No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Takiese Naceer Bethea, *Petitioner*,

v.

State of West Virginia, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jeremy B. Cooper
Counsel of Record
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
(304) 376-0037
jeremy@blackwaterlawpllc.com

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 19-1011 (Upshur County 19-F-35)

Takiese Naceer Bethea,
Defendant Below, Petitioner

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Takiese Naceer Bethea, by counsel Jeremy B. Cooper, appeals the Circuit Court of Upshur County's October 3, 2019, sentencing order entered following his pleas of guilty to malicious assault and first-degree robbery. Respondent State of West Virginia, by counsel Lara K. Bissett, filed a response to which petitioner submitted a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.[1]

On February 22, 2018, police received a call about a disturbance at the Colonial Motel in Buckhannon, West Virginia. At the motel, officers found blood on the floor in Room 56 of the motel, and they found a male who identified himself as Michael Harris. However, they discovered that was a false name and that individual was actually Lamere Troup. Upon entering the bathroom, an officer found the victim, Frank Hall, covered in blood with a swollen left eye, zip tie on one wrist, and duct tape on his wrist and ankles. Upon further inspection, officers discovered pepper spray, a knife, additional zip ties, a ski mask, gloves, and a loaded gun. Mr. Hall told an officer that his sister, Michaelina Sarne, had texted him earlier in the day stating that she was at the Colonial Motel and would like to see him. According to Mr. Hall, while he was there with his sister, two men wearing ski masks entered the room, duct taped his feet and arms at gunpoint, and demanded money from him. Mr. Hall was stabbed multiple times by petitioner, in addition to being pistol whipped and kicked by Mr. Troup, causing him to lose consciousness. Mr. Troup identified

[1] Petitioner also filed a motion for partial designation of the record. This Court hereby denies that motion.

petitioner as the person who stabbed Mr. Hall. Medical records show that Mr. Hall suffered multiple lacerations, facial swelling, and a broken nose.

Ms. Sarne essentially claimed to be a victim, as well, and denied knowing Mr. Troup or petitioner. However, Mr. Troup told officers that Ms. Sarne had offered him $10,000 to drive to West Virginia with Ms. Sarne and another man, later identified as petitioner, to rob Mr. Hall. Mr. Troup said that the group bought duct tape at a Rite Aid in New Jersey, where Mr. Troup lived, and also bought gloves, a ski mask, zip ties, and mace at Wal-marts in New Jersey and Maryland. He further told officers that Ms. Sarne's daughter, Alayna Puglia, drove them to West Virginia and stayed in the car while the others were in the motel room with Mr. Hall. A search of Ms. Sarne's cell phone showed that Mr. Hall texted her a picture of a bag of money on February 13, 2018, indicating that he had just received $60,000. On February 15, 2018, Ms. Sarne texted petitioner, "You wanna make sum cash??" Petitioner replied, "Don't ialways." On February 22, 2018, petitioner texted Ms. Sarne asking "me u n my boy making the trip?"

Petitioner and his co-defendants were indicted on January 15, 2019. Petitioner and Mr. Troup were indicted on charges of kidnapping, first-degree robbery, conspiracy, and malicious assault. Co-defendant Ms. Sarne was indicted of kidnapping, first-degree robbery, and conspiracy while co-defendant Ms. Puglia was indicted for conspiracy. According to petitioner, he and Mr. Troup are African American while Ms. Sarne and Ms. Puglia are Caucasian.[2]

Petitioner pled guilty to first-degree robbery and malicious assault. Prior to imposing petitioner's sentence, the circuit court directed that a presentence investigation ("PSI") be conducted. As part of that investigation, petitioner gave a written statement to the probation officer, which provided that petitioner

> was not only intoxicated but under the influence of [p]rescribed medication of Xanax. . . . Powered by my own greed, selfishness, and out right [sic] disregard for my morals I came up with the notion to rob Mr. Hall, after hearing about a large sum of money he had. Coming to WV I armed myself with a firearm, and other materials I may have needed to commit the crime. . . . I take full responsibility for what I did, im [sic] taking this time to transition to a better man. . . .[3]

After reviewing the PSI report, the circuit court entered its October 3, 2019, sentencing order ordering that petitioner be confined in the state penitentiary for a determinate period of thirty-six

[2] Mr. Troup's sentence is the same as petitioner's; Ms. Sarne was sentenced to one to five years of incarceration pursuant to her plea of guilty to a single count of conspiracy; and Ms. Puglia was sentenced to one year in jail on a misdemeanor count of accessory after the fact.

[3] Petitioner self-reported to the probation officer that he had a juvenile criminal history of "drug charges" and that after violating the terms of his probation at sixteen-years-old, he was placed in a juvenile detention center until he turned eighteen. As an adult, he had numerous criminal charges, including resisting arrest, possession of a controlled substance, aggravated assault, and being a fugitive from justice. Some of petitioner's prior charges were dismissed while he pled guilty to others.

years, with credit for 553 days served, for first-degree robbery and a term of two to ten years for malicious assault, with the sentences to run consecutively. In return for the entry of the guilty pleas, the State moved to nolle prosequi the remaining charges in the indictment; the circuit court granted that motion, so those charges were dismissed. Petitioner appeals from that sentencing order.

As we have previously stated,

> "'[t]he Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syllabus Point 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)." Syllabus Point 2, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010).

Syl. Pt. 1, *State v. Varlas*, -- W. Va. --, 844 S.E.2d 688 (June 11, 2020).

On appeal, petitioner asserts three assignments of error. First, he argues that the circuit court erred by sentencing him in violation of the constitutional principles of proportionality, due process, and equal protection, based upon the "massive disparity" between the plea offers and sentences given to his white co-defendants in comparison to the plea offers and sentences given to petitioner and his African-American co-defendant. At the outset, petitioner concedes that numerous states have maximum robbery sentences longer than petitioner's thirty-six-year sentence. He also admits that this Court has upheld numerous sentences in excess of thirty-six years for robbery. Petitioner, however, argues that "[i]t is the comparison with co-defendants Ms. Sarne and Ms. Puglia that most directly calls into question the proportionality of [p]etitioner's punishment, and also invokes the equal protection concerns . . . ." Petitioner's plea agreement included a recommendation by the State of the minimum ten-year sentence for first-degree robbery to run concurrently with a two to ten-year indeterminate sentence for malicious assault. He points out that he "got more than nine times as much time as Ms. Sarne, and up to forty-six times as much time as Ms. Puglia . . . ."

Without citing to the record, petitioner claims that Ms. Sarne orchestrated the entire conspiracy and was charged with two of the most serious offenses in West Virginia law but will be eligible for parole after only one year due to her plea of guilty to conspiracy in exchange for the dismissal of the robbery and kidnapping charges. The African American co-defendants were offered plea agreements in which they would plead guilty to malicious assault, which carries twice the amount of jail time as conspiracy, in addition to first-degree robbery, which has no upper limit. In arguing that the circuit court multiplied the recommended sentences of the African American co-defendants, petitioner asserts that the circuit court turned "a moderate gap into a chasm." In support of his argument, petitioner relies upon syllabus points one through three of *State v. Marrs*, 180 W. Va. 693, 379 S.E.2d 497 (1989), but those syllabus points specifically address the racial composition of a jury pool. He contends that although there is not a jury issue in the instant case since all of the co-defendants entered into plea agreements, the racially disparate treatment here involves invidious racial discrimination in the decisions of a prosecuting attorney.

This Court has long held that

> [d]isparate sentences for co-defendants are not per se unconstitutional. Courts consider many factors such as co-defendants' respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If defendants are similarly situated, some courts will reverse on disparity of sentence alone.

State v. Cooper, 172 W. Va. 266, 271-72, 304 S.E.2d 851, 856 (1983). As this Court further explained in *Cooper*,

> [t]here are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. *Accord, Stockton v. Leeke,* 269 S.C. 459, 237 S.E.2d 896, 897 (1977). The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher,* 166 W.Va. 523, 276 S.E.2d 205 (1981):
>
> > In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Cooper at 272, 304 S.E.2d at 857.

As the State asserts, petitioner failed to point to anything in the record that demonstrates that the State acted "deliberately based upon an unjustifiable standard such as race." He also offers nothing to establish the race of Ms. Sarne and Ms. Puglia aside from his assertion that they are white. Further, petitioner testified, "If I can recall, I was the only one really doing it." However, he said that Ms. Sarne was involved "to an extent . . . she really didn't know like to-like what degree that I was about to go do 'cause I like mislead[sic] her in a way. Like I didn't really let them know what I was going to do." In addition, when petitioner was asked how he became involved in the crime, he did not implicate the women. Instead, he stated he "kn[e]w people like who deal drugs in the area and they was[sic] sayin' that this guy had a large sum of money that he was 'bout to purchase drugs.'" Referring to Mr. Troup, petitioner said "I'm going to go do this with him; but I think she's going to like-be scared so I don't want to involve [Ms. Sarne] too much because I don't really trust them that well." Petitioner even told the circuit court that Ms. Sarne "knew like I was coming out there with ill-intentions but she didn't know that it was going to be towards her brother." There is no dispute that neither Ms. Sarne nor Ms. Puglia committed acts of violence upon Mr. Hall. Petitioner's own statements clearly place the culpability for the crime at

the feet of petitioner and Mr. Troup. Therefore, we find no error in the circuit court's implied conclusion that petitioner was not similarly situated with the female co-defendants.

We also find that the sentence does not shock the conscience. As we have repeatedly found, "'[i]n making the determination of whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense.' *State v. Adams*, 211 W. Va. 231, 233, 565 S.E.2d 353, 355 (2002)." *State v. Patrick C.*, -- W. Va. --, 843 S.E.2d 510, 515 (Feb. 25, 2020). As set forth above, this violent crime was planned out with sufficient time to travel across several states, purchasing items the group deemed necessary at more than one location. Mr. Hall was violently attacked and suffered multiple lacerations, facial swelling, and a broken nose. According to Mr. Troup, petitioner was the one who stabbed Mr. Hall. Thus, it is clear that petitioner played a significant role in perpetrating the crime against Mr. Hall without any provocation by Mr. Hall. As set forth above, petitioner concedes that numerous states have maximum robbery sentences longer than petitioner's thirty-six-year sentence. He also admits that this Court has upheld numerous sentences in excess of thirty-six years for robbery. Therefore, we find that we do not need to fully address the objective test.

Petitioner next argues that the circuit court failed to sufficiently advise petitioner concerning the implications and procedure of his plea. In support of this assertion, petitioner argues that he is entitled, under Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure, to be informed that he would have no right to withdraw his guilty plea in the event the sentencing court declined to adhere to the recommended sentence contained in the plea agreement. Generally citing fifteen pages of the record, petitioner asserts that the plea colloquy makes clear the circuit court's failure to make this admonition, as it did not inform petitioner that he would be unable to withdraw his plea if the circuit court declined to adhere to the sentencing recommendation. He does, however, acknowledge that the circuit court informed him of the following during the plea hearing:

> the State's going to make a recommendation of the years on [the sentence]. And I'm not – I'm not bound by that. That means that if you come in here I could sentence you – you know, robbery's got unlimited amount of time I could sentence you to. So it's just a minimum of ten years. Do you understand that part of it?

Petitioner responded, "Yes." He also denied having "any questions about any of that[.]" The circuit court continued by addressing the State's recommendation of a two to ten-year sentence for malicious assault and its recommendation that the sentences be concurrent, again informing petitioner that it did not "have to do that either. Do you understand that? I could run them consecutive rather than concurrent." At that point, petitioner responded, "Yes, sir." Petitioner confirmed that was his understanding of the plea agreement and denied having any questions about those issues.

Rule 11(e)(2) provides that

> [i]f a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A), (C), or (D), the court may accept or reject the

> agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

In addressing Rule 11(e)(2), this Court set forth the following:

> A trial court has two options to comply with the mandatory requirements of Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure. It may initially advise the defendant at the time the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea. As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea.

Syl. Pt. 2, *State v. Cabell*, 176 W. Va. 272, 342 S.E.2d 240 (1986). The circuit court clearly explained to petitioner that it was not bound by the State's recommendation and that it had the authority to impose consecutive sentences. Prior to the imposition of sentence, petitioner expressed neither confusion nor a resistance to move forward with his plea, regardless of the possibility of receiving consecutive sentences. Given these circumstances, the trial court's omission of the Rule 11(e)(2) provision was harmless error. *See* Syl. Pt. 3, *State v. Valentine,* 208 W. Va. 513, 541 S.E.2d 603 (2000) ("The omission of the statement required by Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure must be deemed harmless error unless there is some realistic likelihood that the defendant labored under the misapprehension that his plea could be withdrawn.")

Finally, petitioner asserts that he was denied the effective assistance of counsel, resulting in an involuntary guilty plea. He is critical of his counsel below, arguing that during the plea colloquy, petitioner's counsel asked the circuit court to run both the robbery and malicious wounding sentences concurrently, stating, "I think it's overkill if you were to run the – the crimes consecutively – the sentencing consecutively. I believe that the State will recommend – recommend a concurrent sentence. I join that recommendation. I think that ten years is enough for the crime." Petitioner contends that counsel did not argue a ten-year sentence versus a life sentence, as it appears that counsel did not contemplate the peril facing petitioner beyond the prospect of a consecutive two- to ten-year sentence on top of the ten-year robbery sentence.

As this Court has found,

> [i]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and

> may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992). We have also explained that "the preferred way of raising ineffective assistance of . . . counsel is to file a subsequent petition for a writ of habeas corpus raising the issue in the court below." *Watts v. Ballard*, 238 W. Va. 730, 735-36 n.7, 798 S.E.2d 856, 861-62 n.7 (2017) (internal quotations and citation omitted). Consequently, "we decline to address an alleged ineffective assistance of counsel claim in this direct appeal. The record has not been developed on this issue. This is an issue that must be developed in a habeas corpus proceeding." *State v. Richardson*, 240 W. Va. 310, 319-20 n.13, 811 S.E.2d 260, 269-70 n.13 (2018). For these reasons, we affirm the circuit court's October 3, 2019, sentencing order.

Affirmed.

ISSUED: December 7, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 19-1011

STATE OF WEST VIRGINIA,
Respondent,

v.

TAKIESE NACEER BETHEA,
Petitioner.

(An Appeal of a final order of the Circuit Court of Upshur County, Case No. 19-F-35)

PETITIONER'S BRIEF

Counsel for the Petitioner, Takiese Bethea

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by sentencing the Petitioner in violation of the constitutional principles of proportionality, due process, and equal protection, based upon the massive disparity between the plea offers and sentences given to his white co-defendants in comparison to the plea offers and sentences given to the Petitioner and his other African-American co-defendant.
2. The Circuit Court failed to sufficiently advise the Petitioner concerning the implications and procedure of his plea.
3. The Petitioner was denied the effective assistance of trial counsel, resulting in an involuntary guilty plea.

STATEMENT OF THE CASE

The Petitioner was indicted along with three co-defendants on January 15, 2019, following the investigation of an alleged robbery taking place in Buckhannon, Upshur County, West Virginia. The Upshur County Grand Jury returned an indictment charging the Defendant with Kidnapping, First Degree Robbery, Conspiracy, and Malicious Assault. The Petitioner's co-defendant Lamere Troup was indicted for identical crimes. Co-Defendant Michaelina Sarne was indicted for Kidnapping, First Degree Robbery, and Conspiracy. Co-Defendant Alayna Puglia was indicted for Conspiracy. (Appendix Record ["A.R."], at 3-4). The Petitioner and Mr. Troup are black, while Ms. Sarne and Ms. Puglia are white.

The Petitioner entered into a plea agreement on March 7, 2019, in which he agreed to plead guilty to one count of First Degree Robbery and one Count of Malicious Assault in exchange for the dismissal of the other two counts and truthful testimony, among other terms.

The plea agreement anticipated the filing of a Pre-Sentence Investigation, and a recommendation by the State of a 10 year determinate sentence on robbery, to be served concurrently with a 2-10 year sentence on malicious assault. The full terms of the agreement are set forth in the appendix record. (A.R., at 7-15, 74-77). Sentencing was delayed on two occasions, once over the Petitioner's objection, to ensure the opportunity for the Petitioner to testify in the event that the other co-defendants took their cases to trial. (A.R., at 16-18, 110-122).

A pre-sentence investigation was prepared and filed in the Court. (A.R., at 25-44). The Petitioner was sentenced in significant excess to the State's recommendation, with 36 years for the robbery charge and 2-10 running consecutively for malicious assault. (A.R., at 20-24, 123-40). Mr. Troup received an identical sentence. (A.R., at 52-56). Ms. Sarne received a sentence of 1-5 years on a plea deal for a single count of conspiracy. (A.R., at 45-48). Ms. Puglia received a one year jail sentence on an information to a misdemeanor count of accessory after the fact. (49-51). The Petitioner now appeals his sentence and conviction.

SUMMARY OF ARGUMENT

The Petitioner asserts that the circuit court sentenced him in a constitutionally disproportionate manner in light of his offense, and in light of the ultimate dispositions imposed upon his co-defendants. The Petitioner, identically to co-defendant Troup, received a determine 36 year sentence for First Degree Robbery, consecutive with a 2-10 year indeterminate sentence for malicious assault. Co-defendant Sarne received a 1-5 year indeterminate sentence for conspiracy. Co-defendant Puglia received a 12 month jail sentence for misdemeanor accessory after the fact. The latter two sentences being so light is indicative

of the inappropriateness and disproportionality of the lengthy 36 year sentences imposed upon the Petitioner and Troup. The disparity also implicates the Petitioner's rights under equal protection due to the vast gulf in the outcomes for the two white co-defendants and the two African-American co-defendants (the Petitioner and Mr. Troup), based on the arbitrary classification of race.

Additionally, the record in this case demonstrates that the Petitioner did not knowingly and voluntarily enter into a plea agreement in which he was sufficiently informed of the likelihood of the imposition of a sentence against him that was many multiples of the sentence recommended by the State in the plea agreement. The Petitioner was clearly blindsided by the scale of the departure from the recommended ten years, and had not been adequately prepared for the possibility of such an outcome. The Petitioner asserts that the Circuit Court failed to provide the Petitioner sufficient notice of the procedural aspects of his plea, as well as the substantive implications of the potential penalty he was facing. The Petitioner also asserts that his trial counsel provided ineffective assistance of counsel, in large part by failing to inform him of the vast sentencing discretion of the Circuit Court and the likelihood of receiving a robbery sentence greatly in excess of ten years.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for Rule 20 Oral Argument because the appeal presents an issue of first impression and of constitutional magnitude. Alternatively, Rule 19 Oral Argument is appropriate in light of an unsustainable exercise of discretion by the lower court.

ARGUMENT

1. Unconstitutional Sentence on the grounds of disproportionality and equal protection.

The Eighth Amendment of the United States Constitution (*see Harmelin v. Michigan,* 501 U.S. 957 (1991)), as well as Article III of the West Virginia Constitution, proscribe the sentencing of criminal defendants in a manner disproportionate to their offenses. Article III, Section 5 of the West Virginia Constitution explicitly states that "penalties shall be proportioned to the character and degree of the offence." The standard of review for sentencing orders is typically "a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). In this matter, the Petitioner is asserting sentencing error of a constitutional magnitude, (under three different theories, one of which is proportionality) which requires a *de novo* review:

> The issue in this case calls on us to examine a question of constitutional dimension and as such, "[w]here the issue on an appeal from the circuit court is clearly a question of law ... we apply a de novo standard of review." Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

State v. Finley, 639 S.E.2d 839, 841 (2006).

Specifically, a proportionality challenge to a sentence requires the application of the two-part test set forth in *State v. Cooper*, 304 S.E.2d 851, 172 W.Va. 266 (1983). The first part of the *Cooper* test is "whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." *Id.*, 304 S.E.2d at 857, 172 W.Va. at 272. If a sentence does not meet that first prong of the test, then it is subject to the second test

as set forth in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981):

> 5. In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

West Virginia's proportionality test typically is only applicable to the imposition of life sentences and statutory sentences that have no upper limits, such as First Degree Robbery. Syllabus Point 4 of *Wanstreet* sets forth that:

> 4. While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

This Court has stated, in Syl. Pt. 2 of *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984), that:

> 2. Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.

In the instant case, the Petitioner concedes that numerous states have maximum robbery sentences longer than the Petitioner's 36-year sentence (*see*, footnote 46, *State v. Gibbs*, 797 S.E.2d 623 (W. Va., 2017)), although 36 years exceeds the maximum in some states, such as the twenty-year maximum in Connecticut. Connecticut Title 53A. Penal Code Section 53a-134. The Petitioner also concedes that on numerous occasions, this Court has upheld sentences vastly in excess of the thirty-six year robbery sentence imposed upon the

Petitioner. For instance, this Court upheld a 212 year sentence in *State ex rel. Hatcher v. McBride*, 656 S.E.2d 789, 221 W. Va. 760 (2007). However, any comparison between the Petitioner's criminal history, and that of the appellant in *Hatcher* will indicate that the circumstances in *Hatcher* were far more severe. Specifically, by the time the appellant in *Hatcher* was sentenced to 212 years, he had already been convicted of first degree murder in a separate case. *Hatcher v. McBride*, 650 S.E.2d 104, 221 W.Va. 5 (2006). This murder conviction vastly outweighs any of the Petitioner's criminal history, which was limited to a variety of drug charges and other non-violent offenses, with the exception of an assault conviction that was not deemed serious enough by the New Jersey court for treatment under the violent-offense-enhancement statute, the "No Early Release Act" N.J.S.A. 2C:43-7.2. (A.R., at p. 34-35).

It is the comparison with co-defendants Ms. Sarne and Ms. Puglia that most directly calls into question the proportionality of the Petitioner's punishment, and also invokes the equal protection concerns discuss later in this argument section. Ms. Sarne, while indicted for kidnapping, conspiracy, and first degree robbery, was sentenced to a 1-5 year sentence on a single count of conspiracy. (A.R., 45-48). Her daughter, Ms. Puglia, received a one year misdemeanor sentence. (A.R., 49-51). Yet the victim in this case was the brother of Ms. Sarne, and Ms. Sarne appears to be the nexus in orchestrating the entire incident. Ms. Sarne claimed, falsely, to law enforcement, that she had been victimized in addition to her brother, the victim. In his impact statement, the victim stated: "For my sister there is no sentence severe enough or long enough for her. Not only did she break the laws of man, she violated and desecrated the values of family and love." The victim went on to make related

recommendations concerning the two unidentified "black males," and Ms. Puglia. (A.R., at 26-31).

Yet the treatment of the "black males" by the State, and by the circuit court, could not be at greater odds to the mercy visited upon the two white co-defendants, Ms. Sarne and Ms. Puglia. As discussed above, both the Petitioner and Mr. Troup received plea deals to first degree robbery and malicious assault. The Petitioner's plea agreement included the recommendation of the minimum 10 year determinate sentence run concurrently with a 2-10 year indeterminate sentence. At the same time, Ms. Puglia and Ms. Sarne received plea deals to conspiracy, and accessory after the fact, respectively. Ultimately, the Petitioner got more than nine times as much time as Ms. Sarne, and up to forty-six times as much time as Ms. Puglia (the latter of whom was originally only charged with felony conspiracy).

This appears to be a case of first impression, or something close to it, because it is rare that the racial disparity in treatment by prosecutorial agencies and trial courts is so starkly presented. In a recent case, this Court noted in recounting procedural history that the Circuit Court of Ohio County had reduced a sentence on the basis of racial disparity due to a Rule 35 Motion, and found that the sentences, as constituted, did not implicate equal protection or proportionality, as the favorably-treated co-defendant had pleaded guilty and had fewer convictions. *Wilkerson v. Ballard,* No. 16-0689 (W. Va., Nov. 17, 2017) (memorandum decision). However, the prospect of racial disparity in sentencing, let alone racial disparity in the formulation of charging decisions and plea agreements, does not appear to have been considered by this Court in that case.

This Court has examined a claim of selective prosecution in the context of the recidivist

statute under equal protection principles in *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978), in which this Court quoted the United States Supreme Court decision in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962), for a the prospect that an equal protection violation can be shown in the criminal context upon a showing of prosecutorial action "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*, 368 U.S. at 456, 82 S.Ct. At 506. In *Martin*, to the contrary, the appellant did not tie his equal protection claim to membership in such a class of people.

In this case, the disparate treatment between the black co-defendants and the white co-defendants started at the earliest phase of the felony proceedings. The Petitioner and Mr. Troup were charged with kidnapping, first-degree robbery, conspiracy, and malicious assault. The State declined to prosecute Ms. Sarne for malicious assault, and declined to prosecute Ms. Puglia for robbery, kidnapping and malicious assault, when the two white co-defendants could almost certainly have been charged with all of those crimes as accessories before the fact or aiders and abbettors.

In the next phase of discriminatory treatment, Ms. Sarne, who orchestrated the entire conspiracy, and who was charged with two of the most serious offenses in West Virginia state law, will be parole eligible after a year due to her plea agreement to plead guilty to conspiracy in exchange for dropping the robbery and kidnapping charges. The Petitioner and Mr. Troup, on the other hand, were offered plea agreements to Malicious Assault, which carries twice the time as Conspiracy, in addition to First Degree Robbery, which has no upper limit.

The final form of discriminatory treatment was when the circuit court, which could have limited the damage caused by the disparate handling of the case by the State, instead

multiplied the recommended sentences of the Petitioner and Mr. Troup, turning a moderate gap into a chasm. This is a systemic problem, as recognized by Justice Starcher in his concurrence in *State ex rel. Regional Jail v. Cabell County*, 657 S.E.2d 176, 190-91 (W. Va. 2007). A more comprehensive and recent analysis of this phenomenon may be found in a recent article by Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018). But apart from being simply one statistic in a sea of cases, what happened to the Petitioner is a violation of his own rights under equal protection principles.

The Equal Protection Clause is the final clause of the first section of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"West Virginia's constitutional equal protection principle is a part of the Due Process Clause found in Article III, Section 10 of the West Virginia Constitution." Syl. Pt. 4, *Israel by Israel v. West Virginia Secondary Schools Activities Com'n*, 388 S.E.2d 480, 182 W.Va. 454 (1989). "Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity." Syl. Pt. 2, *Id.*

In order to show an equal protection violation under the Fourteenth Amendment in the criminal context, it is necessary (with some exceptions not germane to this case) to demonstrate that decision makers in a defendant's own case acted with discriminatory purpose, rather than simply showing a systemic disparity. *Cleskey v. Kemp*, 481 U.S. 279, 107 S.Ct.

1756, 95 L.Ed.2d 262 (1987). In *Cleskey*, a death-row defendant challenged Georgia's capital punishment scheme on the grounds that it systematically treated black defendants worse than similarly-situated white defendants. Because he could not show the discrimination in the context of his own case, the United States Supreme Court declined to grant him relief. To the contrary, in this case, the invidious discrimination based upon race is clear and obvious: treatment by the prosecutor and the Circuit Court that was undeniably favorable to the two white co-defendants, and undeniably harmful to the two black co-defendants.

West Virginia, unfortunately, has a long history of racial equal protection violations in the administration of criminal justice, dating back to *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879), in which the Supreme Court of the United States reversed this Court, which had affirmed the conviction of a black man who had been tried by a jury that was limited, per statute, to white men only. *Strauder* was a predecessor of *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), which this Court has cited in support of the following principles, first set forth in the first three syllabus points of *State v. Marrs*, 379 S.E.2d 497, 180 W.Va. 693 (1989):

> 1. It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded.
>
> 2. To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from

> the petit jury on account of their race." [Citations omitted.] *Batson v. Kentucky*, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 (1986).
>
> 3. The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury.

Obviously, no juror issues are involved in the instant case, as everyone involved entered into a plea agreement. However, like a *Batson* issue, the racially disparate treatment in this case involves invidious racial discrimination in the decisions of a prosecuting attorney. It is, undoubtedly, an issue of equal protection, as described in *Israel by Israel, supra*, in that there was state action in which the Petitioner and Mr. Troup were treated differently and disadvantageously in comparison to the similarly situated persons Ms. Sarne and Ms. Puglia, on the basis of a classification. In this case, the classification is race.

The Petitioner anticipates that the State may proffer some other purpose for the discriminatory treatment, such as the Petitioner's and Mr. Troup's alleged direct participation in inflicting violence upon the victim in this case; however, the law of West Virginia does not incorporate favorable treatment to persons simply based upon the fact that their responsibility was limited to being an accessory or aider and abbettor: "In the case of every felony, every principal in the second degree and every accessory before the fact shall be punishable as if he or she were the principal in the first degree[.]" W. Va. Code Section 61-11-6(a) (in part). The factual circumstances of the case do not justify any other reason for the imposition of such a vast difference in charging, conviction, and punishment between the black and white co-defendants, necessitating the inference of racial discrimination, per *Batson*.

In addition to the charging and plea resolution disparity attributable to the prosecutor,

there was also state action resulting in a disparate outcome to similarly situated persons on the basis of race in the Circuit Court's sentencing decision. Although the discretion of the Circuit Court was limited in Ms. Sarne and Ms. Puglia's sentence, the Circuit Court had the opportunity not to exacerbate the disparate outcome when sentencing the Petitioner and Mr. Troup. Had the Circuit Court simply sentenced Mr. Troup and the Petitioner to the jointly recommended sentence included in the plea agreement, it could hardly be said that the Circuit Court was directly contributing to the unfair and unequal administration of justice. By dramatically multiplying the sentences for the black men beyond the recommendation and expectation of the parties, the Circuit Court itself became an instrument of the violation of equal protection on the basis of race. The Petitioner asserts that such an impermissible disparity violative of equal protection also implicates proportionality principles, as discussed above, and necessitates relief on both grounds.

Turning to an appropriate remedy for the constitutional violations in this case, there is not a great deal of precedent as to how this Court should correct the situation. The Petitioner believes that this Court could sufficiently remedy the violations described herein by allowing the Petitioner to either be sentenced to the minimum concurrent sentences as jointly recommended by the parties in the plea agreement, or by vacating the conviction and plea agreement. The first remedy would be suitable because the narrowed gap in treatment between the parties across racial lines would be substantially mitigated by the recommended sentence. The second remedy would be suitable because it is similar to a remedy adopted elsewhere by this Court for violations by the State of the terms of a plea agreement under contract principles, and would essentially constitute the rescission of a plea agreement resulting in an illegal

sentence. In *State v. Blacka*, 815 S.E.2d 28, 32-33 (W. Va. 2018), this Court explained that there are two possible remedies for a plea agreement violation by the State; re-sentencing or withdrawal from a plea agreement, and that discretion between the remedies lies with the court. Also, in *State ex rel. State v. Sims,* No. 18-0672 (W. Va., May 3, 2019) (memorandum decision), and its predecessor case, *State v. Howell*, No. 16-0541, (W. Va. Apr. 13, 2018) (memorandum decision), this Court determined that the remedy for an illegal sentence was to rescind, rather than reform the plea agreement. The Petitioner requests that this Court grant the appropriate remedy befitting the circumstances.

2. Failure to advise concerning procedure and implications of plea agreement

The Petitioner is entitled under Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure to be informed that he would have no right to withdraw the guilty plea in the event that the sentencing court declines to adhere to the sentence recommended in the plea agreement. This Court has held, in *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986) that:

> 1. "With the advent of Rule 11 of the West Virginia Rules of Criminal Procedure, a detailed set of standards and procedures now exists governing the plea bargaining process." Syllabus Point 1, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).
>
> 2. A trial court has two options to comply with the mandatory requirements of Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure. It may initially advise the defendant at the time the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea. As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea.

The transcript of the plea colloquy makes clear that the Circuit Court failed to make this admonition. (A.R., at 73-87). The Circuit Court went into insufficient detail about the

essential meaninglessness of the sentence recommendation under the plea agreement, and provided no notice that the Petitioner would be unable to withdraw a guilty plea if the Circuit Court declined to adhere to the sentence recommendation. In *Cabell*, the sentencing court doubled the recommended robbery sentence, while in the instant case, the Circuit Court more than tripled it. While this Court held in *State v. Valentine*, 208 W. Va. 513, 541 S.E.2d 603 (2000) that the *Cabell* warning would be subject to harmless error analysis, the circumstances as discussed in this section and the next section of this brief, indicate a high likelihood that the Petitioner did not fully comprehend the implications of his plea agreement due to insufficient warning by the Circuit Court and his counsel. The record shows nothing that would sufficiently inform the Petitioner, who is from out of state and unfamiliar with West Virginia criminal law, that the Circuit Court had every right and in fact was likely to impose a sentence dramatically in excess of the one described in writing in his plea agreement.

The record indicates only a sparse, and vague acknowledgment of the potential ruin that may stem from a guilty plea to a charge of First Degree Robbery. It is clear that the Circuit Court did not go out of its way in describing the vast range of a potential sentences facing the Petitioner:

> THE COURT: Now, let me talk to you about this part of it Mr. Bethea. So, you're going to plead guilty to the robbery and – you know, the State's going to make a recommendation of then years on that. And I'm not – I'm not bound by that. That means that if you come in here I could sentence you – you know, robbery's got unlimited amount of time I could sentence you to. So it's just a minimum of ten years. Do you understand that part of it?

(A.R., at 76). In fact, the Court goes into more detail about the potential for a life sentence in the event that the Petitioner would commit two additional felonies than it does about the potential life sentence facing the Petitioner in the present plea agreement. (A.R., at 81). There

is simply no indication that the Petitioner was given any notice of the likelihood that the Circuit Court would dramatically depart from the joint recommendation of the parties, with the "unlimited amount of time" discussed as a mere abstraction. It cannot be reasonably expected that a person who is not familiar with criminal law in West Virginia would understand that the recommendation carries so little weight as to bear no relationship to the ultimate sentence to be served.

The Circuit Court did not adequately convey the likelihood of a massive difference between the recommendation and the probable ensuing sentence. The Circuit Court's colloquy is in violation of the following requirements described in *Call v. McKenzie*, 220 S.E.2d 665, 159 W.Va. 191 (1975):

> In addition, it is preferable that questions calling for 'yes' or 'no' answers be avoided. The court should interrogate the accused with regard to the circumstances under which he received a copy of the indictment and the opportunity which he has had to read and understand it. When the court asks the defendant whether he understands the nature of the charges against him and the corresponding maximum penalty the court can impose, the defendant should be required to recite back to the court exactly what the crime is to which he is pleading guilty and what the penalty can be.

Id., 220 S.E.2d at 670, 159 W.Va. at 197. Had the Circuit Court required the Petitioner to state that he could serve a life sentence, or 200 years, or 100 years, or 50 years, or 36 years, or any other sentence vastly in excess of 10 years, then there might be adequate notice. Instead, the Circuit Court asked a yes-or-no question that did not adequately communicate the stakes of the plea deal to the Petitioner. The Circuit Court failed to uphold its duty to ensure a knowing wavier from the Petitioner in this case, and the Petitioner should be granted relief from his conviction and withdrawal from the plea agreement accordingly.

3. Ineffective Assistance of Counsel Resulting in Involuntary Plea Agreement

The Petitioner asserts that his trial counsel was ineffective on the face of the record, including, among other deficiencies, by failing to sufficiently inform him of the sentencing implications of his plea agreement. The Petitioner is mindful of this Court's admonition that:

> It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992). However, the Petitioner asserts that trial counsel Sean Logue's conduct during this case constitutes ineffective assistance simply on the face of the record, and justifies vacating the Petitioner's plea and sentence.

This claim is most broadly governed by the standards set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as referenced by this Court in Syllabus Point 5, *State v. Miller*, 194. W.Va. 3, 459 S.E.2d 114 (1995), which reads as follows:

> 5. In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

The following circumstances show deficiency under the first prong of *Strickland.* The Petitioner asserts that his plea agreement was involuntary because he was not adequately advised of the likelihood that the Circuit Court could dramatically depart from the

recommended sentence, as discussed in the preceding section. It is the Petitioner's contention that he believed he would either receive a ten year determine sentence for robbery, run concurrently with a 2-10 year indeterminate sentence for malicious assault; or, if the Circuit Court departed from the recommendation, that the sentences could simply be run consecutively.

The standard for an assertion of an involuntary guilty plea on direct appeal is set forth as follows:

> 1. A direct appeal from a criminal conviction based on a guilty plea will lie where an issue is raised as to the voluntariness of the guilty plea or the legality of the sentence.
>
> 2. The controlling test as to the voluntariness of a guilty plea, when it is attacked either on a direct appeal or in a habeas corpus proceeding on grounds that fall within those on which counsel might reasonably be expected to advise, is the competency of the advice given by counsel.
>
> 3. Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error.

Syl. Pts. 1, 2, and 3, *State v. Sims*, 248 S.E.2d 834, 162 W.Va. 212 (1978).

Contrary to Syllabus Point 3 of *Sims*, the Petitioner asserts that he was not advised of the likelihood that the Circuit Court would dramatically depart from the sentencing recommendation of the parties as contained in the plea agreement, rather than a specific factual issue for trial. However, this Court has also held that mistaken advice of counsel regarding a plea agreement[1], and even concerning certain collateral consequences of a plea[2], are cognizable

1 *Moats v. Plumley,* No. 12-0022 (W. Va. February 22, 2013) (memorandum decision). *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

2 *State v. Hutton*, 806 S.E.2d 777 (W. Va. 2017).

grounds for withdrawal from a plea agreement.

As described in the preceding section, the record does not show that the Court ensured that the Petitioner was made aware of the implications of the plea agreement. A review of the record shows that his counsel does not appear to have contemplated the profound legal peril either. Mr. Logue's argument at sentencing does not evince an awareness that the Circuit Court's discretion exceeded whether to impose consecutive or concurrent sentence:

> So, Your Honor, what I'm asking you to do is to run both the robbery and the malicious wounding concurrently. And again this was a bad crime. I'm not – I'm not soft-coating it. I'm not – I'm not saying it wasn't egregious. It was bad. But when we get bad crimes in our – in our judicial system – you know, there is – there is a mechanism to deal with these things and that is where the prosecution or the police go to the defendant and say look; you know, we can either hammer you or you can take responsibility for your actions and we can save the State the cost of prosecution. And he did that. [...]
>
> Mr. Bethea's a father. At the time of the offense his son was living with him. And he's going to miss the rest of his son't childhood no matter what, on the robbery. And he feels terrible about that. I think it's overkill if you were to run the – the crimes consecutively – the sentencing consecutively. I believe that the State will recommend – recommend a concurrent sentence. I join that recommendation. I think that ten years is enough for the crime.
>
> Again, its egregious, Judge; but I think that because Mr. Bethea ultimately manned up and took responsibility for his actions; I think that the Court should give him that small break of a concurrent sentence.

(A.R., at 128-30). No argument was made concerning a ten year sentence versus a life sentence, versus a sentence of centuries or versus a sentence of decades. No apparent contemplation of the peril facing the Petitioner beyond the prospect of a consecutive 2-10 on top of the ten year robbery charge. There is no reason in the record to believe that the Petitioner knew what was really facing him until after it happened.

Additionally, the circuit court record demonstrates that Mr. Logue dis not prioritize his representation of the Petitioner during critical phases of representation. First, it is clear that

Mr. Logue was uncooperative with the circuit court concerning even scheduling an appearance at arraignment, in a capital case. The entirety of the January 18, 2019 hearing is as follows:

> THE COURT: This is the case of STATE OF WEST VIRGINIA VS. TAKIESE NACEER BETHEA. Am I pronouncing your name right, sir?
>
> THE DEFENDANT: No. Takiese Naceer Bethea.
>
> THE COURT: Takiese Naceer Bethea. David Godwin's here; but Sean Logue's not here and he's called and said he couldn't be here this morning and – you know, he's – I just –
>
> I don't know what to do about him because he always calls and says he dosn't want to be or can't be here. And I know he's got other cases and that type of thing; but I don't know when I'm going to reset this yet. I'm not – he always thinks that we're going to set it whenever he can be here. It doesn't matter what the Court's docket it.
>
> So I'll find a date and time we'll reschedule this. I'm not sure when it'll be right now; but in the meantime he'll be remanded to the custody of the Sheriff to go back to Tygart Valley Regional Jail until we can have the – get Mr. Logue down here and reschedule this. All right?
>
> All right. You can go back with the Sheriff.

(A.R., at 59).

Thereafter, Mr. Logue did not personally appear at the January 25, 2019 arraignment, nor at the March 7, 2019 hearing during which the plea agreement was executed and the Petitioner pleaded guilty to a crime carrying a potential of life in prison. (A.R. at 62, 70). While it is true that the Petitioner indicated his satisfaction with Mr. Logue and his stand-in (A.R., at 82), for the reasons discussed above, it is apparent that the Petitioner was not fully cognizant of the possibility that the Circuit Court could not simply depart from the recommendations of the parties, but multiply the recommended sentence to his detriment.

Critically, the record also reflects that Mr. Logue did not sufficiently litigate or investigate the case prior to leading his client to accept a plea agreement that involved potential life imprisonment. The docket report reflects that no pretrial motions were filed

whatsoever. The docket report also reflects that Mr. Logue did not even wait for the State to file its discovery response prior to inducing Mr. Bethea to take a plea agreement. (A.R., at 1). Given that Mr. Logue did not appear in court between the date of the preliminary hearing until after the Petitioner's conviction, it does not appear that Mr. Logue undertook any investigation of the circumstances of the case. In fact, at sentencing, Mr. Logue essentially admitted to the Circuit Court that he relied on the representations of the State rather than his own investigation in inducing the Petitioner to enter into a plea agreement [emphasis added]:

> ... When he brought me on board, I contacted Mr. Godwin, he and I – Mr. Godwin and I went back and forth quite a bit on this case at the very beginning. And we had a very long preliminary hearing. I – actually I should say a very long meeting prior to the preliminary hearing. And we went over all the variables involving this case; what Mr. Bethea would be looking at; **what potential evidence would be used against him** ...
>
> ... At the preliminary hearing he waived his right to a preliminary hearing. He accepted the proposed plea that wasn't in writing yet; but it was – it was outlined. He accepted that and then what we're here on today was that accepted agreement.

(A.R., at 128).

It is the law of this state that counsel's performance must be viewed through the lens of the adequacy of the investigation:

> 4. "The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation." Syllabus point 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

Ballard v. Ferguson, 751 S.E.2d 716, 232 W.Va. 196 (2013). In this case, because trial counsel simply accepted the State's representations without independently reviewing discovery, and

performing an investigation, trial counsel has failed to satisfy this test to gain the presumption of competent representation.

In addition to failing to do a sufficient factual investigation, Mr. Logue failed to fully consider a defense of diminished capacity despite openly admitting during sentencing that he was aware that the Petitioner was under the influence of substances at the time of the alleged offense: "that at the time of the offense he was taking Xanax heavily, he was drinking." (A.R., at 129). Notably, all of the crimes charged in the Petitioner's indictment require the proof of various types of specific intent. Most relevant, given the terms of the plea agreement, is the intent required to prove robbery: "The *animus furandi*, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny." Syl. pt. 2, *State v. McCoy*, 63 W.Va. 69, 59 S.E. 758 (1907). Syllabus, *State v. Ferguson*, 285 S.E.2d 448, 168 W.Va. 684 (1981). In the absence of that mental state, a robbery conviction cannot be sustained, although a conviction for a lesser-included offense, such as some form of assault or battery, could be sustained. In a capital case, it is difficult to understand why counsel would fail to request mental evaluations pursuant to W. Va. Code §27-6A-1, *et seq.*, when counsel has apparently been informed of a voluntary intoxication issue, prior to inducing his client to plead guilty to a crime with no cap on its sentence.

Again, as stated above, it is extremely telling that, during his argument to the Circut Court at the sentencing hearing, Mr. Logue did not ask the Court to accept the recommendation of 10 years, and only asked for the sentences to run concurrently. His entire argument was premised around the Court simply deciding between a ten year sentence running concurrently with the 2-10, or consecutively. (A.R., at 128-30). His argument did not even anticipate the

possibility that the Court might sentence the Petitioner to, for example, 36 years, or even more, as it was empowered to do. Mr. Logue failed to investigate, failed to litigate, failed to give his client sufficient notice that he might, under the terms of the agreement, spend multiple decades in prison, if he was, indeed, aware of that possibility.

In an ineffective assistance case in which a defendant pleaded guilty, the second *Strickland* prong is considered as follows:

> In the context of guilty pleas, the second prong, or prejudice requirement of *Strickland*, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. 366.

Montgomery v. Ames, 241 W.Va. 615, 827 S.E.2d 403, 415 (2019).

The Petitioner asserts that he would not have entered into the plea agreement if he was aware that it carried the possibility of as much prison time as he ultimately received. His surprise at the result at sentencing is contextualized by the terms of his counsel's argument, and demonstrated by his own verbal reaction at the conclusion of the hearing. (A.R. 137-38). Thus, the result of the proceedings would have been different, as the Petitioner would not have ceded his various trial rights and taken this particular plea deal had counsel's performance been sufficient. For these reasons, the Petitioner is entitled to have his convictions vacated and plea withdrawn[3], and requests that this Court grant that relief.

CONCLUSION

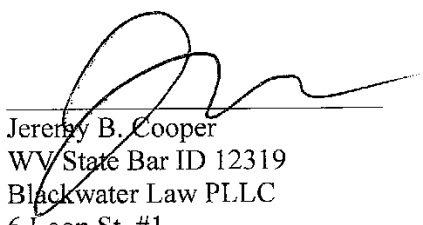
For the foregoing reasons, the Petitioner respectfully requests that this Court vacate the

3 "See *Grooms v. United States*, No. 3:09-1174-CMC, 2013 WL 5771180, at *4 (D.S.C. Oct. 23, 2013) ('where the plea was accepted due to ineffective assistance of counsel, the proper remedy is to vacate the conviction (that is, allow petitioner to withdraw his plea).')." *State v. Hutton*, 806 S.E.2d 777, 788 (W. Va. 2017).

Petitioner's convictions, allow the Petitioner to withdraw from the plea agreement, or alternatively, to order the Petitioner to be sentenced to the recommended sentence in his plea agreement, or grant any other relief the Court deems just and proper.

Respectfully submitted,

TAKIESE BETHEA, Petitioner,
By Counsel,



Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 19-1011

STATE OF WEST VIRGINIA,
Respondent,

v.

TAKIESE NACEER BETHEA,
Petitioner.

(An Appeal of a final order of the Circuit Court of Upshur County, Case No. 19-F-35)

CERTIFICATE OF SERVICE

On this 1st day of February, 2020, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of this Petitioner's Brief to Lara K. Bissett, at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail.

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
PO Box 800
Kingwood, WV 26537
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 19-1011

STATE OF WEST VIRGINIA,
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v.

TAKIESE NACEER BETHEA,
Petitioner.

RESPONDENT'S BRIEF

Appeal from a October 3, 2019, Order
Circuit Court of Upshur County, West Virginia
Case No. 19-F-35

PATRICK MORRISEY
ATTORNEY GENERAL

LARA K. BISSETT
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9102
812 Quarrier Street, 6th Floor
Charleston, WV 25301
(304) 558-5830
Fax: (304) 558-5833
lara.k.bissett@wvago.gov
Counsel for Respondent

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I. ASSIGNMENTS OF ERROR

Petitioner alleges three assignments of error: that the circuit court erred in sentencing Petitioner in violation of the constitutional principles of proportionality, due process, and equal protection; that the circuit court failed to sufficiently advise Petitioner concerning the implications and procedures of his plea; and that Petitioner was denied effective assistance of trial counsel.

II. STATEMENT OF THE CASE

On February 22, 2018, Buckhannon City Police received a call regarding a disturbance at the Colonial Motel. Appendix Record (hereinafter, "A.R.") 26. Upon arrival at Room 56 of the Colonial Motel, the police were greeted by Michaelina Sarne (hereinafter, "Sarne"). *Id.* Sarne attempted to close the door behind her, and the officers advised her multiple times to leave it open. *Id.* Upon looking through the door into the room, Sgt. Courtney noticed blood on the floor of the room. A.R. 27. He stepped inside the room and encountered a male subject, who identified himself as Michael Harris, born on July 13, 1993, in New Jersey. *Id.* However, when Sgt. Courtney conducted a name check, it was discovered that name was false. *Id.* It was later determined that the male subject was Petitioner's co-defendant, Lamere Troup. A.R. 28. Sgt. Courtney noticed more blood on a chair and on a wall in the room. A.R. 27. Recognizing that neither Sarne nor Troup had injuries that would produce that much blood, Sgt. Courtney inquired as to whether anyone else was in the room. *Id.* Cpl. Hissam went into the bathroom where he discovered the victim, Frank Hall. *Id.* Mr. Hall was covered in blood, had a swollen left eye, had a zip tie on his left wrist, and had duct tape on his ankles and wrist. *Id.* As the officers continued to look around the room, they discovered a keychain with pepper spray on the dresser; a knife on the bed closest to the bathroom; two more zip ties under the bed closest to the door; a ski mask and gloves; and a .38 special firearm, which was loaded with six rounds, under the bed closest to the bathroom. *Id.*

Mr. Hall told Sgt. Courtney that his sister, Sarne, had texted him earlier in the day stating that she was at the Colonial Motel and would like to see him. A.R. 28. Mr. Hall said that while visiting Sarne in the motel room, two men wearing ski masks entered the room. *Id.* They duct taped his arms and feet while holding a gun to his head, demanding money. *Id.* Mr. Hall was stabbed multiple times. *Id.* He was also pistol whipped and kicked by Troup, leaving him unconscious. A.R. 32. He was able to break free at one point, running to the door and yelling for help before he was pulled back into the room by the men. A.R. 28. Mr. Hall indicated that Troup was the man who had stabbed him. *Id.* Troup, though, stated that it was Petitioner who stabbed Mr. Hall. A.R. 29, 31. Medical records show that Mr. Hall suffered multiple lacerations, facial swelling, and a broken nose. A.R. 30.

Sgt. Courtney then transported Sarne to the police department to question her. A.R. 28. He read Sarne her rights, and she agreed to provide a statement. *Id.* Sarne stated that she and Mr. Hall had been in the motel room when two males entered the room and sprayed pepper spray. *Id.* She stated that she was thrown to the bed by one man while the other man began hitting Mr. Hall and demanding money. *Id.* Sarne stated that she was then placed in the bathroom, before the assault was interrupted by a knock at the door from the desk clerk, who was soon joined by the police. *Id.* Sarne denied knowing the assailants and denied knowing anything about the money. *Id.*

Sgt. Courtney then interviewed Troup. *Id.* Troup stated that Sarne had offered him $10,000 to drive to West Virginia with her and another man (later identified as Petitioner) to rob Mr. Hall, who was thought to have a large sum of money. *Id.* Troup referred to the plan as a "torture scheme." A.R. 29. Troup stated that the group stopped at a Rite Aid in New Jersey to buy duct tape; at a Wal-Mart in New Jersey to buy gloves; and at a Wal-Mart in Maryland to buy

a ski mask, zip ties, and mace. A.R. 28-29. Troup stated that the group was driven to West Virginia by Sarne's daughter, Alayna Puglia (hereinafter, "Puglia"), who stayed in the car during the robbery and assault. A.R. 29.

Sgt. Courtney and Chief Gregory were able to take the information provided to them and determine that the other man in the "torture scheme" was Puglia's boyfriend, Takiese Naceer Bethea, the Petitioner. *Id.* They also discovered that the motel room had been booked by Puglia. *Id.* A search of Sarne's cell phone, which was conducted pursuant to duly issued search warrants, revealed that on February 13, 2018, Mr. Hall had sent Sarne a text message with a picture of a bag full of money indicating that he had just received $60,000. *Id.* On February 15, 2018, Sarne sent Petitioner a text message saying, "You wanna make sum cash??" to which Petitioner responded, "Don't ialways." *Id.* On February 20, 2018, Petitioner sent Sarne a text message asking, "me u n my boy taking the trip??" *Id.*

In a written statement to the probation officer for purposes of the pre-sentence investigation report (hereinafter, "PSI"), Petitioner asserted:

> [b]efore and during the commission of my crime I was not only intoxicated but under the influence of the Prescribed [sic] medication of Xanax. . . . Powered by my own greed, selfishness, and out right disregard for my morals I came up with the notion to rob Mr. Hall, after hearing about a large sum of money he had. Coming to WV I armed myself with a firearm, and other materials I may have needed to commit this crime. With the prior knowledge of Mr. Hall [sic] whereabouts, I took part in his assault and robbery. My actions where [sic] unjustifiable, im [sic] very remorseful for them not only for the pain and suffering I caused him and his family but also my own. I take full responsibility for what I did, im [sic] taking this time to transition to a better man....

A.R. 32.

Petitioner and Troup were indicted on January 15, 2019, on one count of Conspiracy, one count of Kidnaping, one count of First Degree Robbery, and one count of Malicious Assault. A.R.

3-4. Sarne was indicted on one count of Conspiracy, one count of Kidnaping, and one count of First Degree Robbery. *Id.* Puglia was indicted on one count of Conspiracy. A.R. 3.

On March 7, 2019, Petitioner entered into a plea agreement with the State, pursuant to which he agreed to plead guilty to one count of Robbery and one count of Malicious Assault. A.R. 7-9. The State agreed to recommend concurrent sentences of ten years for the Robbery and two to ten years for the Malicious Assault. A.R. 7. That same day, Petitioner entered a guilty plea pursuant to the terms of the plea agreement. A.R. 12-15. The Plea Order notes that "Defendant stated to the Court that he fully understood the contents of the Petition to Enter a Plea of Guilty." A.R. 12. The Plea Order further reflects that:

> ...the Court proceeded to fully explain to the Defendant the nature of the charges contained in the Indictment and the penalties therefore, as prescribed by the laws and statutes of the State of West Virginia, and the legal consequences of a plea to guilty thereto, and the various pleas which the Defendant might enter upon arraignment. The Court did further explain to the Defendant all of the Defendant's constitutional and legal rights, as prescribed by the laws and statutes of the State of West Virginia, all other matters arising thereon or being pertinent thereto, and at the conclusion thereof the Defendant stated, in his own proper person, that he fully understood all matters explained to him by the Court.

A.R. 13. Indeed, the transcript of the plea hearing demonstrates that the circuit court thoroughly went over the plea agreement with Petitioner, including a discussion of the court's discretion in sentencing. A.R. 74-77. The circuit court further engaged in a comprehensive *Call* colloquy[1] with Petitioner. A.R. 82-88. Petitioner entered his guilty plea as outlined in the plea agreement. A.R. 88, 100.

The PSI noted that Petitioner had a self-reported record as a juvenile offender. A.R. 34. Petitioner reported that he had been adjudicated for "drug charges" and had been placed on probation at age 16, which he violated by subsequently being charged for additional drug offenses.

[1] *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975).

Id. He was placed in a juvenile detention center until his eighteenth birthday. *Id.* As an adult, Petitioner had prior criminal charges in New Jersey for the following:

> 2013: Exhibiting False Documents as Proof of ID and False Reporting to Law Enforcement (pled guilty)
>
> 2013: Resisting Arrest/Eluding, Causing Risk to Public Safety; Hindering—Giving False Information; Resisting Arrest/Eluding after Instructed to Stop (pled guilty; probation later revoked; served 180 days in jail and four years in prison)
>
> 2014: Possession of a Controlled Substance (dismissed)
>
> 2014: Loitering for Purpose of Using, Possession, Selling of Controlled Substance (dismissed)
>
> 2014: Aggravated Assault—Attempting/Causing Serious Bodily Injury, two counts (pled guilty to one count; served four year in prison; crime committed while on probation for a previous offense)
>
> 2017: Wandering/Prowling to Obtain/Sell a Controlled Substance (unknown disposition)
>
> 2017: Possession of a Controlled Substance (unknown disposition)
>
> 2017: Loitering for Purpose of Using, Possession, Selling of Controlled Substance; Wandering/Prowling to Obtain/Sell a Controlled Substance (unknown disposition)
>
> 2017: Possession of Marijuana (five grams) (unknown disposition)
>
> 2018: Fugitive from Justice (dismissed)

A.R. 34-35. The PSI further reflects that Petitioner graduated from high school while in juvenile detention as a B-average student. A.R. 35. He served at least one suspension from school for disrespectful and defiant behavior. *Id.* Petitioner had no employment history and stated that he previously earned money through distributing narcotics. A.R. 36. Petitioner denied alcohol or drug addiction issues. A.R. 37.

The PSI noted that Petitioner had accepted responsibility and expressed remorse for the crimes for which he had been convicted, but the probation officer questioned the sincerity of that

remorse "considering that he has been incarcerated for similar behavior in the past." A.R. 38. The PSI pointed out that Petitioner had only spent approximately three years outside of custody since the age of 17[2] and that he had failed at previous community supervision programs. *Id.*

A sentencing hearing was conducted on September 17, 2019. A.R. 125. Petitioner briefly addressed the circuit court, stating, "I am very remorseful for the crime and my actions," and asserting that "this whole experience... is [sic] changed my outlook on a lot of things; believe it or not." A.R. 130. The circuit court found that the facts underlying this case were uncontroverted. A.R. 131. The circuit court noted that Petitioner's crime was a very serious and violent one in which the victim was stabbed multiple times, knocked unconscious, was duct taped, and had a gun held to his head. *Id.* The circuit court further noted that Mr. Hall was lucky to be alive. A.R. 131-132.

The circuit court expressed its concerns that Petitioner may not have been totally forthright about Sarne's and Puglia's roles in the crime when he offered his guilty plea. A.R. 132. The circuit court noted that Petitioner had an extensive criminal history in New Jersey, which included violations of various terms of probation and incarceration. A.R. 133. Based on all these facts and everything contained in the PSI, the circuit court sentenced Petitioner to a determinate term of 36 years in prison for the First Degree Robbery and to an indeterminate term of not less than two nor more than ten years in prison for the Malicious Assault. A.R. 20-21, 134-135. The sentences were set to run consecutively. A.R. 21, 135. Petitioner now appeals.

[2] Petitioner was then 24 years old. *See* A.R. 36.

III. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

IV. SUMMARY OF THE ARGUMENT

Petitioner's sentence of consecutive terms of 36 years in prison for First Degree Robbery and not less than two nor more than ten years in prison for Malicious Assault is not unconstitutionally disproportionate because the disparity between the sentence of Petitioner and those handed to his co-defendants is not based on race but, rather, based on the co-defendants' lesser roles in the crime. Petitioner also cannot establish that the circuit court erred in advising him of the implications of his plea agreement. Finally, his claim of ineffective assistance of counsel is not ripe for appellate review. Accordingly, the circuit court did not abuse its discretion or otherwise err in sentencing Petitioner; and this Court should affirm the circuit court's decision.

V. STANDARD OF REVIEW

"The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas,* 201 W.Va. 271, 496 S.E.2d 221 (1997). Furthermore, "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight,* 169 W.Va. 366, 287 S.E.2d 504 (1982).

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

VI. ARGUMENT

A. The circuit court did not abuse its discretion or otherwise err when it sentenced Petitioner.

Petitioner argues that his sentence is unconstitutionally disproportionate to the character and degree of his offense under both the objective and subjective tests put forth in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981) and *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). Pet'r Br. 4-5. Petitioner concedes that numerous states have maximum robbery sentences that exceed 36 years and that this Court has, on multiple occasions, upheld sentences for robbery in excess of 36 years. Pet'r Br. 5. His only argument in support of his disproportionality challenge rests on his assertion that he was sentenced more harshly than his female co-defendants, Sarne and Puglia, because he is black and they are white. Pet'r Br. 11. Petitioner argues that disparate treatment on the basis of race constitutes an equal protection issue. *Id.*

Petitioner argues that in *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978), this Court quoted *Oyler v. Boles*, 368 U.S. 448, 456 (1962) for the notion that an equal protection violation can be shown in the criminal context upon a showing of prosecutorial action "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Pet'r Br. 8. Petitioner points out that while he and Troup were indicted for First Degree Robbery, Conspiracy, Kidnaping, and Malicious Assault, Sarne was charged only with First Degree Robbery, Conspiracy, and Kidnaping while Puglia was charged only with Conspiracy. *Id.* Petitioner asserts that both Sarne and Puglia could have been charged as accessories before or after the fact or aiders and abettors for each of the crimes for which he and Troup were charged. *Id.* Petitioner asserts that the discriminatory action against him continued into sentencing. *Id.*

Petitioner's argument fails, however. He points to absolutely nothing in the record to demonstrate that the State acted in any way that was "deliberately based upon an unjustifiable

standard such as race." Indeed, Petitioner offers nothing to even establish the race of Sarne or Puglia short of his assertion that they are white.[3] Moreover, the evidence that *is* available in the record—which comes in large part from Petitioner's own testimony at his plea hearing—is that Sarne and Puglia were far less culpable in this crime than Petitioner or Troup which would justify their lesser sentences in this matter. Petitioner testified that he was the only person who battered Mr. Hall, saying, "If I can recall, I was the only one really doing it." A.R. 91. When asked if Sarne was involved, Petitioner answered, "Yes, to an extent," going on to explain, "She—she really didn't know like to—like what degree that I was about to go do 'cause I like mislead her in a way. *Like I didn't really let them know what I was going to do.*" (Emphasis added.) A.R. 92.

When asked how he came to be involved in the crime, rather than implicating Sarne or Puglia, he testified, "Because I know people like who deal drugs in the area and they was sayin' that this guy had a large sum of money that he was 'bout to purchase drugs." *Id.* When given a further opportunity to implicate Sarne, who was the sister of the victim, in the planning of the crime, Petitioner again distanced her from the crime, stating, "She was coming to get money from [the victim] and I knew of it and *I conspired with the other assailant, Troup*, and I said I knowed that she's coming to like get money from this guy, this, that and the third; I'm going to go do this with him; but I thinks she's going to like—be scared *so I don't want to involve her too much because I don't really trust them that well.*" (Emphasis added.) A.R. 93. The circuit court asked, "Did she know what was going on?" and Petitioner answered, "No, sir. She knew like that I was coming out there with ill-intentions but *she didn't know that it was going to be towards her brother.*" (Emphasis added.) *Id.*

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[3] According to the West Virginia Regional Jail & Correctional Facility Authority's website, both Sarne's and Puglia's race is identified as "Hispanic or Latino." https://apps.wv.gov/OIS/OffenderSearch/RJA/Offender (last accessed March 16, 2020)

The circuit court asked whether Sarne participated in any of the punching or stabbing of the victim; and Petitioner answered, "No. She was—she basicially—the reason I left because *she didn't know who we were* when we first come in there 'cause I had a mask on...but she started screaming and really making a spectacle out of everything like *tryin' to pull me off of [Mr. Hall]*." (Emphasis added.) A.R. 95-96. Regarding Puglia, Petitioner testified that he "left [her] in the car blocks away" from the hotel. A.R. 96.

This Court has held that "[d]isparate sentences for codefendants are not *per se* unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. ***If codefendants are similarly situated***, some courts will reverse on disparity of sentence alone." Syl. Pt. 2, *State v. Buck*, 173 W. Va. 243, 314 S.E.2d 406 (1984) (emphasis added). In the case currently before this Court, the record does not include the PSIs of either Sarne or Puglia, so this Court cannot properly assess their prior records, rehabilitative potential, or lack of remorse.[4] However, the record does make clear that Petitioner and Sarne and Petitioner and Puglia were not "similarly situated" in their involvement in the crime.

While it is clear from the evidence that Sarne had some role in planning the crime, it is equally clear that she did not participate in the malicious assault or in the robbery of the victim. In addition to Petitioner's testimony that Sarne did not participate in the beating or stabbing of the

[4] The failure of Petitioner to include these documents in his Appendix Record cuts against his argument and in favor of affirmance. *State v. Larry A.H.*, 230 W.Va. 709, 716, 742 S.E.2d 125, 132 (2013) (stating that a petitioner "must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.").

victim or in the robbery itself, the victim stated that it was only the two men (Petitioner and Troup) who assaulted him, stabbed him, and demanded money from him. A.R. 28, 30, 33. Troup, too, implicated only himself and Petitioner in the robbery and the malicious assault. A.R. 29, 31. For her part, Sarne denied any involvement in the crime. A.R. 28.

Likewise, the evidence is clear that Puglia's only part in this crime was that of driver. Troup stated to Sgt. Courtney that Puglia "stayed in the car" during the commission of the crime. A.R. 29. Petitioner went even further, putting her "blocks away" from the crime. A.R. 96. Sgt. Courtney's investigation revealed that Puglia booked the motel room in her name and owned the car in which the co-conspirators drove from New Jersey to West Virginia, but by all accounts, that was the extent of her participation in the crime. A.R. 31. The victim didn't even mention Puglia in his statements to law enforcement. A.R. 28, 30.

Accordingly, Sarne was indicted on one count of Conspiracy, one count of Kidnaping, and one count of First Degree Robbery. A.R. 3-4. Puglia was indicted on one count of Conspiracy alone. *Id.* Ultimately, Sarne pled guilty to Conspiracy, for which she was sentenced to not less than one nor more than five years in prison. A.R. 45. Her motion for a suspended sentence in lieu of some alternative sentencing was denied. A.R. 46. Puglia pled guilty to a misdemeanor charge of Accessory After the Fact and was sentenced to twelve months in the regional jail. A.R. 49-50.[5] Again, though, absolutely nothing in the record indicates that the State charged the four co-defendants differently or disproportionately based on their respective races or any other basis of classification.

[5] Troup entered an identical guilty plea to that of Petitioner and received the same sentence that Petitioner received. A.R. 52-55.

Petitioner alternatively argues that the circuit court "had the opportunity not to exacerbate [what he perceives to be] the disparate outcome when sentencing the Petitioner and Mr. Troup" by adopting the recommended sentence set forth in the plea agreement. Pet'r. Br. 12. He argues that when the circuit court opted instead to sentence Petitioner and Troup beyond the recommended sentence, it "became an instrument of the violation of equal protection on the basis of race." *Id.* He argues that the sentence disparity implicates proportionality principles. *Id.* Again, though, Petitioner cannot demonstrate that his sentence was disproportionate either in comparison to the sentences of his co-defendants or in and of itself.

This Court has established two tests to determine whether a sentence is unconstitutionally disproportionate. "The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). This Court went on to find:

> [w]hen it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher,* 166 W.Va. 523, 276 S.E.2d 205 (1981):
>
> > In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Id.

The *Cooper* Court found that the defendant's sentence of 45 years for robbery shocked the conscience because the defendant, who was just nineteen at the time of the crime, had not used a weapon in the commission of the robbery; had only one prior arrest, which was for public intoxication; did not graduate from high school; and had been living on the streets and needed

"guidance and structure in his life." *Id.* at 271, 855. Moreover, the victim in that case was not seriously or permanently injured. *Id.* The *Cooper* Court did not even move on to the *Wanstreet* test, finding the sentence unconstitutionally disproportionate. *Id.* at 272, 857.

The instant matter is very different, however. Petitioner was 23 years old at the time that he committed this crime. *See*, A.R. 25. He graduated high school as a B-average student. A.R. 35. He is the father of a young son. A.R. 36. He has an extensive criminal history as both a juvenile and as an adult, which includes a history of at least two probation revocations which led to two incarcerations. A.R. 34-35. He pointed a gun at and beat Mr. Hall. A.R. 89-90. Mr. Hall suffered multiple stab wounds, a broken nose, and a swollen left eye in the robbery and assault. A.R. 30. Moreover, Petitioner's crime was planned over a series of days; and Petitioner and his co-defendants crossed multiple state lines to perpetrate their crime, stopping multiple times along the way to buy supplies to carry out their "torture scheme." A.R. 28-29. Certainly, Petitioner's crime—in which he conspired with multiple players and in which his victim was seriously injured—and Petitioner's criminal history are far more egregious than those of the defendant in *Cooper*.

Considering all of these factors as well as the fact that the State dismissed charges of Conspiracy and Kidnaping in exchange for his guilty plea to First Degree Robbery and Malicious Assault, Petitioner's sentence of consecutive terms of 36 years and two to ten years in prison cannot be said to shock the conscience. Indeed, this Court has upheld far harsher penalties in similar situations. *See State v. Booth*, 224 W. Va. 307, 685 S.E.2d 701 (2009) (defendant sentenced to 80 years for first degree robbery where the victim suffered serious injury); *State v. Ross*, 184 W. Va. 579, 402 S.E.2d 248 (1990) (defendant sentenced to 100 years for attempted first degree robbery); *State v. Adams*, 211 W. Va. 231, 565 S.E.2d 353 (2002) (defendant sentenced to 90 years

for aggravated robbery, even though no deadly weapon or extreme violence was used); *State v. Gibbs*, 238 W. Va. 646, 797 S.E.2d 623 (2017) (defendant sentenced to consecutive terms of one to five years for conspiracy, one to ten years for entry of a dwelling, and fifty years for first degree robbery). Accordingly, Petitioner's sentence is not unconstitutionally disproportionate when evaluated according to the subjective test laid out in *Cooper*.

Moving on to the *Wanstreet* test, it remains clear that the nature of Petitioner's offense was disturbingly egregious. Petitioner conspired with three other people to travel from New Jersey to West Virginia in order to perpetrate a violent robbery and malicious assault upon a stranger who he sought to rob of a large sum of money, a crime that he admitted was motivated by sheer greed. A.R. 32. The victim of that robbery and malicious assault suffered serious injuries, both physical and emotional. A.R. 33. Certainly, then, the first *Wanstreet* factor weighs in favor of affirming Petitioner's sentence.

The second *Wanstreet* factor considers the legislative purpose behind the punishment for robbery. This Court has held:

> Our cases have recognized that the legislatively created statutory minimum/discretionary maximum sentencing scheme for aggravated robbery serves two purposes. "First, it gives recognition to the seriousness of the offense by imposing a minimum sentence below which a trial court may not go. Second, the open-ended maximum sentencing discretion allows trial courts to consider the weight of aggravating and mitigating factors in each particular case." *State v. Mann,* 205 W.Va. 303, 316, 518 S.E.2d 60, 73 (1999) (per curiam) (citation omitted).

State v. Adams, 211 W. Va. 231, 234–35, 565 S.E.2d 353, 356–57 (2002). Here, the aggravating factors far outweigh any mitigating factors that might exist. Petitioner has an extensive criminal record for someone of just 24 years of age. A.R. 34-35. That record includes two probation revocations and subsequent incarcerations, which demonstrates his utter disregard for the criminal justice system. *Id.*

Of course, the details of *this* crime are greatly disturbing. Petitioner and his accomplices traveled from New Jersey to West Virginia—stopping three times along the way to buy duct tape, zip ties, ski masks, and gloves—for the sole purpose of torturing and robbing a man who Petitioner had never even met. A.R. 31-32. The crime itself was so violent that the circuit court noted that Mr. Hall is lucky to have gotten to the door to call for help. A.R. 131-132. While Petitioner did express remorse for his part in the crime, that does not outweigh all of the aggravating factors. The second *Wanstreet* factor, too, weighs in favor of affirming the sentence as imposed.

The third factor compares the sentence imposed to the sentence imposed for robbery in other jurisdictions. This Court has "previously recognized that other jurisdictions permit long prison sentences for the crime of aggravated robbery. *See State v. Boag,* 104 Ariz. 362, 453 P.2d 508 (1969) (75 to 99 year sentence); *People v. Isitt,* 55 Cal.App.3d 23, 127 Cal.Rptr. 279 (1976) (life sentence); *State v. Victorian,* 332 So.2d 220 (La.1976) (45 year sentence); *State v. Hoskins,* 522 So.2d 1235 (La.Ct.App.1988) (99 year sentence); *People v. Murph,* 185 Mich.App. 476, 463 N.W.2d 156 (1990) (two 46 year sentences); *Garrett v. State,* 486 S.W.2d 272 (Mo.1972) (99 year sentence); *State v. Morris,* 661 S.W.2d 84 (Mo.Ct.App.1983) (life sentence); *Robinson v. State,* 743 P.2d 1088 (Okla.Crim.App.1987) (100 year sentence)." *State v. Adams*, 211 W. Va. 231, 235, 565 S.E.2d 353, 357 (2002). Again, this factor weighs in favor of affirming Petitioner's sentence.

Finally, *Wanstreet* directs the Court to compare the sentence to sentences for other offenses in this jurisdiction. Again, though, "this Court has rejected proportionality challenges in a number of cases involving aggravated robbery sentences. *See State v. Williams,* 205 W.Va. 552, 519 S.E.2d 835 (1999) (upheld 50 year sentence for attempted aggravated robbery); *State v. Phillips,* 199 W.Va. 507, 485 S.E.2d 676 (1997) (upholding 140 year sentence for two counts of aggravated robbery and one count of kidnaping); *State v. Woods,* 194 W.Va. 250, 460 S.E.2d 65 (1995)

(upholding sentence of 36 years for aggravated robbery); *State v. Ross,* 184 W.Va. 579, 402 S.E.2d 248 (1990) (upheld 100 year sentence for attempted aggravated robbery); *State v. Spence,* 182 W.Va. 472, 388 S.E.2d 498 (1989) (upheld 60 year sentence for aggravated robbery); *State v. England,* 180 W.Va. 342, 376 S.E.2d 548 (1988) (upheld life sentence for aggravated robbery); *State v. Brown,* 177 W.Va. 633, 355 S.E.2d 614 (1987) (upheld 60 year sentence for aggravated robbery); *State v. Glover,* 177 W.Va. 650, 355 S.E.2d 631 (1987) (upheld 75 year sentence for aggravated robbery)." *Adams* at 235, 357. The fourth and final factor, then, weighs in favor of upholding the sentence in this case.

Furthermore, "[w]here the state agrees to make a sentencing recommendation and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(B) of the *West Virginia Rules of Criminal Procedure,* the trial court is not bound to impose the sentence recommended by the state if it accepts the plea agreement." Syl. Pt. 1, *State ex rel. Forbes v. Kaufman*, 185 W. Va. 72, 404 S.E.2d 763 (1991). Rule 11(e) states:

> (e) *Plea Agreement Procedure.*
>
> (1) In General. The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty, or nolo contendere to a charged offense or to a lesser or related offense, the attorney for *the state will do any of the following*:
>
> (A) Move for dismissal of other charges; or
>
> (B) *Make a recommendation or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court*; or
>
> (C) Agree that a specific sentence is the appropriate disposition of the case; or
>
> (D) Agree not to seek additional indictments or information for other known offenses arising out of past transactions.

(Emphasis added.) The plea agreement in this case does not specify that it is an 11(e)(1)(B) plea; however, the language contained in the written plea agreement makes clear that it is. A.R. 7-10.

As in all cases, "[t]he Supreme Court of Appeals reviews sentencing orders...under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas,* 201 W.Va. 271, 496 S.E.2d 221 (1997). "[S]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight,* 169 W.Va. 366, 287 S.E.2d 504 (1982). Additionally, "[w]hen a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively." Syl. Pt. 3, *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979).

Here, Petitioner does not even allege that his sentence was *not* within the statutory guidelines. Petitioner fails to prove that his sentence was based on an impermissible factor or was otherwise imposed in a manner that violates his Equal Protection rights. Accordingly, because Petitioner's sentence is not unconstitutionally disproportionate and because the circuit court did not abuse its discretion in sentencing Petitioner to consecutive terms of 36 years in prison for the First Degree Robbery and not less than two nor more than ten years in prison for the Malicious Assault, this Court should affirm the sentence.

B. Any omission by the circuit court in the Rule 11(e)(2) colloquy with Petitioner was harmless error because there is no realistic likelihood that Petitioner labored under the misapprehension that his plea could be withdrawn if the circuit court did not impose the recommended sentence.

Petitioner next argues that the circuit court failed to give the appropriate Rule 11(e)(2) admonition, as laid out in *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986). Pet'r Br. 13. Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure states:

(e) *Plea Agreement Procedure.*

(2) *Notice of such agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A), (C), or (D), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

In *Cabell,* this Court held:

> A trial court has two options to comply with the mandatory requirements of Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure. It may initially advise the defendant at the time the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea. As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea.

Cabell at Syl. Pt. 1, Syl. Pt. 2. In the instant matter, the circuit court engaged in this discussion with Petitioner in the midst of the *Call* colloquy:

> Q: Now, let me talk to you about this part of it, Mr. Bethea. So, you're going to plead guilty to the robbery and—you know, the State's going to make a recommendation of ten years on that. And I'm not—I'm not bound by that. That means that if you come in here I could sentence you—you know, robbery's got unlimited amount of time I could sentence you to. So, it's just a minimum of ten years. Do you understand that part?
>
> A: Yes.
>
> Q: Okay. Do you have any questions about any of that?
>
> A: No.
>
> (Off the record conversation between client and attorney.)
>
> Q: Do you have any questions about that then?

A: No, sir.

Q: Okay. And then you've got two to ten years and the State's going to recommend that that run concurrent with the robbery; but I don't have to do that either. Do you understand that? I could run them consecutive rather than current.

A: Yes, sir.

Q: Okay. All right. Now that's my understanding of the plea agreement. Is that your understanding of the plea agreement?

A: Yes, sir.

Q: Do you have any questions about any of that?

A: No, sir.

A.R. 76-77. Petitioner asserts that this conversation falls short of the requirements of *Cabell*. However, as Petitioner correctly points out, this Court has held that "[t]he harmless error rule of Rule 11(h) of the West Virginia Rules of Criminal Procedure should be applied when the factual evidence is clear that no substantial rights of the defendant were disregarded." Syl. Pt. 2, *State v. Valentine*, 208 W.Va. 513, 541 S.E.2d 603 (2000). Moreover, "[t]he omission of the statement required by Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure *must* be deemed harmless error unless there is some realistic likelihood that the defendant labored under the misapprehension that his plea could be withdrawn." (Emphasis added.) *Id.* at Syl. Pt. 3. Petitioner asserts that being from New Jersey left him unfamiliar with West Virginia criminal procedure, and he did not understand that a recommended sentence carries so little weight here. Pet'r Br. 15. Petitioner's argument seems disingenuous at best, though.

First, beyond what the State has already pointed out, the circuit court engaged in an extensive *Call* colloquy with Petitioner as well, ensuring that Petitioner understood the charges with which he was faced; the potential penalties for those crimes and the sentencing options before

the circuit court; Petitioner's right to proceed to trial by jury, the procedure for such a trial, and the rights he would be waiving in giving up such a trial to plead guilty; and the possibility that Petitioner could face an enhanced sentence in the future if he was to commit another felony offense in the future. A.R. 80-85. The circuit court further ensured that Petitioner understood all of his rights in the plea process, that Petitioner had not been threatened or otherwise coerced into taking the plea offer, and that Petitioner was acting of his own free will. A.R. 86-87. The circuit court also ensured that Petitioner was satisfied with the representation of his attorneys. A.R. 82.

More significant, though, is what happened at the subsequent sentencing hearing or, rather, what *did not* happen: upon pronouncement of sentence by the circuit court, Petitioner sat silent. A.R. 136. He did not object. He did not move to withdraw his plea. In fact, the court specifically asked Petitioner's attorney, "Do you have anything else, Mr. Logue?" and the attorney answered that he did not. *Id.* Surely, if there was a "realistic likelihood that [Petitioner] labored under the misapprehension that his plea could be withdrawn," then he would have moved to withdraw his plea following the pronouncement of his sentence. Yet, he did no such thing.[6] Accordingly, then, pursuant to *Valentine,* the circuit court's omission in failing to advise Petitioner that if the court did not accept the recommended sentence, he would have no right to withdraw the guilty plea must be deemed harmless error.

C. Petitioner's ineffective assistance of counsel claim is not ripe for review on direct appeal and, therefore, it fails.

Finally, Petitioner asserts that his trial counsel—Sean Logue, a Pennsylvania attorney (A.R. 123) who Petitioner retained (A.R. 135)—was ineffective because he failed to sufficiently

[6] Nonetheless, *sua sponte* and at the tail end of the hearing, the circuit court stated, "I'll note—and I will note your objection and exception to the Court's sentence for the record, Mr. Logue." A.R. 137. Trial counsel replied, "Thank you, Your Honor. I was about to do that." *Id.*

inform Petitioner of the sentencing implications of his plea agreement. Pet'r Br. 16. Petitioner acknowledges that this Court has held that "[i]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim." Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992). He asserts, though, that Mr. Logue's conduct was so ineffective on the face of the record that it justifies vacating Petitioner's plea and sentence. Pet'r Br. 16.

The State disagrees. There is nothing on the face of the record available in this appeal that demonstrates ineffective assistance of counsel. In Syllabus Point 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), this Court adopted the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984) to evaluate claims of ineffective assistance of counsel: "(1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." The *Miller* Court went on to hold that "[i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Miller* at Syl. Pt. 6. Here, though, the record does not allow for such an assessment of

Mr. Logue's representation. Or, if it does, then there is nothing in the record that demonstrates that Mr. Logue's actions or omissions were "outside the broad range of professionally competent assistance."

Petitioner asserts that Mr. Logue failed to explain to him that the circuit court did not have to accept the recommended sentence or the "likelihood that the circuit court would dramatically depart from the sentencing recommendation." Pet'r. Br. 17. He complains that at sentencing, Mr. Logue did not make any argument "concerning a ten year sentence versus a life sentence, versus a sentence of centuries, versus a sentence of decades." Pet'r Br. 18. Of course, Petitioner was not sentenced to life or centuries in prison. His plea agreement—which Mr. Logue negotiated and which called for the dismissal of the kidnaping charge that did, in fact, carry a life sentence—spared Petitioner of that. Moreover, his sentence of 36 years for robbery does not "dramatically depart" from the recommended sentence of ten years. Accordingly, there was no good reason under the "broad range of professionally competent assistance" for Mr. Logue to make such a dramatic argument prior to Petitioner's sentencing.

The argument that Mr. Logue did make on behalf of Petitioner prior to sentencing was one which graciously—if not dubiously—painted Petitioner as someone who had "manned up" and taken responsibility for his crimes. A.R. 128. He discussed Petitioner's new-found sobriety and his relationship with his son as reasons for the circuit court to give Petitioner another chance in society. A.R. 129. And despite Petitioner's assertion that Mr. Logue "did not ask the [circuit court] to accept the recommendation of 10 years, and only asked for the sentences to run concurrently," (Pet'r. Br. 21), Mr. Logue *did* state, "I believe that the State will recommend—recommend a concurrent sentence. I join that recommendation. *I think that ten years is enough for the crime.*" (Emphasis added.) A.R. 130. Indeed, trial counsel argued all he could argue on

Petitioner's behalf given the weight of the aggravating factors—including Petitioner's extensive criminal record—versus the mitigating factors. No "reasonable attorney" would have or could have done more given the totality of the circumstances.

Petitioner further complains that Mr. Logue did not personally appear on Petitioner's behalf at his arraignment or at the plea hearing. Pet'r. Br. 9. Instead, Petitioner was represented by Charleston attorney, Richard Walters, at those hearings. A.R. 62, 70. However, as Petitioner himself points out, he did not express any dissatisfaction with Mr. Logue's counsel (A.R. 82), nor did he fire Mr. Logue or otherwise seek to retain or be appointed new counsel.

Petitioner goes on to question whether Mr. Logue undertook any real investigation of this matter and why Mr. Logue didn't explore a defense of diminished capacity. Pet'r. Br. 20-21. These questions do go to the very heart of what a reasonable attorney would undertake in representation of a criminal defendant. However, this Court has found that "[i]n cases involving ineffective assistance on direct appeals, intelligent review [of questions such as these] is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior." *State v. Miller*, 194 W. Va. 3, 14–15, 459 S.E.2d 114, 125–26 (1995). Because the record available to this Court in this appeal does not support a proper and fair *Strickland* analysis, Petitioner's final assignment of error should be rejected.

VII. CONCLUSION

Petitioner has failed to demonstrate that his sentence of consecutive terms of 36 years in prison for the First Degree Robbery and not less than two nor more than ten years in prison for the Malicious Assault is unconstitutionally disproportionate because it violates his equal protection rights in light of the sentences received by his co-defendants. He has further failed to demonstrate

that the circuit court erred in advising him of the implications of his plea agreement. Finally, his claim of ineffective assistance of counsel is not ripe for appellate review. Accordingly, the circuit court did not abuse its discretion or otherwise err in sentencing Petitioner; and this Court should affirm the October 3, 2019, Order of the Circuit Court of Upshur County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL

LARA K. BISSETT
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9102
812 Quarrier Street, 6th Floor
Charleston, WV 25301
(304) 558-5830, ext. 2353
Fax: (304) 558-5833
lara.k.bissett@wvago.gov
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

v. **NO. 19-1011**

TAKIESE NACEER BETHEA,
Petitioner.

CERTIFICATE OF SERVICE

I, Lara K. Bissett, do hereby certify that on the 6th day of March, 2020, I caused the foregoing **Respondent's Brief** to be served upon Petitioner's counsel by delivering to him a true copy thereof, via United States Mail, postage prepaid and addressed as follows:

Jeremy B. Cooper
Blackwater Law, PLLC
6 Loop St. #1
Aspinwall, PA 15215

Lara K. Bissett

LARA K. BISSETT
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9102
812 Quarrier Street, 6th Floor
Charleston, WV 25301
(304) 558-5830, ext. 2353
Fax: (304) 558-5833
lara.k.bissett@wvago.gov
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 19-1011

STATE OF WEST VIRGINIA,
Respondent,

v.

TAKIESE NACEER BETHEA,
Petitioner.

(An Appeal of a final order of the Circuit Court of Upshur County, Case No. 19-F-35)

PETITIONER'S REPLY BRIEF

Counsel for the Petitioner, Takiese Bethea

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by sentencing the Petitioner in violation of the constitutional principles of proportionality, due process, and equal protection, based upon the massive disparity between the plea offers and sentences given to his white co-defendants in comparison to the plea offers and sentences given to the Petitioner and his other African-American co-defendant.
2. The Circuit Court failed to sufficiently advise the Petitioner concerning the implications and procedure of his plea.
3. The Petitioner was denied the effective assistance of trial counsel, resulting in an involuntary guilty plea.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for Rule 20 Oral Argument because the appeal presents an issue of first impression and of constitutional magnitude. Alternatively, Rule 19 Oral Argument is appropriate in light of an unsustainable exercise of discretion by the lower court.

ARGUMENT

1. Unconstitutional Sentence on the grounds of disproportionality and equal protection.

As a preliminary matter, it is important to clarify the circumstances surrounding the Respondent's assertion that the Petitioner's claims are impaired by the absence of his co-defendants' pre-sentence investigation reports in the Appendix Record. (Respondent's Brief, at 10). While those reports, which are sealed in their three respective court files, are not included in the Appendix Record, the Petitioner filed and served a Motion for Partial Designated Record

contemporaneously with the filing of the Petitioner's Brief and Appendix Record, specifically requesting that those reports be produced by the Upshur County Circuit Clerk and delivered to this Court. Therefore, this Court will have access to the relevant sentencing records when assessing the Petitioner's constitutional claims related to the disparate sentences.

Additionally, the Respondent asserts that the Petitioner has not established the race of Ms. Sarne and Ms. Puglia. (Respondent's Brief, at 9). That racial information will be included in the pre-sentence investigation reports sought to be produced in the partial designated record. The Respondent then goes outside the record by citing to information on the jail offender search website which purportedly states that both women are Hispanic or Latino. (Respondent's Brief, at 9, footnote 3). Whether or not Ms. Sarne and Ms. Puglia are of Latino or Hispanic ethnicity has no bearing on an analysis of whether or not the Petitioner suffered disparate treatment as an African-American. Furthermore, a classification as Hispanic or Latino does not foreclose that an individual is also white, as the former categories are recognized as ethnic, rather than racial, in certain contexts:

> The Census recognizes five races: "White," "Black or African American," "American Indian or Alaska Native," "Asian," and "Native Hawaiian or Other Pacific Islander." The government has differentiated "race" from "ethnicity" at least since Directive 15, issued by OMB in 1977. OMB's 1997 race and ethnicity standards use the same distinction.

Vill. of Freeport v. Barrella, 814 F.3d 594 (2nd Cir. 2016) (footnote 13, citations omitted). While other facets of federal law view racial and ethnic categories interchangeably (*See, Id.*, 814 F.3d at 616-17), any interpretation of the respective racial/ethnic identities of the Petitioner and Mr. Troup on the one and, and Ms. Sarne and Ms. Puglia on the other, indicates that they are not of the same racial/ethnic background. The record, as discussed in the Petitioner's Brief

at length, also demonstrates that the two African-Americans received far harsher treatment via the mode of prosecution and sentencing than Ms. Sarne and Ms. Puglia.

The Respondent also seeks to show that the Petitioner was not similarly situated to Ms. Sarne and/or Ms. Puglia. The Respondent's carefully worded assertion (Respondent's Brief, at 11) that "the victim stated that it was only the two men (Petitioner and Troup) who assaulted him, stabbed him, and demanded money from him" elides the victim's full statement of how he ascribed responsibility for his misfortune:

> I think about what would they have done to me if they did get money? How could my sister do that to me, her brother. They would have killed me. No witnesses. For my sister there is no sentence severe enough or long enough for her. Not only did she break the laws of man, she violated and desecrated the values of family and love. To the judge I say do as you feel is just for what she has done. As for the two black males, including my sister they are a threat to society in which I believe no matter how much prison rehabilitation they receive their ways are imbedded within their nature. They are young but I believe this will always by their way. To the judge again I say sentence them as you see fit. For my niece alayna puglia.. [sic] even though she was not the trigger man, she also conspired in this plot and she be found just as guilty.. [sic] These are my recommendations.

(A.R., at 33-34).

Aside from specifically singling Ms. Sarne out as having the greatest responsibility for what happened to him, the victim's statement amply illustrates the invidious attitude surrounding the prosecution of the two "black males," the Petitioner and Mr. Troup. Describing them by their common racial identity, in contrast with Ms. Sarne and Ms. Puglia, the Petitioner and Mr. Troup are deemed to be impervious to rehabilitation by nature. This description echos the types of racial attitudes that have existed in our society since long before the Supreme Court of the United States decided *Strauder*.

Furthermore, the Respondent's contention that Ms. Puglia was merely the driver in the

scheme (Respondent's Brief, at 11) could justify a degree of sentencing disparity (*see, i.e.*, *State v. Pruitt*, No. 17-0802 (W. Va. October 12, 2018) (memorandum opinion)), but has no bearing on criminal responsibility and the vast gulf in the charged offenses between her and the Petitioner. Based upon the definitions set forth in Syllabus Points 6, 7, and 8 of *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989), the acts alleged by law enforcement in the investigation to have been committed by Ms. Puglia (A.R. at 26-30) were sufficient to support charges of kidnapping and robbery as an accessory before the fact.

Despite the similarity in potential exposure to criminal liability, at both the charging and plea offer phase, the two African-American co-defendants received worse treatment from the State than did Ms. Puglia and Ms. Sarne. Despite the greater degree of culpability of Ms. Sarne in the eyes of the victim, the two "black males" received vastly worse plea offers and suffered sentences many multiples of those imposed upon their co-conspirators.

Despite the fact that the Petitioner "did express remorse for his part in the crime" (Respondent's Brief, at 15), and despite the fact that Ms. Sarne "denied any involvement in the crime" (Id., at 11), it was the Petitioner and Mr. Troup[1] who were treated more heavily by the circuit court and the prosecutor. Despite the fact that Ms. Sarne's familial relationship with the victim was the *sine qua non* of the entire scheme, she walked away with a sentence that can be discharged approximately nine times more quickly than that of the two African-American men who accompanied her.

The Petitioner "bears a heavy burden of establishing that he has been singled out over others similarly situated and that the selectivity in favor of him is based on some impermissive

1 Likewise, contrary to Ms. Sarne's conduct, Mr. Troup cooperated with law enforcement and assisted with the prosecution of his co-conspirators. A.R. 26-32.

consideration as race, religion or an attempt to prevent his exercise of constitutional rights." *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39, 43 (1978) [Citations omitted]. The petitioner can meet this burden in this case, because not only did he personally suffer a vastly disproportionate treatment by the prosecutor and the circuit court than Ms. Sarne and Ms. Puglia, but his fate was suffered identically by the only other person involved in this case who shares his racial identity, Mr. Troup. The fact that the two African-American co-defendants received such massively worse treatment than similarly situated individuals who did not share their race is a discredit to our system of justice, and justifies relief from this Court.

2. Failure to advise concerning procedure and implications of plea agreement

The Respondent's description of the circumstances surrounding the pronouncement of the Petitioner's sentence (Respondent's Brief, at 20) is simply not complete. The Respondent states "upon pronouncement of sentence by the circuit court, Petitioner sat silent." Of course, the transcript proves that he did not:

> [THE COURT:] I'll note – and I will note your objection and exception to the Court's sentence for the record, Mr. Logue.
> MR. LOGUE: Thank you, your Honor. I was about to do that. One more thing, Your Honor. I don't do appellate work, so as such I would request – to be able to withdraw from this case.
>
> THE DEFENDANT: That's crazy.
>
> THE COURT: Okay, well –.
>
> THE DEFENDANT: Fuckin' railroaded me.
>
> MR. LOGUE: Shhh. Be quiet now.
>
> THE DEFENDANT: (Inaudible.)
>
> MR. LOGUE: That's not helping you.
>
> THE DEFENDANT: This shit's crazy.

> THE COURT: I'll grant that. What I'll do is I'll appoint an attorney to represent you on any appeal you want to make, Mr. Bethea. Okay? So we'll put that in the order.
>
> MR. LOGUE: Sign here.
>
> THE DEFENDANT: I ain't filling shit out.
>
> THE COURT: All right. There's the order. You'll be remanded to the custody of the Sheriff to go back to jail, Mr. Bethea.
>
> (Hearing concluded at 11:46:34 A.M.)

(A.R., at 137-38.)

Contrary to the Respondent's suggestion that the Petitioner simply acquiesced, this sequence of events indicates that the Petitioner was blindsided, and did not expect the result that he received. These circumstances dovetail with trial counsel's overall ineffective assistance as described in argument section three in the Petitioner's Brief, and in further detail below. When viewed in light of trial counsel's failure to actually even argue for the ten year sentence, instead focusing his argument only on whether the malicious assault 2-10 would run consecutively or concurrently (A.R., at 128-30), the Petitioner's words at the conclusion of his sentencing hearing create a strong inference that he was misinformed about the entire process, including the fact that he was exposed to essentially unlimited time in prison, without recourse. Furthermore, the failure of a layperson defendant to affirmatively move to rescind his plea, upon being summarily dispensed with by his trial counsel, cannot be seen as some sort of knowing and deliberate acquiescence, as the Respondent insinuates. To the contrary:

> "Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right." Syl.Pt. 2, *State ex rel May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964).

State v. Neuman, 371 S.E.2d 77, 179 W.Va. 580 (1988). Perhaps more importantly, Rule 32(e)

of the West Virginia Rules of Criminal Procedure prohibits a motion to withdraw a plea once sentence is imposed except by direct appeal or habeas petition, rendering the Respondent's protestation that the Petitioner did not attempt to withdraw his plea in open court to be dubious at best.

Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure requires, in relevant part, that: "If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea." That advisement did not take place. In this case, the Court's colloquy was deficient on the matter of the irrevocability of the Petitioner's plea. The circumstances indicate that he was blindsided by how his sentencing unfolded. The Petitioner has shown, at minimum, "some realistic likelihood" that he labored under a misapprehension about this aspect of his plea, sufficient to justify relief by this Court.

3. Ineffective Assistance of Counsel Resulting in Involuntary Plea Agreement

The Respondent makes incorrect assertions involving the nature of the Petitioner's plea agreement in its response to this assignment of error. The Respondent states:

> [The Petitioner] complains that at sentencing, Mr. Logue did not make any argument "concerning a ten year sentence versus a life sentence, versus a sentence of centuries, versus a sentence of decades." Pet'r Br. 18. Of course, Petitioner was not sentenced to life or centuries in prison. His plea agreement – which Mr. Logue negotiated and which called for the dismissal of the kidnapping charge that did, in fact, carry a life sentence – spared Petitioner of that. Moreover, his sentence of 36 years for robbery does not "dramatically" depart from the recommended sentence.

(Respondent's Brief, at 22.)

The suggestion that Mr. Logue's negotiated plea agreement spared the Petitioner of centuries or life in prison is entirely spurious. The Petitioner was actually exposed to centuries

or life in prison as a direct result of the plea agreement. Despite the Respondent's apparent misapprehension, First Degree Robbery carries a potential life sentence. *State v. England*, 376 S.E.2d 548, 180 W.Va. 342 (1988).[2] The Circuit Court could have imposed that upon him. The Circuit Court could have also imposed a sentence of centuries upon the Petitioner, as indicated by the litany of extremely long sentences that this Court has upheld in robbery proportionality challenges, not least of which is *State ex rel. Hatcher v. McBride*, 656 S.E.2d 789, 221 W. Va. 760 (2007), which upheld a 212 year sentence. Reviewing the transcript of the sentencing hearing, one would not gather the extreme gravity and peril of the Petitioner's situation based upon the trial counsel's argument to the Court.

Furthermore, the argument that a 36 year sentence does not "dramatically depart" from a 10 year sentence is simply absurd. Adding 13 years to an expected discharge date is roughly equivalent to tacking on an extra second degree sexual assault conviction. It is a massive deprivation of liberty; a profound consequence that is only overshadowed by how much worse it could have been.

The Respondent further asserts that trial counsel's statement at sentencing that "I think ten years in enough for the crime" (A.R. at 130) is somehow evidence that he realized and took seriously the stakes at the sentencing hearing. (Respondent's Brief, at 22). To the contrary, that statement was clearly in the context of running the 2-10 concurrently with the anticipated ten year determinate sentence, rather than the merits of the ten year sentence versus what was within the Circuit Court's discretion.

Finally, the Respondent suggests that the Petitioner's assertions of failure to investigate

2 A case which, notwithstanding the Respondent's rhetoric on page 22, is cited *for exactly this prospect* on page 16 of the Respondent's Brief.

and raise a diminished capacity defense are unripe on the face of the record, and in the absence of trial counsel's testimony, such as would be obtained at a habeas evidentiary hearing. (Respondent's Brief, at 23). Critically, however, a sound investigation is a prerequisite to effective assistance. Syl. Pt. 4, *Ballard v. Ferguson*, 751 S.E.2d 716, 232 W.Va. 196 (2013). Because the record in this case shows that trial counsel failed to conduct his own investigation of the evidence, instead relying upon the representations of the State as to what the evidence would be (A.R., at 128), there is no scenario in which trial counsel's version of events could justify a representation decision of that nature. Accordingly, based upon the failure to investigate, and the circumstances that occurred in the plea and sentencing hearings, there is sufficient justification in the record for this Court to grant relief.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court vacate the Petitioner's convictions, allow the Petitioner to withdraw from the plea agreement, or alternatively, to order the Petitioner to be sentenced to the recommended sentence in his plea agreement, or grant any other relief the Court deems just and proper.

Respectfully submitted,

TAKIESE BETHEA, Petitioner,
By Counsel,

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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TAKIESE NACEER BETHEA,
Petitioner.

(An Appeal of a final order of the Circuit Court of Upshur County, Case No. 19-F-35)

CERTIFICATE OF SERVICE

On this 28th day of May, 2020, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of this Petitioner's Reply Brief to Lara K. Bissett, at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail.

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

CASE NO. 19-F-35C

VS.

OFFENSES: CONSPIRACY, a felony, one (1) count; KIDNAPPING; a felony, one (1) count FIRST DEGREE ROBBERY; a felony, one (1) count; MALICIOUS ASSAULT, a felony, one (1) count.

MICHEALINA K. SARNE,
LAMERE S. TROUP,
TAKIESE NACEER BETHEA,
ALAYNA N. PUGLIA.

DEFENDANT.

WV CODE: **§61-10-31**
§61-2-14a
§61-2-12(a)
§61-2-9(a)

2019 JAN 15 P 2:
BRIAN GAISER
CIRCUIT CLERK
UPSHUR COUNTY WV
FILED

INDICTMENT

FIRST COUNT: The Grand Jurors of the State of West Virginia, in and for the body of the County of Upshur, upon their oaths do charge that **MICHAELINA K. SARNE, LAMERE S. TROUP, TAKIESE NACEER BETHEA,** and **ALAYNA N. PUGLIA,** on or about the 22nd day of February, 2018, in the City of Buckhannon, Upshur County, West Virginia, did unlawfully and feloniously conspire with each other, to commit an offense against the State, to-wit: Robbery in the First Degree, a felony, as charged in the Third Count of this Indictment, and that the said Michealina K. Sarne, Lamere S. Troup, Takiese Naceer Bethea, and Alayna N. Puglia, being members of said conspiracy, committed one or more overt acts in furtherance of this conspiracy, in violation of the applicable provisions of Chapter 61, Article 10, Section 31 of the West Virginia Code, as amended, against the peace and dignity of the State.

SECOND COUNT: The Grand Jurors of the State of West Virginia, and for the body of the County of Upshur, upon their oaths do further charge that **MICHAELINA K. SARNE, LAMERE S. TROUP,** and **TAKIESE NACEER BETHEA,** aiding and abetting each other, on or about the 22nd day of February, 2018, in the City of Buckhannon, Upshur County, West Virginia did unlawfully and feloniously take custody of, confine, and restraint Frank P. Hall against his will by force, with the intent to inflict bodily injury and to terrorize the said Frank P. Hall, in violation of the provisions of Chapter 61, Article 2, Section 14a, of the West Virginia Code, as amended, against the peace and dignity of the State.

THIRD COUNT: The Grand Jurors of the State of West Virginia, in and for the body of the County of Upshur, upon their oaths, do further charge that **MICHAELINA K. SARNE, LAMERE S. TROUP,** and **TAKIESE NACEER BETHEA,** aiding and abetting each other, on or about the 22nd day of February, 2018, in the City of Buckhannon, in Upshur County, West Virginia, did unlawfully and feloniously commit the offense of Robbery in the First Degree, a felony, to-wit: the said Michaelina K. Sarne, Lamere S. Troup, and Takiese Naceer Bethea, did then and there unlawfully and feloniously commit violence upon the person of Frank P. Hall, by means of striking, hitting, beating, and stabbing the said Frank P. Hall, and by such means, did then and there unlawfully, feloniously and violently attempt to steal, take and carry away money and property belonging to Frank P. Hall, all being against the will of the said Frank P. Hall, in violation of the provisions of Chapter 61, Article 2, Section 12(a) of the West Virginia Code, as amended, against the peace and dignity of the State.

FOURTH COUNT: The Grand Jurors of the State of West Virginia, in and for the body of the County of Upshur, upon their oaths, charge that **LAMERE S. TROUP,** and **TAKIESE NACEER BETHEA,** on or about the 22nd day of February, 2018, in the City of Buckhannon, in Upshur County, West Virginia, did unlawfully, feloniously and maliciously cut and wound one Frank P. Hall, by means of knowingly, intentionally, deliberately and maliciously beating and stabbing the said Frank P. Hall, thereby causing serious bodily injury to the said Frank P. Hall,, all being with the intent to unlawfully, feloniously and maliciously maim, disfigure, disable and kill the said Frank P. Hall,, in violation of the provisions of Chapter 61, Article 2, Section 9(a) of the West Virginia Code, as amended, against the peace and dignity of the State.

Found upon the sworn testimony of Sgt. W.J. Courtney, of the Buckhannon Police Department, adduced before the Grand Jury this the 15th day of January, 2019.

A TRUE BILL

Prosecuting Attorney in and for Upshur County, West Virginia

Foreperson

J. Cooper

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS. **CASE NO. 19-F-35**
Hon. Jacob E. Reger

TAKIESE NACEER BETHEA,
DEFENDANT

SENTENCING ORDER

On the 4th day of September, 2019, came the State of West Virginia, by David E. Godwin, Prosecuting Attorney in and for Upshur County, West Virginia; Jason A. Kelley, Chief Probation Officer for the 26th Judicial Circuit; the Defendant, Takiese Naceer Bethea; and Sean Logue, Counsel for the Defendant.

Thereupon, Counsel for the Defendant notified the Court that the Defendant has received the pre-sentence investigation report, and there were no changes, modifications or additions. The State having also received and reviewed the pre-sentence investigation report, and having no additions or corrections, it is Ordered that the pre-sentence investigation report be filed and made part of the record herein.

The Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of Robbery in the First Degree, a felony, in manner and form as the State of West Virginia has charged in the Third Count of the Indictment herein, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Takiese Naceer Bethea, be confined in the state penitentiary for a determinate period of thirty-six (36) years, pursuant to the terms and provisions of Chapter 61, Article 2,

Section 12(a), of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be March 7, 2019, the sentence date shall be September 17, 2019, and the effective date shall be March 14, 2018, thereby awarding the Defendant five hundred fifty-three (553) days credit for time served.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of Malicious Assault, a felony, in manner and form as the State of West Virginia has charged in the Fourth Count of the Indictment herein, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Takiese Naceer Bethea, be confined in the state penitentiary for an indeterminate period and term of not less than two (2) years nor more than ten (10) years, pursuant to the terms and provisions of Chapter 61, Article 2, Section 9(a), of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be March 7, 2019, the sentence date shall be September 17, 2019, and the effective date shall be at the conclusion of the service of the sentence on the Third Count of the Indictment. These sentences are consecutive.

It is further Ordered that the Defendant shall pay to the Clerk of this Court, within two (2) years from the date of entry of this Order, all costs of this proceedings as assessed and taxed by said Clerk, including up to Five Hundred Dollars ($500.00) toward the fees incurred from the expense of his Court appointed attorney.

The Defendant shall provide a DNA sample within thirty (30) days of the date of this

sentencing order, which shall be collected by the jail or correctional facility and forwarded in accordance with the law. Upon compliance, the correctional facility or jail shall provide documentation of such to this Court.

Furthermore, pursuant to the terms and conditions of the plea agreement, the State moved to Nolle Prosequi the remaining charges as found in the First, Second, and Fifth Counts of the Indictment herein. The Court deeming it proper to do so, it is ADJUDGED and ORDERED that the remaining charges in the First, Second, and Fifth Counts of the Indictment be dismissed, and should be stricken and placed with cases ended.

Thereupon, the Court fully explained to the Defendant all rights to appeal to the West Virginia Supreme Court of Appeals and the Defendant, in his own proper person, stated to the Court that he fully and completely understood these rights.

The Defendant, by Counsel, tendered to the Court for filing a signed Notice of Post Conviction Rights. Said form was received and accepted and made part of the record herein.

The Court GRANTS Defense Counsel's motion to withdraw and the Court appoints Jeremy B. Cooper to represent the Defendant for any appeal Mr. Bethea may file.

It is further ADJUDGED and ORDERED that the Defendant be remanded to the custody of the Sheriff of Upshur County, or his duly authorized representative, to be returned to the Tygart Valley Regional Jail, to be placed in the custody of the Commissioner of the West Virginia Division of Corrections. Any appearance bond which has previously been set or posted in this matter is hereby terminated and at an end, and the principal and surety thereon are hereby released from further obligation or responsibility in regard thereto.

The Clerk of this Court shall prepare certified copies of this Order and transmit the same to the following parties:

1. David E. Godwin, Prosecuting Attorney, 38 W. Main St, Room 202, Buckhannon, WV 26201

2. Sean Logue, Counsel for the Defendant, 27 W. Main St., Carnegie, PA 15106

3. Jeremy B. Cooper, Counsel for Defendant, 6 Loop St., #1, Aspinwall, PA 15215

3. Jason A. Kelley, Probation Officer, P.O. Box 737, Buckhannon, WV 26201

4. Upshur County Sheriff, 38 West Main Street, Buckhannon, WV 26201

5. Tygart Valley Regional Jail, 400 Abbey Road, Belington, WV 26250

6. West Virginia Division of Corrections, 1409 Greenbrier Street, Charleston, WV 25301

ORDER ENTERED: October 3, 2019

Jacob E. Reger, Judge of the Circuit Court
Of Upshur County, West Virginia

Prepared By:

David E. Godwin #1407
Prosecuting Attorney
Upshur County, WV

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand 10/3/19

BRIAN P. GAUDET, CLERK

By _____ Deputy Clerk

UPSHUR COUNTY, W.V.
FILED
2019 OCT -3 P 12:03
BRIAN P. GAUDET
CIRCUIT CLERK

CC-10/3/19
Assisted

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

State of West Virginia **Circuit Court Case No.** 19-F-35

v.

Defendant: TAKIESE NACEER BETHEA

DOB: 01 / 17 / 1995 SSN: XXX-XX-9282 Gender: ☑ Male / ☐ Female

WV DIVISION OF CORRECTIONS AND REHABILITATION CERTIFIED PRISON COMMITMENT ORDER

On the 17th day of September, 2019, the State of West Virginia, by David E. Godwin, and the defendant appeared in person and with counsel, Sean Logue.

The defendant has been convicted of the following offense(s):

Robbery First Degree

Malicious Assault

The defendant is committed to the custody of the Commissioner of Corrections and Rehabilitation for a period of:

Thirty-Six (36) Years

Two (2) to Ten (10) Years

Conviction Date: 03 / 07 / 2019 Sentence Date: 09 / 17 / 2019

Effective Sentence Date: 03 / 14 / 2018 Resentence Date: / /

☑ Consecutive to: ☐ Concurrent with:

The effective date Malicious Assault sentence shall be at the conclusion of the service of the sentence on the Robbery First Degree sentence. These sentences are consecutive.

Credit for Jail/Prison Time Served: 553 days Credit for Home Incarceration: days

Credit for Home Incarceration Parole: days Other Non-Penal Credit: days

☐ Credit for time served to be addressed in the detailed sentencing order.

Additionally, the court finds:

UPSHUR COUNTY, WV
FILED
2019 OCT -3 P 12:00
BRIAN GAUJET
CIRCUIT CLERK

The defendant shall be transported to and held in a facility under the control of the Commissioner of the Division of Corrections and Rehabilitation. The court further orders that the cost of incarceration in the jail pending transfer shall be paid by the Commissioner consistent with the provisions of WV Code § 15A-3-16.

Special Instructions:

It is further ordered that the Circuit Clerk shall immediately transmit a certified copy of this commitment order to the Central Office Inmate Records Manager of the Division of Corrections and Rehabilitation by fax at 304-558-8430, by e-mail at *dcrcourtorders@wv.gov* or other electronic transmission, or by mail at 1409 Greenbrier Street, Charleston WV 25311.

Enter this 3rd day of October, 2019.

***Detailed sentencing order to follow.**

Circuit Judge

10/3/19
D Godwin
S Logue
J Cooper
J Kelly
Tues
Tues

SCA-C806: WVDCR Certified Prison Commitment Order
Rev. 06/04/2019; WVSCA Approved: 06/04/2019

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS. **CASE NO. 19-F-93**
Hon. Jacob E. Reger

MICHAELINA K. SARNE,
DEFENDANT

SENTENCING ORDER

On the 7th day of October, 2019, came the State of West Virginia, by David E. Godwin, Prosecuting Attorney in and for Upshur County, West Virginia; Jason A. Kelley, Chief Probation Officer for the 26th Judicial Circuit; Michaelina K. Sarne, the Defendant; and James E. Hawkins, Jr., Counsel for the Defendant.

Thereupon, Counsel for the Defendant notified the Court that the Defendant has received the pre-sentence investigation report, and there were no changes, modifications or additions. The State having also received and reviewed the pre-sentence investigation report, and having no additions or corrections, it is Ordered that the pre-sentence investigation report be filed and made part of the record herein.

The Court inquired of the Defendant if she had anything further to say or offer prior to judgment and sentence being pronounced against her, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of Conspiracy, a felony, in manner and form as the State of West Virginia has charged in the sole Count of the Information herein, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Michaelina K. Sarne, be confined and imprisoned in a facility appropriate for women for an indeterminate period of not less than one (1) year nor more than five (5) years,

pursuant to the terms and provisions of Chapter 61, Article 10, Section 31, of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be August 2, 2019, the sentence date shall be October 7, 2019, and the effective date shall be October 7, 2019.

Thereupon, the Defendant, by Counsel, moved this Court to suspend the sentence imposed and place the Defendant on probation, home confinement, or other form of alternative sentencing. The Court, after hearing statements from Counsel, and after due and mature consideration, does hereby DENY the Defendant's motion for alternative sentencing.

It is further Ordered that the Defendant shall pay to the Clerk of this Court, within eighteen (18) months from the date of entry of this Order, all costs of this proceedings as assessed and taxed by said Clerk.

Thereupon, the Court fully explained to the Defendant all rights to appeal to the West Virginia Supreme Court of Appeals and the Defendant, in her own proper person, stated to the Court that she fully and completely understood these rights.

The Defendant, by Counsel, tendered to the Court for filing a signed Notice of Post Conviction Rights. Said form was received and accepted and made part of the record herein.

It is further ADJUDGED and ORDERED that the Defendant be remanded to the custody of the Sheriff of Upshur County, or his duly authorized representative, to be returned to the Tygart Valley Regional Jail, to be placed in the custody of the Commissioner of the West Virginia Division of Corrections. Any appearance bond which has previously been set or posted in this matter is hereby terminated and at an end, and the principal and surety thereon are hereby released from further obligation or responsibility in regard thereto.

The Clerk of this Court shall prepare certified copies of this Order and transmit the same

to the following parties:

1. David E. Godwin, Prosecuting Attorney, 38 W. Main St, Room 202, Buckhannon, WV 26201
2. James E Hawkins, Defense Counsel, P.O. Box 2286, Buckhannon, WV 26201
3. Jason A. Kelley, Probation Officer, P.O. Box 737, Buckhannon, WV 26201
4. Upshur County Sheriff, 38 West Main Street, Buckhannon, WV 26201
5. Tygart Valley Regional Jail, 400 Abbey Road, Belington, WV 26250
6. West Virginia Division of Corrections, 1409 Greenbrier Street, Charleston, WV 25301

ORDER ENTERED: October 17, 2019

Jacob E. Reger, Judge of the Circuit Court
Of Upshur County, West Virginia

Prepared By:

David E. Godwin #1407
Prosecuting Attorney
Upshur County, West Virginia

OC-10/17/19
As Listed

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

State of West Virginia **Circuit Court Case No.** 19-F-93

v.

Defendant: MICHAELINA K. SARNE

DOB: 10 / 12 / 1976 SSN: XXX-XX-2994 Gender: ☐ Male / ☑ Female

WV DIVISION OF CORRECTIONS AND REHABILITATION CERTIFIED PRISON COMMITMENT ORDER

On the 7th day of October, 2019, the State of West Virginia, by David E. Godwin, and the defendant appeared in person and with counsel, James E. Hawkins, Jr.

The defendant has been convicted of the following offense(s):

Conspiracy

The defendant is committed to the custody of the Commissioner of Corrections and Rehabilitation for a period of:

One (1) to Five (5) Years

Conviction Date: 08 / 02 / 2019 Sentence Date: 10 / 07 / 2019

Effective Sentence Date: 10 / 07 / 2019 Resentence Date: / /

☐ Consecutive to: ☐ Concurrent with:

Credit for Jail/Prison Time Served: _____ days Credit for Home Incarceration: _____ days

Credit for Home Incarceration Parole: _____ days Other Non-Penal Credit: _____ days

☐ Credit for time served to be addressed in the detailed sentencing order.

Additionally, the court finds:

The defendant shall be transported to and held in a facility under the control of the Commissioner of the Division of Corrections and Rehabilitation. The court further orders that the cost of incarceration in the jail pending transfer shall be paid by the Commissioner consistent with the provisions of WV Code § 15A-3-16.

Special Instructions:

It is further ordered that the Circuit Clerk shall immediately transmit a certified copy of this commitment order to the Central Office Inmate Records Manager of the Division of Corrections and Rehabilitation by fax at 304-558-8430, by e-mail at *dcrcourtorders@wv.gov* or other electronic transmission, or by mail at 1409 Greenbrier Street, Charleston WV 25311.

Enter this _____ day of October, 2019.

***Detailed sentencing order to follow.**

Circuit Judge

SCA-C806: WVDCR Certified Prison Commitment Order
Rev. 06/04/2019; WVSCA Approved: 06/04/2019

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IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS. **CASE NO. 19-M-9, 19-E-~~33~~ 30**
Hon. Jacob E. Reger

ALAYNA N. PUGLIA,
DEFENDANT

SENTENCING ORDER

On the 7th day of October, 2019, came the State of West Virginia, by David E. Godwin, Prosecuting Attorney in and for Upshur County, West Virginia; Jason A. Kelley, Chief Probation Officer for the 26th Judicial Circuit; the Defendant, Alayna N. Puglia; David S. Bahuriak, Counsel for the Defendant *pro hac vice;* and Brian W. Bailey, Counsel for the Defendant.

Thereupon, Counsel for the Defendant notified the Court, that the Defendant has received the pre-sentence investigation report, and there were no changes, modifications or additions. The State having also received and reviewed the pre-sentence investigation report, and having no additions or corrections, it is Ordered that the pre-sentence investigation report be filed and made part of the record herein.

The Court inquired of the Defendant if she had anything further to say or offer prior to judgment and sentence being pronounced against her, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of Accessory After the Fact, a misdemeanor, in manner and form as the State of West Virginia has charged in the sole Count of the Information herein, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Alayna N. Puglia, be confined in the Tygart Valley Regional Jail

twelve (12) months, pursuant to the terms and provisions of Chapter 61, Article 11, Section 6, of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be August 2, 2019, the sentence date shall be October 7, 2019, and the effective date shall be October 7, 2019.

The Defendant shall pay to the Clerk of this Court, within eighteen (18) months from the date of entry of this Order, all costs of this proceedings as assessed and taxed by said Clerk.

Furthermore, pursuant to the terms and conditions of the plea agreement, the State moved to Nolle Prosequi the charges as found in the First Count of the Indictment in Case No. 19-F-33. The Court deeming it proper to do so, it is ADJUDGED and ORDERED that the charges in the First Count of the Indictment in Case No. 19-F-33 be dismissed, and should be stricken and placed with cases ended.

Thereupon, the Court fully explained to the Defendant all rights to appeal to the West Virginia Supreme Court of Appeals and the Defendant, in her own proper person, stated to the Court that she fully understood these rights.

Thereupon, the Defendant, by Counsel, tendered to the Court for filing a signed Notice of Post Conviction Rights. Said form was received and accepted and made part of the record herein.

It is further ADJUDGED and ORDERED that the Defendant be remanded to the custody of the Sheriff of Upshur County, or his duly authorized representative, to be returned to the Tygart Valley Regional Jail. Any appearance bond which has previously been set or posted in this matter and in Case No. 19-F-33 is hereby terminated and at an end, and the principal and surety thereon are hereby released from further obligation or responsibility in regard thereto.

The Clerk of this Court shall prepare certified copies of this Order and transmit the same to the following parties:

1. David E. Godwin, Prosecuting Attorney, 38 W. Main St, Room 202, Buckhannon, WV 26201

2. Brian W. Bailey, Counsel for the Defendant, 17 W. Main St., Buckhannon, WV 26201

3. Jason A. Kelley, Chief Probation Officer, P.O. Box 737, Buckhannon, WV 26201

4. Upshur County Sheriff, 38 West Main Street, Buckhannon, WV 26201

5. Tygart Valley Regional Jail, 400 Abbey Road, Belington, WV 26250

ORDER ENTERED: October 17, 2019

Jacob E. Reger, Judge of the Circuit Court
of Upshur County, West Virginia

Prepared By:

David E. Godwin, #1407
Prosecuting Attorney
Upshur County, West Virginia

CC-10/17/19
ASC'stad

2019 OCT 17 A 9:47
UPSHUR COUNTY, W.V.
CIRCUIT CLERK
SANDY GAUDET

SS

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS. **CASE NO. 19-F-34**
Hon. Jacob E. Reger

LAMERE S. TROUP,
DEFENDANT

SENTENCING ORDER

On the 4th day of September, 2019, came the State of West Virginia, by David E. Godwin, Prosecuting Attorney in and for Upshur County, West Virginia; Jason A. Kelley, Chief Probation Officer for the 26th Judicial Circuit; Lamere S. Troup, the Defendant; and G. Phillip Davis, Counsel for the Defendant.

Thereupon, Counsel for the Defendant notified the Court that the Defendant has received the pre-sentence investigation report, and there were no changes, modifications or additions. The State having also received and reviewed the pre-sentence investigation report, and having no additions or corrections, it is Ordered that the pre-sentence investigation report be filed and made part of the record herein.

The Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of Robbery in the First Degree, a felony, in manner and form as the State of West Virginia has charged in the Third Count of the Indictment herein, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Lamere S. Troup, be confined in the state penitentiary for a determinate period of thirty-six (36) years, pursuant to the terms and provisions of Chapter 61, Article 2,

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Section 12(a), of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be July 1, 2019, the sentence date shall be September 4, 2019, and the effective date shall be February 22, 2018, thereby awarding the Defendant five hundred sixty days credit for time served.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgment and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgment and sentence upon the Defendant's plea of guilty and conviction of Malicious Assault, a felony, in manner and form as the State of West Virginia has charged in the Fourth Count of the Indictment herein, it is, therefore, accordingly ADJUDGED and ORDERED that the Defendant, Lamere S. Troup, be confined in the state penitentiary for an indeterminate period and term of not less than two (2) years nor more than ten (10) years, pursuant to the terms and provisions of Chapter 61, Article 2, Section 9(a), of the West Virginia Code, as amended.

It is further ADJUDGED and ORDERED that the conviction date shall be July 1, 2019, the sentence date shall be September 4, 2019, and the effective date shall be at the conclusion of the service of the sentence on the Third Count of the Indictment. These sentences are consecutive.

It is further Ordered that the Defendant shall pay to the Clerk of this Court, within two (2) years from the date of entry of this Order, all costs of this proceedings as assessed and taxed by said Clerk, including up to Five Hundred Dollars ($500.00) toward the fees incurred from the expense of his Court appointed attorney.

The Defendant shall provide a DNA sample within thirty (30) days of the date of this sentencing order, which shall be collected by the jail or correctional facility and forwarded in

accordance with the law. Upon compliance, the correctional facility or jail shall provide documentation of such to this Court.

Furthermore, pursuant to the terms and conditions of the plea agreement, the State moved to Nolle Prosequi the remaining charges as found in the First, Second, and Fifth Counts of the Indictment herein. The Court deeming it proper to do so, it is ADJUDGED and ORDERED that the remaining charges in the First, Second, and Fifth Counts of the Indictment be dismissed, and should be stricken and placed with cases ended.

Thereupon, the Court fully explained to the Defendant all rights to appeal to the West Virginia Supreme Court of Appeals and the Defendant, in his own proper person, stated to the Court that he fully and completely understood these rights.

The Defendant, by Counsel, tendered to the Court for filing a signed Notice of Post Conviction Rights. Said form was received and accepted and made part of the record herein.

It is further ADJUDGED and ORDERED that the Defendant be remanded to the custody of the Sheriff of Upshur County, or his duly authorized representative, to be returned to the Tygart Valley Regional Jail, to be placed in the custody of the Commissioner of the West Virginia Division of Corrections. Any appearance bond which has previously been set or posted in this matter is hereby terminated and at an end, and the principal and surety thereon are hereby released from further obligation or responsibility in regard thereto.

The Clerk of this Court shall prepare certified copies of this Order and transmit the same, to the following parties:

1. David E. Godwin, Prosecuting Attorney, 38 W. Main St, Room 202, Buckhannon, WV 26201

2. G. Phillip Davis, Counsel for Defendant, PO Box 203, Arthurdale WV 26520

3. David C. Fuellhart III, Counsel for Defendant, P.O. Box 1878, Elkins, WV 26241

3. Jason A. Kelley, Probation Officer, P.O. Box 737, Buckhannon, WV 26201

4. Upshur County Sheriff, 38 West Main Street, Buckhannon, WV 26201

5. Tygart Valley Regional Jail, 400 Abbey Road, Belington, WV 26250

6. West Virginia Division of Corrections, 1409 Greenbrier Street, Charleston, WV 25301

ORDER ENTERED: September 20, 2019

Jacob E. Reger, Judge of the Circuit Court
Of Upshur County, West Virginia

Prepared By:

David E. Godwin #1407
Prosecuting Attorney
Upshur County, WV

CC-9/20/19

UPSHUR COUNTY, W.V.
FILED
2019 SEP 20 P 2:24
BRIAN GAUDET
CIRCUIT CLERK

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

State of West Virginia **Circuit Court Case No.** 19-F-34
v.
Defendant: **Lamere Shaquile Troup**

DOB: 07 / 15 / 1993 SSN: XXX-XX-5571 Gender: ☑ Male / ☐ Female

WV DIVISION OF CORRECTIONS AND REHABILITATION CERTIFIED PRISON COMMITMENT ORDER

On the 4th day of September, 2019, the State of West Virginia, by David E. Godwin, and the defendant appeared in person and with counsel, G. Phillip Davis.

The defendant has been convicted of the following offense(s):

Robbery in the First Degree

Malicious Assault

The defendant is committed to the custody of the Commissioner of Corrections and Rehabilitation for a period of:

Thirty-Six (36) Years

Two (2) to Ten (10) Years

Conviction Date: 07 / 01 / 2019 Sentence Date: 09 / 04 / 2019

Effective Sentence Date: 02 / 22 / 2018 Resentence Date: / /

☑ Consecutive to: ☐ Concurrent with:

The effective date of the sentence on the Malicious Assault (Fourth Count) is at the conclusion of the sentence of the Robbery in the First Degree (Third Count).

Credit for Jail/Prison Time Served: 560 days Credit for Home Incarceration: ____ days

Credit for Home Incarceration Parole: ____ days Other Non-Penal Credit: ____ days

☐ Credit for time served to be addressed in the detailed sentencing order.

Additionally, the court finds:

The defendant shall be transported to and held in a facility under the control of the Commissioner of the Division of Corrections and Rehabilitation. The court further orders that the cost of incarceration in the jail pending transfer shall be paid by the Commissioner consistent with the provisions of WV Code § 15A-3-16.

Special Instructions:

It is further ordered that the Circuit Clerk shall immediately transmit a certified copy of this commitment order to the Central Office Inmate Records Manager of the Division of Corrections and Rehabilitation by fax at 304-558-8430, by e-mail at *dcrcourtorders@wv.gov* or other electronic transmission, or by mail at 1409 Greenbrier Street, Charleston WV 25311.

Enter this ____ day of September, 2019

***Detailed sentencing order to follow.**

Circuit Judge

SEP 2019 PM 2:24 UPSHUR COUNTY W.V.

9/20/19 Godwin GP. Davis D. Fullhart S. Kelley used Tyke DOC

SCA-C806: WVDCR Certified Prison Commitment Order
Rev. 06/04/2019; WVSCA Approved: 06/04/2019

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