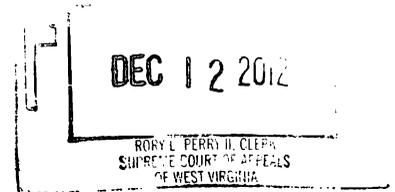

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1028



David Ballard, Warden, Mt. Olive Correctional
Complex, Respondent Below, Petitioner

vs.)

(Mon. County Civil Action No. 06-C-202 and
Felony No. 02-F-95)

Brian Bush Ferguson, Petitioner Below,
Respondent

BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

| | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| ASSIGNMENTS OF ERROR | 1 |
| STATEMENT OF THE CASE..... | 2 |
| The Underlying Case..... | 3 |
| The Instant Habeas Corpus Case..... | 10 |
| SUMMARY OF ARGUMENT..... | 17 |
| STATEMENT REGARDING ORAL ARGUMENT AND DECISION..... | 20 |
| ARGUMENT..... | 20 |
| I. THE CIRCUIT COURT MISAPPLIED THE STANDARD FOR ANALYZING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN HABEAS CORPUS CASES SET FORTH IN <i>STICKLAND V. WASHINGTON</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) AND <i>STATE V. MILLER</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995). THE CIRCUIT COURT SET THE BAR TOO LOW FOR ITS FINDING OF INEFFECTIVE ASSISTANCE BY SEASONED TRIAL COUNSEL BY FAILING TO GIVE THE MANDATED DEFERENCE TO TRIAL COUNSEL’S TESTIMONY EXPLAINING HIS TRIAL STRATEGY, WHICH HE HAD DISCUSSED WITH THE PETITIONER AND THE PETITIONER’S LEGALLY TRAINED FAMILY MEMBERS. | 21 |
| II. THE CIRCUIT COURT FAILED TO GIVE DUE CONSIDERATION TO THE STATE’S EXPERT’S OPINIONS REGARDING TRIAL COUNSEL’S RATIONALE FOR HIS TRIAL STRATEGY. | 28 |
| III. THE CIRCUIT COURT ABUSED ITS DISCRETION BY LIMITING THE STATE’S SECOND EXPERT WITNESS’S TESTIMONY TO ONLY ONE ISSUE, RATHER THAN PERMITTING HIM TO DISCUSS THE REASONABLENESS OF TRIAL COUNSEL’S DEFENSE STRATEGY. THE CIRCUIT COURT INCORRECTLY RULED THAT THE STATE’S SECOND EXPERT WITNESS WOULD BE MERELY REPETITIVE OF THE FIRST EXPERT. | 31 |

IV. THE CIRCUIT COURT’S ORDER ESTABLISHES A MECHANICAL RULE, CONTRARY TO *STRICKLAND* AND *MILLER*, THAT TRIAL COUNSEL’S RELIANCE ON INFORMATION IN A POLICE REPORT AUTOMATICALLY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL, NO MATTER THE CHARACTER OF THE INFORMATION IN THE REPORT AND THE COLLATERAL INFORMATION THAT MAKES IT ENTIRELY REASONABLE FOR COUNSEL TO RELY ON THE REPORT.33

V. THE CIRCUIT COURT’S RULING THAT TRIAL COUNSEL’S ALLEGED DEFECTIVE REPRESENTATION OF THE RESPONDENT HAD A REASONABLE LIKELIHOOD OF AFFECTING THE OUTCOMES OF THE TRIAL IS CLEARLY ERRONEOUS. THE CIRCUIT COURT INCORRECTLY ASSESSED THE PETITIONER’S WITNESSES IN THE OMNIBUS HEARING, FINDING THEM TO BE CONSISTENT AND CREDIBLE EVEN THOUGH CROSS-EXAMINATION REVEALED THEIR EVIDENCE TO BE CONTRADICTORY TO EACH OTHER, CONTRADICTORY TO PHYSICAL FACTS SURROUNDING THE MURDER AND ITS LOCATION, AND TO BE THE PRODUCT OF EXAGGERATION AND OF INFLUENCE BY THE RESPONDENT’S REPRESENTATIVES.... 34

CONCLUSION..... 43

CERTIFICATE OF SERVICE..... 44

TABLE OF AUTHORITIES

| | Page |
|------------------------------------------------------------------------------------------|-----------------------|
| <i>Mathena v. Haines</i> , 219 W.Va. 417, 633 S.E.2d 771 (2006) | 20 |
| <i>McGlone v. Superior Trucking Company, Inc.</i> , 178 W.Va. 659, 363 S.E.2d 736 (1987) | 22 |
| <i>State v. Doman</i> , 204 W.Va. 289, 512 S.E.2d 211 (1998) | 16, 32 |
| <i>State ex rel. Hatcher v. McBride</i> , 221 W.Va. 760, 763, 656 S.E.2d 789, 792 (2007) | 20 |
| <i>State v. Ferguson</i> , 216 W.Va. 420, 607 S.E.2d 526 (2004) | 41 |
| <i>State v. Guthrie</i> , 194 W.Va. 657, 461 S.E.2d 163 (1995) | 40 |
| <i>State ex rel. Daniel v. Legursky</i> , 195 W.Va. 314, 465 S.E.2d 416 (1995) | 19, 27, 34, 37, 38 |
| <i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995) | 1, 17, 19, 20, 27, 33 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 685 S.Ct. 2052 (1984) | 1, 17, 19, 20, 27, 33 |
| W.Va. Rules of Criminal Procedure, Rule 16(a)(2) | 32 |

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Supreme Court No. 12-1028
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Felony No. 02-F-95

Brian Bush Ferguson, Petitioner
Below, Respondent

BRIEF OF THE PETITIONER

Petitioner David Ballard, Warden, Mt. Olive Correctional Complex, by counsel, Marcia Ashdown, Prosecuting Attorney of Monongalia County, and Perri DeChristopher, Assistant Prosecuting Attorney of Monongalia County, hereby files this brief in support of his Petition for Appeal from the August 8, 2012, Order of the Circuit Court of Monongalia County granting habeas corpus relief to Respondent Brian Bush Ferguson.

ASSIGNMENTS OF ERROR

1. The circuit court misapplied the standard for analyzing ineffective assistance of counsel claims in habeas corpus cases set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The circuit court set the bar too low for its finding of ineffective assistance by seasoned trial counsel by failing to give the mandated deference to trial counsel's testimony explaining his trial strategy, which he had discussed with the Petitioner and the Petitioner's legally trained family members.

2. The circuit court abused its discretion by not giving consideration to the State's expert's opinions that agreed with trial counsel's rationale for his trial strategy.

3. The circuit court abused its discretion by limiting the State's second expert witness's testimony to only one issue, rather than permitting him to discuss the reasonableness of trial counsel's defense strategy. The circuit court incorrectly ruled that the State's second expert witness would be merely repetitive of the first expert.

4. The circuit court's order establishes a mechanical rule, contrary to *Strickland* and *Miller*, that trial counsel's reliance on information in a police report automatically constitutes ineffective assistance of counsel, no matter the character of the information in the report and the collateral information that makes it entirely reasonable for counsel to rely on the report.

5. The circuit court's ruling that trial counsel's alleged defective representation of the Respondent had a reasonable likelihood of affecting the outcome of the trial is clearly erroneous. The circuit court incorrectly assessed the Petitioner's witnesses in the omnibus hearing, finding them to be consistent and credible even though cross examination revealed their evidence to be contradictory to each other, contradictory to physical facts surrounding the murder and its location, and to be the product of exaggeration and of influence by the Respondent's representatives.

STATEMENT OF THE CASE

This is an appeal from the lower court's grant of habeas relief for the Respondent, after an omnibus hearing on the Respondent's claim of ineffective assistance of his trial counsel.

The Underlying Case

On Saturday February 2, 2002, Jerry Wilkins, an active, popular West Virginia University student in his final semester of graduate school, was confronted just outside the front door of his apartment located adjacent to a secluded, dead end parking lot, chased across the parking lot and shot to death after falling to the ground, while witnesses looked on. These physical facts and the eyewitness testimony could never be characterized as a random act of violence.

As he ran from his assailant, Wilkins lost his footing and slid to the ground right beside a car stopped at an intersection. The driver of the car, Kathryn Metcalfe, watched as a man ran up and shot, point blank, into the back of the fallen man just outside her car door. (App. Vol. 5, pp. 1013-1014.) The bullet entered his heart. (App. Vol. 5, p. 1059.) The assailant ran from the scene and disappeared into a residential area near the WVU Evansdale Campus. Ms. Metcalfe later described the assailant as a black male, 6 foot to 6'2" tall, medium build, and wearing a dark, hooded jacket or sweatshirt (black or dark blue). (App. Vol. 5, p. 1017.) Another witness, Rachel Herman, also described the assailant as a black male, wearing black pants and a black, hooded sweatshirt. (App. Vol. 5, p. 1029.)¹ Ms. Herman described the handgun as long, and silver in color. (App. Vol. 5, p. 62.)

Jerry Wilkins' condition immediately after the shooting, as described by witnesses at the scene, indicated that the only "remotely coherent" thing he expressed was that he couldn't breathe. (App. Vol. 5, p. 1030.) Jerry Wilkins went into shock after the shooting and had no ability to respond rationally or to convey information. According to a first responding police

¹ Rachel Herman described the shooter as weighing approximately 190 lbs. Two other witnesses, described the assailant as a black man with a black, hooded sweatshirt, 6'1" to 6'2", 180 to 200 lbs., and 6 foot to 6'1", anywhere from 180 to 210 lbs. These descriptions were close to the actual height and weight of Ferguson. They are in contrast to the physical description of Robert Coles as he appeared in 2002 – 5'9, 130 lbs. (Robert Coles deposition, App. Vol. 4, pp. 988, 989-990.)

officer, the victim wasn't even able to give his name in answer to a direct question. (App. Vol. 5, pp. 1087-1088.)

After the shooting, detectives went to the hospital to gather information from friends of the victim. Brian Ferguson's name was given as a possible suspect because it was well known to his friends that Ferguson seemed to hold a grudge against Jerry, (App. Vol. 5, p. 1091) and that in recent weeks Jerry had expressed to friends that Ferguson had been following him and had been parked outside Jerry's apartment. (App. Vol. 5, pp. 1077-1083.)

When police located Ferguson at the residence of his girlfriend, Ebony Gibson, in the hours after the shooting, they obtained consent to search his vehicle and apartment. In his car police found and collected a navy hooded jacket and a black hooded sweatshirt similar to the witnesses' descriptions of the shooter's attire. (App. Vol. 5, pp. 1143-1144.) At Ferguson's apartment police found a .50 caliber Desert Eagle firearm. They also found a 9mm shell casing and two 50 caliber casings. (App. Vol. 5, p. 1145.) Subsequently, police collected a document showing Ferguson's purchase of a 9mm handgun from a local dealer on January 22, 2002, only days before the Wilkins murder. (App. Vol. 5, pp. 1152-1153.)

Police also learned that Ferguson was observed near the scene of the shooting shortly afterward. Data retrieved from the entry system at the WVU Recreation Center, less than a mile from the shooting, showed that Ferguson had entered the center at 7:39 p.m. (App. Vol. 5, p. 1054.) Prior to that evening Ferguson had entered the rec center on only nine days between August 2001 and February 2, 2002. As observed by witnesses at the recreation center, his clothing was described as fitting the description of those having been worn by the shooter, including black sweatpants, which Ferguson told police he had not been wearing and did not possess. (App. Vol. 5, p. 1053.) Ferguson subsequently informed police that he swam in the pool

at the rec center and later showered at Ebony Gibson's apartment before police arrived there. He also told police he had been with his friend, Brian Johnson, before going to Ebony's apartment. (App. Vol. 5, pp. 1122-1123.)

On the night of the murder, Ferguson agreed to go with detectives to the police department to answer questions regarding his whereabouts at the time of the shooting. At the station he was advised that police intended to perform gunshot residue sampling on his person and clothing. Ferguson was seated in an interview room with the door open while officers prepared the gunshot residue kit. Although Ferguson had exhibited an unflustered demeanor when first approached by police at Ms. Gibson's apartment, during conversation at the apartment and while riding downtown, both detectives observed that Ferguson immediately became visibly agitated when informed of the gunshot residue sampling, and vigorously wiped his hands on his jacket while he thought he was not being observed by the detectives. He then began to exhibit other, very nervous mannerisms such as excessive coughing during the performance of the gunshot residue sampling and as his contact with police continued. (App. Vol. 5, pp. 1026-1031, 1096-1098.)

When first approached by police at Ebony Gibson's apartment earlier that night, Ferguson emphasized that he had owned only one firearm, the Desert Eagle later collected from his residence, and that he had not fired *any* firearm in over a year. (App. Vol. 5, pp. 1023-1024, Vol. 5, pp. 1093-1094.) However, Ferguson subsequently called police the very next afternoon, less than twenty-four hours after the murder, to report the theft of his 9mm handgun. He had realized that police may have discovered that he had purchased the 9mm recently, and wanted to explain why he had neglected to mention that handgun when police asked him what guns he owned. Ferguson's explanation was that he had forgotten he owned that gun, although he had

purchased it only nine days earlier. (App. Vol. 5, p. 1093.) He also claimed not to remember the last time or place he had seen the 9mm, and he could not explain how it had been stolen from his residence, when there were no signs of forced entry. (App. Vol. 5, pp. 1097-1100.)

At trial, close friends of Jerry Wilkins testified that there had been encounters between the victim and Ferguson beginning in autumn 2000, from which it was clear that Ferguson had developed a strong animosity toward Jerry Wilkins. The anger started with Ferguson's apparent belief that Jerry Wilkins was interested in Ebony Gibson.

In the fall semester 2000, Ebony Gibson had developed a friendship with Jerry Wilkins. On one occasion she gave him a ride in her car to the downtown campus. Also present in Ms. Gibson's car on that occasion was Brian Ferguson. Ferguson accused Jerry Wilkins of being interested in Ebony and warned Jerry to stay away from her. The encounter ended with Brian Ferguson brandishing a knife and threatening Jerry Wilkins. Wilkins emerged from the car and immediately encountered first one and then another friend, to whom he described the startling and alarming event, while still in a state of excitement and concern. Word quickly spread about the incident, yet Wilkins did not encourage or permit any retaliation against Ferguson, nor did he report the incident to police, as urged by friends. (App. Vol. 5, pp. 1060-1062, 1076, 1085-1086.)

During WVU Homecoming 2001, a party was held at the fraternity to which Jerry Wilkins belonged. During the evening Ferguson and his friend, Brian Johnson, arrived at the party. Because of the previous incident involving Ferguson pulling a knife on Jerry Wilkins, Wilkins made it known that Ferguson was not welcome at the fraternity house. Ferguson said that he did not intend to leave, claiming he had been invited to the party. He was escorted out onto the porch, where he elbowed a fraternity brother. Wilkins' fraternity brother responded by

punching Ferguson. Another fraternity brother escorted Ferguson and Brian Johnson down the street. When Ferguson made the threat that he would “get Jerry when his fraternity brothers weren’t around” one of the brothers struck Ferguson, knocking him to the ground and another kicked him. Ferguson was very angry about the incident, according to Brian Johnson, and continued to talk resentfully about it for a week and a half. (App. Vol. 5, pp. 1064-1066, 1069-1074, 1104-1107.)

As the January 2002 semester began Ferguson was observed in his car in the parking lot outside Wilkins’ apartment. Ferguson’s car was an easily recognized gold Lexus SUV. According to Keith Hall, who visited Wilkins on a night in mid-January 2002, the Lexus was leaving the parking area as Keith arrived. When Keith entered Jerry Wilkins’ apartment, Jerry immediately asked if he had just seen Ferguson’s car outside the apartment. (App. Vol. 5, pp. 1077-1083.)

Close friend Solomon Wright testified that, toward the end of January 2002, shortly before Wilkins’ murder, he and Jerry had a conversation in which Jerry discussed his concern that circumstances were leading to a future confrontation between himself and Ferguson. Solomon Wright testified that Jerry had said that if anything happened to him, Solomon would know who did it, and referred to Ferguson during the conversation. (App. Vol. 5, 1055-1058.)

The bullet that killed Jerry Wilkins was a .44 caliber magnum bullet. Ferguson had told police that he had only owned one gun in his life, the .50 caliber Desert Eagle. However, Ferguson’s good friend, Brian Johnson, informed police that he had seen a large revolver with stainless steel finish in Ferguson’s apartment within two weeks before the murder. According to Johnson, Ferguson had called the gun a “magnum” and had described it as a “powerful” gun. This was not the .50 caliber Desert Eagle, with which Brian Johnson was familiar because he had

accompanied Ferguson when he purchased it. Ferguson told Johnson that a friend had given him the magnum. (App. Vol. 5, pp. 1115-1118.) Brian Johnson also told police that Brian Ferguson had *not* spent time with him on the evening of February 2, 2002, as Ferguson had claimed to police as part of his alibi (App. Vol. 5, pp. 1108-1112.)

In a conversation with Brian Johnson after the shooting, Ferguson told Johnson that the murder weapon was “long gone, that police had no eyewitness to identify the perpetrator and that there was no gunshot residue.” (App. Vol. 5, pp. 1111-1114.) However, the jacket and sweatshirt retrieved from Ferguson’s possession on the night of the murder were tested and both showed the presence of gunshot residue. (App. Vol. 5, pp. 1159-1169.)

