

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

MICHAEL O'DELL DENNIS,)

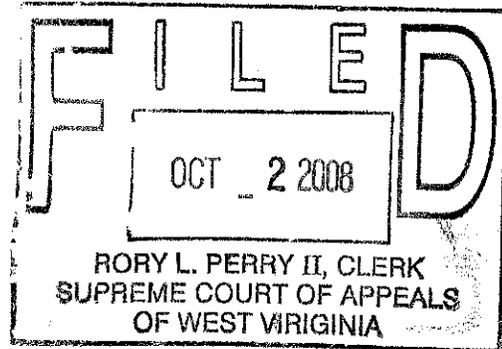
Appellant,)

v.)

STATE OF WEST VIRGINIA, DIVISION OF)
CORRECTIONS, TERESA WAID, WARDEN,)
HUTTONSVILLE CORRECTIONAL CENTER))

Appellees.)

Supreme Court No. 34273



APPEAL

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APPEAL BRIEF

**TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA**

COMES NOW the Appellant, Michael Dennis, by and through undersigned counsel, and hereby petitions this Honorable Court to grant his appeal and overturn the decision of the Ohio County Circuit Court denying his *habeas corpus* petition, and to grant his petition for *habeas corpus* and adjust his sentence accordingly.

I. BRIEF SUMMARY OF APPEAL

The Appellant challenges the denial of his *habeas corpus* petition which challenged the constitutionality of a robbery sentence imposed upon the Appellant. The Circuit Court erroneously concluded that the challenges raised by the Appellant had been previously adjudicated or waived. Yet, the Circuit Court made no findings to support its conclusion dismissing the petition. Moreover, the Circuit Court erred in that none of the grounds raised has been previously waived or adjudicated.

Additionally, the Circuit Court's refusal to hear the petition erroneously upheld a constitutionally impermissible sentence that both deprived the Appellant of credit for the time he served on the robbery while it ran concurrently and that requires the Appellant to serve more time following his successful appeal of the robbery conviction than he would have served had he never appealed. Appellant was sentenced in 2001 to serve 5-18 years for robbery. That sentence was ordered to run concurrently to a kidnapping sentence imposed as a result of the same trial. Following an appeal, the robbery sentence was overturned. The Appellant was recharged. In March 2006, the Appellant entered a Kennedy plea to the robbery charge, other charges were dismissed. When he was sentenced this time, however, the Circuit Court ordered that the robbery sentence thereafter would run consecutively to the kidnapping sentence, even though it had been running concurrently to the kidnapping sentence prior to that point. The Circuit Court also refused to make any specific ruling as to how much time Appellant would be credited for the time he had already served on the robbery sentence during the period it ran concurrently to the kidnapping sentence. Instead, the Circuit Court directed the Division of Corrections to make that determination -- although, the Court did appear to require the Division to grant the Appellant credit for all of the time he had served up from July 2001 until March 2006.

The Parole Board, however, established a sentence for the Appellant which denied the Appellant any credit for the time he had already served on the robbery sentence. This impermissibly deprived the Appellant of credit for the time he had served and impermissibly increased the sentence he would serve as a result of his successful appeal.

The Circuit Court's refusal to hear this matter means that the Appellant continues to face a sentence that is constitutionally too long (five additional years), and that he has been impermissibly denied prior time credits he earned toward that sentence.

II. ASSIGNMENTS OF ERROR

Appellant Michael Dennis assigns the following errors to the Circuit Court's April 3, 2008 decision:

1. The Circuit Court erred by dismissing the *habeas corpus* petition without making any of the findings necessary to support its one sentence conclusion.
2. The Circuit Court erred by dismissing the *habeas corpus* petition on the erroneous ground that the challenges raised by the Appellant had been previously waived or adjudicated.
3. The Circuit Court erred by not granting the *habeas corpus* petition even though it erroneously directed the Parole Board to determine the appropriate length of the Appellant's sentence and it erroneously failed to correct the Parole Board decision even after the Board interpreted the sentencing order in such a way as to violate the United States and West Virginia Constitutions by (1) impermissibly depriving the Appellant of credit for time he already served on the robbery sentence prior to his appeal, and (2) impermissibly imposing a harsher sentence on the Appellant after his appeal than he received prior to his appeal
4. Alternatively, the Circuit Court erred by not granting the *habeas corpus* petition even though the Circuit Court's sentencing order violated the West Virginia and United States Constitutions by (1) impermissibly depriving the Appellant of credit for time he already served on the robbery sentence prior to his appeal, and (2) impermissibly imposing a harsher sentence on the Appellant after his successful appeal than he received prior to his appeal.
5. The Circuit Court also erred by not granting the *habeas corpus* petition even

though the Circuit Court's sentencing order erroneously ordered that the re-imposed robbery sentence run consecutively to the kidnapping charge rather than concurrently to the kidnapping charge, as it had been running prior to the Appellant's successful appeal of the robbery sentence.

III. BRIEF RECITATION OF PERTINENT FACTS AND PROCEDURAL POSTURE

1. The Appellant, Michael Dennis, was arrested on July 24, 2001.

2. On September 21, 2001, Appellant Dennis was indicted for violation of W.Va. Code § 61-2-14a (kidnapping), W.Va. Code § 61-2-12(a) (robbery in the first degree), two counts of W.Va. Code § 61-8B-4(a)(1) (sexual assault in the second degree), W.Va. Code § 61-2-14 (abduction with intent to defile), W.Va. Code § 48-2A-10d (violation of protective order), and W.Va. Code § 61-2-28(a) (domestic battery).

3. After jury trial, Ohio County Circuit Court Case No. 01-F-77, Appellant Dennis was convicted of (1) kidnapping under W.Va. Code § 61-2-14a; (2) two counts of sexual assault in the second degree under W.Va. Code § 61-8B-4(a)(1); (3) robbery in the second degree under W.Va. Code § 61-2-12(b); (4) violation of protective order under W.Va. Code § 48-2A-10d; and (5) domestic battery under W.Va. Code § 61-2-28(a).

