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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,  
ex rel. WARREN D. FRANKLIN,

Petitioner,

v.

Judge Thomas A. Bedell  
Case No. 06-C-377-2  
Underlying Case 86-F-238-2

THOMAS MCBRIDE, Warden,  
MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

**FINAL ORDER FROM OMNIBUS HEARING AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Presently pending before the Court is a Petition Under W. Va. Code 53-4A-1 for Writ of Habeas Corpus, which the Petitioner filed, *pro se*, on August 21, 2006. The Court subsequently appointed Counsel to represent the Petitioner in this proceeding, and accordingly received a "Supplemental Petition for Writ of Habeas Corpus," and Memorandum in Support, thereof, which Counsel filed on December 7, 2006. Furthermore, the Court is in receipt of the Respondent's Response, thereto, which Counsel filed on April 3, 2007.

On August 7, 2007, the Court held an omnibus hearings in this matter. After the August 7th hearing, the Court allowed the Petitioner additional time to gather more evidence in support of his Petition, and thus continued with its omnibus hearing on January 4, 2008. Thereafter, the Court received both the Petitioner's and Respondent's proposed findings of fact and conclusions of law, which were filed on March 28, 2008 and April 1, 2008, respectively.

After reviewing the Petitioner's Petition and the Respondent's Response, hearing testimony in the omnibus hearing, reviewing each party's proposed findings of fact and conclusions of law,

277 S.E.2d 606, 166 W.Va. 762 (1981): (a) prejudicial pre-trial publicity, (b) mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate, (c) consecutive sentence for same transaction, (d) State's knowing use of perjured testimony, (e) information in pre-sentence report erroneous, (f) ineffective assistance of counsel, (g) double jeopardy, (h) challenges to the composition of grand jury or its proceed, (i) lack of full public hearing, (j) claims concerning use of informers to convict, (k) constitutional errors in evidentiary rulings, (l) instructions to jury, (m) sufficiency of evidence, (n) acquittal of co-defendant on same charge, (o) excessive sentence, and (p) key defense witness was killed in the Harrison County Jail.<sup>1</sup>

4. The Petitioner has had a fair and full opportunity to litigate all of the above-mentioned grounds to this Court. However, as to the asserted grounds of consecutive sentence for same transaction, information in pre-sentence report erroneous, ineffective assistance of counsel, challenges to the composition of grand jury or its proceed, claims concerning use of informers to convict, constitutional errors in evidentiary rulings, instructions to jury, sufficiency of evidence, and acquittal of co-defendant on same charge, the Petitioner's evidence adduced at the two evidentiary hearings was merely a recitation of facts and allegations. Thus,

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<sup>1</sup>Pursuant to Syllabus Point 1 of *Losh v. McKenzie*, the Court notes that the Petitioner was advised of all possible grounds for post-conviction habeas corpus relief outlined in *Losh*. The Court provided to the Petitioner and his counsel a "Checklist of Grounds for Post-Conviction Habeas Corpus Relief" which advises the Petitioner to mark all grounds that he deems inapplicable and further advises that the grounds he wishes to raise in his petition must be initialed. Both the Petitioner and his counsel certified in writing that they consulted with each other and determined none of the grounds marked apply to the convictions the Petitioner is challenging. Therefore, in this Order, the Court addresses only those grounds which the Petitioner initialed.

these grounds for habeas corpus relief were wholly unsupported by the evidence. As such, the Court summarily denies any relief on these bases.

5. Therefore, in this Order the Court will only address the asserted grounds of prejudicial pre-trial publicity, mental competency at the time of trial cognizable even if not asserted at the proper time or if resolution not adequate, State's knowing use of perjured testimony, double jeopardy, excessive sentence, lack of full public hearing, and key defense witness killed in the Harrison County Jail.<sup>2</sup>
6. First, the Petitioner argues that the media coverage of the Moundsville Penitentiary riots made it impossible for him to receive a trial by an unbiased jury.
  - a. This exact issue was raised by the Petitioner in the Circuit Court of Marshall County, the original indictment jurisdiction. As such, hearings were held and the Marshall County Court moved the remainder of the proceedings, including the trial by jury, to Harrison County, West Virginia.
  - b. The Court would like to note that the Petitioner testified at the hearings that it seemed as though no public was present during his trial. This seems to rebut his argument that it was so extensively covered by the media that he was unable to get a fair trial in Harrison County.
  - c. Further, the Petitioner makes no specific allegations regarding any certain juror or incident which indicates juror bias against him; he made only a

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<sup>2</sup>This is not a particular ground contemplated in *Losh*. However, the *Losh* Court explained that the list of potential grounds for habeas corpus relief that it set forth is not exhaustive. "Here is our list but counsel should use his or her own imagination in developing further grounds." *Losh*, 166 W.Va. at 769, 277 S.E.2d at 611. Therefore, in the instant matter, the Court considers the Petitioner's additional asserted ground of key defense witness killed in the Harrison County Jail.

conclusory statement that because of the extensive news coverage, he was unable to receive a fair trial.

