

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

**Gregory Brent Christian, Petitioner
Below, Petitioner**

vs.) No. 11-0441 (Cabell County 07-C-572)

**Teresa Waid, Warden,
Respondent Below, Respondent**

FILED

June 29, 2012

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

MEMORANDUM DECISION

Petitioner Gregory Brent Christian appeals, pro se, the circuit court's order denying his petition for a writ of habeas corpus following a hearing. The respondent warden, by Laura Young, her attorney, filed a timely response, to which petitioner filed a reply brief.

This Court has considered the parties' briefs and the record on appeal. 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 record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

Petitioner was indicted on one count of aggravated robbery of a Marathon gas station and on one count of aggravated robbery of a Pizza Hut (separate incidents). Petitioner was also charged with malicious assault on a police officer. Petitioner pled guilty to both first degree robbery counts and to the malicious assault charge.

On September 04, 2003, the circuit court sentenced petitioner to concurrent terms of twenty-five years in prison for the two aggravated robbery counts. These concurrent twenty-five year terms were to be served consecutively to a three to fifteen year term for malicious assault on a police officer. Finally, these state prison terms were all to be served consecutively to a federal firearms sentence of five years.

On three different occasions, petitioner filed an original jurisdiction petition for a writ of habeas corpus in this Court. All three original jurisdiction petitions were summarily refused. On November 4, 2005, petitioner filed for habeas relief in federal district court. The district court subsequently entered an order holding petitioner's federal petition in abeyance pending the exhaustion of his state remedies. Petitioner then filed the instant petition for a writ of habeas corpus in the circuit court on July 6, 2007.

Petitioner asserted, *inter alia*, his actual innocence at least of the robbery charges. Mr. Christian asserted that his identity was mistaken for someone else and that co-defendant Richard

Adams had wrongfully accused him in exchange for a special deal from the police. Petitioner also asserted that he did not wound the police officer, contending that it was the officer's partner who had wounded him.

Petitioner's petition came on for an omnibus hearing on November 30, 2011. Petitioner represented himself with an attorney acting as co-counsel. On February 11, 2011, in a twenty-two page order, the circuit court addressed various grounds of relief and denied petitioner's petition. On appeal, petitioner raises various issues including ineffective assistance of trial counsel and the alleged involuntariness of his guilty plea. The respondent warden disputes petitioner's allegations.

This Court has carefully considered the merits of each of petitioner's arguments as set forth in his brief and in his reply brief. 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," dated February 11, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 29, 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

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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

GREGORY BRENT CHRISTIAN,
Petitioner

v.

TERESA WAID, WARDEN,
Respondent

JOHN L. CHANDLER
CLERK
CABELL WV

CIVIL ACTION NO. 07-C-572
JUDGE JOHN L. CUMMINGS

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

This matter came before this Court on July 6, 2007, when the Petitioner filed his pro se Petition Under W.Va. Code § 53-4A-1 for Writ of Habeas Corpus and Eligibility for Assignment of Legal Counsel. Petitioner was initially assigned legal counsel, however, an order was entered on November 12, 2008, and again on December 15, 2008, allowing Petitioner to represent himself in this action. In the December 15, 2008, order, this Court found that Petitioner would benefit from standby counsel and appointed Adrian Hoosier, Esq., as standby counsel for the Petitioner. On July 30, 2009, this Court entered an order changing the status of Adrian Hoosier, Esq., from standby counsel to lead counsel. Petitioner was allowed to continue as co-counsel in this matter. On April 13, 2010, this Court appointed Glen Conway, Esq., as legal counsel in this matter, and Petitioner continued in his position as co-counsel. This matter came on for an omnibus hearing before this Court on November 30, 2010.

The Court has considered the amended Petition, the supporting memoranda of law, the testimony at the hearings, and has reviewed all pertinent legal authorities. As a result of these deliberations, and for the reasons stated below, this Court has concluded that the Petitioner has not established a basis for his Petition and that Petitioner's Petition for a Writ of Habeas Corpus Ad Subjiciendum should be denied.

ISSUES

Due to the numerous filings in this matter, it is difficult to determine exactly what issues Petitioner desired to raise. Petitioner alleges the following assignments of error in the amended petition:

1. Whether Petitioner was denied the right to a speedy trial.
2. Whether the plea of guilty was voluntary.
3. Whether counsel failed to take a timely appeal
4. Whether the prosecutor suppressed exculpatory evidence.
5. Whether Petitioner had effective assistance of counsel.
6. Whether there were irregularities in Petitioner's arrest.
7. Whether James Adams' statements are reliable.
8. Whether the prosecutor made prejudicial statements.
9. Whether Petitioner is actually innocent so as to negate the plea of guilty.
10. Whether the trial court lacked jurisdiction.

At the hearing held on November 30, 2010, Petitioner stated that he desired to raise the following grounds from Petitioner's Checklist of Grounds Asserted in Post-Conviction Habeas Corpus Proceedings entered in the records of the Circuit Clerk on January 9, 2009 (hereinafter Petitioner's Checklist):

- a. Trial court lacked jurisdiction
- b. Involuntary guilty plea
- c. Constructive denial of counsel
- d. Suppression of helpful evidence by the prosecutor
- e. Ineffective assistance of counsel
- f. Claims of prejudicial statements by the prosecutor
- g. Question of guilt upon an acceptable guilty plea
- h. Question of actual innocence

This Court determined that any other grounds stated by Petitioner at the hearing fell into one of the categories listed above as grounds raised from Petitioner's Checklist.

FACTS & PROCEDURAL HISTORY

On September 13, 2002, Petitioner was named in a three-count indictment, State v. Gregory Brent Christian, 02-F-160. The indictment alleged two counts of First Degree Robbery and one count of Malicious Assault on a Police Officer. The indictment alleged that, in early

June, 2002, Petitioner and a co-defendant named Richard Adams committed first degree armed robbery of a local Pizza Hut, first degree armed robbery of a local Marathon gas station, and that Petitioner shot Huntington police officer Joe Combs with a handgun. The Petitioner was represented by Gerald Henderson, Esq., of the Cabell County Public Defender's Office.

Petitioner pled guilty on September 2, 2003, to the indictment. Petitioner was sentenced to twenty-five years on Count I and twenty-five years on Count II, said sentences to run concurrently with each other, but consecutively to a sentence Petitioner received in a federal charge, and not less than three nor more than fifteen years on Count III, said sentence to run consecutively to all sentences.

On December 17, 2003, the Court reconsidered Petitioner's sentence, upon motion of the Petitioner. The Court found that the plea agreement consisted of the finding of a firearm on all charges. Further consultation at that hearing with counsel for the State and trial counsel for Petitioner revealed that the plea agreement and sentence were in compliance with Petitioner's acceptance thereof.

On three separate occasions, Petitioner filed for habeas corpus relief directly with the West Virginia Supreme Court of Appeals. These petitions were filed on October 6, 2003 (No. 032207), May 26, 2004 (No. 040979), and February 18, 2005 (No. 050395). All three petitions were summarily refused by the Supreme Court of Appeals. On November 4, 2005, Petitioner filed for federal habeas corpus relief. On June 20, 2007, the federal district court entered an order holding Petitioner's federal petition for habeas corpus relief in abeyance, pending Petitioner's exhaustion of his state remedies. Then, on July 6, 2007, Petitioner filed the instant petition in the Circuit Court of Cabell County, West Virginia.

Petitioner is now asserting his innocence, at least of the robbery charges. Petitioner contends that his identity was mistaken for someone else and that the co-defendant, Richard Adams, wrongfully accused Petitioner in exchange for the police ending a possible homicide investigation against Mr. Adams. Petitioner further contends that he did not wound Officer Combs, it was Officer Combs' partner who wounded him.

Glen Conway, Esq., was substituted for Mr. Hoosier by order entered on April 13, 2010. Mr. Conway set this matter on the docket for a hearing at 10:30 a.m. on Friday, October 1, 2010, to hear motions filed pro se by Petitioner. The hearing on Petitioner's motions was continued to Tuesday, October 12, 2010. At the hearing on October 12, 2010, various motions filed by Petitioner were denied and the matter was set for an omnibus hearing on October 14, 2010, at 10:30 a.m. At the hearing on October 14, 2010, the Court determined the matter should be continued in order to allow adequate time for Petitioner's omnibus hearing, and the matter was continued to November 22, 2010. At the hearing on November 22, 2010, the Court determined the matter should be continued in order to allow adequate time for Petitioner's omnibus hearing, and the matter was continued to November 30, 2010. An omnibus hearing was held in this matter on November 30, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Out of an abundance of caution and in order to protect the rights of Petitioner and afford him all due consideration, this Court will rule on any issue raised by Petitioner in the Amended Petition, supplemental filings or at the hearing. These issues will be taken in the order of, and are numbered to correspond to, the "Losh" checklist. This order refers to testimony at the hearing in several places, however, this order was prepared using a draft of the hearing transcript from the court reporter. Due to the length of the hearing, the transcript was contained in several files on the court reporter's computer. In order to issue a timely opinion order prior to Judge Cummings leaving the bench, it was necessary to use a draft of the hearing transcript. Because of this, references to testimony do not contain a reference to a line or page number in the hearing transcript. Once the files are consolidated by the court reporter, a final hearing transcript will be included in the file.

The issues developed through testimony at the hearing held on November 30, 2010, were (a) whether the State withheld or suppressed exculpatory evidence; (b) whether counsel rendered ineffective assistance to Petitioner; and (c) whether Petitioner's guilty plea was voluntary. All other issues are decided by this Court on the briefs submitted.

(1) Trial court lacked jurisdiction

Petitioner contends that the trial court failed to follow its own local rules with regard to entering pleas of guilty and, thus, the trial court lacked jurisdiction to accept Petitioner's plea. Petitioner contends that the court's local rules require that the defendant *himself* must fill in the answers to various questions posed in the plea papers, unless the defendant is incapable of writing. Petitioner contends that his executed plea questionnaire is somehow involuntary because his trial counsel asked Petitioner each question and counsel wrote in the answers. Petitioner contends that the trial court lacked legal authority to accept Petitioner's plea due to noncompliance with the trial court rule that the defendant *must* fill out the plea questionnaire.

Petitioner contends this "local rule" is stated on the front of the plea questionnaire, but does not cite to a local rule number. Petitioner's claim that his plea is unknowing, unintelligent and involuntary or that the trial court somehow lacked jurisdiction to enter Petitioner's plea because his attorney completed the questions based on Petitioner's responses is without merit. It is customary for trial counsel to complete the plea forms based on responses provided by the defendant. Petitioner testified at the plea hearing that these responses were his responses. Petitioner and his counsel both signed the plea forms. Petitioner answered the Court in the affirmative that if the Court asked the Petitioner each and every question contained on the form would Petitioner's answer be the same.

Pursuant to W.Va. Code § 62-3-1a, a plea, when signed and witnessed, "shall constitute prima facie evidence that the defendant was fully advised of his rights" as provided in this section. Petitioner's plea was signed by him in open court and witnessed by his counsel. Petitioner did not carry his burden in showing that he was not fully advised of his rights.

This issue is decided against the Petitioner.

(4) Denial of right to speedy trial

Petitioner contends he was denied the right to a speedy trial because of the fifteen-month delay between his arrest and the trial date, and that the delay was designed by the prosecution to gain a tactical advantage over Petitioner. Petitioner cites the Sixth Amendment to the U.S.

Constitution and claims that his right to a speedy trial was violated because the delay prejudiced the conduct of the defense, and the government delayed purposefully to gain some tactical advantage over the Petitioner. Petitioner does not cite any noncompliance with the three-term rule of West Virginia Code Section 62-3-21.

Delay before trial which is neither lengthy nor purposeful and is otherwise justified by a need to continue an investigation by following leads for several months after the commission of crimes is not violative of a defendant's right to due process. U.S. v. Stinson, 594 F.2d 982 (4th Cir. 1979).

Petitioner contends that he held a fear for his life while he was incarcerated before trial, and that this fear was prejudicial to his defense in that it created a need within Petitioner to be removed from the jail facility in Cabell County. Petitioner claims his panic-stricken rush to plead resulted in an errant plea of guilty. Petitioner did not introduce any evidence to support his claims of physical violence or threats to him.

Petitioner's argument is circular and without merit. Petitioner cannot, on one hand, claim a "panic-stricken rush" to plead guilty on his part, and a lengthy delay by the prosecution. Petitioner also does not state with any specificity the actual prejudice he suffered by his trial date being set within the three-term rule of West Virginia Code Section 62-3-21.

Petitioner's mere recitation of enumerated grounds without detailed factual support does not justify issuance of a writ of habeas corpus, the appointment of counsel, and the holding of a hearing. Perdue v. Coiner, 156 W.Va. 467, 194 S.E.2d 657 (1973). A petition must specifically state in detail the underlying facts that support the claim; mere recitation of grounds without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

This issue is decided against the Petitioner.

(6) Involuntary guilty plea

Due process requires that a guilty plea be voluntary, knowing and intelligent. The burden of proving that a plea was involuntary rests upon the pleader. State ex rel. Clancy v. Coiner, 154 W.Va. 857, 179 S.E.2d 726 (1971). Petitioner contends that, due to his counsel's ineffectiveness in investigating the facts of the case, his guilty plea was not voluntary, knowing and intelligent. Petitioner testified at the hearing that had he known certain facts or certain parts of discovery, he would not have pled guilty. Petitioner's arguments on this issue do not involve the involuntary nature of his plea, rather, Petitioner's arguments under this issue concern whether his counsel was ineffective. The issue of the possibility of the ineffectiveness of counsel will be discussed below.

Petitioner does contend in various places in the amended petition that he pled guilty in order to be transferred from Cabell County and into the custody of the Division of Corrections as soon as possible due to alleged mistreatment while he was in custody awaiting trial. This is a matter where extrinsic pressure may have induced the guilty plea. The law requires that the voluntariness of a guilty plea must be tested by the totality of the circumstances surrounding its entry. Brady v. United States, 397 U.S. 742 (1970); Griffith v. Wyrick, 527 F.2d 109 (C.A. Mo. 1975). The record must affirmatively show, under the totality of circumstances, that the plea of guilty was voluntary, and it is the duty of the judge to establish by inquiry as thorough as circumstances demand its constitutional validity. Id.

Petitioner alleges he was beaten and threatened, however, the amended petition contains only his statements to this effect, and it was only Petitioner's testimony to this effect that took place at the hearing. No photographs, no medical records, and no affidavits of witnesses were attached, nor was any evidence adduced at the hearing to support Petitioner's claims of beatings and threats (other than Petitioner's testimony to this effect).

A guilty plea based on competent advice of counsel represents a serious admission of factual guilt, and where an adequate record is made to show it was voluntarily and intelligently entered, it will not be set aside. Syl. Pt. 3, State ex rel. Burton v. Whyte, 163 W.Va. 276, 256 S.E.2d 424 (1979). Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding

process if the case had proceeded to trial; and (3) the guilty plea must have been motivated by the error. Syl. Pt. 3, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978).

In many criminal cases, there are numerous facts and legal issues which must be weighed to determine the chances of a successful defense. All too frequently, the ultimate result cannot be predicted with any real accuracy, since it hinges on many factors, including the jury's evaluation of the evidence and the credibility of any witnesses. Aside from these formal legal considerations, there are a number of more personal and subjective factors which are not a part of the formal record, but which may have had a considerable bearing on the individual defendant's decision to enter a guilty plea. All of these factors become even more difficult to assess when they are overlaid with a guilty plea made pursuant to a valid plea bargain.

In light of these circumstances, the Court should be unwilling, in the absence of clear proof of incompetency, to accept the assertion that a guilty plea was induced as a result of incompetent advice of counsel. And even then, the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial, and the plea must have been motivated by this error. Essentially, Petitioner contends his guilty plea was brought about because trial counsel divulged the evidence that tended to prove Petitioner's guilt rather than relate any evidence that tended to exonerate the Petitioner. The only evidence adduced at the hearing was Petitioner's self-serving statements that certain witnesses may be able to exonerate him, or that certain evidence may be able to exonerate him. Petitioner did not carry his burden of showing that there was any matter which would have substantially affected the fact-finding process if the case had proceeded to trial, and that his plea was motivated by this error.

Moreover, Petitioner's counsel maintained that Petitioner had four special conditions to be included in Petitioner's plea before he would agree to it, which were (1) that Petitioner was to be allowed to waive his presentence investigation and be sentenced on the day of the plea; (2) that Petitioner was to be taken into federal custody immediately; (3) that there was not to be any mention of a certain medical condition, and (4) that the time he would serve would apply first to the robbery charges. A defendant who lists such specific conditions as part of a plea does not

appear to be entering into an involuntary plea. Petitioner did not refute that he insisted on these four special conditions.

Therefore, this Court finds that Petitioner did not establish by a preponderance of the evidence that his trial counsel acted incompetently, or that these certain witnesses he claims may be able to exonerate him were a substantial part of the State's case, or that Petitioner's guilty plea was motivated by an alleged act of counsel's incompetency. Thus, Petitioner is not entitled to collaterally attack his guilty plea.

Petitioner also asserts that the trial court did not advise Petitioner of the specific rights he would be relinquishing by entering into a plea. Petitioner claims the trial court should have reviewed the plea questionnaire specifically and ask the Petitioner each of the questions contained therein. This argument is without merit. The trial court is not obligated to list every single right

As discussed below, this Court does not find that Petitioner's counsel provided ineffective assistance. Moreover, Petitioner did not carry his burden in proving that his plea was involuntary.

This issue is decided against the Petitioner.

(11) Denial of counsel

Petitioner claims a "constructive" denial of counsel and refers to various sections of various filings by Petitioner. This Court finds that this issue is without merit. Petitioner does not develop this issue with any specific statements of a denial of counsel to him, constructively or otherwise.

Petitioner's mere recitation of enumerated grounds without detailed factual support does not justify issuance of a writ of habeas corpus, the appointment of counsel, and the holding of a hearing. Perdue v. Coiner, 156 W.Va. 467, 194 S.E.2d 657 (1973). A petition must specifically state in detail the underlying facts that support the claim; mere recitation of grounds without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

This issue is found against the Petitioner.

(13) Failure of counsel to take a timely appeal

Petitioner contends that his trial counsel failed to timely file an appeal of his conviction, and that failure of his counsel to take an appeal is a sufficient ground for collateral attack of his conviction. Petitioner pled guilty to the indictment in this case. There is nothing in the record to indicate that Petitioner would desire to appeal his plea.

This issue is decided against the Petitioner.

(16) Suppression of helpful evidence by the prosecutor

Petitioner contends that the police and the prosecutor suppressed and withheld possible exculpatory evidence in the form of witness statements and other reports and evidence that Petitioner alleges exonerate him of the robberies and the shooting of Officer Combs.

Petitioner contends that he was with Tammy Maynard at her residence during the timeframe of the Marathon gas station armed robbery, that he had passed out next to Maynard on the living room floor on the night prior to the Marathon robbery, and that Maynard's nephew, Richard Adams, showed up at the Maynard residence the next morning just prior to the police arriving. With regard to the Pizza Hut robbery, Petitioner contends he was also at Maynard's on the evening in question, but that he was in and out of the house, up until Maynard returned from work.

With regard to the malicious assault on a police officer, Petitioner contends he did not know that he was firing on a police officer when he fired his gun, that he had diverted his final shot into the floor when he realized he was shooting at an officer, and Petitioner has doubts that his bullets are the ones that struck Officer Combs.

Petitioner's main contention is that someone else committed the armed robberies, and that the police and the prosecutor had evidence to this effect that they did not disclose. Petitioner

does not state with specificity any particular piece of evidence that would support the alternative suspect theory. Petitioner failed to sustain his burden in showing there was any evidence that was suppressed by the State. At the hearing, Petitioner attempted to elicit testimony from Officer Rocky Johnson that the original description of the suspect would not have pointed the police to the Petitioner, that the car used in the robberies belonged to someone who did not like the Petitioner, that this same individual worked across the street from one of the robbery sites, that this same individual sent the police to Petitioner's residence and Petitioner wound up shooting at officers, that this same individual and another man were later convicted of an armed robbery of a bar. Officer Johnson testified that he did not recall specific descriptions, specific reports, or specific witness statements.

This Court finds that Petitioner failed to establish any particular evidence was allegedly suppressed or not disclosed by law enforcement. Petitioner also failed to establish by a preponderance of the evidence that he prosecutor's office failed to disclose or suppressed any evidence.

This issue is decided against the Petitioner.

(19) Unfulfilled plea bargain

Petitioner asserts an unfulfilled plea bargain as an assignment of error. Petitioner testified that he had "buyer's remorse" just a few days after entering the plea. Petitioner does not allege any bargain or agreement on the part of the State or others that was unfulfilled, just that he ultimately was unhappy with entering the plea.

Petitioner testified that this assignment of error refers to counsel advising Petitioner that Petitioner must first plead to the federal charges of attempted murder of a police officer before the State would agree to a plea and an agreement on sentencing. Petitioner further testified that, with regard to Petitioner's plea entered before Judge O'Hanlon in September, 2003, the State had indeed honored everything the State said it would do.

Petitioner's argument is without merit, and this issue is decided against the Petitioner.

(21) Ineffective assistance of counsel

The Petitioner was represented by Gerald Henderson, Esq., of the Cabell County Public Defender's Office. Petitioner contends he was denied effective assistance of counsel because of his counsel's failure to consult with Petitioner regarding important issues prior to his guilty plea. Petitioner also contends his counsel failed to conduct reasonable investigations of other witnesses and other evidence and to render adequate legal assistance. In particular, Petitioner assigns as error the following:

- (1) the favorable, impeachment and exculpatory evidence that Petitioner alleges flowed from Richard Adams' and Tammy Maynard's statements
- (2) Petitioner's alleged fact that the get-away car used in the Marathon station and Pizza Hut armed robberies was registered to alternate suspect Joshua Dietz's girlfriend, Michelle Black
- (3) Petitioner's alleged fact that the bullet alleged to have struck Officer Combs could not have been identified as having been fired from Petitioner's gun and other exculpatory ballistics laboratory test results
- (4) Petitioner's assertion that the prosecution was withholding discoverable evidence pertaining to the shooting incident
- (5) the contents contained in the crime scene sketches and police reports provided to counsel
- (6) that the Pizza Hut victim, Jeff Jones, did not identify the Petitioner as being the armed robber.

Petitioner contends he was misinformed by his counsel regarding the above matters and that, at a minimum, trial counsel should have informed the Court that he had not received full discovery prior to the Petitioner entering a plea. Petitioner contends his trial counsel did not conduct adequate discovery prior to him entering a plea, thus, Petitioner's plea was not knowing and intelligent. Petitioner contends that, had he known there was exculpatory evidence in existence, he would not have entered a plea.

Petitioner also cites some examples of the ineffective assistance of his counsel. Petitioner contends that his trial counsel failed to investigate the veracity or credibility of the recorded statements of Tammy Maynard, one of the State's witnesses. Ms. Maynard was some sort of witness for the prosecution who allegedly planned to testify that she received money from Petitioner after the robberies. Petitioner claims Ms. Maynard also made exculpatory statements that Petitioner was not involved in the robberies, and that Petitioner's counsel failed to uncover

the statements and provide the contents of the statements to Petitioner. Petitioner claims that had he known of the contents of these statements, he would not have pled guilty to the armed robberies, and that he was induced to plead guilty by his counsel's incompetence.

Petitioner contends that trial counsel's inadequate discovery of material matters, and trial counsel's failure to share these matters with Petitioner prior to his entry of a plea of guilty constitutes ineffective assistance of counsel.

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, result of the proceedings would have been different. State ex rel. Vernatter v. Warden, 207 W.Va. 11, 528 S.E.2d 207 (1999). Failure to meet the burden on proof imposed by either part of the Strickland test is fatal to a habeas petitioner's ineffective assistance of counsel claim.

A habeas petitioner claiming ineffective assistance of counsel must identify acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment, and the court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance; petitioner's burden in this regard is heavy as there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second guessing of counsel's strategic decisions. The reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. Id. In this discussion, this Court uses the terms "ineffective" and "incompetency." These terms are used interchangeably and similarly for purposes of this discussion.

Petitioner contends trial counsel rendered ineffective assistance by advising Petitioner to plead guilty to the armed robbery charges without first investigating the veracity and stability of

the statements made by the co-defendant, Richard Adams, or the veracity and stability of the statements made by Tammy Maynard. Moreover, Petitioner contends trial counsel failed to properly investigate and analyze alleged alternative suspect evidence. Petitioner also contends that counsel rendered ineffective assistance in that he advised Petitioner to plead guilty to shooting a policeman without first investigating the possibility that the policeman was actually shot by his back-up partner.

Petitioner also contends that trial counsel was ineffective in that he did not follow Petitioner's instructions to file several trial motions. Petitioner also contends that trial counsel did not contact witnesses that Petitioner claims could have verified Petitioner's innocence. Petitioner also contends trial counsel pressured Petitioner into pleading guilty rather than honoring Petitioner's requests for a jury trial. Essentially, Petitioner contends his guilty plea was brought about because trial counsel only divulged to Petitioner the evidence that tended to prove Petitioner's guilt rather than relate any evidence that may have tended to exonerate the Petitioner.

Trial counsel testified at the hearing that he did not independently investigate the statements made by Richard Adams, Tammy Maynard, or other witnesses. In any ineffective assistance of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Id. The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation; although there is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must, at a minimum, conduct reasonable investigation enabling him or her to make informed decisions about how best to represent clients, and this presumption is inappropriate if counsel's strategic decisions are made after inadequate investigation. Id.

Trial counsel testified that Petitioner stated to him in their initial meeting that Petitioner had committed the alleged crimes. Trial counsel also testified that his notes, taken contemporaneously with the initial interview, also reflect Petitioner's statement to counsel that he had committed the crimes. Based upon this confession to counsel, counsel testified that his

role became that of making sure the State proved its case, rather than one of proving Petitioner's innocence.

The prejudice prong of the *Strickland* ineffective assistance of counsel test looks to whether counsel's deficient performance adversely affected the outcome in a given case, and a modified prejudice standard applies in cases where conviction rests upon a plea of guilty. *Id.* Where conviction rests upon a plea of guilty, the prejudice element of the *Strickland* ineffective assistance of counsel test focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process; in other words, to satisfy the prejudice requirement, a habeas petitioner must show that there is reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Id.*

Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; and (3) the guilty plea must have been motivated by the error. Syl. Pt. 3, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978). Before an initial finding will be made that counsel acted incompetently with respect to advising on legal issues in connection with a guilty plea, the advice must be manifestly erroneous. *State ex rel. Burton v. Whyte*, 162 W.Va. 276, 256 S.E.2d 424 (1979).

Trial counsel testified at the hearing that Petitioner told him in their initial interview that Petitioner had committed the robberies and the shooting. Notes made by trial counsel contemporaneous with the interview and entered into the files of the Public Defender's office support trial counsel's statement. These notes were provided to Petitioner and his habeas counsel. Trial counsel testified that Petitioner directed counsel to engage in plea negotiations from the onset of counsel's representation.

Petitioner then questioned why, if Petitioner had admitted the crimes to his counsel, would counsel then go to a preliminary hearing and try to "expose" that someone else had committed the alleged crimes. Counsel testified that his job, even after Petitioner admits guilt or confesses, is to make sure the State still meets its burden of proof that the defendant is the person

who committed the crimes. Counsel testified that his job is to make sure the State proves its case beyond a reasonable doubt; otherwise the trial or hearing is not fair to the defendant. Counsel testified he would still question witnesses at a preliminary hearing or at trial, even if a defendant tells counsel he is guilty, because the State bears the burden of proving it.

Trial counsel also testified that had plea negotiations broken down, counsel would have filed all appropriate and necessary trial motions. Counsel testified that these motions had not been filed by him at the time of the plea because local court custom was for pretrial motions to be filed just before the trial. Counsel is correct in this statement. Judge Dan O'Hanlon presided over Petitioner's criminal matter. It had been the practice of Judge O'Hanlon to have pretrial motions filed just before trial, rather than months in advance. If counsel had filed these pretrial motions at the times he was urged to do so by his client, it is unlikely that Judge O'Hanlon would have taken these motions up until just before trial.

Moreover, trial counsel testified that his strategy was to withhold filing trial motions while the parties were engaged in plea negotiations, in order to delay receiving a ruling from the judge which might adversely impact plea negotiations. Counsel testified that he never refused to file any trial motions, it was counsel's strategy to wait to file motions once any plea negotiations disintegrated. This practice of waiting to file trial motions was common in the court of Judge O'Hanlon and was, in fact, the preferred method of the presiding judge.

Petitioner testified that he wished the pretrial motions had been filed and ruled upon prior to his entry of a plea; that the rulings on these motions would have become a major factor in a determination to plead guilty. Counsel's decision to wait to file pretrial motions is a trial strategy that this Court cannot say was ineffective assistance, especially in light of the local custom of Judge O'Hanlon's courtroom.

Trial counsel testified that he never advised Petitioner to plead guilty. Trial counsel testified that Petitioner urged counsel to engage in plea negotiations from the onset of counsel's representation of Petitioner. Counsel did state that he gives his clients his personal opinion as to the possible outcomes and the possible penalties, but he always leaves it up to his client to make the actual decision whether to accept the plea or not. Trial counsel testified that he reviewed all

discovery provided by the State, which included pictures, the F.B.I. report, Petitioner's taped statement, the statements of the police officers, and counsel's notes regarding conversations with the Petitioner. Counsel also discussed the discovery with Petitioner. Trial counsel also participated in Petitioner's preliminary hearing wherein the police officers testified. Trial counsel also testified that he had Petitioner's statement that Petitioner had committed the crimes alleged. Trial counsel also participated in a discovery conference where counsel obtained information regarding the case. Counsel for the State reported that trial counsel logged time matters recording over 20 meetings with Petitioner exclusive of court hearings.

In Petitioner's testimony, Petitioner stated that he felt pressured to take the plea, however, Petitioner could not articulate any specific factor of pressure that had its origins in the words or testimony of Petitioner's counsel. Petitioner did not state with even a modicum of specificity any instance where counsel pressured Petitioner to enter into a plea.

Here, the legal issue was the adequacy of trial counsel's discovery and investigation, the lack of filing of motions by counsel during plea negotiations, and the possibility of exculpatory statements and reports. This Court cannot say that counsel's possible failure to uncover alleged exculpatory statements of certain witnesses should be deemed incompetency. The incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial. The only evidence that there exists exculpatory statements and witnesses is Petitioner's self-serving statements that there is evidence out there that exonerates him. These witnesses may or may not have been credible to a jury in their statements exculpating the Petitioner at trial.

"Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of the accused." State v. Cecil, 173 W.Va. 27, 311 S.E.2d 144 (1983). Cecil goes on to provide that one who charges that his trial counsel was ineffective must prove the allegation by a preponderance of the evidence. Id; State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

This Court is of the opinion that it cannot say that a reasonably qualified defense attorney would not have so acted in the defense of Petitioner. Counsel testified that Petitioner admitted all wrongdoing to counsel, and notes taken by counsel contemporaneous to this conversation with Petitioner support counsel's assertion. When pretrial motions would be filed is a matter of strategy and tactic, and counsel acted in accordance with local custom of the courtroom in which he was practicing. This Court also finds that Counsel's decision not to investigate statements and evidence was also not ineffective assistance, especially in light of Petitioner's statement that he had committed the crimes alleged.

This Court finds that, in light of all the circumstances, the identified acts or omissions of trial counsel in his representation of Petitioner were not outside the wide range of professionally competent assistance, therefore, trial counsel rendered effective assistance to his client.

This issue is decided against the Petitioner.

(23) Irregularities in arrest

Petitioner claims that the conditions of his detainment were violative of the Eighth Amendment. Petitioner's argument does not have anything to do with his actual arrest, but instead centers on occurrences once he was arrested and incarcerated in the jail. Petitioner's issues regarding his treatment once he was incarcerated are dealt with in the voluntariness of his plea. This issue is decided against the Petitioner as an assignment of error dealing with any possible irregularities in his arrest.

(44) Claims of prejudicial statements by prosecutor

Petitioner contends that the prosecution made prejudicial statements during the course of court proceedings with regard to the Petitioner's decision to plead guilty. The Petitioner asserts that the prosecutor approached the Petitioner without the presence of counsel and stated "this is a shocker, are you sure you know what your (sic) doing?". Petitioner asserts he responded by saying "can you get my attorney?". Petitioner asserts this exchange triggered a chain reaction which led the Petitioner to plead guilty to all counts of the indictment. In this regard, Petitioner claims he was prejudiced by the prosecutor's remarks even though the statements were not heard by a jury.

This argument is without merit and is found against the Petitioner. Petitioner admits the remark was not heard by a jury. Whether this remark led to an involuntary guilty plea should be alleged under the issue of involuntary pleas.

(49) Question of actual guilt upon an acceptable guilty plea

Petitioner contends that throughout all plea negotiations his trial counsel was aware that Cabell County jail officials had beaten the Petitioner on several occasions and had made numerous threats against Petitioner's life. Petitioner further contends that his trial counsel knew that the jail officials had taken measures to use suicide as a cover to carry out death threats by documenting and announcing that the Petitioner was suicidal, thus, placing him in solitary confinement. Petitioner claims he asked his counsel to file a motion for alternative confinement, and he claims his counsel ignored this request. Petitioner claims his trial counsel exploited the beatings of Petitioner and the death threats and used these occurrences to compel the Petitioner to plead guilty.

Petitioner claims that he arrived at the courthouse on the morning of his trial with the intent of agreeing to plead guilty to one count of the indictment for malicious assault on a police officer. Petitioner contends his trial counsel negotiated a plea wherein, upon pleading guilty to the indictment, Petitioner would be sentenced quickly and moved into federal custody. Petitioner contends his trial counsel indicated to Petitioner that he could quickly escape the life threatening danger that overshadowed him at jail if he would only plead guilty to all counts of the indictment.

Petitioner's arguments under this assignment of error actually concern whether the Petitioner had effective assistance of counsel. Petitioner contends that his trial counsel was unresponsive to Petitioner's requests to investigate the allegations against him and to perform trial preparations. Petitioner further contends his counsel coerced him into believing a jury trial would be utterly hopeless regarding the charge of malicious assault on a police officer. Petitioner contends that his counsel advised that if Petitioner pled guilty only to the charge of malicious assault on a police officer, then there would be no plea agreement with the prosecutor and that the prosecutor would then seek a recidivist information against the Petitioner. Petitioner

contends his trial counsel made the Petitioner believe that the plea agreement was in the Petitioner's best interests even though the agreement required the Petitioner to plead guilty to all counts of the indictment. Petitioner asserts that his counsel emphasized to Petitioner that, unless the Petitioner pled guilty to all counts, the Petitioner would then remain at the Cabell County jail.

Petitioner then contends that his guilty plea was not "knowing" in that he claims he was not duly informed when entering his plea of guilty to the offense of malicious assault on a police officer. In essence, Petitioner contends he was not advised of the nature of the charges against him, and if he was so advised, he would not have pled guilty to the offense of "malicious assault on a police officer." Petitioner contends that he was not made aware by either his counsel or the court that he would be subject to an enhanced sentence due to his having acted "maliciously" when he shot Officer Combs, rather than having acted "unlawfully" when he shot Officer Combs. Petitioner was under the impression that he received an enhanced sentence because of a finding of a firearm.

Petitioner contends that *if* he did shoot a police officer, it was without malice, and that he should have been so advised by his attorney and the court of the element of "maliciousness" before pleading guilty. Petitioner contends that the failure by his counsel, the court, or the plea questionnaire to mention the element of "maliciousness" made his plea of guilty to be not knowing, not intelligently made, and involuntary. As a result, the Petitioner received a sentence of three to fifteen years instead of two to five years.

The trial court held a reconsideration hearing December, 2003 at which hearing it was determined that the finding of a firearm was consistent with Petitioner's understanding of the plea.

At the hearing and in pleadings, Petitioner has maintained his innocence, at least of the robbery charges. At the time of the plea, however, there really appeared to be no question of Petitioner's actual guilt upon the acceptance of the guilty plea. In entering his plea, Petitioner recited facts that formed the basis of the crimes alleged. Petitioner swore that he was entering the plea voluntarily. There was no statement by Petitioner or his counsel at the plea to call into question Petitioner's actual guilt upon the acceptable guilty plea.

The court's role in accepting or rejecting a guilty plea is not to make a formal adjudication of guilt beyond a reasonable doubt on the charge to which the defendant is willing to plead, nor to determine whether the defendant is innocent of charges which the prosecutor is willing to dismiss, but rather, the court's role, insofar as the defendant is concerned, is to ascertain that the plea is voluntarily and intelligently made and that the defendant understands its consequences and the constitutional rights he is waiving. Rule 11(f) of the West Virginia Rules of Criminal Procedure; Myers v. Frazier, 173 W.Va. 658, 319 S.E.2d 782 (1984). The trial court in Petitioner's case did its job.

This issue is decided against the Petitioner.

THEREFORE, as all issues have been decided against Petitioner, it is accordingly **ADJUDGED, ORDERED and DECREED**, that the Petitioner is entitled to no relief, and it is therefore Ordered that the writ heretofore issued is discharged and held for naught, and that the Petition herein be dismissed with prejudice from the docket of this Court. This is a final order.

The clerk is directed to send a copy of this order as follows:

Glen Conway, Esq.
635 7th St
Huntington, WV 25701

Office of the Prosecuting Attorney
Cabell County Courthouse
750 Fifth Avenue
Huntington, WV 25701

Gregory Brent Christian
Inmate #40912-1
Mt. Olive Correctional Center
1 Mountainside Way
Mt. Olive, WV 25185

Enter this order this 17th day of February, 2011.

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON 17 FEBRUARY 2011
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 22 DAY OF FEBRUARY 2011

John L. Cummings
Judicial Circuit
ENTERED Circuit Court Civil Order Book

Page 22 this

Adele Chandler
CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA