

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

**Brian E. Ashcraft,
Petitioner Below, Petitioner**

vs) **No. 15-0644** (Harrison County 11-C-289-1)

**David Ballard, Warden,
Mount Olive Correctional Complex,
Respondent Below, Respondent**

FILED

May 23, 2016

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Brian M. Ashcraft, by counsel Christopher M. Wilson, appeals the Circuit Court of Harrison County's June 4, 2015, order denying his petition for writ of habeas corpus. Respondent David Ballard, Warden, by counsel Shannon Frederick Kiser, filed a response.¹ Petitioner filed a reply. On appeal, petitioner alleges that the circuit court erred in denying his habeas petition because his prior habeas counsel was ineffective.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In September of 2003, petitioner was convicted, by jury, of the offenses of first-degree murder, voluntary manslaughter, and carrying a concealed weapon without a license. Following those convictions, petitioner appealed to this Court. We refused petitioner's appeal in February of 2002.

After filing a petition for writ of habeas corpus in the circuit court, petitioner was appointed counsel to file an amended petition. The circuit court then held an omnibus evidentiary hearing on the petition over three days in April of 2006 and August of 2006. Thereafter, the circuit court denied the petition by order entered on September 4, 2008. Petitioner subsequently appealed the denial to this Court, and we refused the same in June of 2009.

Following the denial of his first habeas petition, petitioner filed a second habeas petition in the circuit court and alleged, primarily, ineffective assistance of prior habeas counsel.

¹Pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure, we have replaced the original respondent, Anne Thomas, with David Ballard, who is the current warden of the Mount Olive Correctional Complex where petitioner is incarcerated.

Petitioner was appointed an attorney and an amended petition was filed below. Specifically, petitioner alleged that prior habeas counsel was ineffective for failure to address grounds not waived in petitioner's *Losh*² list; subpoena witnesses necessary to prove grounds asserted in the petition; and utilize expert testimony to support the claim of ineffective assistance of trial counsel. The circuit court held an omnibus evidentiary hearing on the second petition in October of 2012. Thereafter, the circuit court entered an order denying the petition on June 4, 2015. It is from this order that petitioner appeals.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

“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.” Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

On appeal to this Court, petitioner alleges that he was entitled to habeas relief because his prior habeas counsel was ineffective. The Court, however, does not agree.

Upon our review and consideration of the circuit court's order, the parties' arguments, and the record submitted on appeal, we find no error or abuse of discretion by the circuit court. Our review of the record supports the circuit court's decision to deny petitioner post-conviction habeas corpus relief based on these alleged errors, which were also argued below. Indeed, the circuit court's order includes well-reasoned findings and conclusions as to the assignment of error raised on appeal. Given our conclusion that the circuit court's order and the record before us reflect no clear error or abuse of discretion, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignment of error raised herein and direct the Clerk to attach a copy of the circuit court's June 4, 2015, “Order Denying Second Petition For A Writ Of Habeas Corpus” to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 23, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis

²*Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Allen H. Loughry II

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BRIAN E. ASHCRAFT,
Petitioner,

v.

Case No. 11-C-289-1
Judge John Lewis Marks, Jr.

DAVID BALLARD, Warden,
Mt. Olive Correctional Complex
Respondent.

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

On October 15, 2012, came the Petitioner Brian E. Ashcraft, in person, and by his counsel, Christopher Wilson, Esq., and came the Respondent David Ballard, Warden, not in person, but by his counsel, James F. Armstrong, Assistant Prosecuting Attorney of Harrison County, West Virginia, for a habeas corpus evidentiary hearing based on the alleged grounds for relief set forth in Petitioner Ashcraft's July 11, 2011, petition for a writ of habeas corpus and his September 11, 2012, amended petition. In the instant case, Petitioner Ashcraft claims that his prior habeas corpus counsel, Steve Fitz, Esq., was ineffective in Harrison County, West Virginia, Case No. 05-C-152-1.

After studying pertinent legal authority, listening to counsel's arguments, and considering the sworn testimony of Petitioner Ashcraft at the October 15, 2012, hearing, the Court believes that the instant petitions for a writ of habeas corpus should be denied for the reasons that follow.

FINDINGS OF FACT

1. That the Petitioner was tried and convicted by a jury of the offenses of First Degree Murder, Voluntary Manslaughter, and Carrying a Concealed Weapon Without a License on September 23, 2000;

2. That following his conviction, Petitioner filed an appeal of said conviction to the West Virginia Supreme Court of Appeals. Petitioner's appeal was subsequently refused by the court on or about February 10, 2002;

3. That following refusal by the West Virginia Supreme Court of Petitioner's appeal, Petitioner filed a Petition for Post Conviction Writ of Habeas Corpus with this Court in Case No. 05-C-152-1. After filing the petition, Steve Fitz, Esq., a competent attorney licensed to practice law before this Court, was appointed as Petitioner's counsel;

4. That this Court thereafter provided Petitioner with an omnibus evidentiary hearing in Case No. 05-C-152-1 that lasted three days: April 24, 2006; April 25, 2006; and August 2, 2006;

5. That during the omnibus evidentiary hearing in Case No. 05-C-152-1, Petitioner's counsel called numerous witnesses in support of the Petitioner's case, with said witnesses including Petitioner;

6. That after the conclusion of the three-day omnibus evidentiary hearing in Case No. 05-C-152-1, this Court did deny the relief requested by Petitioner in his Petition for Writ of Habeas Corpus by its "Opinion Order *Denying* Petitions for Writ of Habeas Corpus," entered September 4, 2008;

7. That following this Court's denial Petitioner's original petitions for a writ of habeas corpus, Petitioner appealed the decision of this Court to the West Virginia Supreme Court of Appeals. Petitioner's appeal was subsequently refused by the Court on June 17, 2009;

8. That Petitioner has now filed a second petition for a writ of habeas corpus with this Court alleging, primarily, ineffective assistance of prior habeas counsel;

9. That subsequent to the filing of Petitioner's second petition for a writ of habeas corpus, the Respondent and State of West Virginia filed a response thereto;

10. That this Court did hold an omnibus habeas evidentiary hearing on October 15, 2012, to address the instant petition;

11. That at the omnibus habeas evidentiary hearing held October 15, 2012, Petitioner's counsel called Petitioner and rested. Respondent did not call any witnesses;

12. That the grounds Petitioner placed in the second petition supporting his contention that prior habeas counsel was ineffective are that prior habeas counsel was ineffective by failing to address certain grounds not waived by Petitioner in the original Petition including that the trial court lacked jurisdiction, that there was an issue with Petitioner's mental competency at the time of trial cognizable, challenges to the Grand Jury composition, non-disclosure of Grand Jury minutes, more severe sentence than expected and excessive sentence;

13. That in addition to Petitioner's allegation that prior habeas counsel was ineffective by failing to address the grounds cited above, Petitioner further alleged that prior habeas counsel was ineffective by failing to subpoena a witness (i.e., one of the murder victims' family members to elicit testimony that Petitioner's counsel allegedly made a disparaging remark about Petitioner during a break in the trial) for the omnibus habeas evidentiary hearing in Case No. 05-C-152-1 and that prior habeas counsel was ineffective by failing to offer expert testimony in support of Petitioner's claim that his trial counsel was ineffective;

14. That at the October 15, 2012, omnibus evidentiary hearing, Petitioner acknowledged that the omnibus evidentiary hearing held in Case No. 05-C-152-1 lasted three days;

15. That at the October 15, 2012, omnibus evidentiary hearing, Petitioner acknowledged that a substantial amount of evidence was presented by his prior habeas counsel in Case No. 05-C-152-1;

16. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that his prior habeas counsel called numerous witnesses in support of his original Petition in Case No. 05-C-152-1;

17. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that his prior habeas counsel argued his position in Case No. 05-C-152-1;

18. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that the Court hearing this matter also heard the prior petitions for a writ of habeas corpus in Case No. 05-C-152-1 and was the same Court that presided over his criminal trial in Case No. 00-F-5-1;

19. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that this Court issued rulings following the conclusion of the prior habeas corpus proceeding in Case No. 05-C-152-1;

20. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that this Court found his trial counsel to be effective in their representation of Petitioner in Case No. 05-C-152-1;

21. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that this Court was present during trial and had an opportunity to observe the Petitioner;

22. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that this Court had an opportunity to observe trial counsel's strategy as well as the strategy of prior habeas counsel;

23. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that this Court had an opportunity to observe the level of advocacy provided by trial counsel and prior habeas counsel;

24. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that this Court had an opportunity to observe the zealousness of trial counsel's advocacy in the trial of the criminal matter;

25. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that he had no issues regarding communication with his prior habeas counsel;

26. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that a lot of evidence was presented in the three-day omnibus habeas evidentiary hearings in Case Number 05-C-152-1;

27. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that Petitioner was provided with a significant amount of time in which to present evidence to support the allegations in the original petition for a writ of habeas corpus;

28. That at the October 15, 2012, omnibus habeas hearing, Petitioner acknowledged that after the first two days of the omnibus habeas hearing in Case No. 05-C-152-1, there was an intervening period of more than three months before the third --and final--day of the omnibus habeas hearing;

29. That Petitioner testified in the first portion of the omnibus habeas hearing held in Case No. 05-C-152-1 and was recalled as a witness on the last day of the hearing, which occurred more than three months following the second day of the omnibus habeas hearing held in Case No. 05-C-152-1;

30. That Petitioner had more than three months between hearing dates in Case No. 05-C-152-1 in which to think about the subjects his prior counsel addressed and to bring any omissions to the attention of said habeas counsel and this Court;

31. That Petitioner apparently did give the first two days of the omnibus habeas hearing in Case No. 05-C-152-1 some thought during the intervening three-month period as Petitioner brought a list of questions to the third day of the hearing, which his prior habeas counsel addressed with him;

32. That at no time during the three months that elapsed between the hearing dates in Case No. 05-C-152-1 did Petitioner ever advise the Court that his prior habeas counsel had neglected to address issues that Petitioner wished addressed;

33. That at no time during the three months that elapsed between the hearing dates in Case No. 05-C-152-1 did Petitioner ever advise the Court that his prior habeas counsel was failing to take some action that Petitioner wished to be performed;

34. That at no time during the three months that elapsed between the hearing dates in Case No. 05-C-152-1 did Petitioner ever advise this Court that his prior habeas counsel was not representing him properly;

35. That Petitioner claims in the instant case that he only realized that his prior habeas counsel had neglected to address certain grounds when he received the Order denying his original petition in Case No. 05-C-152-1;

36. That in light of the significant time period over which the omnibus habeas hearing in Case No. 05-C-152-1 occurred and in light of Petitioner's attention to the proceedings as evidenced by the fact that he brought additional questions to the third day of the hearing that Petitioner believed addressed issues that had not been adequately addressed during the first two days of the hearing, the sincerity of Petitioner's contention that he only realized prior habeas counsel had neglected to address certain grounds when Petitioner received the Order denying his original Petition is dubious;

37. That although the Petitioner avers that prior habeas counsel was ineffective by failing to address his contention that the trial court in the criminal proceedings lacked jurisdiction, said allegation is without merit and Petitioner acknowledged that he would not pursue this ground in the present habeas proceeding;

38. That although the Petitioner avers that prior habeas counsel was ineffective by failing to address his contention that he received an excessive sentence, said allegation is without merit and Petitioner acknowledged that he would not pursue this ground in the present habeas proceeding;

39. That although the Petitioner avers that prior habeas counsel was ineffective by failing to address his contention that he received a more severe sentence than expected, said allegation is without merit and Petitioner acknowledged that he would not pursue this ground in the present habeas proceeding;

40. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that trial counsel did not challenge the Grand Jury composition or its proceedings, Petitioner failed to present any evidence in support of his contention that there were flaws in the Grand Jury composition;

41. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that trial counsel did not challenge the Grand Jury composition or its proceedings, Petitioner failed to present any evidence in support of his contention that there were irregularities in the Grand Jury proceedings;

42. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that trial counsel did not challenge the Grand Jury composition or its proceedings, Petitioner failed to present any evidence as to what he believes constituted the flaws in the Grand Jury composition;

43. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that trial counsel did not challenge the Grand Jury composition or its proceedings, Petitioner failed to present

any evidence as to what he believes constituted the irregularities in the Grand Jury proceedings;

44. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that trial counsel did not challenge the Grand Jury composition or its proceedings, Petitioner failed to present any facts or evidence as to why the Grand Jury transcripts would have been helpful, how they would have provided impeachment material, or how said transcripts would have led to a different result at trial. Notably, Petitioner Ashcraft admitted to reviewing the Grand Jury transcript at the underlying trial at counsel's table demonstrating, at least, that trial counsel was in possession of the same;

45. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that Petitioner's mental competency at trial was cognizable, Petitioner did not present any evidence to support this ground. At the October 15, 2012, omnibus habeas hearing, Petitioner did make unsubstantiated claims that he was taking antidepressants at the time of trial which he believes affected his competency, yet Petitioner never brought this issue to the attention of the trial court in the original proceedings. Further, the Court recalls that Dr. Dennis Marikis, Petitioner's defense expert in the underlying trial (who was not ultimately called to testify at the criminal trial), was called as a witness by previous habeas counsel at the omnibus habeas hearing in Case No. 05-C-152-1;

46. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that Petitioner's mental

competency at trial was cognizable, Petitioner did not present any evidence as to how his alleged antidepressant use at trial affected his competency;

47. That although Petitioner maintains his contention that prior habeas counsel was ineffective by failing to address the ground that Petitioner's mental competency at trial was cognizable, Petitioner did not present the testimony of any physician, psychiatrist, psychologist, pharmacist or other qualified individual in regard to how his alleged use of antidepressants at trial affected his competency;

48. That the term "cognizable" means capable of being judicially determined and recognizable;

49. That this Court presided over Petitioner's underlying criminal trial and had the opportunity to personally observe Petitioner throughout the proceedings, observe Petitioner's interaction with counsel, observe Petitioner's attentiveness to the proceedings, and observe Petitioner's cooperativeness and level of intellect;

50. That while this Court presided over Petitioner's criminal trial, and during the time this Court had an opportunity to personally observe Petitioner each day of the trial, at no time did this Court observe, hear, or believe that there was any issue with Petitioner's competency and that, to the contrary, the level of attention paid by Petitioner to details of the proceedings as evidenced by the pleadings filed by Petitioner since his conviction completely contradict any claim by Petitioner that he was suffering from competency issues at the time of trial;

51. That alleged issues with Petitioner's competency at the time of trial were not capable of being judicially determined nor were they recognizable because there was no evidence at that time to suggest that Petitioner had any such issues;

52. That there is absolutely nothing in the record, from the criminal proceeding stage forward, to suggest that Petitioner was incompetent at the time of trial;

53. That Petitioner maintains that his prior habeas counsel was ineffective by failing to subpoena a witness to support his contention that one of his trial counsel made an alleged disparaging remark about Petitioner to others during a recess in the criminal proceedings;

54. That despite Petitioner's allegation that his prior habeas counsel was ineffective by failing to subpoena a witness to support his contention that one of his trial counsel made an alleged disparaging remark about Petitioner to others during a recess in the criminal proceedings, Petitioner failed to produce said witness at the instant hearing;

55. That despite Petitioner's allegation that his prior habeas counsel was ineffective by failing to subpoena a witness to support his contention that one of his trial counsel made an alleged disparaging remark about Petitioner to others during a recess in the criminal proceedings, Petitioner has failed to prove this allegation;

56. That despite Petitioner's allegation that his prior habeas counsel was ineffective by failing to subpoena a witness to support his contention that one of his trial counsel made an alleged disparaging remark about Petitioner to others during a recess in the criminal proceedings, Petitioner has failed to present any evidence that even if his trial counsel did make such a remark, how trial counsels' representation of Petitioner in the criminal proceedings was anything less than zealous and competent;¹

¹ It should be noted that Petitioner actually had two experienced attorneys representing him in the criminal proceedings, and Petitioner has never alleged that his other trial counsel ever said anything not to Petitioner's liking.

57. That despite Petitioner's allegation that his prior habeas counsel was ineffective by failing to subpoena a witness to support his contention that one of his trial counsel made an alleged disparaging remark about Petitioner to others during a recess in the criminal proceedings, Petitioner has failed to present any evidence indicating that any such alleged statement had an effect on counsel's representation of Petitioner;²

58. That at the October 15, 2012, omnibus hearing, Petitioner alleged again (as he did in prior habeas Case No. 05-C-152-1) that he was provided with instructions by one of his trial counsel regarding his participation in the case and his testimony at trial and that, as a result, Petitioner did not testify truthfully at trial thereby compromising his defense;

59. That at the October 15, 2012, omnibus hearing, Petitioner acknowledged that he was sworn as a witness prior to testifying at trial and that such oath involved a promise to tell the truth;

60. That at the October 15, 2012, omnibus hearing, Petitioner acknowledged that if what he testified to at said proceeding was true regarding the alleged instructions given to him by his trial counsel and his trial testimony, then Petitioner admitted to perjuring himself at trial;

61. That if Petitioner perjured himself at trial, and has admitted to falsely testifying under oath, this Court possesses concerns that Petitioner is engaging in the same conduct in these proceedings;

² Again, it should be noted that Petitioner was represented by two experienced and well-known attorneys at his criminal trial and this Court has already ruled that said counsels' representation of Petitioner in those proceedings was competent and effective.

62. That Petitioner maintains that his prior habeas counsel was ineffective by failing to call an expert witness at the prior habeas proceeding to support his contention that his trial counsel was ineffective;

63. That although Petitioner maintains that his prior habeas counsel was ineffective by failing to call an expert witness at the prior habeas proceeding to support his contention that his trial counsel was ineffective, Petitioner has not identified who such an expert would have been or what their testimony would have been;

64. That although Petitioner maintains that his prior habeas counsel was ineffective by failing to call an expert witness at the prior habeas proceeding to support his contention that his trial counsel was ineffective, Petitioner failed to call such a witness in the instant proceeding;

65. That although Petitioner maintains that his prior habeas counsel was ineffective by failing to call an expert witness at the prior habeas proceeding to support his contention that his trial counsel was ineffective, this Court has previously and thoroughly reviewed the representation of Petitioner by trial counsel and that this Court has conclusively found that trial counsels' representation of Petitioner in the criminal proceedings was competent and effective;

66. That Petitioner has not demonstrated that his prior habeas counsel was ineffective in his representation of Petitioner in Case No. 05-C-152-1 and, as such, Petitioner is not entitled to the relief requested in his instant petitions for a writ of habeas corpus; and,

67. That Petitioner again raised several issues during the October 15, 2012, omnibus habeas hearing that were already previously addressed and adjudicated in

Case No. 05-C-152-1. For this reason, the Court attaches as an Exhibit to this Order a certified copy of its September 4, 2008, "Opinion Order *Denying* Petitions for Writ of Habeas Corpus."

CONCLUSIONS OF LAW

1. That claims of ineffective assistance of counsel are governed by the two prong test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and subsequently adopted by [the West Virginia Supreme Court of Appeals] in State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). See State ex rel. Daniel v. Legursky, 195 W.Va. 314, 321, 465 S.E.2d 416, 423 (1995).

2. That the West Virginia Supreme Court, in State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), held that "in West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two prong test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (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."

3. That the West Virginia Supreme Court, in State ex rel. Daniel v. Legursky, 195 W.Va. 314, 321, 465 S.E.2d 416, 423 (1995), held that the failure of a Petitioner to meet the burden of proof mandated by either of the two prongs of the Strickland test is fatal to a habeas petitioner's claim.

4. That the first prong of the ineffective assistance of counsel test requires the Petitioner to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court then must determine

whether, in light of all of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984).

5. That in State ex rel. Vernatter v. Warden, West Virginia Penitentiary, 207 W.Va. 11, 17, 528 S.E.2d 207, 213 (1999), quoting Strickland, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984), the West Virginia Supreme Court found that Petitioner's burden of proof in regard to the first prong of the Strickland test "is heavy, as there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

6. That the West Virginia Supreme Court, in Syllabus Point 6 of Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), held that in reviewing ineffective assistance of counsel claims, the court must refrain 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."

7. That the second prong or "prejudice" requirement of the Strickland test looks to whether counsel's deficient performance adversely affected the outcome in a given case. Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984).

8. That, in accordance with principles espoused by the West Virginia Supreme Court of Appeals, the analysis of ineffective assistance of counsel claims "must be highly deferential" and "prohibi[t] '[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance.'" State v. Miller, 194 W.Va. 3, 16, 459 S.E.2d 114 (1995) (internal citation omitted).

9. That when alleging ineffective assistance of counsel as the result of failure to obtain grand jury proceeding transcripts, failure to "specify any facts as to why the grand jury transcripts would have been helpful, how they may have provided impeachment material, or how that material could have led to a different result" is fatal to such a claim. Kees v. Nohe, No. 11-1465, 2013 WL 149614 (*W.Va. Supreme Court, January 14, 2013*) (*memorandum decision*).

10. That "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." Losh v. McKenzie, 166 *W.Va. 762, 771, 277 S.E.2d 606 (1981)*.

11. That "[t]o be competent to stand trial, a Defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceeding against him." State v. Hatfield, 206 *W.Va. 125, 522 S.E.2d 416 (1999)*.

12. That there "is a strong presumption in favor of the regularity of court proceedings." State ex rel. Scott v. Boles, 150 *W.Va. 453 (1966)*.

13. That "effective assistance of counsel is not synonymous with successful counsel and effective representation need not necessarily result in acquittal." Russell v. Peyton, 207 *Va. 469, 150 S.E.2d 530 (1996)*.

APPLICATION OF FINDINGS TO CONCLUSIONS

1. That Petitioner has knowingly, expressly, and permanently waived the following grounds raised in the instant proceeding: trial court lacked jurisdiction, more severe sentence than expected, and excessive sentence. Additionally, this Court finds that even in the absence of such waiver, none of these grounds has any merit.

2. That Petitioner has not presented any substantive evidence as to how the Grand Jury proceedings were irregular, how the composition of the Grand Jury was flawed, how the Grand Jury transcripts would have been helpful, how they may have provided impeachment material, or how that material could have led to a different result and as such, Petitioner has failed to demonstrate that any alleged failure by his habeas counsel to obtain said transcripts constituted ineffective assistance of counsel. The Court, further, finds that Petitioner did concede that his trial counsel had a copy of the Grand Jury transcript at counsel table during the underlying criminal trial.

3. That Petitioner has not presented any substantive evidence supporting his claim that he was not competent at the time of trial. To the contrary, this Court had the opportunity to observe Petitioner during trial and this Court did not observe anything that gave this Court concern respecting Petitioner's competency and that Petitioner's conduct subsequent to his conviction undermines his allegation in this regard.

4. That Petitioner has consistently failed, both in the prior habeas proceeding and in the instant proceeding, to demonstrate that his trial counsel was ineffective and, to the contrary, all evidence considered by this Court clearly indicates that trial counsel was competent and effective in their representation of Petitioner. Further, this Court has previously adjudicated the issue concerning the alleged disparaging remark attributed to trial counsel, Tom Dyer, Esq., in its detailed Opinion Order in Case No. 05-C-152-1.

5. That Petitioner has failed to prove that prior habeas counsel was ineffective by failing to subpoena a witness to testify in support of his allegation that one of Petitioner's trial counsel made a disparaging remark about him during a recess in the criminal proceedings because: 1) Even if such remark were made it does not refute all

evidence previously considered by this Court demonstrating effective and zealous representation of Petitioner by trial counsel; and 2) Petitioner failed to subpoena said witness for this proceeding;

6. That Petitioner failed to prove that prior habeas counsel was ineffective by failing to present expert testimony in support of his contention that trial counsel was ineffective because: 1) This court has previously considered significant evidence in respect to the issue of the effectiveness of trial counsels' representation and found that trial counsel was effective in their representation of Petitioner; 2) that expert testimony would not have been sufficient to contradict the significant amount of evidence demonstrating trial counsels' effective representation; 3) that Petitioner has failed to provide any information as to who such an expert would be, what their testimony would be, what acts or omissions of trial counsel they would testify to or how any such acts or omission had an effect on the outcome of Petitioner's matter; and 4) that Petitioner failed to call such a witness in this proceeding;

7. That Petitioner has failed to meet either prong of the test espoused in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and subsequently adopted by [the West Virginia Supreme Court of Appeals] in State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), used to determine ineffective assistance of counsel;

8. That this Court finds and concludes that prior habeas counsel's, Steve Fitz, Esq.'s, representation of Petitioner in Case No. 05-C-152-1 was competent and effective;

9. That because Petitioner again raised grounds previously adjudicated in Case No. 05-C-152-1 (e.g., *inter alia*, jury instructions, allegations of a disparaging

remark by one of Petitioner's trial counsel to a victim's family member, mental competency at time of trial, ineffective assistance of trial counsel, prejudicial statements, sufficiency of evidence), the Court believes that a certified copy of its prior September 4, 2008, Opinion Order should be and the same is hereby incorporated herein by reference (and attached as an Exhibit) as if the same were more fully set forth herein; and,

10. That Petitioner's July 11, 2011, and September 11, 2012, petitions for a writ of habeas corpus alleging ineffectiveness of previous habeas counsel should be denied in their entirety.

RULINGS

It is, therefore, accordingly **ORDERED** that Petitioner Brian E. Ashcraft's July 11, 2011, and September 11, 2012, petitions for a writ of habeas corpus be and the same are hereby **DENIED**.

The Circuit Clerk is **DIRECTED** to send certified copies of this Order to the following:

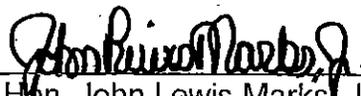
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Counsel for Respondent

The Circuit Clerk is, further, **DIRECTED** to remove this case from the Court's docket.

ENTER: _____

June 4, 2015



The Hon. John Lewis Marks, Jr., Judge