APPENDIX

A

FILED: July 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7518
(1:19-cv-00570)

MICHAEL J. GREENE

Petitioner - Appellant

v.

CHARLES WILLIAMS, Superintendent, Huttonsville Correctional Center

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7518

MICHAEL J. GREENE,

Petitioner - Appellant,

v.

CHARLES WILLIAMS, Superintendent, Huttonsville Correctional Center,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Bluefield. David A. Faber, Senior District Judge. (1:19-cv-00570)

Submitted: June 29, 2021 Decided: July 2, 2021

Before KING and AGEE, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Michael Jermaine Green, Appellant Pro Se. Lindsay Sara See, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

PER CURIAM:

Michael Jermaine Greene seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Greene has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

MICHAEL J. GREENE,

Petitioner,

v. **CIVIL ACTION NO. 1:19-00570**

CHARLES WILLIAMS, Superintendent,
Huttonsville Correctional Center,

Respondent.

MEMORANDUM OPINION AND ORDER

By standing order, this matter was referred to Magistrate Judge Dwane L. Tinsley for submission of proposed findings of fact and a recommendation for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Tinsley submitted his Proposed Findings and Recommendation ("PF&R") on July 29, 2020, in which he recommended that this court grant respondent's motion to dismiss and motion for summary judgment; deny petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254; deny petitioner's motion for relief based upon no answer to petition; and dismiss this matter from the court's active docket.

In accordance with the provisions of 28 U.S.C. § 636(b), the parties were allotted fourteen days, plus three mailing days, in which to file any objections to Magistrate Judge Tinsley's PF&R. Pursuant to § 636(b)(1)(C), the court need not conduct a *de novo* review of the PF&R when a party "makes general and conclusory objections that do not direct the court to a specific error in the

magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Petitioner submitted timely objections to the PF&R on August 5, 2020. On August 28, 2020, Greene filed a notice advising the court of other cases.

Under 28 U.S.C. § 2254, Greene is entitled to federal habeas relief only if he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254(d) provides that when the issues raised in a § 2254 petition were raised and considered on the merits in State court habeas proceedings, federal habeas relief is unavailable unless the State court's decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court stated that under the "contrary to" clause in § 2254(d)(1), a federal habeas Court may grant habeas relief "if the State court arrives at a conclusion opposite to that reached by this Court on a question of law or if the State court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams, 529 U.S. 362, 412-13 (2000). A federal habeas court may grant relief under the "unreasonable application" clause

of § 2254(d)(1) where the State court identified the appropriate Supreme Court precedent but unreasonably applied the governing principles. Id. In determining whether the State court's decision was contrary to, or was an unreasonable application of, Supreme Court precedent, all factual determinations by the State court are entitled to a presumption of correctness. See 28 U.S.C. § 2254(e).

A state court's decision is "contrary to" clearly established federal law when it "applies a rule that contradicts the governing law set forth" by the United States Supreme Court, or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." Williams, 529 U.S. at 405-06. A state court's decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1) "if the state court identifies the correct governing legal rule from . . . [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407. "The state court's application of clearly established federal law must be 'objectively unreasonable,' and 'a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Robinson v. Polk, 438 F.3d 350, 355 (4th Cir. 2006) (quoting Williams, 529 U.S. at 411). Moreover, when "assessing the reasonableness of the state court's

application of federal law, the federal courts are to review the result that the state court reached, not whether [its decision] [was] well reasoned." Wilson v. Ozmint, 352 F.3d 847, 855 (4th Cir. 2003) (quotation marks omitted).

Against this backdrop, the court has carefully considered petitioner's objections and reviewed the record de novo. The court concludes that all of Greene's objections to the PF&R are without merit. Given that Greene's objections mirror his arguments considered and rejected by the magistrate judge, it would serve no useful purpose for the court to address each of those objections and go through the exercise of reiterating the findings of fact and conclusions which are already set forth in Magistrate Judge Tinsley's comprehensive and well-reasoned PF&R. Accordingly, the court **OVERRULES** Greene's objections for the same reasons stated in the PF&R. The court will, however, separately address a few points raised in petitioner's objections.

A. *"Intentionally Ignor[ing] the facts"*

Greene quarrels with Magistrate Judge Tinsley's reliance on the decision of the Supreme Court of Appeals of West Virginia in his recitation of the factual and procedural background. According to petitioner, the PF&R "intentionally ignor[ed] the facts stated in my reply to respondent's answer to petition. . . with all declarations, and all exhibits filed in support." ECF No. 63 at 1. However, as Greene himself states in the aforementioned reply, "[t]he facts of case [are] not in dispute." ECF No. 43 at 1. Furthermore, § 2254

itself provides that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1) (emphasis added); Watkins v. Rubenstein, 802 F.3d 637, 643 (4th Cir. 2015). Greene has not rebutted the state court's findings with "clear and convincing evidence" and, therefore, his objection is **OVERRULED**.

B. *Violation of Plea Agreement*

In January 2010, when Greene was sixteen years of age, he was arrested and charged as a juvenile with the murder of Clayton Mitchum in Mercer County, West Virginia. Although that charge was ultimately dismissed, a subsequent juvenile petition was filed in February 2011 charging Greene with the First Degree Murder of Mitchum. Subsequent to the filing of that petition, Greene was also charged with three counts of Delivery of a Schedule II Narcotic.

In 2012, counsel for Greene negotiated a plea agreement to resolve all outstanding charges against Greene. Pursuant to the terms of that agreement, Greene would plead guilty to the three counts for delivery of a controlled substance and would "be subject to the custody of the Division of Juvenile Services until his 21st birthday." ECF No. 33-5. As to the murder charge, Greene would consent to the filing of an information, waive transfer to adult jurisdiction, and enter a "Best Interest Plea" to First Degree

Robbery as an accessory. See id. The State agreed, pursuant to Rule 11(E)(1)(c), to:

A) A determinate 20 year cap on the sentence;

B) A suspended sentence (Probation) consecutive to release from juvenile custody;

C) Deferred adjudication of guilt; whereby Defendant would be allowed to withdraw his plea and the case would be dismissed upon Defendant's successful completion of probation; or successful completion of a two-year Associates degree program or an equivalent trade-school certification.

Id. On June 18, 2012, Greene entered a guilty plea as an adult to First Degree Robbery as an accessory and as a juvenile to the three counts of Delivery of Schedule II Narcotics.

On May 24, 2013, prior to his 21st birthday, the Circuit Court found that Greene had successfully completed the Division of Juvenile Services Program at the West Virginia Industrial Home for Youth on May 23, 2013. Defendant was placed on supervised probation for a term of five years pursuant to his plea agreement with respect to the First Degree Robbery charge. Four days later, a petition to revoke his term of probation was filed. Ultimately, Greene's probation was revoked and he was sentenced to 20 years in the penitentiary.

Greene contends that, under the terms of his plea agreement, he was subject to the custody of the Division of Juvenile Services until his 21st birthday. Therefore, according to him, he could not be subject to adult jurisdiction until he turned 21 years of age.

However, read in its entirety, the plea agreement does not support Greene's argument. Greene cherry picks one sentence from the plea agreement to support his position but, in doing so, takes that sentence out of context and completely ignores the rest of the agreement. The plea agreement itself makes clear that Greene was to be in juvenile custody for purposes of his controlled substances offenses only and that said custody could continue until his 21st birthday. There is nothing in the plea agreement to suggest that Greene could not be released from juvenile custody prior to his 21st birthday. Furthermore, the plea agreement makes clear that Greene would begin serving his sentence on the robbery charge as an adult "consecutive to release from Juvenile custody." ECF No. 33-5.

In addition, the plain language of the plea agreement is consistent with the plea colloquy. As the PF&R noted, Greene's guilty pleas were entered voluntarily and with a full understanding of the consequences of doing so. The circuit court judge explained exactly how the guilty pleas to the various charges would work and Greene acknowledged his understanding of the same. In particular, the circuit court explained to Greene that his robbery sentence would start to run upon his release from juvenile custody and that might happen prior to his 21st birthday:

> Court: And would put you on probation and the probation would start to run after you're released from juvenile custody. From juvenile jurisdiction. Do you understand that?

Either after you complete the Glen Mills Program or you complete the program at the Industrial Home? Do you understand that?

Greene: Yes, sir.

Court: **One of those, or you turn 21. Which one . . . which ever occurs first I guess.** Alright.

ECF No. 33-10 at 19 (emphasis added); see also id. at 27 ("What would happen after you completed your juvenile sentence you'd be placed on probation."). In response to specific questioning from Greene, the court again told Greene that his juvenile custody could be terminated prior to his turning 21 years of age:

Court: The worst thing that can happen to you on the juvenile charges is that you're locked up until you're 21. That's the wors[t] that can happen to you on the juvenile charges. And you would be in a juvenile facility. Not in jail. Alright?

Greene: Yes, sir.

Court: The wors[t] thing that could happen to you on the robbery charge if you violate your probation is you could go to jail for up to 20 . . . 20 years. Alright. Do you have any questions about any of this?

Greene: Well, if I go . . . if I went to the Industrial Home would that be a program, too?

Court: They have a program up there where you get an ed . . . where you finish your . . . you know, they put you in school. Try to get you to finish your high school diploma. They've got some vocational program. It's a . . . it's a juvenile facility so it's not prison. It's a . . . they do-

Attorney: He's already been there.

Defendant: I mean, I've been there. I just . . . I was just wondering because like you know it is until I turn 21, you know what I'm saying, so I'm thinking like will I be up there -

Court: **Well, if you complete the program before you're 21 then I guess you would start your probation before on your other charge before you're 21. I mean, they don't have to keep you until you're 21.**

Greene: I can . . . I can -

Court: **That's the longest they can keep you is until you turn 21.**

Greene: I can -

Court: **That's the longest they can keep you until you're 21.**

Greene: So if I completed, you know, I'd probably I mean, I'm asking -

Court: **If you completed it in a year than you'd be out in a year and you'd start the probation on the other charge.**

Greene: Alright.

Id. at 40-42 (emphasis added). Based on the foregoing, Greene's objection regarding the State's alleged breach of his plea agreement is **OVERRULED**.

C. *Ineffective Assistance of Counsel*

The PF&R found that Greene's claims of ineffective assistance of counsel were unexhausted and, therefore, should be dismissed. In his objections, Greene does not address this finding but, rather, merely reargues the merits of his ineffective assistance of counsel claims. Because Greene's objection does not point to an

error in Magistrate Judge Tinsley's finding on the issue of exhaustion, his objection is **OVERRULED**.

Petitioner's objections are therefore **OVERRULED**. The court **ADOPTS** the findings and conclusions contained in Magistrate Judge Tinsley's PF&R, **GRANTS** respondent's motion to dismiss and motion for summary judgment; **DENIES** petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254; **DENIES** petitioner's motion for relief based upon no answer to petition; and **DISMISSES** this matter from the court's active docket.

Additionally, the court has considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court **DENIES** a certificate of appealability.

The Clerk is **DIRECTED** to forward a copy of this Memorandum Opinion to all counsel of record and to petitioner, pro se.

IT IS SO ORDERED this 29th day of September, 2020.

ENTER:

David A. Faber
Senior United States District Judge

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

MICHAEL J. GREENE,

Petitioner,

v. **Case No. 1:19-cv-00570**

CHARLES WILLIAMS, Superintendent,
Huttonsville Correctional Center,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATION

This matter is assigned to the Honorable David A. Faber, Senior United States District Judge, and it is referred to the undersigned United States Magistrate Judge for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). Pending before the court is Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 ("Petition") (ECF No. 2) and Respondent's Motion to Dismiss and Motion for Summary Judgment (ECF No. 33). Also pending before the court is Petitioner's Motion for Relief Based Upon No Answer to Petition (ECF No. 38).

For the reasons stated herein, it is respectfully **RECOMMENDED** that the presiding District Judge **GRANT** Respondent's Motion to Dismiss and Motion for Summary Judgment (ECF No. 33), **DENY** Petitioner's Motion for Relief Based Upon No Answer to Petition (ECF No. 38), **DENY** Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF No. 2), and **DISMISS** this civil action from the docket of the court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The following facts are taken from the Supreme Court of West Virginia's (the "SCAWV") Memorandum Decision affirming the Circuit Court of Mercer County's denial of Petitioner's habeas corpus petition:

> Petitioner was arrested on January 9, 2010, in connection with the murder of Clayton Mitchum. Petitioner was charged as a juvenile in Mercer County Criminal Case No. 10-JD-03, and he remained incarcerated until May 3, 2010, when the charge was dismissed. On August 3, 2010, petitioner was arrested for carrying a concealed weapon (Mercer County Criminal Case No. 10-JD-61). Petitioner stipulated to the delinquency charge and was sentenced to the Salem Industrial Home ("Salem").
>
> While petitioner was at Salem, in February of 2011, the murder charge was refiled (Mercer County Criminal Case No. 11-JD-11) along with three counts of delivery of a controlled substance (Mercer County Criminal Case No. 11-JD-118). Although petitioner completed his sentence for the concealed weapon charge in August of 2011, he remained at Salem due to the pending murder and drug charges.
>
> In April of 2012, petitioner entered into a plea agreement with the State, which was approved by the circuit court. In that agreement, petitioner consented to an adjudication of delinquency on the three delivery of a controlled substance charges and placement in a facility to complete a youthful offender program. Petitioner further consented to the filing of an information, consented to transfer to adult jurisdiction, and entered a guilty plea to first-degree robbery as an accessory, stemming from Mr. Mitchum's murder. The agreement provided that his first-degree robbery sentence would be capped at twenty years, his sentence would be suspended and he would be placed on probation "consecutive to release from [j]uvenile custody," and there would be a deferred adjudication of guilt. Specifically, should petitioner "successful[ly] complet[e] . . . probation, or successful[ly] complet[e] . . . a two-year Associate[']s degree program or an equivalent trade-school certification," his guilty plea to robbery would be withdrawn and the case dismissed. Finally, the agreement provided that if either party failed to comply with the agreement's terms, the "plea, conviction and sentence shall be vacated and set aside[,] ... and the parties will be returned to their original positions before the entry of the plea, and any charges dismissed or reduced, as a result of this plea bargain will be reinstated." Petitioner and the State appeared for sentencing on May 24, 2013. The circuit court found that petitioner had successfully completed the youthful offender program (11-JD-118), and it deferred adjudication on the first-degree robbery charge and placed petitioner on five years of probation.

Four days after the sentencing hearing, on May 28, 2013, the State filed a petition to revoke petitioner's probation alleging that he was in possession of a concealed weapon, associated with felons, and broke curfew. At the probation revocation preliminary hearing, Bluefield Police Department Officer Ron Davis testified that shortly after midnight on May 28, 2013, he responded to a report of an altercation at a gas station. After locating the individuals involved in the altercation on another street, Officer Davis learned that Anthony Webb, who had blood on his shirt, had been involved in the altercation. As Officer Davis was speaking with Mr. Webb, he "observed [petitioner] laid back in the driver's seat of a silver" car. Officer Davis approached petitioner from the passenger side of the car and observed a handgun "behind the driver[']s seat in the passenger left side" of the car. After directing petitioner to exit the car, Officer Davis found another handgun concealed "in the driver's compartment of the driver's side of the vehicle, where [petitioner] was seated." Although Officer Davis's investigation did not confirm that either gun was owned by petitioner, his "investigation led [him] to believe that [one of the guns] was in possession of [petitioner] due to his position in the vehicle." Officer Davis also identified other individuals present at the scene, many of whom Officer Davis arrested previously. The circuit court found probable cause to believe petitioner violated the terms and conditions of his probation, as alleged in the revocation petition, and set the matter for a final hearing.

Petitioner and the State appeared for an evidentiary hearing on June 24, 2013. Officer Davis again testified, and his testimony from the preliminary hearing was incorporated into the evidentiary hearing. Mr. Webb also testified. Mr. Webb testified that he was with petitioner earlier in the day, but they parted ways before eventually meeting back up with other individuals at the gas station from which the report of the altercation was made. Mr. Webb claimed that, while at the gas station, someone hit him "out of the blue," and he and the other individual began to fight. Unbeknownst to petitioner, Mr. Webb pulled out one of the guns from his car, which caused the individual with whom Mr. Webb was fighting to run. Mr. Webb put the gun back in the car and began to run after his assailant. Given the presence of guns in the car, Mr. Webb also directed petitioner to move the car away from the altercation, but he did not alert petitioner to the guns. According to Mr. Webb, Officer Davis appeared immediately after petitioner moved the car. Mr. Webb also testified that the car in which petitioner was found was rented to Mr. Webb's stepsister and that the guns found in the car belonged to Mr. Webb. Mr. Webb was adamant that petitioner was unaware of the guns in the car, but he admitted that certain known criminals were present at the gas station on the evening of the altercation.

At the dispositional hearing on July 8, 2013, the circuit court revoked petitioner's probation and imposed his twenty-year sentence pursuant to

the terms of the plea agreement. In reaching this disposition, the circuit court expressed to petitioner that

> [t]ime and time and time again you have been given chance after chance after chance each time. Each time you failed to take advantage of it. You go back to that same lifestyle, that same street lifestyle that I have begged you to leave behind. How long were you out on probation and you're back? It's not that you were out pas[t] curfew. It's not that you were caught in a car with two weapons whether you knew that they were there or not. It's the fact that you're back with the same people, the same lifestyle, that I begged you to leave behind.
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> * * *
>
> Like I said it's ... the potential for violence that, you know the fact that you're out past curfew, you're caught in a vehicle with two guns, whether you knew they [were] there or not, the fact that you're even in that vehicle with people that were involved in violent behavior that night. Mr. Webb said he was getting ready to shoot somebody. I mean, that was his testimony and these are the people you're hanging with.

Greene v. Ames, No. 18-0072, 2019 WL 2246623, at *1-3 (W. Va. May 24, 2019); *see also* ECF No. 33, Ex. 48 at 1-2.[1] Petitioner was represented by William Huffman and Greg Ball in his circuit court criminal proceedings.

With different court-appointed counsel, Matthew Parrott and R. Rockwell Seay, Petitioner filed an appeal in the SCAWV making a singular challenge to the sentencing credit Petitioner received. (ECF No. 33, Ex. 3). On June 21, 2016, the SCAWV affirmed the judgment of the circuit court concerning Petitioner's sentencing credit. *State v. Greene*, No. 15-0402, 2016 WL 3463468 (W.Va. June 21, 2016). (*Id.*, Ex. 31).

On October 21, 2015, Petitioner filed a *pro se* petition for a writ of habeas corpus in the Circuit Court of Mercer County. (*Id.*, Ex. 32). Petitioner was subsequently

[1] The undersigned will cite to the ECF page numbers found at the top of each page, rather than the page numbers within each document.

appointed counsel, Ward Morgan, who filed an amended petition on February 7, 2017. (*Id.*, Ex. 34). The amended petition asserted two specific claims for relief:

> (1) Ineffective assistance of counsel: Petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to explain fully the terms and conditions contained in the plea bargain, in particular the precise definition of a two-year associates' degree or "its equivalent trade school certification." Trial counsel's representation must be analyzed in light of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010).
>
> (2) Material misrepresentations: Petitioner continues to maintain that prior counsel and the Court itself made material misrepresentations to induce him into accepting the plea bargain, and that absent such material misrepresentations, he would not have entered into said agreement.

(*Id.* at 3). The amended petition also incorporated a list of 18 grounds for relief in accordance with the decision in *Losh v. McKenzie*, 277 S.E.2d 606 (W. Va. 1981), which included general assertions that Petitioner was denied effective assistance of counsel and his right to appeal. (*Id.* at 4; ECF No. 33, Ex. 35).

Following an omnibus hearing at which Petitioner and his trial counsel, William Huffman, testified, the circuit court denied Petitioner's amended habeas corpus petition. (ECF No. 33, Ex. 1). The circuit court denied Petitioner's motion to withdraw his amended habeas corpus petition, to have new counsel appointed, and to file a new petition. (ECF No. 33, Ex. 38). Petitioner subsequently unsuccessfully filed a petition for a writ of mandamus in the SCAWV. (ECF No. 33, Ex. 39 and 41).

On January 29, 2018, Petitioner filed a *pro se* Petition for Appeal in the SCAWV concerning the denial of his circuit court habeas petition. (ECF No. 33, Ex. 42). He was subsequently appointed counsel, Ryan Flanagan, to represent him in that proceeding. The appellate briefs filed by Petitioner and his counsel asserted that his direct appellate counsel failed to file an appeal challenging his probation revocation. However, none of

Petitioner's briefs asserted a specific claim concerning ineffective assistance of counsel for failure to appeal the findings concerning the voluntariness of Petitioner's guilty plea or the fulfillment of his plea bargain. (*See* ECF No. 33, Ex. 46 at 3).

On August 5, 2019, Petitioner filed the instant § 2254 petition in this court, in which he asserts that his guilty plea was unlawfully induced, his plea agreement unfulfilled, and that his counsel provided ineffective assistance. (ECF No. 2). On January 27, 2020, Respondent filed the instant motion to dismiss and for summary judgment, with numerous exhibits (ECF No. 33), and a memorandum of law in support (ECF No. 34). The motion is fully briefed and ripe for adjudication. The parties' arguments will be discussed as necessary *infra*.

On February 3, Petitioner filed a Motion for Relief Based Upon No Answer to Petition (ECF No. 38), in which he asserts that Respondent failed to timely file a response to his § 2254 petition, as ordered by the court. This motion will also be addressed *infra*.

STANDARD OF REVIEW

A federal court's review of state court determinations in habeas corpus is extremely limited. Title 28 U.S.C. § 2254(d), which was adopted as part of the Anti-terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000), the Supreme Court held that under the "contrary to" clause, a federal court may grant a writ of habeas corpus with respect to claims adjudicated on the merits in state court only if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) if the state court decides a case differently from the Supreme Court on a set of materially indistinguishable facts. The Court further held that under the "unreasonable application" test, a federal court may grant a writ of habeas corpus with respect to a claim adjudicated on the merits in state court only if the state court identifies the correct governing principle from the Supreme Court's decision, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413.

Moreover, the AEDPA contains a presumption that a state court's factual findings are correct:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). The undersigned will apply these standards in reviewing Petitioner's claims for relief herein.

ANALYSIS

I. Petitioner's Motion for Default Judgment

On February 3, 2020, Petitioner filed a Motion for Relief Based Upon No Answer to Petition (ECF No. 38), which the undersigned construes as a motion for default judgment. Petitioner incorrectly contends that Respondent did not timely file an answer to his § 2254 petition, as ordered by the court. Rather, it appears that, at the time he filed

this motion, Petitioner had simply not received his service copy of Respondent's motion to dismiss and motion for summary judgment.

Default judgments are strongly disfavored and generally inappropriate in federal habeas actions. *See, e.g., Santillana v. Collins*, No. 5:14-cv-12474, 2015 WL 852328, at *3 (S.D. W. Va. Jan. 14, 2015) (collecting cases supporting proposition), *proposed findings and recommendations adopted by* 2015 WL 852335 (S.D.W. Va. Feb. 26, 2015). Moreover, to the extent that Respondent's motion documents were allegedly not timely received, Petitioner has not demonstrated any prejudice therefrom. Thus, the undersigned proposes that the presiding District Judge **FIND** that there is simply no basis for a default judgment in this matter.

II. Respondent's Motion to Dismiss and Motion for Summary Judgment

A. Voluntariness of plea and fulfillment of plea bargain.

In Ground One of his § 2254 petition, Petitioner asserts that his guilty plea to first degree robbery was unlawfully induced and that his plea bargain was not fulfilled because he was transferred to adult probationary status while still under juvenile jurisdiction and, allegedly, after he had completed the requirements for withdrawal of his guilty plea and dismissal of the robbery charges. Specifically, Ground One states:

> Pursuant to WV Code #49-5-13, I (Mr. Greene) would be subject to the custody of the Division of Juvenile Services (DJS) until my (his) 21st birthday per plea bargain before starting adult case; instead the court took me off (DJS) Division of Juvenile Services at (19) nineteen years old and I feel I am wrongfully convicted upon unfulfilled plea bargain, etc.

(ECF No. 2 at 5). On a related note, in Ground Four of his § 2254 petition, Petitioner contends that he was illegally detained because he was being housed as a juvenile in a correctional facility with sentenced adult prisoners, and that those circumstances induced him to enter into his plea agreement. Specifically, Ground Four states:

> On May 24, 2013, at (19) nineteen years old (per plea bargain), I should have stayed in (DJS) Division of Juvenile Services until my 21st birthday, but the circuit court made an error by starting my adult case (in plea) at (19) nineteen years old, and sentenced me to (20) years in state penitentiary, which indicates: Illegal Detention Prior to Arraignment and/or Errors in Arraignment.[2]

(ECF No. 2 at 10). Petitioner also relies upon the SCAWV's decision in *State ex rel. M.L.N. v. Greiner*, 360 S.E.2d 554 (W. Va. 1987), in which the court held that juveniles between the ages of 18 and 20 who remained under jurisdiction of juvenile court may not be incarcerated within sight or sound of adult prisoners.

Respondent contends that these claims are not cognizable in federal habeas corpus because they involve the application and interpretation of state law and do not encompass a violation of the federal Constitution or other federal laws. (ECF No. 34 at 14-15). Nonetheless, to the extent that the court determines that Grounds One and Four do invoke a cognizable federal constitutional claim, Respondent further contends that Petitioner's assertions that such alleged violations should permit him to withdraw his guilty plea and be released from custody lack merit. (*Id.*)

Petitioner's response documents reiterate his assertions that, under state law, he was still subject to juvenile jurisdiction until he turned 21 and, therefore, he should not have been released on adult probation or exposed to a 20-year adult sentence on the robbery charge. He further claims that his plea bargain was not fulfilled because he did not remain in juvenile custody and did not have the robbery charge dismissed when he completed his programming at Salem. Thus, he contends that the prosecutor somehow

[2] The undersigned notes that this language is taken from the "*Losh* checklist" of grounds that may be raised in a state habeas corpus petition. Petitioner's claim boils down to the fact that he believes he should have remained under juvenile jurisdiction until he turned 21 years old and, thus, the circuit court could not begin his adult robbery proceedings until that time. As explained *infra*, Petitioner misinterprets the provisions of his plea agreement which were exhaustively explained to him by the circuit court at his plea hearing and which he clearly acknowledged that he understood.

improperly induced or coerced him to plead guilty and then reneged on the plea agreement. (ECF No. 43 at 5-6, 13-15; ECF Nos. 45, 49).[3]

To the extent that Petitioner claims that his guilty plea was not knowing and voluntary, that claim is a cognizable federal constitutional claim that may be addressed in federal habeas corpus. However, a thorough review of Petitioner's plea agreement and the representations he made during his plea hearing demonstrate that his guilty plea was knowing, voluntary, and not unlawfully induced.

As noted by Respondent, a guilty plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Collateral review of a conviction after a guilty plea is generally limited to whether the plea was "both counseled and voluntary." *United States v. Broce*, 488 U.S. 563, 569 (1989); *see also Fields v. Att'y Gen.*, 956 F.2d 1290, 1294-95 (4th Cir. 1992). A guilty plea entered with the assistance of counsel is strongly presumed to be valid. *United States v. Custis*, 988 F.2d 1355, 1363 (4th Cir. 1993). Moreover, "[i]t is well-established that a voluntary and intelligent guilty plea forecloses federal collateral review of allegations of antecedent constitutional deprivations." *Fields*, 956 F.2d at 1294.

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[3] Petitioner's various response documents also address new assertions concerning the sufficiency of the evidence for his probation revocation and an apparent claim of actual innocence. A stand alone claim of actual innocence is not cognizable in federal habeas corpus. *See Schlup v. Delo*, 513 U.S. 298, 315 (1995); *Collins v. Sec'y, Dept. of Corr.*, 809 F. App'x 694 (11th Cir. Apr. 22, 2020) (a free-standing claim of actual innocence is not cognizable in a non-capital § 2254 petition). Moreover, these claims were not raised in Petitioner's § 2254 petition and the court will not entertain claims raised for the first time in responses to dispositive motions. *See Miller v. Jack*, No. 1:06-cv-64, 2007 WL 2050409, at *4 (N.D. W.Va. July 12, 2007); *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (A plaintiff may not amend his complaint through arguments in his brief in opposition to summary judgment.); *Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir. 2002); *Church v. Maryland*, 180 F. Supp.2d 708, 732 (D. Md. 2002)(disregarding an allegation raised for the first time in plaintiff's affidavit in opposition to defendants' motion for summary judgment); *Marten v. Yellow Freight Sys., Inc.*, 993 F. Supp. 822, 829 (D. Kan. 1998)(finding that a claim not raised in the complaint and initially asserted in a response to a summary judgment motion is not properly before the court.).

In reviewing the constitutional validity of a guilty plea, the court must consider the totality of the circumstances surrounding the plea to determine "whether the guilty plea represents a voluntary and intelligent choice . . . ." *Beck v. Angelone*, 261 F.3d 377, 394 (4th Cir. 2001). Furthermore, "[a]bsent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy." *Fields*, 956 F.2d at 1299. Thus, "the representations of the defendant . . . constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Moreover, "[w]hen a breach of a plea agreement is alleged, the party alleging the breach bears the burden of proving the breach by a preponderance of the evidence. *United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir. 1991).

Respondent contends that Petitioner's plea was "voluntary and made with a full understanding of its consequences." (ECF No. 34 at 16). Respondent's memorandum of law in support of his motion further asserts:

> The written plea agreement spelled out the explicit terms of the agreement and, before accepting Petitioner's guilty plea, the Circuit Court conducted an exhaustive colloquy with him concerning whether his plea was voluntary and intelligent. Petitioner's responses to the Court's questions unequivocally demonstrate that he understood the charges against him, the terms of the plea agreement, the waiver of an indictment, the consent to adult jurisdiction, and the consequence of his guilty plea.

(*Id.*) As Respondent further notes, most significantly, the court specifically addressed Petitioner's waiver of a transfer hearing and his consent to transfer to adult jurisdiction for resolution of his robbery charge. The plea hearing transcript contains the following colloquy:

> THE COURT: The first issue involves the fact that this information purports to charge you with a crime that occurred while you were a juvenile. Do you understand that?
>
> THE DEFNDANT: Yes, sir.

THE COURT: Alright. Because it happened, says it happened January the 9th, 2010 and that time you would have been under the age of 18. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that under the law that you have the right to have this charge first filed as a juvenile petition? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, that this would come under the juvenile jurisdiction of the Court and would stay under the juvenile jurisdiction of the Court unless the State filed a transfer motion or you waive transfer to adult jurisdiction. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now if you waived transfer . . . if you waive your juvenile jurisdiction and you waive transfer to adult jurisdiction what that means is that this case can be filed against you as an adult and that you will face the consequences that an adult would face with regards to this charge. Do you understand that?

THE DEFENDANT: Which means for the trial and all of that, right?

THE COURT: Right.

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Now by waiving transfer do you understand that you're giving up your right to a hearing, you're giving up your right to have the State, uh, to have the State prove this by probable cause and the Court will transfer this to adult jurisdiction because you've agreed to, is that -

THE DEFENDANT: Yes, sir -

THE COURT: - do you understand that?

THE DEFENDANT: - I do.

THE COURT: Now do you have any questions about your right to an indictment or your right to have this matter heard in juvenile court?

THE DEFENDANT: No, sir.

THE COURT: Alright. Now is it your desire to waive juvenile jurisdiction, consent to a transfer to adult jurisdiction, and is it also your desire to waive your indictment and consent to the filing of the information?

THE DEFENDANT: Yes, sir.

(ECF No. 34, Ex. 10 at 8-13). The circuit court found that Petitioner knowingly, voluntarily, and freely waived juvenile jurisdiction and consented to transfer to adult jurisdiction for resolution of his robbery charge in lieu of the murder charge.

The circuit court further reviewed the explicit terms of Petitioner's plea agreement. The plea transcript further states:

THE COURT: Now, the first thing is that you're going to consent and agree basically to admit to the three counts of delivery under this juvenile delinquency petition, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand what that means is that if you were an adult you could go to jail for not less than one nor more than 15 years on each of these. But since there are juvenile cases what that does is that gives the Court jurisdiction over . . . juvenile jurisdiction over you until you turn 21. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And what that means is the State is recommending that you go to Glen Mills until you complete that program but if that doesn't work out then this Court could send you to the Industrial Home for the Youth until you turn 21. Do you understand that?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: And you're going to plea[d] guilty to this robbery and the State has agreed that this will be the sentence you receive and I would have to . . . I would have to go along with that if I accept all of this. Do you understand this?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: First of all the Court would defer adjudication on this matter .... And would put you on probation and **the probation would start to run after you're released from juvenile custody. From juvenile jurisdiction. Do you understand that? Either after you complete the Glen Mills Program or you complete the program at the Industrial Home**. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: **One of those, or you turn 21**. Which one . . . whichever occurs first I guess. Alright. So you would be placed on a period of probation. Now if you successfully complete your probation or if you get a . . . obtain an associate's degree or equivalent trade school certification while you are on probation then at the end of your probation you could come in and ask to withdraw your plea and the robbery would be dismissed. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you violate your probation then . . . you would receive a 20 year sentence. Do you understand that?

THE DEFENDANT: Yes, sir, I do.

* * *

THE COURT: Now is what I just went over with you the full and complete agreement between you and the State?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that agreement?

THE DEFENDANT: Yes, sir.

(Id. at 13-20) (emphasis added).

Later in the plea hearing, in response to Petitioner's questions, the circuit court again explained the consequences of the guilty plea:

THE COURT: What would happen is after you completed your juvenile sentence you'd be placed on probation. Alright. The Court can place you on

> probation for up to five years. Now if you successfully complete your probation then you can withdraw your plea and the case will be dismissed and they can't . . . can not ever bring up that robbery charge again. Okay. Now, during that five year period of time if you violate your probation the State can file a petition saying that Mr. Greene has violated his probation. Judge, we want you to revoke your . . . revoke his probation. If that happens then you're entitled to a hearing in front of the Court. At that hearing the State would have to present testimony and evidence to convince me by a preponderance of the evidence that you violated your probation and at that time if the Court finds by a preponderance of the evidence that you violated your probation then the Court can revoke your probation and send you to penitentiary for up to 20 years. Do you understand that?
>
> THE DEFENDANT: Yes, sir, so they've got to have . . . they've got to prove that.
>
> THE COURT: They've got to prove that you violated your probation. And if you don't, you know, if you don't violate your probation you don't have anything to worry about so to speak.

(ECF No. 33, Ex. 10 at 27-28). Petitioner acknowledged that he understood the plea agreement, did not have any questions about it, and that he was entering his guilty plea voluntarily and of his own free will. (*Id.* at 28-30, 36-39). The court again clarified the Petitioner's circumstances as follows:

> **THE COURT: Well, if you complete the [juvenile] program before you're 21 you would start your probation before on your other charge before you're 21. I mean they don't keep you until you're 21 . . . That's the longest they can keep you is until you turn 21 . . . If you completed it in a year then you would be out in a year and you'd start the probation on the other charge.**

(*Id.* at 41-42) (emphasis added). Following this explanation, Petitioner stated that he was prepared to enter his guilty plea. (*Id.* at 42).

Petitioner now claims that the State was required to keep him in juvenile custody until he turned 21 and, thus, he should not have been subject to adult criminal jurisdiction and a 20-year sentence when his probation was revoked at age 19. However, it is clear from the plea hearing transcript that Petitioner was thoroughly advised of the terms of

the plea agreement and the consequences of his guilty plea and, as asserted by Respondent, Petitioner must be held to the representations he made during his plea colloquy.

The transcripts herein demonstrate that, despite Petitioner's initial misunderstandings concerning the waiver and transfer issue, the circuit court clearly explained to Petitioner that he was waiving the transfer hearing and consenting to adult jurisdiction; that he was pleading guilty to the robbery charge, for which he could be sentenced to 20 years in prison; that the court would withhold adjudication thereof and sentence him to five years of probation; and that, if Petitioner successfully completed the term of probation, or obtained a two-year associate's degree, or an equivalent trade school certification, then he could move to withdraw his guilty plea and the State would dismiss the robbery charge. The court further clarified that, if Petitioner did not successfully complete his term of probation, he would be sentenced to serve his 20-year term of imprisonment in the penitentiary on the robbery charge.

The plea colloquy before the Circuit Court of Mercer County demonstrates that Petitioner was fully aware of the terms and conditions of his guilty plea, and he acknowledged that he was knowingly and voluntarily entering his plea. Petitioner further acknowledged that he was fully satisfied with the performance and assistance of his counsel, that his guilty plea was in his best interests, and that he wanted the court to accept it. He has not demonstrated, by clear and convincing evidence, that he should not be bound by these representations.

Furthermore, the circuit court's order entered on June 18, 2012, following the plea hearing specifically enunciated that Petitioner waived his rights concerning whether the robbery charge would remain in juvenile court and consented to that charge being

transferred to the court's adult criminal court. (ECF No. 33, Attach. 11). Thus, Petitioner was clearly on notice of the fact that he was subject to adult jurisdiction and punishment for the robbery charge.

In *United States v. LeMaster*, 403 F.3d 216, 221 (4th Cir. 2005), the Fourth Circuit held that, absent extraordinary circumstances, a district court is not required to conduct an evidentiary hearing concerning a challenge to a guilty plea, where the defendant's allegations contradict the defendant's sworn statements made during a proper Rule 11 colloquy. *Id.* Rather, the district court may find that such allegations are "palpably incredible" and "patently frivolous and false." *Id.* Such is the case here.

The circuit court made the following findings concerning the petitioner's guilty plea in the order denying him habeas corpus relief:

> It is clear from the record that the Court thoroughly explained to the Petitioner that by "waiving transfer to adult jurisdiction" that the case would be transferred to adult status and that he would be treated as an adult. It also appears clear from the record that the Petitioner understood his rights and that he did not have any questions concerning the transfer to adult jurisdiction. Therefore, the Court finds that the Petitioner was not misled and that he understood what would happen to him under the plea agreement.
>
> * * *
>
> It also appears clear from the record that the Petitioner understood that he would have to complete a two year Associate's Degree or a trade school certification that was equivalent to a two year Associate's Degree. Therefore, the Court finds that the Petitioner was not misled and that he understood the terms of the plea agreement.

(ECF No. 33, Ex. 1 at 24).

Petitioner also asserts that his plea bargain was not fulfilled because he was not permitted to withdraw his guilty plea and have the robbery charges dismissed after he completed his programming at Salem. The Supreme Court has held that "when a plea

rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Petitioner asserts that his completion of the "core curriculum" and other programming while at Salem constituted an "equivalent trade school certification" under his plea agreement. Thus, he asserts that the State breached the plea agreement when it did not allow him to withdraw his plea and dismiss the robbery charges and that his probation violation would not have occurred had the plea agreement been upheld.

Respondent, on the other hand, contends that the subject programming did not fulfill that provision of the plea agreement and the state courts agreed. With respect to the fulfillment of the terms of the plea agreement, the circuit court found:

> At the May 24, 2013 sentencing hearing, the Court found that Petitioner had successfully completed the Youthful Offender program (11-JD-118), and deferred sentencing on the robbery charge, placing him on five (5) years' probation with further conditions. Four days after the sentencing hearing, on May 28, 2013, a Petition to Revoke Probation was filed after his probation officer determined that he was found to be in possession of a concealed weapon, associated with felons, and broke curfew. By Order dated June 24, 2013, the Court found that Petitioner had violated his probation contract. On July 8, 2013, the Court revoked the Defendant's Probation, adjudged him Guilty of Robbery and sentenced the Defendant to 20 years in the penitentiary. The Court finds that all of the terms of the plea agreement were fulfilled by the State. The Petitioner was permitted to admit to a delinquency petition on the drug charges and then was granted a deferred adjudication for the robbery charge and was placed on probation. The Petitioner was also told that the Court would shorten his probationary period if he obtained a two year Associates Degree or equivalent trade school certification. However, the Petitioner violated his probation within 4 days of being placed on probation. Additionally, the Petitioner did not obtain a 2 year Associate's Degree or equivalent trade school certification. The Petitioner obtained his GED, his Core Curricula, a Craft Professional Organization and a 10 hour OSHA certification, which are not equivalent to a two year Associate's Degree. For the reasons stated above, the Court finds that the Petitioner has failed to show that the plea bargain was unfulfilled.

(*Id.* at 11-12).

In affirming the circuit court's denial of his state habeas petition, the SCAWV found that "[t]he plea agreement into which petitioner entered plainly provided that he would 'waive transfer to adult jurisdiction' and enter a plea to first-degree robbery as an accessory." *Greene v. Ames*, No. 18-0072, 2019 WL 2246623, at *5 (W.Va. May 24, 2019) (ECF No. 33, Ex. 48 at 4). The SCAWV further found:

> Petitioner acknowledged his understanding of the process. Thus, after petitioner completed his juvenile sentence, he was properly placed on adult probation, and then properly sentenced to incarceration following the revocation of that probation. [Footnote omitted]. Petitioner's citation to statutes regarding juvenile proceedings and *Greiner* are unavailing, as petitioner was no longer under juvenile jurisdiction with respect to the first-degree robbery charge.

(*Id.*) The SCAWV went on to find as follows:

> Finally, petitioner claims that in completing a core curriculum, he completed a trade school certification equivalent, thereby satisfying the terms of his plea agreement and which should have resulted in the withdrawal of his plea and dismissal of his case. We begin by noting that petitioner offers no evidence or argument to support his assertion that completion of a core curriculum is equivalent to a two-year associate's degree or trade school certification. Moreover, it is undisputed that petitioner did not complete this coursework while on probation.

(*Id.*) Thus, the SCAWV found that it was Petitioner, not the State, who failed to fulfill the requirements of his plea agreement to justify the dismissal of the robbery charge. (*Id.*)

The undersigned proposes that the presiding District Judge **FIND** that Petitioner has not demonstrated that the state courts' decisions were contrary to or involved an unreasonable application of, clearly established federal law, or that they were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, the undersigned further proposes that the presiding District Judge **FIND** that Petitioner is not entitled to habeas corpus relief on Grounds One and Four of his § 2254 petition.

B. Ineffective assistance of counsel claims.

In Grounds Two and Three of his § 2254 petition, Petitioner asserts that his trial and appellate counsel provided ineffective assistance. Specifically, Ground Two states as follows:

> My previous attorney refused to file motions and applications on my behalf, even when I specifically asked to file certain ones that would possibly benefit my case. I feel as though the said lawyers did not represent me to the fullest of their ability and wanted to simply get me to take a plea and be done with this case.

(ECF No. 2 at 7). In Ground Three of the petition, Petitioner asserts:

> I asked my attorneys to file an appeal on my behalf to overturn [my] case upon wrongful conviction in Juvenile Rights being violated and to withdraw my guilty plea: When it was denied they would not appeal the Judge's decision like I asked. I feel like I was definitely denied the right to an appeal.

(*Id.* at 8). Respondent contends that Petitioner failed to exhaust these claims through his state habeas corpus proceedings.

Petitioner's response documents reiterate his contentions that his counsel ineffectively refused to appeal his robbery conviction and sentence as he requested. However, despite his assertions to the contrary, Petitioner failed to properly exhaust the specific ineffective assistance of counsel claims he is now raising in his state habeas proceedings.

Section 2254(b)(1)(A) of Title 28 of the United States Code, states that a petition for a writ of habeas corpus filed in a federal district court by a prisoner in state custody shall not be granted, unless it appears that the applicant has exhausted the remedies available in the state courts, or if the state has waived the exhaustion requirement. 28 U.S.C. §§ 2254(b)(1)(A), (b)(3). "State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the

State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see also Beard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) (Exhaustion requires the habeas petitioner to "fairly present the substance of his claim to the state's highest court.")

In West Virginia, prisoners may exhaust their available state court remedies either by stating cognizable federal constitutional claims in a direct appeal, or by stating such claims in a petition for a writ of habeas corpus in a state circuit court pursuant to West Virginia Code § 53-4A-1, followed by filing a petition for appeal from an adverse ruling to the SCAWV. *Moore v. Kirby*, 879 F. Supp. 592, 593 (S.D.W. Va. 1995); *McDaniel v. Holland*, 631 F. Supp. 1544, 1545 (S.D.W. Va. 1986). A petition for a writ of habeas corpus filed under the original jurisdiction of the SCAWV that is denied with prejudice following a determination on the merits will also exhaust the prisoner's state court remedies. *See Moore*, 879 F. Supp. at 593; *McDaniel*, 631 F. Supp. at 1546; *see also, Meadows v. Legursky*, 904 F.2d 903, 908-909 (4th Cir. 1990) (*abrogated on other grounds, Trest v. Cain*, 522 U.S. 87 (1997)).

Additionally, Petitioner must show that the claims he raised in the state proceedings are the same as the claims he now seeks to raise in his federal habeas proceeding. *See Pitchess v. Davis*, 421 U.S. 482, 487 (1975); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The claims in both courts must "fairly present" the "substance" of the claim, based upon the same factual grounds, and must allege that the same federal constitutional right was violated. *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Petitioner's claim that his counsel failed to file "motions and applications" on his behalf was not raised at all in his state proceedings. Thus, it is unexhausted. Moreover, Petitioner has not specified what "motions and applications" counsel failed to file or how

the filing of the same would have altered the outcome of his criminal proceedings. Accordingly, the undersigned proposes that the presiding District Judge **FIND** that Ground Two of Petitioner's § 2254 petition must be dismissed because it is unexhausted and fails to state a claim upon which relief can be granted.

Likewise, Petitioner's claim in Ground Three of his petition asserting that his counsel failed to file a proper appeal challenging his guilty plea and robbery conviction is also unexhausted. In his state habeas proceedings, Petitioner asserted a general claim (in accordance with his *Losh* checklist) that his counsel failed to file a direct appeal. However, as the state courts found, Petitioner's appellate counsel did file a direct appeal concerning the narrow issue of sentencing credit. Moreover, Petitioner's state habeas corpus petition documents did not specify that his appellate counsel failed to raise a claim concerning the voluntariness and lawfulness of his guilty plea and robbery conviction. Thus, his claim of ineffectiveness of appellate counsel on this basis was not exhausted at the circuit court level or appellate level of his habeas proceedings. Consequently, the undersigned proposes that the presiding District Judge **FIND** that Grounds Two and Three of Petitioner's § 2254 petition must be dismissed as being unexhausted.

RECOMMENDATION

For the reasons stated herein, it is respectfully **RECOMMENDED** that the presiding District Judge **GRANT** Respondent's Motion to Dismiss and Motion for Summary Judgment (ECF No. 33), **DENY** Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF No. 2), **DENY** Petitioner's Motion for Relief Based Upon No Answer to Petition (ECF No. 38), and **DISMISS** this civil action from the docket of the court.

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable David A. Faber, Senior United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and then three days (service/mailing) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the district court and a waiver of appellate review by the circuit court of appeals. *Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Wright v. Collins*, 766 F.2d 841, 846 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on the opposing party and Judge Faber.

The Clerk is directed to file this Proposed Findings and Recommendation, to mail a copy of the same to Petitioner, and to transmit it to counsel of record.

July 29, 2020

Dwane L. Tinsley
United States Magistrate Judge

APPENDIX

D

FILED: August 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7518
(1:19-cv-00570)

MICHAEL J. GREENE

Petitioner - Appellant

v.

CHARLES WILLIAMS, Superintendent, Huttonsville Correctional Center

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. The court denies the motion for appointment of counsel.

Entered at the direction of the panel: Judge King, Judge Agee, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX

E

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Michael Greene,
Petitioner Below, Petitioner

vs.) No. 18-0072 (Mercer County 15-C-357-WS)

Donnie Ames, Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

FILED
May 24, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Michael Greene, by counsel Ryan J. Flanigan, appeals the Circuit Court of Mercer County's January 8, 2018, order denying his amended petition for a writ of habeas corpus.[1] Respondent Donnie Ames, Superintendent, by counsel Scott E. Johnson, filed a response and supplemental appendix.[2] Petitioner filed a reply pro se. On appeal, petitioner asserts that the circuit court erred in not finding that trial counsel failed to file an appeal, not reviewing his probation revocation hearing, not finding that the evidence was insufficient to support revocation of his probation, placing him on adult probation while he was under juvenile jurisdiction, and in finding that his completion of a core curriculum did not satisfy a term of his probation.

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[1]On May 24, 2018, petitioner's counsel moved for leave for petitioner to file a pro se supplemental brief under Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure. This rule provides, in relevant part, that

> [i]f counsel is ethically compelled to disassociate from any assignments of error that the client wishes to raise on appeal, counsel must file a motion requesting leave for the client to file a pro se supplemental brief raising those assignments of error that the client wishes to raise but that counsel does not have a good faith belief are reasonable and warranted.

This Court granted that motion on May 29, 2018, and petitioner, pro se, filed a supplemental brief.

[2]Petitioner listed Ralph Terry, former Warden of Mt. Olive Correctional Complex, as respondent in this matter. Effective July 1, 2018, the positions formerly designated "wardens" are now designated "superintendents," *see* W.Va. Code § 15A-5-3, and the current superintendent is Donnie Ames. Accordingly, the appropriate party has been substituted per Rule 41(c) of the Rules of Appellate Procedure.

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 arrested on January 9, 2010, in connection with the murder of Clayton Mitchum. Petitioner was charged as a juvenile in Mercer County Criminal Case No. 10-JD-03, and he remained incarcerated until May 3, 2010, when the charge was dismissed. On August 3, 2010, petitioner was arrested for carrying a concealed weapon (Mercer County Criminal Case No. 10-JD-61). Petitioner stipulated to the delinquency charge and was sentenced to the Salem Industrial Home ("Salem").

While petitioner was at Salem, in February of 2011, the murder charge was refiled (Mercer County Criminal Case No. 11-JD-11) along with three counts of delivery of a controlled substance (Mercer County Criminal Case No. 11-JD-118). Although petitioner completed his sentence for the concealed weapon charge in August of 2011, he remained at Salem due to the pending murder and drug charges.

In April of 2012, petitioner entered into a plea agreement with the State, which was approved by the circuit court. In that agreement, petitioner consented to an adjudication of delinquency on the three delivery of a controlled substance charges and placement in a facility to complete a youthful offender program. Petitioner further consented to the filing of an information, consented to transfer to adult jurisdiction, and entered a guilty plea to first-degree robbery as an accessory, stemming from Mr. Mitchum's murder. The agreement provided that his first-degree robbery sentence would be capped at twenty years, his sentence would be suspended and he would be placed on probation "consecutive to release from [j]uvenile custody," and there would be a deferred adjudication of guilt. Specifically, should petitioner "successful[ly] complet[e] . . . probation, or successful[ly] complet[e] . . . a two-year Associate[']s degree program or an equivalent trade-school certification," his guilty plea to robbery would be withdrawn and the case dismissed. Finally, the agreement provided that if either party failed to comply with the agreement's terms, the "plea, conviction and sentence shall be vacated and set aside[,] . . . and the parties will be returned to their original positions before the entry of the plea, and any charges dismissed or reduced, as a result of this plea bargain will be reinstated."

Petitioner and the State appeared for sentencing on May 24, 2013. The circuit court found that petitioner had successfully completed the youthful offender program (11-JD-118), and it deferred adjudication on the first-degree robbery charge and placed petitioner on five years of probation.

Four days after the sentencing hearing, on May 28, 2013, the State filed a petition to revoke petitioner's probation alleging that he was in possession of a concealed weapon, associated with felons, and broke curfew. At the probation revocation preliminary hearing, Bluefield Police Department Officer Ron Davis testified that shortly after midnight on May 28, 2013, he responded to a report of an altercation at a gas station. After locating the individuals involved in the altercation

on another street, Officer Davis learned that Anthony Webb, who had blood on his shirt, had been involved in the altercation. As Officer Davis was speaking with Mr. Webb, he "observed [petitioner] laid back in the driver's seat of a silver" car. Officer Davis approached petitioner from the passenger side of the car and observed a handgun "behind the driver[']s seat in the passenger left side" of the car. After directing petitioner to exit the car, Officer Davis found another handgun concealed "in the driver's compartment of the driver's side of the vehicle, where [petitioner] was seated." Although Officer Davis's investigation did not confirm that either gun was owned by petitioner, his "investigation led [him] to believe that [one of the guns] was in possession of [petitioner] due to his position in the vehicle." Officer Davis also identified other individuals present at the scene, many of whom Officer Davis arrested previously. The circuit court found probable cause to believe petitioner violated the terms and conditions of his probation, as alleged in the revocation petition, and set the matter for a final hearing.

Petitioner and the State appeared for an evidentiary hearing on June 24, 2013. Officer Davis again testified, and his testimony from the preliminary hearing was incorporated into the evidentiary hearing. Mr. Webb also testified. Mr. Webb testified that he was with petitioner earlier in the day, but they parted ways before eventually meeting back up with other individuals at the gas station from which the report of the altercation was made. Mr. Webb claimed that, while at the gas station, someone hit him "out of the blue," and he and the other individual began to fight. Unbeknownst to petitioner, Mr. Webb pulled out one of the guns from his car, which caused the individual with whom Mr. Webb was fighting to run. Mr. Webb put the gun back in the car and began to run after his assailant. Given the presence of guns in the car, Mr. Webb also directed petitioner to move the car away from the altercation, but he did not alert petitioner to the guns. According to Mr. Webb, Officer Davis appeared immediately after petitioner moved the car. Mr. Webb also testified that the car in which petitioner was found was rented to Mr. Webb's stepsister and that the guns found in the car belonged to Mr. Webb. Mr. Webb was adamant that petitioner was unaware of the guns in the car, but he admitted that certain known criminals were present at the gas station on the evening of the altercation.

At the dispositional hearing on July 8, 2013, the circuit court revoked petitioner's probation and imposed his twenty-year sentence pursuant to the terms of the plea agreement. In reaching this disposition, the circuit court expressed to petitioner that

> [t]ime and time and time again you have been given chance after chance after chance each time. Each time you failed to take advantage of it. You go back to that same lifestyle, that same street lifestyle that I have begged you to leave behind. How long were you out on probation and you're back? It's not that you were out pas[t] curfew. It's not that you were caught in a car with two weapons whether you knew that they were there or not. It's the fact that you're back with the same people, the same lifestyle, that I begged you to leave behind.
>
> . . .
>
> Like I said it's . . . the potential for violence that, you know the fact that you're out past curfew, you're caught in a vehicle with two guns, whether you knew they [were] there or not, the fact that you're even in that vehicle with people that were

> involved in violent behavior that night. Mr. Webb said he was getting ready to shoot somebody. I mean, that was his testimony and these are the people you're hanging with.

Petitioner filed a pro se petition for a writ of habeas corpus on October 21, 2015. Following the appointment of counsel, petitioner filed an amended habeas petition on February 7, 2017. Petitioner raised several grounds in the amended petition, including, among others, failure to take an appeal, unfulfilled plea bargain, and sufficiency of the evidence. The parties appeared for an omnibus evidentiary hearing on March 24, 2017. On January 8, 2018, the circuit court denied petitioner habeas relief. It is from this order that petitioner appeals.

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." Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

On appeal, petitioner first asserts that the circuit court erred in not finding that trial counsel failed to appeal his probation revocation. Petitioner asserts that "probation revocation was an appealable issue" and should have been appealed because there was insufficient evidence to find that he violated his probation contract.

Although petitioner checked "failure of counsel to take an appeal" on a checklist of potential grounds for habeas relief appended to his amended habeas petition, his amended petition contained no arguments or facts in support of this ground, and petitioner acknowledges that "it was not specifically argued" in his amended petition. In ruling on this ground, the circuit court noted that petitioner "did not argue that his counsel refused to take an appeal in either his brief or at the [o]mnibus [e]videntiary [h]earing," and petitioner failed to "make any argument relating to a ground that could have been pursued on appeal." Nonetheless, the circuit court reviewed the record and determined that counsel filed an appeal related to whether petitioner was entitled to additional credit for time served. *See State v. Greene*, No. 15-0402, 2016 WL 3463468 (W. Va. June 21, 2016)(memorandum decision). Given that specific arguments related to counsel's failure to appeal petitioner's probation revocation were not made below and that counsel clearly did file an appeal on petitioner's behalf, we find no error in the circuit court's conclusion that petitioner "has failed to show that his counsel failed to take an appeal."

Next, petitioner claims that the circuit court erred in not reviewing his probation revocation hearing record. In support, petitioner cites to *State v. Ketchum*, where we held that "[a] probation revocation may be reviewed either by a direct appeal or by a writ of habeas corpus." 169 W. Va. 9, 298 S.E.2d 657, syl. pt. 1 (1981). Petitioner claims that "it does not appear that the [circuit court]

specifically reviewed the record from the probation revocation hearing" because the order denying petitioner habeas relief "lacks any specific facts reviewed regarding the hearing."

Although petitioner is correct in his recitation of our holding in *Ketchum*, nothing in that opinion requires a circuit court to undertake such a review on its own. Rather, a habeas petitioner bears "the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. Pt. 1, in part, *State ex rel. Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486 (1966); *State ex rel. Richey v. Hill*, 216 W. Va. 155, 163, 603 S.E.2d 177, 185 (2004) ("[A] petitioner in a post-conviction proceeding bears the burden of pleading and subsequently proving his claims by a preponderance of the evidence."). Accordingly, petitioner is entitled to no relief on this ground.

Petitioner further claims that the circuit court erred in denying him habeas relief where there was insufficient evidence to establish that he violated his probation contract. He argues that the circuit court ignored Mr. Webb's testimony regarding ownership and knowledge of the guns, and petitioner claims there was no evidence that the criminals present at the gas station were with petitioner. This specific lack of evidence was critical because, according to petitioner, the circuit court revoked his probation not because he was in the car with weapons or past curfew, but because he was with the same individuals the court had asked him to leave behind.

As set forth above, petitioner did not brief or argue issues regarding the sufficiency of the evidence in his amended petition or during the omnibus evidentiary hearing. Nevertheless, the circuit court "again reviewed the record and cannot find any evidence to support" an insufficiency of the evidence claim. In light of the testimony adduced during the probation revocation proceedings recounted above, we find no error in the circuit court's conclusion that petitioner is entitled to no relief on this ground.

Moreover, we find that petitioner's assertion that the circuit court revoked his probation solely due to the fact that he associated with felons to be taken out of context. Although the circuit court was clearly dismayed to learn that petitioner was in the presence of individuals it had cautioned petitioner against associating with, it concluded that petitioner was a "dangerous individual" and that the "potential for violence" existed since he was "out past curfew, . . . caught in a vehicle with two guns, whether [he] knew they [were] there or not, [and] . . . in that vehicle with people that were involved in violent behavior that night." In short, all three charges formed the basis for revoking probation and imposing petitioner's twenty-year sentence.

In petitioner's pro se supplemental brief, he raises a number of assignments of error that can be distilled into two general assignments of error. First, petitioner claims that the circuit court erred in placing him on adult probation when he was still under juvenile jurisdiction. Second, petitioner claims that the circuit court erred in concluding that his completion of a core curriculum did not satisfy the term of his plea agreement requiring "successful completion of a two-year Associate[']s degree program or an equivalent trade-school certification."

In support of petitioner's claim that the circuit court erred in placing him on adult probation, petitioner cites a number of statutes governing juvenile proceedings as well as *State ex rel. M.L.N. v. Greiner*, 178 W. Va. 479, 360 S.E.2d 554. In *Greiner*, we held that "[u]nder West Virginia Code

§§ 49-5-16(a) . . . and 49-5A-2[,] . . . the Legislature intended a prohibition against jailing youths between the ages of eighteen and twenty years, who remain under juvenile jurisdiction, within the sight or sound of adult prisoners." 178 W.Va. at 479, 360 S.E.2d at 554, syl. pt. 4, in part. Importantly, this holding applies to youths "who remain under juvenile jurisdiction." The plea agreement into which petitioner entered plainly provided that he would "waive transfer to adult jurisdiction" and enter a plea to first-degree robbery as an accessory.

Additionally, at petitioner's plea hearing, the circuit court explained that because petitioner committed the first-degree robbery while he was under the age of eighteen, petitioner had "the right to have this charge first filed as a juvenile petition." Petitioner indicated that he understood. Further, the court explained to petitioner that "if you waive your juvenile jurisdiction and you waive transfer to adult jurisdiction what that means is that this case can be filed against you as an adult and that you will face the consequences that an adult would face with regards to this charge. Do you understand that?" Again, petitioner stated that he understood. The circuit court also asked petitioner whether it was his "desire to waive juvenile jurisdiction, consent to a transfer to adult jurisdiction, and is it also your desire to waive your indictment and consent to the filing of the information?" Petitioner responded, "Yes, sir."

As the plea agreement into which petitioner entered also resolved pending juvenile matters, the circuit court also explained to petitioner that his placement on probation for the first-degree robbery charge

> would start to run after you're released from juvenile custody. From juvenile jurisdiction. Do you understand that? Either after you complete the Glen Mills Program or you complete the program at the Industrial Home. Do you understand that. . . . One of those, or you turn 21. Which one . . . which[ever] occurs first I guess.

Petitioner acknowledged his understanding of the process. Thus, after petitioner completed his juvenile sentence, he was properly placed on adult probation, and then properly sentenced to incarceration following the revocation of that probation.[3] Petitioner's citation to statutes regarding juvenile proceedings and *Greiner* are unavailing, as petitioner was no longer under juvenile jurisdiction with respect to the first-degree robbery charge.

Finally, petitioner claims that in completing a core curriculum, he completed a trade school certification equivalent, thereby satisfying the terms of his plea agreement and which should have resulted in the withdrawal of his plea and dismissal of his case. We begin by noting that petitioner offers no evidence or argument to support his assertion that completion of a core curriculum is equivalent to a two-year associate's degree or trade school certification. Moreover, it is undisputed that petitioner did not complete this coursework while on probation. At petitioner's plea hearing, the circuit court informed petitioner that

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[3]The circuit court entered an order on May 30, 2013, stating that petitioner "graduated from the program at [the] West Virginia Industrial Home for Youth on May 23, 2013." The court further deferred sentencing petitioner for first-degree robbery and placed him "on supervision with random drug screens for five (5) years with the usual terms and conditions."

> if you successfully complete your probation or if you . . . obtain an associate[']s degree or equivalent trade school certification *while you are on probation* then at the end of your probation you could come in and ask to withdraw your plea and the robbery would be dismissed. Do you understand that?

(Emphasis added.) Petitioner demonstrated an understanding of this requirement. Accordingly, we find no error in the circuit court's conclusion that petitioner did not satisfy the terms of his plea agreement.

For the foregoing reasons, we affirm the circuit court's January 8, 2018, order denying petitioner's amended petition for a writ of habeas corpus.

Affirmed.

ISSUED: May 24, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison

APPENDIX

F

Scott A. Ash
Prosecuting Attorney of Mercer County

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April 25, 2012

William Huffman, Esq.
210 South Walker Street
Princeton, WV 24740

Greg Ball
c/o Smith, Lilly and Ball
1421 Princeton Avenu
Princeton, WV 24740

RE: State vs. Michael Green
(1st Degree Murder, Delivery of Schedule II Controlled Narcotic x 3)

This letter outlines the complete plea offer from the State of West Virginia to Michael Green. This agreement is as follows:

1. That the defendant consent to adjudication of delinquency and admit to the allegations in the petition regarding three counts of Delivery of Schedule II Narcotic, which carries 1-15 years in the Penitentiary. Pursuant to WV Code # 49-5-13, Mr. Greene will be subject to the custody of the Division of Juvenile Services until his 21st birthday. The State will recommend placement at the Glen Mills School until completion of their program;

2. That the Defendant will consent to the filing of an information, waive transfer to adult jurisdiction, and will enter a "Best Interest Plea" to First Degree Robbery as an accessory. The State will agree, per Rule 11(E)(1)(c), to:
   A) A determinate 20 year cap on the sentence;
   B) A suspended sentence (Probation) consecutive to release from Juvenile custody;
   C) Deferred adjudication of guilt; whereby Defendant would be allowed to withdraw his plea and the case would be dismissed upon Defendant's successful completion of probation; or successful completion of a two-year Associates degree program or an equivalent trade school certification;

3. It is further understood that this Agreement applies only to matters listed or otherwise described herein and is expressly not applicable to any and all matters which may

exist but, of which, the State does not have actual knowledge as of the date of this offer. Furthermore, this Agreement applies only to Mercer County and does not bind any other governmental unit.

4. Should either the State or the defendant violate or fail to fully comply with any provisions of this Agreement, the within plea, conviction and sentence shall be vacated and set aside by the Court upon the motion of the offended party, and the parties will be returned to their original positions before the entry of the plea, and any charges dismissed or reduced, as a result of this plea bargain will be reinstated.

The foregoing __4____ paragraphs constitute the entire plea agreement offered by the State of West Virginia to this respondent. This offer will remain in effect until the 6th day of May, 2012.

Very truly yours,

GEORGE V. SITLER
CHIEF ASSISTANT PROSECUTING ATTORNEY

Accepted and approved:

MICHAEL GREEN, DEFENDANT

GREG BALL, COUNSEL FOR DEFENDANT

WILLIAM HUFFMAN, COUNSEL FOR DEFENDANT

APPENDIX

G

Drawer 49

ORIGINAL

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

IN THE INTEREST OF:

MICHAEL GREENE

JUVENILE NO. 11-JD-118-WS
INFORMATION NO. 12-F-241-WS

REVIEW AND SENTENCING HEARING

Transcript of proceedings had on the hearing of the above-styled action before Honorable William J. Sadler, Judge, on Friday, May 24, 2013, commencing at 1:22 p.m.

APPEARANCES:

GEORGE V. SITLER, ESQ., Assistant Prosecuting Attorney, 120 Scott Street, Suite 200, Princeton, West Virginia 24740, counsel for the State.

GREGORY BALL, ESQ., 1421 Princeton Avenue, Princeton, West Virginia 24740, counsel for the respondent.

Respondent in person.

ALSO PRESENT: Kerry Buzzo, Juvenile Probation Officer
Joe Allen, Adult Probation Officer

Page 6 indicate im only (19) when he soon started my adult case for case incarcerated for; if he would have not I would not be in prison. Als it mean unfulfilled plea bargain.

KATHY PACK LAFON
Certified Court Reporter
67 Dooley Road
Fayetteville, West Virginia 25840
(304) 465-1219

The court ignored my grounds to keep me in prison, with now I am in a court hands who dotty they fail or will be contradicted if not. I praised my client cause the court said I had to. You'll see sooner than later.

BE IT REMEMBERED that heretofore, to-wit, on Friday, May 24, 2013, at 1:22 p.m., on the hearing of the above-styled action before Honorable William J. Sadler, Judge, there also being present George V. Sitler, assistant prosecuting attorney, counsel for the State; the respondent in person and by his counsel, Gregory Ball, attorney at law; Kerry Buzzo, Juvenile Probation Officer; and Joe Allen, Adult Probation Officer, the following proceedings were had:

THE COURT: All right. This is the State of West Virginia vs. Michael Greene. We have two cases: 12-F-241 and 11-JD-118.

Present is the State of West Virginia by its assistant prosecuting attorney. Also present is Mr. Greene in person and by counsel, Greg Ball.

Now, this matter is scheduled for a further review; is that correct?

MR. SITLER: Yes, sir.

MR. BALL: Yes, Your Honor.

THE COURT: Now, as I understand it, Mr. Greene graduated yesterday. Is that right?

MS. BUZZO: Yes.

MR. BALL: Yes, Your Honor.

THE COURT: Now, has he completed everything that we have to offer as far as --

MS. BUZZO: Yes, sir. He completed --

THE COURT: -- juvenile services is involved, DJS?

MS. BUZZO: Yes, sir.

THE COURT: All right. Well, what says the State?

MR. SITLER: Your Honor, pursuant to the 11e plea agreement, at this time the Court would sentence Mr. Greene to a twenty-year sentence on the armed robbery charge and place him on a five-year supervised probation, and that's what the State moves for.

THE COURT: Mr. Ball?

MR. BALL: Your Honor, since Mr. Greene got his degree, I've been doing some checking around, trying to figure out -- also part of the plea agreement is, if he completes a two-year degree program or its equivalent, that the charges would be dismissed at the end of that.

THE COURT: Sort of like a deferred disposition?

MR. BALL; Yes, Your Honor. So in trying to work out some --

THE COURT: Well, I guess we would continue to defer disposition --

MR. SITLER: That's correct, Your Honor. I don't have -- I don't have a plea agreement in front of me, Your Honor, and I --

THE COURT: -- and place him on probation.

MR. BALL: Your Honor, I guess what I'm getting at here is I've been checking on trying to get him into several programs since he got through graduation. And he had some family plans in, I believe, New Jersey and North Carolina that haven't really panned out quite yet. But there's another option. It's the Job Corps, and I spoke with Tim --

THE RESPONDENT: Bragg, wasn't it?

MR. BALL: Bragg, yes. And they've got several programs available, and he was willing to do an orientation with Mr. Greene.

And, basically, the way he explained their programs to me are they are career training with an option to move on with a degree. And just for an example, -- and, again, these are just examples -- you can do --

THE COURT: The plea agreement says successful completion of a two-year associate's degree program or an equivalent trade school certification.

MR. BALL: Yes, Your Honor. And that's what I'm trying to get him placed into through Job Corps.

Now, like I said, he can do what they call a six-month's training for like certified nurse, and then that would lead to a one-year LPN. That's just an example, but he said they have hundreds of programs like that.

But the problem with probation, Your Honor, is they

do not want to be responsible for having to call in and say "He's not here now" or anything like that. In fact, supervised probation would -- they wouldn't even accept him into the Job Corps under that scenario.

So I guess what I'm asking for is a bond or something other than the supervised probation to allow him to try to get into the Job Corps and pursue that degree.

THE COURT: Any reply from the State?

MR. SITLER: Your Honor, the State's not opposed to the Court releasing Mr. Greene on bond with supervision rather than probation, provided that there is regular supervision from a probation office somewhere, continued drug testing; he has to report in and we keep track of him. I don't care what the Court calls it or how we fashion it.

And the goal of this is to get Mr. Greene some sort of trade certification that's going to make him employable and give him an option to do something other than what he's done all his life. So we're not opposed to releasing him on bond, but we need to figure out where he's going to report, who's going to supervise him, and all the nuts-and-bolts details of it.

THE COURT: Yeah. He's got to be under supervision. I mean, there's no two ways about it because, an offense this serious, he's got to be under supervision. What's the -- is

there any recommendation that DJS is making upon his discharge?

MS. BUZZO: I didn't receive a discharge summary. I've had several conversations with the industrial home but, you know, he did --

THE COURT: Is he still at the industrial home?

MS. BUZZO: He was there as of this morning, and --

THE COURT: How many's left there?

THE RESPONDENT: Like, five.

MR. BALL: In and out.

MS. BUZZO: They will all be out by --

THE COURT: You can say you made history. You was one of the last people out of that place.

MR. BALL: I don't think he's going to be touting that, Your Honor. I don't know.

MR. SITLER: Turn out the lights on your way out.

MS. BUZZO: You know, they -- we were just focusing on them getting -- that he had earned all of his credits for his high school diploma and actually had his ceremony yesterday to receive that.

THE COURT: Is he -- you're already 18, aren't you?

THE RESPONDENT: Nineteen, sir.

THE COURT: Okay. All right. Anything else?

MR. SITLER: No, Your Honor.

THE COURT: Like I said, he has to be under supervision. You know, I think that's what the plea agreement called for. That was the deal that was made. Whether we call it probation, deferred adjudication or whatever, he has to be under supervision.

And to that extent, he has to be at least under contract with probation for a period of five years now, to be under the standard terms and conditions of probation. Like I said, whatever you-all want to call it, whether it's, you know, deferred adjudication with supervision, whatever.

But, you know, you have to check in. You'll have a probation officer, and you'll have to check in with your probation officer.

MR. BALL: Your Honor, if I could, -- these programs are all up and down the east coast.

THE COURT: All right.

MR. BALL: I've explained to him, one way or another, he's going to have to check in somehow.

THE COURT: What's his immediate plans?

MR. BALL: The immediate plan is to -- there's an orientation process, and --

THE COURT: I mean, like where's he going like from -- if he's cut loose today, where is he laying his head tonight?

MR. BALL: Oh, I believe with his mom.

THE RESPONDENT: At Mom's.

THE COURT: Okay.

MS. BUZZO: And that process can sometimes be lengthy, because I had another young lady that was in Job Corps, and I worked with her to -- I actually gave you that information.

MR. BALL: Yes. Yes, you did.

MS. BUZZO: And, you know, they'd had some cutbacks at one time, and her admission was put back for a couple of months.

THE COURT: Yeah. You never know what this sequestration stuff is going to have an effect on those programs, either.

MS. BUZZO: So, you know, it's an almost week-to-week being in contact with them. I mean, I would call Mr. Bragg weekly almost to, you know, see when she was to report. But they do have programs all over the east coast.

MR. BALL: And that's the only -- I mean, he just said supervised probation automatically kicks him out. I've explained to Michael that's he's going to be responsible for meeting whatever terms you require. I just want it to be worded in a fashion that doesn't kick him out of it.

THE COURT: Well, we would never require them to

report on his conduct, but he may be required to report himself as to his conduct.

MR. BALL: Exactly. And that's basically what I'm asking, Your Honor.

THE COURT: Okay.

MR. ALLEN: Judge, and the only issue with the deferred adjudication is it's not transferrable through interstate compact, so --

THE COURT: So we can't transfer him.

MR. ALLEN: Deferred adjudication, absolutely cannot.

MR. BALL: So that's -- Mr. Bragg said the programs are all up and down the east coast. Basically, he has to go in and do an orientation and decide what he wants to go into. I don't know where they would --

THE COURT: Well, why don't we do this: Why don't we go ahead -- the Court will find that he has successfully completed the program with DJS.

So the Court is going to release him to adult supervision under our probation department for a period of five years under the standard terms and conditions of probation, a special condition that you participate in either some sort of vocational program or educational program or seek and maintain employment; that you not change residences unless you're given permission by your probation officer.

The Court authorizes the probation officer to allow him to participate in one of these programs. And it seems like, with that type of program, too, it might would be best, you know, even if we couldn't transfer it, that he could at least call in monthly or something like that and maybe, you know, anytime he's in the area, stop by to be drug tested and stuff like that, because we need to make sure that we're doing drug testing and things of that nature.

Any other special terms and conditions, Mr. Allen, that you can think of that we would need?

MR. ALLEN: No, sir.

THE COURT: Ms. Buzzo, do you know of any that we would need? You're probably more familiar with Mr. Greene than -- obviously, you're to stay away from anyone that's using drugs or abusing alcohol or anyone that's committing crimes or anything like that.

MS. BUZZO: Just regular random screening.

THE COURT: Right. I mean, obviously, he'd be subject to random urinalysis.

THE RESPONDENT: Can I say something, Your Honor?

THE COURT: Sure.

THE RESPONDENT: Before I had got like (inaudible) to get sent back to Salem, Your Honor, you was telling me that, if I complete the program, you said that you would --

I'd be on -- stay on probation -- I wouldn't have to worry about doing probation for five years. You said something like "less than five years." I mean, --

THE COURT: If you complete that two-year program, I'd say they'll say -- you know, you complete your two-year program, either get your vocational or your trade certification or complete your associate's degree, they'd probably move to release you early.

THE RESPONDENT: All right.

THE COURT: All right. So if you do that, you know, I don't think anybody is going to have a problem with releasing you early.

THE RESPONDENT: All right.

MR. SITLER: Just learn a skill. Just a job skill and certificate and you'll be dismissed.

THE COURT: And, you know, I kind of like this Job Corps thing. And the reason I like it, Mr. Greene, is it will get you out of this area, you know.

THE RESPONDENT: Yes, sir.

THE COURT: I'm afraid if you stay around here you're going to just go back to the same people, places, that you were before you went to Salem, and those people are going to drag you down. You're too smart of a person. All right? You're too smart. You're a smart young man. You're too smart

to get involved back into the thug life. I'm just going to be blunt with you.

THE RESPONDENT: I understand.

THE COURT: All right. I mean, you're at a crucial point in your life. You can earn your way out of a criminal record on a very serious charge, and you're smart enough to do that, and you're smart enough to accomplish something in life.

You've got a lot going for you. But it also would be easy for you just to fall back into your previous life and, if you do, then you'd better get used to that orange because you're going to end back up in it.

You don't want that. I certainly don't want that. No one in this room wants that for you. All right? You're too smart for that. You need to make something out of yourself, because you have the ability to do that. All right. We --

MR. BALL: Your Honor, just for clarification, we're not calling it supervised probation; correct?

THE COURT: No. We're deferring adjudication, put him under supervision.

MR. SITLER: Bond, supervision. That's what the order will say.

MR. BALL: Okay. Thank you.

THE COURT: All right. Anything else?

MR. BALL: Your Honor, Mr. Greene did complete a OSHA 501 safety award. I don't think it -- well, I would ask that, if it qualifies as a certification, that he would be given that -- but I don't know that it would qualify as a two-year program.

THE COURT: All right. Anything else?

MR. SITLER: No, Your Honor.

THE COURT: All right. Well, congratulations on your graduation and good luck to you. You know, the world is wide open for you. Like I said, pick you a good path and stick to it. You can do it.

THE RESPONDENT: Thank you.

THE COURT: All right. Good luck to you.

THE RESPONDENT: Thank you.

THE COURT: Thank you.

MR. BALL: Thank you, Your Honor.

THE COURT: Thank you all.

(At 1:36 p.m., the hearing was adjourned.)

- - -

STATE OF WEST VIRGINIA,

COUNTY OF MERCER, to-wit:

I, Kathy Pack Lafon, certified court reporter, do hereby certify that the foregoing is a true and correct transcript of an excerpt of the proceedings had and the testimony taken in the hearing of the actions of **IN THE INTEREST OF: MICHAEL GREENE, Case Nos. 11-JD-118-WS and 12F-241-WS**, on Friday, May 24, 2013, as reported by me by Stenomask.

Given under my hand this 15th day of June, 2015.

Kathy Pack Lafon CCR

Kathy Pack Lafon, CCR

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto, as promulgated by the Supreme Court of Appeals.

SIGNED: Kathy Pack Lafon

DATE: 6-15-15

APPENDIX

H

WILLIAM O. (BILL) HUFFMAN
ATTORNEY AT LAW
210 SOUTH WALKER STREET
PRINCETON, WEST VIRGINIA 24740

PHONE: (304) 487-2827
FAX: (304) 487-2843

May 25, 2012

1:19-cv-00570

Michael Greene
c/o Southern WV Regional Jail
1200 Airport Road
Beaver, WV 25813

Dear Michael:

Mr. Ball and I will meet with you at the jail this coming Wednesday morning. This will be the last significant opportunity we will have to discuss your case before the trial on June 5th.

Probably the most important decision you have to make is whether or not you will elect to testify. Frankly, Mr. Ball and I both feel that would be a mistake, but the choice is yours. We will offer you our advice and opinion, but that is your decision to make.

Please make sure to prepare any questions you may have and we will do our best to address each one to its fullest.

Mr. Ball and I both strongly believe that you are making a catastrophic error in not accepting the plea offer from the State. The details of that plea offer have been discussed over and over, but it is our understanding that you are determined to risk the rest of your life behind bars despite the fact that you would walk out of jail (actually a juvenile facility) at your 21st birthday if you took the plea offer.

We both look forward to meeting with you next Wednesday.

Sincerely,

William O. Huffman

WOH/nhm
cc. Greg Ball, Esq.

WILLIAM O. (BILL) HUFFMAN
ATTORNEY AT LAW
210 SOUTH WALKER STREET
PRINCETON, WEST VIRGINIA 24740

PHONE: (304) 487-2827
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April 27, 2012

Confidential
Attorney-Client Privileged

Michael Greene
c/o Southern WV Regional Jail
1200 Airport Road
Beaver, WV 25813

RE: State v. Greene

Dear Michael:

Enclosed is a copy of the last revision of the proposed offer from the State. This is the offer you rejected in this afternoon's meeting with your family in Judge Sadler's jury room.

I believe the decision you have made makes no sense whatsoever, and is completely contrary to your best interests. You are risking the very real possibility that you will spend the rest of your life in prison, knowing that (with the plea) you could walk out of a juvenile facility no later than your 21st birthday and live a productive record-free life.

As you know, the drug trial in Juvenile Court is set for May 9th. There is little to no prospect of a not guilty verdict due to the video and testimonial evidence the State will present. There is an extremely high probability that you will be adjudicated a delinquent and confined in a juvenile detention facility until you are 21 years of age.

The month after that you will face First Degree Murder as an adult. You certainly know what the penalty is should the jury find you guilty. Unfortunately, this is a case in which the State's evidence has only grown stronger over time. As the State's case grows stronger, your chances of acquittal diminish. As a result, you face the very real chance of spending the rest of your life in the penitentiary.

Because your decision totally flies in the face of common sense and all logic, we will be filing a motion to have you evaluated. Basically, I cannot for the life of me understand why someone would risk being locked up for the rest of his life for absolutely no reason whatsoever. However, that is exactly the course you have chosen.

The motion will be filed the first of next week. Also, because you are clearly pursuing a path totally opposite of both your lawyers' considered opinions and against your own self interest, Mr. Ball and I will also be filing a motion to withdraw.

APPENDIX

I

William [illegible] No. 57599-1
SRCI 1200 Airport Rd
Beaver, WVa 25813

September 10, 2013

Re: Direct Appeal of Right
#12-F-241-WS

William Huffman
210 S. Walker St
Princeton, WVa 24740

Dear Sir,

I have asked you in the past about any direct appeal right to pursue in regards to this last Judgement of July 8, 2013 and in yours of July 9th your stated the tall we have left is a Motion for Reconsideration. I'm told I have a right to Appeal and I've asked you to appeal this decision in the past and am asking you again. Please appeal this Judgement. If the time frame is past, move to be adjudged again to renew the time for appeal. A motion for reconsideration may be pursued when a Final order is made by the Supreme Court if the appeal is denied.

Thank you for your time in this matter.

Respectfully,
Michael Greene

cc: Clerk of Court
Bar
file