7. Second, the Petitioner alleges that his trial was defective because he was suffering from Post-Traumatic Stress Disorder and was unable to assist his trial counsel.
  - a. As support for this claim, the Petitioner testified that as a result of what he witnessed during the riot, he had difficulty understanding what counsel told him at his trial, he had difficulty eating, and had nightmares.
8. Third, the Petitioner alleges that the State knowingly used perjured testimony at his trial to obtain a conviction against him.
  - a. As support for this claim, the Petitioner alleges that the corrections officers knew that William ("Red") Snyder committed the murder, but charged Petitioner, Snyder, and another inmate in an attempt to compel his co-defendants to testify against Snyder.
  - b. Further, the Petitioner alleges that the witnesses at his trial gave conflicting testimony about the location of the murder and falsely stated that Petitioner was the assailant.
9. Fourth, the Petitioner alleges that following his conviction, he was placed in administrative segregation within the penitentiary in violation of the prohibitions against double jeopardy, excessive sentence, cruel and unusual punishment, and right to a public trial by an impartial jury, as guaranteed by the United States Constitution, Amendments Five, Eight, and Fourteen.
  - a. As support for these claims, the Petitioner alleges that his placement in administrative segregation denied him due process by violating his right

- against double jeopardy because the segregation was punishment for the same offense he was convicted of by the Harrison County Circuit Court.
- b. Further, although the Petitioner alleges that his placement in administrative segregation was cruel and unusual and excessive, his testimony lacked any facts to support these claims.
  - c. Additionally, the Petitioner alleges he was denied due process because he was denied direct access to the prison law library during his confinement in administrative segregation.
  - d. Lastly, the Petitioner alleges the hearing that resulted in the administrative segregation was a violation of his right to a public trial by an impartial jury because it was held by the Prison Magistrate and was closed to the public.
10. Lastly, the Petitioner alleges that his trial was defective because a key defense witness was killed in the Harrison County Jail.
- a. As support for his claim, the Petitioner alleges that he was under the impression that the testimony of inmate, John Perry,<sup>3</sup> would have implicated Red Synder as Kent Slie's murderer and would have exonerated him.<sup>4</sup> Further, the Petitioner alleges that John Perry was killed during Red Synder's trial and was therefore unavailable as a witness in his criminal trial.

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<sup>3</sup>A review of the records indicates that the inmate's name was Don Perry, however because the Petitioner refers to him as John Perry throughout the hearings, the Court will do the same for purposes of this Order.

<sup>4</sup> The Petitioner testified that he had the impression that John Perry's testimony would have exonerated him based upon a short conversation he had with Mr. Perry on the bus ride to Red Synder's criminal trial for the murder of Kent Slie.

- b. However, upon review of the records, the Court discovered that John Perry was killed in the Harrison County Jail on March 14, 1989, a year and ten days after the Petitioner herein was convicted for the murder of Kent Slie.<sup>5</sup> Therefore, Mr. Perry was alive and available to testify during the Petitioner's trial.

### Conclusions of Law

1. West Virginia Code § 53-4A-3(a) provides, in pertinent part, that "[i]f the petition, affidavits, exhibits, records and other documentary evidence attached thereto . . . show to the satisfaction of the court that the petitioner is entitled to no relief . . . the court shall by order entered of record refuse to grant a writ, and such refusal shall constitute a final judgment."
2. As to the issue of prejudicial pre-trial publicity, the Court finds no basis for granting habeas corpus relief based upon the news coverage of the Moundsville riot.
  - a. Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law. *Chandler v. Florida*, 449 U.S. 560 at 574, 101 S.Ct. 802, 66 L. Ed.2d 740 (1981).

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<sup>5</sup>A review of the records from the Sheriff's office indicates that Mr. Perry died in the Harrison County Jail on March 14, 1989, during case no. 89F-196. Therefore, because the date of Mr. Perry's death is not subject to reasonable dispute, the Court takes judicial notice of that fact in accordance with Rule 201 of the West Virginia Rules of Evidence.

- b. The Court finds that the Petitioner was not denied his right to a verdict based solely upon the evidence and the relevant law because the Marshall County Circuit Court removed the case to Harrison County to protect the Petitioner from extensive new coverage. As such, no one from the public was present during the trial.
      - c. Furthermore, the Court finds that the Petitioner was represented by counsel, and was present with counsel at all times while the jury was undergoing voir dire regarding their knowledge of the Petitioner, the victim, the witnesses or the riot in general. The Petitioner was permitted to utilize strikes to aid in the selection of the jury and had ample opportunity to object to the composition of the jury or any member thereon at the time of trial.
      - d. As such, the Petition is hereby denied upon this asserted ground for habeas corpus relief.
3. As to the issue of the Petitioner's mental competency at the time of trial, the Court finds no basis for granting habeas corpus relief based upon the Petitioner's allegation that he was suffering from Post-Traumatic Stress Disorder.
  - a. Criminal defendants have the right to be competent to stand trial and to be able to meaningfully participate in their own defense. *State v. Kent*, 213 W.Va. 535, 584 S.E. 169 (2003). Further, a Court may order a psychiatric evaluation at any stage of the proceedings, after the return of the indictment. W.Va. Code §27-6A-1-(a).
  - b. The Court finds that the Petitioner has had a fair and full opportunity to litigate this issue with the advise of counsel, and to present evidence to

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support said ground to this Court. The Court finds Petitioner's arguments were wholly unsupported by the evidence.

- c. Further, the Court finds that the Petitioner's trial counsel had ample opportunities to request the trial Court to order a mental competency evaluation and failed to request the same. To now, twenty years later claim that the Petitioner was suffering from Post-Traumatic Stress Disorder cannot be proven or dis-proven.
  - d. As such, the Petition is hereby denied upon this asserted ground for habeas corpus relief.
4. As to the issue of Petitioner's allegations that the State knowingly using perjured testimony, the Court finds no basis for granting habeas corpus relief.
- a. While there is little or no case law directly on point, it is normally assumed that the prosecuting attorney will perform his duties and exercise his powers consistent with his oaths. *Handbook on West Virginia Criminal Procedure*, Cleckley, 2<sup>nd</sup> Ed. Michie (1993).
  - b. The Court finds that the Petitioner merely made conclusory statements that the State use perjured testimony to obtain his conviction. The Petitioner provided no details to support his allegation, expect that the corrections officers knew he did not commit the murder.
  - c. Furthermore, the Petitioner gave no indication of which corrections officer he was taking such allegation against, how he now can prove that they were lying or whether the Prosecuting Attorney knew they were lying.

- d. As such, the Petitioner failed to prove that the corrections officers or the Prosecuting Attorney knowingly used perjured evidence.
  - e. Therefore, the Petition is hereby denied upon this asserted ground for habeas corpus relief.
5. As to the Petitioner's allegations that his placement in administrative segregation denied him due process by violating his right against double jeopardy, cruel and unusual punishment, excessive sentence, and right to a public trial by an impartial jury, the Court finds no bases for granting habeas corpus relief.
- a. Specifically, as to the Petitioner's double jeopardy argument, courts have long held that criminal prosecution does not preclude subsequent prison disciplinary sanctions for the same conduct under the double jeopardy clause of the Fifth Amendment because Congress intended disciplinary proceedings to be civil in nature. *Patterson v. United States*, 183 F.2d 327 (4<sup>th</sup> Cir. 1950).<sup>6</sup> Therefore, the Petitioner's argument that he has been subjected to double jeopardy because his placement in administrative segregation was punishment for the same crime the Circuit Court convicted him of, is without merit.
  - b. The Petitioner further contends that his placement in administrative segregation was cruel and unusual and excessive as prohibited under the

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<sup>6</sup> See *United States v. Mayes*, 158 F.3d 1215, 1222 (11<sup>th</sup> Cir. 1998); *United States v. Galan*, 82 F.3d 639, 640 (5<sup>th</sup> Cir. 1996); *United States v. Brown*, 59 F.3d 102, 103-5 (9<sup>th</sup> Cir. 1995); *United States v. Hernandez-Fundora*, 58 F.3d 802, 806-7 (2<sup>d</sup> Cir. 1995); *Garrity v. Fiedler*, 41 F.3d 1150, 1152-53, (7<sup>th</sup> Cir. 1994); *United States v. Newby*, 11 F.3d 1143, 1144-46 (3<sup>rd</sup> Cir. 1993).

Eighth Amendment of the United States Constitution. As a general matter, prohibited punishments under the Eighth Amendment include those which involve the "unnecessary and wanton infliction of pain," and conditions that are "grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.E.2d 59 (1981).

- c. The Eighth Amendment "not only outlaws excessive sentences but also protects inmates from inhumane treatment and conditions while imprisoned." *Williams v. Benjamin*, 77 E.3d 756, 761 (4<sup>th</sup> Cir. 1996). However, the Eighth Amendment "does not mandate comfortable prisons," *Rhodes*, 452 U.S. at 349, 101 S.Ct. at 2400. "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society" *Id.*, 452 U.S. at 347, 101 S.Ct. at 2399.
- d. To show an Eighth Amendment violation of the right against cruel and unusual punishment, the Petitioner must demonstrate (1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials.<sup>7</sup> Additionally there must be evidence of a serious medical and emotional deterioration attributable to the challenged condition.<sup>8</sup>

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<sup>7</sup> See *Strickler v. Waters*, 989 F.ed 1375, 1379 (4<sup>th</sup> Cir 1993) cert. denied 510 U.S. 949 (1993).

<sup>8</sup> *Id.* at 1380 (quoting *Lopez v. Robinson*, 914 F.2d 486, 490 (4<sup>th</sup> Cir. 1990)).

- e. Here, the Petitioner does not complain that he was denied adequate food or shelter nor that he was unprotected from harm. Rather, the Petitioner's complaints regarding the conditions in administrative segregation are that he was denied the same conveniences as the general prison population. In view of the foregoing authority, the Petitioner clearly does not state facts in support of his claim of cruel and unusual punishment and excessive sentence that would entitle him to relief.
- f. Additionally, the Petitioner asserts that his constitutional rights were violated because he was denied direct access to the prison law library during his confinement in administrative segregation. The United States Supreme Court discussed the right of prisoners to access to the law library in *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), making it perfectly clear that prisoners do not have a right *per se* to a law library or legal assistance. As such, to establish a constitutional violation on this basis, the Petitioner must demonstrate that the alleged denial to the law library or legal assistance program created some palpable actual injury. *Id.*
- g. Here, during the hearings the Petitioner merely stated he was denied access to the law library. Therefore, even if the Petitioner was so denied, he has failed to demonstrate any actual injury that resulted from the denial.
- h. Lastly, the Petitioner alleges the hearing that resulted in the administrative segregation was a violation of his right to a public trial by an impartial jury because it was held by the Prison Magistrate and was closed to the public.

As support for this claim the Petitioner cites the Fourteenth Amendment to the United States Constitution which prohibits a State from depriving "any person of life, liberty, or property, without due process of law."

- i. However, the range of protected liberty interests for defendants convicted and confined in prison are significantly reduced for the period of incarceration. See U.S. Const. amend. XIV, §1; *Gaston v. Taylor*, 946, F.2d 340, 343 (4<sup>th</sup> Cir. 1991). Further, "[t]he fact of conviction and imprisonment implies the defendant's transfer of his liberty to prison officials, who in their broad discretion, administer his sentence." *Cockerham v. Rubenstein*, Slip Copy 2008 WL 417999 (S.D.W.Va.) (citing *Gaston*, 946, F.2d at 343).
  - j. In the present case, prison officials were faced with the difficult task of regaining control of the prison after the unprecedented inmate riot that took place. Therefore, the Court concludes that the Prison Magistrate's placement of the Petitioner in administrative segregation after a hearing closed to the public was well within his broad discretion. Further, the Court finds that the hearing did not deny the Petitioner any of his liberty interests because his protected liberty interests were significantly reduced due to his incarceration.
  - k. Therefore, the Petition is hereby denied upon these asserted grounds for habeas corpus relief.
6. As to the Petitioner's allegation that a key defense witness was killed in the Harrison County Jail, the Court finds no bases for granting habeas corpus relief.

- a. The Court would like to note that there is little or no case law on point. However, because the record indicates that Mr. Perry, the key defense witness the Petitioner relies upon, was killed one year and ten days after the Petitioner's conviction, the Court finds Mr. Perry was alive and available to testify at the Petitioner's trial. As such, the Petitioner's argument has no merit and the Petition is hereby denied upon this asserted ground for habeas corpus relief.

Order

Accordingly, based on the foregoing, it is hereby **ORDERED** that the Petition for Writ of Habeas Corpus is **DENIED**.

It is further **ORDERED** that the Clerk of this Court deliver, by first class mail or other means, a certified copy of this Order to the following:

Warren D. Franklin  
Oak #2-235  
Mt. Olive Correctional Complex  
One Mountainside Way  
Mt. Olive, WV 25185

Greta Davis  
Harrison County  
Public Defender Corporation  
215 South Third St.  
Clarksburg, WV 26301

Jeffery Cramer, Prosecuting Attorney  
Marshall County Courthouse  
7<sup>th</sup> Street  
Moundsville, WV 26041

J.L. Hickok  
West Virginia Public Defender Services  
Building #3, Room 330  
1900 Kanawha Boulevard, E.  
Charleston, WV 25305-0730

ENTER: April 15, 2008

  
THOMAS A. BEDELL, Circuit Court Judge