

**FILED**  
**March 19, 2025**

C. CASEY FORBES, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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

**Codey Dale Foster,**  
**Petitioner Below, Petitioner**

v.) **No. 23-105** (Upshur County CC-49-2018-C-5)

**R.S. Mutter, Superintendent,**  
**Stevens Correctional Center,**  
**Respondent Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Codey Dale Foster appeals the Circuit Court of Upshur County’s February 7, 2023, order denying his petition for a writ of habeas corpus.<sup>1</sup> On appeal, the petitioner argues that the habeas court erred in denying him habeas relief based on a favorable change in the law and ineffective assistance of counsel. Upon our review, we determine that this case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion. For the reasons set forth below, the decision of the circuit court is vacated, and this case is remanded to the circuit court for the entry of a new order setting forth findings of fact and conclusions of law sufficient to allow meaningful appellate review.

In September 2016, a grand jury returned an indictment against the petitioner, charging him with one count each of daytime burglary, first-degree robbery, petit larceny, assault of an elderly person during the commission of a felony, malicious assault of an elderly person, strangulation, and attempted murder. The petitioner thereafter entered into a plea agreement with the State where the petitioner agreed to plead guilty to one count of daytime burglary, one count of first-degree robbery, and one count of strangulation in exchange for the State’s agreement to dismiss the remaining charges and to refrain from filing a recidivist information against the petitioner based on a prior conviction for conspiracy to commit burglary. In the written plea agreement, the possible sentence for daytime burglary was listed as not less than one, nor more than fifteen years of incarceration. However, the petitioner’s counsel crossed out “fifteen” and

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<sup>1</sup> Petitioner appears by counsel Mark A. Barney, and respondent appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. Additionally, the Court has automatically substituted the name of the current Superintendent of Stevens Correctional Center as the respondent. *See* W. Va. R. App. P. 41(c).

replaced it with “ten,” and initialed the change.<sup>2</sup>

At a plea hearing held in April 2017, the circuit court determined that the petitioner had “presented or laid a sufficient factual basis” for the charges and, as such, accepted the petitioner’s plea. After a presentence investigation, the circuit court held a sentencing hearing on July 7, 2017. Ultimately, the court sentenced the petitioner to not less than one nor more than fifteen years of incarceration for his daytime burglary conviction, not less than one nor more than five years for his strangulation conviction, and a determinate forty years for his first-degree robbery conviction. The court ordered these sentences to run consecutively. The petitioner filed a direct appeal, and this Court affirmed his convictions. *See State v. Foster*, No. 18-0247, 2019 WL 1224583 (W. Va. Mar. 15, 2019) (memorandum decision).

After filing a self-represented petition for a writ of habeas corpus in July 2021, the petitioner was appointed counsel, who filed an amended petition raising the following five grounds for relief: (1) that the petitioner’s plea was involuntary and unintelligent because he believed that he was pleading guilty to daytime burglary without breaking, which carried a sentence of one to ten years of incarceration; (2) that the petitioner’s due process rights mandate that the plea agreement be rendered void where the written agreement provided that the penalty for daytime burglary was one to ten years of incarceration; (3) that the petitioner’s plea to both first-degree robbery and strangulation violated double jeopardy; (4) that the petitioner’s counsel was ineffective for failing to perform an adequate investigation, providing incompetent advice regarding the plea agreement, failing to ensure the plea was voluntary, failing to ensure the petitioner’s plea did not violate double jeopardy, and failing to suppress the petitioner’s statement to police; and (5) cumulative error. The petitioner also filed a motion for approval of expenses to retain a psychological expert, which was denied.

The habeas court held an omnibus hearing over the course of two days in August and October 2022. The petitioner and trial counsel testified. By order entered February 7, 2023, the court denied the petitioner’s petition for a writ of habeas corpus. Relevant to this Court’s decision, the habeas court addressed only the petitioner’s claim that there was cumulative error and that his trial counsel was ineffective for failing to perform an adequate investigation, failing to provide adequate advice regarding the plea agreement, failing to ensure that the plea was voluntary, failing to raise the issue of double jeopardy, and failing to move to suppress the petitioner’s statement. Finding no ineffective assistance of counsel or cumulative error, the court denied the petitioner habeas relief. The petitioner now appeals the February 7, 2023, order denying his petition for a writ of habeas corpus.

On appeal, the petitioner argues that the circuit court did not address certain contentions raised in his petition and, rather, touched on them only through the lens of ineffective assistance of counsel. Specifically, the petitioner states that he raised standalone claims regarding the

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<sup>2</sup> At the time of the petitioner’s plea agreement, West Virginia Code § 61-3-11 provided different sentences for daytime burglary. Specifically, if a defendant was alleged to have broken and entered a home, the penalty was not less than one nor more than fifteen years of incarceration; in contrast, if one entered without breaking, the penalty was not less than one nor more than ten years of incarceration.

involuntariness of his plea agreement, double jeopardy, and due process violations that were either not addressed or only touched on through the court's discussion on ineffective assistance of counsel. The respondent admits that the final order does not address the petitioner's standalone arguments regarding his plea agreement and states that because the final order does not address all issues raised in the petitioner's petition, this case should be remanded to the circuit court for entry of a new order.

Typically, our review of a court's order denying habeas relief is for an abuse of discretion; we review underlying findings of fact under a clearly erroneous standard and questions of law de novo. Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). Regarding habeas petitions generally, we have held that "West Virginia Code section 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law *relating to each contention advanced by the petitioner*, and to state the grounds upon which the matter was determined." Syl. Pt. 1, *State ex rel. Watson v. Hill*, 200 W. Va. 201, 488 S.E.2d 476 (1997) (emphasis added); *see also Markley v. Coleman*, 215 W. Va. 729, 734, 601 S.E.2d 49, 54 (2004) ("In deciding to grant or deny relief, circuit courts must make adequate findings of fact and conclusions of law related to the petitioner's habeas corpus allegations.").

Without findings concerning each of the petitioner's claims, this Court is unable to determine whether the circuit court abused its discretion by denying the habeas petition. *See Province v. Province*, 196 W. Va. 473, 483 n.19, 473 S.E.2d 894, 904 n.19 (1996) ("Where we are provided only legal conclusions unsupported by specific facts . . . a reviewing court simply is unable to determine whether or not the conclusion is an abuse of discretion."). We have previously stated that "in cases where there is an absence of adequate factual findings, it is necessary to remand the matter to the lower court to state or, at a minimum, amplify its findings so that meaningful appellate review may occur." *Mullins v. Mullins*, 226 W. Va. 656, 662, 704 S.E.2d 656, 662 (2010); *see also Province*, 196 W. Va. at 483, 473 S.E.2d at 904 ("Where the lower tribunal[] . . . mak[es] only general, conclusory or inexact findings[,] we must vacate the judgment and remand the case for further findings and development."); *Dennis v. State of W. Va., Div. of Corr.*, 223 W. Va. 590, 593, 678 S.E.2d 470, 473 (2009) ("We previously have recognized that 'in most circumstances the failure to make specific findings of fact and conclusions of law regarding an issue raised in habeas proceedings . . . necessitate[s] a remand[.]'" (quoting *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 19, 528 S.E.2d 207, 215 (1999))). Accordingly, we vacate the circuit court's February 7, 2020, order and remand this matter to the circuit court with directions for the court to set forth findings of fact and conclusions of law sufficient to allow meaningful appellate review in the event that petitioner elects to file an appeal.<sup>3</sup>

For the foregoing reasons, we vacate and remand.

Vacated and remanded.

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<sup>3</sup> The petitioner raised additional assignments of error in this appeal involving the merits of the circuit court's decision; however, because the circuit court's order is, at present, inadequate to allow meaningful appellate review, we shall not address those issues at this time.

**ISSUED:** March 19, 2025

**CONCURRED IN BY:**

Chief Justice William R. Wooton

Justice Elizabeth D. Walker

Justice Tim Armstead

Justice C. Haley Bunn

Justice Charles S. Trump IV