4. On September 19, 2002, Appellant Dennis was sentenced by the Honorable Arthur M. Recht of the Ohio County Circuit Court:

- (1) To serve life with mercy on the kidnapping conviction;
- (2) To serve 10-25 years on each of the two sexual assault convictions;
- (3) To serve 5-18 years on the second degree robbery conviction;
- (4) To serve one year on the violation of protective order conviction; and
- (5) To serve one year on the domestic battery conviction.

5. The Circuit Court ordered that Appellant Dennis serve the kidnapping and sexual assault sentences consecutively, but held that each of the other sentences, including the robbery sentence, would run concurrently to the kidnapping charge. See Exhibit 1.
6. Appellant Dennis appealed the verdict to this Honorable Court.
7. On December 1, 2004, this Honorable Court overturned the convictions for sexual assault and robbery, but affirmed the convictions for kidnapping, domestic battery and violation of protective order. See State v. Dennis, 216 W.Va. 331, 607 S.E.2d 437 (2004) (Supreme Court No. 31578). By that time, Appellant Dennis had served 1226 days toward his kidnapping sentence. More importantly, those same days applied independently to his robbery, violation of protective order, and domestic battery sentences, which were running concurrently with the kidnapping sentence. Consequently, by that time, Appellant Dennis had completed his violation of protective order and domestic abuse sentences, and had served more than three years of his robbery sentence.
8. After the appeal, the state re-charged Appellant Dennis with the two counts of sexual assault and the one count of robbery in the second degree.
9. On March 24, 2006, Appellant Dennis entered a plea, as allowed by Kennedy v. Frazier, 178 W.Va. 10, 357 S.E.2d 43 (1987), of guilty to second degree robbery. The state dismissed the sexual assault charges with prejudice.
10. Judge Recht again sentenced Appellant Dennis to serve 5-18 years on the robbery charge. However, despite the fact that the pre-appeal robbery sentence had been running concurrently with the kidnapping sentence, the Circuit Court ordered that the robbery sentence would now run consecutively to the kidnapping sentence.
11. Judge Recht also refused to make any finding, either pro or con, as to whether or

not Appellant Dennis was entitled to credit for “concurrent time” served on the robbery sentence imposed under the initial verdict, prior to appeal. Instead, Judge Recht held that “the issue should be determined by the W.Va. Division of Corrections.” Judge Recht did, however, order that Appellant Dennis “shall receive credit for the time he has served to this point, beginning on July 23, 2001, and ending on March 24, 2006.” See Exhibit 2.

12. No appeal was taken from that decision, as the Appellant understood the decision to give him full credit for the time he had already served under the robbery sentence.

13. Sometime around September 2006, however, Appellant Dennis learned that the Parole Board apparently was refusing to credit him with any of the time he had already served on the robbery sentence. Indeed, the Parole Board established his parole eligibility date as July 25, 2016 rather than July 2011. The Parole Board arrived at the July 2016 date by combining the remaining portion of the minimum sentence Appellant Dennis must serve for kidnapping plus the full five year minimum for a robbery sentence. No reduction was made for the four plus years Appellant had already served on the robbery sentence.

14. Attempts to correct this matter with the Parole Board proved futile.

15. On January 29, 2007, Mr. Dennis brought civil suit in the Kanawha County Circuit Court (Dennis v. West Virginia Parole Board, et al., Case No. 07-C-209), which sits where the Parole Board is located, challenging the Parole Board’s decision. The Kanawha County Circuit Court dismissed that action on March 21, 2007, on the basis that the Appellant could not establish a legal entitlement to relief from a criminal sentence in a civil proceeding. The Circuit Court did not address the merits of the Appellant’s sentence or how it had been determined or implemented. See Exhibit 3.

16. An appeal was filed (Dennis v. West Virginia Parole Board, et al., Supreme Court

No. 071598). On October 24, 2007, this Honorable Court refused to hear that appeal.

17. On February 29, 2008, Appellant filed a petition for *habeas corpus* with the Ohio County Circuit Court. In that *habeas corpus* petition, the Appellant alleged:

A. That the Parole Board's interpretation of the sentencing order (1) improperly requires the Appellant to serve more time than he is required under the sentencing order, and/or (2) violates the United States and West Virginia Constitutions by depriving the Appellant of credit for time he served on the robbery sentence and by causing the robbery sentence imposed after appeal to be greater than the sentence the Appellant faced prior to the appeal;

B. That the sentencing order violates the United States and West Virginia Constitutions by depriving the Appellant of credit for time he served on the robbery sentence and/or by causing the robbery sentence imposed after appeal to be greater than the sentence the Appellant faced prior to the appeal; and

C. That the sentencing order violates the United States and West Virginia Constitutions by causing the robbery sentence to run consecutively to the kidnapping sentence, rather than concurrently to the kidnapping sentence.

See Exhibit 4.

18. The *habeas corpus* petition sought, alternatively, (1) that the Appellant's parole date be re-established to credit his robbery sentence with the time he served between July 23, 2001 and March 24, 2006 or (2) that the sentencing order be amended to require that the robbery sentence run concurrently to the kidnapping sentence. See Exhibit 4.

19. Along with the *habeas corpus* petition, the Appellant, who proceeds *in forma pauperis*, also filed a request for appointment of additional counsel to address issues related to ineffective assistance of counsel -- Appellant's current counsel represented Appellant in the matters at issue and believes that additional counsel is needed to properly address the issue of ineffective assistance of counsel. In that regard, Appellant's petition also sought leave of the

Court to amend the petition to allow such additional counsel to add those issues to the *habeas corpus* petition. See Exhibit 5.

20. On April 3, 2008, the Circuit Court denied the *habeas corpus* petition. The Court's entire reasoning was as follows:

In accord with the requirements of Rule 4(c) of the West Virginia Rules Governing Post Conviction Habeas Corpus, this Court has examined the Petition and the underlying criminal matters and has concluded the grounds for relief the Petitioner has asserted have been previously and finally adjudicated or waived.

See Exhibit 6. No other findings were made and none of the Appellant's contentions was individually addressed.

21. The Circuit Court did not address the motion for additional counsel.

22. This appeal followed.

IV. BRIEF STATEMENT OF LAW

In his *habeas corpus* petition, the Appellant challenged the sentence he received as a result of his plea of guilty to robbery in the second degree. The Appellant identified the following errors: (1) that the Circuit Court erred by directing the Parole Board to determine the appropriate length of the Appellant's sentence and by then failing to correct the Parole Board's decision even after it became clear that the Parole Board had implemented the order in such a way that violated the United States and West Virginia Constitutions and West Virginia code; (2) that, if the Parole Board interpretation/implementation of the sentencing order is the interpretation that the Circuit Court intended, then the Circuit Court erred by issuing the sentencing order, which fails to credit the Appellant with the time he already served on the robbery sentence; and (3) that the Circuit Court erred by ordering the robbery sentence to run consecutively to the kidnapping sentence even though that sentence had been running concurrently with the

kidnapping sentence prior to the Appellant's successful appeal of his conviction for robbery. Additionally, the *habeas corpus* petition sought leave to add a ground based on ineffective counsel to address the advice the Appellant received regarding these same issues.

The Circuit Court dismissed the *habeas corpus* petition by concluding, without any supporting findings, that each of these grounds had been previously adjudicated or waived. However, the Circuit Court erred (1) by dismissing the *habeas corpus* petition without first making any of the findings that are necessary to support the Court's decision; (2) by concluding that the grounds raised in the *habeas corpus* petition had been previously adjudicated or waived; and (3) by failing to grant the *habeas corpus* petition.

A. THE CIRCUIT COURT ERRED BY DISMISSING THE *HABEAS CORPUS* PETITION WITHOUT MAKING ANY FINDINGS TO SUPPORT ITS CONCLUSION

The Circuit Court erred in its decision to deny the *habeas corpus* petition, in that the Circuit Court failed to make any findings of fact or conclusions of law to support its decision. Indeed, the Circuit Court's entire reasoning was as follows:

In accord with the requirements of Rule 4(c) of the West Virginia Rules Governing Post Conviction Habeas Corpus, this Court has examined the Petition and the underlying criminal matters and has concluded the grounds for relief the Petitioner has asserted have been previously and finally adjudicated or waived.

No other findings were made and none of the Appellant's contentions was individually addressed.

Habeas corpus petitions are controlled by the West Virginia Post Conviction Habeas Corpus Act, which was enacted at W.Va. Code §§ 53-4A-1, *et seq.* Under that Act, *habeas* relief is available, *inter alia*, where a court's sentencing order denies or infringes an Appellant's constitutional rights or the sentence exceeds the legal maximum. Pethel v. McBride, 219 W.Va.

578, 589, 638 S.E.2d 727, 738 (2006); W.Va. Code § 53-4A-1. Those are the claims made by the Appellant in his petition.

However, a *habeas corpus* petition may only be filed if the grounds upon which it is based have not been “previously and finally adjudicated or waived.” According to the code and this Honorable Court, “[i]f a circuit court finds that a Petitioner is ‘entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall by order entered or record refuse to grant a writ, and such refusal shall constitute a final judgment.’” Markley v. Coleman, 215 W.Va. 729, 733, 601 S.E.2d 49, 53 (2004) (quoting W.Va. Code § 53-4A-3(a) (1981)). However, this Honorable Court went on to hold that:

The circuit court’s dismissal order must contain “specific findings of fact and conclusions of law as to the manner in which each ground raised in the petition has been previously and finally adjudicated and/or waived.”

Markley, 215 W.Va. at 733, 601 S.E.2d at 53 (quoting Rule 4(c), Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia (1999)). More specifically, the Court held that:

In deciding to grant or deny relief, circuit courts must make adequate findings of fact and conclusions of law related to the petitioner’s habeas corpus allegations. “A circuit court denying or granting relief in a habeas corpus proceeding is statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by petitioner, and to state the grounds upon which the matter was determined.”

Markley, 215 W.Va. at 55, 601 S.E.2d at 735 (quoting Syllabus Point 1, State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997)). The decision of the Circuit Court in this instance fails to satisfy these requirements. Indeed, the Circuit Court’s decision makes no findings of fact at all and presents no conclusions of law other than the conclusory statement that the grounds

raised had been previously adjudicated or waived. Thus, the Circuit Court's decision fails to satisfy the requirements of Markley, Watson and the West Virginia Post Conviction Habeas Corpus Act. Accordingly, the Circuit Court's decision should be overturned.

B. THE CIRCUIT COURT ALSO ERRED BY CONCLUDING THAT THE MATTERS RAISED BY THE APPELLANT HAD BEEN PREVIOUSLY ADJUDICATED OR WAIVED

Putting aside the issue of the lack of factual and legal findings, the Circuit Court's conclusion was itself erroneous. According to the Court, each of the grounds raised by the Appellant had been previously adjudicated or waived. However, this is not correct. The Appellant asserted three grounds for relief in his *habeas corpus* petition and sought permission to add a fourth after the appointment of additional counsel. None of those grounds was previously adjudicated or waived.

1. THE *HABEAS CORPUS* PETITION'S FIRST GROUND FOR RELIEF WAS NOT PREVIOUSLY ADJUDICATED OR WAIVED

The first ground raised by the Appellant's *habeas corpus* petition was a challenge to the Parole Board's interpretation/implementation of the sentencing order. The *habeas corpus* petition explained that the Parole Board's interpretation/implementation of the sentencing order resulted in the imposition of a sentence that violated the West Virginia and United States Constitutions by (1) impermissibly depriving the Appellant of credit for the time he already served, and (2) impermissibly imposing a harsher sentence on the Appellant after his successful appeal than he received prior to his appeal.

