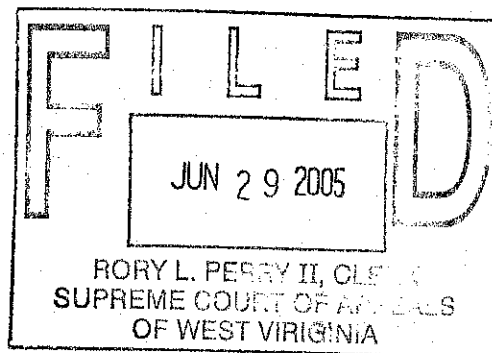


No. 32663

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IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



CHARLESTON

STATE OF WEST VIRGINIA,

Plaintiff below, Appellee,

vs.

FRANCIS ANTHONY SANDOR, III,

Defendant below, Appellant.

APPELLANT'S BRIEF

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I.

**PROCEDURAL HISTORY AND  
RULINGS OF THE LOWER COURT**

Counsel for the Appellant realizes that there may be more detail than normal included in this section of the brief. However, this case did not proceed in the usual manner and the information is provided herein for clarification, so that the errors can be understood by this Honorable Court.

The Appellant, Francis Anthony Sandor, III, was convicted of the misdemeanor offense of battery following a bench trial in Monongalia County Magistrate Court on November 14, 2001. The Appellant appeared pro se in Magistrate Court, filed motions and attempted to contest the court's authority and demanded that rulings be made. At the conclusion of the bench trial, the magistrate imposed a one-year sentence in the North Central Regional Jail and assessed a fine and costs. Said jail sentence was imposed even though the alleged victim never testified and the State did not request the maximum sentence.

On November 19, 2001, the Appellant timely executed a criminal appeal bond and a financial affidavit for appointment of counsel, which stayed the imposition of sentence. This Circuit Court never ruled upon this financial affidavit when it was filed, neither at the motion hearing nor at the de novo bench trial as provided for the appeal from Magistrate Court. Instead, when the case was transferred to the Circuit Court, the trial judge assigned to the appeal, the Honorable Russell M. Clawges, Jr., entered an Order scheduling a non-jury trial for January 22, 2002. The Judge's office forwarded

copies of the Order to the parties. The Appellant scheduled a hearing on January 18, 2002 requesting a continuance advising that he only received actual notice on January 16<sup>th</sup>. The trial court denied the motion but did not rule on the aforementioned financial affidavit. The Circuit Court indicated that it had reviewed the file and was aware that the Appellant had executed a financial affidavit, but no inquiry was made by the court, nor was a finding of ineligibility or waiver made. (January 18, 2002, Tr. P. 13).

On January 22, 2002, a de novo bench trial was held with the Appellant appearing without counsel. The trial court summarily ruled on Appellant's motions and stated that he would be accorded "all of his constitutional rights required by law." (January 22, 2002, Tr. P. 4). The trial court took the matter under advisement at the conclusion of closing statements, and issued a Judgment Order on January 25, 2002, imposing the same sentence meted out by the magistrate. Appellant was not afforded a sentencing hearing nor an opportunity for allocution before his sentence was imposed.

After his conviction in Circuit Court, Appellant filed several post-trial motions. Most importantly, on February 4, 2002, Appellant filed a motion to clarify, asking the Circuit Court to explain why it never ruled on Appellant's initial financial affidavit. Moreover, on the same date, Appellant filed a motion requesting court appointed appellate counsel and later completed another financial affidavit. On February 11, 2002, the undersigned was appointed to represent Mr. Sandor in completing post-trial motions and an appeal to this Honorable Court. On the same date counsel prepared an Order granting a stay of execution of sentence and continuance from a hearing scheduled on February 13, 2002, to hear Appellant's post-trial motions.

On February 28, 2002, counsel first appeared in Circuit Court with Appellant and, after objection from the State, received an extension to file post-trial motions pending the preparation of the transcripts from the two January hearings. Moreover, over objection from the State, Appellant's stay of execution was extended. At the first hearing, counsel began raising concerns about procedural defects, due process and other constitutional violations. The defense was ordered to file authority for its contention that the Appellant was entitled to allocution, a sentencing hearing and pre-sentence investigation. The memorandum was filed, the State responded and on March 28, 2002, the Circuit Court granted the defense motion to set aside the sentence and Ordered that a complete sentencing hearing be held. The lower court made the ruling still not believing that the Appellant was entitled to these procedural rights.

The original sentencing hearing was scheduled for May 28, 2002, but was continued by the trial court until June 14, 2002. At that time, the parties argued the post-trial motions, including Appellant's and those filed by counsel. One of the motions filed by counsel involved the production of the transcripts from a trial in an unrelated felony case involving the Appellant. The undersigned argued this was necessary since the Circuit Court and State made several references to the other trial and defense counsel had no personal knowledge of those proceedings. The State did not object and the Circuit Court ordered the production of any hearings or trial transcripts not previously prepared. Appellant's counsel prepared a separate Order to ensure that the court reporter would be compensated for the transcription. However, Appellant did not receive any transcripts until May 25, 2004.

Additionally at the June 14, 2002 hearing, the Court took the post-trial motions under advisement. The State and then the defense were afforded an opportunity to respond and rebut, respectively, after the production of the transcripts. The Court held that it would either issue a ruling on the post-trial motions or schedule another hearing if further argument was required. The central issue was the defense contention that the Appellant was denied his constitutional right to counsel for the de novo appeal. The Circuit Court further ordered Appellant to submit an Affidavit setting forth his reasons for executing the original financial affidavit.

On December 9, 2002, the Judge's secretary called advising that the Court wanted the Affidavit filed or a ruling would be forthwith issued. Counsel explained that the Court's Order did not set forth a time in which to file the Affidavit. Furthermore, the Affidavit had been completed shortly after the June hearing, but counsel was waiting to include it with the rebuttal in support of the post-trial motions. Nevertheless, the Affidavit was filed that date as well as several additional documents. The State responded on January 9, 2004, by filing a motion for imposition of sentence. The Appellant filed a response on January 15, 2004.

The court reporter never did complete the entire transcripts Ordered by the Circuit Court. Instead, the Appellant received two pre-trial transcripts and a small excerpt from the felony trial. The court reporter explained that he spoke with Court after the hearing and was instructed not produce the entire transcript. Nothing in the court file corroborates or refutes this contention. Pursuant to the June 2002 Order, the State was granted leave to respond to Appellant's post-trial motions and supporting memorandum utilizing the newly produced transcripts. The State filed its response on July 30, 2004

and the Appellant filed his rebuttal on August 5, 2004. Whereupon, the Court, according to its June 2002 Order, was supposed to rule or schedule a hearing after considering the documents which the parties filed. By Order entered August 11, 2004, the Circuit Court rejected Appellant's motion for a new trial and rescheduled the sentencing hearing.

On October 12, 2004, the sentencing hearing was held with the Order being entered on October 21, 2004. The Circuit Court reinstated its former sentence; sua sponte revoked Appellant's bond, denied defense counsel's oral motion for post-conviction bond and remanded Appellant to the North Central Regional Jail. In order to perfect the appeal, on November 19, 2004, the Appellant submitted a notice of intent to appeal and designation of the record. The entirety of the grounds will be fully stated and developed herein.

On October 29, 2004, the Appellant filed a summary petition for post-conviction bail and the State subsequently filed a response. By Order entered December 2, 2004, said petition was denied. The Appellant has completed his sentence, yet nevertheless desires to seek an acquittal through this appeal.

To assist this Court in reviewing the propriety of the verdict, the original papers of the underlying proceedings, both Magistrate and Circuit Court, together with a certified transcript of every hearing in this case, as well as those prepared in the unrelated felony case (01-F-65), have been designated to accompany this brief. The Appellant relies upon these documents, as well as the constitutional statutory and case law cited herein as the basis for a reversal of the verdict and asks that same be read as part of this brief.

## II.

### STATEMENT OF FACTS

The facts in the instant case are really secondary to the procedural and constitutional defects illustrated in section one hereinabove. However, the facts help form the framework and place the errors in context. The Appellant was arrested on the misdemeanor charge of battery on May 5, 2001. The Appellant elected to represent himself in that proceeding. He filed numerous pre-trial motions which were almost all denied without permitting a hearing or argument. He was convicted following a bench trial in Magistrate Court on November 14, 2001. The Appellant was sentenced to serve one year in the North Central Regional Jail and assessed a fine and costs. This sentence was imposed even though the State never requested the maximum sentence and the State never produced the alleged victim for the magistrate's consideration or cross-examination.

The Appellant felt compelled to appeal his conviction believing that he did not receive due process. Accordingly, on November 19, 2001, he completed a financial affidavit requesting court appointed counsel for his appeal to Circuit Court and executed a criminal appeal bond. Subsequently the Appellant filed a formal notice of intent to appeal. On or about November 30, 2001, Magistrate Court forwarded its file to the Monongalia County Circuit Clerk. It appears that the financial affidavit was forwarded with the Magistrate Court file and was not provided in the normal manner to the chief judge, who was assigned to this case, for his review. Instead, the financial affidavit apparently was lodged and became part of the Circuit Court file.

On or about December 4, 2001, the Circuit Court scheduled the de novo bench trial for January 22, 2002 and mailed an Order reflecting the trial date to the parties. The Appellant was out of town visiting relatives during the holidays and only found out about the trial date on January 16, 2002. The Appellant called his neighbor requesting that she check his mail for some documents he was expecting for a work-related project. His neighbor discovered the envelope from the Circuit Court's office and advised him of its contents. The Appellant was surprised to learn that his bench trial date was set for the next week.

He immediately called the court's secretary and requested a continuance. A hearing was scheduled for January 18, 2002. The Appellant prepared a motion and orally argued same. He set forth several reasons why he needed a continuance and did briefly mention that he filed a financial affidavit. (January 18, 2002, Tr. P. 3). The trial court also mentions the affidavit, but makes no further query. (January 18, 2002, Tr. P. 13). The trial court denied the continuance and made findings of fact, but never ruled that the Appellant had waived his right to counsel and was proceeding with self-representation.

The Circuit Court subsequently asserted that the Appellant never requested trial counsel in response to an argument made by appellate counsel. "You were not appointed until after the trial because Mr. Sandor did not ask for counsel until after the trial.... To contend that he was somehow denied appointed counsel for the trial of this case, you're barking up the wrong tree." (February 28, 2002, Tr. P. 13-14). Later yet, the lower court changed its position and acknowledged the filing of the first financial affidavit, but held that the Appellant waived his right to counsel since he never raised the issue before the de novo bench trial.

As previously Ordered, the de novo bench trial occurred on January 22, 2002. At the conclusion of the continuance hearing, the Circuit Court granted the Appellant leave to file motions to be heard before the trial. The Appellant submitted three motions. At the outset of the bench trial, the Circuit Court listed the motions filed and resolved them in a summary manner without permitting the Appellant to argue same, only answer several questions. In one of the motions, the Appellant requested that he be granted all of his constitutional rights. The Court announced that it intended "to afford to the defendant all of his constitutional rights required by law." (January 22, 2002, Tr. P. 4).

Notwithstanding the pronouncement, the Circuit Court heard the case and never advised the Appellant of his constitutional rights or inquired regarding the financial affidavit. Furthermore, there was no discussion if the Appellant was waiving his right to counsel. The Circuit Court never advised the Appellant of his right to testify or the dangers associated with waiving this right. Lastly, the trial court took the evidence under advisement and on January 25, 2002, issued a Judgment Order sentencing the Appellant without according a sentencing hearing and the right of allocution.

During the bench trial, the alleged victim again did not appear. The Appellant requested a current address after she did not appear in Magistrate Court, but the State sent both subpoenas to the same address and never provided a different address to the Appellant. Nevertheless, the State was able to locate a current address to obtain a victim impact statement when the defense obtained a sentencing hearing. This statement varied greatly from the one given on the day of the Appellant's arrest.

It was undisputed that the alleged victim struck the Appellant without provocation while he was seated in the passenger seat of a vehicle parked outside of the Point Marion

Dairy Mart. There was a discrepancy in the testimony regarding what occurred earlier in the evening to anger Ms. Griffin. The Appellant testified that he entered the store with the intention of utilizing the telephone to call the police to report the incident. The Appellant stated that he was again attacked as he attempted to use the telephone and that he requested that the driver and the clerk call the police on his behalf. The Appellant, believing that he was a victim, attempted to restrain Ms. Griffin to prevent further injury until the police arrived. A struggle over the telephone ensued and ultimately the Appellant subdued and held her awaiting the arrival of the police.

Apparently there is a rather large disparity in size between the alleged victim and the Appellant. She, through the other witnesses that actually testified, alleged injuries were incurred while being subdued. The details of the events in the store, the type, extent or existence of any injuries varies greatly depending upon the testimony of the witnesses and victim impact statement submitted by the alleged victim. The Appellant testified, and was not directly contradicted by the State's evidence, that he did not enter the store to confront the alleged victim. However, the witnesses did not agree about what occurred after the Appellant and Ms. Griffin struggled for the telephone.

The Appellant told the trooper at the time of his arrest and at trial that he was attempting to call the police and not retaliate when he entered the store. At trial, the Appellant explained that he believed given with the allegations the woman made in the felony trial, that he needed to summon the police and document that the woman struck him. He stated that he did not intend, nor did he strike, punch, stomp, pull out hair or throw down the alleged victim. Instead, he described Ms. Griffin's attempt to prevent him from using the phone and his decision to subdue her until the police arrived. He

testified that he was attempting to effectuate a citizen's arrest. The Circuit Court rejected his testimony and as previously stated, reinstated the Appellant's sentence by Order dated January 25, 2002.

Shortly thereafter, the Appellant completed another financial affidavit and filed several post-trial motions. In one motion, he formally and specifically raised the trial court's failure to provide counsel. The Appellant's income is virtually identical in both financial affidavits, so he would have been eligible in November 2001. The undersigned was appointed on February 11, 2002, for the purpose of completing post-trial motions and filing an appeal. It became quickly apparent that procedural anomalies existed. For instance, it is not normal that post-trial motions are heard after sentence has been imposed.

However, disturbing the procedural irregularities were, the substantive constitutional defects mentioned previously were even more troubling. The undersigned filed several motions and supporting memorandums during 2002 and 2004 to support her client's assertion of deprivation of his substantive and procedural constitutional rights. The Circuit Court never admitted that the Appellant had the right of allocution or to violating any rights, but did set aside the sentence and ordered a sentencing hearing in an Order issued March 28, 2002. Other than that, the trial court only addressed constitutional issues in its Order rejecting the Appellant's post-trial motions.

On August 11, 2004, the Circuit Court issued its ruling on the Appellant's post-trial motions filed and argued in 2002. The lapse of time occurred while the parties waited for the court reporter to transcribe transcripts from the unrelated felony case. Apparently the Circuit Court, sua sponte, deviated from its ruling and did not require

production of all of the transcripts. In its Order, the Circuit Court held that the Appellant waived his right to counsel, deemed his other grounds for a new trial to be without merit and rescheduled the sentencing hearing. At the sentencing hearing on October 12, 2004, the Circuit Court denied the defense motion for probation and sua sponte remanded the Appellant to begin serving his sentence. This Court refused to grant relief in a summary petition for post-conviction bail and, as predicted, the Appellant fully satisfied his sentence before this Court will rule on the merits of this matter. (October 12, 2004, Tr. P. 32).

### III.

#### ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED BY DENYING APPELLANT THE RIGHT TO COUNSEL.
2. THE CIRCUIT COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS.
3. THE APPELLANT WAS DENIED A FAIR TRIAL DUE TO CUMULATIVE ERROR.

### IV.

#### ARGUMENT

1. **THE CIRCUIT COURT ERRED BY DENYING APPELLANT THE RIGHT TO COUNSEL.**

“The right of a defendant in a criminal proceeding to the assistance of counsel is a fundamental right, the waiver of which will not be presumed by the failure of the accused to request counsel, by the entry of a guilty plea or by reason of a record silent concerning the matter of counsel and the conviction of a defendant in the absence of counsel or of an affirmative showing of an intelligent waiver of such right is void.” Syl. Pt. 4, State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003).

In the case at bar, the Appellant’s right to counsel was violated since the Circuit Court failed to inquire, before, during or after the de novo bench trial about his decision regarding representation. Similarly, the Circuit Court never asked the Appellant if he waived his right to counsel and desired to proceed pro se. The constitutional right to counsel is a two-pronged right. Defendants, including the Appellant, have the right of counsel, either retained or appointed if qualified, and there is also a right of self-representation. This right is granted by Article III, Section 14 of the West Virginia Constitution. The Circuit Court had a duty to advise the Appellant of his constitutional rights and to ascertain that the Appellant understood same and was making knowing and informed decisions.

“Where there is no indication from the record, or otherwise, that an accused was offered counsel, or that he intelligently and knowingly and understandingly waived the assistance of counsel, the constitutional right of such accused relating thereto has been violated, his conviction and sentence are therefore void, and he should be released from confinement ....” Syl. Pt. 3, State ex rel. Arbraugh v. Boles, 149 W.Va. 193, 139 S.E.2d 370 (1964).

In the present case, the record reflects that the Appellant did timely complete a financial affidavit requesting court appointed counsel for his appeal to Circuit Court. The Appellant executed the document in front of the magistrate assistant on November 19, 2001, just five days after his conviction in Magistrate Court. The Circuit Court never ruled on the financial affidavit as required by West Virginia Code 29-21-16(d). It would appear that the financial affidavit was not forwarded in the normal manner for the court's consideration. Instead, it seems that the financial affidavit was lodged in the Magistrate Court file and became part of the Circuit Court file when it was transferred.

Nevertheless, the inquiry does not end there. The Appellant did advise the Circuit Court that he had filed an affidavit in Magistrate Court. (January 18, 2002, Tr. P. 3). The Circuit Court stated that it was familiar with the contents of the court file and even subsequently acknowledged that the financial affidavit had been filed, but failed to inquire, and certainly did not conduct an in-depth colloquy, regarding the Appellant's decision regarding counsel. (January 18, 2002, Tr. P. 13). Moreover, the Appellant further placed the trial court on notice that he was not waiving any of his constitutional rights.

The Appellant filed a motion entitled demand of constitutional rights. As previously stated, the Circuit Court summarily ruled that it would accord the Appellant with "all of his constitutional rights as required by law." (January 22, 2002, Tr. P. 4). Given the dual and conflicting rights embodied in the right of counsel, that of the right to counsel and the right of self-representation, it was incumbent upon the Circuit Court to clarify the Appellant's position regarding counsel. It is the court's responsibility and not that of the accused, to discuss his understanding of his constitutional rights upon the

record. Nevertheless, if the trial court had permitted the Appellant to argue his motion then he would have demonstrated a clear and unequivocal answer that he still desired representation. The only evidence in the record, the Appellant's Affidavit, clearly states that he did not waive representation. Thus the record does not allow this Court to presume waiver.

“Presuming waiver from a silent record is impermissible. The record must show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.” Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). “The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court and it would be fitting and appropriate for that determination to appear upon the record.” Id., at P. 515.

As previously stated, the record is devoid of the Circuit Court's participation or inquiry into the Appellant's right to counsel decision. However, at the June 14, 2002, hearing, the trial court ordered the Appellant to submit an Affidavit setting forth the circumstances surrounding the filing of the first financial affidavit. In it, the Appellant enumerates the reasons and articulates a certainty that he wanted counsel to represent him. (see Addendum). It is interesting to note that the trial court demanded the filing of

the Affidavit on December 9, 2002, but then never mentions or distinguishes same in its subsequent rulings.

Instead, the Circuit Court adopted the State's argument, basically devoid of legal authority, that the Appellant waived counsel in this proceeding because he waived counsel in his earlier felony trial. The partial transcripts produced from that case do not show that the Appellant consistently desired to represent himself. In reality, they depict that Appellant vacillated between wanting to hire counsel, wanting to question his court appointed counsel or wanting to represent himself. Furthermore, after his experience in Magistrate Court, the Appellant requested the reinstatement of his court appointed counsel in the felony case. He advised the Circuit Court that he was not adept at cross-examination and referenced his recent misdemeanor conviction. The Appellant advised the Circuit Court "I basically got run over in Magistrate Court." (Case No. 01-F-65, November 26, 2001, Tr. P. 31). Thus the felony case buttresses the Appellant's contention that he wanted counsel in the de novo appeal.

More importantly, though, it is an incorrect statement of the law to assert that the Appellant's actions in the prior case relieved the trial court of its responsibility to inquire on the record. It is also not well founded in law to contend that the Appellant was precluded from counsel because of his decision in the earlier proceeding. This Court has long-held the opposite. In a case very similar to the instant case, this Court held that a prior waiver does not preclude a defendant of his right to counsel in a subsequent case. Additionally, an earlier waiver does not relieve the Circuit Court of its responsibility to ensure that defendants knowingly and intelligently exercise or waive their constitutional rights in each case.

"It is the contention of the defendant [sic] that the petitioner's refusal or waiver of counsel in the proceedings under Indictment No. 3 constituted a waiver of counsel when he was arraigned under Indictments Nos. 28 and 29. This contention is wholly without merit. There can be no presumption that he had counsel or was offered or waived counsel when he entered guilty pleas to Indictments Nos. 28 and 29 merely because, a short time before, he had effectively waived counsel in another proceeding. The records of the trial court are controlling. These records, as indicated above, clearly are silent on the matter of counsel." Syl. Pt. 3, State ex rel. Kozdron v. Boles, 149 W.Va. 596, 142 S.E.2d 769 (1965).

In every criminal case in which a defendant is involved, he or she is entitled to the full protection of the United States and West Virginia Constitutions. As stated earlier, rights deemed fundamental, such as the right to counsel, can only be waived if the Appellant knowingly and intelligently does so upon the record. It is clear from the record that the Appellant never waived his right to counsel—he represented himself because he had no alternative since the Circuit Court did not appoint counsel. Since the Appellant did not waive his right to counsel, then his conviction is void and must be overturned.

## **2. THE CIRCUIT COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS.**

"While ordinarily rulings on the admissibility of evidence are largely within the trial judge's sound discretion, a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be

represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, section 14 of the West Virginia Constitution.” Syl. Pt. 3, State v. Jenkins, 195 W.Va. 620, 466 S.E.2d 471 (1995).

The Appellant did not waive his right to counsel or any other constitutional right in the de novo bench trial held on January 22, 2002. Consequently, the denial of the right to counsel and other rights made the Appellant’s incarceration (which he has fully served) a violation of due process. As previously stated hereinabove, the trial court adopted the State’s position and ruled that the Appellant never wanted counsel and waived same based upon its versions of the Appellant’s actions in the earlier felony case. Also, as stated in the previous error, the law does not support that holding. In fact, the trial court was attempting to deflect attention away from itself. At the continuance hearing held on January 18, 2002, the court denied the Appellant’s motion partly ruling that he had not fulfilled his responsibility by leaving town over the holidays. Ironically, when confronted, the Circuit Court was unwilling to accept responsibility for its own errors.

It was the Circuit Court’s responsibility to rule upon the financial affidavit. Accepting that it was not forwarded in the normal manner, then the Circuit Court should have ruled once it discovered its existence and not simply ignored the financial affidavit. This Court has held that an appellant did not waive a hearing on a motion for reduction of sentence even though he did not remind the court of the motion pending for over four years. “Because the appellant timely filed his motion, thereby fulfilling his duty under Rule 35, he was not required to remind the court of his motion. The appellant’s failure to

remind the trial court of his motion cannot be considered to be an abandonment of his motion.” State v. Head, 198 W.Va. 298, 303, 480 S.E.2d 507 (1996). In the case at bar, the Appellant fulfilled his obligation by completing the financial affidavit and even brought it to the trial court’s attention, albeit in an indirect manner, and thus he did not abandon or waive his right to counsel.

Furthermore, it was the Circuit Court’s responsibility to advise the Appellant of his constitutional rights on the record. The Court’s perfunctory statement that it intended to accord the Appellant with all of his constitutional rights is hardly sufficient. Instead, the Circuit Court was obligated to ensure that the Appellant understood his rights, such as the right to testify or to remain silent. This duty is required even if the court had previously discussed his rights.

In State v. DeWeese, this Court held that *Miranda* warnings do not last in perpetuity. Id., 213 W.Va. 339, 582 S.E.2d 786 (2003). Consequently, these warnings must be re-administered to ensure that defendants understand their constitutional rights. The purpose of the *Miranda* warnings are akin to the guidelines that trial courts in this state are required to follow to ensure that a defendant is knowingly and intelligently waiving his right to counsel. While there is no magic dialogue that must occur, the Circuit Court was required to inquire if the Appellant intended to proceed pro se and then discuss the consequences if he answered affirmatively. State v. Sandler, 175 W.Va. 572, 336 S.E.2d 535 (1985).

Additionally, as with the right to counsel, the right to testify is a two-pronged right. Defendants have a right to testify and they have an alternative right to be silent and cannot be compelled to be an adverse witness. The record is silent on the Circuit Court’s

inquiry before the Appellant testified. The Circuit Court again the adopted the State's position that cases, such as State v. Neuman, 179 W.Va. 580, 371 S.E.2d 77 (1988) and its progeny do not require an inquiry since the Appellant testified. However, the Circuit Court again misses the point that due process requires a knowing and intelligent election or waiver of constitutional rights. That can only occur if courts apprise defendants of their rights. "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. 6, Id. Later cases have relaxed the obligation of trial courts to inquire in-depth upon the record, if it shows that a defendant had counsel to fully represent his or her interests throughout the prosecution. That certainly did not occur in the case at bar.

Lastly, the trial court initially failed to provide the Appellant his right of allocution before the imposition of sentence. Counsel was finally able to secure this procedural right, but includes same herein because the Circuit Court never accepted responsibility for its failure to provide it in the first place. Instead, the Court acted like it was humoring or indulging the Appellant in its March 28, 2002 Order. In fact, the Circuit Court was simply according the Appellant something to which he was entitled.

Clearly, the Appellant was denied due process in his de novo appeal. These errors cannot be labeled harmless and ignored by this Court. "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. Pt. 4, State v. Jenkins, 195 W.Va. 620, 466 S.E.2d 471 (1995). Specifically, the Appellant could have benefited greatly from the appointment of counsel. For example, counsel should have done the following:

confer with him regarding the law and facts related to this case; conduct an investigation including interviewing witnesses for the State and those identified by the Appellant; follow through on discovery issues such as obtaining a current address for the alleged victim and criminal histories for witnesses; contest the admission of hearsay evidence and advocate the Appellant's right to confront his accuser; file appropriate motions; conduct better cross-examination; help present the Appellant's testimony (if he elected to testify) in a coherent and cohesive manner; articulate proper objections to the State's questions and Circuit Court's rulings; offer a closing statement which included law applicable to his defenses; and ensure that the client was thoroughly advised of his constitutional rights.

Just as the Appellant did not waive his constitutional rights, it cannot be held that the deprivation of same was harmless. "An appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant." Syl. Pt. 11, State v. Gutherie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The remedy for the deprivation of due process, especially for the violation of the right to counsel, is release from incarceration. "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Ash v. Twyman, 174 W.Va. 177, 180, 324 S.E.2d 138 (1984). In the case at bar, this Court can

only overturn the Appellant's conviction. Accordingly, since the record demonstrates that the Appellant's rights were violated, his conviction should be reversed.

### **3. THE APPELLANT WAS DENIED A FAIR TRIAL DUE TO CUMULATIVE ERROR.**

"Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." State v. Walker, 188 W.Va. 661, 668, 425 S.E.2d 616 (1992). In the case at bar, egregious errors occurred which denied the Appellant a fair trial. The State as well as the Circuit Court denied the Appellant fundamental constitutional rights. The State failed to produce the alleged victim or provide the means by which the Appellant could have compelled her testimony. Her credibility was tangentially brought into question, but the Appellant was denied his right of direct confrontation. The Appellant attempted to raise this issue through a pre-trial motion but was delayed by the trial court. It is true that he did not raise the issue during the bench trial, but that underscores the Appellant's need for counsel to ensure that errors were thoroughly raised and preserved for appeal.

The Circuit Court's constitutional deprivations have been previously addressed at length and will not be repeated. However, if this Court is somehow not persuaded that the denial of counsel; failure to inquire if the Appellant desired self-representation; failure to discuss his right to testify or right to remain silent; individually justify a reversal of the Appellant's conviction, then surely the cumulative effect of these errors warrant relief.

V.

**PRAYER FOR RELIEF**

A review of the record proves that the Appellant was denied fundamental constitutional rights and deserves an acquittal. As previously stated, this Court cannot relieve the Appellant of the burden of his sentence since he has fully satisfied it. Nevertheless, a reversal of his conviction would vindicate him partially and relieve him from the remaining improperly imposed burden of restitution and the costs of trying him. More importantly, a reversal of his conviction would affirm a sense of justice and would be in accordance with long-standing precedent of this Honorable Court. Accordingly, the Appellant prays for this and any other relief that this Court can accord.

Respectfully submitted,  
FRANCIS ANTHONY SANDOR, III,  
Appellant, by counsel.

Karen L. Hall

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— ADDENDUM —

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
DIVISION NO. 2

STATE OF WEST VIRGINIA

vs.

CASE NO. 01-MAP-35

FRANCIS ANTHONY SANDOR, III,  
Defendant.

DEFENDANT'S AFFIDAVIT

Comes now the Defendant, Francis Anthony Sandor, III, and offers this Affidavit in compliance with the Court's order during a hearing held on June 14, 2002. The Defendant, as Affiant, duly sworn, deposes and says as follows:

1. That I was convicted of battery in Magistrate Court on November 14, 2001.
2. At this bench trial, I do not believe that I was permitted to defend myself fully. In particular, I was not given the opportunity to argue most of the motions that I filed and was not allowed to call or question every witness necessary to prove my defense.
3. After my conviction, it was clear that I needed an attorney to assist in appealing this conviction to Circuit Court.
4. Consequently, that is why I completed a financial affidavit when I signed my appeal paperwork on November 19, 2001.
5. I had no other reason to complete the financial affidavit other than I realized my need for the assistance of counsel.
6. It was my understanding that after I signed the blank original criminal appeal bond and completed the financial affidavit that the Magistrate would review