STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Stoney G. Riley, Petitioner

vs) **No. 11-0413** (Berkeley County 09-C-639)

Adrian Hoke, Warden,
Respondent

FILED
February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Berkeley County, wherein the petitioner's petition for writ of habeas corpus was denied. This appeal of the order denying his habeas petition was timely perfected by counsel, with Petitioner Riley's record accompanying the petition. Respondent Hoke filed a response in support of the circuit court's decision.

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.

In 2006, Petitioner Riley was convicted by a jury of second degree robbery and conspiracy to commit robbery. The jury acquitted the petitioner of grand larceny. Thereafter, the State sought recidivism and another jury found that the petitioner was a recidivist offender. Consequently, the circuit court sentenced the petitioner to ten to eighteen years for second degree robbery and one to five years for conspiracy to commit robbery; both sentences were ordered to run consecutively. Petitioner's appellate counsel thereafter appealed, which the Court refused. Petitioner Riley filed a petition for writ of habeas corpus with the circuit court, which it denied without conducting an evidentiary hearing. Petitioner Riley now seeks reversal of this order, arguing ten assignments of error, one of which is ineffective assistance of counsel.

"In reviewing challenges to 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 *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

The petitioner raises nine issues alleging ineffective assistance of counsel. The petitioner argues that his trial counsel was ineffective because she failed to: (1) properly investigate his alibi defense; (2) properly relay a plea offer to the petitioner; (3) have the 7-Eleven store video of the alleged robbery forensically analyzed; (4) present proper evidence at trial and properly prepare for trial; (5) request grand jury minutes or grand jury transcripts; (6) assert or explore a mental defense/diminished capacity; (7) communicate with the petitioner; and (8) inform the petitioner that his prior criminal conviction could be used against him to enhance his sentence. The petitioner also argues that his appellate counsel was ineffective because he failed to provide an adequate appeal.

In addition to the petitioner's arguments regarding ineffective assistance of counsel, the petitioner argues nine other assignments of error: (1) the circuit court committed reversible error by denying petitioner's petition for habeas corpus without an evidentiary hearing because there was probable cause to believe that petitioner was entitled to certain relief; (2) the circuit court committed reversible error when it failed to find that petitioner's due process rights were violated because the petitioner was not present during all critical stages of his criminal proceeding; (3) the circuit court committed reversible error when it failed to find that the petitioner's sentence was in violation of the Eighth Amendment of the United States Constitution and Article III of the West Virginia Constitution; (4) the circuit court committed reversible error when it failed to find that petitioner's due process rights were violated because the State failed to meet its burden in proving that petitioner was guilty of the crimes for which he was convicted; (5) the circuit court committed reversible error when it failed to find that petitioner's due process rights were violated by upholding the ruling of the trial court which allowed pictures of certain prejudicial evidence to be seen by the jury; (6) the circuit court committed reversible error when it failed to find that petitioner's due process rights were violated by upholding petitioner's illegal sentence which wrongfully applied the West Virginia recidivist statute and improperly sentenced petitioner to a total effective sentence of eleven to twenty-three years; (7) the circuit court committed reversible error when it failed to find that petitioner's due process rights were violated by upholding petitioner's sentence even though said sentence was grossly disproportionate to that of his co-defendant; (8) the circuit court committed reversible error when it failed to find that petitioner's due process rights were violated because the amount of cumulative error improperly prejudiced petitioner; and (9) the circuit court committed reversible error when it determined that petitioner's remaining arguments had been waived by his failure to raise said issues on appeal.

The Court has carefully considered the merits of each of the petitioner's arguments as set forth in his petition for appeal. Finding no error in the denial of habeas corpus relief, the Court fully incorporates and adopts the circuit court's detailed and well-reasoned "Order Denying Petition for Writ of Habeas Corpus," entered October 4, 2010, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

C. Prezioso

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

STATE OF WEST VIRGINIA
ex rel. STONEY G. RILEY,

Petitioner,

v.

CIVIL ACTION 09-C-639
Underlying Criminal Action
Numbers: 05-F-252
JUDGE WILKES

WILLIAM HAINES, Warden
Huttonsville Correctional Center,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the Court this 4 day of October 2010, pursuant to Petitioner's Petition for Writ of Habeas Corpus. Upon the appearance of Petitioner, Stoney G. Riley, by counsel Christopher Prezioso, and Respondent, William Haines, by counsel Christopher C. Quasebarth.

FINDINGS OF FACT

1. On October 19, 2005, Petitioner, Stoney G. Riley, was charged by Indictment of three violations of West Virginia law, being: Count 1-Robbery in the Second Degree, Count 2-Conspiracy, and Count 3-Grand Larceny. Each of these three charges stemmed from the robbery of a 7-Eleven convenience store on April 5, 2004.

2. The underlying criminal case was styled State of West Virginia v. Stoney G. Riley, Berkeley Count Circuit Court Case No. 05-F-252. For all pre-trial and trial matters Petitioner was represented by appointed counsel Deborah Lawson.

3. A pre-trial hearing was held on January 23, 2006. At the pre-trial hearing the Court denied Riley's Motions to Suppress photographs of certain clothing and an out-of-court identification by a 7-Eleven employee. Also, at the pre-trial hearing the Court reviewed the State's plea offer, which would have resolved all outstanding cases with Petitioner receiving a one-to-three year sentence. Petitioner acknowledged at the hearing that he rejected the plea offer.

4. On January 24, 2006, a jury trial was held in Petitioner's criminal case, where a jury found Petitioner guilty of Count 1-Roberry in the Second Degree and Count 2-Conspiracy. At trial the State offered testimony from five witnesses, which were Jenny Spoonire, Pamela Vincent, Sergeant Johnson, Deputy Sherman, and Deputy Shetley. Riley's counsel offered no evidence.

5. On January 30, 2006, the trial court entered an Order Dismissing Count Three of the Indictment, which dismissed with prejudice the Grand Larceny charge against Petitioner.

6. On February 15, 2006, a jury found that Petitioner was a recidivist offender based upon a prior California felony conviction.

7. Sentencing was held on March 24, 2006, where Riley was sentenced to an indeterminate sentence of 10 to 18 years under Count One and an indeterminate sentence of 1 to 5 years under Count Two. These two sentences were ordered to run consecutively, with an effective sentence date of January 27, 2004.

8. New counsel, S. Andrew Arnold, was appointed for the appellate process. A direct appeal was filed but later refused by the West Virginia Supreme Court of Appeals. The appeal was made on six grounds: 1) trial court error in refusing the lesser-included instruction on petit larceny; 2) trial court error in admitting photos of evidence destroyed by the police; 3) trial

court error in refusing an instruction that the destruction of evidence can be inferred to be unfavorable to the State and may create a reasonable doubt as to guilt; 4) trial court error in refusing to suppress the eyewitness identification evidence; 5) trial court error in admission of a fingerprint card at the recidivist trial; and 6) trial court error in admitting expert testimony on ultimate issue.

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 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 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 adjudication of the matter,' the dismissal is without prejudice." *Markley v. Coleman,* 215 W. Va. 729, 734 (2004), *see* R. Hab. Corp. 4(c). However, rather than dismissing without prejudice the court may "summarily deny unsupported claims that are

randomly selected from the list of grounds," 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 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 Writ of Habeas Corpus is DENIED. The Court is satisfied by the pleadings and exhibits to find that the Petitioner is entitled to no relief, and below the Court will discuss how each contention is here denied and how there is no need for an evidentiary hearing.

I. Petitioner's Claim of Ineffective Assistance of Counsel

Petitioner here raises the contention of ineffective assistance of counsel pertaining to his trial and appellate counsels' 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. Strogen 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. 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).

First, Petitioner argues that his trial counsel failed to properly investigate all defenses available to Petitioner, namely an alibi defense. Petitioner argues that he informed trial counsel that his parents were willing to testify to his whereabouts on the night of the crime. Trial counsel did not call Petitioner's parents as witnesses, and Petitioner argues that Lawson never investigated this possible defense. Petitioner's Exhibit 1 is a letter from Joyce and Larry Riley, Petitioner's parents. Petitioner's parents state that they were with Petitioner until 12:00 p.m. on April 4, 2004, when they went to bed. Also, the letter states that they set an alarm to wake up at 2:30 p.m. to ensure that they could take Petitioner's friend to work on time. From Petitioner's argument and this Exhibit it is clear that there was no prejudice from trial counsel's failure to investigate and raise this defense. The robbery and conspiracy, for which Petitioner was convicted, occurred just after 2:00 a.m. on April 5, 2004. The letter itself states that the Riley's knew where Petitioner was the afternoon before the crime, not during the crime. But, even if you assume that Petitioner's parents accidentally wrote p.m. instead of a.m., the timeframe offered still does not show that they knew of Petitioner's whereabouts during the commission of the crime. Also, the letter doesn't say that at 2:30 p.m., or possibly 2:30 a.m., they took Petitioner to work, instead it says they took Petitioner's friend to work. Finally, the evidence at trial placing Petitioner at the scene of the crime was significant with an eye-witness description of the Petitioner and his codefendant, a voice identification, Petitioner's vehicle and clothing matched witnesses descriptions, and evidence found in the vehicle tying Petitioner to the crime. Therefore, Petitioner's parents' questionable story of two-and-a-half hours of sleep is insufficient

to overcome the wealth of evidence against Petitioner. Beyond the lack of prejudice, Petitioner's parents letter indicates that trial counsel, Lawson, spoke with the Riley's before trial, informing them they may receive a subpoena to testify about Petitioner's whereabouts. Trial counsel must have investigated the case in order to tell Petitioner's parents this warning, and then apparently decided not to pursue this defense, a strategic decision this Court will not overrule. Therefore, from the Exhibit presented by Petitioner, the Court sees that there is no prejudice and trial counsel's actions appear objectively reasonable, therefore no evidentiary hearing is necessary.

Petitioner's second argument for ineffective assistance of counsel states that trial counsel did not properly relay the plea offer from the State. Petitioner also argues that when the plea offer was discussed at the pre-trial hearing on January 23, 2006 he was improperly removed from the courtroom. A review of the transcripts available show that the plea was properly relayed and therefore there is no ineffective assistance of counsel, and no need for an evidentiary hearing. First, at a January 6, 2006 status hearing, trial counsel informed the trial court that Petitioner has rejected a plea offer. Petitioner was present at that time and made no objections. Furthermore, during the January 23, 2006 pre-trial hearing, the trial court stated that Petitioner was outside the courtroom but was "able to partake in the proceeding and has counsel with him there." Pre-Trial Hearing Transcript, January 23, 2006, p. 3. Petitioner's counsel also informed the court during the January 23, 2006 pre-trial hearing that the plea was rejected, a statement the Petitioner was able to hear from outside the court and to which he could have voiced an objection to the counsel sitting with him. Counsel sitting with Petitioner outside court appears from the transcript to be Mr. Adams. It is clear from the transcript that Petitioner heard the pre-trial proceedings because the judge asked Petitioner if he heard the discussion concerning his plea offer, to which Petitioner answered yes. Then the Court asked Petitioner if his trial counsel relayed the plea

offer and Petitioner answered in the affirmative. Petitioner now claims that he was just saying yes to all questions, but the Court finds this assertion suspect. "[T]here 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). A defendant's responses before the Court carry heavy weight in regards to that person's rights and it is highly suspect to believe that a defendant would take lightly the questions placed before him. Furthermore, the transcript states that Petitioner was in a position to hear the proceedings and make objections to secondary counsel. There is no reason to now second-guess the truth of Petitioner's ability to hear the proceedings or to take those proceedings seriously, and to respond honestly when directly addressed by the trial court.

The third argument presented by Petitioner was that trial counsel was ineffective for failing to have a video surveillance tape forensically analyzed in order to present an expert at trial to refute the State's claims in regards to said tape. There is no showing of prejudice based on counsel's actions in this matter. The video surveillance tape was not the only evidence presented by the State. From the January 23, 2006 pre-trial hearing the discussion of the surveillance tape indicated it was of medium quality and did not clearly show the individuals. Instead, the stronger evidence was from eye witnesses and from an out-of-court identification by one of the store clerks. There was sufficient evidence to convict Petitioner without the surveillance tape, therefore he was not prejudiced by the lack of a forensic evaluation of the tape.

Fourth, Petitioner argues that trial counsel's performance at trial was deficient. First, Petitioner argues that trial counsel failed to present any evidence in defense. What evidence to present at trial is a strategic decision, which means it is unlikely that the Court will override such a decision. Also, Petitioner does not state what evidence the trial counsel failed to present that

would have shown Petitioner was not the same person identified at the scene of the crime. The Court has already addressed Petitioner's claim that his parents should have been called as witnesses, finding the evidence is questionable and that trial counsel was not unreasonable in failing to call them as witnesses. Beyond Petitioner's parents the Court sees no claims of exculpatory evidence. Second, Petitioner argues that trial counsel did not object to evidence of Jenny Spoonire's out-of-court identification based on defendant's stutter. This issue was fully addressed at the January 23, 2006 pre-trial hearing. The trial court found at the pre-trial hearing that the out-of-court identification was reliable because of the proximity between the witness and the Petitioner, the amount of time the witness had for observation, and the limited amount of time between the crime and the out-of-court identification. There is no showing that the Court's decision was clearly wrong, therefore the Court can not fault trial counsel for not objecting at trial. The transcripts from the trial and pre-trial hearing are clear and there is no need for an evidentiary hearing.

As a fifth contention, Petitioner argues that trial counsel's performance was ineffective because Lawson failed to request the grand jury transcripts. Despite his general claim, there is no showing as to why Petitioner was entitled to the grand jury transcripts. Furthermore, there is no showing as to why the outcome at trial would have been different if the transcripts would have been requested and received. Without any showing of prejudice, or a showing of necessity to request the transcripts, the Court does not see any reason to find trial counsel's performance ineffective. Petitioner does not present a valid contention therefore there is no need for an evidentiary hearing on this matter.

Next, Petitioner contends that trial counsel failed to investigate and raise a diminished capacity or mental defense at trial. Petitioner provides absolutely no evidence in support of any

diminished capacity or mental defense. There is no claim as to facts that would have put trial counsel on notice of such a defense. In fact, the exhibits presented by Petitioner show that his mental capacity is not diminished. Petitioner provides certificates showing his completion of various programs while in the penitentiary, including a certificate stating that Petitioner received his General Education Degree. Petitioner's ability to participate in these programs and to achieve the equivalent of a high school diploma run counter to any claim of diminished capacity. The lack of any claim or assertion of facts that would have put trial counsel on notice, as well as Petitioner's own exhibits, show that this contention is without merit and no evidentiary hearing is necessary.

In Petitioner's seventh claim for ineffective assistance of counsel, the complaint is that trial counsel failed to communicate with her client. Petitioner claims that trial counsel did not meet with Petitioner once during the criminal proceedings and that the first time trial counsel discussed any plea offers or defense strategy was at the pre-trial conference. "Counsel must confer with his client without undue delay and as often as necessary, to advise him of his right [sic] and to elicit matters of defense or to ascertain that potential defenses are unavailable." *Syl. Pt. 1, State v. Hottle*, 197 W. Va. 529 (1996). It is clear from the exhibits in this Petition for Writ of Habeas Corpus that trial counsel met the standard for a reasonable attorney. Petitioner's claim that trial counsel never met with him is refuted by Petitioner's own exhibit. Exhibit 2 of Petitioner's Petition is a log of trial counsel's hours spent on Petitioner's criminal case. The log includes multiple entries for phone calls with her client, letters sent to Petitioner, and meeting with the Petitioner on October 4, 2005. The standard requires counsel to confer with their client, not necessarily to meet face-to-face, and the amount of phone calls and correspondence shown by Petitioner's exhibit meets the objective reasonableness standard. Second, the claim that the

State's plea offer was never relayed to Petitioner is clearly wrong based on the transcript. At the January 6, 2006 status hearing trial counsel told the trial court that Petitioner rejected a plea offer, and Petitioner did not object. Petitioner was able to hear the proceedings of the January 23, 2006 pre-trial hearing when trial counsel again informed the trial court that Petitioner rejected the plea offer. Petitioner did not raise an objection before the trial court or to secondary counsel sitting with him. The transcript and Petitioner's own Exhibit 2 shows that this contention has no merit, therefore there is no need for an evidentiary hearing.

Eighth, Petitioner contends that his appellate counsel failed to provide an adequate appeal. This contention is based on appellate counsel's failure to raise the following issues on appeal: 1) challenge court's denial of Motion to Suppress, 2) challenge to denial of Motion for Acquittal, 3) court admitting unauthenticated evidence, 4) challenge to sufficiency of evidence, 5) argument to suppress out-of-court identification by Witness Jenny Spoonire. First, it is clear from the appeal that appellate counsel did raise arguments of trial error concerning the court's decision on Petitioner's Motion to Suppress. Second, Petitioner provides no evidence of trial error concerning the Motion for Acquittal. Therefore, it is unclear how Petitioner believes the appellate counsel has prejudiced him by not raising this contention on appeal. The third contention is unclear, because Petitioner provides no specific information as to what unauthenticated evidence Petitioner wanted challenged on appeal. The appeal clearly raised the issue of trial error in admitting photographs of destroyed evidence, which from the trial transcript is the closest thing to unauthenticated evidence this Court can find. Later in this Order the Court will discuss how the evidence at trial was sufficient. Therefore, there is no prejudice resulting from appellate counsel not raising this issue on appeal. Finally, the appellate counsel clearly raised the issue of trial court error in allowing Jenny Spoonire's out-of-court identification, so

Petitioner's contention that the appeal was deficient for failure to raise suppression issues is without merit. The transcript and the appeal filed by appellate counsel are sufficient to show that Petitioner's contentions are without merit and therefore should be denied without an evidentiary hearing.

Petitioner's final claim for ineffective assistance of counsel states that trial counsel never informed Petitioner of the possibility of an enhanced sentence based on Petitioner's previous convictions. Even assuming that Petitioner's contention is true and trial counsel never discussed this issue with Petitioner, there is no showing of prejudice. The first possibility for prejudice may have been in rejecting the plea offer. But, the transcript from the January 23, 2006 pre-trial hearing shows that the plea offer did not contain an offer by the State to forego any recidivist action, therefore Petitioner's knowledge of the recidivist consequences were not relevant to his decision to accept or reject the plea offer. Furthermore, Petitioner had a full and fair opportunity to challenge his criminal charge at trial. Petitioner then was represented by counsel and had a full and fair opportunity to challenge the recidivist action. There is no need for an evidentiary hearing because even assuming unreasonable actions by trial counsel, there is no showing of prejudice.

B. Violation of Due Process Rights When Petitioner Was Not Present At All Critical Stages of Criminal Proceeding

In this contention, Petitioner argues that he was improperly removed from the courtroom during the pre-trial hearing on January 23, 2006. The transcript does show that the Petitioner was outside of the courtroom in order to avoid tainting any in-court identification, since the Court had to hear testimony from witnesses at pre-trial who would later provide an in-court identification of Petitioner at trial. "The defendant has a right under Article III, Section 14 of the

West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." *Syl. Pt. 4, State v. Brown,* 210 W. Va. 14 (2001). While Petitioner has raised a proper state constitutional right, the transcript clearly shows that Petitioner was present at all critical stages. Being present does not require that Petitioner sit at the defense table, instead there are various alternate means to allow for a Defendant's presence through technology. A clear example gaining more and more popularity is video conference. In this case, Petitioner was present because he was in a room adjoining the court room where it was set-up so that he could hear all of the proceedings. A secondary defense counsel was with Petitioner to ensure that his rights were protected and to allow him to discuss the court proceedings and raise any objections with the secondary counsel. Petitioner was asked upon returning to the courtroom if he could hear everything that had gone on while he was in the adjoining room, and the Petitioner responded in the affirmative. Finally, Petitioner's rights were clearly being considered by the trial court, because the court established an adjoining listening station to avoid tainting any in-court identification through undue suggestion when the witnesses saw Petitioner sitting in the courtroom before trial. Therefore, it is clear from the transcript that this contention is without merit. Also, Petitioner did waive this contention by not raising it on appeal. "[T]here 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).

C. Violation of Eight Amendment and Article III of the West Virginia Constitution for Improper Sentence

Upon conviction Petitioner was given an indeterminate sentence of eleven (11) to twenty-three (23) years in the penitentiary of West Virginia. Petitioner argues that this sentence is grossly disproportionate to the crimes for which Petitioner was convicted. "Sentences imposed by the trial court, if within statutory limits and if not based on some umpermissible factor, are not subject to appellate review." *Syl. Pt. 6, State v. Woodson,* 222 W. Va. 607 (2008). There is no claim raised by Petitioner that the court considered any impermissible factors when issuing the sentence in this case. Furthermore, Petitioner's sentence is within the statutory limits. Therefore, there is no merit to the challenge that this sentence is grossly disproportionate and no evidentiary hearing is necessary for this contention.

D. State Did Not Meet Its Burden in Proving Petitioner's Guilt Beyond a Reasonable Doubt

Petitioner here challenges the sufficiency of the evidence presented at trial, arguing that it is clear that no reasonable jury could have found Petitioner guilty because the evidence was insufficient for the State to meets its burden.

> "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 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).

The State provided eye-witness testimony, an out-of-court identification of the Petitioner's voice, a video surveillance tape, and testimony from investigating officers

concerning the Petitioner driving a car and wearing clothes that matched those described at the scene of the crime. Petitioner raises various contentions about the validity of the testimony and evidence offered at trial and the inferences that can be taken from that evidence. But, the standard for a challenge to the sufficiency of evidence clearly states that the court must take the evidence in the light most favorable to the prosecution and make all inferences and credibility assessments in favor of the prosecution. There is clearly enough evidence shown through the transcripts to support the jury's verdict in this case, therefore this contention has no merit and there is no need for an evidentiary hearing.

E. Violation of Due Process Rights When Court Wrongfully Allowed Pictures of Certain Prejudicial Evidence to be Seen by the Jury

Petitioner raises the contention that certain photographs should have been suppressed, and allowing them in as evidence was a trial error that denied Petitioner his right to a fair trial. Petitioner argues that the trial court improperly denied the motion in limine to exclude photographs of clothing found in Petitioner's vehicle, when the clothing had been destroyed. Since Petitioner has had a full and fair adjudication of this matter at the January 23, 2006 pre-trial hearing, he must show that the trial court's decision is clearly wrong. Petitioner argues that under *State v. Osakalumi*, the Court should have denied submission of the photographs because the actual clothing should not have been destroyed.

> "When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what

> consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction." *Syl. Pt. 2, State v. Osakalumi,* 194 W. Va. 758 (1995).

The trial court considered this argument at the January 23, 2006 pre-trial hearing and found that the pictures should be admitted. The Court decided to allow the photographs because there was no showing, or even allegation, of bad faith on the part of the investigating officer. Furthermore, the trial judge distinguished articles of clothing from evidence that needed to be tested. The trial court reasoned that this case is different from *State v. Osakalumi* or for instance a case where DNA testing was necessary, in that the destruction of these clothes was not as detrimental because the State did not test these items for forensic evidence and then deny the defense an opportunity for independent evaluation. Instead, the photographs were merely being used to support the officer's description of the clothes found in Petitioner's vehicle. Therefore, since there was no bad faith on the part of the investigating officers there is no need to deny the photographs admission. The reasoning by the Court follows the elements laid out in prior case law and there is no reason to find this reasoning clearly wrong. Therefore, this contention has no merit and there is no need for an evidentiary hearing on this matter.

F. Improper Sentence Due to Court Wrongfully Applying the West Virginia Recidivist Statute

Petitioner claims that his indeterminate sentence of eleven (11) to twenty-three (23) years in the penitentiary is improper. Petitioner claims that the trial court improperly applied West Virginia Code § 61-11-18. The statute provides that when a person is previously convicted of a felony, "in such case the court imposes an indeterminate sentence, the *minimum term* shall be

twice the term of years otherwise provided for under such sentence." W. Va. Code § 61-11-18 (2010) (Emphasis Added). Petitioner was convicted of robbery in the second degree which generally carries an indeterminate sentence of five (5) to eighteen (18) years. W. Va. Code § 61-2-12. Petitioner was also convicted of conspiracy to commit robbery, which carries an indeterminate sentence of one (1) to five (5) years. W. Va. Code § 61-10-31 (2010). The Sentencing Order issued by the trial court on September 25, 2006 issued Petitioner an indeterminate sentence of ten (10) to eighteen (18) years for his conviction for robbery, a felony and a second offense, and an indeterminate sentence of one (1) to five (5) years for his conviction for conspiracy to commit robbery, for a total sentence of eleven (11) to twenty-three (23) years. This matter has been previously fully and fairly adjudicated when the Court considered Petitioner's Motion for Correction of Illegal Sentence. Therefore, Petitioner must show that the trial court's ruling was clearly wrong. Petitioner argues here, and in his motion, that five years should have been added to the end of his sentence not the beginning, giving him a sentence of six (6) to twenty-eight (28) years. The trial court found that the statute clearly refers to the minimum term of the sentence to which the recidivist enhancement should be added. The trial court's reading of the statute is correct, therefore it can not be shown to be clearly wrong.

Petitioner also contends that the evidence presented at the recidivist trial was insufficient to show that Petitioner was previously convicted of a felony in California. Also, Petitioner argues that the conviction for a felony in California was for a crime that would be a misdemeanor in West Virginia. First, Petitioner provides no proof or raises no specific contention about the sufficiency of the evidence at the recidivist trial. The transcript from those proceedings provide evidence that the State clearly showed that Petitioner agreed to a plea agreement in which he pled guilty to a felony in California, which qualifies as a conviction.

Also, the State proved that Petitioner was the same person as the Stoney Riley convicted in California. There is no evidentiary hearing necessary since the transcript from the recidivist hearing clearly shows that Petitioner's contention has no merit. Also, there is no case law that states that a felony conviction in another state that would otherwise be a misdemeanor in West Virginia can not be used as a prior conviction under the recidivist statute. Petitioner's argument is without support under West Virginia law.

Finally, Petitioner has submitted a renewed Motion for Correction of Illegal Sentence along with his Petition for Writ of Habeas Corpus. The only new argument raised in this motion is that the California conviction is based on an improper plea agreement. Petitioner's argument is not proper before this Court. A recidivist hearing is not meant to challenge the sufficiency of the prior conviction, only if the person previously convicted is the same person now before the court. Therefore, upon a habeas challenging Petitioner's recidivist hearing the court can not go back and evaluate the propriety of a California conviction; that issue must be addressed through the appropriate procedures under California law. Therefore, Petitioner's contention remains without merit and since this is a matter of law there is no need for an evidentiary hearing.

G. State Constitutional Violation From Sentence That Was Grossly Disproportionate to That of His Codefendant

Petitioner now raises the contention that his sentence is unconstitutional when compared with the sentence his codefendant received. "Disparate sentence for codefendants are not per se unconstitutional. Courts consider many factors such as each transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone." *Syl. Pt. 2, State v. Buck*, 173 W. Va. 243 (1984). The sentence

received by Andre Juste, the codefendant, was one (1) year in the regional jail, which was the result of a plea agreement. There is no constitutional violation here because of the clear differences between the codefendants. Petitioner was the prime mover, in that he was the person who actually interacted with the store clerk to effectuate the robbery. Also, Petitioner's sentence is much larger because of the recidivist enhancement. Finally, the fact that Juste accepted a plea agreement is evidence of his post-arrest conduct of accepting responsibility and potentially showing remorse for his crimes. There are various factors that support the difference in sentences and there is no showing of a constitutional violation, the evidence before the Court is sufficient and there is no need for an evidentiary hearing.

H. Incorporated Arguments Waived Due to Failure to Raise Upon Appeal

Petitioner included additional arguments in his Petition for Writ of Habeas Corpus that were completed without the assistance of counsel. The three at issue here are Petitioner's contention that the indictment was insufficient, that Petitioner was impermissibly charged and convicted of conspiracy, and a violation of the Confrontation Clause of the United States Constitution. "[T]here 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). These issues were not raised upon appeal and this Court has already determined the appellate counsel's actions were reasonable in filing the appeal, therefore each of these contentions are waived.

I. DENIAL OF FAIR TRAIL THROUGH CUMMULATIVE EFFECT OF ERRORS

Petitioner in his final contention argues that the cumulative effect of the various errors alleged above lead to a constitutional violation and subrogation of his right to a fair trial. This

argument has no merit because the Court has already found that each alleged error or constitutional violation is without merit. When no error is shown then the cumulative error doctrine does not apply, therefore there can be no cumulative error in this case. *See State v. Knuckles*, 196 W. Va. 415 (1996).

J. Losh List

Petitioner completed a Checklist of Grounds for Post-Conviction Habeas Corpus Relief, which follows the list of grounds provided by the West Virginia Supreme Court of Appeals in *Losh v. McKenzie*. Petitioner specifically waived the following ground for relief: trial court lacked jurisdiction, involuntary guilty plea, language barrier to understanding the proceedings, unintelligent waiver of counsel, improper venue, and question of actual guilt upon an acceptable guilty plea. In addition, 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). Even though Petitioner did not expressly waive many of the claims in the *Losh* list, any claim that was not addressed above is hereby summarily denied because Petitioner provided no support for the claim in his Petition for Writ of Habeas Corpus.

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 Petitioner is denied the relief request in his Petition for Writ of Habeas Corpus.

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

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

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: Teresa L. Cooper
Deputy Clerk