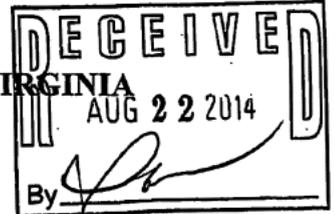


14-0920



SCANNED

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA



STATE OF WEST VIRGINIA ex. rel.
TEX S [REDACTED],
Petitioner,

Case No. 13-P-16
Underlying Case No. 07-F-20

v.

DAVID BALLARD, Warden,
Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter came before the Court this 18 day of August, 2014, pursuant to a Motion for Reconsideration of Order Denying Habeas Petition filed by Petitioner, Tex S [REDACTED], by counsel, Shawn R. McDermott, Esq. Upon review of the Motion, Court's Order denying the Petition, the Petition, all papers submitted in support and opposition thereof, and all pertinent legal authorities, the Court DENIES Defendant's Motion, as more fully stated herein.

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The Court previously granted in part and denied in part Petitioner's post-conviction habeas corpus Petition. Petitioner succeeded on part of his Petition – that he was improperly sentenced. He was recently re-sentenced to the proper term of imprisonment. However, the remaining claims were denied. Petitioner's instant motion requests that the Court vacate the prior order, allow for discovery and for an evidentiary hearing. The Motion also argues that no ruling was made on whether an evidentiary hearing was required.

It is apparent from the substantive opinion order that one is not necessary. In fact, the Court specifically stated that "Having been fully briefed on the matters, this Court finds that it would not be aided by further discussion and dispenses with the need for a hearing." Furthermore, the substantive findings and conclusions and support this conclusion that evidence or a hearing would not shed any more light on the Petitioner's claims. Petition states that there

appears to be a remaining sample which could be tested. Yet, as the order clearly states, a Habeas Petition is not a means to re-open a trial counsel's strategic decisions. Petitioner's claim for ineffective assistance of counsel fails on this issue because of the strategic nature of the decisions. No test results could have an effect upon that.

Throughout the Motion, Petitioner also argues that there is scientific evidence out there that, in the interest of justice, should be tested or reviewed. Yet, at his trial Petitioner had the opportunity to review the results, get his own expert witness, and/or cross-examine the State's expert on this issue. The record shows that trial counsel explored and/or did this. So, Petitioner has had the opportunity to challenge the testing, and, to a large degree, did so. A Habeas Petition cannot be used to re-try a criminal case in the absence of any Constitutional error.

So, discovery and an evidentiary hearing are clearly unnecessary. Moreover, the Order Denying Habeas Petition, entered by the previously assigned Judge in this matter, appears to properly consider and properly rule upon each claim made by Petitioner. Accordingly, in light of all matters of record, the Motion for Reconsideration fails to show that Petitioner is entitled to relief.

Therefore, it is hereby ADJUDGED and ORDERED that Defendant's Motion is DENIED. The Court directs the Circuit Clerk to distribute attested copies of this order to the

following counsel of record:

CC: 8-18-14

Counsel for Resondent:

Debra MH McLaughlin, Esq.
77 Fairfax Street, Rm 301
Berkeley Springs, WV 25411

Counsel for Petitioner:

Shawn R. McDermott, Esq.
1800 West King Street
Martinsburg, WV 25401

A TRUE COPY, ATTEST:
[Signature]
Clerk of the Circuit Court
of Morgan County, West Virginia

[Signature]

CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
MORGAN COUNTY, WEST VIRGINIA

GUARDIAN MAG
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CRIMINAL ADM
ORDER BOOK 44