

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA ex rel.
STANLEY M. MYERS,

Petitioner,

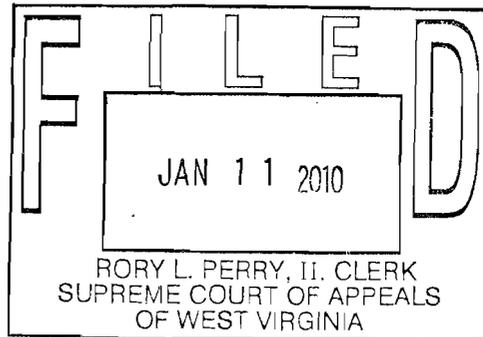
v.

DOCKET NO.:

HONORABLE GINA GROH,
Judge, 23rd Judicial Circuit,

Respondent.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION



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COPY

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Petitioner, required to register as a sex offender based on his earlier felony convictions for the sexual assaults of four young boys, is currently indicted for one felony count of Failure to Register as a Sex Offender and one misdemeanor count of Contributing to the Delinquency of a Minor.¹ The charges arise from the Petitioner cultivating a relationship with a different young boy against the boy's parents' directive, and establishing an e-mail account of which the Petitioner did not inform the State Police as required by his sex offender registration.

The Petitioner moved the Respondent trial court to bar the State from using a pre-sentence psychological diagnosis and a classification of the Petitioner that was prepared, pursuant to **W. Va. Code** § 62-12-7a, following the Petitioner's prior jury trial convictions for felony sexual offenses of four young boys in State v. Stanley Myers, Case No.: 95-F-44. In that evaluation, the Petitioner admitted to fondling and performing oral sex on two of the young boys, admitted to a previous sexual incident with another boy in 1978, admitted to a having a six-year old male relative of the first four boys perform oral sex on the Petitioner and urinate in the Petitioner's mouth, admitted to engaging in oral sex and masturbatory activities with his older brother Randall when they were eight to ten years old, and acknowledged sexual attraction to children, especially in the age range of seven to eleven years old. In that evaluation, the psychological conclusions opine the Petitioner's lack of guilt for his behavior, a strong orientation towards children sexually, an inability to control his impulses, a lack of regard for the rights/welfare of his victims, manipulative ploys, same sex pedophilic orientation, and premeditated and predatory sexual involvement with children.

Pursuant to **W.V.R.E.** 404(b), and a summary of expert testimony required by **W.V.R.Cr.P.** 16(a)(1)(E), the State notified the Petitioner of its intent to offer evidence at trial as to the methods and motivations of pedophiles to groom potential victims for sexual exploitation and how the Petitioner's conduct fits into those patterns to demonstrate the Petitioner's sexual motive, intent, modus operandi and lack of absence or mistake in committing the indicted acts in

¹The Petitioner is represented by retained counsel, James T. Kratovil, in the underlying criminal case, State v. Stanley M. Myers, Case No.: 09-F-127. For reasons unexplained by the Petitioner, Mr. Kratovil does not represent the Petitioner in the *pro se* Petition *sub judice*.

the current case.

By Order entered December 2, 2009, the Respondent trial court denied the Petitioner's motion, but reserved further ruling as to the admissibility of the information in this report pending ruling on the State's 404(b) evidence. [Order from Pretrial Motions Hearing, 12/2/09.] The Respondent trial court has not yet ruled on the State's 404(b) evidence and, consequently, has not finally ruled as to the admissibility of this evidence. The Respondent trial court's ruling on the State's 404(b) evidence is now held in abeyance pending this Court's consideration of this Petition. [Order Granting Extension on 404(b) Memoranda, 12/18/09.]

This Court is respectfully requested to refuse the Petition.

II. STATEMENT OF THE FACTS

1. In mid-February, 2009, a librarian at the Berkeley County Martinsburg Public Library observed the Petitioner with a young boy. The boy was then observed to retrieve a note and some candy from a specific book on the shelf. On February 18, 2009, the librarian found the same book with a new note and some more candy. The note read as follows:

2/18/09 J-Bug:

Hope you enjoyed your day off from school, even if
it was ugly outside. Just want you to know you are
really special to me, and your smile makes my day!
You now have \$10⁰⁰ more on your Amazon
account.

Love ya,

S

[Martinsburg Police Report; State Police Report.]

2. The police were notified. The police located the Petitioner and spoke with him. Further investigation revealed that the Petitioner previously had been told by the boy's parents to stay away from their child when they found out he was a sex offender, and that the Petitioner

established an e-mail account of which, as a registered sex offender, he was required to notify the State Police but never had. [West Virginia State Police Report.]

3. The Petitioner was indicted for one felony count of Failure to Register as a Sex Offender and one misdemeanor count of Contributing to the Delinquency of a Minor. [Indictment, 5/20/09.]

4. Evidence to be presented at trial includes that the Petitioner gained access to the child, an underprivileged boy, by introducing himself to the boy's parents at the boy's church under the auspices of "helping" the boy, frequently met the boy at the public library, set up an e-mail account with the boy, bought the boy gifts, placed money on an Amazon.com account he set up for the boy, and other like conduct.

5. The Petitioner moved the Respondent trial court to bar the State from using a pre-sentence psychological diagnosis and a classification report of the Petitioner that was prepared, pursuant to **W. Va. Code** § 62-12-7a, following the Petitioner's prior jury trial convictions for felony sexual offenses of four young boys in State v. Stanley Myers, Case No.: 95-F-44. In that evaluation, the Petitioner admitted to fondling and performing oral sex on two of the young boys, admitted to a previous sexual incident with another boy in 1978, admitted to a having a six-year old male relative of the first four boys perform oral sex on the Petitioner and urinate in the Petitioner's mouth, admitted to engaging in oral sex and masturbatory activities with his older brother Randall when they were eight to ten years old, and acknowledged sexual attraction to children, especially in the age range of seven to eleven years old. In that evaluation, the psychological conclusions opine the Petitioner's lack of guilt for his behavior, a strong orientation towards children sexually, an inability to control his impulses, a lack of regard for the rights/welfare of his victims, manipulative ploys, same sex pedophilic orientation, and premeditated and predatory sexual involvement with children.

6. Pursuant to **W.V.R.E.** 404(b), and a summary of expert testimony required by **W.V.R.Cr.P.** 16(a)(1)(E), the State notified the Petitioner of its intent to offer evidence at trial as to the methods and motivations of pedophiles to groom potential victims for sexual exploitation, and how the Petitioner's conduct fits into those patterns, to demonstrate the Petitioner's sexual

motive, intent, modus operandi and lack of absence or mistake in committing the indicted acts in the current case. [Notice of 404(b) Evidence, 8/27/09; State's Expert Designation, 10/1/09.]

7. By Order entered December 2, 2009, the Respondent trial court denied the Petitioner's motion, but reserved further ruling as to the admissibility of the information in this report pending ruling on the State's 404(b) evidence. [Order from Pretrial Motions Hearing, 12/2/09.] The Respondent trial court has not yet ruled on the State's 404(b) evidence and, consequently, has not finally ruled as to the admissibility of this evidence. The Respondent trial court's ruling on the State's 404(b) evidence is now held in abeyance pending this Court's consideration of this Petition. [Order Granting Extension on 404(b) Memoranda, 12/18/09.]

8. Trial is currently scheduled to commence on February 9, 2010.

9. Despite the fact that the trial court has not finished its analysis of the admissibility of this evidence, and that the Petitioner is represented by counsel below, the Petitioner sought a writ from this Honorable Court. The Respondent respectfully requests that this Court refuse the writ.

III. THE ISSUE PRESENTED

WHETHER THE PETITIONER PROVES A "CLEAR ERROR OF LAW" ON THE ADMISSIBILITY OF EVIDENCE FROM A PRIOR PRE-SENTENCE DIAGNOSTIC AND CLASSIFICATION EVALUATION OF THE PETITIONER IN A DIFFERENT CASE?

IV. AUTHORITIES RELIED UPON

<u>United States Const., Am. 5</u>	13.
<u>W. Va. Const., Art. III, § 5</u>	13.
<u>Estelle v. Smith</u> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).....	13.
<u>Minnesota v. Murphy</u> , 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984)....	13, 14, 15.
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	14, 15.
<u>State ex rel. Caton v. Sanders</u> , 215 W. Va. 755, 601 S.E.2d 75 (2004).....	7, 15, 16.
<u>Hinkle v. Black</u> , 164 W. Va. 112, 262 S.E.2d 744 (1979).....	7, 15, 16.
<u>State ex rel. Hoover v. Berger</u> , 199 W.Va. 12, 483 S.E.2d 12 (1996).....	7, 8, 15, 16.
<u>State ex rel. Nelson v. Frye</u> , 221 W.Va. 391, 655 S.E.2d 137 (2007).....	7.
<u>State ex rel. Games-Neely v. Sanders</u> , 220 W.Va. 230, 641 S.E.2d 153 (2006)..	7.
<u>State ex rel. Shepard v. Holland</u> , 219 W.Va. 310, 633 S.E.2d 255 (2006).....	7.
<u>SER Bosley v. Willett</u> , 204 W. Va. 662, 515 S.E.2d 825 (1999).....	8.
<u>State ex rel. Kees v. Sanders</u> , 192 W. Va. 602, 453 S.E.2d 436 (1994).....	8.
<u>State v. Biehl</u> , —W. Va. —, — S.E.2d — (Slip op. 34701, decided November 23, 2009)....	8.
<u>State ex rel. Myers v. Painter</u> , 213 W.Va. 32, 576 S.E.2d 277 (2002).....	8-9.
<u>State v. Myers</u> , 216 W.Va. 120, 602 S.E.2d 796 (2004).....	9.
<u>State v. Godfrey</u> , 170 W. Va. 25, 289 S.E.2d 660 (1981).....	10, 15.
<u>Rowe v. Sisters of Pallottine Missionary Society</u> , 211 W.Va. 16, 560 S.E.2d 491 (2001)....	12.
<u>Hughes v. Gwinn</u> , 170 W.Va. 87, 290 S.E.2d 5 (1982).....	14.
<u>People v. Hillier</u> , 392 Ill.App.3d 66, 910 N.E.2d 181 (Ill. App. 3 Dist., 2009).....	14, 15.
<u>Baumann v. United States</u> , 692 F.2d 565, 576 (9th Cir.1982).....	14.
<u>United States v. Rogers</u> , 921 F.2d 975 (10th Cir.1990).....	14.
<u>United States v. Miller</u> , 910 F.2d 1321 (6th Cir.1990).....	14.
<u>United States v. Cortes</u> , 922 F.2d 123 (2d Cir.1990).....	14.
<u>People v. Corrigan</u> , 129 Ill.App.3d 787, 84 Ill.Dec. 924, 473 N.E.2d 140 (1985)....	14.
<u>People v. Bachman</u> , 127 Ill.App.3d 179, 82 Ill.Dec. 270, 468 N.E.2d 817 (1984)....	14-15.
<u>Dzul v. State</u> , 118 Nev. 681, 56 P.3d 875 (2002).....	15.

<u>People v. Wright</u> , 431 Mich. 282, 430 N.W.2d 133 (1988).....	15.
W. Va. Code § 62-12-7a.....	8, 10, 11, 12, 15.
W. Va. Code § 62-12-7.....	10.
W. Va. Code § 62-12-2(e)	10, 11, 12, 13, 15.
W.V.R.Cr.P. 32(b)(3).....	10, 15.
W.V.R.E. 404(b).....	8.
<i>Code of Judicial Conduct</i> Canon 3(B)(11).....	10.

V. ARGUMENT

THE PETITIONER FAILS TO PROVE A “CLEAR ERROR OF LAW” ON THE ADMISSIBILITY OF EVIDENCE FROM A PRIOR PRE-SENTENCE DIAGNOSTIC AND CLASSIFICATION EVALUATION OF THE PETITIONER IN A DIFFERENT CASE.

1. Legal Standards.

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is

to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 3, in part, State ex rel. Caton v. Sanders, 215 W. Va. 755, 601 S.E.2d 75 (2004), *citing*

Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

This Court applies five factors when determining whether to entertain and issue a writ:

[i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). *See also*: State

ex rel. Nelson v. Frye, 221 W.Va. 391, 655 S.E.2d 137 (2007); State ex rel. Games-Neely v.

Sanders, 220 W.Va. 230, 232-233, 641 S.E.2d 153, 155-156 (2006); State ex rel. Shepard v.

Holland, 219 W.Va. 310, 633 S.E.2d 255 (2006).

The extraordinary writ of prohibition is further limited: “Prohibition lies only to restrain

inferior courts from proceeding in causes over which they have no jurisdiction, or, in which having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.’ Syllabus Point 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).” Syl. Pt. 1, SER Bosley v. Willett, 204 W. Va. 662, 515 S.E.2d 825 (1999).

Prohibition does not lie to prevent a simple abuse of discretion:

‘A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1.’ Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

Syl. Pt. 1, *State ex rel. Caton v. Sanders*, *supra*; Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994).

“Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion[.]’ Syllabus Point 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).”

State v. Biehl, —W. Va. —, — S.E.2d — (Slip op. 34701, decided November 23, 2009.)

2. Discussion.

The Petitioner is not entitled to a writ of prohibition on the Respondent trial court’s discretionary decision regarding the admissibility of evidence. State v. Biehl, *id.*

The Petitioner is not entitled to a writ of prohibition because Petitioner may have another means to obtain the relief requested since the Respondent trial court has only partially ruled on the admissibility of this evidence and has not completed a **W.V.R.E. 404(b)** analysis. State ex rel. Hoover v. Berger, *supra*.

The Petitioner is a registered sexual offender following his release from ten years’ incarceration for the sexual assaults of four young boys. After the Petitioner’s jury trial convictions in Case No.: 95-F-44, a Pre-sentence Evaluation Report, consisting of a psychological diagnosis and a classification report of the Petitioner, was prepared, pursuant to **W. Va. Code § 62-12-7a**. This Court reversed those convictions on appeal from a habeas corpus proceeding and remanded the matter for new trial, State ex rel. Myers v. Painter, 213 W. Va. 32,

576 S.E.2d 277 (2002). The Petitioner was subsequently convicted in that case by guilty plea of lesser-included felony sexual offenses, for which he was sentenced to four-to-twenty years, and served ten. The Petitioner, at the time of conviction and sentence upon his guilty pleas--and represented by the same counsel that represented him on his habeas appeal and currently represents him in the current underlying criminal proceeding, James T. Kratovil--*waived his right to any further presentence report*. [Conviction and Sentencing Order, 3/25/03; Case No.: 95-F-44.] That conviction was affirmed by this Court on the Petitioner's *pro se* direct appeal, State v. Myers, 216 W.Va. 120, 602 S.E.2d 796 (2004).

The Petitioner now stands charged with the felony offense of Failure to Register as a Sexual Offender, for failing to notify the State Police of an e-mail address, and the misdemeanor offense of Contributing to the Delinquency of a Child.

Evidence to be presented at trial includes that the Petitioner gained access to the child, an underprivileged boy, by introducing himself to the boy's parents at the boy's church under the auspices of "helping" the boy, frequently met the boy at the public library, set up an e-mail account with the boy, bought the boy gifts, placed money on an Amazon.com account he set up for the boy, and other like conduct. The State intends on introducing evidence of the "grooming" behaviors of pedophiles with intended victims for sexual exploitation. This evidence will explain to the jury the Petitioner's sexual motive, intent, modus operandi and lack of absence or mistake in committing the indicted acts in the current case, Case No.: 09-F-127. Without this evidence the jury may be left with the impression that the Petitioner was merely "helping" a poor, underprivileged lad. The State intends to use the factual and clinical information from the Petitioner's pre-sentence psychological evaluation from Case No.: 95-F-44 as part of its evidence to demonstrate the Petitioner's sexual motive, intent, modus operandi and lack of absence or mistake in committing the indicted acts in the current case. The clinical information in that report of a lack of guilt for his behavior, a strong orientation towards children sexually, an inability to control his impulses, a lack of regard for the rights/welfare of his victims, manipulative ploys, same sex pedophilic orientation, and premeditated and predatory sexual involvement with children are all relevant to the current case. The Petitioner's admissions in the

report, which help form the basis of the clinical information, to having sex with little boys and a sexual attraction to children is relevant to the current case.

This pre-sentence evaluation is properly used for this purpose. A Pre-sentence Evaluation Report prepared pursuant to **W. Va. Code** § 62-12-7a is to be treated in the same manner as a presentence investigation report prepared by a probation officer pursuant to **W. Va. Code** § 62-12-7. State v. Godfrey, 170 W. Va. 25, 289 S.E.2d 660 (1981).

Since the evaluation report in question is to be treated in the same manner as a presentence report prepared by a probation officer, the Court's consideration will turn on whether and when a presentence report prepared by probation officer may be disclosed. **W.V.R.Cr.P.** 32(b)(3) permits the disclosure of a presentence investigation report prepared by a probation officer when "the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty." The Petitioner was found guilty upon his guilty plea in Case No.: 95-F-44. The Petitioner at that time waived any further presentence report, thereby relying on the same report that was prepared following his jury trial conviction. The Pre-sentence Evaluation Report prepared pursuant to **W. Va. Code** § 62-12-7a is plainly subject to disclosure under **W.V.R.Cr.P.** 32(b)(3) because the Petitioner pleaded guilty and was convicted of the charges.

The Petitioner asserts that the pre-sentence report should not be disclosed because it is "nonpublic information," relying on the Terminology section of the *Code of Judicial Conduct*. It is true that "pre-sentencing reports" are included in that definition of "nonpublic information." However, *Code of Judicial Conduct* Canon 3(B)(11) only admonishes that "A judge shall not disclose or use, *for any purpose unrelated to judicial duties*, nonpublic information acquired in a judicial capacity." (Emphasis added.) Clearly, the use of this information in the Petitioner's criminal trial is a purpose related to "judicial duties." The information in the pre-sentence evaluation report is usable in this criminal proceeding.

The Petitioner's assertion that **W. Va. Code** § 62-12-2(e) bars use of the pre-sentence evaluation report must be rebuffed. As already noted, State v. Godfrey, *supra*, 170 W. Va. 25, 289 S.E.2d 660 (1981), and **W.V.R.Cr.P.** 32(b)(3) allow disclosure of the report.

Additionally, the Petitioner's pre-sentence evaluation report prepared in Case No.: 95-F-

44 was not a psychiatric report prepared under **W. Va. Code** § 62-12-2(e), but a discretionary diagnostic and classification evaluation pursuant to **W. Va. Code** § 62-12-7a. That statute begins:

Notwithstanding any other provision of law, when any person has been found guilty of, or pleads guilty to, a felony, or any offense described in article eight-d or eight-b, chapter sixty-one of this code, against a minor child, the court may, prior to pronouncing of sentence, direct that the person be delivered into the custody of the commissioner of corrections, for the purpose of diagnosis and classification for a period not to exceed sixty days[.]

W. Va. Code § 62-12-7a.

The phrase “Notwithstanding any other provision of law” is significant because it broadcasts the legislative intent that the discretionary diagnostic and classification report of **W. Va. Code** § 62-12-7a is different from, and in addition to, the “physical, mental and psychiatric study” of **W. Va. Code** § 62-12-2(e) that is required before a defendant convicted of certain offenses may be eligible for probation.

W. Va. Code § 62-12-2(e) reads in significant part:

In the case of any person who has been found guilty of, or pleaded guilty to, a violation of the provisions of section twelve, article eight, chapter sixty-one of this code, the provisions of article eight-c or eight-b of said chapter, or under the provisions of section five, article eight-d of said chapter, such person shall only be eligible for probation after undergoing a physical, mental and psychiatric study and diagnosis which shall include an on-going treatment plan requiring active participation in sexual abuse counseling at a mental health facility or through some other approved program: *Provided*, 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, in which case such information may be released only to such persons as might be necessary for protection of the said person, animal, institution or property.

W. Va. Code § 62-12-2(e).

Both statutes provide tools for the sentencing court to consider at sentencing. However, the discretionary diagnostic and classification report of **W. Va. Code** § 62-12-7a is different in nature from the psychiatric study required by **W. Va. Code** § 62-12-2(e) for a defendant to be

eligible for probation. The discretionary diagnostic and classification report of **W. Va. Code § 62-12-7a** is a post-conviction tool ordered by the court. A psychiatric evaluation under **W. Va. Code § 62-12-2(e)** is had at the behest of the defendant in order to demonstrate probation eligibility; there is no statutory time frame in the proceedings for when it may be sought. The statutory prohibition on further use of defendant disclosures during the psychiatric evaluation under **W. Va. Code § 62-12-2(e)** may be intended by the legislature to encourage defendants to utilize that process without imperiling their rights.

The discretionary diagnostic and classification report of **W. Va. Code § 62-12-7a** is not a substitute for the mandatory psychiatric study required by **W. Va. Code § 62-12-2(e)** for a defendant to be eligible for probation. One is not eligible for probation simply by having been ordered to a diagnostic and classification under **W. Va. Code § 62-12-7a**. Only a psychiatric study required by **W. Va. Code § 62-12-2(e)** can qualify one for probation. Had the legislature intended a prohibition on use of defendant disclosures during the **W. Va. Code § 62-12-7a** diagnostic and classification report they would have put it directly into the statute, as they did for the mandatory psychiatric study required by **W. Va. Code § 62-12-2(e)**. The Court must presume from that silence that the legislature did not intend for a statutory prohibition to apply to **W. Va. Code § 62-12-7a**. “It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.’ Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).” Rowe v. Sisters of Pallottine Missionary Society, 211 W.Va. 16, 560 S.E.2d 491 (2001).

The Petitioner acknowledged in his Motion in Limine before the Respondent trial court that the Pre-sentence Evaluation Report prepared pursuant to **W. Va. Code § 62-12-7a** is not a “psychiatric” study and, therefore, “does not meet the criteria contemplated by **W. Va. Code § 62-12-2(e)**.”

Were this Court to hold that the nondisclosure clause of **W. Va. Code § 62-12-2(e)** has applicability to the Petitioner’s discretionary diagnostic and classification report under **W. Va. Code § 62-12-7a**, the State urges the Court to also apply the exception in **W. Va. Code § 62-12-**

2(e) and allow use of the Petitioner's information. That exception allows disclosure where the "information disclosed shall indicate the intention or plans of the probationer to do harm to any person, animal, institution or property, in which case such information may be released only to such persons as might be necessary for protection of the said person, animal, institution or property." **W. Va. Code** § 62-12-2(e) (in part). Since the evaluation opines on the Petitioner's lack of guilt for his behavior, a strong orientation towards children sexually, an inability to control his impulses, a lack of regard for the rights/welfare of his victims, manipulative ploys, same sex pedophilic orientation, and premeditated and predatory sexual involvement with children, its use should be allowed for this purpose to protect children, such as the victim in this case, from the Petitioner's premeditated and predatory sexual involvement with children.

The Petitioner did not raise in his pleadings before the Respondent trial court Fifth Amendment self-incrimination assertions² that his statements in the pre-sentence evaluation should not be used. There is nothing in the record that shows, and the Petitioner does not assert, that he invoked his Fifth Amendment rights during the court ordered pre-sentence psychological evaluation. Moreover, the Petitioner misconstrues the holdings and effect of the United States Supreme Court cases he cites in support of his proposition that use of the information in that pre-sentence psychological evaluation is barred by the Fifth Amendment. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), and Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), do not apply to court ordered pre-sentence evaluations. Estelle held that the right against self-incrimination barred the government's use of statements made by a murder defendant in a *pre-trial competency evaluation* to elevate punishment in the defendant's post-conviction sentencing hearing. Murphy held that incriminating statements a person on probation for a sex offense made to his probation officer about a murder were not barred by the right against self-incrimination when those statements were used against him in trial for that

² *United States Const.*, Am. 5; *see also: W. Va. Const.*, Art. III, § 5.

murder.³

It should first be noted that the State is not attempting to prosecute the Petitioner for anything that he said during the pre-sentence evaluation. Those matters are resolved by the guilty plea in the prior case 95-F-44. The State's use of this information is to educate the jury on the Petitioner's grooming behaviors which demonstrate the Petitioner's sexual motive, intent, modus operandi and lack of absence or mistake in committing the indicted acts in the current case, Case No.: 09-F-127.

As to court ordered pre-sentence psychological evaluations, several jurisdictions hold that *Miranda*⁴ warnings do not apply to court ordered pre-sentence psychological evaluations and that a prisoner waives his Fifth Amendment right if he does not invoke it. The Petitioner in the case *sub judice* never invoked his Fifth Amendment rights during the course of his court ordered pre-sentence psychological evaluation.

In the recently decided case of People v. Hillier, 392 Ill.App.3d 66, 910 N.E.2d 181 (Ill. App. 3 Dist., 2009), the appellate court affirmed the sentence in a child sex assault case, refuting the defendant's Fifth Amendment claim as to his court-ordered pre-sentence sex offender psychological evaluation by holding that he waived it by not exercising it. The Hillier court distinguished Estelle as addressing the use of a pre-trial competency evaluation, not a post-conviction pre-sentencing evaluation, noting that several courts have held that pre-sentence interviews do not implicate *Miranda* warnings, citing Baumann v. United States, 692 F.2d 565, 576 (9th Cir.1982); United States v. Rogers, 921 F.2d 975 (10th Cir.1990); United States v. Miller, 910 F.2d 1321 (6th Cir.1990); United States v. Cortes, 922 F.2d 123 (2d Cir.1990); People v. Corrigan, 129 Ill.App.3d 787, 84 Ill.Dec. 924, 473 N.E.2d 140 (1985); and People v.

³Murphy favorably cited this Court's opinion in Hughes v. Gwinn, 170 W.Va. 87, 290 S.E.2d 5 (1982), that a probationer is not entitled to *Miranda* warnings when speaking with her probation officer. Murphy, 465 U.S. 420, 424 n.3.

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Bachman, 127 Ill.App.3d 179, 82 Ill.Dec. 270, 468 N.E.2d 817 (1984). Hillier, *supra*, 910 N.E.2d 181, 186-188. Based on this analysis, the Hillier court found that *Miranda* does not apply to court ordered pre-sentence psychological evaluations. *Id.*, 910 N.E.2d 181, 187-188. The Hillier court then cited Murphy, 465 U.S. 420, 427, for the proposition that when *Miranda* does not apply, a person waives his Fifth Amendment right by not invoking it. *Id.*, at 188.

Similarly, in Dzul v. State, 118 Nev. 681, 56 P.3d 875 (2002), the Supreme Court of Nevada affirmed the sentence for attempted lewdness with a child under fourteen, distinguishing Estelle and holding that *Miranda* did not apply to the defendant's court ordered pre-sentence psychosexual evaluation.

In People v. Wright, 431 Mich. 282, 430 N.W.2d 133 (1988), the Supreme Court of Michigan likewise distinguished Estelle in affirming a murder sentence, holding that a court ordered pre-sentence custodial psychological evaluation does not implicate *Miranda*.

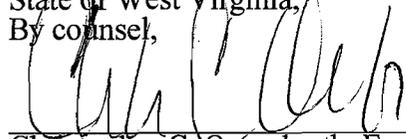
The information in the Petitioner's prior court ordered pre-sentence psychological evaluation had under **W. Va. Code § 62-12-7a** may be disclosed as a pre-sentence report. State v. Godfrey, *supra*, 170 W. Va. 25, 289 S.E.2d 660 (1981), and **W.V.R.Cr.P. 32(b)(3)**. **W. Va. Code § 62-12-2(e)** does not bar the disclosure of the information as the evaluation was not had under that section. To the extent that **W. Va. Code § 62-12-2(e)** has any applicability, the statutory exception to non-disclosure should apply to allow its use to protect children, such as the victim in this case, from the Petitioner's premeditated and predatory sexual involvement with children. *Miranda* does not apply to the court ordered pre-sentence psychological evaluation. Hillier, *supra*; Dzul, *supra*; Wright, *supra*. The Petitioner waived any Fifth Amendment protections by not invoking them at the time he provided the information to his interviewers. Murphy, *supra*; Hillier, *supra*; Dzul, *supra*; Wright, *supra*.

The Petitioner is not entitled to the extraordinary writ of prohibition, State ex rel. Caton v. Sanders, *supra*; State ex rel. Hoover v. Berger, *supra*; Hinkle v. Black, *supra*. This Court is respectfully requested to refuse the Petition.

VI. CONCLUSION.

For the foregoing reasons, the State of West Virginia prays that this Honorable Court find that the Petitioner failed to prove that the circuit court erroneously applied the law in denying the Petitioner's Motion to Suppress Use of the 60-Day Evaluation. The Petitioner fails to establish that he is entitled to a Writ of Prohibition. State ex rel. Caton v. Sander, supra; State ex rel. Hoover v. Berger, supra; Hinkle v. Black, supra.

Respectfully submitted,
State of West Virginia,
By counsel,



Christopher C. Quasebarth, Esq.
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

CASE NO.: 09-F-127
(Judge Groh)

STANLEY M. MYERS,

Defendant.

STATE'S NOTICE OF INTENT TO USE 404(b) EVIDENCE

Comes now the State of West Virginia, by counsel, and pursuant to **W.V.R.E. 404(b)** with notice of its intent to use evidence of the Defendant's other crimes, wrongs of acts.

1. The Defendant is indicted on one (1) felony count of Failure to Register as a Sex Offender and one (1) misdemeanor count of Contributing to the Delinquency of a Minor.
2. Trial is scheduled for December 15, 2009.
3. The Failure to Register as a Sex Offender count is based on the Defendant establishing an e-mail account, which he did not inform the State Police of as is required by the terms of his Sex Offender Registration. The purpose of the e-mail account was for the Defendant to have contact with a young boy. The Contributing to the Delinquency charge is based on the Defendant's contact with the boy. In addition to the evidence substantiating the indicted counts, the State will introduce evidence that the Defendant sexually assaulted and sexually abused four young boys in the 1990s for which he was later convicted by guilty plea in Berkeley County Case No.: 95-F-44. The State will also introduce the Pre-sentence Evaluation Report that was prepared, pursuant to **W. Va. Code § 62-12-7a**, wherein the Defendant admitted to fondling and performing oral sex on two of the young boys, admitted to a previous sexual incident with another boy in 1978, admitted to having a six-year old male relative of the first four boys perform oral sex on the Defendant and urinate in the Defendant's mouth, admitted to

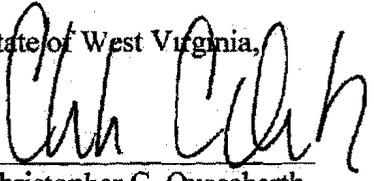
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engaging in oral sex and masturbatory activities with his older brother Randall when they were eight to ten years old, and acknowledged sexual attraction to children, especially in the age range of seven to eleven years old.

4. This evidence is admissible under W.V.R.E. 404(b) for the following purposes.

Motive—this evidence is probative of the Defendant's compulsion to commit sexual offenses on children and to groom such children for sexual exploitation, and evidences the motivation for the Defendant's actions in the current case. **Intent**—much like motive, this evidence is probative of the Defendant's intent to groom children for sexual exploitation. **Modus operandi**—this evidence is probative of the Defendant's method of grooming children for sexual exploitation. **Absence of mistake or accident**—this evidence is probative on the issue that the Defendant's continued contact with the boy was neither mistake nor accident but was the intentional act of the Defendant.

State of West Virginia,


Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971

BERKELEY COUNTY
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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA

v.

CASE NO.: 09-F-127
(Judge Groh)

STANLEY M. MYERS,

Defendant.

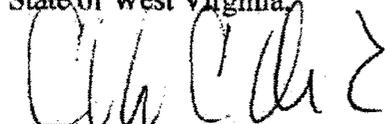
STATE'S EXPERT DESIGNATION

Please be advised that the State may also call the following witness as an expert at trial in
this matter:

Paul F. Kradel, Ph.D.
316 W. Stephen Street
Martinsburg, West Virginia 25401

Dr. Kradel will testify as to his review of the evidence in this case and, based on his training and experience in the field of sexual abuse counseling, is expected to offer testimony as to the methods and motivations of pedophiles to groom potential victims for sexual exploitation and offer his opinion as to how the Defendant's conduct fits into those patterns. Dr. Kradel's *curriculum vitae* is attached. He has not prepared any written report.

State of West Virginia



Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971

BERKELEY COUNTY
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VIRGINIA SHERIFF CLERK

**IN THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VIRGINIA**

State of West Virginia

vs.

Criminal Action # **95-F-44**

Stanley Melvin Myers,

DOB 6 / 26 / 1951

SS# 233-86-6045

Defendant.

CONVICTION AND SENTENCE

This **February 24, 2003**, the Defendant, in person and by counsel, **James T. Kratovil**, Esq., and the State by **Christopher C. Quasebarth**, Esq., Assistant Prosecuting Attorney for Berkeley County; appeared and informed the Court that, pursuant to an agreement, the Defendant wished to enter a plea of Guilty to three counts of **Sexual Abuse In The First Degree**, being lesser included felony offenses to those charged in **Counts 1, 2 and 3** of the Indictment, and to one count of **Sexual Assault In The Third Degree** as charged in the Indictment, in exchange for a binding agreement that the State will not pursue any other prosecutions stemming out of the transactions which gave rise to this case and will agree that June 13, 1996 is the effective date of sentence.

WHEREUPON, the Prosecutor represented to the Court that the victims and the investigating officer approved of the proposed plea agreement.

WHEREUPON, the Court conducted a dialogue with the Defendant, and the Prosecutor, and finds that the Defendant understands the nature of the offense, the consequences of the plea, that the decision to plead was made freely and voluntarily and that there is a factual basis to support the entry of said plea.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that the Defendant is **CONVICTED** of the above offenses. The Defendant then waived his right to a further pre-sentence report.

Finding no cause which would preclude Sentencing, and having heard all submissions with

3/25/03
cc

PO
PA
ER

J Kratovil

Dir Dept of Corr.

regard to the appropriate Sentence, and the Court being fully informed of the circumstances surrounding the charges, ACCORDINGLY:

**IT IS THE SENTENCE OF THE LAW
AND THE JUDGMENT OF THIS COURT:**

- Upon conviction for **Sexual Abuse In The First Degree**, a lesser-included felony of that charged in **Count 1 of the Indictment**; that the Defendant be confined at the penitentiary house of this State for not less than ONE (1) YEAR nor more than FIVE (5) YEARS there to be dealt with according to law, and the Defendant shall be **fined TWO THOUSAND DOLLARS (\$2,000.00)**.
- Upon conviction for **Sexual Abuse In The First Degree**, a lesser-included felony of that charged in **Count 2 of the Indictment**; that the Defendant be confined at the penitentiary house of this State for not less than ONE (1) YEAR nor more than FIVE (5) YEARS there to be dealt with according to law, and the Defendant shall be **fined TWO THOUSAND DOLLARS (\$2,000.00)**.
- Upon conviction for **Sexual Abuse In The First Degree**, a lesser-included felony of that charged in **Count 3 of the Indictment**; that the Defendant be confined at the penitentiary house of this State for not less than ONE (1) YEAR nor more than FIVE (5) YEARS there to be dealt with according to law, and the Defendant shall be **fined TWO THOUSAND DOLLARS (\$2,000.00)**.
- Upon conviction for **Sexual Assault In The Third Degree**, as charged in **Count 4 of the Indictment**; that the Defendant be confined at the penitentiary house of this State for not less than ONE (1) YEAR nor more than FIVE (5) YEARS there to be dealt with according to law, and the Defendant shall be **fined TWO THOUSAND DOLLARS (\$2,000.00)**.

The Sentences imposed in this case shall be **consecutive**, for a combined total effective sentence of **not less that FOUR (4) YEARS nor more than TWENTY (20) YEARS** and a combined **fine of EIGHT THOUSAND DOLLARS (\$8,000.00)**.

The Court further makes the specific finding that **this Defendant is a SEXUAL PREDATOR** within the meaning of that term as used in West Virginia law. The Court Orders that the Defendant have no further contact with his victims in this case, and he shall fulfill the registration requirements of the **West Virginia Sexual Offender Registration Act** including lifetime registration with the West Virginia State Police.

The State shall recover of the Defendant its costs in this behalf expended.

It is further ORDERED that the Defendant is remanded to the Commissioner of the Division of Corrections to begin serving the sentence herein imposed: until such time that a

representative of the Division of Corrections takes custody of the Defendant, he is remanded to the temporary custody of the Superintendent of the Eastern Regional Jail, per diem cost associated with the Defendant's custody shall be paid solely by the Division of Corrections from the date of this Order.

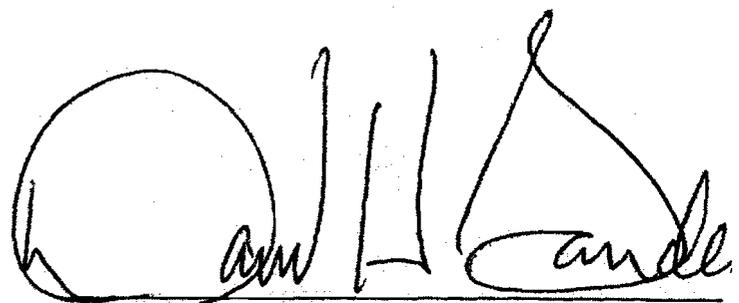
WHEREUPON, the Court advised the Defendant of the rights regarding appeal, as will appear on the record.

DATE OF CONVICTION:	February 24,	2003
DATE OF SENTENCING:	February 24,	2003
EFFECTIVE DATE OF SENTENCE:	June 13,	1996

The Clerk shall enter the foregoing as for the date first above written and shall forward attested copies to all counsel of record; to the Court's Probation Officer; to the Eastern Regional Jail; and to the Commissioner of the Department/Division of Corrections. The Clerk shall then retire this matter from the docket, placing it among causes ended and report the matter as disposed.

Entered: **March 25, 2003**

CRIMINAL ORDER BOOK NO. 95
PAGE 573
DATE 3/25/03


JUDGE OF THE CIRCUIT COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF PROHIBITION** on this the 7th day of January, 2010, by ___ hand-delivery, first-class mail, postage prepaid, ___ facsimile to:

Stanley Myers
Pro se
13463 Apple Harvest Drive
Martinsburg, West Virginia 25403



Christopher C. Quasebarth