

B. Crawley-Woods

VIRGINIA  
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COURT CLERK

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex. rel.  
WADE PAINTER,  
Petitioner,

v.

DAVID BALLARD, Warden,  
MT. OLIVE CORRECTIONAL COMPLEX,  
Respondent.

CASE NO. 09-C-573  
UNDERLYING: 06-F-24  
JUDGE LORENSEN

**ORDER DENYING  
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, by counsel, Ben Crawley-Woods, seeks relief from confinement through a writ of habeas corpus. Respondent, by Christopher C. Quasebarth, opposes the granting of the writ. Both sides have thoroughly briefed the court, and oral argument on this matter would not aid the Court's decision. The Court reviewed all briefs, exhibits, the underlying criminal case, the Petition for Appeal, and relevant legal authority. An evidentiary hearing on this matter would not assist the Court in this matter as all pertinent facts and arguments are available in the parties' briefs and the record.

After carefully analyzing the Amended Petition, briefs filed, and the record of the previous habeas petition, the Court denies the Petition.

**PROCEDURAL HISTORY**

1. On September 18, 2007, Petitioner was convicted by a Berkeley County Petit Jury of entering without breaking, grand larceny, burglary, petit larceny, two counts of first degree murder without mercy, and possession of a stolen vehicle.
2. On November 16, 2007, Defendant sought post trial relief alleging the search of the Painter/Conner trailer violated the Fourth Amendment to the United States Constitution

The Court found a valid consent to search given by Angie Conner who resided with Petitioner.

3. Following the denial of his post-trial motions, Defendant Wade W. Painter was sentenced to one to ten years for daytime burglary without breaking, one to ten years for of grand larceny, one to fifteen years for burglary, one year for petit larceny, two life sentences for first degree murder, and one to five years for possession of a stolen vehicle. All sentences are to be served consecutively.
4. On May 27, 2008, Petitioner appealed to the Supreme Court. On February 3, 2009, the West Virginia Supreme Court of Appeals refused Petitioner's Petition for Appeal.
5. On July 17, 2009, Petitioner petitioned for a Writ of Habeas Corpus with application to proceed in *Forma Pauperis*.
6. On August 17, 2009, the Court appointed counsel and directed the filing of a *Losh* list and amended petition.
7. After multiple agreed extensions and motions to withdraw from representation and new counsel appointed, Petitioner, Wade Painter, by and through his counsel Ben Crawley-Woods, Esq., filed an amended Petition for Writ of Habeas Corpus on May 23, 2014.
8. On December 16, 2014, this Court summarily dismissed all but one of the grounds for habeas relief asserted in Petitioner's Amended Petition and ordered the Respondent to respond to argument II B of the Petition for Writ of Habeas Corpus:

B. Petitioner Wade Painter's Trial And Appellate Counsel Failed To Investigate, Raise And Assert That The Seizure And Search of The Gym Bag And Garbage Bags Found By The Police In The Painter Home Without A Search Warrant Was An Unreasonable Seizure And Search In Violation Of The Fourth Amendment To The United States Constitution And Article III, Sections 6 of the West Virginia Constitution, And That The Fruit of These Seizures And Searches of The Gym Bag And Garbage Bags Should Have

Been Suppressed At Trial, And That This Failure To Investigate And Assert This Legal Defense To The Admission Of Numerous Items of Personal Property Found In The Gym Bag And Garbage Bags By A Motion To Suppress Constitute Ineffective Assistance Of Counsel Which Denied Petitioner A Fair Trial And Due Process of Law Under The Fourteenth Amendment And Sixth Amendment To The United States Constitution And Article III, Section 14 of the West Virginia Constitution.

9. Respondents responded on February 19, 2015 arguing that there was no constitutional error because Angie Conner, a co-resident of Petitioner's home, voluntarily consented to the search of the residence and its contents.

#### FINDINGS OF FACT

1. Raymond White, Jr. and Raymond White, IV, were murdered in Berkeley County, on September 14, 2005.
2. The Victims' home was ransacked and property was stolen including the victims' Mazda vehicle.
3. Petitioner was found to be in possession of the stolen Mazda, but told police that it was given to him by a stranger who picked him up hitchhiking.
4. On September 15, 2005, John Beitzel contacted Cpl Brendan Hall to tell the police that the Petitioner was a tenant of a trailer Mr. Beitzel owned and he saw a vehicle matching the description of the stolen Mazda.
5. Cpl. Hall and Sgt. Snyder went to Petitioner's residence. Petitioner answered the door. Petitioner's girlfriend and co-resident, Angie Conner, was also home at the time. The officers asked Petitioner to join them to the station to talk about the vehicle. Petitioner voluntarily joined the officers at the station.

6. Also on September 15, 2005, Monte Conner, Angie Conner's father contacted Captain Denny Streets and told Captain Streets that Angie said there is a lot of property in her home that did not belong there.
7. At the station, Petitioner was advised of his *Miranda* rights, but waived those rights both orally and in writing, and answered questions about the Mazda.
8. While Petitioner was being questioned, Captain Streets went to the Petitioner's and Ms. Conner's home and asked to see the property that did not belong in her house. The property was located in the living room. Ms. Conner consented to the search of her residence, and consented to the search of a red duffel bag that she said did not belong to either her or her co-tenant, the Petitioner.
9. Petitioner, after realizing that police had found the victim's property in his home, eventually asked for counsel and the questioning ceased.
10. Petitioner now alleges that the search of the red duffel bag by the police was unlawful because Ms. Conner did not have the authority to give consent to the search, and that trial counsel's failure to make the argument constitutes ineffective assistance of counsel.

#### CONCLUSIONS OF LAW

Petitions for writs of habeas corpus are "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." W. Va. Code § 53-4A-1(a); *State ex rel. Harrison v. Coiner*, 154 W. Va. 467 (1970). Persons convicted of crimes and currently incarcerated, may file a petition for writ of habeas corpus contending one or more of the following: 1.) a denial or infringement of the petitioner's constitutional rights rendering a conviction or sentence void, 2.) lack of jurisdiction, 3.) the sentence is beyond the authorized maximum, and 4.) "the conviction or sentence is otherwise subject to collateral attack upon any

ground of alleged error heretofore available under the common law or any statutory provision of this state.” W. Va. Code § 53-4A-1(a). Claims that have been “previously and finally adjudicated,” either on direct appeal or in a previous post-conviction habeas proceeding, may not form the basis for habeas relief. W. Va. Code §53-4A-1(b); *Bowman v. Leverette*, 169 W. Va. 589, 289 S.E.2d 435 (1982).

A claim adjudicated or waived in a previous post-conviction proceeding is precluded when the petitioner was either represented by counsel or knowing waived his right to be represented by counsel and the proceeding was an complete omnibus habeas corpus proceeding. *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981); *Gibson v. Dale*, 173 W. Va. 681, 319 S.E.2d 91 (1972). A claim waived is any ground for habeas relief that could have been advanced on direct appeal or in a previous post-conviction proceeding but was not advanced. W. Va. Code § 53-4A-1(c). Should a petitioner wish to raise a ground waived in a subsequent proceeding, it is the petitioner that bears the burden of demonstrating that such waiver was less than knowing and intelligent. *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972).

A habeas corpus proceeding is markedly different from a direct appeal or writ of error in that only errors involving constitutional violations shall be reviewed. Syl. Pt. 2., *Edwards v. Leverette*, 163 W. Va. 571 (1979). Petitions for writ of habeas corpus are governed in part by West Virginia Code §53-4A-1. The habeas corpus statute “contemplates the exercise of discretion by the court.” *Perdue v. Coiner*, 156 W. Va. 467 (1973). The circuit court denying or granting relief in a habeas corpus proceeding must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. *State ex rel. Watson v. Hill*, 200 W.

Va. 201 (1997). To sustain his Petition, Petitioner must prove his claims by a preponderance of the evidence.

If the court upon review of the petition, exhibits, affidavits, or other documentary evidence is satisfied that petitioner is not entitled to relief, the court may deny a petition for writ of habeas corpus without an evidentiary hearing. Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467 (1973); *State ex rel. Waldron v. Scott*, 222 W. Va. 122 (2008). Upon denying a petition for writ of habeas corpus the court must make specific findings of fact and conclusions of law as to each contention raised by the petitioner, and must also provide specific findings as to why an evidentiary hearing was unnecessary. Syl. Pt. 1, *State ex rel. Watson v. Hill*, 200 W. Va. 201 (1997); Syl. Pt. 4., *Markley v. Coleman*, 215 W. Va. 729 (2004); R. Hab. Corp. 9(a).

This Court reviews claims of ineffective assistance of counsel under the following two-part test: whether

(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.

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 74 (1984); *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995). Then, to determine whether performance was deficient,

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.

Syl. Pt. 6, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Thus, Petitioner has a heavy burden to prove previous counsel's ineffectiveness. "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably

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qualified defense attorney would have so acted in the defense of an accused.” Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

### Searches

Both the West Virginia and United States Constitutions prohibit unreasonable searches by government agents:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

W. Va. Const. art. III, § 6.

Although slight differences in phraseology, “Article III, Section 6 of the West Virginia Constitution, is virtually identical to the Fourth Amendment to the United States Constitution.” *State v. Julius*, 185 W. Va. 422, 426, 408 S.E.2d 1, 5 (1991).

Both the West Virginia and United States Supreme Courts have long recognized that warrantless searches are unreasonable and prohibited, unless the search is within one of the well-delineated exceptions to the warrant requirements. Here, the applicable exception to the warrant requirement is consent.

The general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures.

Syl. Pt. 3, *State v. Worley*, 179 W. Va. 403, 406, 369 S.E.2d 706, 709 (1988); Syl. Pt. 8, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971; *see also Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 267, 65 L.Ed. 654 (1921); *Frazier v. Cupp*, 394 U.S. 731, 740, 89 S.Ct. 1420, 1425, 22 L.Ed.2d 684 (1969), *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045, 36 L. Ed. 2d 854 (1973); *United States v. Matlock*, 415 U.S. 164, 170-71, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242 (1974). These cases make clear that someone with mutual use or common authority over property may consent to its contents being searched. Even if there only exists “apparent authority” a consent search is not unreasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 180, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148 (1990). Thus, when officers believe that the person giving consent has authority to consent, but in fact does not have the authority to consent to a search, the search is still valid.

Finally,

Under the inevitable discovery rule, unlawfully obtained evidence is not subject to the exclusionary rule if it is shown that the evidence would have been discovered pursuant to a properly executed search warrant.

Syl. Pt. 11, *State v. Newcomb*, 223 W. Va. 843, 848, 679 S.E.2d 675, 680 (2009); Syl. Pt. 3, *State v. Flippo*, 212 W.Va. 560, 575 S.E.2d 170 (2002).

To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.

Syl. Pt. 12, *State v. Newcomb*, 223 W. Va. 843, 848, 679 S.E.2d 675, 680 (2009); Syl. Pt. 4, *State v. Flippo*, 212 W.Va. 560, 575 S.E.2d 170 (2002).

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### Analysis

Whether trial counsel's performance was deficient hinges on whether the search in question violated Petitioner's Fourth Amendment rights. A man's home (trailer) is his castle, and that a warrant is generally required to search a residence. So to, a woman's trailer is her castle, and she may consent to a search of her residence. Here, Petitioner and Ms. Conner were co-tenants with equal domain and control over the trailer where they resided. There is no evidence that either Petitioner or Ms. Conner did not have access to any part of the home. Rather, both had access and control over the entire home. Both parties agree that a search took place, and that Ms. Conner Ms. Conner voluntarily consented to a search of the residence.

Petitioner argues that because the red gym bag in Ms. Conner's living room did not belong to Ms. Conner she does not have the authority to consent to its search. The red gym bag was not locked or placed in a place as to avoid Ms. Conner from viewing its contents. Ms. Conner had access to the bag and had authority to consent to its search. Ms. Conner consented to the search of the home, the living room, and its contents. Ms. Conner, not only had authority to consent to the search of the premises and the bag in the premises, she too had apparent authority to consent to a search of the trailer, the living room, and its contents. Nonetheless, the search of the bag did not take place in a vacuum; other incriminating items were already found in the living room. Accordingly, the search of the red gym bag did not violate the Petitioner's Fourth Amendment right to be free from unreasonable searches and seizures.

Finally, even had Ms. Conner not had authority or apparent authority to give consent to the search of the red bag, the contents of the bag would not be subject to the exclusionary rule, because the evidence would have been discovered pursuant to a properly executed warrant. Assuming, for arguments sake, that the search of the bag was unlawful, there was a reasonable

probability that the evidence would have been discovered by lawful means anyway, because the police possessed the leads making the discovery inevitable (a person in possession a vehicle stolen from murder victims). Moreover, the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the search by questioning Petitioner about the stolen vehicle and other stolen items.

Petitioner's argument for ineffective assistance of counsel is dependent on the failed search and seizure argument discussed above. Because the search of the red gym bag was lawful, it was not ineffective assistance to fail to make that argument at trial. Accordingly, trial counsel was not ineffective and this Petition is DENIED.

#### Conclusion

The Petitioner failed to carry his burden and is not entitled to relief on these grounds as a matter of law. Therefore, the Petition is DENIED. These issues will not be further addressed by this Court in any proceedings. After a full review of the petition, exhibits, and all documentary evidence, this Court is satisfied that the Petitioner is not entitled to relief on the above mentioned grounds, and finds that the record would not be aided by taking evidence and hearing argument. The Court notes the timely objections of all parties to any adverse rulings herein.

The Clerk shall enter this Order as of the date written below and shall transmit attested copies to all counsel and parties of record, including the Prosecuting Attorney for Berkeley County and Ben Crawley-Woods, Esq., counsel for the petitioner.

ENTER this 8 day of Mar, 2014 <sup>5</sup>

The Clerk is directed to retire this action from the active docket and place among causes ended.

**ATTEST**

Virginia M. Sine  
Clerk Circuit Court

By: J. Cooper  
Deputy Clerk



MICHAEL D. LORENSEN, JUDGE  
TWENTY-THIRD JUDICIAL CIRCUIT  
BERKELEY COUNTY, WEST VIRGINIA

*B. Crawley-Woods*

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

2014 DEC 16 PM 4:40

STATE OF WEST VIRGINIA, ex. rel.  
WADE PAINTER,  
Petitioner,

VIRGINIA M. SINE, CLERK

v.

CASE NO. 09-C-573  
UNDERLYING: 06-F-24  
JUDGE LORENSEN

DAVID BALLARD, Warden,  
MT. OLIVE CORRECTIONAL COMPLEX,  
Respondent.

**ORDER SUMMARILY DISMISSING CERTAIN GROUNDS AND  
CALLING FOR RESPONDENT'S LIMITED ANSWER TO  
PETITION FOR WRIT OF HABEAS CORPUS**

Pending before the Court is a Petition for Writ of Habeas Corpus filed by Petitioner, WADE PAINTER, and amended by and through his counsel Ben Crawley-Woods, Esq., on May 23, 2014. Upon review of the Petition and review of the case file, the Court does ORDER the Respondent to file a substantive answer to argument II B of the Petition for Writ of Habeas Corpus within sixty (60) calendar days of the receipt of this Order.

B. Petitioner Wade Painter's Trial And Appellate Counsel Failed To Investigate, Raise And Assert That The Seizure And Search of The Gym Bag And Garbage Bags Found By The Police In The Painter Home Without A Search Warrant Was An Unreasonable Seizure And Search In Violation Of The Fourth Amendment To The United States Constitution And Article III, Sections 6 of the West Virginia Constitution, And That The Fruit of These Seizures And Searches of The Gym Bag And Garbage Bags Should Have Been Suppressed At Trial, And That This Failure To Investigate And Assert This Legal Defense To The Admission Of Numerous Items of Personal Property Found In The Gym Bag And Garbage Bags By A Motion To Suppress Constitute Ineffective Assistance Of Counsel Which Denied Petitioner A Fair Trial And Due Process of Law Under The Fourteenth Amendment And Sixth Amendment To The United States Constitution And Article III, Section 14 of the West Virginia Constitution.

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The Respondent's answer shall indicate what transcripts are available, when they can be furnished, and what proceedings have been recorded and not transcribed, pursuant to R. Hab. Corp. 5. The Respondent's answer should be in the form of either a substantive brief in opposition to the Petition, or if preferred, a proposed order in that same vein. The Petitioner shall thereafter have thirty (30) calendar days from the date of service of the Respondent's brief or proposed order to file a rebuttal brief or proposed order if desired. Each party shall attach to its brief or proposed order portions of any transcript it deems relevant to its argument.

THEREAFTER, the Court will rule upon the Petition and the record or schedule a hearing if the Court deems necessary. Any original proposed orders and copies of briefs shall be sent directly to the Judge. Parties are encouraged to submit proposed orders or judicial copies of briefs in Microsoft Word or PDF format to this Court's Judicial Assistant. Copies of the proposed orders and the original briefs shall be filed with the Clerk of the Circuit Court.

As for the remaining claims, the Court has reviewed the Amended Petition, the underlying case file, and all pertinent legal authorities and finds as follows.

#### FINDINGS OF FACT

1. On September 18, 2007, the Petitioner, Wade Painter, was convicted by a Berkeley County Petit Jury of entering without breaking, grand larceny, burglary, petit larceny, murder of the first degree with no mercy, murder of the first degree with no mercy, and possession of a stolen vehicle.
2. On November 16, 2007, the Court took up Defendant's Motion For A New Trial And For Judgment Notwithstanding The Verdict of The Jury. The Motion cited three grounds: the search of the Painter/Conner trailer was in violation of the Fourth Amendment to the United States Constitution and his due process right to a fair trial; that the interrogation of

Wade Painter by Captain Streets and Sargent Snyder after Wade Painter had invoked his Fifth Amendment right to counsel and after he had placed under arrest rendered his subsequent statement inadmissible and that the Court's ruling to the contrary and the subsequent admission of that statement in evidence violated Wade Painter's due process right to a fair trial; and that the Court's failure to direct a verdict in favor of the defendant at the close of the State's case-in-chief and at the close of all evidence was contrary to the evidence presented. The Court found that the consent to search given by co-tenant Angie Conner was valid, that the Defendant's statement was admissible because interrogation not initiated by police but rather by the Defendant himself, and that there was more than sufficient evidence for a jury to find the Defendant guilty beyond a reasonable doubt. Accordingly the Court denied Defendant's motions and his exception was noted.

3. Following the denial of his post-trial motions, Defendant Wade W. Painter was sentenced to an indeterminate term of no less than one nor more than ten years for his conviction of daytime burglary without breaking, an indeterminate term of not less than one nor more than ten years for his conviction of grand larceny, an indeterminate term of not less than one nor more than 15 years for his conviction of burglary, a period of one year in the regional jail for his conviction of petit larceny, confinement in the penitentiary house of this state for the rest of the Defendant's life for his conviction of murder in the first degree, confinement in the penitentiary house of this state for the rest of the Defendant's life for his second conviction of murder in the first degree, and an indeterminate term of not less one nor more than five years for his conviction of possession of a stolen vehicle, to be served consecutively.
4. On May 27, 2008, defense counsel filed Defendant Wade Painter's Petition for Appeal.

5. On February 3, 2009, the West Virginia Supreme Court of Appeals refused the Defendant's Petition for Appeal.
6. On July 17, 2009, Petitioner made his first Petition for Habeas Corpus with application to proceed in *Forma Pauperis*.
7. The Court appointed counsel and directed the filing of a *Losh* list and amended petition on August 17, 2009.
8. After multiple agreed extensions and motions to withdraw from representation and new counsel appointed, Petitioner, Wade Painter, by and through his counsel Ben Crawley-Woods, Esq., filed an amended Petition for Writ of Habeas Corpus on May 23, 2014.
9. Petitioner also filed a *pro se* Motion to Amend Order of Restitution Payments on May 23, 2014, which was previously denied by this Court by Order dated May 28, 2014.

#### CONCLUSIONS OF LAW

Petitioner alleges nine main grounds of error: (A.) that the Petitioner was illegally seized and arrested at his home on September 15, 2005, and that the admission of evidence obtained as a result of said seizure and subsequent search denied the Petitioner a fair trial and due process of law; (B.) that trial and appellate counsel failed to object to, suppress, and appeal the admission of evidence found in Petitioner's bags found in his home without a search warrant constituting ineffective assistance of counsel; (C.) that trial and appellate counsel failed to object to, suppress, and appeal the admission of the Petitioner's statement to police on the grounds that police failed to promptly present Petitioner to a magistrate without unnecessary delay constituting ineffective assistance of counsel; (D.) that appellate counsel was ineffective by virtue of his failure to appeal the State's use of Rule 404(b) evidence of collateral crimes or misconduct, which was introduced into evidence without notice thereof, and without a *McGinnis-Dolin* hearing, and that the failure

of trial counsel to object to this Rule 404(b) evidence on some occasions constituted ineffective assistance of counsel; (E.) that appellate counsel was ineffective by virtue of his failure to appeal comments made by the prosecuting attorney and trial court during the State's closing argument that were an improper reference to Petitioner's failure to testify and an improper reference to the Petitioner having a burden to prove himself innocent; (F.) that appellate counsel was ineffective by virtue of his failure to appeal certain errors; (G.) that trial and appellate counsel were ineffective by failing to assert that Petitioner was deprived of due process and a fair trial as a result of the State's failure to collect, test, and disclose potentially exculpatory evidence, and as a result of the State's failure to test and disclose potentially exculpatory evidence that was collected; (H.) that Petitioner's assignments of error previously raised on direct appeal entitle him to relief; and (I.) that the cumulative weight of the errors within Petitioner's trial warrant the granting of a new trial. Further, the Petition requests, under subsection J, that Painter is entitled to habeas relief regarding restitution payments being deducted from his inmate account and requests this Court consider the Petitioner's *Pro Se* Motion To Amend Order Of Restitution Payments Within The Instant Habeas Proceeding. However, this Court has already dealt and dispensed with said motion by Order dated May 28, 2014.

The Court has reviewed these claims in detail and finds that, with the exception of argument B, the Petitioner is clearly not entitled to relief and that there is no need for an evidentiary hearing on these grounds.

The first issue before the Court is whether the Petitioner waived all grounds relied upon in the instant action by failing to assert them in an appeal of the underlying case, 06-F-24. The post-conviction habeas corpus statute, West Virginia Code §53-4A-1 may be applied to bar consideration of matters waived by petitioners.

When any such contention or contentions and grounds could have been advanced by the petitioner before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, but were not in fact so advanced, there shall be a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds.

W. Va. Code § 53-4A-1.

As for the grounds that were not brought in the Petitioner's prior appeal, the instant petition asserts that appellate counsel was ineffective for failing to assert said claims. The Court will deal with each of these allegations in turn and has fully reviewed all grounds raised in the instant Petition.

The procedure surrounding petitions for writ of habeas corpus is "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." W. Va. Code § 53-4A-1(a); *State ex rel. Harrison v. Coiner*, 154 W. Va. 467 (1970). A habeas corpus proceeding is markedly different from a direct appeal or writ of error in that only errors involving constitutional violations shall be reviewed. Syl. Pt. 2., *Edwards v. Leverette*, 163 W. Va. 571 (1979).

Petitions for writ of habeas corpus are governed in part by West Virginia Code §53-4A-1. The habeas corpus statute "contemplates the exercise of discretion by the court." *Perdue v. Coiner*, 156 W. Va. 467 (1973). The circuit court denying or granting relief in a habeas corpus proceeding must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. *State ex rel. Watson v. Hill*, 200 W. Va. 201 (1997). To sustain his petition, a petitioner must prove his claims by a preponderance of the evidence.

Further, upon review of the petition, exhibits, affidavits, or other documentary evidence, if a court is satisfied that a petitioner is not entitled to relief, the court may deny a petition for writ of habeas corpus without an evidentiary hearing. Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467 (1973); *State ex rel. Waldron v. Scott*, 222 W. Va. 122 (2008); W. Va. Code § 53-4A-7(a). However, upon denying a petition, the court must make specific findings of fact and conclusions of law as to each contention raised by the petitioner, and must provide specific findings as to why an evidentiary hearing was unnecessary. Syl. Pt. 1, *State ex rel. Watson v. Hill*, 200 W. Va. 201 (1997); Syl. Pt. 4., *Markley v. Coleman*, 215 W. Va. 729 (2004); R. Hab. Corp. 9(a). On the other hand, if the court finds “probable cause to believe that the petitioner may be entitled to some relief . . . the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced . . . .” W. Va. Code § 53-4A-7(a).

When reviewing the merits of a petition for writ of habeas corpus, the court recognizes that “there is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed.” Syl. Pt. 2, *State ex rel. Scott v. Boles*, 150 W. Va. 453 (1966). Furthermore, specificity is required in habeas pleadings; a mere recitation of a ground for relief without detailed factual support will not justify the issuance of a writ or the holding of an omnibus hearing. W. Va. Code § 53-4A-2; *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981). “When a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation because the petition does not provide adequate facts to allow the circuit court to make a ‘fair adjudication of the matter,’ the dismissal is without prejudice.” *Markley v. Coleman*, 215 W. Va. 729, 734 (2004), see R. Hab. Corp. 4(c). However, rather than dismissing without prejudice the court may “summarily deny unsupported

claims that are randomly selected from the list of grounds.” *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981).

First, the Petition alleges that

A. Petitioner Wade Painter Was Subjected To An Illegal Seizure And Arrest At His Trailer Home On September 15, 2005, In Violation of The Fourth Amendment To The United States Constitution And Article III, Section 6 of The West Virginia Constitution, and Admission of Evidence Obtained as a result of Said Seizure and Subsequent Search Denied Petitioner A Fair Trial And Due Process of Law Under The Fourteenth Amendment And Sixth Amendment To The United States Constitution And Article III, Section 14 of the West Virginia Constitution.

While this ground is not asserted in the Petitioner’s prior appeal of the underlying conviction, Petitioner alleges that Petitioner’s trial counsel and appellate counsel rendered ineffective assistance of counsel by failing to raise this issue at trial or at pretrial by motion to suppress in violation the Sixth Amendment and the Fourteenth Amendment of the U.S. Constitution and pursuant to Article III, Section 14 and 10 of the WV Constitution. Typically any ground for habeas relief that could have been advanced on direct appeal or in a previous post-conviction proceeding but was not is considered waived under West Virginia Code §53-4A-1(c), however, Petitioner essentially alleges that his counsel was ineffective for failing to raise the issue in trial and then on appeal. Accordingly, the Court will review this particular allegation. After a full review of this ground and the underlying file, this Court must conclude that the Petition cannot be sustained on this claim. Neither Petitioner’s trial counsel nor appellate counsel was constitutionally ineffective. This finding bars any further inquiry into the Petitioner’s claim as Petitioner has not rebutted the presumption that said ground was knowingly and intelligently waived.

This Court reviews claims of ineffective assistance of counsel under the following two-part test: whether

(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.

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 74 (1984); *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995). In order to determine whether performance was deficient,

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.

*State v. Miller*, 459 S.E.2d 114 (W.Va. 1995). Accordingly, petitioners have the burden of showing that no other reasonable attorney would have acted as their counsel did under the same circumstances. *Id.*

Strategic decisions are not reviewable in habeas corpus proceedings.

In 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.

