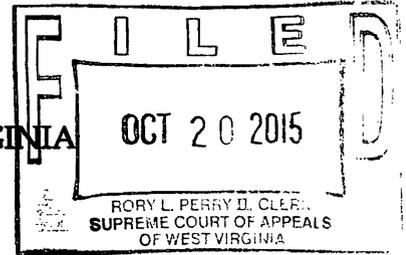


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WADE PAINTER,

Petitioner/Petitioner Below,

v.

Docket No.: 15-0540

**DAVID BALLARD, Warden,
Mount Olive Correctional Complex,**

Respondent/Respondent Below.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENTS OF ERROR.....1.

II. STATEMENT OF THE CASE.....1-14.

III. SUMMARY OF THE ARGUMENT.....14-15.

IV. STATEMENT AS TO ORAL ARGUMENT.....15.

V. ARGUMENT.....15-30.

**THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER’S CLAIMS
BASED ON THE PLEADINGS, EVIDENCE AND RECORD OF THE CRIMINAL TRIAL
WITHOUT THE NECESSITY OF TAKING ADDITIONAL EVIDENCE.**

Standard of review.....15-17.

The circuit court’s findings of fact are not clearly wrong, and the circuit
court properly applied the law in denying the Petitioner relief....17-18.

The circuit court properly denied the Petitioner’s allegation of illegal
arrest.....18-20.

The circuit court properly denied the Petitioner’s allegation of ineffective
assistance of counsel as to prompt presentment.....20-21.

The circuit court properly denied the Petitioner’s allegation of improper
404(b) evidence and ineffective assistance of counsel as to that evidence.
.....21-24.

The circuit court properly denied the Petitioner’s allegation of ineffective
assistance of counsel as to appealing a comment made by the State at
closing.....24-25.

The circuit court properly denied the Petitioner's allegation of failure of the State to test evidence and ineffective assistance of counsel for not making that an issue.....25-26.

The circuit court properly denied the Petitioner's allegations raised on appeal but refused by this Court.....26-28.

The circuit court properly denied the Petitioner's allegation of ineffective assistance of counsel regarding the search and seizure of the gym bag, which search was consented to by the co-tenant.....28-30.

VI. CONCLUSION.....31.

TABLE OF AUTHORITIES

FEDERAL

- Arizona v Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988).....25.
- California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984).....25.
- Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006).....18, 30.
- Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)...18.

STATE

- Perdue v. Coiner, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979)
.....17, 18, 20, 21, 23, 24, 25, 26, 28, 30.
- State ex rel. Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49, 54 (2004)...17.
- State ex rel. Watson v. Hill, 200 W. Va. 201, 488 S.E.2d 476 (1997).....18.
- State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).....21.
- State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).....18, 21, 22.
- State v. Newcomb, 223 W. Va. 843, 679 S.E.2d 675 (2009).....30.
- State v. Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (1995).....26.
- State v. Worley, 179 W. Va. 403, 369 S.E.2d 706 (1988).....29.
- State v. Youngblood, 221 W. Va. 20, 650 S.E.2d 119 (2007).....26.
- Tex S. v. Pszczolkowski, — W. Va. —, — S.E.2d —, <http://www.courtswv.gov/supreme-court/docs/fall2015/14-0920.pdf> (Decided 10/8/15)
.....16-17, 18, 19, 20, 21, 23, 24, 25, 26, 28, 30.
- W. Va. Code § 53-4A-1(b)**.....19, 22, 23, 24, 27, 28, 29, 30.
- W. Va. Code § 53-4A-3(a)**.....17.

W. Va. Code § 53-4A-7(a).....17.

W. Va. Code § 62-1-5(a)(1).....2.

Rules Governing Post-conviction Habeas Corpus Proceedings in West Virginia 4...19.

Rules Governing Post-conviction Habeas Corpus Proceedings in West Virginia 9.....17.

W. Va. R. Cr. P. 5(a).....21.

W. Va. R. E. 404(b).....22.

I. ASSIGNMENT OF ERROR.

WHETHER THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S CLAIMS BASED ON THE PLEADINGS, EVIDENCE AND RECORD OF THE CRIMINAL TRIAL WITHOUT NECESSITY OF TAKING ADDITIONAL EVIDENCE?

II. STATEMENT OF THE CASE.

1. On September 14, 2005, local law enforcement responded to a Berkeley County home south of Martinsburg on a report of death. Raymond White, Jr., age fifty-four, and his twenty year old son, Raymond White IV, were brutally and violently murdered in that home that they shared. The elder White appeared to have been bludgeoned to death [it was later determined that he was also twice shot in the head]; the younger White killed with a gunshot wound to the head. The home was ransacked. A Mazda vehicle was missing. Witnesses were aware that the vehicle leaked oil. A young man was captured on videotape purchasing oil on September 14, 2005, with the White's credit card at a gas station south of Martinsburg. The next day, the vehicle was found nearby. A witness identified the Petitioner as a tenant whom he had seen driving a green Mazda that was having problems, including leaking oil. The witness thought that there might be stolen items in the vehicle. The Petitioner had scratches and bruises on his body and arms when approached by police. The Petitioner admitted to police to driving the vehicle but explained that it was given to him by a stranger that picked him up hitchhiking. The Petitioner's girlfriend consented to a search of the residence she

shared with the Petitioner, where police found several items belonging to the victims, some of which appeared to have blood on them. The Petitioner admitted to knowing the victims and using their credit card. [Criminal Complaint, 9/15/05, Appendix Record (A.R.) 1-7.]

2. A grand jury indicted the Petitioner for the felonies of two counts of First Degree Murder, two counts of Burglary (Entering without Breaking in the Daytime, and Breaking and Entering in the Daytime), one count of Grand Larceny and one count of Possession of a Stolen Vehicle, and the misdemeanor of Petit Larceny. [Indictment, 2/21/06, State v. Wade Painter, Case No.: 06-F-24, A.R. 177-181.]

3. At a pre-trial hearing on the Petitioner's Motion to Suppress Evidence [Motion to Suppress Evidence, 8/24/07, A.R. 198-201; State's Response, 8/31/07, A.R. 202-216], the State called the following Berkeley County Sheriff's Department officers to testify: Cpl. Brendan Hall; Sgt. Ted Snyder; and Capt. Denny Streets. The State also called the Petitioner's girlfriend, Angie Conner, to testify. The Petitioner put on no evidence.

4. Cpl. Hall testified that:

a. [On September 15, 2005,] while investigating the double homicide, a John Beitzel contacted him and informed him that the Petitioner was a tenant of his and he had seen the Petitioner with a vehicle matching the description of the vehicle missing from the crime scene. [Tr., 8/27/07, 7, A.R. 237.]

b. He and Sgt. Snyder then went to the Petitioner's residence. The Petitioner answered the door. The Petitioner's girlfriend, Angela Conner, was also there. They asked the Petitioner to come to the station to talk about the vehicle. He changed his clothes and went with them. He was not handcuffed and was advised that he did not have to speak with them and was free to leave. [Id., 8-10, A.R. 238-240.]

c. They later advised the Petitioner of his *Miranda*¹ rights after receiving a call from Capt. Streets, to whom Ms. Conner had given permission to search the residence, that certain evidence had been found in the residence. The Petitioner waived his *Miranda* rights orally and in writing. [Id., 11-14, A.R. 241-244.]

d. The interview stopped when the Petitioner asked for counsel. [Id., 14, A.R. 244.]

e. On cross-examination, Cpl. Hall testified that the Petitioner was oriented and not under the influence at the time of the interview, that the Petitioner was not an official suspect in the murders at the time of the interview, and provided further explanation of the Petitioner's signing of the *Miranda* waiver forms. The *Miranda* waiver forms were admitted into evidence. [Id., 15-24, A.R. 245-264; A.R. 12-14.]

f. Cpl. Hall also testified that he returned to the residence on September 20, 2005, and was given consent to search by Ms. Conner. A pair of tennis shoes was seized. [Id., 70-71, A.R. 300-301; State's Pre-trial Exh. 2.]

¹Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

5. Sgt. Snyder testified:

a. Upon receiving suspicions from the Petitioner's landlord about the Petitioner having a car and certain property in the car, he and Cpl. Hall went to the Petitioner's residence. [Id., 26, A.R. 256.]

b. The Petitioner answered the door, they identified themselves as law enforcement and asked to speak with him about a vehicle he was in possession of the day before. They asked to come inside to talk but the Petitioner refused. The Petitioner agreed to speak with them outside and went back inside for three to five minutes before re-emerging. [Id.]

c. They asked the Petitioner about the car and the Petitioner said he borrowed it from a person that they could not trace. The Petitioner admitted to knowing the younger White and said that "he let me borrow it." [Id., 27-28, A.R. 257-258.]

d. The Petitioner was not arrested, not then *Mirandized*, voluntarily accompanied the officers, and was not handcuffed. The Petitioner was interviewed at the sheriff's department. The Petitioner was *Mirandized* and waived those rights in writing. [Id., 28-32, A.R. 258-262; A.R. 12-14.]

e. Once he found out that other officers been in the Petitioner's residence, he asked the Petitioner about the homicides. The Petitioner said he wanted a lawyer.

The Petitioner was placed under arrest. All questioning ceased. [Id., 32-34, A.R. 262-264.]

f. The Petitioner afterwards spoke with [Captain] Streets, whom he knew, and wanted to talk to Streets. Streets declined because the Petitioner was arrested. The Petitioner insisted and signed the form waiving his request for counsel and *Miranda* rights. He and Streets spoke with the Petitioner, but the Petitioner ended the interview. They asked no further questions. [Id., 34-37, A.R. 264-267.]

g. On cross-examination, Sgt. Snyder testified that, the morning after the killings were discovered, the Petitioner's landlord had alerted them to the fact that the Petitioner was in possession of a vehicle fitting the description of the vehicle from the murder scene. Ms. Conner, the Petitioner's girlfriend, gave consent to search the trailer. They had seen her earlier at the residence when she came outside. He does not recall the Petitioner saying he can't afford a lawyer when first *Mirandized*. The Petitioner did not appear to be under the influence. When they met the Petitioner at his residence, they asked if they could come in and talk. The Petitioner said no. Ms. Conner was present at that time. They did not ask Ms. Conner if they could come in. [Id., 37-45, A.R. 267-275.]

h. On re-direct, Sgt. Snyder testified that they went to the residence to speak with the Petitioner, not to conduct a search. They only asked to come inside to be more comfortable rather than sitting on the porch. [Id., 45-46, A.R. 275-276.]

i. On re-cross, Sgt. Snyder testified that the vehicle was recovered without any property in it before they spoke with the Petitioner. A Mr. Demory later contacted them about seeing a person driving the vehicle and, upon being shown a photo array, immediately identified the Petitioner as the person driving the vehicle. [Id., 46-53, A.R. 276-283.]

6. Captain Streets testified that:

a. He was involved in the recovery of the decedent's vehicle on September 15, 2005, though, at that time, they did not have the Petitioner's name attached. Later that day he received a call from Monte Conner, Angie Conner's father, that *Angie told him there was a lot of property in her home that did not belong there and she did not know what to do*. Mr. Conner called Captain Sheets back and said that Angie would let them look in the residence. He went to the residence and asked Ms. Conner if she would allow him on the property to look. She said that she didn't want the property there and allowed him in. He seized video games and other property at Ms. Conner's request. He had not spoken with the Petitioner at that time. He was not at the station when he received the call from Mr. Conner and did not speak with Hall [or Snyder] before going to the residence. [Id., 53-57, A.R. 283-287.]

b. Monte Conner is his next-door-neighbor, so he [Streets] knew the Petitioner from that personal relationship. When he returned to the station, he asked the Petitioner in the processing room if he needed anything. The Petitioner and he talked.

The Petitioner agreed to speak with him and was *Mirandized*. He was not aware at that time that the Petitioner had already requested an attorney. [Id., 57-59, A.R. 287-289.]

c. On cross-examination, Captain Streets testified that Angie Conner consented to the search of the residence. He saw the Petitioner when he came back to the station because the back entry to the station is beside the processing room. He did not then know the specifics of the conversation that Hall and Snyder had with the Petitioner or that the Petitioner had requested counsel. The Petitioner was in custody. The Petitioner seemed nervous and upset. After talking to the Petitioner initially, he went back in to see if the Petitioner wanted to answer any questions. He wrote a report about the events. The Petitioner waived his *Miranda* rights. [Id., 59-66, A.R. 289-316; Defendant's Pre-trial Exh. 4.]

d. On re-direct, Captain Streets reviewed the written report he prepared two years earlier on September 15, 2005, and testified that he went to speak with the Petitioner because of the personal relationship he had with the Petitioner. Correcting his earlier testimony, he saw that Sgt. Snyder had told him that the Petitioner asked for an attorney. He told the Petitioner that he should speak with his attorney before answering any other questions. The Petitioner spoke with him in generalities. The Petitioner was *Mirandized*. [Id., 67-68, A.R. 297-298.]

e. On re-cross, Captain Streets' report (or "Action Taken") was admitted into evidence. Of significance for this response Captain Streets wrote:

I asked Angie [Conner] to assist us by showing us what belonged to them and what didn't. With her assistance all property that did not belong there was collected and secured in my cruiser. Angie told me while collecting the property that painter told her that he had purchased the property at a Flea Market. While collecting the property a red duffle bag was found in the living room, upon checked the contents, several articles of clothing and a pair of shoes were found inside that had what appeared to be blood, and bloodstains on them. Also inside the bag were two wet towels that appeared to have been recently washed, along with a "dog tag" with the name of one of the victims.

[Id., 68-69, A.R. 298-299; Defendant's Pre-trial Exh. 5.]

7. Angela Conner testified that she is 27 years old and in September 2005 she and the Petitioner, her boyfriend, were renting a trailer from John Beitzel. On September 15, 2005, police officers came to the door. The Petitioner answered the door. The police wanted to speak with him about a car and asked to come in but the Petitioner said no. She guessed that they just wanted to talk to the Petitioner. The Petitioner agreed to go with the police. The police did not ask to search the trailer. She then called her dad because she was upset that the police were there and that *there were things in the house that did not belong to she and the Petitioner*. Her dad asked if she wanted an officer to come out and she told him yes. She thinks her dad called [Capt.] Denny Streets, whom she knows because he is her dad's neighbor. Streets came out and she gave him permission to search the home. She signed a consent form. She also signed another consent form later when officers came out. [Tr., 9/6/07, 3-12, A.R. 313-322; A.R. 8-11.]

b. On cross-examination, Ms. Conner testified that she was a signatory to the lease with Beitzel. When the officers came on September 15, she heard them ask if they could come in and the Petitioner say no. She did not have any conversation with the Petitioner about whether to allow a search or not. *She called her dad because there were things in the house that did not belong to them* and guesses that her dad called the station and spoke with Streets. Streets came out with other police officers and they asked if they could come in and look around at the stuff. She signed a consent. [Id., 12-19, A.R. 322-329.]

8. The Petitioner presented no witnesses. [Tr., 8/27/07, Tr. 9/6/07, *passim*; A.R. 231-398, *passim*.]

9. The trial court found Ms. Conner's consent to search valid and allowed admission of the items seized from the residence. [Pre-trial Hearing Order, 10/9/07; Tr. 9/6/07, 24-38, A.R. 334-348.]

10. The trial court found that the statement the Petitioner gave to Captain Streets was also admissible since the Petitioner was the one who initiated discussion with Captain Streets about the crimes being investigated. The trial court found that Captain Streets' contact with the Petitioner started with a simple inquiry as to his comfort, that Captain Streets advised the Petitioner to speak with his attorney, and that the Petitioner waived his rights, including speaking with an attorney, before there was

further questioning about the criminal investigation. [Pre-trial Hearing Order, 10/9/07; Tr. 9/6/07, 46-66, A.R. 356-376.]

11. At trial, the State called as witnesses William Barrett, Bradford Hall, Mary Kackley, Joshua Willard, James Gregory, Brendan Hall, Scott Doyle, Alec Hall, Hamada Mahoud, Jennifer Lam, Walter Demory, Alan Sencindiver, Theodore Snyder, Stephen King, Kevin McDowell, Phillip Cochran, David Miller, Brent Myers, Jack Fleagle, Michelle Johnson, John Beitzel, Robert Millett, Heather Dunlap, Davindrath Maharah, Carl Norberg, Angela Conner, Denny Streets, Misty Wilson, Paul Frazier, Kenneth Weigle. [Except for Ms. Conner's and Capt. Streets' testimony noted below, the full extent of the testimony and evidence given over four days is not summarized for the purposes of this response.] [Trs., 9/11/07, 9/12/07, 9/13/07, 9/17/07, A.R. 400-1203.]

12. Ms. Conner testified at trial as follows. She shared a residence with the Petitioner. The Petitioner left for work on September 13, 2005, but did not call her on break as he usually does. When she called the Petitioner's employer, the employer said that the Petitioner came in and quit. She did not see the Petitioner until the following day, September 14. The Petitioner brought in garbage bags full of stuff. The Petitioner said it came from the flea market, but she did not believe him. She thinks the Petitioner looked through the bags but does not remember if he took anything out. She did not touch the bags. The police arrived the next morning and woke them up by banging on the door. The police spoke with the Petitioner and he left with them. She then called her

dad because she was scared. Her dad contacted a police officer neighbor of his, Denny Streets. Streets and other officers arrived. She signed a consent for them to search the house. She identified the bags and items that did not belong to either she or the Petitioner. She gave the police a photograph of the Petitioner in which he was wearing a red backpack, which backpack she identified as belonging to the Petitioner. Except for the photo, a T-shirt and a pair of black shoes, the items that the police took did not belong to she or the Petitioner. She consented to a second search a few days later. They took a pair of white shoes that did not belong to the Petitioner. [Tr., 9/13/07, 178-181, 181-183, 184-185, 186-189, 189-191, 192-193, A.R. 1006-1021.]

12. Capt. Streets testified that Angie Conner consented to a search of the residence and invited him in. There was property laying everywhere, video games, consoles, bags, all kinds of property. Ms. Conner told him that the property did not belong to either the Petitioner or she. Amongst that property so identified as not being the Petitioner's or Ms. Conner's was a red gym bag. *Inside the red gym bag* were found a t-shirt with what appeared to have blood on it and a toboggan. Ms. Conner then identified *the T-shirt and the toboggan* as belonging to the Petitioner. [Tr. 9/17/07, 7- 9, A.R. 1041-1043.]

13. The Petitioner called the following witnesses: Scott Dillon, Walter Johnson, Salvador Campos, Jeanetta Adkins and Brendan Hall, before resting. [The full extent of

their testimony and evidence given is not summarized for the purposes of this response, but none spoke to ownership of the red gym bag.] [Id., 80-108, A.R. 1115-1143.]

14. The jury was instructed, deliberated and returned findings of guilt of two counts of First Degree Murder, two counts of Burglary (Entering without Breaking in the Daytime, and Breaking and Entering in the Daytime), one count of Grand Larceny and one count of Possession of a Stolen Vehicle, and the misdemeanor of Petit Larceny. [Id., 9/17/07, 108-168, A.R. 1143-1203; Tr., 9/18/07, 3-6, A.R. 1206-1209.]

15. After hearing evidence in a bifurcated hearing on the issue of mercy, the jury did not recommend mercy. [Tr., 9/18/07, 11-73, 84, A.R. 1214-1276, 1287.]

16. The Petitioner's post-trial motions were denied and the Petitioner sentenced to the statutory sentences, each to run consecutively to the other. [Sentencing Order 11/27/07, A.R. 1358-1363; Tr., 11/16/07, A.R. 1364-1381.]

17. The Petitioner's direct appeal alleged that the trial court erred in not suppressing the evidence seized from his residence on the issue of consent, that the trial court erred in not suppressing his statement to the police, and that the trial court erred in not granting a judgment of acquittal. The Petition was refused. [State v. Painter, Order, 2/3/09, Docket No.: 081400, A.R. 1382.]

18. The Petitioner filed a Petition for Writ of Habeas Corpus, for which counsel was appointed. The Petitioner went through several attorneys before the verified Amended Petition and *Losh* list were filed on or about May 23, 2014. The Amended

Petition alleged: Unlawful Seizure and Arrest from his Residence; Ineffective Assistance of Counsel Regarding the Search and Seizure of Certain Evidence; Ineffective Assistance of Counsel Regarding Prompt Presentment; Improper 404(b) Evidence and Ineffective Assistance of Counsel Regarding the Admission of that Evidence; Improper Remarks by the Prosecutor and Improper Curative Instruction and Ineffective Assistance of Counsel Regarding the Remark; Failure to Test and Disclose Potentially Exculpatory Evidence and Ineffective Assistance of Counsel Regarding that Alleged Evidence; Three Issues Raised on Direct Appeal: Denial of Suppression Motion, Improper Interrogation, and Improper Denial of Motion for Acquittal; and, last, Cumulative Error. [Amended Petition for Writ of Habeas Corpus, 05/23/14, Case No.: 09-C-573, A.R. 1383-1616.]

19. By written order, the Court summarily denied all of the allegations, except one, Argument IIB, relating to Ineffective Assistance of Counsel Regarding the Search and seizure, to which allegation the Court directed the Respondent to respond. [Order Summarily Dismissing Certain Grounds and Calling for Respondent's Limited Answer to Petition for Writ of Habeas Corpus, 12/16/14, A.R. 1617-1642.]

20. The Respondent responded, asserting that the Petitioner failed to prove that trial or appellate counsel provided ineffective assistance of counsel as alleged regarding the lawful search and seizure. [Respondent's Return to and Motion to Dismiss Habeas, and Memorandum, 2/19/15, A.R. 1643-1668.]

21. The Circuit Court denied this final allegation . [Order Denying Petition for Writ of Habeas Corpus, 5/8/15, A.R. 1669-1678.]

22. It is from the December 16, 2014, and May 8, 2015, Order that the Petitioner appeals.

23. The Respondent asks this Court to affirm he rulings of the Circuit Court.

III. SUMMARY OF THE ARGUMENT.

The Petitioner was convicted at a jury trial of the horribly violent murders of two acquaintances, 54 year old Raymond White, Jr., and his twenty year old son, Raymond White IV. This Court refused the direct appeal.

After several years, and several counsel, the Petitioner filed an Amended Petition for Post-conviction Habeas Corpus relief. The Circuit Court properly summarily denied most of the claims, based on the records of the trial and the habeas proceedings. Tex S. v. Pszczolkowski, — W. Va. —, — S.E.2d — (2015); Perdue v. Coiner, 156 W. Va. 467, 194 S.E.2d 657 (1973).

The Circuit Court required the Respondent to answer the sole remaining allegation of ineffective assistance of counsel regarding the lawful search and seizure of certain items linking the Petitioner to the murders. Following that answer, and again based on the records of the trial and the habeas proceedings, the Circuit Court properly found the allegation of ineffective assistance unproven by the Petitioner. The Circuit Court correctly ruled that the search and seizure was based on lawful consent, citing,

inter alia, State v. Worley, 179 W. Va. 403, 369 S.E.2d 706 (1988). The Circuit Court also ruled that, absent consent, the evidence was subject to inevitable discovery, citing State v. Newcomb, 223 W. Va. 843, 679 S.E.2d 675 (2009). Consequently, trial counsel was not ineffective. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Since each of the allegations could be decided based on the records of the criminal case and the habeas case, the circuit court properly concluded that no further evidence was necessary. *State ex rel. Watson v. Hill*, 200 W. Va. 201, 488 S.E.2d 476 (1997); Perdue v. Coiner, *supra*.

The Petitioner failing to have carried his burden of proof, the circuit court properly denied each of the claims based on the record. The Respondent respectfully asks this Court to affirm those rulings.

IV. STATEMENT AS TO ORAL ARGUMENT.

If the Court were to choose this case for oral argument, disposition under *W.V.R.App.P.* 19 is appropriate.

V. ARGUMENT.

THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S CLAIMS BASED ON THE PLEADINGS, EVIDENCE AND RECORD OF THE CRIMINAL TRIAL AND HABEAS CASE WITHOUT NECESSITY OF TAKING ADDITIONAL EVIDENCE.

1. Standard of review.

This Court applies the following standards for review of final orders from post-conviction habeas corpus proceedings:

1. "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

2. "On an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973).

3. "A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief." Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973).

Syl. Pts. 1-3, *Tex S. v. Pszczolkowski*, — W. Va. —, — S.E.2d —,

<http://www.courtswv.gov/supreme-court/docs/fall2015/14-0920.pdf> (Decided 10/8/15).

The standards necessary to prove ineffective assistance of counsel claims are:

4. "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

5. "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. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. Pt. 6, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Syl. Pts. 4-5, *Tex S. v. Pszczolkowski*, *supra*.

2. The circuit court's findings of fact are not clearly wrong, and the circuit court properly applied the law in denying the Petitioner relief.

In denying the Petitioner the relief requested the circuit court made specific reference to the record in the underlying criminal case, the direct appeal from that criminal case, and the record presented in the habeas case. [A.R. 1617-1642, 1669-1678.] Denial of the habeas petition was required because the Petition, along with the record from the proceeding resulting in the conviction and the record from any proceeding wherein the Petitioner sought relief from the conviction, showed that the Petitioner was entitled to no relief, or that the contentions have been previously adjudicated or waived. W. Va. Code § 53-4A-3(a), -7(a); *State ex rel. Markley v. Coleman*, 215 W.Va. 729, 601 S.E.2d 49, 54 (2004); *Perdue v. Coiner*, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979).
See: Rules Governing Post-conviction Habeas Corpus Proceedings in West Virginia 9.

After making specific references to these records as a basis for denying the Petitioner relief, the circuit court concluded that no additional evidence at a hearing was necessary. [A.R. 1617-1642, 1669-1678.] See State ex rel. Watson v. Hill, 200 W. Va. 201, 488 S.E.2d 476 (1997); and Perdue v. Coiner, *supra*, 156 W. Va. 467, 194 S.E.2d 657 (1973).

The Petitioner does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in deciding the issues based solely upon the record. Tex S., *supra*.

3. The circuit court properly denied the Petitioner's allegation of illegal arrest.

A circuit court is authorized to deny a post-conviction habeas corpus petition if the record demonstrates that the petitioner is not entitled to relief. Syl. Pt. 3, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 1, Perdue v. Coiner, *supra*. The circuit court gave thorough review to the Petitioner's claim of illegal arrest, since it was primarily an assertion of ineffective assistance of trial and appellate counsel for not fully pursuing the arrest as an issue. [A.R. 1624-1628.] The circuit court reviewed the trial record, referenced the testimony about how the Petitioner voluntarily accompanied the police to the station and was not then under arrest and was free to leave, and cited to the legal standards necessary to review the claim: Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The Petitioner does not argue to this Court that the circuit court's findings of fact were clearly erroneous. The trial court previously held the Petitioner's accompaniment of the police to be voluntary when denying the Petitioner's motion to suppress evidence. [A.R. 334-348.] The Petitioner did not prove the trial court to be clearly wrong. **W. Va. Code § 53-4A-1(b)**. The Petitioner does not argue to this Court that the circuit court erred in its application of the law in denying the claim. The Petitioner fails to carry his burden before this Court. Syl. Pt. 2, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 2, Perdue v. Coiner, *supra*.

Instead, the Petitioner's sole complaint on appeal as to this allegation is that the circuit court did not require a response from the State before the circuit court reviewed the record on its own and denied the claim based on that record. Whether the State is directed by the circuit court to file a response is inconsequential when the circuit court undertakes its own review of the record and determines that the record does not support a petitioner's claim. Contrary to the Petitioner's assertion, *Rules Governing Post-conviction Habeas Corpus Proceedings in West Virginia* 4 does not mandate a circuit courts to inefficiently prolong post-conviction habeas corpus litigation when the circuit court is more than capable of reviewing its records. The circuit court is authorized to review those records and to deny post-conviction habeas proceedings without a hearing, without even appointing counsel, if the records show that the Petitioner is entitled to no

relief. Syl. Pt. 3, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 1, Perdue v. Coiner, *supra*. The circuit court determined that the Petitioner is entitled to no relief.

The Petitioner asserts that if the circuit court ordered the State to respond, then maybe the State would have agreed with the Petitioner's allegations that there was an error. The Respondent assures this Court that the Petitioner is mistaken in this assertion. The Petitioner does not prove that the circuit court would have ruled in his favor had the State responded to this allegation. The Petitioner fails to carry his burden before this Court. Syl. Pt. 2, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 2, Perdue v. Coiner, *supra*.

The State asks this Court to affirm the ruling of the circuit court. Tex S. v. Pszczolkowski, *supra*.

4. The circuit court properly denied the Petitioner's allegation of ineffective assistance of counsel as to prompt presentment.

The Respondent adopts its prior argument about the circuit court's authorization to review its own records and deny a post-conviction habeas corpus petition when those records show that the petitioner is entitled to no relief. Syl. Pt. 3, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 1, Perdue v. Coiner, *supra*. As in the issue above, the Petitioner does not argue to this Court that the circuit court's findings of fact were clearly erroneous or that the circuit court erred in its application of the law in denying the claim. He only argues that the circuit court should have ordered the State to respond.

The circuit court gave through review to the Petitioner's claim of ineffective assistance of counsel regarding prompt presentment. [A.R. 1628-1630.] The circuit court reviewed the trial record, referenced the testimony, and cited to the legal standards necessary to review such claims. **W. Va. Code § 62-1-5(a)(1); W. Va. R. Cr. P. 5(a); State v. Guthrie**, 173 W. Va. 290, 315 S.E.2d 397 (1984), and the ineffective assistance of counsel standards of **State v. Miller**, *supra*. The circuit court concluded that the record showed that there was no legally actionable prompt presentment issue available to the Petitioner, and so counsel were not ineffective for not raising it as an issue.

The Petitioner does not challenge these findings or conclusion, but only complains that the State was not required to respond. The Petitioner fails to carry his burden. Syl. Pt. 2, **Tex S. v. Pszczolkowski**, *supra*; Syl. Pt. 2, **Perdue v. Coiner**, *supra*.

The State asks this Court to affirm the ruling of the circuit court. **Tex S. v. Pszczolkowski**, *supra*.

5. **The circuit court properly denied the Petitioner's allegation of improper 404(b) evidence and ineffective assistance of counsel as to that evidence.**

The Respondent adopts its prior argument about the circuit court's authorization to review its own records and deny a post-conviction habeas corpus petition when those records show that the petitioner is entitled to no relief. Syl. Pt. 3, **Tex S. v. Pszczolkowski**, *supra*; Syl. Pt. 1, **Perdue v. Coiner**, *supra*. In exactly the same fashion as in the two prior issues, the Petitioner does not argue to this Court that the circuit court's

findings of fact were clearly erroneous or that the circuit court erred in its application of the law in denying the claim.

The circuit court gave through review to the Petitioner's claim of improper 404(b) evidence and ineffective assistance of counsel regarding that evidence. [A.R. 1630-1635.] The circuit court reviewed the trial record, referenced the testimony and actions of counsel and the trial court, and cited to the germane portions of *W. Va. R. E. 404(b)*; and the ineffective assistance standards of *State v. Miller, supra*.

The circuit court concluded that the alleged 404(b) evidence of the Petitioner's statement to police explaining how he received certain injuries was not evidence of other crimes, wrongs or other acts to prove character, but was found admissible by the trial court for the limited purpose of addressing the Petitioner's alibi defense. The circuit court found that the trial court gave the jury a limiting instruction about how to consider that evidence. The circuit court concluded that it was not unreasonable for appellate counsel to have not pursued this as an appellate issue and that the outcome of the proceedings would have been changed had he done so. [A.R. 1632-1633.] The Petitioner did not prove the trial court to be clearly wrong. *W. Va. Code § 53-4A-1(b)*.

The circuit court also concluded that the introduction of the Petitioner's "mugshot" was not objected to by trial counsel, except as to whether the photo depicted injuries. The circuit court concluded that trial counsel was not ineffective by employing a strategy that would not discredit the Petitioner's alibi by presenting potentially

confusing competing theories. The circuit court concluded that appellate counsel was not ineffective for not appealing matters not objected to. [A.R. 1633.]

Similarly, a photo was introduced showing the Petitioner wearing a T-shirt similar to one found at his home and depicting a backpack similar to one found at the crimes scene. The circuit court found that trial counsel objected to the fact that the photo also appeared to depict the Petitioner holding a bag of marijuana, and that the trial court gave a cautionary instruction. The circuit court further concluded that, even without the objection and cautionary instruction, the marijuana reference was harmless in the context of the case. [A.R. 1633-1634.] The Petitioner did not prove the trial court to be clearly wrong. **W. Va. Code § 53-4A-1(b)**.

Finally, the circuit court concluded that appellate counsel was not ineffective for not raising on appeal evidence of Xanax abuse, where the Petitioner's brother lived, and testimony of Mr. Wiegler, none of which was objected to by trial counsel. The circuit court concluded that trial counsel was not ineffective for strategically not objecting to these matters. [A.R. 1634-1635.] The Petitioner did not prove the trial court to be clearly wrong. **W. Va. Code § 53-4A-1(b)**.

Once again, the Petitioner only claims that the circuit court should have required the State to respond, not that the circuit court was clearly wrong in its factual findings or erred in its ultimate conclusion. The Petitioner fails to carry his burden. Syl. Pt. 2, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 2, Perdue v. Coiner, *supra*.

The State asks this Court to affirm the ruling of the circuit court. Tex S. v.

Pszczolkowski, *supra*.

6. The circuit court properly denied the Petitioner's allegation of ineffective assistance of counsel as to appealing a comment made by the State at closing.

The Respondent adopts its prior argument about the circuit court's authorization to review its own records and deny a post-conviction habeas corpus petition when those records show that the petitioner is entitled to no relief. Syl. Pt. 3, Tex S. v.

Pszczolkowski, *supra*; Syl. Pt. 1, Perdue v. Coiner, *supra*.

The Petitioner admits in this argument that his trial counsel successfully objected to a comment made by the State at closing, and that the trial court gave the jury a curative instruction. The Petitioner did not prove the trial court to be clearly wrong. W. Va. Code § 53-4A-1(b). The Petitioner misrepresents the trial court's curative instruction as "an endorsement" of the State's comment. It was not an endorsement but a redirection of the jury from that comment. The Petitioner does not argue to this Court that the circuit court's findings of fact were clearly erroneous or that the circuit court erred in its application of the law in denying the claim.

The circuit court reviewed the trial record, referenced the closing comment, the objection of counsel, and the trial court's curative instruction. The circuit court explained why appellate counsel was not unreasonable in not bringing this on as an appellate issue. The circuit court explained that the Petitioner offered no rebuttal to the

presumption that the issue was waived by not bringing it on in appeal, citing *W. Va.*

Code § 53-4A-1(c). [A.R. 1635-1636.]

The Petitioner's only claim is that the circuit court should have required the State to respond, not that the circuit court was erroneous in its ultimate conclusion. The Petitioner fails to carry his burden. Syl. Pt. 2, *Tex S. v. Pszczolkowski*, *supra*; Syl. Pt. 2, *Perdue v. Coiner*, *supra*.

The State asks this Court to affirm the ruling of the circuit court. *Tex S. v. Pszczolkowski*, *supra*.

7. The circuit court properly denied the Petitioner's allegation of failure of the State to test evidence and ineffective assistance of counsel for not making that an issue.

The Respondent adopts its prior argument about the circuit court's authorization to review its own records and deny a post-conviction habeas corpus petition when those records show that the petitioner is entitled to no relief. Syl. Pt. 3, *Tex S. v. Pszczolkowski*, *supra*; Syl. Pt. 1, *Perdue v. Coiner*, *supra*.

The circuit court made very detailed findings and conclusions in denying this allegation regarding this issue. [A.R. 1636-1640.] The Petitioner does not challenge any of them, but, like a bell in the night, rings out one tone: "The circuit court should have required the State to respond to this allegation."

The Petitioner does not assert that the circuit court wrongly applied *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988), or *California v. Trombetta*, 467 U.S. 479,

104 S.Ct. 2528 (1984), or State v. Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (1995), or State v. Youngblood, 221 W. Va. 20, 650 S.E.2d 119 (2007), in holding that the Petitioner failed to prove that there was evidence favorable to him that was suppressed or destroyed and that he was prejudiced in any way.

The Petitioner does not assert that the circuit court wrongly applied the standards of State v. Miller, *supra*, in determining that trial and appellate counsel were not ineffective for not pursuing this baseless claim.

The Petitioner's only claim is that the circuit court should have required the State to respond, not that the circuit court was clearly wrong in its factual findings or erred in its ultimate conclusion. The Petitioner fails to carry his burden. Syl. Pt. 2, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 2, Perdue v. Coiner, *supra*.

The State asks this Court to affirm the ruling of the circuit court. Tex S. v. Pszczolkowski, *supra*.

8. The circuit court properly denied the Petitioner's allegations raised on appeal but refused by this Court.

The Respondent adopts its prior argument about the circuit court's authorization to review its own records and deny a post-conviction habeas corpus petition when those records show that the petitioner is entitled to no relief. Syl. Pt. 3, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 1, Perdue v. Coiner, *supra*.

The circuit court reviewed, and denied, each of the grounds raised on direct appeal by the Petitioner, which appeal was refused by this Court without opinion on the merits. [A.R. 1640-1641.]

a. The circuit court found that the record established that the search of the Petitioner's home was conducted upon the consent of the other resident, the Petitioner's girlfriend, after the Petitioner's girlfriend's father contacted the police, and denied the claim. The circuit court concluded that the trial court did not commit a constitutional error in denying the Petitioner's motion to suppress that evidence at trial. [A.R. 1640.]

The Petitioner did not prove the trial court to be clearly wrong. **W. Va. Code § 53-4A-1(b)**. The Petitioner does not challenge the circuit court's findings or conclusions. The Petitioner points to no place in the record where he objected to the police searching his residence, yet he claims that he must have been impermissibly removed from the home and asserts that "the State should have been required to respond to the claim."

b. The circuit court also found that the record established that the Petitioner re-initiated discussion with the police about the crime after requesting an attorney, and thereafter waived his rights on recording. The circuit court concluded that the trial court did not commit a constitutional error in so ruling. [A.R. 1641.]

The Petitioner did not prove the trial court to be clearly wrong. **W. Va. Code § 53-4A-1(b)**. The Petitioner does not challenge the circuit court's findings or conclusions. The Petitioner conjectures that a police officer, Lt. Streets, who went to check on the

Petitioner while he was held at the Sheriff's Department must have used that as a ruse, but cites only to a transcript excerpt where Lt. Streets is steadfast during cross-examination that he just asked the Petitioner "if he needed to go to the bathroom, needed a drink, how he was generally doing." That citation does not contradict the circuit court's findings.

c. The circuit court also found in its full review of the record, sufficient evidence to support the jury's verdicts of guilt. The circuit court concluded that the trial court committed no error in denying the motion for acquittal. [A.R. 1641.]

The Petitioner did not prove the trial court to be clearly wrong. W. Va. Code § 53-4A-1(b). The Petitioner did not challenge this denial on appeal at all.

The Petitioner fails to carry his burden. Syl. Pt. 2, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 2, Perdue v. Coiner, *supra*.

The State asks this Court to affirm the ruling of the circuit court. Tex S. v. Pszczolkowski, *supra*.

9. The circuit court properly denied the Petitioner's allegation of ineffective assistance of counsel regarding the search and seizure of the gym bag, which search was consented to by the co-tenant.

The Respondent adopts its prior argument about the circuit court's authorization to review its own records and deny a post-conviction habeas corpus petition when those records show that the petitioner is entitled to no relief. Syl. Pt. 3, Tex S. v. Pszczolkowski, *supra*; Syl. Pt. 1, Perdue v. Coiner, *supra*.

The Respondent notes that the circuit court did require a response to this allegation, and that the Respondent filed a written response opposing the allegation.

The Petitioner fails to prove that the circuit court was either clearly wrong in its factual findings or abused its discretion in denying this claim of ineffective assistance of counsel regarding the seizure of a red gym bag. The gym bag was seized by police through the consent of the Petitioner's girlfriend, Angela Conner, a co-tenant. The circuit court found that the record established that Ms. Conner contacted her father about certain property that did not belong to her or the Petitioner that was at the residence. Mr. Conner then contacted Lt. Streets, who was a neighbor of his. When Lt. Streets arrived, Ms. Conner consented to allow the police to search her residence and see the property about which Ms. Conner was concerned. [A.R. 1669-1678.]

The circuit court gave a very thorough analysis of the case law on consent to search and correctly concluded that Ms. Conner, as a co-tenant, had complete authority to consent to the search. "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.' Syllabus Point 8, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971)." Syl. Pt. 3, *State v. Worley*, 179 W. Va. 403, 369 S.E.2d 706 (1988). The Petitioner did not prove the trial court to be clearly wrong. **W. Va. Code § 53-4A-1(b)**.

The circuit court further concluded that, under the facts of the case where the police were in possession of other fruits of the crime and were actively seeking a search warrant at the time of Ms. Conner's consent, the gym bag would have been inevitably discovered. "'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.' Syllabus Point 3, *State v. Flippo*, 212 W.Va. 560, 575 S.E.2d 170 (2002)." Syl. Pt. 11, *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009).

The Petitioner stands upon the ground that there may have been a violation of *Georgia v. Randolph*, *supra*, 547 U.S. 103, 126 S.Ct. 1515 (2006), a claim that the circuit court earlier disposed of when denying the Petitioner's allegation of an illegal arrest.

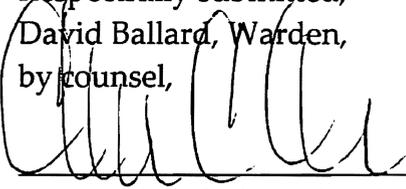
The Petitioner fails to carry his burden. Syl. Pt. 2, *Tex S. v. Pszczolkowski*, *supra*; Syl. Pt. 2, *Perdue v. Coiner*, *supra*.

The State asks this Court to affirm the ruling of the circuit court. *Tex S. v. Pszczolkowski*, *supra*.

VI. CONCLUSION.

For the foregoing reasons, the Respondent respectfully requests this Court to affirm the circuit court's rulings denying the Petitioner's post-conviction habeas allegations.

Respectfully submitted,
David Ballard, Warden,
by counsel,

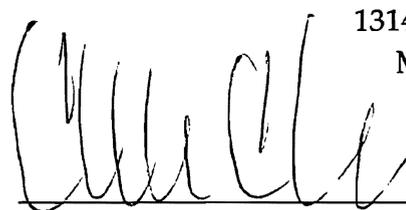


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing on this the 16th day of October, 2015, by hand-delivery, first-class mail, postage prepaid, facsimile to:

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Christopher C. Quasebarth