Ferguson testified in his own defense and presented several witnesses, including Ebony Gibson. Although Ms. Gibson acknowledged the conflict between Ferguson and Wilkins, she minimized the incident involving Ferguson’s threat with a knife by stating that only words were exchanged between the two men. She denied seeing a knife. (App. Vol. 5, p. 1207.) However, the State presented rebuttal witness, Adrienne Batkins, who testified that Ebony Gibson had told her, contemporaneously with the incident, that Ferguson *had* started a confrontation with Wilkins in Ebony’s vehicle and *had* pulled a knife. It was also clear from Ms. Batkins’ testimony that Ebony Gibson had maintained an interest in contacting or communicating with Jerry Wilkins shortly before the murder (App. Vol. 5, pp. 1208-1209), continuing to fuel the resentment and anger of Ferguson toward Wilkins.

In the trial Ferguson was limited in his ability to present positive character evidence by the fact that the State had a large volume of bad character evidence, including threats of violence toward individuals in WVU dormitories resulting in his ejection from student housing, and a firearm theft. The State also possessed a videotape showing Ferguson engaged in the fraudulent

use of a credit card to purchase merchandise. (App. Vol. 5, pp. 993-1008, pretrial hearing.)

Although the State argued that Ferguson's repeated reference to his social status, family background and the prestigious positions held by his relatives constituted good character evidence potentially justifying the State's impeachment by bad character evidence, Ferguson's trial counsel was successful in commencing the trial court to prohibit the State's use of that evidence. (App. Vol. 5, pp. 1009-1010, pretrial hearing.)

In November 2002, Brian Bush Ferguson, was convicted by a jury of premeditated murder, and was later sentenced to life imprisonment.

Following his conviction and sentencing, Brian Ferguson initiated a direct appeal through his counsel, James Zimarowski, and Franklin Cleckley. After a full appellate process, the West Virginia Supreme Court of Appeals affirmed Ferguson's first degree murder conviction. Thereafter, the Supreme Court of the United States denied Mr. Ferguson's Petition for Writ of Certiorari.

The Habeas Corpus Case

On March 28, 2006, Brian Ferguson filed his Petition for Writ of Habeas Corpus through new counsel. His petition asserted 1) that his state and federal constitutional rights were violated when the State failed to disclose evidence affecting the credibility of a prosecution witness; 2) that his state and federal constitutional rights were violated by the ineffective assistance of trial counsel; and 3) that his state and federal constitutional rights were violated by the ineffective assistance of appellate counsel. The answer on behalf of the Respondent Warden was filed on September 18, 2006. By an order dated September 11, 2007, the Honorable Robert B. Stone denied Ferguson's Petition for Writ of Habeas Corpus, having found an omnibus evidentiary hearing to be unnecessary. Judge Stone also subsequently denied Ferguson's Motion to Alter or Amend the Judgment.

Judge Stone's order was appealed to the West Virginia Supreme Court of Appeals, which reversed his judgment and remanded the case for an omnibus evidentiary hearing. During the omnibus evidentiary hearing conducted by the Honorable Phillip D. Gaujot on September 20, 21 and 22, 2011, Ferguson presented only one issue to the circuit court, his claim of ineffective assistance of trial counsel.

The Respondent asserted that his trial counsel was ineffective when he did not investigate and introduce information in the trial that a person named Robert Coles had "confessed" to the murder. Respondent's trial attorney, James B. Zimarowski, testified during the omnibus hearing that his decisions regarding the value, potential use and utility of the Robert Coles information that was produced to the defense in the criminal discovery process, were strategic and were intended to focus on the primary defense that counsel believed would be the most effective. The primary defense was the presentation of the Respondent as a well-spoken, intelligent young man

with a high G.P.A. at West Virginia University, whose family was upper middle class and included a mother who was a federal bankruptcy judge and other relatives in prestigious professions. His strategy was to make the Respondent, in his denial of the crime and denial of any strong animosity toward the victim, the centerpiece of the defense. Counsel believed that the Respondent would make a strong witness in his own defense, capable of withstanding cross-examination. Mr. Zimarowski provided all discovery information to his client during the course of investigating and preparing for the trial. He also had discussions with Ferguson's uncle, John Bush, who was an Assistant United States Attorney at the time. (App. Vol. 2, pp. 64, 66, 79, 94, 99-100, 104, 112-114, 117-123, 128-133, 137-142.)

Mr. Zimarowski had been retained by the Respondent's family to represent the Respondent on the murder charge. He was not appointed from the criminal appointment list and he had represented the Respondent on an earlier criminal charge involving the theft of a firearm. (App. Vol. 2, p. 109.) Although John Bush, Ferguson's uncle, and Ferguson's mother, Lynn Bush, were listed as witnesses for the Petitioner for the omnibus hearing, neither testified to contradict Mr. Zimarowski's testimony that he had conducted discussions with Ferguson's relatives regarding the evidence and trial strategy. *Neither did the Respondent himself testify in contradiction of Mr. Zimarowski's testimony that he had shared all discovery information with the Respondent and discussed all aspects of the case with him.*

The Respondent's assertion that his trial counsel was ineffective revolves around an item in Detective Steven Ford's report, referring to a statement allegedly made by one Robert Coles to or in the presence of Mary Jane Linville and Spring King. The entry in the police report related the following more than nine weeks after the murder:

Mary Linville advised that two days after the shooting of Jerry Wilkins, she was at Spring King's trailer in trailer park off Burroughs Street. Mary Linville said that it was around 0300-0400 hours. Mary Linville said that Robbie Coles showed up at the trailer with a heavy set girl. Mary Linville said that Robbie Coles was drunk and said, "Know that Jerry kid in the paper that got shot, I shot him." Mary Linville said that Robbie Coles said that the police did not what they were talking about, that he shot him in the chest and not in the back. Mary Linville said that Robbie Coles advised that he shot Jerry Wilkins because he did not like the way he looked at him. Mary Linville said that Spring King had since moved the Waynesburg area. (App. Vol. 5, pp.817-818.)

At the omnibus hearing, Detective Steven Ford testified that at the time of the murder investigation, he had extensive experience in drug case debriefings, documenting the information given by defendants. He had previously been assigned to the Mon Valley Drug Task Force and had been a designated DEA agent, attached to many state and federal drug prosecutions. He testified that he had carefully documented the entry in his police report of the Jerry Wilkins murder, and that the words placed in quotation marks were precisely those stated by Mary Jane Linville on April 14, 2012. Detective Ford's handwritten notes from which the police report entry was made were introduced as a hearing exhibit. (App. Vol. 3 p. 816.)

During the omnibus hearing, it became very clear that Mary Jane Linville's versions of the Robbie Coles incident had changed radically from her initial statement to Detective Ford, to her affidavit obtained by Ferguson's habeas counsel and investigator, to her omnibus hearing testimony. Ms. Linville's hearing testimony actually added an entirely new feature, that of Robert Coles allegedly telling Mary Jane Linville that, after shooting the victim and escaping from the scene, he later returned to the scene where "police were everywhere." Her description

of the murder scene where Robbie Coles allegedly observed the many police officers and cruisers is a location at least a mile distant from the actual crime scene. (App. Vol. 2, p. 217)

Testimony showed that Mary Jane Linville and Spring King were interviewed multiple times by Ferguson’s habeas investigator and attorneys.

| Mary Jane Linville | Spring King |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • Unrecorded interview February 7, 2006. • Audio recorded interview March 2, 2006. • Reviewed and signed prepared affidavit December 28, 2007. | <ul style="list-style-type: none"> • Unrecorded interview February 10, 2006. • Handwritten statement March 3, 2006. (Handwritten by Petitioner’s attorney, signed by Spring King) • Reviewed and signed prepared affidavit January 8, 2008. |

The handwritten statement signed by Spring King (App. Vol. 3, p. 811-813) was introduced in the omnibus hearing as an exhibit. In the handwritten statement, Ms. King’s initial account was, “He may have said something about shooting someone that night.” Testimony showed that, after going over the statement with Ferguson’s representatives, an insert was written in the margin by Petitioner’s counsel and initialed by Spring King, stating: Robbie said he shot someone “down the hill.” The sentence “he may have said something about shooting someone that night” was left out of the typed signed affidavit. Instead only the “shot someone down the hill” version was included.

The Spring King affidavit (App. Vol. 3, p.814-815) was also admitted as an exhibit. Included in the handwritten statement, but not the final typed affidavit, was the fact that Ms. King had only been clean for two years (since 2004; the murder was in 2002.) Any negative fact

or vague statement in the handwritten version were either deleted or changed prior to the development of the Spring King affidavit that was attached, along with other affidavits, to the petition for appeal to the West Virginia Supreme Court of Appeals that secured the omnibus hearing in this matter.

