

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

**Elmer Castle,
Petitioner Below, Petitioner**

vs.) **No. 11-1154** (Berkeley County 07-C-103)

**Adrian Hoke, Warden,
Respondent Below, Respondent**

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Christopher J. Prezioso, arises from the Circuit Court of Berkeley County's July 6, 2011, "Final Order Denying Petition For Writ Of Habeas Corpus." The State, by counsel Cheryl K. Saville, has filed its response.

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 is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

During the May 2002 term, a Berkeley County grand jury indicted petitioner for the following crimes: one count of first degree sexual abuse; three counts of first degree sexual assault; four counts of sexual abuse by a parent, guardian, or custodian; and, three counts of incest. Petitioner thereafter entered a guilty plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970), to one count of sexual abuse by a parent, guardian, or custodian, and the remaining counts in the indictment were dismissed. Following entry of petitioner's plea, the circuit court thereafter sentenced petitioner to an indeterminate term of ten to twenty years of incarceration. After a prior petition for writ of habeas corpus was summarily denied by the circuit court, petitioner filed a second petition seeking habeas relief on February 3, 2011. In seeking a writ of habeas corpus in the second circuit court proceeding, petitioner alleged the following grounds for relief: 1) ineffective assistance of counsel; 2) lack of a rational understanding of the law when he pled guilty; 3) improper sentence; 4) failure to explore his mental state at the time of the alleged crime prior to entry of guilty plea; and, 5) other grounds which included illegally obtained statement, indictment showing no offense was committed, erroneous information in the pre-sentence investigation report, irregularities in arrest, failure to provide a copy of the indictment, excessive sentence, and unfulfilled plea bargains. Upon review of the petition below, and without conducting an omnibus evidentiary hearing, the circuit court denied the second petition for habeas relief by order entered on July 6, 2011.

On appeal, petitioner alleges that the circuit court erred in denying his petition for habeas relief. Upon review of the brief and the record, petitioner raises essentially the same grounds on appeal as he raised below. He begins by arguing that it was error to deny the petition for habeas corpus because there was probable cause to believe he was entitled to certain relief. According to petitioner, he clearly met the probable cause standard required for an evidentiary hearing under West Virginia Code § 53-4A-7(a). As to his ineffective assistance of counsel claims, petitioner argues that his counsel did not represent him effectively and wrongfully coerced him into entering a plea agreement. Petitioner maintains his wish to have a trial on the merits and that entering into the plea agreement was against his best interests. Petitioner was initially represented by Robert Barrat during his criminal proceedings, and argues that his failures as counsel, including erroneously telling petitioner he would be eligible for parole after three and a half years, prevented him from rationally understanding the implications of the plea agreement he entered into when represented by his second attorney, Craig Manford. Petitioner further argues that attorney Manford failed to explore the possibilities of a defense based on mental state, and that he further chose to wrongfully proffer at the plea hearing that absolutely no diminished capacity defense was available. According to petitioner, attorney Manford also failed to properly evaluate the alleged offense against petitioner. Petitioner argues that both attorneys failed to properly investigate the case, thereby missing several valid defenses and exculpatory evidence. Lastly, counsel failed to explain that petitioner had a right to appeal his conviction.

As to his allegation that he did not have a rational understanding of the law when he pled guilty, petitioner argues that he suffered from several mental disorders and addictions to drugs and alcohol at the time. Petitioner admits that the circuit court held the appropriate colloquy regarding his understanding of his guilty plea, but that he did not understand what was being said, and that he would not have accepted the guilty plea if he could have properly conversed with his attorney. Petitioner further argues that he was wrongfully encouraged by members of his family to enter into the plea. Petitioner next alleges that his sentence was improper. While he admits that his sentence is within the statutory limits for the crime for which he was convicted, petitioner argues that the sentence is grossly disproportionate to his actions. Petitioner states that he would benefit from an alternative sentence, and that he does not wish to be registered as a sex offender for the remainder of his life. Lastly, petitioner argues that his constitutional rights were violated because he was not given the opportunity to argue any mental defenses regarding his capacity to commit the crime in question prior to entering his plea. According to petitioner, he believes he was only given a psychological and psychiatric examination for purposes of obtaining competency so his lawyers could coerce him into pleading guilty. For these reasons, petitioner argues that his conviction should be overturned.

In response, the State argues that the circuit court did not commit error by denying petitioner habeas relief without an evidentiary hearing because the petition, affidavits, exhibits, records, and other documentary evidence demonstrated that petitioner was not entitled to relief on any ground alleged. According to the State, in its final order, the circuit court included specific findings of fact and conclusions of law in regard to each of petitioner's allegations. This includes citations to the underlying record supporting the circuit court's rulings, and findings as to why an evidentiary hearing was unnecessary. The State argues that the circuit court determined, with specificity and with regard to every claim, that petitioner is entitled to no relief

or that the contentions have been previously adjudicated or waived. As such, the State argues that the circuit court was correct to deny petitioner the relief sought pursuant to West Virginia Code § 53-4A-7(a). In relation to petitioner's remaining arguments, the State cites to the circuit court's final order denying habeas relief to argue that no error was committed.

The Court has previously established the following standard of review:

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). The Court has carefully considered the merits of these arguments as set forth in the petition for appeal and in the response, and it has reviewed the designated appendix. Accordingly, we find no error in the circuit court's decision to deny petitioner habeas corpus relief without holding an evidentiary hearing pursuant to West Virginia Code § 53-4A-7(a). Having reviewed the circuit court's well-reasoned "Final Order Denying Petition For Writ Of Habeas Corpus" and finding no error, this Court fully incorporates and adopts said order, dated July 6, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
ELMER CASTLE,

Petitioner,

v.

Case No.: 07-C-103
JUDGE WILKES

ADRIAN HOKE, Warden,

Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On a previous day came the parties, by counsel, on the Petitioner's Amended Petition for Writ of Habeas Corpus and the Respondent's Motion To Dismiss Petition for Habeas Corpus. Upon mature consideration of the pleadings and the record of the Petitioner's binding counseled *Alford* guilty plea agreement below in State v. Elmer A. Castle, Case No.: 02-F-69, the Court denies the Amended Petition.

FINDINGS OF FACT

1. Pursuant to a binding counseled *Alford* guilty plea agreement, the Petitioner pleaded guilty to one (1) felony count of Sex Abuse by Parent, Guardian or Custodian committed against a child under the age of eleven. As part of the agreement, the State agreed to dismiss ten other felony sexual offenses committed against the same child. The Petitioner was then sentenced to the statutory sentence of ten-to-twenty years in the penitentiary. [Conviction and Sentencing Order, 4/15/03; Tr. 4/14/03; Indictment, 5/21/02, State v. Elmer A. Castle, Case No.: 02-F-69.]
2. There were no objections to the pre-plea investigation report. [Tr. 4/14/03, 6, 19.]
3. The Petitioner was sworn. [Id., 5.]

4. The court noted that the record shows that the Petitioner had a full psychological and psychiatric evaluation and the Petitioner was deemed competent to stand trial. [Id.]

5. The Petitioner's counsel also noted for the record that the evaluation found no diminished capacity or mental health defense. The Petitioner agreed. [Id., 5-6.]

6. The Petitioner answered that he reads and writes, and that he has a little college education. [Id., 7.]

7. In response to whether he is currently under the influence of any medication, drug or alcohol, the Petitioner replied, "No." [Id., 8.]

8. The Petitioner then proceeded to indicate his understanding of all his legal rights in this matter, and the import of his waiving those rights to enter his guilty plea. [Id., 8-12.]

9. The Petitioner received the indictment on May 30, 2002 and his counsel, Mr. Manford, explained that he went over all of the elements of the offense with the Petitioner. [Id., 12.]

10. The Court informed the Petitioner that under this plea agreement the sentence is ten to twenty years in the penitentiary. The Petitioner acknowledged that he understood. [Id., 13.]

11. The Petitioner acknowledged his understanding of the impact of a felony conviction on his civil rights and the State's recidivist statute. [Id., 13-14.]

12. The Petitioner informed the Court that he had fully discussed his case with counsel, discussed possible defenses, received counsel's advice, and was satisfied with the representation he received from his counsel. Petitioner admitted that no one promised him anything, or threatened, forced, pressured, or intimidated him into taking the plea, including his counsel. [Id., 14-15.]

13. The Petitioner agreed with his counsel's representation that the Petitioner understands his rights, the consequences of his plea, that the plea is knowing and voluntary, and that the plea is in his best interest. [Id., 15-16.]

14. The Court made a finding, based on the representations of the Petitioner, that he understood the nature of the offense, the consequences of the guilty plea, and that that decision was made freely and voluntarily of his own free will and accord. [Id., 17-18.]

15. Given one more opportunity to withdraw his guilty plea, the Petitioner declined. [Id., 18.]

16. The Petitioner and his counsel declined to address the court before sentencing, and the court sentenced the Petitioner to the binding statutory sentence of ten-to-twenty years. [Id., 19-22; Conviction and Sentencing Order, 4/15/03.]

17. The Petitioner never appealed from that conviction or sentence. [Record, *passim*.]

18. The Petitioner is due to discharge his sentence on November 5, 2011. [DOC Records.]

19. On or about February 2, 2007, the Petitioner filed a pro se Petition for Habeas Corpus. [Petition, 2/2/07.]

20. Appointed counsel filed an Amended Petition. [Amended Petition, 2/3/11.]

21. The Petitioner also filed a Losh list. [Checklist of Grounds, 2/3/11].

22. The Court directed the Respondent to file a return to the Petition. [Order, 2/4/11.]

CONCLUSIONS OF LAW

This matter comes before the Court on the Petitioner's Petition for Writ of Habeas Corpus. This Court previously appointed counsel, who filed an Amended Petition, and subsequent to an initial review, the Court ordered the Respondent to file an answer. At this point

in the proceedings, the Court is to review the relevant filings, affidavits, exhibits, records and other documentary evidence attached to the Petition to determine if the Petitioner's claims have merit and demand an evidentiary hearing to determine if the writ should be granted. Otherwise, the Court must issue a final order denying the petition.

The procedure surrounding petitions for writs of habeas corpus is "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." State ex rel. Harrison v. Coiner, 154 W.Va. 467, 176 S.E.2d 677 (1970); W. Va. Code § 53-4A-1(a). A habeas corpus proceeding is markedly different from a direct appeal or writ of error in that only errors involving constitutional violations shall be reviewed. Syl. Pt. 2, Edwards v. Leverette, 163 W.Va. 571 (1979).

If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings an a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought. W. Va. Code § 53-4A-7(a).

If the court upon review of the petition, exhibits, affidavits, or other documentary evidence is satisfied that the petitioner is not entitled to relief the court may deny a petition for writ of habeas corpus without an evidentiary hearing. Syl. Pt. 1, Perdue v. Coiner, 156 W.Va. 467, 194 S.E.2d 657 (1973); State ex rel. Waldron v. Scott, 222 W. Va. 12 (2008). Upon denying a petition for writ of habeas corpus the court must make specific findings of fact and conclusions of law as to each contention raised by the petitioner, and must also provide specific

findings as to why an evidentiary hearing was unnecessary. Syl. Pt. 1, State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997); Syl. Pt. 4, Markley v. Coleman, 215 W. Va. 729, 601 S.E.2d 49 (2004); *W. V. R. Hab. Corp.* 9(a). On the other hand, if the Court finds “probable cause to believe that the petitioner may be entitled to some relief ... the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced...” W. Va. Code § 53-4A-7(a).

When reviewing the merits of a Petitioner’s contention the court recognizes that “there is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed.” Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966). Furthermore, specificity is required in habeas pleadings, thus a mere recitation of a ground for relief without detailed factual support will not justify the issuance of a writ or the holding of a hearing. W. Va. Code § 53-4A-2; Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981). “When a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation because the petition does not provide adequate facts to allow the circuit court to make a ‘fair adjudication of the matter’ the dismissal is without prejudice. Markley v. Coleman, 215 W. Va. 729, 734; *W. V. R. Hab. Corp.* 4(c). However, rather than dismissing without prejudice the court may “summarily deny unsupported claims that are randomly selected from the list of grounds,” laid out in Losh v. McKenzie, 166 W. Va. 762, 771 (1981); Markley v. Coleman, 215 W. Va. 729, 733.

In addition to a review on the merits, the Court must determine if the contentions raised by the petitioner have been previously and finally adjudicated or waived. “W. Va. Code § 53-4A-1(b) [1981] states that an issue is ‘previously and finally adjudicated’ when, at some point, there has been a ‘decision on the merits thereof after a full and fair hearing thereon’ with the

right to appeal such a decision having been exhausted or waived., unless said decision upon the merits is clearly wrong.” Smith v. Hedrick, 181 W. Va. 394, 395 (1989). But, a “rejection of a petition for appeal is not a decision on the merits precluding all future consideration on the issues raised therein...” Syl. Pt. 1, Smith v. Hedrick, 181 W. Va. 394, 395 (1989). However, “there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance.” Syl. Pt. 1, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972). In addition, any grounds not raised in the petition for habeas corpus are deemed waived. Losh v. McKenzie, 166 W. Va. 762.

The Court, in reviewing the petition, answer, affidavits, exhibits, and all other relevant documentary evidence finds that the Petitioner’s Amended Petition for Habeas Corpus should be DENIED. Below the Court will discuss each contention raised by the Petitioner and show how none of the claims contained in this petition demand the relief requested.

1. Allegation of Ineffective Assistance.

The Petitioner fails to meet either prong of the two-prong standard necessary to prove ineffective assistance claims: 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. 1, State ex rel. Bailey v. Legursky, 200 W. Va. 770, 490 S.E.2d 858 (1997); Syl. Pt. 5, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

a. Coerced into a plea that was against his best interest.

The Petitioner was sworn to tell the truth during the plea taking hearing. [Tr. 4/14/03, 5.] The Petitioner then informed the Court that he had fully discussed his case with his counsel, Mr.

Manford, and discussed possible defenses, received counsel's advice, and is satisfied with his counsel's representation. No one promised him anything, or threatened, forced, pressured, or intimidated him into taking the plea, including his counsel. [Id., 14-15.] The Petitioner also agreed with his counsel's representation that the Petitioner understands his right, the consequences of his plea, that the plea is knowing and voluntary, and that the plea is in his best interest. [Id., 15-16.] Based on this record, the Petitioner's claim has no merit and no additional evidence would be necessary in an evidentiary hearing.

b. Allegations against Attorney Robert Barrat.

Mr. Barrat was not the Petitioner's counsel during the plea hearing on April 14, 2003. Mr. Barrat had been replaced by Mr. Manford five months earlier. [Order of Substitution of Counsel, 11/19/02.] The allegations that Mr. Barrat improperly advised the Petitioner as to his parole eligibility or did not have him evaluated, are without merit and cannot be said to have had any effect on the outcome of the case. No additional evidence would be necessary in an evidentiary hearing.

c. Evaluation for diminished capacity/mental defense.

At the plea hearing, the court noted that the record shows that the Petitioner had a full psychological and psychiatric evaluation and the Petitioner was deemed competent to stand trial. [Tr. 4/14/03, 5.] The Petitioner's counsel also noted for the record that the evaluation found no diminished capacity or mental health defense. The Petitioner agreed. [Id., 5-6.] The Petitioner offers no evidence in his habeas Petition that, despite his and his counsel's representations, he then possessed a basis for a diminished capacity or mental health defense. Based on this record, the Petitioner's claim has no merit and no additional evidence would be necessary in an evidentiary hearing.

d. *Case Investigation.*

The Petitioner fails to allege how counsel did not properly investigate his case or to describe the “several valid defenses and exculpatory evidence” such an investigation would have revealed. Based on this record, the Petitioner’s claim has no merit and no additional evidence would be necessary in an evidentiary hearing.

e. *Appeal.*

The record shows that the Petitioner did not appeal from his guilty plea and sentence. The Petitioner fails to allege any grounds that he may have successfully brought on a direct appeal. The Petitioner fails to allege that he asked counsel to file such an appeal. Based on this record, the Petitioner’s claim has no merit and no additional evidence would be necessary in an evidentiary hearing.

The record is plain that the Petitioner is not entitled to any relief on the above asserted grounds. State ex rel. Bailey v. Legursky, supra; State v. Miller, supra; W. Va. Code § 53-4A-7(a); Perdue v. Coiner, supra.

2. Allegation of Incompetency.

As noted above, at the plea hearing the court noted that the record shows that the Petitioner had a full psychological and psychiatric evaluation and the Petitioner was deemed competent to stand trial. [Tr. 4/14/03, 5.] The Petitioner answered that he reads and writes, and has a little college education. [Id., 7.] In response to whether he is currently under the influence of any medication, drug or alcohol, the Petitioner replied, “No.” [Id., 8.] The Petitioner then proceeded to indicate his understanding of all his legal rights in this matter, and the import of his

waiving those rights to enter his guilty plea. [Id., 8-12.] The Petitioner agreed with his counsel's representation that the Petitioner understands his right, the consequences of his plea, that the plea is knowing and voluntary, and that the plea is in his best interest. [Id., 15-16.]

The Court finds that the record demonstrates that the Petitioner exhibited no signs of incompetency that would void his guilty plea. Based on this record, the Petitioner's claim has no merit and no additional evidence would be necessary in an evidentiary hearing. The record is plain that the Petitioner is not entitled to any relief on the above asserted grounds. W. Va. Code § 53-4A-7(a); Perdue v. Coiner, *supra*.

3. Allegation of Improper Sentence.

The Petitioner acknowledges that he was sentenced to the statutory sentence of ten-to-twenty years as a result of his binding plea agreement. The other felony sexual offenses were dismissed as part of the plea agreement. The Petitioner is scheduled to be discharged on November 5, 2011.

The West Virginia Supreme Court holds:

“Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 366, 287 S.E.2d 504, 505 (1982); Syl. Pt. 6, State v. Woodson, 222 W.Va. 607, 671 S.E.2d 438 (2008); Syl. Pt. 6, State v. Slater, 222 W.Va. 499, 665 S.E.2d 674 (2008); Syl. Pt. 3, State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002).

The Petitioner fails to allege any impermissible factor in his sentencing that would permit the sentence imposed to be reviewed in this proceeding. Based on this record, the Petitioner's claim has no merit and no additional evidence would be necessary in an evidentiary hearing. The

record is plain that the Petitioner is not entitled to any relief on the above asserted grounds. W. Va. Code § 53-4A-7(a); Perdue v. Coiner, *supra*.

3. Allegation of Mental Defense.

At the plea hearing, the court noted that the record shows that the Petitioner had a full psychological and psychiatric evaluation in which the Petitioner was deemed competent to stand trial. [Tr. 4/14/03, 5.] The Petitioner's counsel also noted for the record that the evaluation found no diminished capacity or mental health defense. The Petitioner agreed. [Id., 5-6.] The Petitioner offers no evidence in his habeas Petition that, despite his and his counsel's representations, he then possessed a basis for a diminished capacity or mental health defense.

The Court finds that the record demonstrates that the Petitioner possessed no basis for any mental defense that would render his guilty plea void. Moreover, upon his guilty plea, the Petitioner waived any non-jurisdictional defect in his criminal case. "A knowing and voluntary guilty plea waives all antecedent, nonjurisdictional defects." State v. Greene, 196 W.Va. 500, 507 n. 1, 473 S.E.2d 921, 928 n. 1 (1996). *See also*: State v. Legg, 207 W. Va. 686, 536 S.E.2d 110, 114 (2000). Based on this record, the Petitioner's claim has no merit and no additional evidence would be necessary in an evidentiary hearing. The record is plain that the Petitioner is not entitled to any relief on the above asserted grounds. W. Va. Code § 53-4A-7(a); Perdue v. Coiner, *supra*.

4. Other allegations.

The Petitioner offers no factual or legal basis whatsoever in support of any other allegation in his original Petition, or which is not initialed as waived on the *Losh* list. Specificity in habeas pleading is required. W. Va. Code § 53-4A-2. "A mere recitation of any of our enumerated grounds without detailed factual support does not justify the issuance of a writ, the

appointment of counsel, and the holding of a hearing.’ *Losh* [v. McKenzie, *supra*].” SER Markley v. Coleman, *supra*. Waiver also applies to these issues as the Petitioner was convicted upon his guilty plea. State v. Proctor, *supra*. The record is plain that the Petitioner is not entitled to any relief on any waived or unsupported ground alleged. W. Va. Code § 53-4A-7(a); Perdue v. Coiner, *supra*. Each of the following allegations is summarily denied.

a. *Petitioner’s Statement.*

This issue is waived by virtue of the plea. State v. Proctor, *supra*. In addition, the Petitioner offers no factual basis that indicates that his statement was taken in violation of his constitutional protections.

b. *Indictment.*

This issue is also waived by virtue of the plea. State v. Proctor, *supra*. In addition, the Petitioner fails to allege how the Indictment was defective or did not meet the standards of Syl. Pt. 3, State v. Donald S.B., 184 W.Va. 187, 399 S.E.2d 898 (1990).

c. *Pre-sentence Report.*

The record show that there were no objections to the pre-plea investigation report. [Tr. 4/14/03, 6, 19.] Even if the record were not crystal clear on this point, the Petitioner identifies no errors affecting the outcome of his case.

d. *Arrest.*

This issue is waived. State v. Proctor, *supra*. In addition, the Petitioner identifies no errors affecting the outcome of his case.

e. *Copy of Indictment.*

The Petitioner stated at the plea hearing that he received the indictment on May 30, 2002, and Mr. Manford explained that he went over all of the elements of the offense with Petitioner. [Tr. 4/14/03, 12.]

f. *Sentence.*

The Petitioner received the statutory sentence in a binding plea agreement to the single felony count for which he was convicted upon his plea. “‘Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.’ Syl. Pt. 4, State v. Goodnight, *supra*.

g. *Plea Bargain.*

The Petitioner identifies no term of his plea bargain that was not adhered to. The State agreed that he would be sentenced to the statutory sentence of ten-to-twenty years in the penitentiary. That’s exactly what the court sentenced him to.

Based on this record, the Petitioner’s claims have no merit and no additional evidence would be necessary in an evidentiary hearing. The record is plain that the Petitioner is not entitled to any relief on any of the waived and/or unsupported grounds alleged above. W. Va. Code § 53-4A-7(a); Perdue v. Coiner, *supra*. Each of these allegations is summarily denied.

5. Grounds expressly waived.

The Petitioner expressly waived on his filed, signed and verified Losh list the following grounds: 1, 2, 4, 5, 8-12, 14, 16, 18, 22, 24-48. [Losh List.] Losh v. McKenzie, *supra*. The record is plain that the Petitioner is not entitled to any relief on the above expressly waived grounds. W. Va. Code § 53-4A-7(a); Perdue v. Coiner, *supra*. Further, since the Petitioner never filed a direct appeal, he waived any ground which he could have raised on direct appeal but did not. Ford v. Coiner, *supra*.

6. Grounds not waived for which Petitioner provided no factual or legal basis.

The Petitioner left several grounds unwaived on his Losh list but provided no factual support at all for the following unwaived grounds:

- 17–State’s Knowing Use of Perjured Testimony;
- 49–Question of actual guilt upon an acceptable guilty plea;
- 52–Mistaken Advice of Counsel as to Parole or Probation Eligibility;
- 53–Amount of time served on sentence, credit for time served.

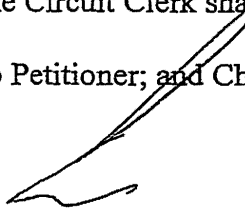
Specificity in habeas pleading is required. W. Va. Code § 53-4A-2. The Petitioner’s mere recitation of these enumerated grounds “without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing.’ *Losh* [v. McKenzie, *supra*].” SER Markley v. Coleman, supra.

Without any support, the record is plain that the Petitioner is not entitled to any relief on the above grounds, which are hereby summarily denied. W. Va. Code § 53-4A, -7(a); Perdue v. Coiner, supra.

Accordingly, the Court DENIES the Petitioner’s Amended Petition for Writ of Habeas Corpus. The Court notes the exceptions and objections of the parties to any adverse ruling herein.

Therefore, it is hereby ADJUDGED and ORDERED that the relief requested in the Petition for Writ of Habeas Corpus is DENIED. The Circuit Clerk shall transmit attested copies of this order to: Christopher J. Prezioso, counsel to Petitioner; and Christopher C. Quasebarth, counsel to Respondent.

ENTERED: *July 6, 2011*


CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: *Marsha Melnick*

Deputy Clerk

FINAL ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS