions, he was aware of the order by **October 1, 2005** at the latest. Thus, even if the Court crafted a “discovery of the existence of an order” rule as tolling the time in which to file a Rule 59 motion, Appellant should have filed such a Rule 59 motion no later than October 11, 2005. The **November 3, 2005** filing was untimely, and the Rules do not contain an exception for his untimely filing, even if Appellant had attempted to raise some sort of excuse or justification for his delay.<sup>4</sup>

Since no timely filed Rule 59 motion was made, and no motion was ever granted requesting a stay on the appeals period or an extension of time in which to file an appeal, Appellant had until four months after entry of the final order to file his appeal, or until January 13, 2006. Appellant’s July 13, 2007 filing of this appeal is, simply put, a year and a half too late.

There is no rule or case law holding that the issuance of the **SUPPLEMENTAL ORDER**, about a year and a half **after** the final order had been entered in this case (September 13, 2005), somehow corrects Appellant’s failure to timely appeal the September 13, 2005 order within

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<sup>4</sup> While Rules 2, 3, and 16 of the Rules of Appellate Procedure allow the Court to suspend or enlarge the time period in which to file an appeal, the rules only apply if the party requesting additional time can demonstrate “good cause.” Under these rules, the Court may consider administrative difficulties such as lack of a transcript or the death or reassignment of an attorney. *West Virginia Dept. of Energy v. Hobet Mining and Construction Co.*, 178 W. Va. 262, 264, 358 S.E. 2d 823, 825 (1987). However, typically requests to enlarge the time period in which to file an appeal must be made before the fact. *Id.* Moreover, even the provisions of Rule 3 which provide for extensions, limits any such extension to a period of two months. The present appeal, being a year and a half late, would not come close to being permissible under the rules. Additionally, Appellant has not demonstrated any cause, much less “good cause” for this year and a half delay.

four months. Furthermore, based upon the specific language in the September 13, 2005 order, the special judge's limited authority to preside over the habeas corpus case already had expired. Thus, when the **SUPPLEMENTAL ORDER** was issued on March 16, 2007, the trial court had no jurisdiction or authority to issue that order.<sup>5</sup> Consequently, Appellee respectfully submits that the Court should dismiss the present appeal as improvidently granted because this Court lacks jurisdiction to consider this appeal.

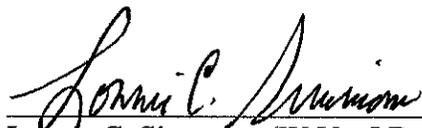
#### IV.

#### Conclusion

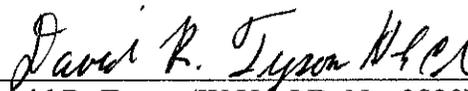
For the foregoing reasons, Appellee Stephen Westley Hatfield respectfully asks this Court either to deny this appeal as being improvidently granted, based upon this Court's lack of jurisdiction, or to affirm the trial court's ruling on the merits.

**STEPHEN WESTLEY HATFIELD**, Appellee,

-By Counsel-



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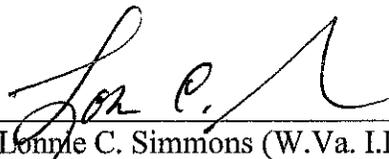
<sup>5</sup>As noted previously, this **SUPPLEMENTAL ORDER** largely parrots the findings of fact and conclusions of law already adopted by the trial court in the January 31, 2005 order. Therefore, this **SUPPLEMENTAL ORDER** was unnecessary.

**CERTIFICATE OF SERVICE**

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **APPELLEE'S BRIEF** was served on counsel of record on the 4<sup>th</sup> day of January, 2008, through the United States Postal Service, at the following addresses:

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