Spring King testified that she did not know Coles on a friendly basis. (App. Vol. 2, pp. 198, 243.) In fact, Spring King admitted that the first time she had seen Robbie Coles was an occasion when he spit in her face for some reason. The second time was when he came to the trailer and “confessed” to murder. (App. Vol. 2, p. 248.) Moreover, both Spring King and Mary Jane Linville admitted that Robbie Coles left the trailer when he was told to, he did not threaten either of them with any kind of harm, he never told them not to tell anyone what he had allegedly divulged, and neither of them ever saw him again after that. (App. Vol. 2, pp. 169, 188, 193, 246.) According to the statements and testimony of Mary Jane Linville and Spring King, Coles never mentioned having a gun. Neither did he produce or threaten that he had a gun with him. (App. Vol. 2, p. 188.)

James Zimarowski testified that his decision not to call witnesses regarding the Robbie Coles alleged statements was strategic. He analyzed the information from Mary Jane Linville as untruthful, given the untimeliness of her disclosure and the fact that the setting and the context of the disclosure were her own debriefing in a federal case of drug charges against her. Mr. Zimarowski was aware of the factual inaccuracies contained in the Mary Jane Linville statement to police on April 14, 2002, nearly ten weeks after the murder of Jerry Wilkins, and that those inaccuracies were documented by Detective Ford. (App. Vol. 2, pp. 64, 74-76, 81, 140.)

Mr. Zimarowski testified that he determined that Mary Jane Linville’s reported information was not corroborated by the physical facts of the murder of Jerry Wilkins, in that she

stated that Robbie Coles had said that the victim was shot in the *chest* and not in the back. Jerry Wilkins was actually shot in his upper right back according to the medical examiner's report, a fact known to Mr. Zimarowski.

Mr. Zimarowski testified that maintaining Brian Ferguson's credibility before the jury was of utmost importance to the defense. He filed motions in *limine* prior to trial and effectively obtained rulings from the trial court that prevented reference by the State to Mr. Ferguson's other bad acts and damaging boasts about harming someone.

Referring to his trial strategy, Mr. Zimarowski testified that he believed that bringing Robert Coles to the witness stand in the Respondent's trial, or encountering him as a State's witness, would certainly result in Robert Coles' denial of the murder, and testimony from witnesses that there was absolutely no connection between Robert Coles and Jerry Wilkins that would provide any motivation for the murder. The strength of Ferguson's denial would be undermined by the State's strong evidence of Ferguson's motive, based upon prior animosity between Ferguson and Jerry Wilkins.

Attorney J. Michael Benninger testified on behalf of the Petitioner (State) as an expert witness on the subject of ineffective assistance of counsel. Mr. Benninger agreed with Mr. Zimarowski's assessment of the criminal case, and with the strategy to focus upon Brian Ferguson as the central figure of the defense. Mr. Benninger agreed that to say or present something in the defense of a client, which is not strong and cannot be proven reflects badly upon the client in the eyes of the jury. He agreed that he would not want to present a defense that would look "half-baked" or illusory to the jury. He stated that to pursue a defense or present witnesses who are less than credible, who are subject to significant challenge by the prosecution, or who may be ruled inadmissible in whole or in part before the jury, tends to make a jury doubt

the central defense, which in the Ferguson case was the Respondent's own denial of guilt, supported by several defense witnesses. (App. Vol. 2, pp. 638-642.)

A part of Ferguson's claim of ineffectiveness of his trial counsel is the assertion that Mr. Zimarowski should have sought the raw data of the polygraph examination of Robert Coles that the Morgantown police conducted, as was reported in the investigative report. In an effort to give substance to this argument, Ferguson, during the habeas proceedings, obtained the data from the polygraph examination conducted by Morgantown Police Lt. Kevin Clark in May 2002. Ferguson subsequently obtained the opinion of Barry Colvert, an independent polygraph examiner and consultant, regarding the polygraph examination conducted by Kevin Clark. Mr. Colvert testified at the omnibus hearing that he disagreed with Kevin Clark's report that Robert Coles had passed the polygraph examination and had been considered to be truthful in his denial of involvement in the killing of Jerry Wilkins. Mr. Colvert testified that he would have scored the raw data from the polygraph examination differently, and would have reported failure of the polygraph examination. Kevin Clark testified that he stood by his results as he originally reported them. (App. Vol. 2, p. 329.) There are subjective components to conducting and scoring polygraph examinations, and because polygraph examinations are not universally considered scientifically reliable, results are not admissible in most courts, as Kevin Clark testified (App. Vol. 2, p. 332.) including West Virginia courts, in which they are uniformly prohibited.

The Respondent claimed that his trial counsel should have, and could have, obtained the Robert Coles polygraph report. Attorney Raymond Yackel testified on behalf of the State in the omnibus hearing. Mr. Yackel was defense counsel in *State v. Doman*, 204 W.Va. 289, 512 S.E.2d 211 (1998). He testified that, even if Mr. Zimarowski had asked the State to disclose the

polygraph report, it would not have been produced as criminal discovery, due to Rule 16(a)(2) and *Doman*. (App. Vol. 2, pp. 759-762.) The Respondent's trial counsel would not have been successful in gaining access to the Robert Coles polygraph materials, as pointed out by Mr. Yackel.

Mr. Yackel was expected to testify regarding his expert legal opinion that Mr. Zimarowski was not ineffective and that the decision by Mr. Zimarowski not to further investigate the Robbie Coles information had no reasonable likelihood of affecting the outcome of the trial. However, the circuit court refused to permit the proffered testimony, ruling that it would be merely repetitive of Mr. Benninger's testimony. (App. Vol. 2, pp. 745-752.)

After asking the parties to submit briefs and proposed comprehensive orders for the court's consideration, the circuit court, Honorable Phillip D. Gaujot, entered an order on August 8, 2012, granting the Respondent a new trial.

SUMMARY OF ARGUMENT

The circuit court misapplied the standards for analyzing ineffective assistance of counsel claims in habeas corpus cases set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The lower court did not give deference to trial counsel's explanation of his rationale for his analysis of information and the defense objectives and strategies.

The circuit court's findings did not "indulge the strong presumption that counsel's performance fell within the wide range of reasonably professional assistance", and instead set a standard that *Strickland* and *Miller, supra*, do not contemplate for defense counsel. Defense attorneys should be permitted to rely upon years of experience and well-considered judgment regarding information they receive in the criminal discovery process and in the strategic

decisions that are based upon the information that is available to them at the time of trial preparation and trial proceedings.

A habeas petitioner seeking to prove ineffective assistance of counsel must meet a high burden. The circuit court did not impose that burden and instead set the bar too low for its finding of ineffective assistance by seasoned trial counsel. The court failed to give the mandated deference to trial counsel's testimony explaining his trial strategy, which he had discussed with the Petitioner.

Trial counsel's testimony during the omnibus hearing established a rational basis for the defense strategy, which counsel had shared and discussed with the Respondent and at least one of the Respondent's relatives, some of whom are high achieving legal professionals. Although the relatives were listed as witnesses for the omnibus hearing, neither they nor the Respondent testified in contradiction of trial counsel's testimony.

The circuit court failed to give due consideration to the State's experts' opinions regarding trial counsel's rationale for his trial strategy. One of the legal experts was highly qualified attorney J. Michael Benninger, who testified extensively regarding the reasonableness of trial counsel's strategic decisions regarding the Robbie Coles information, and his opinion that the evidentiary realities of attempting to present Robbie Coles as the murderer would have failed utterly and damaged the primary defense in the process.

The Petitioner intended to present the testimony of a second highly qualified legal expert, attorney Raymond Yackel, to support the position that the Respondent's trial counsel was neither ineffective nor was there reasonable likelihood that inclusion of the "Robbie Coles" defense would have affected the outcome. The circuit abused its discretion by limiting Mr. Yackel's testimony to only one issue, rather than permitting him to discuss the reasonableness of trial

counsel's defense strategy. The circuit court incorrectly ruled that Mr. Yackel's testimony witness would be merely repetitive of Mr. Benninger's. It is clear that when a petitioner is claiming that no reasonable attorney would have made the decisions made by his trial counsel, the opinion of more than one attorney, highly experienced in the representation of defendants charged with murder, should have been considered by the circuit court, rather than disallowed.

Mr. Yackel's testimony was expected to discuss particular aspects of the State's evidence as it pertained to Mr. Zimarowski's decisions regarding defense preparation and strategy. He would have concluded that trial counsel's decisions were reasonable within the known and existing context prior to trial. Mr. Yackel would also have stated that, in light of the State's overwhelming evidence, with which he had completely familiarized himself, a defense focused on Robbie Coles would not have changed the outcome.

The circuit court's ruling establishes a mechanical rule that trial counsel's reliance on information in a police report automatically constitutes ineffective assistance of counsel, no matter the character of the information in the report and the collateral information that makes it entirely reasonable for counsel to rely on the report. Such a mechanical, inflexible position is not contemplated by *Strickland* and *Miller*.

The circuit court's order sets a standard that mandates trial counsel turn over every unlikely stone and travel perceived blind alleys, rather than developing and following a reasonable trial strategy, even when counsel's contemporaneous assessment of available information, per *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995), indicates the futility of those avenues of investigation. This creates a bright-line standard that imposes an unreasonable burden on finite time and resources of every defense attorney and

public defender. Such a heightened standard is neither contemplated nor imposed by *Strickland* and *Miller*.

The circuit court's ruling that trial counsel's alleged defective representation of the Respondent had a reasonable likelihood of affecting the outcome of the trial is clearly erroneous. The circuit court incorrectly assessed the Petitioner's witnesses in the omnibus hearing, finding them to be consistent and credible even though cross examination revealed their evidence to be contradictory to each other, contradictory to physical facts surrounding the murder and its location, and to be the product of the gloss of exaggeration and extensive contacts and influence by the Respondent's investigator and attorneys.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that this case is appropriate for Rule 20 argument. Oral argument is necessary to assist the Court to resolve the issue of ineffective assistance of counsel, even though the case involves assignments of error in the application of settled law, i.e., *Strickland v. Washington*, and *State v. Miller*.

ARGUMENT

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). See *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 763, 656 S.E.2d 789, 792 (2007).

I. THE CIRCUIT COURT MISAPPLIED THE STANDARD FOR ANALYZING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN HABEAS CORPUS CASES SET FORTH IN *STICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S.Ct. 2052 (1984) AND *STATE V. MILLER*, 194 W.Va. 3, 459 S.E.2d 114 (1995). THE CIRCUIT COURT SET THE BAR TOO LOW FOR ITS FINDING OF INEFFECTIVE ASSISTANCE BY SEASONED TRIAL COUNSEL BY FAILING TO GIVE THE MANDATED DEFERENCE TO TRIAL COUNSEL’S TESTIMONY EXPLAINING HIS TRIAL STRATEGY, WHICH HE HAD DISCUSSED WITH THE PETITIONER AND THE PETITIONER’S LEGALLY TRAINED FAMILY MEMBERS.

The Respondent asserted that his trial counsel was ineffective when he did not focus the defense on a contention that a person named Robert Coles had “confessed” to the murder. Respondent’s trial attorney, James B. Zimarowski, testified during the omnibus hearing that his decisions regarding the value, potential use and utility of the Robert Coles information that was produced to the defense in the criminal discovery process, were strategic and were intended to focus on the primary defense that counsel believed would be the most effective. The primary defense was the presentation of the Respondent as a well-spoken, intelligent young man with a high G.P.A. at West Virginia University, whose family was upper middle class and included a mother who was a federal bankruptcy judge and other relatives in legal and other prestigious professions. His strategy was to make the Respondent, in his denial of the crime and denial of any real animosity toward the victim, the centerpiece of the defense. Counsel believed that the Respondent would make a strong witness in his own defense, capable of withstanding cross-examination. Mr. Zimarowski provided all discovery information to his client during the course of investigating and preparing for the trial. He also had discussions with Ferguson’s uncle, John Bush, who was an Assistant United States Attorney at the time. (App. Vol. 2, pp. 64, 66, 79, 94, 99-100, 104, 112-114, 117-123, 128-133, 137-142.)

Mr. Zimarowski had been retained by the Respondent’s family to represent the Respondent on the murder charge. He was not appointed from the criminal appointment list and

he had represented the Respondent on an earlier criminal charge involving the theft of a firearm. (App. Vol. 2, p. 109) Although John Bush, Ferguson's uncle, and Ferguson's mother, Lynn Bush, were listed as witnesses for the Petitioner for the omnibus hearing, neither testified to contradict Mr. Zimarowski's testimony that he had conducted discussions with Ferguson's relatives regarding the evidence and trial strategy. *Neither did the Respondent himself testify in contradiction of Mr. Zimarowski's testimony that he had shared all discovery information with the Respondent and discussed all aspects of the case with him.*

It is well settled law in civil cases that:

[W]here one party to a legal controversy has within its control evidence material to the issue and does not produce it, there is a strong presumption that such evidence, if produced, would operate to his prejudice. This so-called presumption arises from the failure to produce real or documentary evidence, the failure to call a material witness, or from a party's own failure to take the stand as a witness or, as a witness, to answer questions when he possesses material knowledge. *McGlone v. Superior Trucking Company, Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987)

The circuit court failed to include the failure of the Respondent to present material witnesses, including himself, in the calculus of the decision on ineffective assistance of counsel.

Respondent Brian Bush Ferguson's trial counsel was effective in presenting the strongest points of the Brian Ferguson defense. These points included the argument that Jerry Wilkins did not identify his shooter when he could have, implying that Wilkins did not know his shooter. (Testimony by the medical examiner indicated that Mr. Wilkins may well have not been in a condition to communicate information.) Mr. Zimarowski emphasized that the murder weapon was never found and nothing of a physical or documentary nature tied Brian Ferguson to the murder. The defense also attempted to paint Ferguson's friend, Brian Johnson, as a liar in his testimony, with reasons to lie to get himself out of some sort of police trouble. Mr. Zimarowski

focused on the small quantity of gunshot residue found, and called their own expert on that issue. He also minimized the finding of the .44 caliber casing in the dumpster because the dumpster served multiple apartments in the complex. He argued to the jury that the witnesses were inconsistent in their description of the shooter. He also attempted to show that the shooter had fled in a getaway car located not far from the scene of the murder, and that the car did not match Ferguson's own vehicle. Mr. Zimarowski pointed out that the clothing described as being worn by the shooter, even though it might look the same as some clothing possessed by Ferguson, was clothing of the description generally worn by a great number of young men in Morgantown at the time. (App. Vol. 2, pp.683-698.)

The proper standard for judging an attorney's performance is that of reasonably effective assistance considering all of the circumstances. A challenge must prove that counsel's representations fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be high deferential, and a fair assessment of the attorney's performance required that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. The standard requires no special amplification in order to define counsel's duty to investigate. The circuit court must apply the strong presumption that trial counsel's performance was reasonable and adequate and fell within the "wide-range" of effective assistance of counsel. Instead of "indulging" the strong presumption that counsel's performance fell within the wide range of reasonably "professional assistance," the circuit court set a mechanical standard that *Strickland* and *Miller* do not contemplate for defense counsel, who should be permitted to rely upon years of experience and well-considered judgment regarding

strategic decisions that are based upon the information that is available to them at the time of trial preparation and trial proceedings.

Mr. Zimarowski's qualifications as a defense attorney were discussed during the omnibus hearing and include the fact that he had been practicing criminal law exclusively for many years at the time of his representation of Ferguson. He had served on the criminal appointment lists in Monongalia County and surrounding counties for many years and subsequently began to represent defendants only on retained cases. He had practiced criminal law in federal courts and continues to take federal criminal appointments. He testified that he has represented defendants in approximately twenty cases of first degree murder, taking many of them to jury trials. He stated that four first degree murder trials had ended with acquittals, two resulted in voluntary manslaughter verdicts and one in an involuntary manslaughter verdict. Others resulted in plea agreements that were more favorable than first degree murder convictions. In a Virginia death penalty case, he was able to obtain a plea for his client that avoided the death penalty. Five of his first degree murder trials resulted in murder verdicts against the clients. Mr. Zimarowski has also tried approximately six kidnapping cases, which are considered capital cases in West Virginia. (App. Vol. 2, pp. 105-107.)

James Zimarowski testified that his decision not to call witnesses regarding the Robbie Coles alleged statements was strategic. He analyzed the information from Mary Jane Linville as untruthful, given the untimeliness of her disclosure and the fact that the setting and the context of the disclosure were her own debriefing in a federal case of drug charges against her. Mr. Zimarowski testified about his extensive history representing drug-charged defendants, who are all debriefed by investigators and who routinely give information that is highly questionable in order to obtain more favorable sentence recommendations for themselves. Mr. Zimarowski was

aware of the factual inaccuracies contained in the Mary Jane Linville statement to police on April 14, 2002, nearly ten weeks after the murder of Jerry Wilkins, and that those inaccuracies were documented by Detective Ford. (App. Vol. 2. pp. 64, 74-76, 81, 140.)

Mr. Zimarowski testified that he determined that Mary Jane Linville's reported information was not corroborated by the physical facts of the murder of Jerry Wilkins, in that she stated that Robbie Coles had said that the victim was shot in the *chest* and not in the back. Jerry Wilkins was actually shot in his upper right back according to the medical examiner, a fact known to Mr. Zimarowski. He concluded that an attempt to present Linville as a witness in the Ferguson trial would encounter insurmountable hearsay obstacles and be highly likely to incur unwanted, damaging results. Mr. Zimarowski testified that he declined to further investigate the Robbie Coles information based upon his analysis that he could best use the Coles information by allowing mention of a third party involvement to be made during trial without exposing the details, which would have shown the implausibility of a claim by the defense that Robert Coles had committed the murder rather than Ferguson. Mr. Zimarowski stated that it was his professional opinion that attempting to make a "defendant" out of Robert Coles would backfire badly and damage his credibility and that of the Respondent in the eyes of the jury. It was Mr. Zimarowski's strategic decision to present his defendant as wrongly accused of the murder of Jerry Wilkins, arguing that Wilkins had been deliberately tracked down at his residence by an unknown person who had some particular reason to want Mr. Wilkins dead, because witness statements showed that Jerry Wilkins had been encountered outside of his apartment, chased across the parking lot and shot to death after he lost footing and slid to the ground. (App. Vol. 2, pp. 66, 76, 79, 81, 114, 129-133, 136-137, 142.) Those known facts were entirely inconsistent with a scenario of a "random act of violence" inherent in a "Robbie Coles" defense.

Mr. Zimarowski testified that maintaining Brian Ferguson's credibility before the jury was of utmost importance to the defense. He filed motions in *limine* prior to trial and effectively obtained rulings from the trial court that prevented reference by the State to Mr. Ferguson's criminal history involving theft and possession of a firearm, involvement in fraudulent use of a credit card, and an out-of-court boastful statement to a friend that he had chased and shot someone in Washington, D.C. (App. Vol. 2, pp. 121-122.)

Referring to his trial strategy, Mr. Zimarowski testified that he believed that bringing Robert Coles to the witness stand in the Respondent's trial, or encountering him as a State's witness, would certainly result in Robert Coles' denial of the murder, and testimony from witnesses that there was absolutely no connection between Robert Coles and Jerry Wilkins that would provide any motivation for the murder. With a Robbie Coles focus the defense would be encumbered with the non-credible claim by Mary Jane Linville (if admissible at all) that Robbie Coles had stated that he had killed "that Jerry guy" merely because he did not like the way the victim had looked at him. The Ferguson defense would be placed in the position of portraying the implausible "Robbie Coles defense" along with a simple denial by Brian Ferguson. The strength of his denial would be undermined by the State's extensive evidence of Ferguson's motive, based upon prior animosity between Ferguson and Jerry Wilkins. That animosity had resulted in Ferguson brandishing a knife toward the victim and threatening him over Ferguson's girlfriend. Mr. Zimarowski was aware that further evidence of Ferguson's motive would be introduced regarding the fact that Ferguson had been beaten up by the Wilkins' fraternity brothers when he attempted to attend a fraternity party at which he was not welcome because of the knife incident, and threatened to "get" Jerry Wilkins when his fraternity brothers were not around. The State's evidence of which Mr. Zimarowski was well aware included Ferguson

stalking the victim by parking his vehicle just outside the victim's apartment at times shortly before the murder.

To the evidence presented in the record and during the omnibus proceedings the circuit court must apply the standards set forth in *Strickland v. Washington* and *State v. Miller, supra*. The cases require that a court deciding an ineffective assistance of counsel claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. *State ex rel. Daniel v. Legursky, supra* cites the "rule of contemporary assessment", which requires an attorney's actions to be examined according to what was known and reasonable at the time the attorney made his or her choices. These cases, which guide a habeas court's analysis, hold that counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary.

Mr. Zimarowski offered testimony that although he declined to investigate [Robbie Coles] he did not decline to evaluate and to use the information to its best possible strategic advantage during the trial. (App. Vol. 2, p. 132.) This position is squarely supported by *Strickland* holding that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland* at 691. In reviewing the facts and circumstances surrounding the Robbie Coles information that were evaluated by Mr. Zimarowski, it is obvious that his decision not to investigate the obtaining and declination to use this information was more than reasonable, and thus approved by *Strickland*.

The Respondent's trial counsel fulfilled the duty to consult with the Respondent on important decisions and to keep Ferguson informed of important developments in the course of the prosecution, as is mandated by *Strickland v. Washington*. Based upon a study of the State's

evidence and conversations with the client, trial counsel made strategic decisions regarding: 1) what was the objective of the defense, 2) what was the trial strategy to reach that objective, and 3) how was the strategy to be implemented. Relying upon *Strickland* and *Miller*, the circuit court should have found counsel's choices, as explained during the omnibus hearing and with the backdrop of the criminal trial record, to be reasonable.

II. THE CIRCUIT COURT FAILED TO GIVE DUE CONSIDERATION TO THE STATE'S EXPERT'S OPINIONS REGARDING TRIAL COUNSEL'S RATIONALE FOR HIS TRIAL STRATEGY.

The circuit court failed to give due consideration to the State's expert's opinions regarding trial counsel's rationale for his trial strategy. The circuit court gave no consideration to the extensive and well-reasoned expert opinion of attorney J. Michael Benninger, who testified that Mr. Zimarowski's tactical decisions were reasonable in light of certain indisputable facts surrounding the murder and his analysis of the Robbie Coles information as it existed prior to trial in 2002.

Mr. Benninger has an extensive civil and criminal practice in state and federal courts in West Virginia and Pennsylvania, including the representation of numerous clients charged with murder. Among his professional affiliations is his membership as a Fellow in the American College of Trial Lawyers, an invited and peer-reviewed membership. He is also an Advocate in the American Court of Trial Advocates, another peer-reviewed organization of exclusive membership. Mr. Benninger has served on the West Virginia Lawyer Disciplinary Board in the position of conducting evidentiary hearings and making findings of fact. He has taught Justice Franklin Cleckley's criminal procedure law class at the West Virginia University College of Law when Justice Cleckley was stricken with a serious illness. (App. Vol. 2, pp. 599-609.)

Mr. Benninger testified that he held a high opinion of James Zimarowski as a seasoned, skilled, experienced, and capable criminal defense attorney, with whom he has discussed legal issues, from whom he has sought technical advice regarding points of law, and to whom he has referred clients for representation. (App. Vol. 2, pp. 617-618.)

Mr. Benninger agreed with Mr. Zimarowski's assessment of the criminal case, and with the strategy to focus upon Brian Ferguson as the central figure of the defense. Mr. Benninger recognized that Mr. Zimarowski had a client who was intelligent, had a 4.0 G.P.A., and who was a good-looking young man, who came from a supportive family of legally trained professionals. The defendant was not indigent and did not appear to have gang associations. Mr. Benninger stated that, if it is viable, the best possible defense presentation, in any courtroom in any case, is for the defendant to testify in his own defense. (App. Vol. 2, pp. 623-628, 637.)

Mr. Benninger agreed with Mr. Zimarowski's assessment of the criminal case, and with the strategy to focus upon Brian Ferguson as the central figure of the defense. Mr. Benninger agreed that to say or present something in the defense of a client, which is not strong and cannot be proven reflects badly upon the client in the eyes of the jury. He agreed that he would not want to present a defense that would look "half-baked" or illusory to the jury. He stated that to pursue a defense or present witnesses who are less than credible, who are subject to significant challenge by the prosecution, or who may be ruled inadmissible in whole or in part before the jury, tends to make a jury doubt the central defense, which in the Ferguson case was the Respondent's own denial of guilt, supported by several defense witnesses. (App. Vol. 2, pp. 638-642.)

Mr. Benninger agreed with Mr. Zimarowski's assessment that the Mary Jane Linville statement to police on April 14, 2002, was highly lacking in credibility, due to the information being given in a debriefing session in a drug case against her, as well as the content of the statement itself, which was completely inconsistent with known and documented facts about the murder. Mr. Benninger also pointed out that Mr. Zimarowski's deposition during the habeas proceedings described the conversations he had with Ferguson and at least one member of Ferguson's "co-counsel family" regarding the Mary Jane Linville information. The fact that Mr. Zimarowski discussed the issue and the strategy with his client further placed Mr. Zimarowski's decisions into the context of the strategy of his handling of Ferguson's defense, in Mr. Benninger's opinion. (App. Vol. 2, pp. 644-647.)

Mr. Benninger further agreed that the content of the Mary Jane Linville information was extremely problematic in that she reported to police that the conversation with Robbie Coles had occurred two days after the murder, that the victim had been shot in the chest versus the back, that he had referenced the victim's name that had been gleaned from newspaper coverage, and concluded with reporting a random act of violence (because Robbie Coles allegedly said that he had not liked the way the victim looked at him.) Mr. Benninger recognized that Detective Ford had specifically documented the Linville statement, and that the physical facts of the murder, as known by Mr. Zimarowski at the time he became aware of the Robbie Coles information from the police report, were entirely contradictory to the Mary Jane Linville statement. (App. Vol. 2, pp. 648-649.)

Mr. Benninger opined that, if Robbie Coles' alleged out-of-court statement were to have been made a feature of the Ferguson defense at trial, Mr. Coles would have to appear as a witness called by one party or the other. As Mr. Coles did in his police interviews, he certainly

would have denied under oath any involvement in the killing of Jerry Wilkins. Thereupon, the defendant would attempt to call Mary Jane Linville and/or Spring King as witnesses, to impeach Robbie Coles by extrinsic evidence, if permitted by the trial court. Even if Mr. Zimarowski had obtained the type of statements presented by those witnesses during the omnibus hearing in the habeas corpus hearing, they would have been subject to the very damaging cross-examination that occurred in the habeas corpus hearing, thereby significantly damaging the credibility of a defense strategy pointing to Robert Coles as the perpetrator of the murder. Even if the trial court had accepted an argument that the later statements made by Mary Jane Linville, such as those presented in her testimony in this proceeding, constituted an excited utterance by Robbie Coles, Linville's testimony would nonetheless have been fatally damaged by cross-examination dwelling on the fact that her initial statement, made during her drug debriefing long after the murder, was a much different version of events than those which she portrayed in the omnibus hearing. (App. Vol. 2, pp. 650-655.)

III. THE CIRCUIT COURT ABUSED ITS DISCRETION BY LIMITING THE STATE'S SECOND EXPERT WITNESS'S TESTIMONY TO ONLY ONE ISSUE, RATHER THAN PERMITTING HIM TO DISCUSS THE REASONABLENESS OF TRIAL COUNSEL'S DEFENSE STRATEGY. THE CIRCUIT COURT INCORRECTLY RULED THAT THE STATE'S SECOND EXPERT WITNESS WOULD BE MERELY REPETITIVE OF THE FIRST EXPERT.

The circuit court incorrectly ruled that the State's second expert witness, attorney Raymond H. Yackel, would be merely repetitive of J. Michael Benninger's testimony. Because a finding of ineffective assistance of counsel under *Strickland* and *Miller* requires the habeas court to find that no reasonably competent attorney would make the decisions made by the attorney under scrutiny, it would certainly be relevant for the court to entertain the testimony of more than one experienced and qualified criminal attorney, to the effect that the handling of the

case by trial counsel was reasonable and fell within the wide-range of reasonably professional assistance. The circuit court sustained the objection by the Respondent to the effect that Mr. Yackel's testimony would have merely been repetitive and cumulative of Mr. Benninger's testimony.

Mr. Yackel testified that he had tried eleven murder cases to jury verdicts, and has represented more in resolutions by plea agreements. He has practiced in state and federal courts, is a member of the Board of Governors of West Virginia Trial Lawyers Association, and has lectured at WVU and WVU College of Law on criminal law.

As proffered by the State during the omnibus hearing, Mr. Yackel would have offered his two-fold opinion 1) that trial counsel's representation was not ineffective and 2) that presentation by the defense of Robbie Coles as an alternative shooter would have had no reasonable likelihood of affecting the outcome of the trial to Brian Ferguson's benefit.

Mr. Yackel was permitted to testify only regarding the effect of *State v. Doman, supra*, and criminal discovery Rule 16(a)(2) regarding the Respondent's claim that his trial counsel should have, and could have, obtained the results of the polygraph examination of Robert Coles conducted at the Morgantown Police Department, and any raw data therefrom. Mr. Yackel testified that any request by trial counsel for that information would have been defeated by *Doman* and the discovery rule, as discussed in *Doman*, wherein the West Virginia Supreme Court of Appeals held that polygraph examinations fall within criminal discovery Rule 16(a)(2), which lists information that is not subject to disclosure by the State in criminal discovery.

The circuit court's limitation of Mr. Yackel's expert testimony resulted in unfairness to the State and tended to reduce the burden of proof placed upon the habeas petitioner.

IV. THE CIRCUIT COURT’S ORDER ESTABLISHES A MECHANICAL RULE, CONTRARY TO *STRICKLAND* AND *MILLER*, THAT TRIAL COUNSEL’S RELIANCE ON INFORMATION IN A POLICE REPORT AUTOMATICALLY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL, NO MATTER THE CHARACTER OF THE INFORMATION IN THE REPORT AND THE COLLATERAL INFORMATION THAT MAKES IT ENTIRELY REASONABLE FOR COUNSEL TO RELY ON THE REPORT.

During the testimony of Det. Steve Ford in the habeas omnibus hearing, the State introduced as an exhibit a portion of the detective’s police report in which appeared the entry of the debriefing of Mary Jane Linville. The entry states:

04/11/02

1315 Hours:

Detective Ford went to a debriefing of a [federal] defendant, Mary Jane Linville, in a drug case with Detective Metheney. Mary Linville advised that *two days after* the shooting of Jerry Wilkins, she was at Spring King’s trailer in the trailer park off of Burroughs Street. Mary Linville said that it was around 0300-0400 hours. Mary Linville said that Robbie Coles showed up at the trailer with a heavysset girl. Mary Linville said that Robbie Coles was drunk and said, “know that Jerry kid in the paper that got shot, I shot him.” Mary Linville said that Robbie Coles said that the police did not know what they were talking about, that he shot him in the *chest and not in the back*. Mary Linville said that Robbie Coles advised that he shot Jerry Wilkins *because he did not like the way he looked at him*. Mary Linville said that Spring King had since moved to the Waynesburg area. (Emphasis added throughout.) (Petitioner’s Hearing Exhibit No. 4, App. Vol. 5, pp. 817-818.)

Detective Ford’s testimony recounted police efforts to locate Robbie Coles, interview him at the police department, and set up a subsequent time for him to return to the department to take the polygraph examination. Detective Ford’s omnibus hearing testimony included the fact that the polygraph examiner reported that Coles had passed the polygraph. All of the information involving the Mary Jane Linville interview and the Robert Coles follow-up was included in the police report produced to the defense prior to trial. As James Zimarowski testified at the habeas hearing, he reviewed, analyzed and determined a strategic use of the

Robbie Coles information, including the content and context of the Mary Jane Linville statement. The strategic decision was based upon what counsel knew and was apt to learn during pre-trial preparation. (App. Vol. 2, pp. 61-70.) As Mr. Benninger agreed, Mr. Zimarowski's analysis was reasonable, and the circuit court did not give due deference to the tactical decisions of trial counsel made within the context of all of the information provided by the State and known to counsel through consultations with his own client.

The circuit court's order sets a standard that mandates trial counsel turn over every unlikely stone and travel perceived blind allies, rather than develop and follow a reasonable trial strategy, even when counsel's contemporaneous assessment of available information, per *State ex. rel. Daniel v. Legursky, supra*, indicates the futility of those avenues of investigation. The circuit court's order creates a bright-line standard that imposes an unreasonable burden on finite time and resources of every defense attorney and public defender. Such a heightened standard is neither contemplated nor imposed by *Strickland* and *Miller*.

V. THE CIRCUIT COURT'S RULING THAT TRIAL COUNSEL'S ALLEGED DEFECTIVE REPRESENTATION OF THE RESPONDENT HAD A REASONABLE LIKELIHOOD OF AFFECTING THE OUTCOMES OF THE TRIAL IS CLEARLY ERRONEOUS. THE CIRCUIT COURT INCORRECTLY ASSESSED THE PETITIONER'S WITNESSES IN THE OMNIBUS HEARING, FINDING THEM TO BE CONSISTENT AND CREDIBLE EVEN THOUGH CROSS-EXAMINATION REVEALED THEIR EVIDENCE TO BE CONTRADICTORY TO EACH OTHER, CONTRADICTORY TO PHYSICAL FACTS SURROUNDING THE MURDER AND ITS LOCATION, AND TO BE THE PRODUCT OF EXAGGERATION AND OF INFLUENCE BY THE RESPONDENT'S REPRESENTATIVES.

The subsequent permutations of Mary Jane Linville's initial statement to police can only be attributed to the passage of time, the influence of media reports and the suggestibility of an unsophisticated individual persistently and frequently exposed to Ferguson's version of the facts of this case. The testimony of Mary Jane Linville about the multiple times she was contacted by

the Respondent's investigator, Nancy Stephens, and the nearly two-year passage of time between Ms. Linville's first recorded interview by Nancy Stephens and Linville's signing of her affidavit is persuasive of that point.

In her testimony Mary Jane Linville agreed that she had described the number of times that she spoke to the Respondent's investigator, Nancy Stephens, as "a hundred times", although she explained that "a hundred" was an exaggeration for "a lot." (App. Vol. 2, pp. 176.) During the omnibus hearing Ms. Linville referred to Ferguson's counsel as her own lawyer before correcting herself, while she described one of the many conversations in which she was presented with witness statements and a copy of police report so they could "review" her version of the events. (App. Vol. 2, pp. 211-212.) Ms. Linville was told by Ferguson's counsel that the police "have someone that claims they're innocent and that they don't think he did it because he always had a clean record and stuff." (App. Vol. 2, p. 213.)

The testimony of witness Spring King during the habeas hearing did nothing to enhance the credibility of Mary Jane Linville's testimony. In fact, it was much different. Ms. King declared that her memory of the events was very clear, and that she was certain that the alleged visit made by Robbie Coles to her trailer in early 2002 occurred just as she stated in her direct testimony at the habeas hearing. When comparing Spring King's testimony with Mary Jane Linville's version of the event, King's was much more limited than the embellished version presented by Mary Jane Linville. This contrast is meaningful and damaging to the circuit court's finding that a Robert Coles defense based solely on these two witnesses, would have had a reasonable likelihood of affecting the outcome of the trial.

The following comparison of testimony of Mary Jane Linville and Spring King demonstrates the contrasts and inconsistencies in their testimony regarding the alleged visit by Robbie Coles to the Spring King trailer. (References below are to App. Vol. 2:)

| Mary Jane Linville | Spring King |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • “Man, you-all got to give me a place to hide out. I just killed a fucking nigger up on the hill, come down from the school, and I know he’s dead because I shot like three times and I hit him.” (pp. 159-160) • “I just killed a fucking nigger on the hill by the college there and I need a place to hide out. And I know I fucking killed him because I shot three times, hit him in the back probably--at least twice, and once here. And when I hit him, he dropped.” (p. 210) (The statement is contrary to physical and testimonial evidence, in that the victim was chased and fell down before being shot, he did not “drop”; witnesses heard no more than two shots and the victim was shot only once.) • “He said he had drove back by, or drove by there and there was cops all the way down to the keg store.” (p. 215) (This claim was never presented in <i>any</i> prior statement of Ms. Linville.) • He asked how Shallowmist was doing. (pp. 202-204) (Shallowmist was Mary Jane Linville’s girlfriend, who had been in the hospital for a lengthy period.) • On that night, two of the items of clothing Coles was wearing were | <ul style="list-style-type: none"> • “I can’t believe what I just did. I just shot a man down the hill.” (p. 227) • Q: [Y]our memory of the complete statement of Robbie Coles is I shot—let me make certain I have that – I shot a man down the hill? A: Yes. (pp. 230-231) • (Referencing her sworn affidavit) Q: He never said hide out? A: No. (p. 245) • Q: He didn’t tell you how many times he shot? A: No. (p. 231) • Q: So Robbie didn’t give you any more explanation or any description of the shooting other than he shot someone down the hill? A: No. Q: And if he did you would have heard it? A: Yes. (p. 247) • Q: He didn’t tell you about seeing any police in the area? A: No, ma’am. Q: Are you certain of that? You would remember that? A: Yes. (p. 231) • Coles did not ask about Shallowmist. (p. 232) • Coles was wearing boots. (p. 246) He was not wearing a hat. (p. 247) |

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|
| <p>tennis shoes (p. 182) and a cap (p. 183)</p> <ul style="list-style-type: none"> • The car Mary Jane Linville claimed Robbie Coles arrived in was seafoam green (p. 163) | <ul style="list-style-type: none"> • The car in which Coles had allegedly arrived was dark-colored. (p. 242) |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|

The claims by Spring King and Mary Jane Linville that Robbie Coles chose to go to Spring King’s trailer after supposedly shooting a stranger for no particular reason, seem all the more spurious when placed in the context of the testimony at the omnibus hearing, especially Spring King’s testimony that Robbie Coles had spit in her face the first time she had met him. (App. Vol. 2, p. 248.)

A “Robbie Coles defense” would have enabled the jury to fully assess the great implausibility of Robbie Coles killing Jerry Wilkins, when viewed in conjunction with the great plausibility of the story against Ferguson told by the State’s evidence. Based upon these known facts from the record, the alleged statements by Robert Coles, to or in the presence of King and Linville, do not reasonably match the actual evidence and would have carried little credibility in the criminal trial.

As pointed out by Mr. Benninger, the habeas court had an opportunity to see and listen to the Robbie Coles defense as it *might* have played out at trial. Although Mr. Zimarowski did not seek out and interview Mary Jane Linville and Spring King, his evaluation of the admissibility and value of that evidence was correct.

From a position of hindsight, the Robbie Coles defense had no reasonable likelihood of changing the outcome of Ferguson’s criminal trial to his advantage. The circuit court was in a similar position to the habeas court in *State ex rel. Daniel v. Legursky, supra*, in that the court

heard the very best version of the evidence that would have been offered at Ferguson's trial, had the defense strategy been the "Robbie Coles defense."

Although the circuit court, like the *Legursky* habeas court, heard the entirety of the Respondent's proposed evidence for trial, that should have been the only exercise of hindsight in which the circuit court engaged. As stated in *Legursky*, habeas courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined under what was known and reasonable at the time the attorney made his or her choices. The evidence shows that Ferguson's trial counsel was not ineffective in the strategic decisions regarding the Robert Coles information known at the time of trial.

The use of a Robbie Coles defense in addition to the Respondent's defense of denial, would not have altered the State's presentation of its own case at trial, nor diminished the effect of its evidence. Mr. Benninger testified that the State's case was the strongest circumstantial evidence case of which he had ever become aware in his career in criminal matters. In his analysis of the ineffective assistance claims during the omnibus hearing, he summarized the State's evidence against Brian Ferguson, which included the following commentary:

- Several witnesses testified that Ferguson had perceived a problem with victim Jerry Wilkins over Ferguson's girlfriend, Ebony Gibson, which resulted in an incident that occurred in a car in which Brian Ferguson, Ebony Gibson and Jerry Wilkins were all present. Brian Ferguson displayed and brandished a knife toward Jerry Wilkins while making a threat regarding Ebony Gibson. This happened approximately sixteen months prior to the murder. (App. Vol. 2, p. 631.)
- Witnesses testified that, approximately three months before the murder Brian Ferguson had attempted to attend a party at a fraternity, of which Jerry Wilkins was a member. Jerry Wilkins' fraternity brothers were aware of the prior occurrence of the knife incident and ejected Mr. Ferguson from the party. In that process Mr. Ferguson was struck several times and knocked to the ground. He responded, according to testimony, that he would "get" Jerry Wilkins when his fraternity brothers were not around. (App. Vol. 2, p. 632.)

- In the days and weeks before Jerry Wilkins murder, Brian Ferguson was seen parked in his vehicle in the parking lot just outside of Mr. Wilkins' apartment.
- Jerry Wilkins was accosted as he emerged from his apartment located in a cul-de-sac area that included the parking lot for a number of apartments. He was chased by the assailant who was wielding a handgun, silver in color. Jerry Wilkins was chased to where he lost footing and slid to the ground and was shot in the back. Witnesses observed this event from varying distances and provided height and body weight descriptions that matched Ferguson. (According to the trial record, four witnesses gave height and weight descriptions from six-foot to six-foot-two inches and weight descriptions of 180 to 210 pounds. Testimony from Detective Ford during the omnibus hearing advised that the physical description of Robert Coles during 2002 was much different from the description of the shooter given by witnesses. He stated that Ferguson is much taller than Robert Coles and that Coles was "a scrawny, skinny little guy" at that time.) (App. Vol. 2, p. 507.)
- Ferguson's name was immediately provided to investigating police officers as the only person with whom Jerry Wilkins had ever had any disagreement or trouble.
- When police located Brian Ferguson at Ebony Gibson's apartment on the night of the murder, Ferguson informed officers that the only firearm he owned, or had ever owned, was a .50 caliber desert eagle. He also denied having shot firearms for a couple of years. He stated that he had gone to the WVU recreation center at around 7:00 p.m. that evening and that he had gone swimming there. (App. Vol. 2, pp. 631, 741.)
- Police subsequently learned that Ferguson owned other firearms. It was also learned during the investigation that Brian Ferguson had not arrived at the recreation center until 7:39 p.m., after the time of the murder. (App. Vol. 2, p. 632.) (It is notable in the record that, after shooting Jerry Wilkins, the shooter ran from the scene in a direction that would take him to the recreation center within a short period of time, and which would account for him swiping his university ID card at the center at 7:39 p.m., after the murder had occurred at approximately 7:25 p.m. (App. Vol. 2, p. 634.)
- Ferguson accompanied police to the police department on the night of the murder. When he was advised that the police would be using a gunshot residue kit, he was observed surreptitiously and vigorously wiping his hands on his clothing. (App. Vol. 4, pp. 634, 741.)
- Ferguson's best friend, Brian Johnson, testified at trial that a short time before the murder he had visited in Ferguson's apartment. Ferguson showed Brian Johnson a large silver handgun and described it as a "magnum" a "powerful gun." The bullet that killed Jerry Wilkins was from a .44 magnum. After the murder, a spent casing from a .44 magnum, a powerful gun. The bullet was found in the dumpster near Ferguson's apartment. (App. Vol. 2, pp. 633, 742.)

- Brian Johnson testified that in the days after the murder of Jerry Wilkins, he had conversations with Ferguson during which Ferguson made the statements: The weapon is long gone, the police don't have gunshot residue, they don't have anything. (App. Vol. 2, p. 633.)
- Particles of gunshot residue were identified on articles of Ferguson's clothing found in his vehicle. (App. