STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

August 29, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Freddie Lee Bragg,
Petitioner Below, Petitioner

vs) **No. 13-0684** (Kanawha County 12-MISC-177)

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

MEMORANDUM DECISION

Petitioner Freddie Lee Bragg's appeal, filed by counsel Charles R. Hamilton, arises from the Circuit Court of Kanawha County, which denied petitioner post-conviction habeas corpus relief by order entered on September 17, 2013. Respondent David Ballard, Warden, by counsel Derek A. Knopp, filed a response. Petitioner argues that he received ineffective assistance of trial counsel.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was convicted of various sexual offenses in 2010 and sentenced to fifty-three to eighty years in prison. Petitioner's convictions were affirmed by this Court in 2012. His petition for writ of habeas corpus followed. After an omnibus evidentiary hearing on this petition, the circuit court denied petitioner post-conviction habeas corpus relief. Petitioner now appeals this order.

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

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

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

Petitioner asserts that his trial counsel was ineffective for failing to (1) properly engage in voir dire with the jury; (2) visit the crime scene; (3) interview witnesses; (4) subpoena a gynecologist; (5) subpoena character witnesses; (6) obtain school and psychological records; and (7) object to a self-incriminating arraignment video. Petitioner also asserts that his trial counsel ineffectively failed to prepare him for trial and failed to file a motion for reconsideration.

The following standard is applied to claims concerning 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, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Upon our review of the record and the briefs on appeal, we find no error or abuse of discretion by the circuit court. Petitioner does not provide any support for his arguments concerning any motions for reconsideration or his trial counsel's preparation of him for trial. "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981). Further, our review of the record does not indicate that petitioner demonstrated that his trial counsel's performance was deficient under an objective standard of reasonableness and that, but for his counsel's alleged errors to prepare him for trial and to file a motion for reconsideration, there is a reasonable probability that the results of the proceedings would have been different. All of the other issues petitioner raises on appeal were issues addressed and discussed by the circuit court in its order denying petitioner post-conviction habeas corpus relief. Petitioner raises nothing new that supports those arguments. Having reviewed the circuit court's "Final Order Denying Petitioner's Amended Petition for Writ of Habeas Corpus," entered on September 17, 2013, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to those assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's opinion letter and order to this memorandum decision.[1]

For the foregoing reasons, we affirm.

Affirmed.

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[1]Because the underlying criminal matter involves sensitive facts in which the minor victim was related to petitioner, we have redacted the circuit court order to protect the victim's identity. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

ISSUED: August 29, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

13-0284

#18

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
Ex rel. FREDDIE LEE BRAGG
Petitioner,

v.

Civil Action No. 12-MISC-177
Judge Louis H. Bloom

DAVID BALLARD, Warden,
MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.[1]

FINAL ORDER DENYING PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS

On April 3, 2013, came the Petitioner, Freddie Lee Bragg ("Mr. Bragg"), via video conference and by counsel, Charles R. Hamilton ("Mr. Hamilton"), and for the Respondent, Fred Giggenbach, Jr. ("Mr. Giggenbach"), Assistant Prosecuting Attorney, for an omnibus hearing on the "Petitioner's Amended Petition for Writ of Habeas Corpus" ("Amended Petition").

Upon review of the evidence presented at the omnibus hearing, the Amended Petition, the underlying criminal record, and the applicable law, the Court is of the opinion that the Petitioner's Amended Petition should be denied based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Mr. Bragg was indicted in Kanawha County, West Virginia, in Felony Indictment Number 10-F-202, for eleven counts of sexual assault and sexual abuse. Indictment, Feb. 25, 2010.

2. The charges were the result of multiple alleged sexual acts between Mr. Bragg and T.C., a child who was residing at his home. Am. Pet. 3, June 19, 2012. T.C. had resided with Mr.

[1] At the time of the filing of the Amended Petition, the Petitioner was being held at the Tygart Valley Regional Jail with the Administrator position vacant at that time. However, the Petitioner is currently being held at the Mount Olive Correctional Complex. Thus, pursuant to Rule 41(c) of the Rules of Appellate Procedure, the latter is the appropriate Respondent in the present habeas action. Om. Hr'g Tr., R. 44, 3:15.

Bragg and his wife, B E since 2003. *Id.* T.C. is B B 's granddaughter. *Id.* T.C. underwent multiple hospitalizations and was diagnosed as bipolar with psychotic tendencies. *Id.*

3. After a complete trial, the jury found Mr. Bragg guilty of nine of the eleven counts with which he was indicted. *Id.* at 4.

4. On June 30, 2012, Mr. Bragg was sentenced to a total of 53–80 years in prison. Sentencing Order, July 6, 2012.

5. Mr. Bragg appealed to the Supreme Court of Appeals of West Virginia, and the Supreme Court issued a Memorandum Decision affirming the conviction on February 10, 2012. *State v. Bragg*, No. 11-0211 (W. Va. Feb. 10, 2012). Chief Justice Menis E. Ketchum and Justice Brent D. Benjamin both dissented from the decision. *Id.*

6. Michael Clifford represented Mr. Bragg at trial, and Crystal L. Walden represented Mr. Bragg for his appeal.

Habeas Corpus Petition and Omnibus Hearing

7. On April 10, 2012, Charles R. Hamilton was appointed to represent Mr. Bragg in this habeas corpus action. Order Appointing Counsel and Setting Briefing Schedule, Apr. 10, 2012.

8. On September 27, 2012, the Court held an omnibus habeas corpus hearing as contemplated in W. Va. § 53-4A-1 (1967) and further explicated in *Losh v. McKenzie*, 166, W. Va. 762, 277 S.E.2d 606 (1981). The September 27, 2012, hearing was continued and heard on November 27, 2012. The November 27, 2012, hearing was rescheduled and completed on April 3, 2013.

9. At the onset of the omnibus hearing, the Court and Mr. Bragg's counsel extensively inquired, on the record, into whether Mr. Bragg knew and understood each element of the

possible grounds for habeas relief. Omnibus Hr'g Tr. 6–11, Sept. 27, 2012. Mr. Bragg testified that he knew and understood each element of the possible grounds for habeas relief and that he did in fact make a knowing and intelligent waiver of all possible grounds not raised herein, as defined in *Losh*. Thus, the Court finds that Mr. Bragg, with the advice of counsel, knowingly and intelligently waived all grounds not asserted herein.

10. In Mr. Bragg's Amended Petition and at the omnibus hearing, he raised the ground for relief of ineffective assistance of counsel. Am. Pet. 3, June 19, 2012; Omnibus Hr'g Tr. 11:5–7, Sept. 27, 2012. Specifically, Mr. Bragg cites the following errors as ineffective assistance of counsel: Mr. Clifford's failure to object and waiving objection to a self-incriminating video played to the jury by the State; failure to adequately and reasonably investigate the offense, including failure to inspect the crime scene, to interview witnesses, and subpoena Riverside High School, medical, and DHHR records of the victim; failure to obtain a gynecological expert; and failure to properly question the jury panel during voir dire. Am. Pet. 3, June 19, 2012; Omnibus Hr'g Tr. 11, Sept. 27, 2012.

11. At the omnibus hearing, Mr. Bragg and the following witnesses testified: B. B. —his wife; Crystal Walden—Mr. Bragg's attorney on appeal; Tim Stricker—an investigator; Michael Clifford—Mr. Bragg's trial attorney; Richelle Garlow—co-counsel with Michael Clifford; and Mark Lawrence French—an attorney testifying as an expert on criminal law. The Respondent called no witnesses.

DISCUSSION

1. Mr. Bragg alleges that Mr. Clifford did not provide him effective assistance of counsel. Ineffective assistance of counsel claims are governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and adopted in West Virginia by

State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995). Under *Miller*, a petitioner must prove that "(1) [c]ounsel'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.'" *Id.* at syl. pt. 5 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

2. With regard to the first prong of the test, a petitioner must first "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *State ex rel. Myers v. Painter*, 213 W. Va. 32, 35, 576 S.E.2d 277, 280 (2002) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066); *Miller*, 194 W. Va. at 15, 459 S.E.2d at 126. The petitioner's burden in this regard is heavy because there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at syl. pt. 4 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). "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. . . ." Syl. pt. 6, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Therefore, a reviewing court must ask "whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Id.* Moreover, counsel's strategic decisions must rest upon a reasonable investigation enabling him or her to make informed decisions about how to represent criminal clients. Syl. pt. 3, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 423 (1995).

3. With regard to the second prong of the test, a petitioner must show that counsel's performance, if deficient, adversely affected the outcome in a given case. *Painter*, 213 W. Va. at

36, 576 S.E.2d at 281. Therefore, a petitioner must demonstrate that the complained-of deficiency or errors of counsel resulted in prejudice or a "reasonable probability" that, in the absence of such error, the result of the proceedings would have been different. *Id.*

4. Finally, in deciding an ineffective assistance of counsel claim, the Supreme Court of Appeals of West Virginia has stated that a court may dispose of such claim "based solely on a petitioner's failure to meet either prong of the [*Strickland*] test." Syl. pt. 5, *Legursky*, 195 W. Va. 314, 465 S.E.2d 416.

5. Mr. Bragg identified the following acts or omissions of Mr. Clifford that he alleges resulted in an unfair trial: failure to properly voir dire the jury; failure to obtain a gynecological expert; failure to object and waiver of objection to the admission of evidence, testimony, and argument of a self-incriminating statement Mr. Bragg made during his arrest processing; and failure to subpoena and interview witnesses, take photographs of the crime scene, and subpoena Riverside High School, DHHR, and medical records of the victim.

6. *Failure to properly voir dire the jury*—Mr. Bragg claims that the voir dire conducted by his counsel "violated the petitioner's right to a fair trial" because "[c]ounsel asked the jury panel four questions" that were "ineffective and meaningless." Am. Pet. 5, June 19, 2012.

7. The Supreme Court of Appeals of West Virginia has previously expounded upon *Miller*'s presumption and stated that "the level of participation employed by trial counsel during voir dire is also subject to the presumption that such decisions were motivated by sound trial strategy." *State v. Frye*, 221 W. Va. 154, 157, 650 S.E.2d 574, 577 (2006).

8. Mr. French testified that he reviewed the voir dire of the trial transcript and opined that, although he "would have asked . . . quite a bit more extensive voir dire," "older practitioners prefer to keep voir dire very short and concise." Omnibus Hr'g Tr. 19:14–17, Apr. 3, 2013. Mr.

French also testified that he could not say with reasonable certainty that the results of the proceeding would have been different if the voir dire had been conducted differently. Omnibus Hr'g Tr. 27:12–15, Apr. 3, 2013. The Petitioner has offered no evidence to show that Mr. Clifford's voir dire was deficient under an objective standard of reasonableness.

9. Therefore, the Court finds that Mr. Bragg: has not overcome the presumption that Mr. Clifford's voir dire was motivated by sound trial strategy, has not shown that Mr. Clifford's voir dire performance was deficient under an objective standard of reasonableness, and has not shown a reasonable probability that asking more or different questions on voir dire would have changed the result of the trial.

10. *Failure to obtain a gynecological expert*—Mr. Bragg claims, "Counsel's failure to provide an expert on behalf of Freddie Lee Bragg weaken[ed] his defense and was ineffective assistance. An expert . . . could have caused a more favorable outcome for the defendant." Am. Pet. 5, June 19, 2012. Specifically, Mr. Bragg claims that his counsel should have countered the testimony of the physician who examined T.C., Jo Ann Phillips, M.D., with expert testimony. *Id.* Dr. Phillips testified that T.C.'s hymen was "notched," indicating sexual penetration, but had since healed. Phillips Test., Trial Tr. 195–96, June 1, 2010.

11. Mr. Clifford testified that he did not procure an expert because he "read extensively medical literature [sic]" and attempted to anticipate the parameters of Dr. Phillips's testimony. Omnibus Hr'g Tr. 64–65, Nov. 7, 2012. However, Mr. Clifford further testified, "I never dreamed that Dr. Phillips would testify the way she did." *Id.* at 64:18–19. At trial, Mr. Clifford cross-examined Dr. Phillips, asking her how long it normally takes for a hymen to heal and whether or not repeated intercourse, as was alleged, "would negate the ability of that hymen to heal." Phillips Test., Trial Tr. 203–04. Dr. Phillips answered that it normally takes four weeks for

a hymen to heal, that the status of T.C.'s hymen indicated that T.C. had not underwent sexual intercourse for four weeks, and that repeated sexual intercourse would stifle a hymen's healing process. *Id.* at 203–205.

12. Mr. Bragg claims that Mr. Clifford should have provided an expert to "give a second opinion as to whether a notch would be consistent with T.C.'s representation that she and Mr. Bragg had intercourse between 20 and 50 times." Am. Pet. 5, June 19, 2012. However, the trial testimony reveals that Mr. Clifford was able to effectively cross-examine Dr. Phillips, as she admitted that the health of T.C.'s hymen was not necessarily indicative of repeated intercourse. Phillips Test., Trial Tr. 203–05.

13. Therefore, the Court finds that the Mr. Bragg's argument satisfies neither prong of the *Strickland* test. Mr. Bragg has not shown that Mr. Clifford's performance was deficient under an objective standard of reasonableness because Mr. Clifford extensively cross-examined Dr. Phillips and researched the relevant medical issues. With regard to the second prong under *Miller*, Mr. Bragg has the burden of showing that the result *would* have been different if Mr. Clifford had provided a medical expert, yet Mr. Bragg only asserts that the outcome "*could* have caused a more favorable outcome. . . ." Am. Pet. 5, June 19, 2012. More importantly, Mr. Bragg has put forth no evidence to indicate that the absence of Mr. Clifford's alleged error would have rendered different results at trial. *See id.*

14. *Failure to object and waiving objection to the admission of evidence, testimony, and argument of a self-incriminating statement Mr. Bragg made during his arrest processing*—Mr. Bragg claims that Mr. Clifford's failure to object and waiver of objection was ineffective assistance of counsel because it violated his privilege against self-incrimination. Am. Pet. 6, June 19, 2012. Further, Mr. Bragg claims that he lost his appeal because Mr. Clifford failed to object

to the arrest processing video. *See id.* In the video, Mr. Bragg denies the charge of incest, saying, "She's not kin to me. She's my stepdaughter's daughter." Snuffer Test., Trial Tr. 140:17–18, June 1, 2010.

15. During the pre-trial suppression hearing, Mr. Clifford objected to the admission of the video's contents, specifically the exchange about incest, on the grounds of relevance and Mr. Bragg's right to remain silent. Snuffer Test., Trial Tr. 10–15. During trial, the Court asked Mr. Clifford if he had "an objection to the part that was played." *Id.* at 141:13–15. Mr. Clifford initially responded that he had "no problem" with the admission of the videotape, but Mr. Clifford finished his response with: "Well, maybe. We've already discussed this in the pretrial matters." *Id.* at 141:17–18.

16. Additionally, on appeal, the Supreme Court of Appeals of West Virginia held that, "even if waiver had not occurred, there was no demonstration of plain error." *State v. Bragg*, No. 11-0211 (W.Va. Feb. 10, 2012). As the Supreme Court noted, plain error requires that "substantial rights be affected in such a manner so as to seriously affect the fairness, integrity, or public reputation of the judicial proceedings." *Id.*; syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The Supreme Court also acknowledged in a footnote that "Petitioner received *Miranda* warnings at the time of his arrest at his home, before he was processed." *Bragg*, No. 11-0211; Snuffer Test., Trial Tr. 134:6–8. Moreover, Detective Snuffer testified that he "read him [h]is *Miranda* warning again" while Mr. Bragg was being processed at the Kanawha County Sheriff's Department. Snuffer Test., Trial Tr. 137:21–22; *see id.* at 134:20–21.

17. More stringent than plain error, the ineffective assistance of counsel standard requires that, "but for counsel's unprofessional errors, the result of the proceedings would have been different." *Miller* at syl. pt. 5. The Court therefore finds that Mr. Bragg has not shown Mr.

Clifford's performance at trial to be deficient under an objective standard of reasonableness and has not shown a reasonable probability that objecting differently to the video would have changed the result of trial.

18. *Failure to investigate*—Mr. Bragg claims that Mr. Clifford "may have procured a different result if he would have talked to all the witnesses and subpoenaed them, subpoenaed school, medical, and DHHR documents, and took photographs of the crime scene." Am. Pet. 7, June 19, 2012.

19. The Supreme Court of Appeals of West Virginia has previously stated that:

> 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 professional assistance, and judicial scrutiny of counsel's performance 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. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

Syl. pt. 3, *Legursky*, 195 W. Va. 314, 465 S.E.2d 416. As the Court noted, the adequacy of a pretrial investigation is the fulcrum of the lever by which defense counsel seeks to move the proceedings. *Id.* at 320, 422.

20. When asked during the omnibus hearing if additional records would have altered the outcome of the trial, Mr. Hamilton responded, "Well, I would hate to speculate . . . because I don't have all of these records. . . . So it would seem that [Mr. Clifford's] tactics and strategies couldn't be accurate if you don't have a full investigation of the victim. These records would have given us more knowledge." Omnibus Hr'g Tr. 91:13–21, Sept. 27, 2012.

21. Further, Mr. French noted during the omnibus hearing that the school records may not have been admissible and that, if they were admitted, the records would not have created a

reasonable probability of different results. Omnibus Hr'g Tr. 26:2–5,22–24, 27:1–2, Apr. 3, 2013. Mr. French testified:

> [Respondent] Q. And in fact you can't say that anything that was done or not in this case, what -- the results of the trial would have been different if it had been done differently; right?
>
> [Mr. French] A. I can't sit here and say that definitively, no.

Id. at 26:6–10.

22. Richelle Garlow ("Ms. Garlow") testified that Mr. Clifford "filed a motion before this Court for all of the psychological records of the victim in this case." Omnibus Hr.'g Tr. 50:22–24, 51:1–2, Nov. 7, 2012. This Court then reviewed the records *in camera*. Ms. Garlow also testified that Mr. Clifford obtained DHHR, school, and investigative reports. *Id.* at 51–52.

23. Therefore, the Court finds that, with regard to T.C.'s records, Mr. Clifford conducted a reasonable investigation enabling him to make informed decisions about how best to represent Mr. Bragg.

24. Ms. Garlow and Mr. Clifford testified that Mr. Clifford hired an investigator who worked on Mr. Bragg's case. Omnibus Hr'g Tr. 50:11–13, 72:4–6, Nov. 7, 2012. However, the investigator did not take photographs of the crime scene because Mr. Clifford had obtained photographs from the police investigative report and from Mr. Giggenbach. *Id.* at 69–70. During the omnibus hearing, Mr. Bragg admitted to obtaining fifty photos from Mr. Giggenbach. Omnibus Hr'g Tr. 78:1–2, Sept. 27, 2012.

25. Therefore, the Court finds that, with regard to Mr. Clifford's failure to take crime scene photos, Mr. Clifford conducted a reasonable investigation by obtaining approximately fifty photos of the crime scene, which enabled him to make informed decisions about how best to represent Mr. Bragg.

26. With regard to Mr. Bragg's claim that Mr. Clifford was ineffective for failing to subpoena and interview witnesses, Ms. Garlow explained Mr. Clifford's trial strategy at the omnibus hearing. She testified, "If I recall there was a question of opening the door into character evidence with Mr. Bragg. There were some other witnesses that may have been brought in that could have been adverse to his case if we opened the door. So that was another line we had to stay very close to." Omnibus Hr'g Tr. 46:15–20, Nov. 7, 2012. Ms. Garlow testified Mr. Clifford's "full-time staff investigator . . . talked to witnesses and coordinated getting witnesses to court." *Id.* at 43:8–14. However, Ms. Garlow was unable to remember all of the names of the witnesses who were interviewed. *See id.* at 43:17–18, 44:2–3.

27. Mr. Clifford testified about his trial strategy, saying, "if we had put on the character witness, that would have opened the door." *Id.* at 74:9–10. Mr. Clifford testified that he talked to and investigated several witnesses, including Mrs. Bragg, the "young girls who frequented [the Braggs'] house," and other witnesses that the Braggs suggested—including Rick Howell, Chuck Blair, Norris Light, and T.C.'s mother. *Id.* at 73– 75. Mr. Clifford admitted failing to appear in court for one proceeding that resulted in a revocation of Mr. Bragg's bond, but also testified that he met with Mr. Bragg several times throughout his representation. *Id.* at 86:3–11.

28. Therefore, the Court finds that, with regard to Mr. Clifford's alleged failure to subpoena and interview witnesses, Mr. Clifford conducted a reasonable investigation enabling him to make informed decisions about how best to represent Mr. Bragg.

CONCLUSIONS OF LAW

1. The Court concludes that Mr. Bragg's ineffective assistance of counsel claim must fail because it does not meet the test provided in *Strickland*. *See* syl. pt. 5, *Miller*, 194 W. Va. 3, 459

S.E.2d 114. First, the Court concludes that Mr. Clifford's performance was not deficient because he adequately investigated the case and properly consulted with and advocated for Mr. Bragg.

2. Furthermore, the Court also concludes that, even if trial counsel's performance were deficient, the Petitioner's claim fails the second prong of the *Strickland* test because Mr. Bragg did not demonstrate that trial counsel's deficiencies resulted in prejudice or a "reasonable probability" that, in the absence of such error, the result of the proceedings would have been different. *See* syl. pt. 5, *Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (ruling that a court can dispose of such claim "based solely on a petitioner's failure to meet either prong of the [*Strickland*] test.").

3. Finally, based on the foregoing, this Court concludes as a matter of law that the Petitioner is not entitled to habeas corpus relief.

DECISION

Accordingly, the Court does hereby **ORDER** that the "Petitioner's Amended Petition for Writ Habeas Corpus" be **DENIED**. There being nothing further, the Court **ORDERS** that the above-styled action be **DISMISSED** and **STRICKEN** from the docket of the Court. The objections of any party aggrieved by this Order are noted and preserved.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record and to the Petitioner at the following addresses:

Fred Giggenbach, Jr., Esq.
Kanawha County Prosecutor's Office
301 Virginia Street, East
Charleston, WV 25301

Charles R. Hamilton
Hamilton Law Office
5130 MacCorkle Avenue, S.E.
Charleston, WV 25304

Freddie Lee Bragg
Mt. Olive Correctional Complex
1 Mountainside Way
Mt. Olive, WV 25185

ENTERED this 16 day of September 2013

Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF 2013
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 9/17/13
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