STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

State ex rel. Steve A. Watkins,
Petitioner

vs) **No. 11-0530** (Fayette County 09-C-102)

Jim Rubenstein, Commissioner of the
Division of Corrections and Shannon Markle,
Administrator at the Central Regional Jail,
Respondents

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Fayette County, wherein the petitioner's petition for writ of habeas corpus was denied following an omnibus hearing. This appeal of the order denying his habeas petition was timely perfected by counsel, with Petitioner Watkins's appendix accompanying the petition. Respondent Rubenstein filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was convicted by a jury of attempt to commit second degree robbery. Petitioner thereafter filed an appeal of this conviction to the Court, which was refused. Petitioner subsequently filed a petition for habeas corpus in circuit court and an omnibus evidentiary hearing followed. Subsequently, the circuit court entered an order denying the petitioner of habeas relief. Petitioner now seeks reversal of this order, arguing five assignments of error.

"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 ten issues alleging ineffective assistance of counsel. The petitioner argues that his trial counsel was ineffective because he failed to: (1) file a motion to dismiss; (2) move to dismiss alleging no assault in the indictment or that the charge was provable; (3) move the trial court for an evaluation for competency or criminal responsibility; (4) plea negotiate; (5) acquire the preliminary hearing tape or request the grand jury transcript; (6) object during opening statement; (7) engage in meaningful cross-examination; (8) sufficiently address the right to testify with the petitioner; (9) object during closing argument as it was not supported by evidence and because there was a golden rule violation; and (10) contact the petitioner's psychiatrist before the sentencing hearing. In addition to the petitioner's arguments regarding ineffective assistance of counsel, the petitioner argues four other assignments of error: (1) that the petitioner was denied a fair trial because the State of West Virginia failed to inform the petitioner that the prosecuting witness/alleged victim had told them that he was not afraid of the petitioner, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963); (2) that the circuit court erred in finding that the evidence elicited at the trial of this matter was insufficient to support a conviction for attempted robbery in the second degree; (3) that the circuit court erred in finding that the cumulative error in this case did not deprive the petitioner of a fair trial and due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 14 of the West Virginia Constitution; and (4) that the circuit court erred in denying and dismissing the Amended Petition for Habeas Corpus ad Subjiciendum as factual findings made by the court were entirely unsupported by the evidence and therefore clearly erroneous.

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 and Dismissing Petition for Writ of Habeas Corpus," entered February 25, 2011, 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

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

STEVEN A. WATKINS, Petitioner,

v.

Case No.: 09-C-102
(Underlying Indictment No. 07-F-176)
Judge Paul M. Blake, Jr.

JIM RUBENSTEIN, Commissioner
of the Division of Corrections, and
SHANNON MARKLE, Administrator
at the Centeral Regional Jail, Respondents.

ORDER
DENYING AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Presently pending before the Court is petitioner Steven A. Watkins' *Petition for Writ of Habeas Corpus, ("Petition.")*

On January 10, 2011, Court convened for an omnibus evidentiary hearing in the above-captioned matter. The petitioner appeared in person and by counsel Christopher S. Moorehead, esq. The respondents appeared, not in person but counsel Assistant Prosecuting Attorney Brian Parsons, esq.

Thereupon, and as is more fully reflected upon the record, the Court inquired of the petitioner as to his "*Losh List,*" *(Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981)),* setting forth all the grounds asserted in this action. After having made inquiry of the petitioner and the Court being sufficiently advised, the Court marked the *Losh List* as *Exhibit No. 1* and ordered the same made a part of the record. The Court then heard counsel's proffers and arguments and the testimony of the petitioner and his trial counsel Jim Adkins, esq. The Court then directed counsel to submit proposed findings of fact and conclusions of law with appropriate citation to the record.

The Court has carefully reviewed the parties' submissions, the whole of the record, and the relevant legal authority.

Based upon all of the above and the findings of fact and conclusions of law set forth below, this Court is of the opinion to and hereby does **DENY** and **DISMISS** the *Petition.*

FINDINGS OF FACT

1. On September 11, 2007 a Fayette County Grand Jury returned an indictment charging the petitioner with the felony offense of *Attempted Robbery, Second Degree* in violation of West Virginia Code §61-2-12. The body of the indictment states:

> The Grand Jurors of the State of West Virginia, in and for the body of the County of Fayette, upon their oaths, and now attending the said Court, present that STEVEN A. WATKINS, on or about the 7th day of June, 2007, in the said County of Fayette, committed the offense of "attempted robbery in the second degree" in that he did in and upon on Mike Zimm, an employee of Zimm Pharmacy, Inc., an assault did feloniously make, and he, the said STEVEN A. WATKINS, did then and there feloniously put in fear of bodily injury and did attempt to take goods, chattels or property of the said Mike Zimm, from the person of or from the presence of Mike Zimm and against his will, then and there feloniously and violently did attempt to steal, take and carry away, with intent to permanently deprive the owner thereof, against the peace and dignity of the State.

2. On December 5, 2007, a jury found the petitioner guilty of *Attempted Robbery, Second Degree* as charged by the above-described indictment. On or about December 17, 2007, the petitioner moved the Court to set aside the verdict and enter a judgment of acquittal and made a motion for a new trial. The Court denied said motions.

3. The Fayette County Probation Department conducted a pre-sentence investigation and, prior to sentencing, the Court ordered that the petitioner undergo a sixty day diagnostic evaluation at the Anthony Correctional Center. Thereafter, the Court and counsel were provided with the investigation reports. Said reports included information regarding the

petitioner's mental health history. During the sentencing hearing, the Court asked the petitioner, on the record, if he had reviewed the same and requested that he inform the Court of any additions and/or corrections.

4. After considering the arguments and proffers of counsel as well as the presentence reports, the Court sentenced the petitioner to not less than five nor more than eighteen years in the state penitentiary. (*See May 12, 2008 Order.*)

5. On September 10, 2008, the petitioner filed a direct appeal with the West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals denied the appeal January 27, 2009.

6. On March 5, 2009, the petitioner, *pro se*, filed in Braxton County, West Virginia Circuit Court a *Petition for Writ of Habeas Corpus, ("Petition.")* On March 16, 2009, Braxton County Circuit Court Judge Richard A. Facemire transferred the matter to the Circuit Court of Fayette County, W.Va. pursuant to Rule 3(a) of the *West Virginia Rules for Post-Conviction Habeas Corpus Proceedings*.

7. After reviewing the *pro se Petition*, this Court determined that the action was governed by West Virginia Code §§53-4A-1, *et seq.* and the *West Virginia Rules for Post-Conviction Habeas Corpus Proceedings*. This Court further found it appropriate, pursuant to West Virginia Code §53-4A-4 and Rules 3 and 4 of the *West Virginia Rules for Post-Conviction Habeas Corpus Proceedings*, to appoint counsel Christopher Moorehead, esq. to draft and submit an *Amended Omnibus Habeas Corpus Petition* including any and all grounds for post-conviction habeas relief which counsel found applicable and appropriate. *See March 20, 2009 Order.*

8. On December 10, 2009, the petitioner, by counsel, filed an *Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum* and *Memorandum in Support of Amended Petition for Writ of Habeas Corpus Ad Subjiciendum.* After review of the same, on February 8, 2010 the Court entered an *Order* directing the respondents, (referred to herein as "the State"), to file a *Response* to the *Amended Petition* by March 10, 2010. Thereafter, the State, by Fayette County Assistant Prosecuting Attorney Brian Parsons, esq., timely filed a *Response to the Petitioner's Amended Petition for a Writ of Habeas Corpus ad Subjiciendum.*

9. On March 15, 2010, the petitioner filed, *pro se*, a *Motion to Recuse Trial Judge From Conducting Habeas Omnibus Proceedings.* Thereafter, on April 6, 2010, the Fayette County Circuit Court received a West Virginia Supreme Court of Appeals of West Virginia *Administrative Order* directing this Court to continue to preside in the matter.

10. On May 13, 2010, the Court entered an *Order Scheduling Matter for an Omnibus Habeas Corpus Hearing* on June 28, 2010. Thereafter, the petitioner moved to continue and on June 28, 2010 the Court entered an *Order Continuing the Evidentiary Hearing.*

11. On November 15, 2010, the petitioner himself filed a *Brief* setting forth additional grounds for relief and legal arguments.

12. Thereafter, on November 30, 2010, the petitioner, through counsel, filed a *Notice of Evidentiary Hearing* regarding the afore-mentioned January 10, 2011 omnibus evidentiary hearing.

13. In this action, the petitioner presented numerous contentions of error. The petitioner alleged that the indictment was fatally flawed, that the State failed to provide impeachment and/or exculpatory evidence in violation of *Brady v. Maryland*, and that there was insufficient evidence to support his conviction. The majority of the petitioner's contentions of error concerned alleged ineffective assistance of counsel. The petitioner asserted that trial counsel failed to:

(1) file a pretrial motion to dismiss on the grounds that the indictment did not state what goods/property the petitioner attempted to take and because there was no evidence of an "assault;"

(2) file a motion seeking an evaluation of the petitioner's criminal responsibility at the time of the alleged crime and/or his competency to stand trial;

(3) adequately cross-examine the State's witnesses and/or call any defense witnesses;

(4) properly negotiate a plea/engage in plea negotiations;

(5) obtain a transcript of the preliminary hearing and the grand jury proceedings;

(6) object during the State's opening statement on the basis that the opening statement failed to identify the defendant, establish venue, and set forth all the elements of the crime;

(7) object on numerous occasions and/or seek curative instructions;

(8) adequately advise the petitioner with regard to his right to testify;

(9) object during the State's closing argument thereby leaving certain improprieties unchallenged, (including "Golden Rule" violations, speculation, improper innuendo regarding what indictment could have been obtained, and mention of a weapon previously suppressed by the Court); and,

(10) retain/consult with/call as a witness an expert regarding the petitioner's psychological/psychiatric history, (especially considering the Anthony Correctional Center pre-sentence evaluation report suggesting that petitioner was likely to re-offend).

Finally, the petitioner alleged that the cumulative effect of all of the above errors resulted in a violation of his constitutional right to due process and a fair trial.

14. The petitioner claims that trial counsel's failure to file a motion to dismiss the indictment resulted in a denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article Three, Section Ten of the West Virginia Constitution. The petitioner claims that remaining above-described failures resulted in a violation of his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article Three, Section Fourteen of the West Virginia Constitution.

15. The Court has carefully considered the whole of the record and the relevant legal authority.

16. The Court **FINDS** that trial counsel chose not to acquire any of the petitioner's mental health records nor did he contact the petitioner's psychiatrist Dr. Hasan. As is reflected in the record of the omnibus evidentiary hearing, trial counsel considered a number of factors, including petitioner's prior psychological/psychiatric counseling/hospitalizations known to counsel at that time, as well as the petitioner's apparent ability to understand and intelligently discuss his case. Trial counsel determined that there was no strategic advantage in asserting what he believed to be a meritless claim of lack of competency.

17. The Court **FINDS** that trial counsel focused trial strategy on the State's failure to prove the elements of the alleged crime. In determining who to cross-examine, trial counsel chose only those State witnesses he believed would provide attackable concession points. In an effort to limit the chance of putting additional evidence of guilt before the jury, trial counsel made a strategic decision not to cross-examine certain witnesses or call defense witnesses.

18. The Court **FINDS** that trial counsel's ability to negotiate a plea was limited. The indictment included a single count. The State was not willing to offer a plea to any lesser included offenses and/or in offering a misdemeanor plea, (such as "wearing a mask in public.") Trial counsel did not recall the State ever making a plea offer.

19. The Court **FINDS** that trial counsel was aware of the possibility that the witnesses who testified during the preliminary hearing[1] and the witness who testified before the Grand Jury[2] would testify during the trial. The State's witnesses' testimony was consistent with their statements to police at the time of the incident, and trial counsel chose not to acquire transcripts of the testimony.

20. The Court **FINDS** that trial counsel, based upon his knowledge and experience in conducting criminal trials, decided not pose certain objections during the State's opening statement and closing arguments and at other times during trial. The Court is of the opinion that such decisions arise from strategic as much as evidentiary concerns. Trial counsel believed that the State's evidence failed to sufficiently prove the elements of the offense and therefore determined that it was in the petitioner's best interest not to potentially add to the State's evidence or potentially open doors to evidence of an undesirable nature.

21. The petitioner claims that he was not adequately advised or provided sufficient time to decide whether or not to testify. The Court **FINDS** that, on at least two or three occasions prior to and/or during trial, trial counsel discussed with the petitioner his right to testify or

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[1]Public Defender E. Scott Stanton, esq., (trial counsel's co-worker), represented the petitioner during his preliminary hearing. Trial counsel discussed the preliminary hearing with Mr. Stanton.

[2]Fayetteville Municipal Police Officer Sam Parsons testified before the Grand Jury.

remain silent. Additionally, the Court **FINDS** that it also addressed the petitioner regarding the right to testify and offered the petitioner additional time to consult with his counsel before informing the Court of whether or not he would testify. The petitioner declined the Court's offer and chose not to testify.

22. The Court **FINDS** that, during trial, State witness/victim Mike Zimm testified that he was afraid of the petitioner based upon what the petitioner said in Mr. Zimm's store and upon the petitioner's appearance. Mr. Zimm's trial testimony was consistent with the statement he gave to police at the time of the incident.

23. The Court **FINDS** that, at some time after the trial of this matter, trial counsel was told that Mr. Zimm said he was not "afraid" at the time of the incident at issue. Assistant Prosecuting Attorney Brian Parsons, esq. discussed with Mr. Zimm the definition of the word "fear" as it applied to the elements of the crime at issue, and that Mr. Parsons informed Mr. Zimm that if the element of fear did not exist, then the case could not be proven at trial. The discovery provided to the defense did not contain any reference to Mr. Zimm's alleged statement that he was not "afraid" or to the above described conversation between Mr. Parsons and Mr. Zimm.

CONCLUSIONS OF LAW

1. The right to petition the Court for post-conviction writ of habeas corpus is guaranteed by the *West Virginia Constitution*, Article III, Section Four. *West Virginia Code* §53-4A-1, *et seq*. and the *Rules Governing Post Conviction Habeas Corpus Proceedings in West Virginia* govern the Court's procedure and practice regarding such writs. Pursuant thereto, this Court has jurisdiction over the subject matter of this proceeding.

2. A post-conviction writ of habeas corpus is not a substitute for a writ of error. Trial errors which do not involve constitutional violations will not be considered, (*Syl. Pt. 4, State ex rel. McMannis v. Mohn, 163 W.Va. 129 (1979)*), nor will claims which have been previously and finally adjudicated or waived in trial and/or on direct appeal or in a previous post-conviction habeas proceeding, *(W.Va. Code §53-4A-1(b); Bowman v. Leverette, 169 W.Va. 589 (1982))*.[3] When a petitioner is granted an omnibus habeas corpus hearing, the petitioner is required to raise all grounds known or that reasonably could be known by the petitioner. *Markley v. Coleman, 215 W.Va. 729,733 (2004), quoting Losh v. McKenzie, 166 W.Va. 762 (1981).*

3. Courts are typically afforded broad discretion when considering whether or not a petition has stated grounds warranting the issuance of the writ. *State ex rel. Valentine v. Watkins, 208 W.Va. 26, 31 (2000).*

Legal Sufficiency of Indictment/Failure to Challenge Indictment

4. Citing *State ex rel Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001),* the petitioner asserts that the indictment at issue herein was legally insufficient.

5. Rule 7(c)(1) of the *West Virginia Rules of Criminal Procedure* states, in pertinent part:

> ...[T]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . The indictment or the information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement, except that it shall conclude, against the peace and dignity of the state. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed by on or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated.

W.Va. Rules of Crim. Proc., Rule 7(c)(1).

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[3] However, claims merely raised in a petition for appeal which was refused are not necessarily precluded from review.*Syllabus, Smith v. Hedrick, 181 W.Va. 394 (1984).*

6. "An indictment is sufficient under Article III, §14 of the West Virginia Constitution and W.Va. R. Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent from being placed twice in jeopardy." *Syl. Pt. 2, State ex rel Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001).*

7. Based upon review of the record and the relevant legal authority, the Court **CONCLUDES** that the indictment herein was legally sufficient and **CONCLUDES** that the petitioner's assertions regarding the sufficiency of the indictment and his trial counsel's failure to challenge the same are without merit.

Brady v. Maryland

8. ". . .[S]uppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor. *Brady v. Maryland, 373 U.S. 83,__, 83 S.Ct. 1194, 1197-1198, 10 L.Ed. 2d 215, __ (1963).* The Court **CONCLUDES** that the State has an obligation to disclose to the defendant favorable impeachment or exculpatory knowledge that is within its knowledge.

9. The Court **CONCLUDES** that the State's alleged failure to inform defense counsel of the conversation between Mr. Parsons and Mr. Zimm regarding the requirement of "fear" did not violate the dictates of *Brady v. Maryland.*

10. Additionally, the Court **CONCLUDES** that Mr. Parsons' statements to Mr. Zimm with regard to the element of "fear" were an accurate way to describe elemental requirements to a lay person/witness and that there is no evidence that Mr. Parsons suggested or improperly influenced Mr. Zimm's testimony.

Sufficient Evidence to Support Conviction

11. "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence where the State's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the Court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." *Syl. Pt. 4, State v. Ocheltree, 170 W.Va. 68, 289 S.E.2d 742 (1982).*

12. The Court **CONCLUDES** that, when viewed in a light most favorable to the State, the evidence submitted to the jury was sufficient to support the jury's finding of guilt beyond a reasonable doubt.

Trial Counsel's Performance

13. The Sixth Amendment to the United State's Constitution and Article III, Section Fourteen of the West Virginia Constitution provide the criminally accused with the right to counsel.

14. "A trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who was denied effective assistance of counsel." *Syl. Pt. 5, State v. Thomas, 157 W.Va. 640, 644, 203 S.E. 2d 445, 450 (1974).*

15. "A charge of ineffective assistance of counsel is not one to be made lightly. It is a serious charge which calls into question the integrity, ability and competence of a member of the bar." *State ex rel. Daniel v. Legursky, 195 W.Va. 314, 319, 465 S.E.2d 416, __ (1995), quoting State v. Baker, 169 W.Va. 357, 365 (1982).*

16. In *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984),* the United States Supreme Court set forth a two-pronged test for claims of ineffective assistance of counsel. First, the court should determine if counsel's performance was deficient under an objective standard of reasonableness. Second, the court determines if there is a reasonable probability that, but-for counsel's unprofessional errors, the outcome of the proceeding would have been different. The West Virginia Supreme Court has adopted the *Strickland* test. *See Syl. Pt. 5, State v. Miller, 194 W.Va. 3, 459 S.E. 2d 114 (1995); Syl. Pt. 1, State ex rel. Daniel v. Legursky, supra.*

17. A petitioner alleging ineffective assistance of counsel has the burden of showing that counsel's performance was deficient and that such deficiency prejudiced the petitioner's case, (that *but for* counsel's unprofessional errors, the result of the proceedings at issue would have been different.) *See State ex rel. Daniel v. Legursky, supra.*

18. When determining whether or not an accused was prejudiced by ineffective assistance of counsel, courts should examine whether or not counsel exhibited the normal and customary degree of skill possessed by attorneys reasonably knowledgeable of criminal law. Additionally, proven counsel error which does not affect the outcome of the case is regarded as harmless error. *See Syl. Pt. 1, State v. Glover, 183 W.Va. 431, 396 S.E.2d 198 (1990).*

19. "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. Pt. 2, *State ex rel. Daniel v. Legursky, supra., at pp. 317, 419.*

20. Courts give great deference to the decisions of trial counsel. *See State ex rel. Daniel v. Legursky, supra., Strickland, supra.* Courts must examine counsel's actions "according to what was known and reasonable at the time the attorney made his or her choices." *Syl. Pt. 4, State ex rel. Daniel v. Legursky, supra. at pp. 317, 419.* "Where 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 an accused." *Syl. Pt. 3, State v. Cooper, 172 W.Va. 266, 267, 304 S.E.2d 851, 852 (1983).*

Criminal Responsibility/Competency Evaluation & Use of Psychiatric/Psychological Evidence

21. "After a reasonable tactical decision makes further investigation into a particular matter unnecessary, an attorney is not deficient in his or her duty to make a reasonable investigation by failing to further investigate and develop a matter." *State v. LaRock, 196 W.Va. 294, 470 S.E. 2d 613 (1996), citing Strickland, supra.*

22. "A lawyer is not required to investigate and present every defense with the thoroughness of a biographer. The strong presumption that counsel's actions were the result of sound trial strategy . . .[*Strickland*], can be rebutted only by clear record evidence that the strategy adopted by counsel was unreasonable." *LaRock, supra. at pp. 628, 309.*

23. The Court **CONCLUDES** that trial counsel's decisions concerning seeking a criminal responsibility/competency evaluation and trial counsel's decisions regarding the use of the petitioner's psychiatric/psychological history were objectively reasonable.

Plea Negotiation

24. The Court has not been presented with legal authority that *requires* the plea negotiation process to occur in criminal prosecution. The Court notes that Rule 11 of the West Virginia Rules of Criminal Procedure states ". . .[t]he attorney for the State and the attorney for the defendant or the defendant when acting pro se *may* engage in discussions with a view toward reaching and agreement." *W. Va. Rules of Crim. Proc., Rule 11(e)(1), emphasis added.*

25. The Court is of the opinion that plea negotiations in this matter could hardly be extensive based upon the positions of the parties and the nature of the indictment. The Court **CONCLUDES** that trial counsel made appropriate efforts to obtain a plea and that his assistance in that regard was not unreasonable or deficient

Failure to Obtain Transcript of Preliminary Hearing or Grand Jury Testimony

26. The petitioner made no showing that, but-for trial counsel's failure to obtain a transcript of the preliminary hearing before the Fayette County Magistrate Court or the transcript of the grand jury proceeding, the outcome of the trial would have been different.

Failure to Object, Failure to Cross Examine, and Failure to Call Defense Witnesses

27. Regarding opening statements, Rule 42.04(a) of the *West Virginia Trial Court Rules* states, in pertinent part: "At the commencement of trial in a criminal action, the State and the defendant may make non-argumentative opening statements as to their theories of the case and the manner in which they expect to offer their evidence.. . ." The *Rules* do not further dictate the requirements for opening statements. Opening statements are to provide a general idea of the evidence and act as an aid in receiving the evidence at trial. Opening statements are not evidence.

28. Regarding closing statements, Rule 42.04(b) of the *West Virginia Trial Court Rules* states, in pertinent part: "Counsel may refer to instructions. . .but may not argue against the correctness of any instruction. . .Counsel may not comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled. . .No portion of a lawbook shall be read to the jury by counsel."

29. "Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and, (4) whether the comments were deliberately placed before the jury to divert attention to extratraneous matters. Syl. Pt. 6, *State v. Sugg, 193 W.Va. 388 (1995).*

30. "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." *Syl. Pt. 5, Ocheltree, supra.*

31. Based upon evidence presented at trial and relevant authority cited hereinabove, the Court **CONCLUDES**, that the State's opening statement and closing argument were acceptable.

32. The Court **CONCLUDES** that trial counsel's decisions regarding when to object, which witnesses to cross-examine, the depth of cross-examination, and which witnesses to call during defense were matters of trial strategy and were not unreasonable or deficient.

Advice Regarding Petitioner's Right to Testify

33. Based upon the evidence before the Court, the Court **CONCLUDES** that the petitioner made a knowing, intelligent, voluntary, and counsel assisted decision not to testify during his trial.

Cumulative Error

34. " Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from received a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." *Syl. Pt. 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).*

35. Finding no error or deficiency in this matter, the Court likewise finds no cumulative error.

Conclusion

36. Based upon careful review and consideration of the whole of the record and the relevant legal authority, the Court **CONCLUDES** that the petitioner's allegations in this action are not factually supported by the record nor by the relevant legal authority.

37. The Court **CONCLUDES** that the petitioner was provided effective assistance of counsel throughout the underlying proceeding. Petitioner failed to prove serious errors by counsel and failed to show that alleged deficiencies in counsel's performance had a reasonable probability of changing the outcome of the proceeding.

THEREFORE, and for the above stated reasons, this Court hereby **ORDERS** that the *Petition* herein be hereby **DENIED** and **DISMISSED**, with *prejudice.*

The Clerk of this Court is directed to remove this matter from the Court's active docket.

The Clerk is further directed to send attested copies of this order to Christopher S. Moorehead, esq., 219 North Court Street, Fayetteville, WV 25840 and to Brian D. Parsons, esq., *Fayette County Assistant Prosecuting Attorney,* 108 East Maple Avenue, Fayetteville, WV 25840.

ENTERED this the 24th day of February, 2011.

PAUL M. BLAKE, JR.
JUDGE

JUDGE PAUL M. BLAKE, JR.

A TRUE COPY of an order entered
February 25, 2011
Teste: Daniel E. Knight
Circuit Clerk Fayette County, WV