*State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), Syl. Point 6. Therefore, petitioners have a heavy burden to meet when attacking previous counsel's assistance. "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Petitioner alleges that the officers' discussion with Mr. Painter on his front porch was coercive and rendered the encounter a seizure or *de facto* arrest. However the evidence does not

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support this contention and mandatory case law does not impose such a burden upon law enforcement. Petitioner cites case law from other jurisdictions but fails to provide mandatory authority directing the trial court to weigh whether the interaction was coercive. It is not the job of a reviewing court to retry the case or make new law. This Court must find that the trial court acted within the law of West Virginia and that this ground is not sufficient to sustain a petition for writ of habeas corpus.

After receiving a report that Wade Painter had been seen driving the victim's vehicle with a large quantity of merchandise, Sgt. Snyder and Cpl. Hall went to Painter's residence to speak with him. When the police asked if they could come in to talk, Painter denied the police entrance but agreed to step out on the porch to speak with them. Wade Painter's girlfriend and a co-tenant, Angela Conner, remained inside the trailer. The Petitioner gave two accounts about how he came into possession of the victim's Mazda vehicle stating that he borrowed it from a friend that he could not accurately name and then that Little Ray, one of the victims, let him borrow it. The Petitioner voluntarily rode to the station with the police to answer some questions. He was not advised of his *Miranda* rights at his residence or in the cruiser and was not placed under arrest. Even when the troopers found a small amount of marijuana on the Petitioner after conducting a pat-down for safety purposes, they stated that they were not worried about finding a small amount of marijuana and instead spoke at length about the possibility of the Petitioner becoming a confidential informant for law enforcement.

At trial the police testified that they were attempting to distract Painter from destroying evidence while they waited on a warrant. These facts do not tend to show a *de facto* arrest wherein the Petitioner would have thought he was under arrest or compelled to continue the discussion. Painter knew he could say no to the officers' requests and in fact did so when they

asked to enter his home to discuss the vehicle. While police admitted that they wished to keep the Petitioner away from the evidence while a warrant was obtained, this was not a coercive tactic to gain access to the house without a warrant. Nor did law enforcement invent an exigent circumstance to gain entry into the trailer without a warrant. Police did nothing to make Painter feel like he could not terminate the conversation. At no point before actual arrest was Painter effectively deprived of his liberty. Nor can this court find that the discussion turned into a custodial interrogation prior to arrest. This court cannot find fault in the officers' handling of the conversation with Mr. Painter and accordingly cannot find fault in trial or appellate counsel for not raising the issue in trial or on appeal. Counsel's decision to not raise an unsupported claim cannot be second guessed. Further, Petitioner cannot show how the outcome of this case would have been different, but-for counsel's actions. The instant Petition cannot be sustained on this ground.

Additionally, because the Court finds no error in this discussion, there is no need to conduct a fruit of the poisonous tree analysis. Petitioner complains that before he was mirandized, Cpl. Hall took photos of Painter's body but fails to describe how this act converted a consensual encounter into a *de facto* arrest. Petitioner relies on his argument that he was illegally seized on his front porch and that the taint of that seizure extends to this evidence. Likewise, Petitioner complains that a swab of his DNA and DNA recovered from the green Mazda was part of the poisonous tree flowing from the seizure and illegal arrest, and that counsel should have moved to suppress the evidence, but again, because Petitioner's argument that he was seized on his porch fails, so too must arguments that contend that the taint of that "arrest" extends to other evidence. In habeas proceedings the burden is upon petitioner to show an irregularity in the proceedings. Petitioner has not met this burden.

Similarly, Petitioner argues, that under this tree, Painter was improperly removed from his residence which prevented him from reasserting a refusal to permit entry into his home. However, Painter wasn't removed for the purpose of obtaining consent from Ms. Connors, the co-tenant. Under *Georgia v. Randolph*, it is improper to remove an objecting tenant in order to obtain the consent of a co-tenant. 547 U.S. 103, 126 S. Ct. 1515, (2006). The facts do not show any such conduct.

In the instant case, Ms. Connors called her father about the items in the home, communicating that she was worried that she would get in trouble. With his daughter's permission, Connors' father called the police to arrange a meeting. It was only after this arrangement that troopers returned to the Painter/Connors residence, at which time Ms. Connors gave the troopers consent to search the home. A subsequent consent by a co-tenant is sufficient grounds to search a home without a warrant, provided that the objecting party was not removed *in order to obtain* the consent. Here, the evidence shows that Painter was not removed in order to obtain Ms. Connors' consent. Accordingly, trial counsel and appellant counsel did not err by failing to raise this fruitless argument. Accordingly, Petitioner's claim for ineffective assistance of counsel fails under both the *Strickland* prongs.

Petitioner's second claim, found under subsection II B of the Petition, is addressed above and is held in abeyance.

Third, Petitioner alleges that

C. Petitioner Wade Painter's Trial And Appellate Counsel Failed To Investigate, Raise And Assert By Motion To Suppress That The Failure By The Police To Promptly Present Petitioner Painter To A Magistrate Without Unnecessary Delay In Accordance With W.Va. Code§ 62-1-5 And Rule 5(a) of The West Virginia Rules of Criminal Procedure After Petitioner Was Arrested Was A Violation of His Fifth Amendment Rights Under The United States Constitution And His Due Process Rights Under The Fourteenth

Amendment To The United States Constitution And Article III, Section 10 Of The West Virginia Constitution And Constitutes Ineffective Assistance of Counsel Under The Sixth Amendment To The United States Constitution And The Due Process Clause of The Fourteenth Amendment To The United States Constitution And Article III, Sections 10 and 14 of The West Virginia Constitution.

Petitioner alleges that trial counsel and appellate counsel rendered constitutionally ineffective assistance by failing to raise the issue of prompt presentment to a magistrate following arrest at trial or at pretrial by motion to suppress. After a review of this ground and the underlying file, this Court must conclude that the Petitioner's right to prompt presentment, a state statutory right, was not violated and accordingly neither trial counsel nor appellate counsel erred in not raising the issue.

West Virginia Code §62-1-5(a)(1) provides that

An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

Likewise, Rule 5(a) of the West Virginia Rules of Criminal Procedure provides that

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivision of this rule.

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Petitioner alleges that his presentment was unnecessarily delayed for the purpose of first obtaining a search of the Painter/Conner trailer and to prompt Petitioner's interview. However, the evidence and record do not support this claim.

The Petitioner was not arrested until after the search of his trailer had been completed. Consequently, the statute and rule do not apply to this period of time. Painter was arrested at approximately 2:17 p.m. on Thursday, September 15, 2005, at the Berkeley County Sheriff's Department. He was presented to a magistrate prior to 5:25 p.m. From 3:50 p.m. to 4:45 p.m. Wade Painter gave a voluntary interview. Accordingly, the only delay to consider for the purpose of Petitioner's argument was from 2:17 p.m. to approximately 3:50 p.m., 1 hour and 33 minutes. Without more, there is no West Virginia case law that interprets an hour and a half as "unnecessary delay." Nor does Petitioner present any evidence that the sole purpose of the delay was to obtain a confession as prohibited by *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984). Interrogation ceased when Petitioner invoked his right to counsel and was only reinstated after Petitioner instigated the interview and waived his right to counsel during questioning. The time between Petitioner's arrest and his voluntary questioning was 1 hour and 33 minutes. This Court finds that this allegation is insufficient to suggest delay as a coercive tactic. Therefore, Petitioner has failed to show that counsel's performance was deficient under an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. As such, Petitioner has failed to demonstrate, under either prong of *Strickland v. Washington*, that counsel was ineffective by virtue of failing to raise this claim in trial or on appeal.

Fourth, Petitioner alleges that

D. Petitioner Wade Painter was Denied, Due to Process of Law  
And a Fair Trial During the Guilt Phase of His Trial Under the

Sixth And Fourteenth Amendments To The United States Constitution And Article III, Sections 10 and 14 of The West Virginia Constitution By The State's Use of Rule 404(b) Collateral Crime or Misconduct which was Introduced In Evidence without Notice Thereof, And Without A Without A McGinnis-Dolin Hearing Prior To Such Rule 404(b) Evidence Being Heard By The Jury. While Objected To By Trial Counsel On Several, But Not All Occasions, And The Error Preserved For Appeal, Appellate Counsel Failed To Assert Any of These Instances of Use By The State of Unnoticed Rule 404(b) other Crimes Evidence On Appeal. This Failure of Appellate Counsel To Assert These Grounds On Appeal Constitutes Ineffective Assistance of Counsel Under The Sixth Amendment To The United States Constitution, And The Due Process Clause of The Fourteenth Amendment To The United States Constitution And Article III, Sections 10 And 14 of The West Virginia Constitution. The Failure of Trial Counsel To Object To This Rule 404(b) Evidence On Some Occasions Constitutes Ineffective Assistance of Counsel Under The Sixth Amendment To The United States Constitution, And The Due Process Clause of The Fourteenth Amendment To The United States Constitution And Article III, Sections 10 And 14 of The West Virginia Constitution.

First, Petitioner complains that Painter's explanation about how his injuries were received should have not been admitted into evidence under 404(b) of the West Virginia Rules of Evidence. However, the complained of testimony relayed a party admission and an alibi made by the Petitioner himself. The testimony supported Petitioner's position that he received cuts and bruises from a fight and in a bike accident instead of at the White residence. This information was presented to the jury through Painter's own statements and was not offered to prove a person's character in order to show that he acted in conformance therewith. Accordingly, the evidence was not prohibited under 404(b) which outlines

1. Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
2. Permitted Uses; Notice Required. This evidence may be

admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Any party seeking the admission of evidence pursuant to this subsection must:

1. provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and
2. do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Even so, the Court issued an instruction to the jury to make sure that they did not consider the evidence for the purpose of guilt or innocence, but merely the defendant's explanation of the injuries he received. Hence, appellate counsel may have not found such an argument to be convincing or worth the Supreme Court's time. Often, appellate attorneys present only the strongest grounds on appeal, seeking to present a clean and convincing appeal that does not distract from stronger grounds or negatively impact the perceived trustworthiness of the overall appeal. Because this falls within the scope of reasonableness, such a strategy decision is not reviewable within a habeas proceeding.

Petitioner further objects based on the State's failure to notify defense of its intention to offer evidence of Wade painter's fight and arrest as 404(b) evidence. Again, this information was presented to the jury through Painter's own statements, and the defendant was aware his statements would be presented. The trial court found that the evidence was admissible for the limited purpose of establishing defendants' given alibi. Even if appellate counsel could have raised this ground on appeal, the claim is a weak one. This would not have been a good argument to make on appeal and appellate counsel clearly presented a tailored petition that would give his client the best chance for appeal. Petitioner cannot show that no other reasonable attorney would have employed this method. Nor that the outcome of the appeal would have been

different if this course would have been pursued, much less that it would have been different but-for unprofessional errors. Such a decision is precisely the type of strategy decision that this Court cannot review in a habeas proceeding. This Court will not employ hindsight to weigh appellate counsel's grounds against Petitioner's now preferred claim.

Next, Petitioner complains that introduction of his mug shot from the bar fight was another reference to the arrest but admits that the photo was not objected to by defense counsel as Rule 404(b) evidence but rather to the prosecutor's follow-up question as to whether the photograph depicted injuries or not. Defense objected that "the photograph speaks for itself." Accordingly, appellate counsel would have been barred from raising such a ground on appeal. Further, this Court notes that trial counsel appeared to be employing a sound strategy which would not discredit Painter's alibi. Accordingly, even if Defense could have raised a 404(b) objection, this Court cannot find that trial counsel was constitutionally ineffective for choosing not to object. Presenting conflicting theories to a jury can be discrediting to a defense and accordingly are often avoided by shrewd trial attorneys. As such, this Court can find no fault in appellate or trial counsel.

Further, Petitioner complains that the State introduced a photograph where the Petitioner appeared to be holding a bag of marijuana. The photo was introduced to show Mr. Painter wearing a gray t-shirt similar to the one seized at the home and depicted a backpack similar to the one found at the crime scene. However, the officer through whom the photo was introduced, did state that the bag may have been marijuana. Trial counsel objected asking for a cautionary instruction, which the Court provided. Again, appellate counsel would have been barred from raising petitioner's new 404(b) ground for appeal because strategically choosing the best grounds for objection, consequently limits the grounds for appeal to the objection made on the record. In

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this instance, trial counsel strategically chose to make a more effective request. In fact, a 404(b) issue is not presented within the issue of whether Petitioner used marijuana because the charged crime was for violent crimes and theft, not drug related charges. Accordingly, such evidence would not tend to establish violent history and thus wouldn't lead a jury to believe he was acting in accordance therewith. More importantly however, trial counsel chose to ask for appropriate instructions to the jury. The jury already knew the Petitioner used drugs, including marijuana, based on the safety search and Petitioner's own statements. Thus such evidence would likely not influence the jury even without the curative instruction.

Nor can Petitioner claim that appellate counsel was ineffective for failing to bring a 404(b) based argument regarding the introduction of evidence concerning Xanax abuse, a question regarding where the Petitioner's brother lived, or the testimony of Mr. Weigle because trial counsel chose not to object on the grounds of 404(b). Again, appellate counsel would have been barred from raising petitioner's new 404(b) ground on appeal because strategically choosing the best grounds for objection during trial limits the grounds for appeal to those raised objections. Nor were the admissions plain error, which would have allowed appellate counsel to raise the issues in petitioner's prior appeal. Accordingly, appellate counsel cannot be weighed as ineffective. Further, this Court also notes that trial counsel strategically chose to make a more effective request instead of objecting on weak grounds. For example, it appears the testimony of Mr. Weigle may have been useful to defense as it may have introduced another suspect for the jury to consider as the perpetrator of the crimes, giving rise to doubt of the defendant's guilt as well as timeline evidence that might have offered some rebuttal to the State's allegations concerning where Petitioner was and when. For these reasons, this Court cannot review the strategy decision of counsel in the instant habeas proceeding. Additionally, this finding bars any

further inquiry into Petitioner's claim D. as Petitioner has failed to rebut the presumption that the waiver of appeal claims were knowing and intelligent.

Fifth, Petitioner alleges that

E. Petitioner Wade Painter Was Denied Due Process of Law And A Fair Trial During The Guilt Phase of His Trial Under The Fifth, Sixth And Fourteenth Amendments To The United States Constitution And Article III, Sections 10 And 14 of The West Virginia Constitution By:(1) Comments Made By The Prosecuting Attorney During Closing Argument That Were An Improper Reference To Petitioner's Failure To Testify And (2) An Improper Reference To The Petitioner Having A Burden To Prove Himself Innocent Which Comments Were Objected To By Petitioner's Trial Counsel And Preserved As Error And; (3) And By The Court's Comment To The Jury In Sustaining Petitioner's Trial Counsel's Objection That The Prosecutor's Evidence Had Not Been Refuted; And Petitioner Wade Painter Was Deprived of Effective Assistance of Counsel On Appeal By The Failure of Appellate Counsel To Assert These Instances of Error On Appeal Which Failure Constitutes Ineffective Assistance of Counsel Under The Sixth And Fourteenth Amendments To The United States Constitution And Article 10 And 14 of The West Virginia Constitution.

Again, any ground for habeas relief that could have been advanced on direct appeal or in a previous post-conviction proceeding but was not is considered waived under West Virginia Code §53-4A-1(c). Here, Petitioner alleges appellate counsel was ineffective for failing to bring the claim properly preserved by trial counsel's objection. Indeed, the prosecuting attorney's statement was an incorrect statement of law and objectionable, but defense counsel timely objected and the Court gave a clear instruction, paired with the standard charge which included instruction regarding the burden of proof. Additionally, this Court finds no merit in Petitioner's complaint about the Court's curative instruction. It appears that appellate counsel chose not to include in the prior appeal a ground for error which was explicitly addressed by the trial court by

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interrupting the State's closing argument to correct and reiterate that the defendant had no burden to prove himself innocent.

Appellate counsel clearly presented a tailored petition that would give his client the best chance for appeal and did not waste the Supreme Court's patience on weak arguments. Accordingly, this Court cannot find that appellate counsel rendered ineffective assistance by preparing an appropriate appeal that presented the strongest claims, a proper strategic decision. The appeal did not step outside the standard of standard of reasonableness and Petitioner cannot show a reasonable probability that, but for counsel's unprofessional errors, the result of the appeal would have been different. Therefore, Petitioner cannot meet his burden to show that appellate counsel's performance was constitutionally ineffective and therefore, Petitioner's attempt to reassert his trial objection is considered waived for the purposes of this habeas proceeding. Nor has Petitioner offered any evidence or argument to rebut the presumption that such waiver was not knowing and intelligent. Consequently, the Petition for Writ of Habeas Corpus cannot be supported by this claim.

In his sixth ground for relief, Petitioner alleges that

F. Petitioner Wade Painter Was Denied Due Process of Law by the failure of Petitioner's appellate counsel to assign certain errors on appeal.

Petitioner reiterates the errors alleged under subsection E in this section of the Petition. For the same reasons addressed in the paragraphs above, the instant Petition for Writ of Habeas Corpus cannot be supported by this claim.

Seventh, Petitioner claims that

G. Petitioner Wade Painter Was Denied Due Process of Law And A Fair Trial Under Article III, Sections 10 And 14 of The West Virginia Constitution: (1) As A Result of The Failure of The State To Collect, Test And Disclose Potentially Exculpatory Evidence, And (2) As a Result of The Failure of The State To Test And

Disclose Potentially Exculpatory Evidence That Was Collected; And Petitioner Was Deprived of Effective Assistance of Trial Counsel And Appellate Counsel Under Article III, Sections 10 And 14 of The West Virginia Constitution: Where Trial Counsel Failed To Assert At Pretrial And Trial That Petitioner Was Deprived of Due Process of Law And A Fair Trial: (1) As A Result of The Failure of The State To Collect, Test And Disclose Potentially Exculpatory Evidence, And (2) As A Result of The Failure of The State To Test And Disclose Potentially Exculpatory Evidence That Was Collected; And Where Appellate Counsel Failed To Assert On Appeal That Petitioner Was Deprived of Due Process of Law And A Fair Trial (1) As A Result of The Failure of The State To Collect, Test And Disclose Potentially Exculpatory Evidence, And (2) As A Result of The Failure of The State To Test And Disclose Potentially Exculpatory Evidence That Was Collected.

Petitioner claims that a gunshot residue test kit ("GRT") should have been performed upon William Christopher Barrett, Alex Hall, Bradford Hall, and Lori Love and that their shirts should have been collected and examined for residue and blood. The petitioner states that William Christopher Barrett was alone the afternoon of September 14, 2005, when he discovered the robbery at the White residence, that he then called his friend Alec Hall who came to the house with his Father Bradford Hall and Lori Love and found the bodies.

Petitioner also complains that the State should have performed a GRT on the Petitioner and that collected scrapings from the fingernails of the victims should have been analyzed. Based on all these complaints, Petitioner asserts that his constitutional right to exculpatory evidence was violated.

Petitioner cites *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988), admitting that the United States Supreme Court of Appeals has held that the Fourth Amendment does not require the State to preserve *potentially useful* evidence unless the criminal respondent can show bad faith on the part of the police.

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Further, Petitioner cites *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (1984), which found that the State had the duty to preserve evidence that “might be expected to play a significant role in the suspect’s defense.” Here, however, the State did not destroy any evidence. But even in *Trombetta*, the Court found that the State’s failure to preserve breath samples didn’t violate due process because it was not readily apparent that the evidence possessed exculpatory value before it was destroyed. In the instant case, there is no indication that the now requested evidence had exculpatory value. *Trombetta* also recites that criminal defendants have “a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed.” *Id.* There is no argument in the above-captioned case that any of this now sought evidence was requested or that the evidence was material to the guilt of the Defendant, only that it had potential to be exculpatory.

Clearly, none of the Petitioner’s federal constitutional rights were violated, however, the Petitioner continues, that other jurisdictions, including West Virginia, have not made a distinction between “potentially useful” and “material exculpatory” evidence for the purpose of weighing state constitutionality rights. Petitioner asserts that in *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), West Virginia adopted a broader rule for due process protections in its own constitution, and delineated a three-part test to determine whether the State had breached its duty to preserve *Brady* materials.

In *Osakalumi*, the police failed to preserve a couch in which the fatal bullet was lodged, failed to photograph the couch, and destroyed the couch before the defendant could fully and fairly examine the trajectory of the bullet. “It is clear from [the expert witness’s] testimony that

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the trajectory of the bullet through the couch was paramount to his determination that [the victim's] death was the result of a homicide, and not suicide." *Id.* at 761-62.

The instant case is clearly distinguishable from *Osakalumi* and does not fall under the same test. In *Osakalumi*, the police were in possession of a vital piece of evidence and actively destroyed it. Here, the police simply failed to employ every possible test that the defendant now claims should have been used in the investigation of the crime. There is no allegation that the defendant requested and was denied access to evidence in the State's possession. For example, there is no allegation that the Petitioner requested and was denied access to the nail clippings for independent analysis.

Instead, the appropriate case to compare Petitioner's state constitutional claim to is *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007), which explains the "three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must be suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

Here, there is no evidence that the evidence at issue was favorable to the Petitioner. There is no claim that the evidence was suppressed or destroyed by the State, only that it wasn't tested or wasn't collected. Lastly, Petitioner has not shown that prejudice ensued. Accordingly, Petitioner's state constitutional claims regarding potentially exculpatory evidence are also without merit.

Consequently, Petitioner's argument that counsel was constitutionally ineffective by virtue of failing to bring such an argument before the trial or appellate court must fail. Such an argument would have, in all likelihood, failed before the trial court. And because trial counsel did not raise the ground during trial, appellate counsel was foreclosed from making such an

argument. Hence, Petitioner has failed to demonstrate the trial or appellate counsel's conduct was beyond what any reasonable attorney in a similar position would do or that the result of the proceedings would have likely been different but for counsel's unprofessional errors. The Petition cannot be sustained on ground G.

Eighth, Petitioner contends that

H. Petitioner's assignments of error previously raised on direct appeal entitle him to relief.

Claims that have been previously and finally adjudicated on direct appeal may not form the basis for habeas relief, but claims that were raised in a petition for appeal that was refused are not precluded. *Smith v. Hedrick*, 181 W. Va. 394, 382 S.E.2d 588 (1989). Accordingly, the Court will review Petitioner's prior grounds asserted on appeal.

Wade Painter asserted three grounds of error in his previous appeal to the Supreme Court of Appeals of West Virginia and incorporates those grounds into his Petition by reference. Put simply, Petitioner alleges that the trial court's denial of his motion to suppress the fruits of the trailer search, motion to suppress Painter's statement made to Captain Streets, and motion for directed verdict deprived the Petitioner of a fair trial. All three grounds must fail in this habeas proceeding.

Petitioner argues that he was removed from his home so Lt. Streets could later go to the house and obtain consent from Ms. Conners. However, the evidence does not support this allegation as Ms. Conners, through her father, contacted the police after Mr. Painter had left the residence. Accordingly, the Court cannot find that the trial court deprived Petitioner a constitutional right in denying the Defense motion to suppress the fruits of the search based on Ms. Conner's consent.

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Petitioner argues that Lt. Streets improperly initiated interrogation after Mr. Painter had requested an attorney. The evidence does not support this allegation as police are not required to remain in complete silence. While Streets did address Wade Painter, it was the Petitioner who reinitiated the conversation about the investigation and knowingly waived his previously asserted right on audio recording. This Court finds that there was no constitutional infringement and the trial court made no constitutional error.

Petitioner argues that the trial court should have granted his motion for directed verdict because, based on the evidence presented, reasonable minds could not have found that the Petitioner was guilty beyond a reasonable doubt of the crimes for which he was convicted. After a full review of the underlying record, this Court finds that the State presented sufficient evidence to carry its burden and that the jury's verdict of guilt beyond a reasonable doubt was supported by the evidence.

This Court finds that the Petitioner was not denied a fair trial and that his constitutional rights were adequately protected. Finding no error in the trial court's treatment of the underlying criminal case, the Petition for Writ of Habeas Corpus cannot be sustained on this ground.

Ninth and lastly, the Petitioner asserts that

I. The cumulative weight of the errors within Petitioner's trial warrant the granting of a new trial.

Because the Court has not found error in the Petitioner's trial, there can be no cumulative weight of errors which would entitle the Petitioner to a new trial. As such, the Petition cannot succeed on this ground.

Further, the Petition requests, under subsection J, that Wade Painter is entitled to habeas relief regarding restitution payments being deducted from his inmate account and requests this Court consider the Petitioner's *pro se* motion to amend order of restitution payments within the

instant habeas proceeding. However, this Court has already dispensed with said motion by Order dated May 28, 2014.

After a full review, the Court now determines that the Petitioner has failed to carry his burden and is not entitled to relief on these grounds as a matter of law. Further, should there be any grounds not expressly waived by the Petitioner on the *Losh* list previously submitted by the petitioner, but not asserted in the instant Petition with specificity and factual support, the Court finds that the Petitioner has knowingly and intentionally waived all grounds not asserted in the Petitioner's over two hundred page petition for writ of habeas corpus, as amended by competent and discreet counsel and verified by the Petitioner himself. Therefore, these issues, with the exception of argument II B, will not be further addressed by this Court in any hearing, briefing, or proceeding. After a full review of the petition, exhibits, and all documentary evidence, this Court is satisfied that a Petitioner is not entitled to relief on the above mentioned grounds, and finds that the record would not be aided by taking evidence and hearing argument on those claims for the reasons set forth above. The Court will determine whether a hearing is necessary in regards to argument II B after due consideration of the State's response. The Court notes the timely exception of all parties to any and all adverse rulings herein contained.

The Clerk shall enter the foregoing as the date written below and shall transmit attested copies to all counsel and parties of record, including the Prosecuting Attorney for Berkeley County and Ben Crawley-Woods, Esq., counsel for the petitioner.

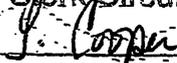
ENTER this 16 day of Dec, 2014.



MICHAEL D. LORENSEN, JUDGE  
TWENTY-THIRD JUDICIAL CIRCUIT  
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court

By:   
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

WADE PAINTER

PETITIONER,

v.

CIVIL CASE NO. 09-C-573

DAVID BALLARD, WARDEN  
MT. OLIVE CORRECTIONAL COMPLEX,  
RESPONDENT.

BERKELEY COUNTY  
CLERK  
2013 JUN 24 AM 10:15  
VIRGINIA M. SINE, CLERK

ORDER PERMITTING WITHDRAW FROM REPRESENTATION AND  
APPOINTING NEW COUNSEL

This matter came before this Court on this the 21 day of June, 2013, upon the Motion to Withdraw from Representation of Neil J. Zahradnik, Esq., counsel for the Petitioner, Wade Painter, wherein Counsel advised this Court that counsel has a conflict of interest as a result of his impending employment with the Jefferson County Prosecuting Attorney's Office.

Accordingly, it appears to this Court that and Counsel, Neil J. Zahradnik, Esq., shall be removed as counsel of record for the Petitioner and that Ben Crawley Woods, a competent Attorney at Law practicing before the Bar of this Court shall be appointed to represent him in this matter.

THE CLERK shall enter the foregoing as of the day noted below and shall transmit attested copies of this Order to Neil J. Zahradnik, Esq., at 142 N. Queen Street, Martinsburg, WV 25401; to the Petitioner at his last known address of record, and to newly appointed counsel.

Entered: June 21

Hon. Christopher C. Wilkes  
Circuit Court Judge

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court

By: J. Cooper  
Deputy Clerk

Prepared By:  
Neil Zahradnik