IN THE UNITED STATES SUPREME COURT OF APPEALS

No._____

YASSER ABDELHAQ,
PETITIONER

VS.

JOSH V. WARD, ACTING SUPERINTENDENT,
MOUNT OLIVE CORRECTIONAL COMPLEX
RESPONDENT

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

APPENDIX RECORD

Filed By:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

YASSER ABDELHAQ,

Petitioner,

v. **CIVIL ACTION NO. 3:21-CV-145 (GROH)**

DONALD F. AMES,

Respondent.

REPORT AND RECOMMENDATION

I. INTRODUCTION

This case was initiated on September 2, 2021, when the Petitioner filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. The Petitioner paid the $5.00 filing fee on September 28, 2021. ECF No. 20.

Accordingly, this case is before the undersigned for a report and recommendation pursuant to Local Rule of Prisoner Litigation Procedure (LR PL P) 2, et seq., and 28 U.S.C. §§ 1915(e) and 1915(A).

II. FACTUAL AND PROCEDURAL HISTORY

A. State Court Proceedings: Conviction, Sentence, Direct Appeals, and Habeas Corpus Petitions [1]

Petitioner is currently a state prisoner incarcerated in Mount Olive Correctional Center in Mount Olive, West Virginia. https://apps.wv.gov/ois/offendersearch/doc. Following the November 1999 killing of Dana Tozar, Petitioner has twice been convicted of her murder in the Circuit Court of Ohio County, West Virginia, and three times appealed his conviction and sentence, and subsequent habeas corpus cases to the Supreme Court of Appeals of West Virginia. In Petitioner's latest appeal to the Supreme Court of Appeals, that court summarized the proceedings through June 2021:

> In January of 2000, petitioner was indicted in the Circuit Court of Ohio County on one count of first-degree murder for the stabbing death of Dana Tozar ("the victim"). At a jury trial in August of 2000, petitioner was convicted of first-degree murder and sentenced to a life term of incarceration without the possibility of parole. Petitioner appealed his conviction in *State v. Abdelhaq* ("*Abdelhaq I*"), 214 W. Va. 269, 588 S.E.2d 647 (2003), and this Court vacated the conviction due to a defective indictment and remanded the matter. *Id.* at 274, 588 S.E.2d at 652. Shortly after this Court's decision in *Abdelhaq I*, petitioner contends that he filed in the circuit court, as a self-represented litigant, a "blue print" outlining his strategy for his second trial. In this "blue print," petitioner states that he "instructed counsel not to tell the jury he was guilty of murder [in a second trial]."
>
> Petitioner was indicted for a second time on one count of first-degree murder for the murder of the victim and was represented by attorneys Robert G. McCoid and John J. Pizzuti. At petitioner's second trial, he admitted to killing the victim and sought a conviction on the lesser-included offense

[1] The facts contained in Section I.A. are taken from the memorandum decision issued in docket number 20-0521, by the State of West Virginia Supreme Court of Appeals, on June 23, 2021, in www.courtswv.gov/supreme-court/memo-decisions/spring2021/20-0521%20md.pdf; Abdelhaq v. Ames, 2021 WL 2581741 (June 23, 2021). Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (courts "may properly take judicial notice of public record); Colonial Penn. Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the contents of court records.'").

of second-degree murder. Petitioner was again convicted of first-degree murder. In the bifurcated sentencing stage, the jury did not recommend mercy. Accordingly, the circuit court sentenced petitioner to a life term of incarceration without the possibility of parole. Subsequently, petitioner's second appeal to this Court was refused by order entered on May 25, 2005.

In 2006, petitioner filed his first petition for a writ of habeas corpus in the circuit court, raising the following fourteen grounds for relief: (1) Whether petitioner was denied effective assistance of trial counsel; (2) Whether the evidence was insufficient to support a conviction for first-degree murder; (3) Whether the introduction of autopsy photographs was more prejudicial than probative; (4) Whether petitioner was denied a right to a fair sentencing when the circuit court allowed the victim's family to testify during the second phase of the bifurcated trial as to their preference that he be denied mercy; (5) Whether the jury should have been instructed with regard to mitigating factors on which it could determine petitioner's eligibility for parole; (6) Whether the circuit court's refusal to suppress all evidence seized during a warrantless search of the motel room where the crime took place was erroneous; (7) Whether the admission of hearsay testimony was erroneous; (8) Whether the admission of photographs of the victim before her death, i.e. "life photographs," was erroneous; (9) Whether the circuit court's refusal to admit evidence of the victim's drug use was erroneous; (10) Whether the circuit court's refusal to admit evidence of a witness's past criminal history was erroneous; (11) Whether the inclusion of a jury instruction with regard to "transferred intent" was erroneous; (12) Whether the circuit court's failure to include a jury instruction defining the term "spontaneous," as it related to the issue of deliberation, was erroneous; (13) Whether the circuit court's jury instruction, instructing the jury that the use of a deadly weapon allows an inference of malice and intent to kill, was incomplete; and (14) Whether the circuit court's refusal to limit petitioner's cross-examination of a State's witness with regard to specific intent was erroneous. The circuit court denied the petition by order entered on March 22, 2006, without holding a hearing.

Petitioner appealed the circuit court's March 22, 2006, order denying his first habeas petition on May 3, 2006. By order entered on December 6, 2006, this Court "grant[ed] [petitioner's] petition for appeal." The Court did not reverse the March 22, 2006, order, but remanded the case to the circuit

court "for the holding of an omnibus habeas corpus hearing on the issue of ineffective assistance of [trial] counsel." Upon remand, the parties litigated whether petitioner was barred from raising every issue set forth in the habeas petition except for ineffective assistance of trial counsel. Following a September 11, 2015, hearing, by order entered on October 19, 2015, the circuit court ruled that petitioner was barred "from raising any claim other than his claim for ineffective assistance of [trial] counsel," finding that petitioner misinterpreted this Court's decision in *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), setting forth principles governing the application of the doctrine of res judicata in habeas cases.

With regard to ineffective assistance of trial counsel, petitioner and both trial counsels testified at an August 2, 2016, omnibus hearing. Petitioner asserts that the issue of his strategy "blue print" for the second trial "was never settled" because "counsel state[d] they did not have a copy of the trial strategy." Nevertheless, Mr. McCoid testified unequivocally that petitioner understood "the full ramifications" of counsels' trial strategy of admitting that he killed the victim and asking for a conviction of second-degree murder and gave his consent. At several points during his testimony, Mr. McCoid addressed discussions the attorneys had with petitioner concerning the trial strategy, petitioner's understanding of the risks and benefits of such a strategy, and petitioner's consent to pursuing it. Having the benefit of seeing the State's theory of the case during the first trial, Mr. McCoid testified that they reevaluated the trial strategy since this "was not a case about whether [petitioner] had taken [the victim's] life," but was rather "about what his mental status was at the time that he did so." Mr. McCoid relied on portions of his opening statement where he admitted that petitioner killed the victim, but urged the jury to convict petitioner of second-degree murder due to the absence of premeditation. Based upon the opening, Mr. McCoid indicated during the omnibus hearing that

> [i]t is inconceivable that I would have given an opening statement in a first-degree murder case asking the jury to convict my client of second-degree murder without hav[ing] closely consulted with my client, discussed the minutia associated with that decision and obtained the full consent of my client in ... advancing that defense.

Thereafter, by order entered on December 29, 2016, the circuit court rejected petitioner's ineffective assistance claim and denied the habeas petition.

Petitioner appealed the circuit court's December 29, 2016, denial of the habeas petition to this Court. However, petitioner did not challenge the court's October 19, 2015, order allowing him to raise only ineffective assistance of trial counsel at the omnibus hearing. In *Abdelhaq v. Terry* ("*Abdelhaq II*"), No. 17-0078, 2018 WL 6131283 (W. Va. November 21, 2018) (memorandum decision), this Court affirmed the circuit court's denial of the habeas petition. Relevant here, the Court found that "[a]side from [petitioner's] unsupported claims that he never agreed to the strategy to admit culpability and seek a second-degree murder conviction, the evidence obtained at the omnibus hearing overwhelmingly establishes that petitioner's trial counsel advanced this strategy with petitioner's consent and support." *Id.* at *3. Petitioner subsequently filed a petition for rehearing which the Court refused by order entered on March 7, 2019. On March 15, 2019, this Court issued its mandate, and the decision in *Abdelhaq II* became final.

Petitioner filed his second habeas petition in the circuit court on August 12, 2019. In the habeas petition, petitioner argued that the circuit court erred in its October 19, 2015, order in *Abdelhaq II* by allowing him to raise only ineffective assistance of trial counsel at the omnibus hearing. Petitioner further argued that habeas counsel in *Abdelhaq II* was ineffective in failing to adequately argue to the circuit court that none of the fourteen issues set forth in the first habeas petition were adjudicated prior to the August 2, 2016, omnibus hearing. Accordingly, petitioner reasserted every issue from the first habeas petition in his second habeas petition. With regard to ineffective assistance of trial counsel, petitioner argued that the United States Supreme Court's decision in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), represented a change in the law favorable to him. By order entered on March 30, 2020, the circuit court denied the second habeas petition, finding that petitioner's claims were adjudicated in the first habeas proceeding in *Abdelhaq II*. The circuit court rejected petitioner's claim that habeas counsel failed to adequately argue that none of the fourteen issues set forth in the first habeas petition were adjudicated prior to the August 2, 2016, omnibus hearing, due to a lack of support for the claim. Finally, the circuit court found that the United States Supreme

> Court's decision in *McCoy* did not represent a change in the law such that petitioner would be allowed to relitigate the issue of whether he consented to trial counsels' strategy of admitting that he killed the victim and asking for a conviction of second-degree murder.
>
> Petitioner now appeals the circuit court's March 30, 2020, order denying his second habeas petition.

Abdelhaq v. Ames ("*Abdelhaq III*"), No. 20-0521, 2021 WL 2581741, at *1–3 (W. Va. June 23, 2021) (bracketed text in original); ECF No. 33-28. In *Abdelhaq III*, the Supreme Court of Appeals affirmed the circuit court's March 30, 2020, order which denied Petitioner's second petition for a writ of habeas corpus.

B. Instant Federal Habeas Petition

In the instant § 2254 petition, Petitioner raises six[2] grounds for relief, that:

(1) there was insufficient evidence to prove that Petitioner was capable of the premeditation necessary to support a first-degree murder conviction [ECF Nos. 24 at 8, 24-1 at 13];

(2) the trial court erred in rulings on the admission and preclusion of evidence, specifically:

(a) admission of autopsy photographs; and

(b) admission of life photos of the victim;

(c) exclusion of testimony about the victim's drug use;

(d) exclusion of the criminal history of a state witness; and

(e) exclusion of limited cross examination of State witnesses.

[ECF Nos. 24 at 10 – 11, 24-1 at 14];

[2] Petitioner concedes that although he raises six claims for relief, many of his claims have sub-grounds. ECF No. 43-1 at 7 – 8.

(3) the trial court erred in its jury instructions related to transferred intent, "the definition of spontaneous relative to deliberation", and inferred intent [ECF Nos. 24 at 13, 24-1 at 16];

(4) the trial court erred when it permitted the victim's family to make a sentencing recommendation during the bifurcated penalty phase of trial [ECF Nos. 24 at 15, 24-1 at 19];

(5) he received ineffective assistance of counsel at trial, specifically when counsel:

(a) Failed to object to the prosecutor's misstatement of law in closing argument [ECF No. 24-1 at 19 – 20];

(b) Failed to object to the prosecutor's statement during closing argument regarding the credibility of a state witness [Id. at 20 – 21];

(c) Failed to object to the prosecutor's mention of "mercy" during the bifurcated penalty phase [Id. at 21 – 22];

(d) Failed to object to a jury instruction "which allowed the inference of malice and intent to kill from the use of a deadly weapon" [Id. at 22]; and

(e) Employed a trial strategy, without Petitioner's approval, that conceded Petitioner was guilty of second degree murder [Id. at 22 – 26]; and

(6) the warrantless search of Petitioner's hotel room was an unreasonable search and seizure, and the evidence obtained should have been suppressed [ECF No. 24-1 at 27].

Petitioner acknowledged in his petition that he raised claims 1 through 4 on direct appeal and in a prior habeas corpus proceeding. ECF No. 24 at 9, 11, 13 – 14, 16. Further, Petitioner acknowledged in his petition that he raised claim 5, ineffective

assistance of counsel, in a prior habeas corpus proceeding, but was precluded from raising that issue on direct appeal. ECF No. 24-1 at 26. Finally, Petitioner acknowledged in his petition that although he raised claim 6, regarding the warrantless search of his hotel room, in a prior habeas corpus proceeding, he failed to raise the issue on direct appeal because his counsel on direct appeal was ineffective. Id. at 28 – 29.

For relief, Petitioner requests that the Court reverse his conviction and remand the matter for a new trial. ECF No 24 at 22.

C. Respondent's Motion to Dismiss or For Summary Judgment

On March 28, 2022, Respondent filed a motion to dismiss, or for summary judgment. ECF No. 33. Respondent filed a memorandum [ECF No. 34] in support thereof, and extensive exhibits [ECF Nos. 33-1 through 33-32] from the state court proceedings. Respondent contends that Petitioner also raised seventh and eight claims for relief that Petitioner's constitutional rights were violated: (7) when appellate counsel failed to raise the issue of trial counsel failing to object to, move for a mistrial, and/or request a limiting instruction based on the testimony of state witnesses; and (8) by the effects of cumulative error. ECF No. 34 at 18.

Respondent argues that Petitioner is not entitled to the writ of habeas corpus because: (1) grounds 2 and 3 are partially, and grounds 6, 7, and 8, are completely procedurally defaulted based on Petitioner's failure to exhaust state remedies [Id. at 20 – 26]; (2) ground 1 is without merit because the evidence[3] supported a first-degree murder

[3] Respondent contends that state expert witness, Dr. Krieg, testified that neither Petitioner's depressive nor psychotic disorders rendered him incapable of distinguishing right from wrong. ECF No. 34 at 27. Further, the state's second expert witness, Dr. Williams, agreed with Dr. Krieg's opinions. Id. Additionally, Petitioner's own expert witness testified that Petitioner was not experiencing any diminished capacity resulting from drug use, and knew the difference between right and wrong. Id. Finally, the Respondent argues that the number of stab wounds, mainly above the victim's waist, inflicted the maximum possible pain, and the fact that Petitioner cleaned the victim's blood from her body, and attempted to clean

conviction [Id. at 26 – 28]; (3) the admission of autopsy photos did not constitute error as alleged in ground 2, because the photos "provided probative evidence of the elements of murder, namely premeditation given the number of stab wounds" [Id. at 28 – 29]; (4) Petitioner's claims in ground 3 were proper and consistent with both federal and state law [Id. at 29 – 30]; (5) the admission of testimony from the victim's family during the penalty phase was permissible [Id. at 31 – 32]; and (6) Petitioner failed to demonstrate that he received ineffective assistance of counsel pursuant to Strickland v. Washington, based on (a) failure to object to an alleged misstatement of law by the prosecutor because trial counsel did not view this as a clear misstatement of the law; (b) failure to object to the prosecutor offering his person opinion on an expert witness' credibility because "[c]ommenting on the evidence and attacking the credibility of witnesses is a crucial part of closing arguments"; (c) failure to object to the prosecutor's use of the word "mercy" during the penalty phase because a prosecutor may properly argue that a murder was committed without mercy, and thus merits no mercy for the murderer in sentence; (d) failure to object to a jury instruction on the inference of malice based on West Virginia law that permits such an inference; (e) related to counsel's trial strategy to seek a conviction for the lesser included offense of second degree murder because Petitioner's contention that he disagreed with the plan contradicted his counsel's testimony and his own testimony[4] that he would have been thrilled to be convicted of second-degree murder with

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the crime scene after the murder, indicated that he was not acting under any diminished capacity, and committed an intentional act. Id. at 27 – 28.

[4] At the evidentiary hearing in his habeas petition in Ohio County Circuit Court, Petitioner was asked, "And you would've been thrilled to get a verdict of life with mercy or second-degree murder, anything but life without, correct?" and answered, "Correct." ECF No. 33-24 at 160:12 – 15.

the resulting term of incarceration which would permit a possibility of release [Id. at 33 – 46].

D. Petitioner's Response to Motion to Dismiss or for Summary Judgment

Petitioner filed a response in opposition to the motion to dismiss or for summary judgment, along with a memorandum on May 9, 2022. ECF No. 43, 43-1. Petitioner takes issue with Respondent's characterization of his claims as being eight grounds for relief, rather than six, even though Petitioner concedes that several of his claims contain subparts. ECF No. 43-1 at 7. Petitioner contends that he did not raise grounds 7 and 8 as articulated by Respondent. Id. at 8.

Petitioner argues that: (1) his psychosis, including his drug-induced psychosis, precluded him from forming the necessary intent to commit first degree murder, and that the jury's verdict is "grossly contradictory to the weight of the evidence" [Id. at 12- 14]; (2) he was prejudiced by the individual and cumulative effect of the trial court's erroneous evidentiary rulings, including admission of autopsy photos, hearsay testimony, and life photos of the victim, and the exclusion of testimony regarding the victim's drug use, a state witness' criminal history, and limited cross examination of witnesses [Id. at 15 - 20]; (3) the individual and cumulative effect of the trial court's erroneous jury instructions[5] on aggravation and mitigation, transferred intent, the definition of "spontaneous related to deliberation", inferred intent from the use of a deadly weapon [Id. at 20 – 26]; (4) he received ineffective assistance of counsel when his counsel failed to object to the prosecutor's misstatement of the law, the prosecutor's "vouching" for a witness, the

[5] Petitioner concedes that all of these claims regarding jury instructions were raised before both the Ohio County Circuit Court and the Supreme Court of Appeals, and that he was denied relief on all these grounds. Id. at 21.

prosecutor's mention of mercy during closing argument, to the instruction on inferred intent, and concession of guilt without Petitioner's consent [Id. at 28 – 35]; and (5) his constitutional rights were violated by unreasonable search and seizure [Id. at 35 – 36].

III. LEGAL STANDARDS

A. Pro Se Litigants

Courts must read *pro se* allegations in a liberal fashion and hold those pro se pleadings "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Pursuant to 28 U.S.C. § 1915A(b), the Court is required to perform a judicial review of certain suits brought by prisoners and must dismiss a case at any time if the Court determines that the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. A complaint is frivolous if it is without arguable merit either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (superseded by statute). The Supreme Court in Neitzke recognized that:

> Section 1915(d)[6] is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.

[6] The version of 28 U.S.C. § 1915(d) which was effective when Neitzke was decided provided, "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." As of April 26, 1996, the statute was revised and 28 U.S.C. § 1915A(b) now provides, "On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint– (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief."

490 U.S. at 327.

B. Petitions for Relief Under 28 U.S.C. § 2254

All petitions for habeas corpus relief under § 2254 are subject to a strict one-year period of limitation, based on the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Further, pursuant to Rule 3, of the Rules Governing Section 2254 Cases in the United States District Courts, "[t]he time for filing a petition is governed by 28 U.S.C. § 2244(d)." That statute provides that:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Substantively, the provisions of 28 U.S.C. § 2254 must be examined to determine whether habeas relief is proper. Under 28 U.S.C. § 2254(a) a district court must entertain a petition for habeas corpus relief from a prisoner in State custody, but "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

A petitioner can only seek § 2254 relief if he has exhausted the remedies available in state court, the corrective process is not available in state court, or the state process is ineffective to protect the petitioner. 28 U.S.C. § 2254(b). Moreover, "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254 (c).

The statute further addresses when a writ of habeas corpus shall not be granted to a state prisoner:

> 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)(1) and (2); see also Williams v. Taylor, 529 U.S. 362 (2000). The statute also fully addresses factual determinations made in state court:

> 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).

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). The "contrary to" and "unreasonable application clauses of § 2254(1)(d) have separate and independent meanings. Williams v. Taylor, 529 U.S. 362, 364 (2000). A state court decision warrants habeas relief under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court's." Lewis v. Wheeler, 609 F.3d 291, 300 (4th Cir. 2010) (quoting Williams, 529 US at 405) (internal quotations omitted). A writ of habeas corpus may be granted under the "unreasonable application" clause if the state court "identifies the correct governing legal rule from the [Supreme] Court's cases but unreasonably applies it to the facts of the particular case." Id. at 300 - 301 (internal marks omitted). Therefore, the AEDPA limits the habeas court's scope of review to the reasonableness, rather than the correctness, of the state court's decision.

C. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court of the United States established a two-part test to determine whether counsel was constitutionally ineffective. Under the first prong, Petitioner must demonstrate that his counsel's performance was deficient and "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). But, "[j]udicial scrutiny of counsel's performance must be highly deferential" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense assistance after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. In addition, a court must indulge a strong presumption that counsel's conduct

falls within the wide range of reasonably professional assistance. Id. at 689-90. There are no absolute rules for determining what performance is reasonable. See Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995) (noting counsel's representation is viewed on the facts of a particular case and at the time of counsel's conduct).

Under the second prong, Petitioner must show that the deficient performance caused him prejudice. Strickland, 466 U.S. at 687. To show prejudice, Petitioner must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (quoting Strickland, 466 U.S. at 687 (1984)). Consequently, if counsel's errors have no effect on the judgment, the conviction should not be reversed. Strickland, 466 U.S. at 691. The Fourth Circuit has recognized that, if a defendant "cannot demonstrate the requisite prejudice, [then] a reviewing court need not consider the performance prong" and vice versa. Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992).

D. Motions to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a case when a complaint fails to state a claim upon which relief can be granted. The Federal Rules of Civil Procedure require only, "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Courts long have cited, "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

Plaintiff is proceeding *pro se* and therefore the Court must liberally construe his pleadings. Estelle v. Gamble, 429 U.S. 97, 106 S.Ct. 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 – 21 (1972) (per curiam); Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197 (2007). Although a complaint need not contain detailed factual allegations, a plaintiff's obligation in pleading, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Accordingly, "[f]actual allegations must be enough to raise a right to relief above the speculative level," to one that is "plausible on its face." Id. at 555, 570. In Twombly, the Supreme Court found that, "because the plaintiffs [ ] have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. at 570. Thus, to survive a motion to dismiss, a plaintiff must state a plausible claim in his complaint which is based on cognizable legal authority and includes more than conclusory or speculative factual allegations.

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S.Ct. 1937 (2009). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," because courts are not bound to accept as true a legal conclusion couched as a factual allegation. Id. at 678. "[D]etermining whether a complaint states a plausible claim . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. Thus, a well-pleaded complaint must offer more than, "a sheer possibility that a defendant has acted unlawfully," in order to meet the plausibility standard and survive dismissal for failure to state a claim. Id. at 678.

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990)). In considering a motion to dismiss for failure to state a claim, a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. Mylan Labs, Inc. v. Matkari, 7 F.3d1130, 1134 (4th Cir. 1993); see also Martin, 980 F.2d at 952.

E. Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), the Court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In applying the standard for summary judgment, the Court must review all the evidence in the light most favorable to the nonmoving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322 – 23 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex, the Supreme Court held that the moving party bears the initial burden of informing the Court of the basis for the motion to, "demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323. Once "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

"The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a verdict." Anderson, supra, at 256. Thus, the nonmoving party must present specific facts showing the existence of a genuine issue for trial, meaning that "a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. The "mere existence of a scintilla of evidence" favoring the nonmoving party will not prevent the entry of summary judgment. Id. at 248.

To withstand such a motion, the nonmoving party must offer evidence from which a "fair-minded jury could return a verdict for the [party]." Id. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987). Such evidence must consist of facts which are material, meaning that they create fair doubt rather than encourage mere speculation. Anderson, supra, at 248.

Summary judgment is proper only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita, supra, at 587. "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. citing First Ntl. Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289, 88 S.Ct. 155, 1592 (1968). See Miller v. Fed. Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990). Although any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, where the record taken as a whole could not lead a rational trier of

fact to find for the non-moving party, disposition by summary judgment is appropriate. Matsushita, supra, at 587-88. Anderson, supra, at 248-49.

IV. ANALYSIS

Petitioner is not entitled to relief because he seeks habeas corpus relief upon six grounds which have all previously: (1) been raised and decided either in the Circuit Court of Ohio County, West Virginia, or the West Virginia Supreme Court of Appeals, or both; and/or (2) been procedurally defaulted. Under the plain language of the statute—that a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings—all six of Petitioner's claims fail because those claims were previously raised and adjudicated on the merits in State court. Further, not only were those claims decided in State court, Petitioner does not contend, nor does this Court find that those decisions were contrary to or involved an unreasonable application of Federal law.

A. Claims Previously Decided in State Court

1. Ground 1: Sufficiency of the Evidence Presented at Trial

Petitioner's claim that there was insufficient evidence to support his conviction was previously addressed by the Circuit Court of Ohio County in Petitioner's first habeas corpus petition, filed in 2006. ECF No. 33-28 at 1. In that first habeas corpus petition, Petitioner raised 14 separate issues, including the sufficiency of evidence at his trial. Id. at 1 – 2. In ground 2 therein, Petitioner questioned "[w]hether the evidence was insufficient to support a conviction for first-degree murder." Id. at 1. The circuit court denied the petition, which denial the Petitioner appealed to the Supreme Court of Appeals of West Virginia. Id. at 2.

In his petition for appeal, Petitioner asserted that, "there was insufficient evidence to find the Petitioner guilty of first degree murder beyond a reasonable doubt." ECF No. 33-17 at 3. Without addressing the merits of other issues, the Supreme Court of Appeals remanded the matter to the circuit court for an omnibus hearing on the limited issue of ineffective assistance of trial counsel. Id.

Following an omnibus hearing, the circuit court again denied the first habeas corpus petition by order entered on December 29, 2016. Id. That decision was affirmed by the Supreme Court of Appeals of West Virginia in its *Abdelhaq II* decision issued November 21, 2018. Id.; ECF No. 33-5. In its unpublished opinion, the Supreme Court of Appeals did not address sufficiency of the evidence, however, Petitioner's brief shows that the issue was raised before that court. ECF Nos. 33-5. Petitioner's claim raised herein contains the identical issue that he raised before the circuit court, and appealed to the state Supreme Court of Appeals. That claim was adjudicated in the circuit court, and in the Supreme Court of Appeals.

Further, Petitioner has not articulated any grounds that would support relief under the "contrary to" or "unreasonable determination" exceptions found in subparagraphs (1) and (2). Petitioner has not shown any unreasonable application of federal law which occurred in the state proceedings in relation to the finding that there was sufficient evidence presented at trial to support his conviction. Nor does Petitioner allege that the state court's adjudication resulted in a decision based on an unreasonable determination of the facts.

Thus, under the plain language of § 2254, Petitioner's first claim as to the sufficiency of the evidence has already been considered in State court, adjudicated on

the merits, and does not meet either exception listed in the statute. Accordingly, Petitioner's first claim for relief is without merit and should be denied.

2. Ground 2: Evidentiary Rulings by the Trial Court

Petitioner's claim that the trial court erred in evidentiary rulings raises five separate issues: (1) admission of autopsy photos; (2) admission of life photos of the victim; (3) exclusion of testimony about the victim's drug use; (4) exclusion of the victim's criminal history; and (5) the limited cross examination of State witnesses. ECF Nos. 24 at 10 – 11, 24-1 at 14. All five evidentiary issues were previously raised by Petitioner in his first habeas corpus petition before the circuit court. Further, after denial of relief in the circuit court, all five issues were appealed to the Supreme Court of Appeals of West Virginia.

In his first state habeas petition, Petitioner argued in the circuit court that the trial court erred by:

(1) In ground 3, "allowing into evidence autopsy photographs that were more prejudicial than probative." ECF No. 33-15 at 4;

(2) In ground 8, "admitting into evidence cumulative photographs of the alleged victim before her death." Id. at 6;

(3) In ground 9, "not allowing evidence of drug use by the alleged victims." Id.;

(4) In ground 10, "not allowing evidence of [State's witness] past criminal history." Id.; and

(5) In ground 14, "limiting defense cross examination." Id. at 8.

As noted above, the circuit court denied Petitioner relief on all grounds. ECF No. 33-16. When Petitioner appealed the denial of habeas relief to the Supreme Court of Appeals, he argued these five grounds of trial court error:

(1) In ground 3, "by allowing too many 'gruesome' autopsy photographs at trial." ECF No. 33-17 at 3;

(2) In ground 8, "by allowing too many 'life photographs' of the victim into evidence." Id.;

(3) In ground 9, "by not allowing evidence of prior drug use by the victim." Id.;

(4) In ground 10, "by not allowing testimony about [State's witness'] criminal history." Id.; and

(5) In ground 14, "by limiting cross examination (of a state witness) designed to determine the Petitioner's specific intent." Id. at 4.

Petitioner's claims on evidentiary rulings raised herein are the same five claims which he raised in his prior habeas before the state circuit court, and before the state Supreme Court of Appeals. In both the circuit court and the Supreme Court of Appeals, Petitioner's five claims of improper evidentiary rulings were found to be without merit. Further, Petitioner has not articulated any grounds that would support relief under the "contrary to" or "unreasonable determination" exceptions found in subparagraphs (1) and (2). Petitioner has not shown any unreasonable application of federal law which occurred in the state proceedings in relation to the finding that his statement to law enforcement was made voluntarily. Additionally, Petitioner does not allege that the state court's adjudication resulted in a decision based on an unreasonable determination of the facts.

Thus, under the plain language of § 2254, Petitioner's second claim which encompasses five evidentiary rulings, has already been considered in State court and adjudicated on the merits, and does not meet either exception listed in the statute. Accordingly, Petitioner's second claim for relief is without merit and should be denied.

3. Ground 3: Jury Instructions

Petitioner's claims raised in ground three related to the jury instructions given by the trial court is also without merit. Petitioner claims the trial court erred when it: (1) instructed the jury without defining "aggravation and mitigation"; (2) erroneously instructed the jury on transferred intent; (3) instructed the jury without defining "spontaneous relative to deliberation"; and (4) erroneously instructed the jury on inferred intent through the use of a deadly weapon. ECF No. 24 at 13. The first of those claims related to the definition of aggravation and mitigation was raised by Petitioner in his direct appeal filed with the Supreme Court of Appeals. ECF No. 33-11 at 38 – 40. The remaining three claims were raised by Petitioner in his state habeas corpus claim in the Ohio County Circuit Court. Petitioner raised the issue of whether the jury was properly instructed on transferred intent before the circuit court in ground 11. ECF No. 33-15 at 6. Petitioner argued in ground 12, that the trial judge erroneously by refusing to instruct the jury on "spontaneous" as relates to deliberation. Id. at 7. In ground 13, Petitioner argued that the circuit court erred when it instructed the jury that it could infer malice and intent to kill based on the use of a deadly weapon. Id.

Petitioner raised the final three grounds before the Supreme Court of Appeals when he appealed the denial of habeas corpus relief. ECF No. 33-17. In his petition for relief before the Supreme Court of Appeals, Petitioner claimed in ground 11 that the trial judge "erred by instructing the jury about 'transferred intent.'" Id. at 3. Further, Petitioner claimed in ground 12 that the trial court erred "by not instructing the jury about the meaning of 'spontaneous' relative to 'deliberation.'" Id. Finally, Petitioner contended in ground 13 that the trial judge erroneously instructed the jury "that intent could be inferred

by the use of a deadly weapon." Id. at 3 – 4. Again, Petitioner acknowledges that he has previously raised all of his ineffective assistance of counsel claims, in state court, either in a direct appeal, or in a prior state habeas proceeding. ECF No. 24 at 13 – 14.

In his third ground for relief Petitioner has failed to articulate any grounds that would support relief under the "contrary to" or "unreasonable determination" exceptions found in subparagraphs (1) and (2). Petitioner has not shown that the state court's decisions were contrary to or involved an unreasonable application of federal law in relation to his claim of erroneous jury instructions. Additionally, Petitioner does not allege that the state court's adjudication resulted in a decision based on an unreasonable determination of the facts. Accordingly, under the plain language of the statute, Petitioner's third claim has been considered and adjudicated on the merits in State court, thereby precluding relief under § 2254.

4. Claim 4: Evidentiary Rulings of the Trial Court in the Bifurcated Penalty Phase

Petitioner's fourth claim for relief is that the trial court "erroneously allowed the victim's family to give the jury a sentencing [recommendation] during the sentencing phase of Petitioner's bifurcated trial." ECF No. 24 at 15. However, that same claim was previously raised by Petitioner in both his direct appeal and in his prior state habeas petition. In his direct appeal, Petitioner asserted that the trial court when it allowed "the decedent's family to testify in the second phase of the bifurcated trial as to their preference that Petitioner [should] be denied mercy." ECF No. 33-11 at 40 – 43. In his habeas corpus appellate petition filed with the Supreme Court of Appeals, Petitioner restated that claim as, "the trial judge erred by allowing family members of the victim to recommend life without the possibility of parole when they testified during the sentencing phase of the

trial." ECF No. 33-17 at 3. As discussed above, Petitioner was denied relief on all these grounds by both the circuit court and Supreme Court of Appeals.

Further, Petitioner has not articulated any grounds that would support relief under the "contrary to" or "unreasonable determination" exceptions found in subparagraphs (1) and (2). Petitioner has not shown any unreasonable application of federal law which occurred in the state proceedings in relation to the testimony permitted during the bifurcated sentencing or penalty phase of Petitioner's murder trial. Additionally, Petitioner does not allege that the state court's adjudication resulted in a decision based on an unreasonable determination of the facts.

Thus, under the plain language of § 2254, Petitioner's fourth claim as to the testimony permitted in the penalty phase has already been considered in State court and adjudicated on the merits, and does not meet either exception listed in the statute. Accordingly, Petitioner's fourth claim for relief is without merit and should be denied.

5. Claim 5: Ineffective Assistance of Counsel at Trial

Petitioner's ineffective assistance of counsel claim raised in ground five is also without merit. Petitioner claims his counsel provided ineffective assistance of counsel when his lawyer failed to: (1) object to an alleged misstatement of law during closing argument; (2) object to the prosecutor's opinion on the credibility of a witness; (3) object to the prosecutor's reference to "mercy" during the penalty phase; (4) object to a jury instruction on malice; and (5) obtain Petitioner's consent to concede that Petitioner was guilty of second-degree murder.

In his state habeas corpus claim in the Ohio County Circuit Court, in ground 1, Petitioner alleged that he received ineffective assistance of counsel, including when

counsel admitted Petitioner was guilty of second-degree murder, contrary to Petitioner's wishes. ECF No. 33-15 at 2. In the appeal of his denial of habeas corpus, in ground 1 Petitioner more generally alleged ineffective assistance of counsel. ECF No. 33-17 at 3. The Supreme Court of Appeals remanded the matter to the circuit court for additional proceedings on the subject of ineffective assistance of counsel. ECF No. 33-18.

Upon remand, Petitioner twice, by counsel, filed amended petitions for habeas corpus. ECF Nos. 33-19, 33-21. The second of those petitions, filed on August 18, 2014, argued that Petitioner received ineffective assistance of counsel at trial when: (1) counsel failed to object to an erroneous statement of law by the prosecutor; (2) counsel failed to object during closing arguments when the prosecutor attacked the credibility of a defense witness; (3) failed to object to the prosecutor's "prejudicial remark concerning mercy" in the sentencing phase of the trial; (4) failed to ask for a jury instruction on involuntary manslaughter, and incorrectly applied a diminished capacity defense to the element of premeditation and deliberation, rather than to intent and malice. ECF No. 33-21 at 11.

The circuit court, by order entered on October 19, 2015, limited the remanded habeas proceedings to claims of ineffective assistance of counsel. ECF No. 33-23. On August 2, 2016, the circuit court conducted an evidentiary hearing on the allegations of ineffective assistance of counsel. ECF No. 33-24. Most significantly, at the hearing, Petitioner's trial counsel testified about and read a letter that Petitioner wrote to his counsel which stated:

> Dear John and Rob, as I told you today, I want to plead guilty for killing Dana. I did not plan to kill her on that day, but due to my mental condition and drug use, I unfortunately did kill her. I wish that I could take back what happened that day. Now that I'm thinking better, I know that my mental condition and drug use does not make me innocent, but makes me

> guilty of murder, but not first-degree murder. Please ask the prosecutor to accept my plea of guilty like we talked about. I am so very sorry for what happened. Thank you, Yasser.

Id. at 88:7 – 17. In his testimony about developing trial strategy, Petitioner's counsel testified, "[t]his was not a case about whether Mr. Abdelhaq had taken her life, it was a question about what his mental status was at the time that he did so." Id. at 79: 6 – 8. The trial strategy was further explained by counsel during questioning:

> Q. Now, Mr. Abdelhaq had been convicted by the first jury of murder in the first degree without a recommendation of mercy; is that correct?
> A. Yes.
> Q. And you knew that by reducing that verdict either to murder in the first degree with mercy or second degree [ ] would be a great benefit to Mr. Abdelhaq? Would you agree with that?
> A. It was our belief—yes, I would. It was our belief that given the horrific facts associated with the case, which involved a paraplegic young lady stabbed 237 times or so by a man who was in a profound state of self-induced, psychosis, that a jury would not, based upon our review of the evidence, based upon a review of the first trial, a transcript, that a jury would be inclined to acquit Mr. Abdelhaq on the basis of insanity. In addition, to which we believe the law furnished a basis for that type of defense given that the insanity associated with—or his mental deficiencies associated with drug use was not permanent and fixed. And the law, although I don't think the law has really caught up to the science, the law provide—or provided at the time anyway, that in order to avail oneself of the defense of diminished capacity as a perfect defense, any insanity associated with drug use had to be permanent and fixed, and that was not the case. At least as of the time of the competency hearing when Mr. Abdelhaq was determined by Drs. William and Hewitt in the court to be capable of standing trial.
>
> So, with those thoughts in mind, we believe that presenting the jury with the option of convicting Mr. Abdelhaq of murder, provided that it was of the right degree, represented the best advantage for use to see that he did not get another life in prison with the possibility of parole sentence.

Id. at 82:3 – 83:11. Later in his testimony, trial counsel reinforced that the Petitioner approved of the trial strategy of conceding that he killed the victim, but that based on his inability to premediate, the killing constituted second-degree murder:

> Q. And had you discussed this strategy with Mr. Abdelhaq prior to making those statements?
> A. Of course.
> Q. And could you tell us about that, those conversation.
> A. Mr. Abdelhaq was very well aware of the substantial limitations that we had in trying this case. . . . [A] conviction of murder in the second degree with a term of years represented a great opportunity for the jury to discharge its duty, to return a verdict of murder, to go back into the community, in Ohio County, and say that they had fulfilled their obligation and that they had not let someone walk away from this horrible event. But at the same time extend and afford Mr. Abdelhaq the opportunity for freedom at some point and to still have a life outside of prison.
> Q. And he agreed with that strategy; is that correct?
> A. Yes, he did.
> Q. After you made that opening statement at trial, did Mr. Abdelhaq express any objection to that strategy?
> A. To the contrary. My recollection is, as I took my seat after my opening statement, he said to me, whispered to me, "Good job." . . . . What he did not do was ask me what the hell I had just said. He did not say what are you doing. He did not voice objection to Mr. Pizzuti within my range of hearing over what I had stated. He did not express incredulity or shock at what I had stated. At that point in time or at any point thereafter in the trial or, frankly, until this habeas petition was filed. It is inconceivable that I would have given an opening statement in a first-degree murder case asking the jury to convict my client of second-degree murder without having closely consulted with my client, discussed the minutia associated with that decision and obtained the full consent of my client in making that—or advancing that defense.
> Q. And you got his full consent?
> A. I did.

Id. at 97:10 – 98:8; 98:12 – 99:1.

Further, Petitioner acknowledges that he has previously raised all of these same ineffective assistance of counsel claims, which were previously adjudicated in state court. ECF No. 24-11 at 26.

Moreover, to the extent that Petitioner claims that trial counsel and/or appellate counsel was ineffective for failing to raise or preserve all potential issues, such a claim does not merit relief. The Supreme Court has long recognized that:

> When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment). That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." *Massaro v. United States*, 538 U.S. 500, 505, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003). Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.

Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 5–6, 157 L. Ed. 2d 1 (2003). "A defendant is bound by the tactical decisions of competent counsel." Reed v. Ross, 468 U.S. 1, 13, (1984) (Citing Wainwright v. Sykes, 433 U.S. 72, 91, and n. 14 (1977); Henry v. Mississippi, 379 U.S. 443, 451 (1965)).

Counsel made a tactical decision to argue some issues, to the exclusion of other issues favored by Petitioner. That decision is strongly presumed to have been made in the exercise of professional judgment, and accordingly, counsel's performance in this regard did not fall below an objective standard of reasonableness. Moreover, there was no reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Further, Petitioner has not articulated any grounds that would support relief under the "contrary to" or "unreasonable determination" exceptions found in subparagraphs (1) and (2). Petitioner has not shown any unreasonable application of federal law which occurred in the state proceedings in relation to his ineffective assistance of counsel claims. Additionally, Petitioner does not allege that the state court's adjudication of his ineffective assistance of counsel claims resulted in a decision based on an unreasonable determination of the facts.

Thus, under the plain language of § 2254, Petitioner's fifth claim, and its subparts, all of which concern his alleged ineffective assistance of counsel, has already been considered in State court and adjudicated on the merits, and does not meet either exception listed in the statute. Accordingly, Petitioner's fifth claim for relief is without merit and should be denied.

6. Claim 6: Unreasonable Search and Seizure

Petitioner's sixth claim for relief is that the trial court erred when it failed to suppress all evidence seized during a warrantless search of the motel room where the crime occurred. ECF No. 24-1 at 27. That same claim was previously raised by Petitioner in ground 6 of his prior state habeas petition filed in the circuit court. ECF No. 33-15 at 5. In his appeal of the denial of relief in the circuit court, Petitioner asserted in ground 6, that "[p]olice conducted an illegal search of the Petitioner's motel room, the scene of the alleged murder, and evidence seized was erroneously admitted at trial." ECF No. 33-17 at 3. Again, Petitioner was denied relief on these grounds by both the circuit court and Supreme Court of Appeals.

Further, Petitioner has not articulated any grounds that would support relief under the "contrary to" or "unreasonable determination" exceptions found in subparagraphs (1) and (2). Petitioner has not shown any unreasonable application of federal law which occurred in the state proceedings in relation to the search and seizure conducted in the hotel room where the murder occurred. Additionally, Petitioner does not allege that the state court's adjudication resulted in a decision based on an unreasonable determination of the facts.

Thus, under the plain language of § 2254, Petitioner's sixth claim as to the unreasonable search and seizure of Petitioner's hotel room has already been considered in State court and adjudicated on the merits, and does not meet either exception listed in the statute. Accordingly, Petitioner's sixth claim for relief is without merit and should be denied.

B. Claims Which Were Procedurally Defaulted

To the extent that Petitioner raises any issues, which relate to alleged errors in his trial, but which were not raised on direct appeal, or in post-conviction proceedings, he is not entitled to relief on any such claims.

Such a failure to raise those issues on direct appeal precludes relief through habeas proceedings. "Habeas review is an extraordinary remedy and " 'will not be allowed to do service for an appeal.' " Bousley v. United States, 523 U.S. 614, 621, 118 S. Ct. 1604, 1610 (1998) (quoting Reed v. Farley, 512 U.S. 339, 354, 114 S.Ct. 2291, 2300 (1994), and Sunal v. Large, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590-1591 (1947)). Accordingly, Petitioner's claims were either already raised in the state court, or were procedurally defaulted by failure to raise those claims in state court. In either case, this

Court may not grant Petitioner relief. Failure to exhaust any argument in state court prior to presentment of the same issue in federal court is fatal to a petition for habeas corpus under § 2254.

In Baldwin v. Reese, 541 U.S. 27, 29, 124 S.Ct. 1347, 1349 (2004), the Supreme Court held that to, "provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim." Accordingly, a petition for writ of habeas corpus on behalf of a prisoner in State custody should not be entertained by a federal court unless the petitioner has first exhausted his state remedies.

Regardless of whether Petitioner exhausted his remedies, to the extent that Petitioner asserts any grounds that he did not raise on direct appeal, Petitioner is not entitled to relief because those grounds are now procedurally defaulted for not raising those issues on direct appeal. Accordingly, for all the above reasons, it is inappropriate for this Court to entertain the Petitioner's federal habeas petition sought under 28 U.S.C. § 2254(d), and the petition should be dismissed with prejudice.

V. RECOMMENDATION

For the reasons set forth in this opinion, it is **RECOMMENDED** that the amended petition [ECF No. 24] for habeas corpus, filed pursuant to 28 U.S.C. § 2254, be **DENIED AND DISMISSED WITH PREJUDICE.**

It is further **RECOMMENDED** that the Respondent's motion to dismiss or for summary judgment [ECF No. 33] be **GRANTED.**

Within fourteen (14) days after being served with a copy of this Recommendation, any party may file with the Clerk of the Court, **specific written objections, identifying the portions of the Report and Recommendation to which**

objection is made, and the basis of such objection. A copy of such objections should also be submitted to the Honorable Gina M. Groh, United States District Judge. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitation, consistent with LR PL P 12.

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 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

This Report and Recommendation completes the referral from the district court. The Clerk is directed to terminate the Magistrate Judge's association with this case.

The Clerk is directed to provide a copy of this Report and Recommendation to the *pro se* Petitioner by certified mail, return receipt requested, to his last known address as reflected on the docket sheet, and to all counsel of record, as applicable, as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

DATED: November 23, 2022

/s/ Robert W. Trumble
ROBERT W. TRUMBLE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

YASSER ABDELHAQ,

Petitioner,

v. **CIVIL ACTION NO.: 3:21-CV-145 (GROH)**

DONALD F. AMES,
Superintendent,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

Currently before the Court is a Report and Recommendation ("R&R") entered by United States Magistrate Judge Robert W. Trumble on November 23, 2022. ECF No. 49. Therein, Magistrate Judge Trumble recommends that this Court dismiss the Petitioner's Petition with prejudice. The Petitioner timely filed his objections to the R&R on December 27, 2022. ECF No. 54. With leave of this Court, the Petitioner filed supplemental objections on January 10, 2023. Accordingly, this matter is now ripe for adjudication.

I. BACKGROUND

On September 2, 2021, Yasser Abdelhaq ("Petitioner"), filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. On January 26, 2022, the Petitioner filed the Petitioner filed an Amended Petition. ECF No. 24. A review of the Petition and supplement reveal that the Petitioner alleges six grounds for relief with some containing various sub-grounds. Upon reviewing the record, the Court finds that the background and facts as explained in the R&R accurately and succinctly describe the circumstances

underlying the Petitioner's claims and no objection was made to these sections. For ease of review, the Court incorporates those facts herein.

II. LEGAL STANDARDS

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. Thomas v. Arn, 474 U.S. 140, 150 (1985). Further, failure to file timely objections constitutes a waiver of *de novo* review and the Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir.1989); United States v. Schronce, 727 F.2d 91, 94 (4th Cir.1984). Pursuant to this Court's local rules, "written objections shall identify each portion of the magistrate judge's recommended disposition that is being challenged and shall specify the basis for each objection." LR PL P 12(b). The local rules also prohibit objections that "exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitation." LR PL P 12(d).

"When a party does make objections, but these objections are so general or conclusory that they fail to direct the district court to any specific error by the magistrate judge, de novo review is unnecessary." Green v. Rubenstein, 644 F. Supp. 2d 723, 730 (S.D. W. Va. 2009) (citing Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982)). "When only a general objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to only a

clear error review." Williams v. New York State Div. of Parole, No. 9:10-CV-1533 (GTS/DEP), 2012 WL 2873569, at *2 (N.D.N.Y. July 12, 2012). "Similarly, when an objection merely reiterates the same arguments made by the objecting party in its original papers submitted to the magistrate judge, the Court subjects that portion of the report-recommendation challenged by those arguments to only a clear error review." Taylor v. Astrue, 32 F. Supp. 3d 253, 260-61 (N.D.N.Y. 2012).

Courts have also held that when a party's objection lacks adequate specificity, the party waives that objection. See Mario v. P & C Food Markets, Inc., 313 F.3d 758, 766 (2d Cir. 2002) (finding that even though a party filed objections to the magistrate judge's R&R, they were not specific enough to preserve the claim for review). Bare statements "devoid of any reference to specific findings or recommendations . . . and unsupported by legal authority, [are] not sufficient." Mario 313 F.3d at 766. Pursuant to the Federal Rules of Civil Procedure and this Court's Local Rules, "referring the court to previously filed papers or arguments does not constitute an adequate objection." Id.; See also Fed. R. Civ. P. 72(b); LR PL P 12. Finally, the Fourth Circuit has long held, "[a]bsent objection, we do not believe that any explanation need be given for adopting [an R&R]." Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983) (finding that without an objection, no explanation whatsoever is required of the district court when adopting an R&R).

III. DISCUSSION

Upon review of all the filings in this matter, including over 1,000 pages from the underlying cases, the Court finds that the Petitioner has presented no new material facts or arguments in his objections to the magistrate judge's R&R. The objections simply state blanket assertions that the state courts' decisions were unreasonable and that many of

his claims were never decided on the merits. The objections lack specificity, but to the extent they are specific, they do not state any new material facts or arguments.

On the other hand, the R&R thoroughly and adequately addresses each of the Petitioner's grounds in his habeas petition. The Court notes that the evidence in this case includes admissions—by the Petitioner during his post-trial proceedings—that he stabbed the victim 235 times. See Abdelhaq v. Terry, No. 17-0078, 2018 WL 6131283, at *2 (W. Va. Nov. 21, 2018). The record is replete with ample evidence to sustain the Petitioner's conviction and without any indication that a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, or based on an unreasonable determination of the facts in light of the evidence. This case includes procedural anomalies, to be sure, and the state courts' summary disposition of some claims may seem lacking at first glance. However, a thorough review of the filings makes it clear that the Petitioner has procedurally defaulted on several of the instant claims.

Therefore, the Court finds that *de novo* review is not required because the Petitioner's objections make no new legal arguments, and the factual presentation was properly considered by the Magistrate Judge in his R&R. See Taylor, 32 F. Supp. 3d 253, 260-61. Even if the Court applied a *de novo* review, it would reach the same conclusion as the R&R for the reasons stated therein, for those contained in the Respondent's Motion, and based upon the entire record of the Petitioner's underlying state cases.

IV. CONCLUSION

Accordingly, finding that Magistrate Judge Trumble's R&R carefully considers the record and applies the appropriate legal analysis, it is the opinion of this Court that Magistrate Judge Trumble's Report and Recommendation [ECF No. 49] should be, and

is, hereby **ORDERED ADOPTED** for the reasons more fully stated therein. Thus, the Respondent's Motion for Summary Judgment is **GRANTED** [ECF No. 33], and the Petitioner's Petition is **DISMISSED WITH PREJUDICE**. ECF No. 1. This case is **ORDERED STRICKEN** from the Court's active docket.

The Clerk of Court is further **DIRECTED** to transmit a copy of this Order to all counsel of record and to mail a copy to the *pro se* Petitioner by certified mail, return receipt requested, at his last known address as reflected upon the docket sheet.

DATED: February 17, 2023

GINA M. GROH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

YASSER ABDELHAQ,

Petitioner,

v. **CIVIL ACTION NO.: 3:21-CV-145 (GROH)**

DONALD F. AMES,
Superintendent,

Respondent.

ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY

The Petitioner has not met the requirements for issuance of a certificate of appealability. A court may issue a certificate of appealability "only if the applicant has 'made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court denies a petitioner's claims on the merits, then "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). "If, on the other hand, the denial was procedural, the petitioner must show 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" United States v. McRae, 793 F.3d 392, 397 (4th Cir. 2015) (quoting Slack, 529 U.S. at 484). Here, upon a thorough review of the record, the Court concludes that the Petitioner has not made the requisite showing. Accordingly, the Request for Certificate of Appealability is **DENIED**. ECF No. 60.

The Clerk of Court is **DIRECTED** to transmit a copy of this Order to all counsel of record and to mail a copy to the *pro se* Petitioner by certified mail, return receipt requested, at his last known address as reflected upon the docket sheet.

DATED: March 1, 2023

GINA M. GROH
UNITED STATES DISTRICT JUDGE

FILED: December 18, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6274
(3:21-cv-00145-GMG)

YASSER ABDELHAQ

Petitioner - Appellant

v.

DONALD F. 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/ NWAMAKA ANOWI, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6274

YASSER ABDELHAQ,

Petitioner - Appellant,

v.

DONALD F. AMES, Superintendent,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, District Judge. (3:21-cv-00145-GMG)

Submitted: December 4, 2023 Decided: December 18, 2023

Before NIEMEYER, GREGORY, and WYNN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Yasser AbdelHaq, Appellant Pro Se. Lindsay Sara See, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Yasser AbdelHaq 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*, 580 U.S. 100, 115-17 (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 AbdelHaq 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

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th of May, 2005, the following order was made and entered:

State of West Virginia, Plaintiff Below,
Respondent

vs.) No. 050713

Yasser Abdelhaq, Defendant Below,
Petitioner

On a former day, to-wit, April 7, 2005, came the petitioner, Yasser Abdelhaq, by Robert G. McCoid and John J. Pizzuti, McCamic, Sacco, Pizzuti & McCoid, PLLC, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Ohio County, rendered on the 25th day of August, 2004, with the record accompanying the petition. On the same day, came the respondent, the State of West Virginia, by Scott R. Smith, Prosecuting Attorney, and presented to the Court its written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Starcher would grant.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS

IN VACATION

Yasser Abdelhaq, Petitioner Below, Appellant

vs.) No. 33252

Thomas McBride, Warden, Mount Olive Correctional Center, Respondent Below, Appellee

On a former day, to-wit, May 3, 2006, came the petitioner, Yasser Abdelhaq, pro se, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Ohio County, rendered on the 22nd day of March, 2006, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal and remand it to the Circuit Court of Ohio County for the holding of an omnibus habeas corpus hearing on the issue of ineffective assistance of counsel.

This matter is hereby dismissed from the docket of this Court.

DONE IN VACATION of the Supreme Court of Appeals, this 6th day of December, 2006.

Honorable Robin Jean Davis, Chief Justice

Honorable Larry V. Starcher

Honorable Elliott E. Maynard

Honorable Joseph P. Albright

Honorable Brent D. Benjamin

Received the foregoing order this 6th day of December, 2006, and entered the same in Order Book No. 158.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

2018 WL 6131283
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Appeals of West Virginia.

Yasser ABDELHAQ, Petitioner Below, Petitioner,
v.
Ralph TERRY, Superintendent, Mt. Olive Correctional Complex, Respondent Below, Respondent

No. 17-0078
|
Filed November 21, 2018

(Ohio County 06-C-93)

MEMORANDUM DECISION

*1 Petitioner Yasser Abdelhaq, by counsel Kevin L. Neiswonger, appeals the Circuit Court of Ohio County's December 29, 2016, order denying his petition for writ of habeas corpus. Respondent Ralph Terry[1], Superintendent, Mt. Olive Correctional Complex, by counsel Gordon L. Mowen II, filed a response in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying habeas relief because he received ineffective assistance of counsel.

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

In January of 2000, petitioner was indicted on one count of first-degree murder for the stabbing death of Dana Tozar ("the victim"). Following an August of 2000 jury trial, petitioner was convicted of first-degree murder and sentenced to a term of incarceration of life, without mercy. Petitioner appealed his conviction, and this Court thereafter vacated the conviction and remanded the matter for a new trial. *See State v. Abdelhaq*, 214 W.Va. 269, 588 S.E.2d 647 (2003).

Thereafter, petitioner was indicted for a second time on one count of first-degree murder and was represented by attorneys Robert G. McCoid and John J. Pizzuti. During his bifurcated trial, petitioner's defense was that he could not have deliberately and intentionally killed the victim because he was in a psychotic state due to drug use. As such, petitioner sought a conviction on the lesser-included offense of second-degree murder. At the conclusion of his second jury trial, petitioner was again convicted of first-degree murder. Ultimately, the jury did not recommend mercy, and petitioner was sentenced to a term of incarceration of life, without mercy. Following this conviction, petitioner's second appeal to this Court was refused by order entered in May of 2005.

In 2006, petitioner initiated habeas corpus proceedings. Following a summary denial of his petition for writ of habeas corpus, this Court granted petitioner relief and ordered the matter remanded for the holding of an omnibus hearing on the limited issue of ineffective assistance of trial counsel.

In August of 2016, the circuit court held an omnibus hearing. During the hearing, Mr. McCoid testified extensively to the trial strategy and tactics employed, as well as to specific instances wherein he opted not to object to certain statements from the prosecution that petitioner alleged constituted prosecutorial misconduct. Mr. McCoid further testified unequivocally that petitioner understood "the full ramifications" of the trial strategy to admit guilt and ask for a conviction of second-degree murder and gave his consent. At several points during his testimony, Mr. McCoid addressed discussions the attorneys had with petitioner concerning the trial strategy, petitioner's understanding of the risks and benefits of such a strategy, and his consent to pursuing it. Having the benefit of seeing the State's theory of the case during the first trial, Mr. McCoid testified that they reevaluated the trial strategy since this "was not a case about whether [petitioner] had taken [the victim's] life," but was rather "about what his mental status was at the time that he did so." Mr. McCoid cited to portions of his opening statement in the case where he admitted that petitioner's guilt was not in question but urged the jury to convict him of second-degree murder due to the absence of

premeditation. Based on the opening, Mr. McCoid indicated that

> *2 [i]t is inconceivable that I would have given an opening statement in a first-degree murder case asking the jury to convict my client of second-degree murder without hav[ing] closely consulted with my client, discussed the minutia associated with that decision and obtained the full consent of my client in ... advancing that defense.

Next, petitioner testified and admitted to killing the victim by stabbing her 235 times. He further agreed that he would have been "thrilled" with a verdict of life, with mercy, or second-degree murder. Petitioner testified that he did not agree with the strategy to ask for a conviction of second-degree murder, however. And while he was willing to take responsibility for the victim's murder, petitioner indicated the he "did not premediate" the act. Ultimately, by order entered on December 29, 2016, the circuit court denied petitioner habeas relief. It is from this order that petitioner appeals.

Our review of the circuit court's order denying petitioner's petition for a writ of habeas corpus is governed by the following standard:

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

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

On appeal, petitioner asserts three assignments of error, all of which involve allegations of ineffective assistance of trial counsel. First, petitioner argues that counsel failed to object to the following three instances of prosecutorial misconduct: (1) the prosecuting attorney's misstatement of the law concerning premeditation, wherein the prosecutor told the jury "don't forget the instructions. How long does it take to premeditate and deliberate? An instant"; (2) the prosecutor's personal opinion regarding the credibility of an expert witness; and (3) the prosecutor's inappropriate mention of mercy, including an instance wherein the prosecutor said that "[petitioner's] mercy is that he gets to live. People worked to save his life at that hospital. He gets to live, and [the victim] is dead." Second, petitioner argues that counsel was ineffective for failing to object to what he alleges was an improper jury instruction on the inference of malice and the intent to kill. Finally, petitioner alleges that counsel was ineffective for failing to obtain his consent to pursue a defense strategy of admitting culpability but challenging the requisite intent to support a first-degree murder conviction. However, our review of the record supports the circuit court's decision to deny petitioner's petition for writ of habeas corpus as to each of petitioner's assignments of error. Petitioner's arguments presented herein, with the exception of his assertion that the circuit court failed to substantively address his third assignment of error, were thoroughly addressed by the circuit court in its order denying petitioner habeas relief.

As to petitioner's third assignment of error asserting that his counsel was ineffective for pursuing a trial strategy to which he did not consent, we find no error. This Court has held that

> *3 [i]n the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

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

> [i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or

> omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Id. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6. Finally, "[w]here a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, we find that petitioner is entitled to no relief in regard to his third assignment of error, because he cannot show that no reasonably qualified defense attorney would have pursued the strategy that trial counsel did herein. Further, petitioner's argument in support of this assignment of error lacks any basis in the record. Aside from his unsupported claims that he never agreed to the strategy to admit culpability and seek a second-degree murder conviction, the evidence obtained at the omnibus hearing overwhelmingly establishes that petitioner's trial counsel advanced this strategy with petitioner's consent and support.

Specifically, Mr. McCoid testified that petitioner and trial counsel spoke about the trial strategy at length, even going so far as to author a letter together in advance of trial seeking a plea agreement to second-degree murder on the basis that petitioner admitted to killing the victim but without the intent necessary to be guilty of first-degree murder. While the record shows that counsel instructed petitioner to author this letter in the hope that it could be used to mitigate against a sentence of life, without mercy, in the event of a first-degree murder conviction, the fact remains that it is indicative of petitioner's agreement to pursue an overall strategy to obtain a conviction on a lesser-included offense or otherwise lessen the subsequent term of incarceration imposed. Further, counsel testified at length about the discussions he had with petitioner concerning the trial strategy, in addition to petitioner's understanding of that strategy, its attendant risks and benefits, and his ultimate consent to the strategy. As such, this issue was one of credibility for the circuit court to make. *See State v. Guthrie*, 194 W.Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) ("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact."). Given that the circuit court denied petitioner relief on this ground, it is clear that it did not find his testimony that he did not agree to this trial strategy to be credible. This is especially true in light of petitioner's testimony at the omnibus hearing that he would have been "thrilled" with a conviction of either second-degree murder or a sentence of life, with mercy. Given that petitioner specifically acknowledged his desire to be sentenced to something less that life, without mercy, it is clear that he supported trial counsel's strategy to obtain such a result. Accordingly, we find no error.

*4 The circuit court's order includes well-reasoned findings and conclusions as to the assignments of error now raised on appeal. Because we find no clear error or abuse of discretion in the circuit court's order or record before us, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignments of error raised on appeal and direct the Clerk to attach a copy of the circuit court's December 29, 2016, "Order" to this memorandum decision.

For the foregoing reasons, we affirm.

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Elizabeth D. Walker

Justice Tim Armstead

Justice Evan H. Jenkins

Justice Paul T. Farrell sitting by temporary assignment

Attachment

17-D078

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
YASSEN ABDELHAQ,

Petitioner,

v. CASE NO. 06-C-93

DAVID BALLARD, WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

ORDER

Currently pending before the Court is Petitioner, Yasser Abdelhaq's (hereinafter "Petitioner") Petition for Writ of Habeas Corpus. After considering the Petition, the response in opposition, the applicable law and the Court file, and after considering the evidence and argument submitted during the Final Omnibus Habeas Corpus hearing of August 8, 2016, the Court is prepared to issue its decision.

I. FACTUAL/PROCEDURAL HISTORY

This action was initiated in February 2006 and was assigned to The Honorable Arthur Recht (retired). Judge Recht dismissed the original Petition via a summary dismissal Order in approximately March 2006. Petitioner appealed said dismissal in approximately April 2006. On December 6, 2006, the Supreme Court granted Mr. Abdelhaq's Petition for Appeal and remanded the case to Ohio County Circuit Court "for the holding of an omnibus habeas corpus hearing on the issue of ineffective assistance of counsel." *See* Supreme Court Order dated December 6, 2006. The Supreme Court's Order is silent with respect to the balance of the issues raised by Petitioner's Petition for Appeal.

On remand in February 2007, Judge Recht entered a *Losh* Order which included a revised pleading schedule. Additionally, Judge Recht directed Petitioner to file an Amended Petition for Writ of Habeas corpus setting forth each and every ground upon which Petitioner believed he was entitled to relief. Petitioner filed said Amended Petition in December 2007. In January 2008, Respondent filed its response.

After several changes in counsel, Petitioner filed an Omnibus Habeas Corpus Petition in August 2014 by and through his current counsel, Dana McDermott, Esq. In September 2014, Respondent filed its Response to said Petition. Thereafter, Respondent filed a Motion in Limine and/or Motion to Strike, which was granted and precluded Petitioner from raising at the final hearing any claim other than ineffective assistance of counsel.[1]

[1] Though much has happened in the intervening years since this matter was remanded to Circuit Court by the Supreme Court of Appeals, the events are not relevant for our purposes. As a result, and in the interest of brevity, they have not been summarized for this Order.

II.
PETITION FOR WRIT OF HABEAS CORPUS

A. Petitioner's Arguments

Petitioner argues that he received ineffective assistance of counsel during the underlying proceedings. Specifically, he argues that his attorneys were ineffective because they (1) failed to object to prosecutorial misconduct; (2) they failed to object to a faulty jury instruction; and (3) they failed to ask the trial court to determine whether Defendant/Petitioner's agreement to ask the jury for a conviction of second-degree murder was knowingly and willfully made.[2]

With respect to Petitioner's contention that his attorneys failed to object to prosecutorial misconduct, Petitioner alleges three (3) instances of such misconduct and failure to object. Instance one (1) allegedly occurred during the prosecuting attorney's closing argument at trial in July 2004 at which time Petitioner alleges the prosecutor "intentionally misstated" well-settled law regarding premeditation and deliberation. Petitioner avers that this intentional misstatement prejudiced Petitioner in that it made a first-degree murder conviction more likely.

Instance two (2) allegedly occurred when the prosecuting attorney intentionally attacked the credibility of a defense expert witness, Mace Beckson, M.D. without commenting in any way on the substance of the evidence presented or the expert witness's methodology. Petitioner argues that the prosecuting attorney inserted his personal opinion regarding the expert, which is improper and asks that the conviction be reversed as a result.

Finally, Petitioner contends instance three (3) occurred when the prosecuting attorney made improper arguments concerning whether Petitioner is entitled to mercy during closing arguments. Such arguments were improper because the guilt and mercy phases of Petitioner's trial had been bifurcated. Petition avers that, such improper arguments, taken cumulatively, amount to Petitioner having received an unfair trial.

Petitioner also argues that defense counsel failed to object to a faulty jury instruction. Specifically, Petitioner maintains that the trial judge erred by including in the instructions to the jury that "the use of a deadly weapon allows an inference of malice and intent to kill in the commission of a crime." The trial judge later repeated the instruction, adding "unless the State's own evidence demonstrates circumstances affirmatively showing an absence of malice." Petitioner argues that the trial judge failed to give the complete *Brant* instruction (*State v. Brant*, 252 S.E.2d 901, 162 W.Va. 762 (1979)). The entire instruction should have included: "which would make an inference of malice from the use of a deadly weapon alone improper, a conviction for second degree murder cannot be upheld." Petitioner contends this omission may have caused the jury to presume malice rather than infer malice, thus relieving the State from having to prove every element of the offense beyond a reasonable doubt.

Petitioner claims that defense counsel failed to ask the trial court to

2 During the underlying criminal proceedings, Petitioner was represented by Robert McCoid, Esq. and John Pizzuli, Esq., both of whom were present and testified under oath during the Final Omnibus Habeas Corpus Proceeding. For the sake of brevity, their testimony will not be summarized in the Instant Order.

determine if Petitioner's agreement to ask the jury for a conviction on the murder charge was knowingly and willfully made. In so arguing, Petitioner acknowledges that this is not presently required under West Virginia law. Nevertheless, Petitioner argues that courts strongly prefer that such an agreement between Defendant and counsel be on the record in open court and memorialized in a court transcript. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969).

B. Respondent's Arguments

Respondent contends that defense attorneys McCoid and Pizzuti aggressively pursued discovery, filed relevant and appropriate pretrial motions, and pursued expert support for their defense theories, as evidenced by a review of the underlying criminal file. Respondent opposes Petitioner's contention that he received ineffective assistance of counsel.

Additionally, and with respect to Petitioner's specific contentions, Respondent argues that the prosecutorial statements which Petitioner argues constitute prosecutorial misconduct, do not in fact constitute misconduct. Respondent further argues that, to the extent said statements are or were improper, which Respondent denies, said statements do not rise to a constitutional violation.

Respondent also argues that the jury instruction given pursuant to *State v. Brant* was not faulty, but was appropriate. Respondent further notes that the facts contained within *State v. Brant* were unique and entirely different than those presented in the underlying criminal action.

III.
APPLICABLE LAW

West Virginia Code § 53-4A-1 provides those persons convicted and incarcerated pursuant to said conviction the ability to file a Petition for Writ of Habeas Corpus if they believe that

> there was such a denial or infringement of [their] rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State.

Such a person can file a Petition for Writ of Habeas Corpus, and seek

> release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

The contention or contentions raised in the Petition for Writ of Habeas Corpus will be considered waived or previously adjudicated if:

> the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under

> the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver.

If such contention or contentions are considered waived, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds. *See* W.Va. Code § 53-4A-1.

> A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

W. Va. Code § 53-4A-2 also provides in relevant part that the Petition for Writ of Habeas Corpus "shall...specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based, and clearly state the relief desired."

Finally, according to W. Va. Code § 53-4A-3[a], the Court has the discretion to deny the Writ if the Court is satisfied, after reviewing the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the record in the proceedings which resulted in the conviction and sentence, that the petitioner is entitled to no relief.

IV.
DISCUSSION

After considering Petitioner's written briefs, Respondent's opposition, the applicable law and the Court file, including the underlying criminal file, and after considering the evidence and argument submitted during the hearing of August 2, 2016, the Court is satisfied that the instant Petition for Writ of Habeas Corpus should be **DENIED.**

Petitioner alleges that he received ineffective assistance of counsel during his 2004 criminal trial. Petitioner's ineffective assistance of counsel claim is governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), i.e. (1) whether counsel's performance was deficient under an objective standard of reasonableness; and (2) whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

In syl. pt. 2 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) the Supreme Court provided guidance as to how to evaluate an ineffective assistance counsel of claim:

> Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.

With these standards in mind, the Court will now evaluate Petitioner's ineffective assistance of counsel claim.

A. Prosecutorial Misconduct

1. Instance One – Premeditation in an "instant"

Petitioner argues that, during closing arguments, the prosecutor intentionally misstated the law regarding the time it takes to premediate or deliberate a murder. Petitioner maintains that the prosecuting attorney's statement that premeditation can occur in an "instant" was an intentionally made, incorrect statement of the law and that Petitioner's trial counsel should have objected to the same. Petitioner argues that, because his counsel failed to object to this misstatement of the law, Petitioner was prejudiced in that said misstatement of the law made a conviction of first-degree murder more likely. The Court disagrees.

Prior to closing arguments, the Court instructed the jury on the pertinent law, which included law regarding the time needed to premediate or deliberate a murder. Further, the jury was instructed that nothing said or done by the attorneys should be considered evidence, and that they must base their verdict solely on the evidence before them. The jurors were provided with a written copy of the Court's instructions, which they had available to them in the jury room during deliberations. Given the above, the Court does not believe it likely that the jurors relied upon the prosecutor's utterance regarding premeditation in an "instant" to unanimously convict Petitioner of first degree murder.

The Court would also note that, although Petitioner claims the prosecuting attorney intentionally misstated the law regarding premeditation and

deliberation during his closing argument, Petitioner has not provided evidence to support said allegation. Moreover, the Petitioner has not developed evidence to show that any of the jurors did in fact rely upon the prosecuting attorney's utterance to convict Petitioner.

For all of these reasons, the Court cannot find that Petitioner's trial counsel's failure to object to the above-noted statements as made during the closing argument of the prosecutor was deficient under an objective standard of reasonableness. Further, the Court cannot find that there is a reasonable probability that, but for trial counsel's failure to object, the outcome of the trial would have been different. Accordingly, the Court FINDS this assignment of error is without merit.

2. Instance Two – Personal Opinion of Prosecutor

Petitioner additionally claims that, during his closing argument, the prosecuting attorney offered his personal opinion regarding the credibility of defense expert witness, Mace Beckson, M.D. Petitioner contends that it was improper for the prosecuting attorney to do so, pursuant to *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981). Petitioner notes that, in *Critzer*, the court reversed defendant's conviction because of the prosecutor's improper comments on the credibility of a defense witness. Similarly, Petitioner asks that the Court reverse Petitioner's conviction.

The Court has reviewed and considered the statements made by the prosecuting attorney during his closing argument, as well as Petitioner's

arguments regarding the same and applicable statutory and case law. The Court has additionally considered Petitioner's cited case *State v. Critzer*. After considering all of the above information, the Court is satisfied that this argument is without merit.

Initially, the Court again notes that the jury was instructed that nothing said or done by the lawyers or the Court was to be considered evidence. Rather, their verdict must be based upon the evidence and testimony submitted during the trial.

Notwithstanding the above, and assuming the jury based its verdict in any part upon the statements made by the prosecuting attorney during closing arguments, the Court nevertheless does not believe that the prosecuting attorney's statements can be fairly read as attacking the credibility of the defense's expert witness "without connecting, in anyway, on the substance of the evidence presented or the expert witness's methodology," as Petitioner contends. Rather, a reading of the relevant pages in the trial transcript reveals that the prosecuting attorney's attack upon the credibility of expert witness Mace Benson, M.D. was taken from a larger attack upon the theories of Dr. Beckston.

Assuming *arguendo* that the prosecuting attorney's credibility attack was made without connecting upon the substance of the evidence presented or the expert witness's methodology, the Court is nevertheless satisfied that the statements made by the prosecuting attorney do not rise to the level of those statements made in *Critzer*. In *Critzer*, the prosecutor

> injected his personal opinion as to the guilt of defendant, asserted his belief in the honesty, sincerity, truthfulness, and good motives of his witnesses, while attacking the honesty and veracity of the defendant's witnesses. He compared the defendant to a vulture and appealed to local prejudice by indicating the defendant came to West Virginia to victimize dumb hillbillies. On several occasions during the course of the argument he pointed to and directly addressed the defendant. He also argued facts not in evidence....The prosecutor's manifest purpose could only have been to inflame the minds of the jury in order to gain a conviction based on emotions rather than evidence.

See Critzer, supra at 660-661. The same is not the case here.

In the instant matter, Petitioner has cited to page 1384, in 16-24 and page 1385, in 1-8 of the trial transcript as support for his claims. The transcript captures the prosecuting attorney's statement thusly:

> Now, c'mon! Here's a man that comes from California to West Virginia to testify about a report he did on someone he never even saw in a murder case. And he's concerned about saving a couple pieces of paper?

The Court is satisfied that these statements are clearly different than those made in *Critzer, supra*. In the case *sub judice*, there is no evidence or argument that the prosecuting attorney injected his personal opinion regarding the guilt of Petitioner, or asserted his belief as to the honesty...etc. of the State's witnesses while disparaging witnesses for the defendant. There is no evidence or argument that the prosecuting attorney insulted any witness or the Petitioner during closing arguments; nor is there any evidence or argument that the prosecuting attorney argued facts not in evidence. Rather, and as the Supreme Court noted in *State v. Garrett*, 182 W. Va. 166, 177, 386 S.E.2d 823 (1989), the Court is satisfied that a "wide latitude must be given to all counsel in connection

with final argument....every improper remark is [not] a proper basis for a mistrial." Therefore, the Court **FINDS**, assuming this statement was in error, it was harmless. As a result, the Court **FINDS** Petitioner's trial counsel's failure to object to this statement does not constitute a performance by counsel that could be considered deficient under an objective standard of reasonableness. Therefore, the Court **FINDS** this assignment of error is without merit.

3. Instance Three – Mention of "Mercy"

Petitioner next argues that the prosecuting attorney improperly injected issues regarding sentencing into the bifurcated trial[3] by arguing that he had already been shown "mercy" because he was alive as opposed to the victim, Dana Tozer, who had died. Petitioner cites to pg. 1671, ln 22-25 and p. 1672, ln 1-5 of the transcript to support his argument. Petitioner avers that such a statement was designed to persuade the jury that the Petitioner was already getting one form of mercy and should not be granted additional mercy by the jury. Petitioner claims that he was prejudiced by these statements in that they made a conviction of first degree murder more likely and his trial counsel should have objected to the same. Petitioner cites *State v. Mills*, 219 W.Va. 28, 631 S.E.2d 586 as support for this argument.

In *Mills, supra*, defendant was convicted following a jury trial of first degree murder with use of a firearm. His first conviction was reversed and remanded for new trial. On remand, defendant was again convicted of first degree murder. Again he appealed. On appeal, defendant argued, among other things, that the

3 As the record reflects, the guilt phase of this trial was bifurcated from the sentencing phase.

prosecutor's comments during closing argument constituted an impermissible attempt to equate the sentence of life without mercy to mercy. The defendant argued that he was prejudiced by these statements and that his conviction should be reversed. *See Mills, supra* at pgs. 34-36.

In reviewing these arguments, the Supreme Court commented as follows:

> The prosecutor's comments in this present case were extremely unconventional to the extent that the prosecutor's intent was apparently to equate "life without mercy" to "mercy". In other words, because the Appellant was not being subjected to the death penalty, mercy had already been tendered. That is a drastic mischaracterization of the concept of mercy and was clearly designed to persuade the jury that the Appellant was already getting one form of mercy and should not be granted additional mercy by the jury. We therefore find that the prosecutor's remarks in the present case were clearly in error. Such a reference to the absence of the death penalty as constituting mercy has no place in the closing arguments of any prosecutor and should not be repeated.

See Mills, supra at 86.

The Court further noted that, while the Court might reverse a conviction in some circumstances based upon the prosecutor's words, the Supreme Court declined to do so in the *Mills* case. The Court analyzed the prosecutor's remarks through the lens of the case *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995), and found that the prosecutor's remarks were of limited duration, were not extensive or overly coercive toward the jury. There was no indication that the comments were placed before the jury to distract them to extraneous matters and that defendant was not clearly prejudiced by them and the comments did not result in manifest injustice, particularly in light of the fact that this was the second jury that had reviewed the evidence and convicted defendant without a

recommendation of mercy. *See Mills, supra* at 35 (internal citations and quotations omitted).

The Court **FINDS** the instant case is analogous to the *Mills* case. Indeed, the prosecutor's statements regarding mercy were of limited duration, much more limited than those comments at issue in *Mills*. They were not extensive or overly coercive toward the jury. There is no evidence or indication that the prosecutor placed those comments before the jury to divert the jury's attention to extraneous matters. Finally, the Court is satisfied that defendant was not clearly prejudiced by them and the comments did not result in manifest injustice. In support of this finding, the Court notes, as did the *Mills* Court, that this is the second conviction for first degree murder rendered by a jury after review and consideration of the evidence.

Given the very limited scope of the prosecutor's comments at issue and given the lack of evidence that those comments were placed before the jury to distract them to extraneous matters or that defendant was clearly prejudiced by them, the Court **FINDS** that Petitioner's trial counsel's failure to object to this statement does not constitute a performance by counsel that could be considered deficient under an objective standard of reasonableness. Therefore, the Court **FINDS** this assignment of error is without merit.

4. Unfair Trial

Petitioner asserts that the cumulative effect of the above-described failures/errors resulted in an unfair trial, which violates his Constitutional right

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to a fair trial by a jury of his peers. For the reasons set forth above, the Court would disagree. Consequently, the Court **FINDS** this argument to be without merit.

B. Jury Instruction

Petitioner argues that the trial judge erred by instructing the jury that "the use of a deadly weapon allows an inference of malice and intent to kill in the commission of a crime." Later, the trial judge repeated this instruction and added "unless the State's own evidence demonstrates circumstances affirmatively showing an absence of malice." Petitioner claims the trial judge left out the following language: "which would make an inference of malice from the use of a deadly weapon alone improper, a conviction for second degree murder cannot be upheld." Petitioner contends that the instruction given by the trial judge caused the jury to presume malice rather than infer malice, which relieved the State from having to prove every element of the offense charged beyond a reasonable doubt, and that as a result, his trial counsel should have objected. Failure of his trial counsel to object to this faulty instruction constitutes ineffective assistance of counsel.

The trial instruction with which Petitioner takes issue was taken from *State v. Brant*, 252 S.E.2d 901, 162 W.Va. 762 (1979). Syllabus point 2 of *Brant, supra* provides as follows:

> Malice may be inferred from the intentional use of a deadly weapon; however, where the State's own evidence demonstrates circumstances affirmatively showing an absence of malice which would make an inference of malice from the use of a deadly weapon

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> alone improper, a conviction for second degree murder cannot be upheld.

In the underlying matter, Petitioner alleges the jury was instructed thusly:

> The use of a deadly weapon allows an inference of malice and intent to kill in the commission of a crime...unless the State's own evidence demonstrates circumstances affirmatively showing an absence of malice.

After reading the two instructions together, the Court does not believe that a substantive difference exists between the two. Although the instruction which Petitioner contends was provided to the jury appears to be missing the sentence "which would make an inference of malice from the use of a deadly weapon alone improper, a conviction for second degree murder cannot be upheld", the Court believes this sentiment is merely a redundancy, eliminated by the trial court because the same is implied by the Trial Court's use of the word "unless" in its instruction. Consequently, the Court does not believe it was error for defense counsel to fail to object to the same.

Assuming *arguendo* that the instructions was faulty and it was error for trial counsel to fail to object to the verbiage used in the *Brant* instruction, the Court is nevertheless satisfied that this argument is without merit because there is no evidence or indication that such a failure resulted in a different outcome vis-à-vis the jury's verdict. Indeed, the balance of the Court's instructions advised the jury of the State's burden to prove their case beyond a reasonable doubt, which burden included the element of malice and Petitioner has not provided any evidentiary support that the jury did not independently weigh and consider the evidence in the criminal matter as it pertained to malice.

Finally, the Court would agree with Respondent in that there was no evidence of malice the *Brant* case. Conversely, in the instant case, there was evidence of malice, including but not limited to the fact that the victim was a paraplegic, bound to a wheelchair who was stabbed over 200 times in the torso. Additionally, the Court acknowledges evidence of a note which was left accusing the victim of being a 'narc' (presumably demonstrating motivation for Petitioner's actions).

Accordingly, and for all of the foregoing reasons, the Court is satisfied that trial counsel's failure to object to the above-noted jury instruction does not constitute ineffective assistance of counsel because it does not constitute a performance deficient under an objective standard of reasonableness, and because there is no evidence to support the conclusion that, but for this failure to object, Petitioner's conviction would not have occurred. Therefore, the Court **FINDS** this assignment of error is without merit.

C. Failure of Defense Counsel to Record Defense Strategy on the Record

Petitioner contends that his trial counsel should have obtained his consent, on the record, for the defense strategy at trial to essentially concede the fact that he committed second degree murder and to argue *against* first degree murder. Petitioner further argues that, the "lack of record or memorialization of the alleged agreement between the Defendant/Petitioner and his two trial defense counsels is a violation of a constitutional safeguard, the right against

incrimination, and another instance of ineffective assistance of trial counsel in the underlying criminal case."

In support of his argument, Petitioner relies upon *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). A review of *Boykin, supra*, reveals that the United States Supreme Court reversed a conviction obtained by guilty plea for a man who had pled guilty to five indictments of common law robbery because, at the time defendant entered his guilty plea, the trial judge failed to inquire as to whether the guilty plea was knowing and voluntary. *See Boykin, supra* at 242-244.

Petitioner also cites to the case of *Wiley v. Sowders*, 669 F.2d 386 (6th Cir.) in support of his argument. There, petitioner, Elmer Lee Wiley, brought a Petition for Writ of Habeas Corpus relief and argued, among other things, that he received ineffective assistance of trial counsel because of trial counsel's admission during closing argument that Mr. Wiley was guilty of first degree burglary and theft. Mr. Wiley's trial counsel argued for leniency and that there were mitigating circumstances to the case. The Court could not conclude that he had received ineffective assistance of counsel because the Court did not have evidence concerning whether or not Mr. Wiley consented to such a strategy. Though the Court remanded for an evidentiary hearing to determine whether Mr. Wiley consented to such strategy, the Court held as follows:

> We conclude that an on-the-record inquiry by the trial court to determine whether a criminal defendant has consented to an admission of guilt during closing arguments represents the preferred practice. But...we do not now hold, that due process requires such practice.

See Wiley, supra at 389.

After considering Petitioner's arguments and the cited case law, the Court is satisfied that this argument is without merit. In so holding, the Court notes that *Boykin* does not stand for the proposition for which Petitioner has cited it. It does not discuss the need to record on the record a criminal defendant's consent to a trial strategy of conceding guilt. Further, the *Wiley* case is not a West Virginia State case. Rather, it is a Sixth Circuit Court of Appeals case. As such, it is not binding precedent upon the State Courts of West Virginia.

Moreover, even if *Wiley* were binding precedent, the Sixth Circuit Court clearly held that due process does not require the recording on the record of a criminal defendant's consent to trial strategy which includes a concession of guilt. As a result, the Court **FINDS** this assignment of error is without merit.

VI.
CONCLUSION

Accordingly, and for all of the foregoing reasons, Petitioner's Petition for Writ of Habeas Corpus is hereby **DENIED**.

It is so **ORDERED**.

It is further **ORDERED** that the clerk of the Court shall send attested copies of this Order to Scott Smith, Esq., Assistant Ohio County Prosecuting

Attorney, 1500 Chapline Street, 2nd Floor, Wheeling, WV 26003; and Dana McDermott, Esq., 3396A Winchester Avenue, Martinsburg, WV 25405-2451.

ENTERED this 29th day of December, 2016.

JAMES P. MAZZONE, JUDGE

A copy, Teste:

Cindy S. Miller
Circuit Clerk

All Citations

Not Reported in S.E. Rptr., 2018 WL 6131283

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Footnotes

1 Effective July 1, 2018, the positions formerly designated as "wardens" are now designated "superintendents." *See* W.Va. Code § 15A-5-3. Moreover, petitioner originally listed David Ballard as respondent in this action. Mr. Ballard is no longer the superintendent at Mt. Olive Correctional Complex. Accordingly, the appropriate public officer has been substituted pursuant to Rule 41 of the West Virginia Rules of Appellate Procedure.

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

YASSER ABDELHAQ,
Petitioner,

v.

DONALD F. AMES, Superintendent, MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

CASE NO. 19-C-196 MJO

ORDER

On a previous day came the Petitioner, Yasser AbdelHaq, (hereinafter "Petitioner"), *Pro Se*, with a *Petition Under W.Va. Code § 53-4A-1 for Writ of Habeas Corpus* (*Petition*) arising out of his conviction of one count of Murder in the First Degree. Importantly, Petitioner previously brought an Omnibus Petition for Habeas Corpus (Omnibus Petition), in which he was represented by competent counsel. The prior Omnibus Petition was fully and fairly litigated and ultimately denied. He has now brought the subject *Petition* on new grounds. After reviewing the *Petition* and reviewing all related case file documentation, this Court has determined that the *Petition* should be **DENIED**.

FINDINGS OF FACT

1. On August 30, 2000, Petitioner was found guilty of First Degree Murder and was sentenced to life in prison without mercy on September 6, 2000.
2. On April 17, 2003, on appeal, the West Virginia Supreme Court reversed the decision and remanded it back to circuit court for a new trial.
3. On July 27, 2004, after a new trial, Petitioner was again found guilty of First Degree Murder and was sentenced to life in prison without mercy, on July 29, 2004.
4. The West Virginia Supreme Court refused a second appeal by Petitioner.
5. Petitioner filed his first Writ of Habeas Corpus Petition (First Petition) on February 27, 2006, which was denied by the Ohio County Circuit Court on May 3, 2006.
6. The West Virginia Supreme Court then entered an Order remanding the lower court's decision for an omnibus hearing.
7. On August 16, 2014, Petitioner, via counsel, filed an Amended Omnibus Petition for Writ of Habeas Corpus (Omnibus Petition) and the hearing was held on August 2, 2016.
8. Importantly, Petitioner was represented by counsel at the omnibus hearing held on August 2, 2016.

change in the law, favorable to the applicant; and/or 3) newly discovered evidence, in his prior Petition while being represented by counsel and aware of the rules of waiver, any claims outside of the aforementioned three (3) exceptions are deemed waived and thus summarily **DENIED**.

6. Furthermore, Petitioner's claim for "ineffective assistance of counsel at the omnibus habeas corpus hearing" and "change in the law, favorable to the applicant" should also be summarily **DENIED** due to the lack of a legal basis for either claim.

7. Petitioner asserts that his counsel was ineffective due to "not presenting to the Court proof that the fourteen (14) listed grounds were NOT fully and fairly litigated by the Supreme Court or the Circuit Court." *See Petition* at 9.

8. Because Petitioner does not set forth a sufficient basis in support of his claim for ineffective assistance of counsel at the omnibus habeas corpus hearing, this claim should be **DENIED**.

9. Moreover, Petitioner's claim that the law has changed under *McCoy v. Louisiana*, 138 S. Ct. 1500 L. Ed.2d 821 (2018), is an inaccurate statement of law as it has always been the case that the Defendant has the right to choose the objective of his defense. Further, this same claim was already set forth in the Petitioner's prior Petition. Hence, because this claim has been fully and fairly litigated and the law has not changed, this claim is hereby **DENIED**.

CONCLUSION

Accordingly, for all of the foregoing reasons, the Court hereby **DENIES** the *Petition*.

It is so **ORDERED**.

It is further **ORDERED** that the clerk of the Court shall send attested copies of this Order to counsel of record and Petitioner.

ENTERED this 30th day of March, 2020.

HON. MICHAEL J. OLEJASZ
First Judicial Circuit Court Judge

A copy, Teste:

Brenda K. Miller
Circuit Clerk

2021 WL 2581741
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Appeals of West Virginia.

Yasser ABDELHAQ, Petitioner Below, Petitioner
v.
Donnie AMES, Superintendent, Mt. Olive Correctional Complex, Respondent Below, Respondent

No. 20-0521
|
FILED June 23, 2021

(Ohio County 19-C-196 MJO)

MEMORANDUM DECISION

*1 Self-represented petitioner Yasser Abdelhaq appeals the March 30, 2020, order of the Circuit Court of Ohio County denying his second petition for a writ of habeas corpus. Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel Lara K. Bissett, filed a response in support of the circuit court's order. Petitioner filed a reply.

The 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.

In January of 2000, petitioner was indicted in the Circuit Court of Ohio County on one count of first-degree murder for the stabbing death of Dana Tozar ("the victim"). At a jury trial in August of 2000, petitioner was convicted of first-degree murder and sentenced to a life term of incarceration without the possibility of parole. Petitioner appealed his conviction in *State v. Abdelhaq* ("*Abdelhaq I*"), 214 W. Va. 269, 588 S.E.2d 647 (2003), and this Court vacated the conviction due to a defective indictment and remanded the matter. *Id.* at 274, 588 S.E.2d at 652. Shortly after this Court's decision in *Abdelhaq I*, petitioner contends that he filed in the circuit court, as a self-represented litigant, a "blue print" outlining his strategy for his second trial. In this "blue print," petitioner states that he "instructed counsel not to tell the jury he was guilty of murder [in a second trial]."

Petitioner was indicted for a second time on one count of first-degree murder for the murder of the victim and was represented by attorneys Robert G. McCoid and John J. Pizzuti. At petitioner's second trial, he admitted to killing the victim and sought a conviction on the lesser-included offense of second-degree murder. Petitioner was again convicted of first-degree murder. In the bifurcated sentencing stage, the jury did not recommend mercy. Accordingly, the circuit court sentenced petitioner to a life term of incarceration without the possibility of parole. Subsequently, petitioner's second appeal to this Court was refused by order entered on May 25, 2005.

In 2006, petitioner filed his first petition for a writ of habeas corpus in the circuit court, raising the following fourteen grounds for relief: (1) Whether petitioner was denied effective assistance of trial counsel; (2) Whether the evidence was insufficient to support a conviction for first-degree murder; (3) Whether the introduction of autopsy photographs was more prejudicial than probative; (4) Whether petitioner was denied a right to a fair sentencing when the circuit court allowed the victim's family to testify during the second phase of the bifurcated trial as to their preference that he be denied mercy; (5) Whether the jury should have been instructed with regard to mitigating factors on which it could determine petitioner's eligibility for parole; (6) Whether the circuit court's refusal to suppress all evidence seized during a warrantless search of the motel room where the crime took place was erroneous; (7) Whether the admission of hearsay testimony was erroneous; (8) Whether the admission of photographs of the victim before her death, i.e. "life photographs," was erroneous; (9) Whether the circuit court's refusal to admit evidence of the victim's drug use was erroneous; (10) Whether the circuit court's refusal to admit evidence of a witness's past criminal history was erroneous; (11) Whether the inclusion of a jury instruction with regard to "transferred intent" was erroneous; (12) Whether the circuit court's failure to include a jury instruction defining the term

"spontaneous," as it related to the issue of deliberation, was erroneous; (13) Whether the circuit court's jury instruction, instructing the jury that the use of a deadly weapon allows an inference of malice and intent to kill, was incomplete; and (14) Whether the circuit court's refusal to limit petitioner's cross-examination of a State's witness with regard to specific intent was erroneous. The circuit court denied the petition by order entered on March 22, 2006, without holding a hearing.

*2 Petitioner appealed the circuit court's March 22, 2006, order denying his first habeas petition on May 3, 2006. By order entered on December 6, 2006, this Court "grant[ed] [petitioner's] petition for appeal." The Court did not reverse the March 22, 2006, order, but remanded the case to the circuit court "for the holding of an omnibus habeas corpus hearing on the issue of ineffective assistance of [trial] counsel." Upon remand, the parties litigated whether petitioner was barred from raising every issue set forth in the habeas petition except for ineffective assistance of trial counsel. Following a September 11, 2015, hearing,[1] by order entered on October 19, 2015, the circuit court ruled that petitioner was barred "from raising any claim other than his claim for ineffective assistance of [trial] counsel," finding that petitioner misinterpreted this Court's decision in *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), setting forth principles governing the application of the doctrine of res judicata in habeas cases.

With regard to ineffective assistance of trial counsel, petitioner and both trial counsels testified at an August 2, 2016, omnibus hearing. Petitioner asserts that the issue of his strategy "blue print" for the second trial "was never settled" because "counsel state[d] they did not have a copy of the trial strategy." Nevertheless, Mr. McCoid testified unequivocally that petitioner understood "the full ramifications" of counsels' trial strategy of admitting that he killed the victim and asking for a conviction of second-degree murder and gave his consent. At several points during his testimony, Mr. McCoid addressed discussions the attorneys had with petitioner concerning the trial strategy, petitioner's understanding of the risks and benefits of such a strategy, and petitioner's consent to pursuing it. Having the benefit of seeing the State's theory of the case during the first trial, Mr. McCoid testified that they reevaluated the trial strategy since this "was not a case about whether [petitioner] had taken [the victim's] life," but was rather "about what his mental status was at the time that he did so." Mr. McCoid relied on portions of his opening statement where he admitted that petitioner killed the victim, but urged the jury to convict petitioner of second-degree murder due to the absence of premeditation. Based upon the opening, Mr. McCoid indicated during the omnibus hearing that

> [i]t is inconceivable that I would have given an opening statement in a first-degree murder case asking the jury to convict my client of second-degree murder without hav[ing] closely consulted with my client, discussed the minutia associated with that decision and obtained the full consent of my client in ... advancing that defense.

Thereafter, by order entered on December 29, 2016, the circuit court rejected petitioner's ineffective assistance claim and denied the habeas petition.

Petitioner appealed the circuit court's December 29, 2016, denial of the habeas petition to this Court. However, petitioner did not challenge the court's October 19, 2015, order allowing him to raise only ineffective assistance of trial counsel at the omnibus hearing. In *Abdelhaq v. Terry* ("*Abdelhaq II*"), No. 17-0078, 2018 WL 6131283 (W. Va. November 21, 2018) (memorandum decision), this Court affirmed the circuit court's denial of the habeas petition. Relevant here, the Court found that "[a]side from [petitioner's] unsupported claims that he never agreed to the strategy to admit culpability and seek a second-degree murder conviction, the evidence obtained at the omnibus hearing overwhelmingly establishes that petitioner's trial counsel advanced this strategy with petitioner's consent and support." *Id.* at *3. Petitioner subsequently filed a petition for rehearing which the Court refused by order entered on March 7, 2019. On March 15, 2019, this Court issued its mandate, and the decision in *Abdelhaq II* became final.[2]

*3 Petitioner filed his second habeas petition in the circuit court on August 12, 2019. In the habeas petition, petitioner argued that the circuit court erred in its October 19, 2015, order in *Abdelhaq II* by allowing him to raise only ineffective assistance of trial counsel at the omnibus hearing. Petitioner further argued that habeas counsel in *Abdelhaq II* was ineffective in failing to adequately argue to the circuit court that none of the fourteen issues set forth in the first habeas petition were adjudicated prior to the August 2, 2016, omnibus hearing. Accordingly, petitioner reasserted every issue from the first habeas petition in his second habeas petition.[3] With regard to ineffective assistance of trial counsel, petitioner argued that the United States Supreme Court's decision in

McCoy v. Louisiana, 138 S.Ct. 1500 (2018), represented a change in the law favorable to him. By order entered on March 30, 2020, the circuit court denied the second habeas petition, finding that petitioner's claims were adjudicated in the first habeas proceeding in *Abdelhaq II*. The circuit court rejected petitioner's claim that habeas counsel failed to adequately argue that none of the fourteen issues set forth in the first habeas petition were adjudicated prior to the August 2, 2016, omnibus hearing, due to a lack of support for the claim. Finally, the circuit court found that the United States Supreme Court's decision in *McCoy* did not represent a change in the law such that petitioner would be allowed to relitigate the issue of whether he consented to trial counsels' strategy of admitting that he killed the victim and asking for a conviction of second-degree murder.

Petitioner now appeals the circuit court's March 30, 2020, order denying his second habeas petition. This Court reviews a circuit court order denying a habeas petition under the following standards:

> "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).
>
> ....
>
> " '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.' Syllabus Point 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973)." Syl. Pt. 2, *White v. Haines*, 215 W.Va. 698, 601 S.E.2d 18 (2004).

Syl. Pts. 1 & 3, *Ansley v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016). However, because we have before us the denial of petitioner's *second* habeas petition, we first consider the application of Syllabus Point 4 of *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981):

> A prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing ... or, a change in the law, favorable to the applicant, which may be applied retroactively.

On appeal, petitioner argues that the circuit court erred in its October 19, 2015, order in *Abdelhaq II* in allowing him to raise only ineffective assistance of trial counsel at the omnibus hearing. Petitioner further argues that none of the fourteen issues set forth in the first habeas petition were adjudicated prior to the August 2, 2016, omnibus hearing because our December 6, 2006, order granting his first habeas appeal was not a decision on the merits pursuant to the Syllabus of *Smith v. Hedrick*, 181 W. Va. 394, 382 S.E.2d 588 (1989). Respondent makes the concession that, pursuant to *Smith*, none of the issues set forth in the first habeas petition, except for ineffective assistance of trial counsel, were adjudicated in *Abdelhaq II*. We decline to accept respondent's concession.[4]

*4 In the Syllabus of *Smith*, we held that:

> [t]his Court's rejection of a petition for appeal is not a decision on the merits precluding all future consideration of the issues raised therein, unless, as stated in [former] Rule 7 of the West Virginia Rules of Appellate Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted.[5]

181 W. Va. at 394, 382 S.E.2d at 588. We find that the Syllabus of *Smith*, which governs rejections of petitions for appeal, does not apply to this case because our December 6, 2006, order "grant[ed] [petitioner's] petition for appeal." *See Abdelhaq II*, 2018 WL 6131283, at *1 (stating that, in our December 6, 2006, order, "this Court *granted* petitioner *relief*") (emphasis added). While granting petitioner's first habeas appeal, we did not reverse the circuit court's prior denial of the first habeas petition, but remanded the case to the circuit court "for the holding of an omnibus habeas corpus hearing on the issue of ineffective assistance of [trial] counsel." *See*

Abdelhaq II, 2018 WL 6131283, at *1 (stating that we "ordered the matter remanded for the holding of an omnibus hearing on the *limited* issue of ineffective assistance of trial counsel") (emphasis added). Upon remand from our December 6, 2006, order, the parties litigated the issue of whether petitioner could raise only ineffective assistance of trial counsel. By order entered on October 19, 2015, the circuit court ruled that petitioner was barred "from raising any claim other than his claim for ineffective assistance of [trial] counsel," finding that petitioner misinterpreted this Court's decision in *Losh* where we set forth principles governing the application of the doctrine of res judicata in habeas cases.

If petitioner believed that the circuit court erred in ruling that he was barred from raising any claim other than his claim of ineffective assistance of trial counsel at the omnibus hearing, the time for challenging that ruling was in *Abdelhaq II* because, "if an appeal is taken from what is indeed the last order disposing of the last of all claims as to the last of all parties, then the appeal brings with it all prior orders." *Riffe v. Armstrong*, 197 W. Va. 626, 637, 477 S.E.2d 535, 546 (1996), *modified on other grounds*, *Moats v. Preston Cty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999). The only issue petitioner raised in *Abdelhaq II* was ineffective assistance of trial counsel, and he failed to challenge the ruling that he was barred from raising his other issues. With the issuance of this Court's mandate in *Abdelhaq II*, all rulings therein have become final, and we no longer have jurisdiction of that case. W. Va. Rul. App. Proc. 26(a) (providing, in pertinent part, that the "[i]ssuance of the mandate terminates jurisdiction of the Supreme Court in an action before this Court"). Therefore, as the circuit court's ruling set forth in its October 19, 2015, order in *Abdelhaq II* is now final, we find that the circuit court did not err in finding that the issues petitioner reasserted in the second habeas petition were adjudicated in *Abdelhaq II*.[6]

*5 Nevertheless, petitioner further argues that he is entitled to an omnibus hearing and appointment of counsel in his second habeas proceeding pursuant to Syllabus Point 4 of *Losh* based on alleged ineffective assistance of habeas counsel and a purported change in the law favorable to him. We disagree and easily dispense with petitioner's ineffective assistance of habeas counsel claim pursuant to the following standard:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Here, we find that habeas counsel's performance was not deficient under an objective standard of reasonableness as the circuit court's October 19, 2015, order reflects that habeas counsel presented multiple arguments that the circuit court "could consider issues other than ... ineffective assistance of counsel ... on remand" from this Court's December 6, 2006, order. Therefore, we conclude that the circuit court properly found there was no support for the claim that habeas counsel in *Abdelhaq II* failed to adequately present this issue to the circuit court.

With regard to the other exception to the doctrine of res judicata allegedly applicable to this case, petitioner argues that the United States Supreme Court's decision in *McCoy* is a change in the law favorable to him, but fails to address whether *McCoy* "may be applied retroactively." Syl. Pt. 4, *Losh*, 166 W. Va. at 762-63, 277 S.E.2d at 608. Even if *McCoy* may be retroactively applied, it is arguable that the holding of *McCoy* does not extend beyond of the death penalty context. In *McCoy*, the Supreme Court held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." 138 S.Ct. at 1505. The Supreme Court further stated that "[b]ecause a client's autonomy, not counsel's competence, is in issue," the test for determining ineffective assistance of counsel, set forth in *Strickland*, does not apply when a defendant objects to trial counsel's strategy of admitting guilt. 138 S.Ct. at 1510-11. Rather, the Supreme Court found that trial counsel's violation of the defendant's Sixth Amendment-secured autonomy is not subject to harmless error review. *Id.* at 1511.[7]

Assuming, arguendo, that petitioner could show that *McCoy* applies, the Supreme Court in *McCoy* distinguished that case from cases where the defendant

"complain[s] about the admission of his guilt only after trial." *Id.* at 1509 (citing *Florida v. Nixon*, 543 U.S. 175, 185 (2004)). Here, we found in *Abdelhaq II* that, "[a]side from his unsupported claims that he never agreed to the strategy to admit culpability and seek a second-degree murder conviction, the evidence obtained at the omnibus hearing overwhelmingly establishes that petitioner's trial counsel advanced this strategy with petitioner's consent and support." 2018 WL 6131283, at *3. Therefore, we find that the instant case is factually distinguishable from *McCoy* and concur with the circuit court's finding that petitioner would be not allowed, pursuant to Syllabus Point 4 of *Losh*, to relitigate the issue of whether he consented to trial counsels' strategy of admitting that he killed the victim and asking for a conviction of second-degree murder. Accordingly, we conclude that the circuit court did not abuse its discretion in denying petitioner's second habeas petition.

*6 For the foregoing reasons, we affirm the circuit court's March 30, 2020, order denying petitioner's second petition for a writ of habeas corpus.

Affirmed.

CONCURRED IN BY:

Chief Justice Evan H. Jenkins

Justice Elizabeth D. Walker

Justice Tim Armstead

Justice John A. Hutchison

Justice William R. Wooton

All Citations

Not Reported in S.E. Rptr., 2021 WL 2581741

Footnotes

1 Litigation in petitioner's first habeas proceeding was protracted. As the circuit court explained in a December 29, 2016, order denying petitioner's first habeas petition, "[t]hough much has happened in the intervening years since this matter was remanded to [the] [c]ircuit [c]ourt by the Supreme Court of Appeals, the events are not relevant for [present] purposes."

2 Rule 26(a) of the West Virginia Rules of Appellate Procedure provides, in pertinent part, that "an opinion of the Court or memorandum decision of the Court considering the merits of a case is not final until the mandate has been issued."

3 In petitioner's second habeas petition, he raised one additional issue: that he was not read his *Miranda* rights before questioning in a custodial setting. Notwithstanding that conclusory allegation, petitioner failed to include factual allegations to support his contention. Therefore, we find that petitioner's claim based upon *Miranda v. Arizona*, 384 U.S. 436 (1966), was subject to summary denial. *See Losh v. McKenzie*, 166 W. Va. 762, 771, 277 S.E.2d 606, 612 (1981) (finding that an assertion of a claim "without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing").

4 In Syllabus Point 8 of *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991), we held that this Court will accept a party's concession only after our own independent review of the issue.

5 The present Rules of Appellate Procedure took effect on December 1, 2010.

6 Respondent suggests that we remand this case to the circuit court with directions to make findings of fact and conclusions of law as to every issue petitioner raises except for ineffective assistance of trial counsel. However, respondent makes this suggestion based on the concession that none of the other issues set forth in the first habeas petition were adjudicated in *Abdelhaq II*. As we explained above, we decline to accept respondent's concession. Therefore, we find that the circuit court's correct finding that the issues petitioner reasserted in the second habeas petition were adjudicated in *Abdelhaq II* constituted a sufficient

basis to support its denial of the second habeas petition.

7 The Sixth Amendment to the United States Constitution provides that a defendant is entitled to "the [a]ssistance of [c]ounsel for his defence." In *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), the United States Supreme Court found that "the Sixth Amendment 'contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.' " 138 S.Ct. at 1508 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979)).

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