

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

STATE EX REL. STANLEY M. MYERS,

Petitioner,

v.

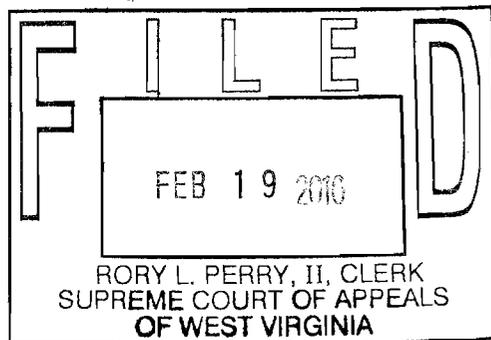
SUPREME COURT NO. 35473

THE HONORABLE GINA GROH, JUDGE, 23rd JUDICIAL CIRCUIT,

Respondent.

**PETITIONER'S BRIEF IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION**

**Underlying Case No. 09-F-127
Unrelated Underlying Criminal Action No. 95-F-44
From The Circuit Court Of Berkeley County, WV**



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**Stanley M. Myers
Petitioner, By Counsel**

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THE HONORABLE GINA GROH, JUDGE, 23rd JUDICIAL CIRCUIT,

Respondent.

Comes now the Petitioner, Stanley M. Myers, by and through his Counsel, James T. Kratovil, Esq., and hereby submits the Petitioner's Brief In Support Of Petition For Writ Of Prohibition, pursuant to Rule 10(a), W.Va. Rules of Appellate Procedure. The Petitioner respectfully requests that the Honorable Supreme Court of Appeals of West Virginia **GRANT** his Petition For Writ Of Prohibition, and thereby **PROHIBIT** the Respondent named herein above from permitting the State of West Virginia to admit into evidence, or to introduce through testimony or otherwise, or to utilize any portion or all of the Petitioner's 60-Day Presentence Evaluation Report in an upcoming criminal trial, Case No. 09-F-127, which is different, distinct and unrelated to the matter for which said Presentence Report was originally prepared and considered.

KIND OF PROCEEDING

The present action is an Original Jurisdiction Petition For Writ Of Prohibition, brought on by the Petitioner pursuant to WV Code § 53-1-1 and Rule 14(a), W.Va. Rules of Appellate Procedure. The Petitioner's Pro Se Petition in this matter was **GRANTED** by the Honorable West Virginia Supreme Court of Appeals, after the Court conducted a

review of said Petition at a Miscellaneous Motions Hearing held on January 28, 2010. This document represents the Petitioner's Brief In Support Of Petition, which is being filed pursuant to Rule 10(a), W.Va. Rules of Appellate Procedure, in accordance with this Court's Order in this matter, entered on January 28, 2010.

NATURE OF THE RULING IN THE LOWER TRIBUNAL

The Petitioner, by and through his Counsel, James T. Krativil, Esq., filed the "Defendant's In Limine Motion To Suppress Use of 60-Day Presentence Evaluation Report", in underlying Case No. 09-F-127, on August 18, 2009. The State of West Virginia filed its "Response In Opposition..." to the Defendant's Motion To Suppress and "Notice Of Intent To Use 404(b) Evidence", on August 29, 2009. A Pretrial Motions Hearing was held in the Circuit Court of Berkeley County, WV, in the underlying matter on November 10, 2009, at which time the Respondent, the Honorable Gina Groh, ruled in favor of the State, and denied the Petitioner's Motion To Suppress. The Respondent's ruling is embodied in the "Order From Pretrial Motions Hearing", dated November 10, 2009, and Entered on December 1, 2009, Exhibit 9, Appendix Of Exhibits. Essentially, that Order reflects that the Respondent will permit the State to introduce, at trial, statements allegedly made by the Petitioner during the course of his 60-Day Presentence Evaluation, and other information contained in the related Report, via expert testimony. (Order, p.2) In addition, that Order indicates that the Respondent may permit the State to introduce, at trial, other information contained in the Petitioner's 60-Day Evaluation Report, under the guise of 404(b) evidence, and the State has given Notice of its intention to do so. (Order, p.2) It is these actions on the part of the Respondent which the Petitioner

now seeks to **PROHIBIT**, in an effort to prevent the State from introducing or otherwise admitting all or any part of his 60-Day Presentence Evaluation Report at trial, via expert testimony or otherwise.

STATEMENT OF FACTS OF THE CASE

The Petitioner's 60-Day Pre-sentence Evaluation Report was prepared at the request of Defense Counsel at the Huttonsville Correctional Center, during the period from November through December, 1996, pursuant to W.Va. Code § 62-12-7a, as a requisite to the Petitioner's consideration for probation, prior to Sentencing in the unrelated underlying Criminal Action No. 95-F-44. [See "Motion To Continue Sentencing Hearing", 9/11/1996, Exhibit 1, Appendix Of Exhibits]

The Circuit Court, the Honorable Andrew Frye presiding, given the alternative of choosing between a pre-sentence evaluation (diagnosis and classification) report being prepared pursuant to W.Va. Code § 62-12-2(e) or W.Va. Code § 62-12-7a, granted the Defense Motion at a hearing held on September 17, 1996, and chose the latter, entering an Order to that effect on October 2, 1996. [See "Order", entered 10/02/1996, Exhibit 2, Appendix Of Exhibits]

Prior to the initiation of the Petitioner's 60-Day Pre-sentence Evaluation, both Defense Counsel, B. Craig Manford, Esq., and Appellate Counsel, Richard Gay, Esq., assured the Petitioner that nothing which he might disclose during the course of the 60-Day Evaluation would later be admissible against him in Court, should the Petitioner substantially prevail in his forthcoming Petition For Appeal in that matter.

The Petitioner's 60-Day Pre-sentence Evaluation Report, pursuant to W.Va. Code

§ 62-12-7a, was completed on December 16, 1996. Copies of the same were disclosed to the State and Defense Counsel for their review prior to Sentencing on February 21, 1997. [See Cover Page, 60-Day Evaluation Report, Exhibit 3, Appendix Of Exhibits.]

The Petitioner was sentenced to the maximum term of incarceration in that criminal matter. After Sentencing, the Circuit Court “sealed” the Petitioner’s 60-Day Pre-sentence Evaluation Report in the Court’s files. The State of West Virginia, as a part of Discovery in a subsequent Habeas Corpus proceeding (Case No. 98-C-96), succeeded in having the 60-Day Pre-sentence Evaluation Report “unsealed.” [See “Motion To Unseal...”, 03/15/99, Exhibit 4, Appendix Of Exhibits.]

The Petitioner was Indicted in the May, 2009, term of the Berkeley County, WV, Grand Jury for the felony charge of failing to register as a sex offender and the misdemeanor charge of contributing to the delinquency of a minor. (Case No. 09-F-127)

On August 18, 2009, the Petitioner’s Counsel, James T. Kratovil, Esq., submitted the “Defendant’s In Limine Motion To Suppress Use Of 60-Day Pre-sentence Evaluation Report”, seeking to have the Circuit Court of Berkeley County, WV, restrain the State from utilizing said Report as evidence in the forthcoming trial in Case No. 09-F-127, which had been scheduled for February 09, 2010. [See “Defendant’s In Limine Motion”, 8/18/2009, Exhibit 5, Appendix Of Exhibits.] However, the State, in its “Response In Opposition To Motion In Limine” [Exhibit 6, Appendix Of Exhibits] and “Notice Of Intent To Use 404(b) Evidence” [Exhibit 7, Appendix Of Exhibits] filed on August 29, 2009, indicated its intention to utilize information contained in the Petitioner’s 60-Day Pre-sentence Evaluation Report in the upcoming trial of the underlying matter herein.

Counsel for the Petitioner filed the “Defendant’s Reply To State’s Motion In Opposition To Motion In Limine”, on October 6, 2009, in a continuing effort to prevent the State from admitting the Petitioner’s 60-Day Pre-sentence Evaluation Report into evidence at trial. [See “Defendant’s Reply To State’s Motion In Opposition...”, October 6, 2009, Exhibit 8, Appendix Of Exhibits.]

At a Pretrial Motions Hearing held on November 10, 2009, the Respondent denied the “Defendant’s In Limine Motion To Suppress...”, thus permitting the State to utilize portions of Petitioner’s 60-Day Pre-sentence Evaluation Report as admissible evidence, via expert testimony, at trial. [See “Order From Pretrial Motions Hearing”, dated November 10, 2009, Exhibit 9, Appendix Of Exhibits.] It is this action on the part of the Respondent about which the Petitioner complains and which he now seeks to prohibit.

The Petitioner filed his Pro Se Petition For Writ Of Prohibition with this Court on or about December 17, 2009. (Supreme Court No. 091856)

At a Miscellaneous Motions Hearing conducted on January 28, 2010, this Court **GRANTED** the Petitioner’s Petition For Writ Of Prohibition, by Order entered on January 28, 2010, and set the date for Argument in this matter for April 21, 2010.

ASSIGNMENT OF ERROR RELIED UPON

The Respondent has abused and/or exceeded her legitimate powers by ruling that the State of West Virginia will be permitted to introduce or otherwise admit any portion or all of the Petitioner's 60-Day Presentence Evaluation Report, via expert testimony or otherwise, in a pending criminal matter which is different, distinct and unrelated to the matter for which said Presentence Report was originally prepared and considered.

MANNER DECIDED IN THE LOWER TRIBUNAL

The ruling of the Respondent, as reflected in the "Order From Pretrial Motions Hearing", p. 2., (Exhibit 9, Appendix Of Exhibits), entered on December 1, 2009, essentially denied the Petitioner's "Motion In Limine To Suppress" his 60-Day Presentence Evaluation Report (prepared for Case No. 95-F-44), which sought to prevent the State from introducing or admitting into evidence said report at the trial of another pending matter, Case No. 09-F-127, in the Circuit Court of Berkeley County, WV. Instead, the Order indicates that the Respondent intends to permit the State to introduce information contained in the Petitioner's Presentence Evaluation Report (i.e., statements attributed to the Petitioner and information about alleged "grooming" practices) via expert testimony at trial. Furthermore, that Order suggests that the Respondent may permit the State to introduce or otherwise admit portions or all of the Petitioner's 60-Day Presentence Evaluation Report under the guise of 404(b) evidence.

POINTS AND AUTHORITIES RELIED UPON

Constitutional Provisions:

5th Amendment, U.S. Constitution.....11, 12, 15
6th Amendment, U.S. Constitution.....15

Statutory Provisions:

Or. Rev. Stat. § 161.735(4).....11
Va. Code Ann. § 19.2-264.3:1.....11
W.Va. Code § 53-1-1.....1
W.Va. Code § 61-8B-3.....9
W.Va. Code § 61-8B-5.....9
W.Va. Code § 62-12-2.....3, 9, 10, 11, 12, 13, 14, 15
W.Va. Code § 62-12-7.....13
W.Va. Code § 62-12-7a.....3, 4, 9, 10, 13, 14, 15

Rules Of Law:

Canon 3(B)(11), W.Va. Code Of Judicial Conduct.....13, 14
Rule 10(a), W.Va. Rules of Appellate Procedure.....1
Rule 14(a), W.Va. Rules Of Appellate Procedure.....1
Rule 11(e)(6), W.Va. Rules Of Criminal Procedure.....11
Rule 12.2(c), W.Va. Rules Of Criminal Procedure.....11
Rule 32, W.Va. Rules Of Criminal Procedure.....9, 14
Rule 404(b), W.Va. Rules Of Evidence.....2, 4, 6
Rule 43.02, W.Va. Trial Court Rules.....14
Rule 44.01, W. Va. Trial Court Rules.....14

Case Law:

Cape v. Francis, 741 F. 2d 1287 (11th Cir. 1984).....12

Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981).....12

Hoffman v. Arave, 236 F. 3d 523 (9th Cir. 2001).....12

Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136 (1984).....12

Savino v. Murray, 82 F. 3d 593 (4th Cir. 1996).....11

Sizemore v. Rubenstein, 2006 WL 709220 (S.D.W.Va.).....11, 13

State v. Baker, 376 S.E. 2d 127 (W.Va. 1988).....11

State v. Godfrey, 289 S.E. 660 (W.Va. 1981).....13

State v. Jackson, 298 S.E. 2d 866 (W.Va. 1982).....11

State v. Plumley, 401 S.E. 2d 469 (W.Va. 1990).....13

State v. Smith, 438 S.E. 2d 554 (W.Va. 1993).....11

State ex rel. Myers v. Painter, 576 S.E. 2d 277 (W.Va. 2002).....15

State ex rel. Simpkins v. Harvey, 305 S.E. 2d 268 (W.Va. 1983).....9

U.S. v. Harrington, 923 F. 2d 1371 (9th Cir. 1991).....11

U.S. v. Johnson, 935 F. 2d 4 (4th Cir. 1991).....12

Williams v. Stewart, 441 F. 3d 1030 (9th Cir. 2006).....12

Other:

H.C. Black, Black's Law Dictionary, (6th ed. 1994).....10

DISCUSSION OF LAW

Generally speaking, pre-sentence reports are prepared and submitted to the Court **after conviction**, by trial, plea of guilty or nolo contendere. Rule 32(c), W.Va. R.Crim.Proc.; State ex rel. Simpkins v. Harvey, 1983, 305 S.E. 2d 268, 172 W.Va. 312. Thus, such reports are not intended to be prepared and submitted at the pretrial stage, nor intended for use as evidence at trial for the consideration of a guilt-phase jury.

W.Va. Code § 62-12-2, Eligibility for probation., subsection (e), provides in pertinent part that: **“In the case of any person who has been found guilty of...a felony...under the provisions of section twelve or twenty four, article eight, chapter sixty-one of this code, or under the provisions of article 8-c or eight-b of said chapter...such person shall only be eligible for probation after undergoing a physical, mental and psychiatric study and diagnosis...”** [emphasis added] Obviously, this subsection was applicable to the Petitioner, who had been convicted of three counts of violating W.Va. Code § 61-8B-3, and one count of violating W.Va. Code § 61-8B-5.

Of particular note in the instant case, is the fact that the Petitioner’s 60-Day Presentence Evaluation Report was conducted and prepared in accordance with the provisions of W.Va. Code § 62-12-7a. W.Va. Code § 62-12-7a provides a **legal alternative**, and nothing more, to the Court for determining where and by whom the potential probationer’s pre-sentence evaluation report should be prepared. That was true, as well, in the Petitioner’s case. [“2. The Defendant, **to be considered for probation**, moves the Court to transfer his custody to the Commissioner of the Department of

Corrections for the purpose of diagnosis and classification for a period not to exceed sixty (60) days. W.Va. Code § 62-12-7a...3. **In the alternative**, the Defendant moves the Court...to allow the Defendant to obtain a physical, mental and psychiatric study and diagnosis to include an on-going treatment plan which is required before his **consideration for probation**. W.Va. Code § 62-12-2(e)"] ("Motion To Continue Sentencing Hearing", Criminal Action No. 95-F-44, 9/11/1996). This is further evidenced by the legal term "notwithstanding", as found in W.Va. Code § 62-12-7a, which means "despite", "in spite of". Black's Law Dictionary, (6th ed. 1994). W.Va. Code § 62-12-7a falls under Article 12 of Chapter 61, which deals strictly with Probation and Parole. Thus, it is clear that the Legislature intended W.Va. Code § 62-12-7a to be used as a discretionary mechanism for the Court to consider a convicted person for probation, "despite" or "in spite of" the provisions found in W.Va. Code § 62-12-2(e). One should conclude, therefore, that W.Va. Code § 62-12-7a may be used by the Court **in lieu of** the mechanism established in W.Va. Code § 62-12-2(e), as a basis for granting probation to persons convicted of violations of Article 8b, Chapter 61 of the W.Va. Code. W.Va. Code § 62-12-7a must, therefore, be read *in para materia* with W.Va. Code § 62-12-2, because W.Va. Code § 62-12-7a also encompasses those who have violated the provisions of article 8b of chapter 61. It stands to reason then, that the non-admissibility provisions of W.Va. Code § 61-12-2(e) must also apply to W.Va. Code § 62-12-7a, and W.Va. Code § 62-12-7a should be viewed simply as one method of carrying out the mandatory provisions of W.Va. Code § 62-12-2(e). W.Va. Code § 62-12-2(e) continues by stating: "That **nothing disclosed** by the person during such study or diagnosis shall be made

available to any law-enforcement agency, or other party without that person's consent, or **admissible in any court of this state**, unless such information disclosed shall indicate the intention or plans of the probationer to do harm to any person, animal, institution or property..."¹ [**emphasis added**]

Numerous other jurisdictions have provided similar statutory protections to criminal defendants against the use of their statements or disclosures made during the course of pre-sentence mental evaluations in **subsequent** court proceedings or **criminal trials**. [Va. Code Ann. § 19.2-264.3:1, Savino v. Murray, 82 F. 3d 593 (4th Cir. 1996); Or. Rev. Stat. § 161.735(4), U.S. v. Harrington, 923 F. 2d 1371 (9th Cir. 1991)]

The purpose for the non-admissibility provisions of W.Va. Code 62-12-2(e) has been held to act as a mechanism for the protection of a criminal defendant's 5th Amendment privilege against self-incrimination, with regard to his statements or disclosures made during the course of a pre-sentence mental evaluation and diagnosis. Sizemore v. Rubenstein, 2006 WL 709220, at 32-33 (S.D.W.Va.). Again, other jurisdictions have recognized the application of the 5th Amendment self-incrimination bar to interviews conducted in the process of the preparation of pre-sentence reports and found that, unless

¹ The Petitioner has not given his consent to make his Pre-sentence Evaluation Report available to anyone. Neither does his Report demonstrate that he disclosed any indication of intentions or plans to do harm to anyone or anything. The non-admissibility provisions of the statute are not dependent upon what party requested the study. Non-admissibility safeguards also accompany statements made in the course of pre-trial mental status evaluations. Rule 12.2(c), W.Va.R.Crim.Proc., State v. Jackson, 298 S.E. 2d 866 (W.Va. 1982); State v. Baker, 376 S.E. 2d 127 (W.Va. 1988). In addition, the non-admissibility of pre-sentence reports at trial has been extended to situations where a defendant has successfully withdrawn a guilty plea. Rule 11(e)(6), W.Va.R.Crim.Proc., State v. Smith, 438 S.E. 2d 554 (W.Va. 1993).

adequate warnings are provided or waivers obtained (similar to a *Miranda*-type caution), no statements or disclosures made by a defendant may later be admitted in any court in **future criminal proceedings**. [*Hoffman v. Arave*, 236 F. 3d 523, (9th Cir. 2001); *Williams v. Stewart*, 441 F. 3d 1030 (9th Cir. 2006); *Cape v. Francis*, 741 F. 2d 1287 (11th Cir. 1984) The basis for these findings rests upon the United States Supreme Court's decisions in *Estelle v. Smith*, 451 U.S. 454, 101 S Ct. 1866 (1981), and *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136 (1984).

[The 5th Amendment] privileges him [the defendant] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Murphy, Id., at 426, 104 S. Ct. at 1141. (citations omitted) The Court in *Murphy*, clarified its position with respect to cases involving probation considerations, stating that:

Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, **as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.** [emphasis added]

Murphy, Id., at 425, n.7, 104 S. Ct. at 1146, n. 7. Such is the protection provided by W.Va. Code § 62-12-2(e). In fact, the protections provided by W.Va. Code § 62-12-2(e) are broader in scope than the protections afforded by the 5th Amendment, in that **nothing disclosed is admissible**, whether it might be considered incriminating or not, in any future proceeding. While the Court in *Murphy*, held that one's 5th Amendment rights must be asserted in a non-custodial setting, such as an interview of a probationer by a **probation officer**, who is considered to be an officer of the Court and not the State, [*U.S. v. Johnson*, 935 F. 2d 4(4th Cir. 1991)], the Petitioner's case may be distinguished. His

pre-sentence evaluation and interviews were conducted in a custodial setting, i.e., at the Huttonsville Correctional Center (as mandated by W.Va. Code § 62-12-7a), by counselors and psychologists who were in the employ of the State. Therefore, his 5th Amendment right to remain silent should have been “self-executing”, similar to that in a *Miranda*-type situation. It is unreasonable to suggest that the self-incrimination protections provided by W.Va. Code § 62-12-2(e) to one criminal defendant during his/her pre-sentence evaluation, in a non-custodial setting, and performed by a mental health professional of his or her choice, (as was the case in Sizemore, supra.) would not also be available to another criminal defendant, whose pre-sentence evaluation was conducted in a custodial setting, under W.Va. Code § 62-12-7a, by agents of the State.

Furthermore, pre-sentence evaluation reports conducted under W.Va. Code § 62-12-7a are to be treated in the same manner as other presentence reports, including those prepared pursuant to W.Va. Code § 62-12-7. State v. Godfrey, 289 S.E. 2d 660, 664 (W.Va. 1981); State v. Plumley, 401 S.E. 2d 469, 475 (W.Va. 1990). In general, pre-sentence reports are considered to be “Nonpublic information”, that is information which, by law, is not available to the public. (W.Va. Code of Judicial Conduct, Terminology) While Canon 3(B)(11), W.Va. Code of Judicial Conduct, provides that, “A judge shall not **disclose** or **use**, for any purpose unrelated to judicial duties, non public information acquired in a judicial capacity”, the term “disclose” is not synonymous with and should not be confused with the term “admissible”. The term “admissible”, found in W.Va. Code § 62-12-2(e) does not mean that a judge cannot use a pre-sentence report prepared thereby for the purpose of consideration for probation, except under narrowly proscribed

circumstances. That would defeat the intended purpose of the statute. Admissibility, then, clearly refers to the use of the information in the pre-sentence report as evidence at a trial, and that may be permitted only under the certain enumerated circumstances listed in W. Code § 62-12-2(e)—the indication of the “intention or plans of the probationer to do harm to any person, animal, institution or property.” The term “disclose”, found in Canon 3(B)(11), on the other hand, is consistent with the one used in Rule 32(b)(3), W.Va. Rules of Criminal Procedure. However, even “disclosure”, as provided for in Rule 32, is limited in scope. As Section 32(b)(6) states in pertinent part: “...the probation officer must furnish the presentence report to **the defendant, the defendant’s counsel, and the attorney for the State.**” Of course, a copy is first submitted to **the Court** for its consideration, [Section 32(b)(3)] and also later furnished to **the Board of Parole.** [Section 32(c)(1)] No provision is made for disclosing any presentence report, including one prepared under W.Va. Code § 62-12-7a, to anyone else (including a trial jury), other than to those persons enumerated in Rule 32, W.Va.R.Crim.Proc.² Although a judge ultimately decides issues of “admissibility” as it relates to evidence at trial, it is not in the purview of a judge’s “judicial duties” to “disclose” evidence to a trial jury. The Petitioner does not believe that it now is, or ever has been, the standard practice of the Circuit Courts of this State to permit prosecuting attorneys to retrieve pre-sentence mental study, diagnosis and classification reports (prepared under W.Va. Code § 62-12-7a or any other statute), and offer them for admission into evidence at trial **in a subsequent criminal case.** Were that the case, then in the future a better practice would

² See also: Rules 43.02 and 44.01(a), W.Va. Trial Court Rules.

be for the Circuit Courts to advise criminal defendants (in a fashion similar to a *Miranda*-type warning) that they may assert a 5th Amendment right to remain silent and/or assert a 6th Amendment right to the presence and assistance of Counsel during the preparation of a pre-sentence evaluation report, particularly those conducted pursuant to W.Va. Code § 62-12-7a.³ However, such a practice would seem to be counterproductive, defeating the openness and honesty necessary to make such pre-sentence evaluations useful in assisting the Circuit Courts to make the most efficacious determinations about who are the best candidates for probation. Because candid disclosure is expected on the part of potential probationers, that end can only be achieved if those probationers are adequately protected from the potential adverse effects of their own statements and disclosures, particularly in terms of their use in **subsequent criminal prosecutions**, as is provided for by W.Va. Code § 62-12-2(e). Under the circumstances in which the Petitioner herein now finds himself, according to the State and the Respondent, no such protection has been provided to or is due him.

³ The Petitioner received no such warning and did not knowingly waive his 5th or 6th Amendment rights in this situation, but instead substantially relied upon the representations of his Counsel that his statements and disclosures were protected by the statute, in the event that he should prevail on his pending direct appeal and be granted a new trial. However, his trial Counsel, upon whose advice he relied, was later found by this Court to be "ineffective". State ex rel. Myers v. Painter, 576 S.E. 2d 277, 285 (W.Va. 2002).

RELIEF PRAYED FOR

Wherefore, the Petitioner respectfully **PRAYS** that the Honorable Supreme Court of Appeals of West Virginia would **GRANT** his Petition For Writ Of Prohibition, **PROHIBITING** the Respondent from permitting the State of West Virginia to admit into evidence, or otherwise introduce or utilize at trial, in the underlying matter herein above, by expert testimony or otherwise, all and any portion of the Petitioner's 60-Day Pre-sentence Evaluation Report, which was prepared solely for the Court's consideration of the Petitioner for probation in Criminal Action No. 95-F-44.

Respectfully Submitted,

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Stanley M. Myers
Petitioner, By Counsel

CERTIFICATE OF SERVICE

I, James T. Kratovil, Esq. Counsel for the Petitioner, hereby Certify that I have Served a true and complete copy of the foregoing Petitioner's Brief In Support Of Petition For Writ Of Prohibition and accompanying Appendix Of Exhibits, upon the Respondent and Respondent's Counsel, as listed below, by _____ First Class prepaid US Mail delivery, on this _____ day of _____, 2010.

The Honorable Gina Groh, Judge
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