In rejecting the *habeas corpus* petition, the Circuit Court concluded that this ground had been previously adjudicated or waived. Yet, that is not correct. Indeed, the merits of this challenge have never been ruled upon by any Circuit Court, or indeed any court, and the Appellant never failed to challenge this issue immediately upon the discovery of the Parole

Board's actions.

a. THE MERITS OF THE *HABEAS CORPUS* PETITION'S FIRST GROUND HAVE NEVER BEEN ADJUDICATED

The *habeas corpus* petition's first ground, that the Parole Board's interpretation/implementation of the sentencing order violated the West Virginia and United States Constitutions has never been previously adjudicated. When the Appellant learned of the Parole Board's decision, the Appellant filed suit in Kanawha County Circuit Court to challenge the agency's decision. That suit was dismissed by the Kanawha County Circuit Court on the basis that the challenge made could not be adjudicated through a civil proceeding. See Dennis v. West Virginia Parole Board, et al., Case No. 07-C-209 (Kanawha County Circuit Court). This Honorable Court refused to hear the subsequent appeal of that decision. See Dennis v. West Virginia Parole Board, et al., Supreme Court No. 071598. Neither the Kanawha County Circuit Court, nor this Honorable Court, addressed the merits of the Appellant's challenge to the Parole Board's actions. No other courts have ever examined this issue either. Thus, this matter has never been adjudicated. See State ex rel. Hall v. Liller, 207 W.Va. 696, 699, 536 S.E.2d 120, 123 (2000) (the rejection of a petition for appeal is not generally a decision on the merits).

b. THE *HABEAS CORPUS* PETITION'S FIRST GROUND WAS NOT WAIVED

The *habeas corpus* petition's first ground, that the Parole Board's interpretation/implementation of the sentencing order violated the West Virginia and United States Constitutions has never been waived either. Indeed, this issue could not have arisen until after the Parole Board interpreted the sentencing order in such a manner as to deprive the Appellant of credit for the time he had served. Once the Appellant learned that the Parole Board had implemented the sentencing order in such a manner, the Appellant promptly sought to challenge

the Parole Board's decision through the Kanawha County Circuit Court civil suit -- which the Appellant believed to be a necessary exhaustion of what appeared to be administrative remedies created by the sentencing order. Following that challenge, the Appellant filed a timely *habeas corpus* petition with the Ohio County Circuit Court. At no time did the Appellant ever fail to raise this issue on appeal.

The state likely will argue that the Appellant should have challenged the sentencing order itself. However, at the time the sentencing order was issued, the sentencing order appeared to grant the Appellant credit for the time he had served. Indeed, the sentencing order provided that Appellant Dennis "shall receive credit for the time he has served to this point, beginning on July 23, 2001, and ending on March 24, 2006." Thus, there was no reason to challenge the sentencing order at that time, because the violation of his rights did not occur until the Parole Board chose to interpret the order in such a way that deprived the Appellant of the time credits he had earned -- an interpretation that appears to be in direct contradiction to the sentencing order.

Moreover, the sentencing order itself does not even purport to be the final order on the issue of the length of the sentence, in that the sentencing order not only refused to make any ruling, either pro or con, on the issue of "concurrent time," it actually held that the Parole Board would decide the issue (and, with it, the ultimate length of the sentence): "the issue should be determined by the W.Va. Division of Corrections." Thus, the sentencing order cannot fairly be called a final decision on this issue, and it would be unjust to argue that the Appellant's attempt to redress the constitutional violation of his rights should be barred by an alleged failure to appeal that order.

The Appellant never waived this challenge. Accordingly, the Circuit Court's decision is erroneous and should be overturned.

2. THE *HABEAS CORPUS* PETITION'S SECOND GROUND FOR RELIEF WAS NOT PREVIOUSLY ADJUDICATED OR WAIVED

The second ground raised by the Appellant's *habeas corpus* petition was that in the event that the Circuit Court considered the Parole Board's interpretation of the sentencing order to be correct, then the sentencing order itself violated the United States and West Virginia Constitutions by depriving the Appellant of credit for time he served on the robbery sentence and/or by causing the robbery sentence imposed after appeal to be greater than the sentence the Appellant faced prior to the appeal. As with the first ground, this second ground was not previously adjudicated or waived. Thus, again, the Circuit Court's decision was in error.

The merits of this challenge have never been ruled upon by any Circuit Court or by this Honorable Court. Nor has the Appellant waived his right to make such a challenge. While the state again will argue that the Appellant could have appealed this issue at the time the sentencing order was issued, that assertion would be incorrect. As noted above, the sentencing order, as written, appeared to give the Appellant the time credit which the Parole Board subsequently denied. In fact, the sentencing order specifically provided that Appellant Dennis "shall receive credit for the time he has served to this point, beginning on July 23, 2001, and ending on March 24, 2006." Thus, at the time the sentencing order was issued, the Appellant had no reason to make the challenge he had to make in his *habeas corpus* petition. It was not until the Parole Board refused to grant the Appellant any credit for that time, that this became an issue. Following that discovery, the Appellant filed a timely *habeas corpus* petition to raise that point. Thus, the Appellant did not waive this challenge.

Moreover, as noted above as well, it was not clear that an appealable final decision had even been issued at that time because the Circuit Court expressly refused to make any findings, either pro or con, regarding the issue of the amount of "concurrent time" that would be credited

to the Appellant. Instead, the Circuit Court ordered that this “issue should be determined by the W.Va. Division of Corrections.”

Consequently, the Circuit Court erred when it concluded that this challenge had been previously adjudicated or waived, and the Circuit Court’s decision should be overturned.

3. THE *HABEAS CORPUS* PETITION’S THIRD GROUND FOR RELIEF WAS NOT PREVIOUSLY ADJUDICATED OR WAIVED

The third ground raised by the Appellant’s *habeas corpus* petition was that the Circuit Court erred when it converted the robbery sentence from one running concurrently to the kidnapping sentence to one running consecutively to the robbery sentence. After the sentencing order was issued, the Appellant initially filed a Rule 35 request for a correction of the sentencing order to undo this conversion. The Circuit Court denied that request. However, no appeal was taken from that denial because the sentencing order appeared to make moot the need for an appeal because it ordered that the Appellant would receive credit for the time he had already served up to the date of sentencing. Specifically, the sentencing order provided that Appellant Dennis “shall receive credit for the time he has served to this point, beginning on July 23, 2001, and ending on March 24, 2006.” This appeared to make an appeal unnecessary because Appellant Dennis had already served almost the entire minimum sentence for the robbery by March 24, 2006. It was not until the subsequent decision of the Parole Board refusing to grant the Appellant any time credit that the Appellant first learned that the sentencing order apparently did not give the Appellant credit for the time he served, despite containing language to the contrary. Thus, it was not until the Parole Board acted that the issue of the conversion from concurrent to consecutive became relevant. Therefore, this matter was neither previously waived nor finally adjudicated.

For these reasons, the Circuit Court’s decision should be overturned.

4. THE ISSUE OF INEFFECTIVE COUNSEL ALSO HAS NOT BEEN PREVIOUSLY ADJUDICATED OR WAIVED

Finally, the Appellant moved the Circuit Court to appoint additional counsel, who could add ineffective assistance of counsel as another ground to the *habeas corpus* petition¹, and moved for leave to allow such counsel to add that ground to the petition. Indeed, if the other challenges made in the *habeas corpus* petition proved to be legally incorrect or were waived, then the Appellant's right to the effective assistance of counsel was violated by the failure of his counsel to provide proper advice on the issues of (1) whether or not to appeal, (2) whether the new robbery sentence could be made to run consecutively, (3) the proper calculation of the length of sentence the Appellant would face after entering his plea, (4) whether the Appellant was entitled to credit for the time already served, and (5) the date he would first become eligible for parole if he accepted the plea agreement offered. The issue of ineffective counsel has never been raised before in any prior proceeding, nor was that issue ripe prior to the actions of the Parole Board or until the Circuit Court upheld the decision of the Parole Board. Nevertheless, the Circuit Court denied the *habeas corpus* petition, and consequently this fourth ground for the petition, on the basis that each of the grounds raised had been previously waived or adjudicated. Thus, the Circuit Court's conclusion was erroneous and the Circuit Court's decision should be overturned.

C. THE CIRCUIT COURT ERRED BY NOT GRANTING THE *HABEAS CORPUS* PETITION

The Appellant asserted three grounds for relief in his *habeas corpus* petition. Each of those grounds justified the relief sought. Consequently, the Circuit Court erred by not granting the *habeas corpus* petition.

¹ However, as counsel for the Appellant is the counsel who advised the Appellant on these matters, Appellant requested the appointment of additional counsel to address these issues and sought leave of the Circuit Court to add these grounds after such counsel could be appointed.

1. THE CIRCUIT COURT ERRED BY DIRECTING THE PAROLE BOARD TO DETERMINE THE APPELLANT'S SENTENCE AND BY FAILING TO CORRECT THE PAROLE BOARD'S DECISION EVEN THOUGH IT VIOLATED THE STATE AND FEDERAL CONSTITUTIONS

The Circuit Court erred by directing the Parole Board to determine the appropriate length of the Appellant's sentence. The Circuit Court compounded this error by failing to correct the Parole Board's decision, even after the Parole Board interpreted/implemented the sentencing order in such a way as to violate the United States and West Virginia Constitutions and West Virginia code. Thus, the Circuit Court erred by failing to grant the *habeas corpus* petition and correcting these constitutional violations.

a. THE CIRCUIT COURT ERRED INITIALLY BY DIRECTING THE PAROLE BOARD TO DETERMINE THE LENGTH OF THE APPELLANT'S SENTENCE

The Circuit Court erred initially in its sentencing order when the Court refused to make any findings regarding the amount of time to be credited to the Appellant's re-imposed robbery sentence for the time he had already served on the robbery sentence prior to the Appellant's successful appeal. Rather than make that determination itself, the Circuit Court erroneously ordered the Parole Board to make that determination. Indeed, the Circuit Court expressly refused to make any findings either pro or con as to whether or not the Appellant was entitled to credit for the "concurrent time." Instead, the Court held that "the issue should be determined by the W.Va. Division of Corrections." See Exhibit 2. However, West Virginia Code charges the Circuit Court, not the Parole Board, with the duty to determine the sentence to be imposed, including the amount of time to be credited for time served. W.Va. Code § 61-11-16. Thus, the Circuit Court's decision was erroneous and should have been overturned.

b. THE CIRCUIT COURT FURTHER ERROR BY NOT CORRECTING THE PAROLE BOARD'S DECISION AFTER THE PAROLE BOARD IMPOSED A CONSTITUTIONALLY IMPERMISSIBLE SENTENCE

The Circuit Court further erred by failing to correct the Parole Board's decision after the Parole Board interpreted/implemented the sentencing order in such a way as to violate the West Virginia and United States Constitutions. Indeed, despite the Circuit Court's guidance that the Appellant "shall receive credit for the time he has served to this point, beginning on July 23, 2001, and ending on March 24, 2006", the Parole Board imposed a sentence on the Appellant that failed to credit the Appellant with any of the time he had already served on the robbery sentence prior to his successful appeal. That failure caused the sentence imposed to violate the West Virginia and United States Constitutions by (1) impermissibly depriving the Appellant of credit for the time he already served and (2) impermissibly imposing a harsher sentence on the Appellant after his successful appeal than he received prior to his appeal. Thus, the Circuit Court erred by refusing to grant the *habeas corpus* petition and thereby correcting the decision of the Parole Board.

1. THE CIRCUIT COURT ERRED BY NOT OVERTURNING THE DECISION OF THE PAROLE BOARD, EVEN THOUGH THE SENTENCE IMPOSED IMPERMISSIBLY DEPRIVES THE APPELLANT OF CREDIT FOR TIME HE HAS SERVED

The Circuit Court erred by refusing to overturn the decision of the Parole Board once it became clear that the Parole Board's decision was in violation of the West Virginia and United States Constitutions, as well as West Virginia statutory law, by impermissibly depriving the Appellant of credit for time he already served on the robbery sentence prior to his appeal.

According to the prior decisions of this Honorable Court, the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that an inmate receive credit for the time they have served, both pre-trial and post-trial. State v. McClain, 211 W.Va. 61, 66, 561 S.E.2d 783, 788 (2002); State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991);

Martin v. Leverette, 161 W.Va. 547, 244 S.E.2d 39 (1978); W.Va. Const. Art. 3, § 5; W.Va. Const. Art. 3, § 10. West Virginia code and federal law contain similar requirements. See W.Va. Code § 61-11-24; U.S. Const. Amend. XIV; U.S. Const. Amend. V. The Parole Board, however, refused to credit the Appellant with any of the time he had already served on his robbery sentence prior to his successful appeal. Thus, the Parole Board's interpretation/implementation of the sentencing order violated the Appellant's constitutional and statutory rights. Accordingly, the Circuit Court erred by not granting the *habeas corpus* petition and correcting the Parole Board's decision.

In the Kanawha County Circuit Court action, the state suggested that Appellant Dennis was not entitled to credit for the time he served because the sentencing order provided that his robbery sentence would run consecutively to the kidnapping sentence. The state based this on State. v. Middleton, 220 W.Va. 89, 640 S.E.2d 152 (2006), which it cited for the proposition that "the time served credit applies to the total effective sentence, not separately to each component of the sentence." However, the state failed to consider that the Appellant's robbery sentence was running concurrently to the kidnapping sentence *until after the appeal*, at which time it was converted to run consecutively.² During that period of time, the Appellant was earning time credit toward the completion of his robbery sentence. Indeed, had the appeal been delayed long enough or never been filed, the Appellant would have completed the robbery sentence already (just as he completed the violation of protective order sentence).

Under both the state and federal constitutions, the Appellant is entitled to credit for the amount of time that sentence was reduced while the two sentences were running concurrently.

² Middleton addressed only the situation of the application of "presentence incarceration to a defendant receiving *consecutive sentences*," it did not address the situation of concurrent sentences in any way or of sentences that are converted from concurrent to consecutive sentences. Middleton, 220 W.Va. at 108, 640 S.E.2d at 171.

See McClain, 211 W.Va. at 66, 561 S.E.2d at 788; Roach, 185 W.Va. 23, 404 S.E.2d 415; Martin, 161 W.Va. 547, 244 S.E.2d 39; W.Va. Const. Art. 3, § 5; W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV; U.S. Const. Amend. V. To hold otherwise, would deprive the Appellant of credit he has earned and would require him to serve that time twice. That would be constitutionally impermissible. Id.

Thus, the Circuit Court erred by refusing to grant the *habeas corpus* petition and correcting the Parole Board's decision. Accordingly, the Appellant respectfully requests that this Honorable Court overturn the decision of the Circuit Court and issue a writ of *habeas corpus* to change the sentencing order to require that the Appellant receive credit for all of the time that he served on the robbery sentence while it was running concurrently to the kidnapping sentence.

2. THE CIRCUIT COURT ERRED BY NOT OVERTURNING THE PAROLE BOARD, EVEN THOUGH THE SENTENCE IMPERMISSIBLY IMPOSES A HARSHER SENTENCE ON THE APPELLANT THAN HE RECEIVED PRIOR TO HIS APPEAL

The Circuit Court also erred by not overturning the decision of the Parole Board once it became clear that the Parole Board's decision violated the West Virginia and United States Constitutions by impermissibly imposing a harsher sentence on the Appellant than he received prior to his appeal.

West Virginia law prohibits the imposition of a harsher sentence after re-conviction following a successful appeal than was imposed prior to appeal. State v. Gwinn, 169 W.Va. 456, 461, 288 S.E.2d 533, 537 (1982) (Syl. Pt. 1, "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."). Imposing a harsher sentence than was originally imposed violates both the West Virginia and United States Constitutions. See State v. Eden, 163 W.Va. 370, 382, 256

S.E.2d 868, 875 (1979); W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV.

In Eden, this Honorable Court dealt with this issue for the first time following then-recent decisions of the United States Supreme Court that limited the power of trial courts to impose greater sentences on re-conviction after successful appeals. First, the Court concluded that the West Virginia Constitution (and the United States Constitution) contains an “absolute right to *apply* for a writ of error, supersedeas or appeal.” Eden, 163 W.Va. at 382, 256 S.E.2d at 875 (citing U.S. Const. Amend. XIV, W.Va. Const. Art. 3, § 10, and W.Va. Const. Art. 8, § 4). The denial of that right to *apply* for relief “offends due process.” Id. Next, the Court noted that allowing a greater sentence to be imposed following a successful appeal would place an “impermissible burden” on that right to appeal. Eden, 163 W.Va. at 379-380, 256 S.E.2d at 873-874 (adopting the reasoning of Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), cert. denied, 390 U.S. 905, 88 S.Ct. 818 (1968)). The impermissible burden was the fear that an appeal could worsen the defendant’s position. That fear would act as a chilling factor on the defendant’s right to appeal:

It is clear to us that when a defendant refuses to prosecute an appeal to which he is entitled by law for fear he will receive a heavier sentence on retrial, he has been denied his right to appeal. The decision not to appeal is the defendant’s but the necessity of making the decision is forced upon him by the State. The State is in effect imposing conditions upon the defendant’s right to appeal by telling him that he has the right, but that by exercising it he risks a harsher sentence.

Eden, 163 W.Va. at 382, 256 S.E.2d at 875. Finally, the Court summed this up by holding that allowing a potentially increased sentence would violate a defendant’s right to appeal:

The fear of increased sentencing on retrial as punishment for prosecuting an appeal from his conviction fetters the defendant’s exercise of his right to appeal and violates due process, even in cases of nonconstitutional error.

Eden, 163 W.Va. at 380-381, 256 S.E.2d at 874 (citing and adopting North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969)). Thus, a defendant may not be subjected to a harsher sentence after appeal than was originally imposed.

To determine whether or not a harsher sentence is being imposed, one does not look to the technical length of the sentence, but instead one must look to the overall impact on the length of the sentence. See United States v. Williams, 651 F.2d 644, 647 (9th Cir. 1981) (“[i]n determining whether the second sentence is harsher than the first, we look not at the technical length of the sentence but at its overall impact on Williams” and “[w]hen the practical effect of a second sentence after retrial is to increase the amount of time the defendant would have served in prison under the original sentence, the sentencing judge has increased the severity of punishment and thus implicated the Pearce rule”) (citing Thurman v. United States, 423 F.2d 988, 989-90 (9th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 148 (1970); Gilbert v. United States, 401 F.2d 507, 508-09 (9th Cir. 1968); United States v. Markus, 603 F.2d 409, 413-14 (2nd Cir. 1979); United States v. Young, 593 F.2d 891, 893 (9th Cir. 1979); United States v. Mathis, 579 F.2d 415, 419 (7th Cir. 1978); Barnes v. United States, 419 F.2d 753, 754-55 (D.C. Cir. 1970); and North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969)).

When Appellant Dennis filed his appeal to the West Virginia Supreme Court, the robbery sentence was running concurrently to the kidnapping sentence. Consequently, the time left for Appellant Dennis to serve on the robbery sentence was being diminished. **Had the Appellant never appealed the robbery sentence or had the Court’s decision been delayed, the Appellant would already have served the minimum time required for that sentence.** However, the Parole Board refused to credit the Appellant with the time he served. Thus, if the Parole Board’s decision is upheld, the Appellant must serve the entire minimum sentence all

over again after he completes the minimum sentence for the kidnapping charge, even though he had already served most of that minimum sentence before his appeal. Said differently, whereas the Appellant would have completed his robbery sentence by July 2006 and then could have sought parole on the kidnapping sentence as early as July 2011 under the original pre-appeal sentence, under the new sentence he cannot even begin serving the robbery sentence until July 2011 and cannot seek parole until at least July 2016. Thus, the Parole Board's interpretation of the sentencing order will cause the Appellant to face a longer sentence for robbery post-appeal than he would have served had he never appealed the robbery sentence -- five years longer. This violates the West Virginia and United States Constitutions. See W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV; Gwinn, 169 W.Va. at 461, 288 S.E.2d at 537; Eden, 163 W.Va. at 382, 256 S.E.2d at 875; Pearce, 395 U.S. 711, 89 S.Ct. 2072. Therefore, the Circuit Court should have granted the *habeas corpus* petition and corrected the decision of the Parole Board so as to grant the Appellant credit for the time he already served prior to the March 24, 2006 sentencing order.

By failing to correct the decision of the Parole Board, the Circuit Court erroneously allowed its sentencing order to deprive the Appellant of constitutionally protected rights. Thus, the Circuit Court erred by refusing to grant the *habeas corpus* petition. Accordingly, the Appellant respectfully requests that this Honorable Court overturn the decision of the Circuit Court and issue a writ of *habeas corpus* to modify the sentencing order to require that the Appellant receive credit for all of the time that he served on the robbery sentence while it was running concurrently to the kidnapping sentence.

2. IN THE EVENT THE PAROLE BOARD CORRECTLY INTERPRETED THE SENTENCING ORDER, THEN THE SENTENCING ORDER ITSELF WAS ERRONEOUS

In the event that the Parole Board did not misinterpret the Circuit Court's order, then it is

the sentencing order itself that is in violation of the West Virginia and United States Constitutions. Indeed, as noted above, the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that an inmate receive credit for the time they have served, both pre-trial and post-trial. McClain, 211 W.Va. at 66, 561 S.E.2d at 788; Dietrick, 185 W.Va. 23, 404 S.E.2d 415; Leverette, 161 W.Va. 547, 244 S.E.2d 39; W.Va. Const. Art. 3, § 5; W.Va. Const. Art. 3, § 10. West Virginia code and federal law contain similar requirements. See W.Va. Code § 61-11-24; U.S. Const. Amend. XIV; U.S. Const. Amend. V. Yet, as interpreted by the Parole Board, the sentencing order gives no credit to the Appellant for any of the time he served on the robbery sentence prior to his successful appeal. The failure to credit the Appellant with that time violates the West Virginia and United States Constitutions and West Virginia Code. Thus, to the extent that the Parole Board has interpreted the sentencing order in a manner that is consistent with the Circuit Court's intent, the sentencing order itself was erroneous. Accordingly, the Circuit Court erred by denying the *habeas corpus* petition and thereby refusing to correct the sentencing order.

Moreover, as interpreted, the sentencing order also violates the West Virginia and United States Constitutions by imposing a harsher sentence upon the Appellant for the robbery conviction than he received when he was initially sentenced for robbery prior to the appeal. As also noted previously, West Virginia and federal law prohibit the imposition of a harsher sentence after re-conviction following a successful appeal than was imposed for the original sentence. Gwinn, 169 W.Va. at 461, 288 S.E.2d at 537 (Syl. Pt. 1); Eden, 163 W.Va. at 382, 256 S.E.2d at 875; W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV. This is because allowing a greater sentence to be imposed following a successful appeal would place an "impermissible burden" on the constitutional right to appeal. Eden, 163 W.Va. at 379-380, 256 S.E.2d at 873-

874 (adopting the reasoning of Patton, 381 F.2d 636); W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV. Therefore, the sentencing order, as interpreted, also places an “impermissible burden” on the Appellant’s right to appeal, which violates the West Virginia and United States Constitutions. See W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV; Gwinn, 169 W.Va. at 461, 288 S.E.2d at 537; Eden, 163 W.Va. at 382, 256 S.E.2d at 875; Pearce, 395 U.S. 711, 89 S.Ct. 2072; Patton, 381 F.2d 636. Thus, the Circuit Court erred by refusing to grant the *habeas corpus* petition and correcting the sentencing order accordingly.

For these reasons, the Appellant respectfully requests that this Honorable Court overturn the decision of the Circuit Court and issue a writ of *habeas corpus* to modify the sentencing order to require that the Appellant receive credit for all of the time that he served on the robbery sentence while it was running concurrently to the kidnapping sentence.

3. THE CIRCUIT COURT ERRED BY ORDERING THAT THE ROBBERY SENTENCE RUN CONSECUTIVELY TO THE KIDNAPPING SENTENCE

The Circuit Court also erred in its sentencing order by ordering that the re-imposed robbery sentence would run consecutively to the kidnapping sentence rather than concurrently to the kidnapping sentence, as it had been running prior to the Appellant’s successful appeal of the robbery sentence.

It is undisputed that when a defendant is convicted of multiple sentences, it lies within the discretion of the Circuit Court to determine whether those sentences should run consecutively or concurrently. State v. Manley, 212 W.Va. 509, 512, 575 S.E.2d 119, 122 (2002). However, that decision still must comply with the requirements of the West Virginia and United States Constitutions, both of which prohibit trial courts from imposing a greater sentence after re-conviction following a successful appeal than was imposed during the original sentence. See Gwinn, 169 W.Va. at 461, 288 S.E.2d at 537 (Syl. Pt. 1, “imposition by the sentencing court of

an increased sentence violates due process” and “original sentence must act as a ceiling above which no additional penalty is permitted”); Eden, 163 W.Va. at 382, 256 S.E.2d at 875; W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV. According to this Honorable Court, allowing a harsher sentence to be imposed following a successful appeal would place an “impermissible burden” on the constitutional right to appeal. Eden, 163 W.Va. at 379-380, 256 S.E.2d at 873-874 (citing Patton, 381 F.2d 636); W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV.

To determine whether or not a harsher sentence will be imposed, one does not look to the technical length of the sentence, but instead one must look to the overall impact on the length of the sentence. See Williams, 651 F.2d at 647 (“[i]n determining whether the second sentence is harsher than the first, we look not at the technical length of the sentence but at its overall impact on Williams” and “[w]hen the practical effect of a second sentence after retrial is to increase the amount of time the defendant would have served in prison under the original sentence, the sentencing judge has increased the severity of punishment and thus implicated the Pearce rule”) (citing Thurman, 423 F.2d at 989-90; Gilbert, 401 F.2d at 508-09; Markus, 603 F.2d at 413-14; Young, 593 F.2d at 893; Mathis, 579 F.2d at 419; Barnes, 419 F.2d at 754-55).

In this instance, the robbery sentence originally ran concurrently to the kidnapping sentence. As a result of that decision, the Appellant was earning time credit toward that sentence at the same time he was earning time credit toward the kidnapping sentence. Had he not appealed the robbery sentence, he would have served the minimum on the robbery sentence by July 2006, and would have been eligible for parole on the kidnapping sentence in July 2011. However, after the successful appeal of the robbery sentence, the Circuit Court re-imposed the same sentence, but ordered that the sentence run concurrently to the kidnapping sentence. Consequently, the Appellant, post appeal, must now serve the remainder of the robbery sentence

after he has completed the minimum sentence for the kidnapping. Said differently, rather than being eligible for parole in July 2011, the Appellant must now begin serving the robbery sentence at that time. When this is combined with the decision of the Parole Board/Circuit Court to not grant the Appellant any credit for the time he served on the robbery sentence while it was running currently, this means that the Appellant would not be eligible for parole until at least July 2016 -- five years after he would have been eligible for parole under the sentence imposed prior to his successful appeal. Thus, by changing the manner in which the sentence would run from concurrently to consecutively, the Circuit Court required the Appellant as a practical matter to serve an additional five years to complete the robbery sentence, even though the sentence itself was not technically longer.

Thus, by changing the robbery sentence from concurrent to consecutive, the March 24, 2006 sentencing order imposed a significantly harsher sentence upon the Appellant than he faced had he not appealed the robbery conviction. This is constitutionally impermissible. See W.Va. Const. Art. 3, § 10; U.S. Const. Amend. XIV; Gwinn, 169 W.Va. at 461, 288 S.E.2d at 537; Eden, 163 W.Va. at 382, 256 S.E.2d at 875; Pearce, 395 U.S. 711, 89 S.Ct. 2072; Patton, 381 F.2d 636. Consequently, the Circuit Court erred by ordering that the robbery sentence was to run consecutively rather than concurrently.

For these reasons, the Appellant respectfully requests that this Honorable Court overturn the decision of the Circuit Court and issue a writ of *habeas corpus* to order that the robbery sentence run concurrently to the kidnapping sentence.

V. CONCLUSIONS AND RELIEF SOUGHT

For the reasons cited herein, the Appellant respectfully contends that the Circuit Court erred in dismissing his *habeas corpus* petition and denying him a writ of *habeas corpus*.

Accordingly, the Appellant respectfully requests that this Honorable Court overturn the decision of the Circuit Court and grant a writ of *habeas corpus* as outlined herein.

Michael Dennis
Respectfully submitted,

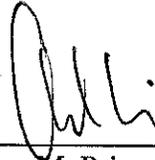


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VERIFICATION

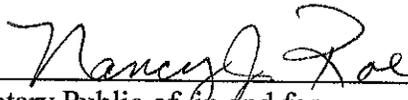
STATE OF WEST VIRGINIA,
COUNTY OF OHIO, TO-WIT

Andrew M. Price for the above-named Appellant, after having been by me, the undersigned authority, duly sworn according to law, says that the facts and allegations set forth within the foregoing Appeal Brief are true, except so far as they are therein stated to be on belief or information, and that so far as they are therein stated to be on belief or information, I believe them to be true.



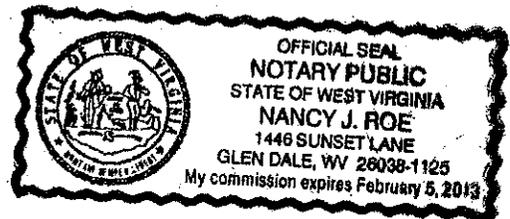
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Taken, sworn to and subscribed before me, the undersigned authority, in my County and State aforesaid, this 29th day of September 2008.



Notary Public of, in and for
The State of West Virginia

My Commission Expires: FEBRUARY 5, 2013



EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE