IN THE UNITED STATES SUPREME COURT OF APPEALS

No._____

MELVIN SIMMS,
PETITIONER

VS.

DONALD F. AMES, Superintendent
Mount Olive Correctional Complex
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

APPENDIX RECORD

Filed By:

Melvin Simms, *pro se*
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia 25185

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CLOSED,HABEAS,PSLC Blalock

U.S. District Court
Northern District of West Virginia (Wheeling)
CIVIL DOCKET FOR CASE #: 5:20-cv-00107-JPB-JPM

Simms v. Ames
Assigned to: District Judge John Preston Bailey
Referred to: Magistrate Judge James P. Mazzone
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 06/09/2020
Date Terminated: 02/24/2021
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Melvin G. Simms

represented by **Melvin G. Simms**
3368560
MOUNT OLIVE Correctional Complex

1 Mountainside Way
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V.

Respondent

Donald Ames
Superintendent

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Date Filed	#	Docket Text
06/09/2020	1	PETITION for Writ of Habeas Corpus against Donald Ames, filed by Melvin G. Simms. (Attachments: # 1 State of WV Supreme Court of Appeals Memorandum Decision, # 2 Supreme Court of Appeals NOTICE, # 3 Cover letter, # 4 Envelope) (copy to counsel via cm/ecf) (nmm) (Entered: 06/09/2020)
06/09/2020	2	** SEALED ** Prisoner Trust Fund Account Statement by Melvin G. Simms. (Attachments: # 1 Ledger Sheets, # 2 Cover letter, # 3 Envelope) (nmm) (Entered: 06/09/2020)
06/09/2020	3	NOTICE OF GENERAL GUIDELINES FOR APPEARING PRO SE IN FEDERAL COURT. (copy to pro se petitioner via cm,rrr) (nmm) (Additional attachment(s) added on 6/11/2020: # 1 Certified Mail Return Receipt) (nmm). (Entered: 06/09/2020)
06/09/2020	4	NOTICE OF DEFICIENT PLEADING re 1 Petition for Writ of Habeas Corpus, (Attachments: # 1 Application for IFP) (copy to pro se petitioner via cm,rrr) (nmm) (Additional attachment(s) added on 6/11/2020: # 2 Certified Mail Return Receipt) (nmm). (Entered: 06/09/2020)
06/18/2020	5	RETURN RECEIPT as to 4 Notice of Deficient Pleading and 3 Notice of General Guidelines. SERVICE ACCEPTED on 6/15/2020. (ag) (Entered: 06/18/2020)
06/23/2020	6	Filing fee: $ 5.00, receipt number WVNW002481 (nmm) (Entered: 06/23/2020)
08/05/2020	7	ORDER: the respondent shall file an answer to the 1 petition or other responsive pleading and shall file such transcripts and exhibits as may be relevant, on or before October 5, 2020; Petitioner, at his option, may file a reply, which shall be due on or before December 4, 2020. Signed by Magistrate Judge James P. Mazzone on 8/5/2020. (copy to pro se petitioner via cm,rrr; copy to counsel via cm/ecf and us mail) (nmm) (Additional attachment(s) added on 8/5/2020: # 1 Certified Mail Return Receipt) (nmm). (Entered: 08/05/2020)
08/11/2020	8	RETURN RECEIPT as to 7 ORDER. SERVICE ACCEPTED on 8/7/2020 (per usps website). (nmm) (Entered: 08/11/2020)
10/05/2020	9	MOTION for Summary Judgment by Donald Ames. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit, # 28 Exhibit, # 29 Exhibit, # 30 Exhibit, # 31 Exhibit, # 32 Exhibit, # 33 Exhibit, # 34 Exhibit, # 35 Exhibit, # 36 Exhibit, # 37 Exhibit, # 38 Exhibit, # 39 Exhibit, # 40 Exhibit, # 41 Exhibit, # 42 Exhibit, # 43 Exhibit, # 44 Exhibit, # 45 Exhibit,

		# 46 Exhibit, # 47 Exhibit)(Niday, Mary) (Entered: 10/05/2020)
10/05/2020	10	Memorandum in Support re 9 MOTION for Summary Judgment filed by Donald Ames. (Niday, Mary) (Entered: 10/05/2020)
10/15/2020	11	ORDER AND ROSEBORO NOTICE re 9 MOTION for Summary Judgment filed by Donald Ames. Within twenty-eight days from the date of this Order, the pro se party shall file any opposition to the motion. Signed by Magistrate Judge James P. Mazzone on 10/15/2020. (copy to pro se petitioner via cm,rrr) (nmm) (Additional attachment(s) added on 10/15/2020: # 1 Certified Mail Return Receipt) (nmm). (Entered: 10/15/2020)
10/22/2020	12	RETURN RECEIPT as to 11 ORDER AND ROSEBORO NOTICE. SERVICE ACCEPTED on 10/19/2020 (per usps website). (nmm) (Entered: 10/22/2020)
10/30/2020	13	LETTER dated 10/14/2020 from Melvin Simms to Rory L. Perry II requesting copy of docket sheet and Roseboro Notice.(ag)(docket sheet and copy of Notice mailed to pro se Petitioner) (Entered: 10/30/2020)
11/09/2020	14	PETITIONER'S RESPONSE TO 9 MOTION FOR SUMMARY JUDGMENT, filed by Melvin G. Simms. (Attachments: # 1 Cover letter, # 2 Envelope)(nmm) (Entered: 11/09/2020)
11/09/2020	15	MOTION TO STAY AND ABEYANCE, by Melvin G. Simms. (Attachments: # 1 Cover letter, # 2 Envelope)(nmm) (Entered: 11/09/2020)
11/09/2020	16	CERTIFICATE OF SERVICE by Melvin G. Simms re 14 PETITIONER"S RESPONSE TO MOTION FOR SUMMARY JUDGMENT and 15 MOTION TO STAY AND ABEYANCE (Attachments: # 1 Envelope) (nmm) (Entered: 11/09/2020)
02/24/2021	17	**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT: Respondents 9 Motion for Summary Judgment is GRANTED; Petitioners 15 Motion for Stay and Abeyance is DENIED. Accordingly, petitioners 1 Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody is DENIED and DISMISSED WITH PREJUDICE. This case is hereby ORDERED STRICKEN from the active docket of this Court. This Court hereby DENIES petitioner a certificate of appealability. Signed by District Judge John Preston Bailey on 2/24/2021. (copy to pro se petitioner via cm,rrr) (nmm)** (Additional attachment(s) added on 2/25/2021: # 1 Certified Mail Return Receipt) (nmm). Modified docket text re: cert. of appealability on 2/26/2021 (nmm). (Entered: 02/24/2021)
03/08/2021	18	LETTER from Melvin Simms to Clerk requesting docket sheet. (public docket sheet sent via us mail) (Attachments: # 1 Envelope)(nmm) (Entered: 03/08/2021)

PACER fee: Exempt

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MELVIN G. SIMMS,

Petitioner,

v. **CIVIL ACTION NO. 5:20-CV-107**
Judge Bailey

DONALD AMES, Superintendent,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Pending before this Court is Respondent's Motion for Summary Judgment and accompanying Memorandum of Law [Docs. 9 & 10], filed October 5, 2020. Petitioner filed a Response to Motion for Summary Dismissal [Doc. 14] on November 9, 2020. Also pending is petitioner's Motion for Stay and Abeyance [Doc. 15], filed November 9, 2020. Accordingly, this matter is now ripe for adjudication. For the reasons contained herein, this Court will grant respondent's Motion for Summary Judgment and deny petitioner's Motion for Stay and Abeyance.

FACTUAL AND PROCEDURAL HISTORY

On June 9, 2020, petitioner filed a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody. *See* [Doc. 1]. The petition stems from underlying criminal proceedings in West Virginia state court. More specifically, in October 2010, a grand jury in Berkeley County, West Virginia, returned a seven count indictment against petitioner charging him with four counts of sexual abuse by a parent, guardian, custodian, or person in

position of trust in violation of West Virginia Code § 61-8D-5(a); and three counts of sexual assault in the third degree in violation of West Virginia Code § 61-8B-5(a)(2).

Following a six-day jury trial in October 2012, petitioner was convicted of all counts as charged. Subsequently, the state court denied petitioner's motion for a new trial. Petitioner, by counsel, then appealed his conviction and sentence to the Supreme Court of Appeals of West Virginia, arguing five assignments of error: (1) the trial court erred in denying petitioner's pretrial motion to allow B.F. to testify; (2) the trial court erred at trial in denying petitioner's renewed motion to admit B.F's testimony where the motion was made immediately after the victim placed her past sexual conduct into evidence; (3) the trial court erred in denying petitioner's motion to dismiss the indictment because it was legally insufficient; (4) the trial court erred in denying petitioner's motion for a bill of particulars; and (5) the trial court erred in denying petitioner's motion for new trial due to the cumulative errors at trial. On March 28, 2014, the Supreme Court of Appeals of West Virginia affirmed petitioner's conviction and sentence. *See* ***State v. Melvin G. S.***, 2014 WL 1272538 (W.Va. Mar. 28, 2014) (memorandum decision).

Then, petitioner, by counsel, filed a habeas corpus petition in the Circuit Court of Berkeley County, raising the following nine grounds for relief: (1) the trial court erred in barring the testimony of B.F. whose testimony could have been used to impeach the victim due to the Rape Shield Statute; (2) the trial court erred in barring the testimony of B.F. whose testimony could have been used to impeach the victim due to the Rape Shield Statute even after testimony by the victim put the victim's sexual past into issue; (3) the trial court erred in denying petitioner's Motion to Dismiss by order dated September 24, 2012, for insufficient

indictment; (4) the trial court erred in denying petitioner's Motion for Bill of Particulars; (5) the trial court erred in not granting petitioner a new trial; ineffective assistance of trial counsel; (7) prosecutorial misconduct; (8) appellate counsel failed to raise all available grounds able to be presented on direct appeal constituting ineffective assistance of counsel; and (9) cumulative error. *See* [Doc. 9-32].

After subsequently filing amended petitions and changing counsel, petitioner, by counsel, filed a third amended habeas petition and checklist for grounds for post-conviction habeas relief. *See* [Docs. 9-36 & 9-37]. The habeas court entered its final order denying habeas relief on January 31, 2019. *See* [Doc. 9-41].

On May 30, 2019, petitioner appealed his habeas denial to the Supreme Court of Appeals of West Virginia asserting the following assignments of error: (1) the circuit court committed reversible and prejudicial error by denying petitioner an omnibus hearing on his petition; (2) the circuit court committed reversible and prejudicial error by holding, at paragraph 20, that petitioner is not entitled to relief on his allegation of prejudicial statements made by the assistant prosecutor in closing; (3) the circuit court committed reversible and prejudicial error by holding at paragraph 37, that petitioner is not entitled to relief on his allegations of ineffective assistance of counsel; (4) the circuit court committed reversible and prejudicial error by holding, at paragraph 49, that petitioner is not entitled to relief on his allegation that his counsel was ineffective at the sentencing hearing for failing to offer additional argument regarding mitigating circumstances before the sentencing court; (5) the circuit court committed reversible and prejudicial error by holding, at paragraph 56, that petitioner is entitled to no relief on the allegation that his trial counsel did not communicate the

state's second plea offer to him; and (6) the circuit court committed reversible and prejudicial error by holding, at paragraph 60, that petitioner is not entitled to relief on the allegation that he was absent at a critical stage or hearing of the proceeding. *See* [Doc. 9-45]. The Supreme Court of Appeals of West Virginia affirmed the habeas court's final order on April 6, 2020. *See **Melvin S. v. Ames***, 2020 WL 1674278 (W.Va. April 6, 2020) (memorandum decision).

Petitioner filed the instant Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody, alleging the following four grounds for relief: (1) petitioner was deprived of his United States Constitutional due process rights to remain silent and to a fair trial under the Fifth and Fourteenth Amendments when the State made prejudicial statements in closing argument and rebuttal; (2) petitioner's due process rights under the Sixth Amendment to the United States Constitution were violated when his attorney provided ineffective assistance of counsel; (3) petitioner's rights under the Sixth Amendment to the United States Constitution were violated when petitioner was not present at all critical stages of the trial; and (4) petitioner was deprived of his United States Constitutional due process rights under the Fifth, Eighth, and Fourteenth Amendments when the habeas court summarily denied his Petition for Writ of Habeas Corpus without holding an omnibus evidentiary hearing. *See* [Doc. 1]. As noted above, respondent seeks summary judgment on each argument asserted by petitioner.

STANDARDS OF REVIEW

I. Motions for Summary Judgment

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322–23 (1986). If the moving party meets this burden, the nonmoving party "may not rest upon the mere allegations or denials of its pleading, but must set forth specific facts showing there is a genuine issue for trial." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Id.*** "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Id.*** at 250.

In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. *See* ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 587 (1986). Additionally, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Id.*** at 586. That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other

evidence demonstrating there is indeed a genuine issue for trial. Fed. R. Civ. P. 56(c); ***Celotex Corp.***, 477 U.S. at 323–25; ***Anderson***, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson***, 477 U.S. at 249 (citations omitted). Although all justifiable inferences are to be drawn in favor of the non-movant, the non-moving party "cannot create a genuine issue of material fact through mere speculation of the building of one inference upon another." ***Beale v. Hardy***, 769 F.2d 213, 214 (4th Cir. 1985). Further, "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." ***Celotex Corp.***, 477 U.S. at 322.

II. Habeas Review Under 28 U.S.C. § 2254

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides federal relief to state prisoners only if they are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). If a petitioner's claim "rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review." ***Weeks v. Angelone***, 176 F.3d 249, 262 (4th Cir. 1999); *see also* ***Estelle v. McGuire***, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

When the issues raised in a § 2254 petition were raised and "adjudicated on the merits in State court proceedings," federal habeas relief is available only if the state court's decision (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly establish 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). Petitioner carries the burden of proof as to this "highly deferential" and "difficult to meet" standard. ***Cullen v. Pinholster***, 563 U.S. 170, 181 (2011). The "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." ***Burt v. Titlow***, 571 U.S. 12, 19 (2013).

Review under § 2254(d)(1) is limited "to the record that was before the state court that adjudicated the claim on the merits." 28 U.S.C. § 2254(d)(1). A claim is generally considered to have been "adjudicated on the merits" when it is "substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree." ***Thomas v. Davis***, 192 F.3d 445, 455 (4th Cir. 1999). A state court decision is "contrary to" United States Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts." ***Williams v. Taylor***, 529 U.S. 362, 412–13 (2000). A state court decision constitutes an "unreasonable application" of United States Supreme Court precedent "if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." ***Id.*** at 413.

Review under § 2254(d)(2) of a state court's factual determination is available only if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d)(2). Factual determinations made by state courts "shall

be presumed to be correct" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also* ***Tucker v. Ozmint***, 350 F.3d 433, 439 (4th Cir. 2003).

DISCUSSION

I. Petitioner's Motion for Stay and Abeyance

When a state inmate presents a § 2254 petition containing both exhausted and unexhausted claims, district courts possess the discretion to stay the matter to allow petitioners to present unexhausted claims to the state court in the first instance. *See* ***Rhines v. Weber***, 544 U.S. 269 (2005). However, a stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. ***Id.***

"Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." ***Id.*** at 277. Further, "even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." ***Id.*** (citing 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State")).

Here, petitioner contends that several of his claims are unexhausted. First, petitioner asserts that his claim concerning trial counsel's ineffectiveness for failing to object to the

prosecutor's comments concerning petitioner's silence during trial is both unexhausted and meritorious. [Doc. 15 at 6]. Similarly, petitioner contends that his appellate counsel was ineffective for failing to raise trial counsel's failure to object on direct appeal. [Id.]. Even assuming these claims are unexhausted, this Court finds that they are meritless for the reasons articulated by the Supreme Court of Appeals of West Virginia. ***Melvin S. v. Ames***, 2020 WL 1674278, at *3 (W.Va. 2020) (memorandum decision) ("[E]ven if petitioner's first assignment of error were to be considered on the merits, he is entitled to no relief because (1) the remarks did not specifically reference petitioner's decision to remain silent, (2) the remarks were isolated, (3) there was overwhelming evidence presented as to petitioner's guilt, and (4) the comments at issue were comments on the evidence introduced at trial and not deliberate attempts to call attention to petitioner's failure to testify."). Having found both petitioner's purportedly unexhausted claims meritless, petitioner's Motion for Stay and Abeyance is denied.

II. Petition and Motion for Summary Judgment

Petitioner alleges four (4) grounds in support of his Petition for Writ of Habeas Corpus By a Person in State Custody Pursuant to 28 U.S.C. § 2254. [Doc. 1]. As explained herein, respondent is entitled to summary judgment on each ground.

A. Prejudicial Statements

Petitioner contends he was deprived of his Fifth and Fourteenth Amendment rights when the state made prejudicial statements in closing argument and rebuttal. [Id.]. More specifically, petitioner argues that the state's statements were not isolated, were repeated multiple times, and were designed to tell the jury that he "was guilty because he never denied

the allegations to them or the victim's mother which equated to the allegations being refuted." [Id. at 6]. Federal habeas review of claims for prosecutorial misconduct is available only upon a showing that the prosecutor's remarks were improper and that the remarks "prejudicially affected the defendant's substantial right so as to deprive the defendant of a fair trial." ***United States v. Mitchell***, 1 F.3d 235, 240 (4th Cir. 1993). The appropriate test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Darden v. Wainwright***, 477 U.S. 168, 181 (1986). The fact that the comments are "undesirable or even universally condemned is insufficient to establish a due process violation." ***Id.***

In answering these inquiries, courts consider the following factors: "(1) the nature of the comments, (2) the nature and quantum of evidence before the jury, (3) the arguments of opposing counsel, (4) the judge's charge, and (5) whether the errors were isolated or repeated." ***Arnold v. Evatt***, 113 F.3d 1352, 1358 (4th Cir. 1997). The prosecutor's comments may not be reviewed in isolation; rather, the prosecutor's remarks must be reviewed in context of the entire proceedings to determine if the comments violated the petitioner's fundamental right to a fair trial. ***Mitchell***, 1 F.3d at 240; ***United States v. Young***, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context[.]").

Here, petitioner's arguments concerning the prosecutor's statements fall woefully short of the aforementioned standard. Rather, a review of the record as a whole indicates that the prosecutor's statements amounted to nothing more than an interpretation of the presented

evidence and did not prejudicially affect petitioner's substantial rights such as to deprive him of a fair trial.

B. Ineffective Assistance of Counsel

Petitioner asserts several allegations concerning ineffective assistance of counsel, each of which are without merit. Under the Sixth Amendment, criminal defendants are entitled to receive representation from their attorney which meets a constitutionally-mandated minimum threshold of competence. ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). As explained in ***Strickland v. Washington***, 466 U.S. 668 (1984), a defendant who alleges ineffective assistance of counsel must satisfy the following two-pronged standard:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." ***Id.*** Both showings are necessary as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Id.*** at 691. Only when a petitioner has satisfied both prongs can it be said that the Sixth Amendment's purpose–"to ensure that a defendant has

[received] the assistance necessary to justify reliance on the outcome of the proceeding"–has been abridged. ***Id.*** 691–92.

Satisfying the first prong requires a petitioner to identify specific actions or omissions of counsel, and establish that those acts or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688; *see also* ***Glover v. Miro***, 262 F.3d 268, 275 (4th Cir. 2001) ("To prove deficiency, a defendant must show that counsel's representation fell below an objective standard of reasonableness."). A court engaged in such a review of counsel's performance must be "highly deferential." ***Strickland***, 466 U.S. at 689. There is a "strong presumption" that any decision made by counsel was undertaken in furtherance of a "sound trial strategy." ***Id.***; *see also* ***Lunchenburg v. Smith***, 79 F.3d 388, 392 (4th Cir. 1996) ("[A] petitioner challenging his conviction on the grounds of ineffective assistance must overcome a strong presumption that the challenged action amounted to trial strategy.").

Petitioners who seek to rebut this presumption of effectiveness face a "difficult burden" because there is a "wide range" of constitutionally acceptable performance. ***Waters v. Thomas***, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). Satisfying ***Strickland*** has "nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. [A reviewing court need] ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." ***White v. Singletary***, 972 F.2d 1218, 1220 (11th Cir. 1992); *accord* ***State v. Miller***, 194 W.Va. 3, 16, 459 S.E.2d 114, 127 (1995)[1]. "[T]he burden to show that counsel's performance was

[1]In ***Miller***, the Supreme Court of Appeals of West Virginia expressly adopted the ***Strickland*** standard for evaluating claims of ineffective assistance in West Virginia.

deficient rests squarely on the defendant." ***United States v. Ray***, 547 F. App'x 343, 345–46 (4th Cir. 2013).

Assuming counsel's performance is objectively unreasonable, the petitioner must still demonstrate that the complained-of deficient performance was both material and sufficiently prejudicial. ***Strickland***, 466 U.S. at 693 ("Even if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the defense."). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." ***Id.*** (internal citation omitted). Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Finally, when evaluating a claim of ineffective assistance during federal habeas review, the Supreme Court of the United States has held that the applicable standard is "doubly deferential." *See* ***Cullen v. Pinholster***, 563 U.S. 170, 190 (2011). As the Court has explained, "to succeed, [a federal habeas petitioner] must do more than show that he would have satisfied ***Strickland's*** test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied ***Strickland*** incorrectly. Rather, he must show that the [state court] applied ***Strickland*** to the facts of his case in an objectively unreasonable manner." ***Bell v. Cone***, 535 U.S. 685, 699 (2002).

1. The "Defective Indictment"

Petitioner contends that his trial counsel was ineffective for failing to move for judgment of acquittal based on the insufficiency of the evidence at trial that he committed any alleged abuse against the victim in July 2009, as charged in the Indictment. [Doc. 1 at 9]. However, the record reveals that on direct appeal of his conviction, petitioner challenged the constitutional sufficiency of counts I, III, V, and VII of the Indictment. *See* ***State v. Melvin G.S.***, 2014 WL 1272538, at *4–6 (W.Va. 2014) (memorandum decision).

In his Response, petitioner conceded to the Government's argument that his claims concerning the Indictment do not constitute ineffective assistance of counsel. *See* [Doc. 14 at 6]. Even absent this concession, this Court would find the argument without merit as petitioner failed to demonstrate that the Supreme Court of Appeals of West Virginia's ruling concerning the propriety of the Indictment runs afoul of federal law.

2. The Sentencing Hearing

Next, petitioner asserts that trial counsel was ineffective for failing to advocate for leniency at the sentencing hearing. [Doc. 1 at 9]. More specifically, petitioner argues that trial counsel failed to make any sentence recommendation, request a sex offender risk evaluation, or present any evidence in mitigation of sentence. ***Id.*** This argument strains credulity as petitioner has failed to demonstrate that the outcome of the recommendation or evaluation would have resulted in a different outcome at sentencing.

Absent speculation, it is unclear to this Court what petitioner would have had trial counsel present as evidence in support of mitigation. As noted by the Supreme Court of Appeals of West Virginia, the record was nearly devoid of *any* mitigating circumstance.

Rather, the record illustrated that (1) petitioner began raising the victim when she was three years old, and that the victim called petitioner "daddy"; (2) petitioner began sexually abusing the victim when she was 13-years old and only stopped after he impregnated her at the age of 14; and (3) petitioner did not accept responsibility for his conduct and simply offered an "I'm sorry." *See **Melvin S. v. Ames***, 2020 WL 1674248, at *4 (W.Va. 2020) (memorandum decision). Still, the trial court appears to have run some of petitioner's sentences concurrently, presumptively indicating some consideration of mitigating factors. In any event, petitioner's mere conjecture concerning trial counsel's failure to advocate for leniency fails to satisfy ***Strickland*** and fails to demonstrate that the Supreme Court of Appeals of West Virginia contravened federal law.

3. The Second Plea Offer

Next, petitioner contends that trial counsel was ineffective for failing to communicate the state's second plea offer. [Doc. 1 at 9]. More specifically, petitioner asserts that although the trial court placed the plea offer on the record and gave counsel the opportunity to review the plea offer with petitioner, trial counsel failed to explain the plea agreement and state the risks versus rewards. [Id. at 9–10].

The record demonstrates that both the habeas court and the Supreme Court of Appeals of West Virginia found that the plea offer and possible sentences were read into the record at a hearing at which petitioner was present. *See **Melvin S.***, 2020 WL 1674278, at *5. As such, the Government contends that petitioner failed to establish that trial counsel's performance fell below an objectively reasonable standard, or that had trial counsel further explained the offer and the risks versus benefits, petitioner would have accepted the offer.

See [Doc. 10 at 18]. In his Response, petitioner contends that the prosecutor engaged in an *ex parte* communication by reading the plea offer into the record. *See* [Doc. 14 at 7]. It is hard to fathom how a statement made in open court, on the record, and in the presence of the parties could constitute an *ex parte* communication. Even so, petitioner has failed to offer any evidence to support that the Supreme Court of Appeals of West Virginia misapplied ***Strickland*** or contravened federal law when it found petitioner's arguments concerning the plea offer to be without merit.

C. Presence at a Critical Stage

In his third ground for habeas relief, petitioner asserts he was denied his Sixth Amendment right to be present at all critical stages of trial when he was absent from a June 18, 2012, pre-trial motions hearing. [Doc. 1 at 12]. "The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment together guarantee a defendant charged with a felony the right to be present at all critical stages of his trial." ***United States v. Rolle***, 204 F.3d 133, 136 (4th Cir. 2000). The right to be present, "though obviously important, is not . . . an absolute, systemic right." ***United States v. Tipton***, 89 F.3d 861, 872 (4th Cir. 1996).

The purpose of a defendant's presence "is to permit the defendant to contribute in some meaningful way to the fair and accurate resolution of the proceedings against him." ***United States v. Gonzales-Flores***, 701 F.3d 112, 118 (4th Cir. 2012). This right has been defined as one "to be present at all stages of the trial where [defendant's] absence might frustrate the fairness of the proceedings." ***Faretta v. California***, 95 S.Ct. 2525, 2533 n.15 (1975). "[T]he presence of a defendant is a condition of due process to the extent that a fair

and just hearing would be thwarted by his absence, and to that extent only." ***United States v. Gagnon***, 105 S.Ct. 1482, 1484 (1985).

The record reveals that on June 18, 2012, a hearing took place in which petitioner was not present but was represented by counsel. *See* [Doc. 9-4]. The purpose of the hearing was to enter an agreed order regarding the release of medical records from West Virginia University Hospitals regarding the victim's abortion and resulting DNA sample taken from the victim. [Id. at 3–4]. During the hearing, the state requested that the court proceed with reviewing the information surrounding the abortion and to disclose any such pertinent information to petitioner. [Id. at 4–8]. Petitioner's counsel advised the court that she was interested in learning how the tissue sample was taken from the victim, how it was packaged and transported, and who performed the actual abortion and undertook the tissue sample, packaging, and transport. [Id. at 9]. The court then discussed with counsel how the records would be distributed to counsel and how the other records would be re-sealed. [Id. at 9–13].

Petitioner argues that the June 18, 2012, hearing was a critical pretrial hearing because it "require[d] an attorney" and concerned various evidence. [Doc. 14 at 10]. Further, petitioner asserts that deeming the hearing as "clerical or administrative" would set "a dangerous precedent that would preclude defendants from all evidentiary or pretrial hearings." [Id.]. Petitioner's arguments in this regard are incorrect.

This Court agrees with the Supreme Court of Appeals of West Virginia, which determined that the June 18, 2012, hearing was not a critical stage because "it was administrative in nature" and was "held to clarify the parties' wishes regarding the victim's medical records which were discussed on June 4, 2012, when petitioner was present." *See*

Melvin S. v. Ames, 2020 WL 1674278, at *5) (W.Va. April 6, 2020) (memorandum decision). The Supreme Court of Appeals of West Virginia noted that pursuant to the holding in ***State v. Boyd***, 160 W.Va. 234, 233 S.E.2d 710 (1977), "[p]re-trial hearings involving substantial matters of law or the testimony of witnesses would be deemed critical" and routine matters of a clerical or administrative nature, like the hearing at issue, do not require the accused's presence. The state court's conclusion was neither contrary to, nor did it constitute an unreasonable application of, federal law.

Even assuming, *arguendo*, that petitioner had a right to be present at the hearing, petitioner has failed to demonstrate any prejudice resulting from his absence. "If a defendant is denied his right to be present during a critical stage, the error is considered harmless unless the defendant can offer a specific showing of prejudice." ***Tipton***, 90 F.3d at 875. Petitioner's absence in this case did not impair the fairness of the trial or impede his defense whatsoever.

D. The "Right" to an Omnibus Evidentiary Hearing

Finally, petitioner contends that he was denied his Fifth, Eighth, and Fourteenth Amendment rights when the habeas court summarily denied his petition without an evidentiary hearing to develop his claims of ineffective assistance of counsel. [Doc. 1 at 15]. An individual seeking habeas relief has no absolute right, under either West Virginia or federal law, to an evidentiary hearing. *See* W.Va. Code § 53-4A-7(a) ("If it is determined that . . . the petition was filed in bad faith or is without merit or is frivolous . . . [a] request . . . for the appointment of counsel shall be denied and the court making such determination shall enter an order setting forth the findings pertaining thereto and such order shall be final."); ***Gibson***

v. Dale, 173 W.Va. 681, 319 S.E.2d 806 (1984) ("It is evident from a reading of § 53-4A-7(a) that a petitioner for habeas corpus relief is not entitled as a matter of right, to a full evidentiary hearing in every proceeding instituted under the provisions of the post-conviction habeas corpus act"); ***Cardwell v. Greene***, 152 F.3d 331, 336 (4th Cir. 1998), *overruled on other grounds by* ***Bell v. Jarvis***, 236 F.3d 149 (4th Cir. 2000) (explaining that "federal courts retain [ ] discretion in many [habeas] cases to grant or deny a [evidentiary] hearing").

In Syl. Pt. 1, ***Purdue v. Coiner***, 156 W.Va. 467, 194 S.E.2d 657 (1973), the Supreme Court of Appeals of West Virginia held:

> A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.

Id. The determination of whether a petitioner has set forth sufficient facts warranting the holding of an evidentiary hearing or appointment of counsel is within the "broad discretion" of the circuit court. ***Tex S. v. Pszczolkowski***, 236 W.Va. 245, 778 S.E.2d 694 (2015).

Here, the Supreme Court of Appeals of West Virginia determined that petitioner was not entitled to an evidentiary hearing because his claims were without merit. *See, yet again,* ***Melvin S. v. Ames***, 2020 WL 1674278, at *5 (W.Va. April 6, 2020) (memorandum decision). The state court's decision in this regard is neither contrary to, nor constitutes an unreasonable application of, clearly established federal law.

CONCLUSION

Having reviewed the pleadings in their entirety, Respondent's Motion for Summary Judgment **[Doc. 9]** is **GRANTED**. Petitioner's Motion for Stay and Abeyance **[Doc. 15]** is **DENIED**. Accordingly, petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody **[Doc. 1]** is **DENIED** and **DISMISSED WITH PREJUDICE**. Finally, this case is hereby **ORDERED STRICKEN** from the active docket of this Court.

Upon an independent review of the record, this Court hereby **DENIES** petitioner a certificate of appealability, finding that he has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and mail a copy to petitioner.

DATED: February 24, 2021.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

FILED: July 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6379
(5:20-cv-00107-JPB-JPM)

MELVIN G. SIMMS

Petitioner - Appellant

v.

DONALD AMES, Superintendent

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. 21-6379

MELVIN G. SIMMS,

Petitioner - Appellant,

v.

DONALD AMES, Superintendent,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:20-cv-00107-JPB-JPM)

Submitted: June 30, 2022 Decided: July 19, 2022

Before NIEMEYER and RICHARDSON, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Melvin G. Simms, Appellant Pro Se. Lindsay Sara See, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Melvin G. Simms 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 Simms 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

FILED: November 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6379
(5:20-cv-00107-JPB-JPM)

MELVIN G. SIMMS

Petitioner - Appellant

v.

DONALD AMES, Superintendent

Respondent - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: November 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6379
(5:20-cv-00107-JPB-JPM)

MELVIN G. SIMMS

Petitioner - Appellant

v.

DONALD AMES, Superintendent

Respondent - Appellee

MANDATE

The judgment of this court, entered July 19, 2022, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk