

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State ex rel. Michael W. Crummit
Petitioner below, Petitioner**

vs.) **No. 11-0157** (Berkeley County 06-C-863)

**David Ballard, Warden
Respondent below, Respondent**

FILED
May 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Michael W. Crummit appeals the circuit court’s order denying his habeas corpus petition without an evidentiary hearing, alleging fourteen assignments of error. A timely summary response was filed by Respondent David Ballard, Warden. Petitioner seeks a reversal of the circuit court’s decision, and a vacation of his conviction, or, alternatively, that this matter be remanded to the circuit court for a full evidentiary hearing on the merits of his habeas corpus claims.

This Court has considered the parties’ briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was convicted by a jury of two counts of second degree sexual assault and sentenced to two consecutive ten to twenty-five years sentences. Petitioner appealed to this Court, and his appeal was refused in July 2005. He later filed a petition for writ of habeas corpus in the circuit court, alleging multiple issues. On September 15, 2010, the circuit court issued a twenty page order denying the petition for writ of habeas corpus without a hearing.

Petitioner now appeals from the denial of his habeas corpus petition below. “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).

Petitioner’s first assignment of error is that the circuit court erred in denying petitioner’s petition for habeas corpus without an evidentiary hearing, as there was probable cause to believe that petitioner was entitled to at least some of the relief requested. “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, Warden*, 156 W.Va. 467, 194 S.E.2d 657 (1973). The Court finds no error in the circuit court’s decision to deny the petition for writ of habeas corpus without a hearing.

Regarding the other thirteen assignments of error petitioner alleges, the Court has carefully considered the merits of these arguments as set forth in his petition for appeal and in the State’s response, and it has reviewed the appellate record. The Court finds no error in the denial of habeas corpus relief and fully incorporates and adopts, herein, the circuit court’s detailed order dated September 15, 2010. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 16, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

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**IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Division II**

**STATE OF WEST VIRGINIA
ex rel. MICHAEL W. CRUMMITT,**

Petitioner,

v.

**THOMAS MCBRIDE, Warden,
Mount Olive Correctional Complex,**

Respondent.

CIVIL ACTION 06-C-863
Underlying Criminal Action
Numbers: 03-F-212
JUDGE WILKES

BERKELEY COUNTY
CIRCUIT CLERK
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VIRGINIA NS
CLERK

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the Court this 15th day of September 2010, pursuant to Petitioner's Petition for Writ of Habeas Corpus. Upon the appearance of Petitioner, Michael Crummitt, by counsel Christopher Prezioso, and Respondent, Thomas McBride, by counsel Christopher C. Quasebarth.

FINDINGS OF FACT

1. On October 14, 2003, Petitioner, Michael Crummitt, was indicted by the State of West Virginia in Berkeley County for five counts of Sexual Assault in the First Degree. Under Counts 1 through 3 the incidents occurred in April 2003 against the victim and under Counts 4 and 5 the incidents occurred in July 2003 against the victim

2. Petitioner was appointed counsel, Robert Barrat. On May 7, 2004, due to deterioration in communications and relations between Barrat and Petitioner, Barrat was granted permission to withdraw as counsel. Paul Lane was then appointed as counsel to represent Michael Crummitt's interests.

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3. The underlying criminal case was styled State of West Virginia v. Michael Crummitt, Berkeley County Circuit Court Case No: 03-F-212.

4. On August 27, 2004, the Court during a status hearing considered Defendant's motion to sever the counts relating to different victims, and the State did not oppose such a severance.

5. On March 11, 2004, Crummitt was ordered by the trial court to undergo a 20-day detailed forensic psychological examination. The report from the examination was filed in the case-file on May 10, 2004, in which Crummitt was found competent to stand trial and criminally responsible.

6. For Counts 4 and 5, the pre-trial was held on September 17, 2004. The trial for these counts was conducted on September 21 & 22, 2004.

7. At the pre-trial hearing the court heard pre-trial testimony from Sergeant Gary Harmison, Sergeant Russell Shackelford and the Petitioner's former girlfriend, Mary Hannah, in regards to Petitioner's Motion to Suppress, which sought to suppress any statements made by Crummitt and any and all evidence seized from Crummitt. The court denied the Motion to Suppress.

8. At the pre-trial hearing the State informed the court that Petitioner rejected a pre-indictment guilty plea offer and more recently Petitioner had rejected a guilty plea offer where Petitioner would plea guilty to one count of Sexual Assault in the Second Degree. Petitioner acknowledged that the State has made such offers and that he had rejected them.

9. At trial the State called the following witnesses to testify: Katherine Nicholas, Sergeant Gary Harmison, Sergeant Russell Shackelford, Mary Hannah, and For the defense, the only witness was Michael Crummitt.

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10. At trial, during the jury deliberation, the jury sent a question to the court asking what the next step is if they don't reach an agreement. After reading the question on the record with the State and Petitioner present, the Court sent the bailiff to bring out the jury to ask them in open court if they wished to break for the evening. The bailiff returned to inform the Court that the jury had since reached a verdict.

11. The September 24, 2004 Conviction Order represents that Crummitt, by jury trial, was convicted of two counts of Sexual Assault in the Second Degree, which were lesser included offenses of Counts 4 & 5 of the October 14, 2003 Indictment.

12. On December 3, 2004, the Court held a Sentencing Hearing where Petitioner received an indeterminate sentence of 10 to 25 years for each of the two counts of Sexual Assault in the Second Degree, and the sentences were ordered to be served consecutively. Crummitt was also required to comply with the West Virginia Sex Offender Registration Act. Also at the Sentencing Hearing, the Court considered Paul Lane's request to withdraw as counsel for Crummitt due to his client filing an ethics complaint against Lane accusing him of conspiring with the state and the court to secure a conviction against Crummitt. Crummitt had made similar accusations against previous counsel, Robert Barratt. Lane's request for withdrawal was denied, but subsequent to sentencing Lane was relieved and Steven Andrew Arnold was appointed as appellate counsel.

13. A direct appeal was filed on April 4, 2005 and then refused by the West Virginia Supreme Court of Appeals by Order dated July 5, 2005.

CONCLUSIONS OF LAW

This matter comes before the Court upon Petitioner's Petition for Writ of Habeas Corpus. This Court has previously appointed counsel, who filed an amended petition, and subsequent to

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an initial review the Court has ordered the respondent to file an answer. At this point in the proceedings the Court is to review the relevant filings, affidavits, exhibits, records and other documentary evidence attached to the petition to determine if any of petitioner's claims have merit and demand an evidentiary hearing to determine if the writ should be granted. Otherwise the Court must issue a final order denying the 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).

"If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence . . . show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought." W. Va. Code § 53-4A-7(a).

If the court upon review of the petition, exhibits, affidavits, or other documentary evidence is satisfied that the 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). On the

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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 petitioner’s contention 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, thus a mere recitation of a ground for relief without detailed factual support will not justify the issuance of a writ or the holding of a 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 adjunction 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,” laid out in *Losh v. McKenzie*. *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981); *Markley v. Coleman*, 215 W. Va. 729, 733 (2004).

In addition to a review on the merits, the Court must determine if the contentions raised by the petitioner have been previously and finally adjudicated or waived. “West Virginia Code § 53-4A-1(b) (1981) states that an issue is ‘previously and finally adjudicated’ when, at some point, there has been ‘a decision on the merits thereof after a full and fair hearing thereon’ with the right to appeal such decision having been exhausted or waived, ‘unless said decision upon the merits is clearly wrong.’” *Smith v. Hedrick*, 181 W. Va. 394, 395 (1989). But, a “rejection of a petition for appeal is not a decision on the merits precluding all future consideration on the issues

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raised therein . . .” *Syl. Pt. 1, Smith v. Hedrick*, 181 W. Va. 394 (1989). However, “there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance.” *Syl. Pt. 1, Ford v. Coiner*, 156 W. Va. 362 (1972). In addition, any grounds not raised in the petition for habeas corpus are deemed waived. *Losh v. McKenzie*, 166 W. Va. 762 (1981).

The Court in reviewing the petition, answer, affidavits, exhibits, and all other relevant documentary evidence finds that Petitioner’s Petition for Habeas Corpus should be DENIED. Below the Court will discuss each contention raised by Petitioner and show how none of the claims contained in this petition demand the relief requested.

A. Ineffective Assistance of Counsel

Petitioner here raises the contention of ineffective assistance of counsel pertaining to his trial counsel’s performance. Both the Sixth Amendment to the Constitution of the United States and Article III, §14 of the Constitution of West Virginia assure not only the assistance of counsel in a criminal proceeding but that a defendant should receive “competent and effective assistance of counsel.” *State ex rel. Stroger v. Trent*, 196 W. Va. 148, 152 (1996). In order to evaluate whether a defendant has received competent and effective assistance from their counsel West Virginia has adopted the two pronged test established by the United State Supreme Court in *Strickland v. Washington*. In order to prevail on a claim of ineffective assistance of counsel a petitioner under the two-prong test must show: “(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.*

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Pt. 5, State v. Miller, 194 W. Va. 3 (1995) (referencing *Strickland v. Washington*, 466 U.S. 668 (1984)). “In reviewing counsel’s performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the indentified 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 (1995); *Syl. Pt 2, State ex rel. Strogen v. Trent*, 196 W. Va. 148, 152 (1996). Under a consistent policy shown by the West Virginia Supreme Court of Appeals and the United States Supreme Court the analysis under ineffective assistance of counsel “must be highly deferential and prohibiting “intensive scrutiny of counsel and rigid requirements for acceptable assistance.” *State v. Miller*, 194 W. Va. 3, 16 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984)). One key area, or the “fulcrum,” for this analysis is counsel’s investigation of the case, therefore while judicial scrutiny must be highly deferential, “counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients.” *Syl. Pt. 3, State ex rel. Strogen v. Trent*, 196 W. Va. 148, 152 (1996).

Under Petitioner’s claim of ineffective assistance of counsel the first contention is that the trial counsel failed to properly investigate the criminal case. Petitioner alleges that no one interviewed the witnesses that should have been interviewed, stating that several character and factual witnesses that could have been interviewed and possibly called were never contacted. Yet, the Petitioner does not name or describe those witnesses. In fact both the victim and petitioner testified at trial that the incident occurred while the two were in a secluded location. The only difference between the two witnesses’ testimonies at trial went to consent and the use

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of a weapon during the sexual act. There is no indication in the testimony at trial of certain persons who could shed light on the pertinent facts in this matter, and Petitioner provides no specificity in his habeas contention as to what witnesses his attorney failed to interview. In fact, the counsel's performance at the September 17, 2004 pre-trial hearing and during trial show that he was well acquainted with the facts and surrounding circumstances of the case. Therefore, Petitioner's first contention has no merit and the Court sees no need for an evidentiary hearing if the Petitioner is not able to specify what witnesses were not interviewed.

Second, Petitioner claims that the plea offered by the state was not properly relayed to the petitioner. The record clearly shows that Petitioner's contention is unfounded. First, at the September 17, 2004 pre-trial hearing the Petitioner acknowledges that he was apprised of a pre-indictment plea offer, which he denied. Then the Court, at the same pre-trial hearing, considered the plea offered prior to trial which was a guilty plea to one count of 2nd Degree Sexual Assault. The plea was laid out on the record and petitioner acknowledged that he understood the plea offer. There is no evidence in the transcript that the trial counsel did not share this plea with his client, but even if he did not there was no prejudice since Petitioner was fully apprised of the offer and denied the offer in open court. Therefore, this contention has no merit and no additional evidence would be necessary in an evidentiary hearing.

Next petitioner raises the contention that his trial counsel failed to raise a Motion for Disqualification of the trial judge under Trial Court Rule 17.01, despite the petitioner's request. According to the petition the Petitioner informed trial counsel that the trial judge presided over a prior civil proceeding in which the Petitioner was involved. Trial counsel discussed the issue with Petitioner and decided not to raise the motion. Petitioner alleges that trial counsel's explanation is that the motion would "get him [petitioner] killed," meaning it would have a

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detrimental effect on his case. West Virginia Code of Judicial Conduct Canon 3(E)(1) states that involvement in a prior civil proceeding is not enough to demand recusal, unless the judge shows some personal bias. The trial counsel's decision to not pursue a motion to disqualify when there was no additional showing of personal bias was certainly reasonable. Furthermore, the failure to raise the motion did not prejudice the Petitioner, because the Court discussed a possible motion to disqualify at the September 17, 2004 pre-trial hearing and expressed the court's belief that the motion would have been denied even if it was timely filed. Since the transcript from the pre-trial hearing shows that as a matter of law the trial counsel's actions did not raise to the level of ineffective assistance of counsel there is no need for an evidentiary hearing on this matter.

Fourth contention raised by Petitioner complains that trial counsel did not request the grand jury transcripts or minutes in order to impeach the testimony of the witnesses at trial. But, Petitioner makes no claim that the testimony of witnesses at trial was materially different from their testimony before the grand jury. There is no prejudice from the trial counsel's actions even alleged under this contention, therefore there is no merit to Petitioner's claim. An evidentiary hearing is not needed since no meritorious claims have been raised.

The fifth contention raised by Plaintiff is that trial counsel was ineffective because he failed to explore an "erection" defense. Petitioner states that trial counsel failed to investigate or hire an expert to show that someone on crack cocaine could not sustain an erection, thus showing that Petitioner was not able to commit the sexual assault. This contention seems disingenuous considering the Petitioner admitted at trial that he had sex with the victim, but raised the defense that the act was consensual. Petitioner does not allege here that he was unable to sustain an erection on the date in question or that he ever informed trial counsel of such a problem during his sexual experience with the victim. "What defense to carry to the jury, what witnesses to call,

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and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.” *State v. Miller*, 194 W. Va. 3, 17 (1995). It is clear from the record that trial counsel acted reasonably in developing a defense in this case. The central defense as testified to by the Petitioner was that the act was consensual. There is no allegation that Petitioner actually had an erection problem or shared that with the attorney. But even if the trial counsel knew of this possible defense the Court can not second guess the strategic decision to not put before the jury two competing and contradictory defenses. The actions by the counsel, even assuming as true all of Petitioner’s allegations were clearly reasonable and there is no need for additional evidence during an evidentiary hearing.

The final contention raised against trial counsel by petitioner is that counsel’s performance at trial was deficient. Petitioner raised three main concerns with trial counsel’s performance. First, Petitioner complains that trial counsel asked him on the stand where he lived and Petitioner responded at the Eastern Regional Jail. Petitioner alleges that a curative instruction should have been sought, but the trial counsel can’t control how Petitioner responds to straightforward questions and no curative instruction was available. Second, the Petitioner alleges that trial counsel failed to object to the state’s mischaracterization of the knife used against the victim as a big knife during opening statements. This does not raise to the level of ineffective assistance since the knife was marked as evidence and the jury was able to review the knife themselves. Finally, Petitioner complains that trial counsel failed to object to nurse Nicholas’s expert status. According to the transcript from the trial, Nicholas only testified to her own observations and impressions of the victim’s demeanor during her examination. This testimony does not constitute expert witness testimony and therefore no objection was necessary.

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Trial counsel's performance was reasonable, none of Petitioner's contentions have merit, and the record is clear on these matters so no evidentiary hearing is necessary.

Finally, in part L of the Petition for Writ of Habeas Corpus, Petitioner raised a complaint of ineffective assistance of counsel against his appellate counsel, Andrew Arnold. Petitioner contends that counsel failed to appeal the issue of Petitioner's unfair treatment during his criminal proceedings and the improper and prejudicial actions of the State. Petitioner does not further describe what that unfair treatment or prejudicial actions were and provides no factual support. Looking at the record in this case an appeal was filed and denied by the West Virginia Supreme Court of Appeals. This Court is aware, through this Petition for Writ of Habeas Corpus, that Petitioner feels that a conspiracy was hatched against him and that the prosecutor's office, defense counsel, and the judge took certain actions to his detriment. But, in evaluating the claims raised in this habeas petition the Court finds no error nor proof of a conspiracy. Therefore, the court finds the actions of appellate counsel reasonable not to bring forth the more far-fetched claims alleged by Petitioner, since no factual support has been brought forward at anytime in support of Petitioner's allegations.

None of Petitioner's contentions, nor their cumulative effect, meet the two-prong test under *Strickland* therefore the relief request under the contention of ineffective assistance of counsel should be denied.

B. Implication of Due Process Rights By Court's Denial of Motion to Dismiss Indictment

In this contention raised by Petitioner the central issue is the Motion to Dismiss Indictment denied by the trial court during pre-trial proceedings. The indictment under counts 4 and 5 stated that Petitioner was charged with "sexual intrusion," under W. Va. Code § 61-8B-3(a)(1)(ii). This section of the code states that person is guilty of Sexual Assault in the 1st

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Degree when, “the person engages in sexual intercourse or sexual intrusion.” *Id.* The difference between the two terms is that sexual intercourse involves “penetration of the female sex organ by male sex organ,” and sexual intrusion involves the use of an “object.” *Id.* Since the Motion to Dismiss Indictment was fully adjudicated during the September 17, 2004 pre-trial hearing the standard on this matter is whether the court’s decision was “clearly wrong.” The trial court’s reasoning for denying the motion was that “object” can be used to describe a variety of items, including even body parts such as fingers, therefore there is no reason to exclude the male penis from that list. In addition, an indictment need only meet certain minimum standards. *Syl. Pt. 2, State v. Miller*, 197 W. Va. 588 (1996). The Petitioner was clearly apprised of the crime for which he was being charged and knew the relevant facts allowing him to formulate a defense. The trial court’s reasoning fits within the statute and allowing the case to proceed was not clearly wrong, therefore there is no merit to petitioner’s contention. This contention is based on the decision at the pre-trial hearing and therefore the transcript is sufficient and no evidentiary hearing is needed to determine that this claim has no merit.

C. Implication of Due Process Rights Through Court’s Denial of Motion to Suppress

At the September 17, 2004 pre-trial hearing Petitioner’s counsel filed a Motion to Suppress statements made by Petitioner to police investigators. Petitioner’s argument is that the statements were given during a custodial interrogation and that Petitioner was not provided an attorney after he requested one, in violation of his Sixth Amendment right to counsel. This matter was fully adjudicated by the trial court at the pre-trial hearing, thus this Court must look to see if the previous ruling was clearly wrong. During the September 17, 2004 pre-trial hearing the trial judge read in open court the transcript from the police interrogation of Petitioner. The dialogue shows that Petitioner indicated that he wanted a lawyer present and then asked how he

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could get a lawyer. Investigators then informed Petitioner of his rights, stating that he was not under arrest so he could have a lawyer present but that they would not be able to provide him a lawyer. Investigators then asked Petitioner if he wished to have a lawyer, stating that if he did the questioning would stop at that time. Petitioner then began to discuss the circumstances of the case, at which point the Investigators stopped the Petitioner and made sure he didn't want a lawyer before they proceeded with questioning. Petitioner then indicated he was willing to answer questions without a lawyer present. The dialogue between investigators and Petitioner was clearly laid out during the pre-trial hearing and shows that the decision to deny the motion to suppress made by the trial court was correct. Investigators made sure not to continue questioning the Petitioner until he indicated that he understood his right to counsel and that he wished to proceed without counsel. Although Petitioner initially indicated a desire to have counsel present, once apprised of his rights he decided to waive his right to counsel and answer the investigators questions. Furthermore, the investigators did explain Petitioner's Miranda rights prior to questioning. Therefore the statements were not in violation of Petitioner's Sixth Amendment or Fifth Amendment constitutional rights, and the trial court's decision was not clearly wrong. The pre-trial transcript is sufficient to show that this contention has no merit and there is no need for an evidentiary hearing.

D. Sentencing Violated Petitioner's 8th Amendment Rights

Petitioner claims that the sentence handed down was too harsh and thus violated his 8th Amendment rights. The Petitioner does admit that the sentence was within the statutory limits. "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." *Syl. Pt. 6, State v. Woodson*, 222 W. Va. 607 (2008). There is no claim here that the court considered impermissible factors when

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issuing the sentence and since the sentence is also within the statutory limits there is no merit to a challenge to the sentence. There is no need for further evidentiary development during a hearing because petitioner has admitted the crucial issue, that the sentences are within the statutory limits.

E. Implication of Due Process Rights Due to Improper Conspiracy Against Petitioner

Petitioner raises the contention that an impermissible conspiracy was hatched against him thus denying him the right to a fair trial thus violating his due process rights. Petitioner alleges that the judge was prejudiced because of a prior civil proceeding before the trial judge in which Petitioner was involved. Petitioner also alleges that the state covered up certain criminal activity of unknown confidential informants. Also, Petitioner alleges that his initial counsel, Barratt, was intentionally appointed in furtherance of the conspiracy against Petitioner and had worked against the Petitioner in a prior legal proceeding. Finally, the magistrate judge was also allegedly involved in the conspiracy and played a part by intentionally denying Petitioner's Motion to Dismiss Barratt as counsel. Despite the bold allegations made by Petitioner there are no facts or supporting materials provided in the petition for habeas corpus. This Court has already considered the claim of judicial prejudice and found that the trial judge did not need to disqualify himself. Furthermore, Petitioner makes no allegation as to who the confidential informants were and what criminal activity was actually withheld. Finally, Petitioner neglects to name the prior proceeding in which Barratt worked against the Petitioner. With absolutely no support the outrageous claims made by Petitioner can not be seen to have merit. "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). Petitioner has not come close to overcoming

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that strong presumption and has not indicated in his petition that there is evidence to support his allegations that he would bring during an evidentiary hearing, therefore this contention is denied without an evidentiary hearing.

F. Implication of Due Process Rights As State's Witness Provided False Testimony

Petitioner raises the contention that _____ the victim, provided false testimony and was also an undercover agent for the state. Petitioner alleges that _____ actions denied him the opportunity for a fair trial in violation of his due process rights. Besides the allegation that _____ provided false testimony and that she was an undercover agent, there is no factual support provided in the petition. Once again the Court must review a petition for writ of habeas corpus with a strong presumption of the regularity of the proceedings. The jury was able to evaluate the credibility of the witnesses' testimony and decided that _____ testimony was more credible than Petitioner's. There is no reason to go back and overturn the jury's determination, especially considering the complete lack of factual support for Petitioner's claims, therefore the contention carries no merit and there is no need for an evidentiary hearing.

G. Implication of Due Process Rights Due to Conviction on Insufficient Evidence

Petitioner contends that his conviction was improper because there was insufficient evidence to prove his guilt. The sufficiency of the evidence was previously and finally adjudicated by the trial court and therefore the standard now is whether the court's decision was clearly wrong.

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the

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jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.” *Syl. Pt. 3, State v. Guthrie*, 194 W. Va. 657 (1995).

Petitioner claims that the only evidence presented against him was the testimony of

The burden for such a contention is heavy and Petitioner was required to show that there was no evidence from which the jury could have found the Petitioner guilty. The state called five witnesses and submitted various exhibits in support of their case. The transcript from the trial shows that there was sufficient evidence, and therefore there is no need for an evidentiary hearing to find that this contention has no merit.

H. Implication of Due Process Rights When Petitioner Was Denied Opportunity to Review Pre-Sentence Investigation

Petitioner alleges in this contention that he was denied that opportunity to review the pre-sentence investigation report prior to the Court issuing a sentence. “West Virginia Rule of Criminal Procedure 32 requires that a criminal defendant and his or her counsel be provided with a copy of the presentence investigation report prepared in accordance with subsection (b) of the rule.” *Syl. Pt. 2, State ex rel. Aaron v. King*, 199 W. Va. 533 (1997). While there is a statutory requirement to provide the pre-sentence report and to make a record concerning the issue, this does not create a constitutional right, therefore this contention is not appropriate for a writ of habeas corpus. Alternatively, even if there was a constitutional right implicated in general, this case does not demand the relief requested. The transcript from the sentencing hearing demonstrates that the probation officer provided the Petitioner a copy of the report a week prior to the sentencing hearing. The reason Petitioner did not have an opportunity to review the report

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with his counsel is because the relationship between the two had deteriorated and Petitioner had filed an ethics complaint against this trial counsel. Furthermore, there is no allegation in the petition that anything was inaccurate in the report or that Petitioner was prejudiced. Therefore, Petitioner was not denied his rights and his sentence was not improperly imposed, thus his contention has no merit and the transcript is clear so no evidentiary hearing is necessary.

I. Implication of Due Process Rights With Allegation That Trial Court Improperly Hurried the Jury

Petitioner contends that his right to trial by jury was impeded when the trial court improperly rushed the jury during their deliberation. The allegation here is that after the jury posed a question to the trial court the court's actions led to the jury feeling rushed and making a decision faster than they wished. The incident alleged began as the jury during deliberation sent out the following question: "If the jury cannot come to an agreement, what is the next step." Looking at the transcript from September 22, 2004 the trial court received the question and read it in open court. The judge then advised the parties that he was going to tell the jury, "it's too soon to be considering—to be worrying about what the next step is, that they need to continue deliberating." *See* Trial Transcript, September 22, 2004, p. 113. Then as the Bailiff went to bring the jury out so the trial judge could answer their question in open court and the jury informed the Baliff they had reached a decision during the interim. The transcript clearly shows that the trial court did not rush the jury, but instead intended to advise them to take more time to deliberate. Furthermore, the transcript shows no improper influence by the Bailiff. The Bailiff says on the record, "I knocked and said could they come out for a moment, and they said, we're almost done, we think we have it settled." *Id.* It was a decision of the jury and the jury alone to reach their verdict in the timeframe that they did, and the court had no improper influence. The

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record is clear on this issue and therefore there is no need for an evidentiary hearing to find that this contention has no merit.

J. Implication of Due Process Rights Due to Improper Venue

Petitioner raises the contention in his petition for writ of habeas corpus that the criminal trial took place in the wrong jurisdiction because there was no actual proof that the criminal activity took place in Berkeley County. Despite Petitioner's allegation it is clear from the trial transcript that evidence was put forth, by Sgt. Harmison, showing that the relevant acts took place in Berkeley County. Petitioner makes no allegation in his petition that Sgt. Harmison gave false testimony or was incorrect as to the location of the sexual assault. Admittedly, the occurrence at issue took place near the border of Berkeley County, but even if the act took place on the boundary line venue would have been proper in both jurisdictions. W. Va. Code § 61-11-11. Also, it is beyond reproach from testimony of the investigating officers and that part of the criminal activity occurred within Berkeley County. If part of the act or occurrence happened in one jurisdiction and part in another, venue is proper in both locations. W. Va. Code § 61-11-12. Therefore, it is clear that Petitioner's claim here has no merit and there is enough proof in the trial transcript that an evidentiary hearing is not necessary.

K. Implication of Due Process Rights Due to Unfair Pretrial Publicity

Petitioner here contends that his right to a trial by a fair and impartial jury was abrogated by the pretrial publicity, found in newspaper articles, rumors spread by the victim, and through a conspiracy perpetrated by the State of West Virginia. Petitioner does not point to any newspaper articles to show that there was actual pretrial publicity. Most importantly, during voir dire the trial judge asked: "Is there any member of the panel who has read anything about this case in any of the news media." See Trial Transcript, September 21, 2004, p. 37. None of the jurors

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responded. Also, the judge asked the jury panel if they know the Petitioner at all. None of the Jurors indicated that they knew him. *Id.* at 25-27. The transcript clearly shows that the Petitioner was not prejudiced by pretrial publicity because none of the potential jurors knew of him or had read any stories concerning the case. There is no need for an evidentiary hearing because the transcript makes it clear that Petitioner's contention has no merit.

L. Implication of Due Process Rights Because Petitioner Was Incompetent to Stand Trial

The final contention raised by Petitioner in the Petition for Writ of Habeas Corpus states that Petitioner's due process rights were violated because Petitioner was incompetent to stand trial. Petitioner admits that a psychological evaluation was ordered by the trial court and returned in May of 2004. The evaluation found Petitioner competent to stand trial and criminally responsible. Petitioner now alleges that a second psychological evaluation should have been done closer to trial, which occurred four months later. Petitioner makes this contention without making any allegation as to why his mental health would have deteriorated over those four months. Furthermore, there is no legal precedent showing that a psychological evaluation done four months before the trial is not sufficient to show competency at the time of trial. With the fact that a full evaluation was completed and came back showing Petitioner to be competent, and with no allegation of changed circumstances, it is clear from the record that this contention has no merit.

M. Losh List

Petitioner completed a Checklist of Grounds for Post-Conviction Habeas Corpus Relief, which provides the grounds listed in *Losh v. McKenzie* and advises the Petitioner to initial the grounds he specifically waives and to raise all other grounds in his amended petition. Petitioner specifically waived the following grounds: involuntary guilty plea, language barrier to

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understanding the proceedings, failure of counsel to take an appeal, coerced confessions, failure to provide copy of indictment to defendant, acquittal of co-defendant on same charge, question of actual guilt upon an acceptable guilty plea. Petitioner did not waive all other claims and raised a good portion of those claims in the amended petition, which have been addressed above. As for the claims not waived but not raised in the Petition for Writ of Habeas Corpus, the court may “summarily deny unsupported claims that are randomly selected from the list of grounds,” laid out in *Losh v. McKenzie*. *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981); *Markley v. Coleman*, 215 W. Va. 729, 733 (2004). Without any support, these remaining claims from the *Losh* list are hereby summarily denied.

Accordingly, the Court DENIES Petitioner’s Petition for Writ of Habeas Corpus. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

Therefore it is hereby ADJUDGED and ORDERED that relief requested in the Petition for Writ of Habeas Corpus is DENIED.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

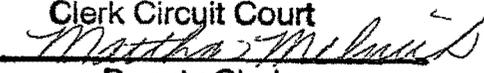
Counsel for Plaintiff:

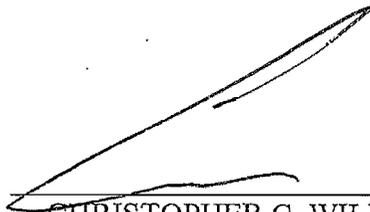
Christopher Prezioso
Luttrell & Prezioso, PLLC
206 W. Burke St.
Martinsburg, WV 25401

Counsel for Defendant:

Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
380 W. South St., Ste. 1100
Martinsburg, WV 25401

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court
By: 
Deputy Clerk


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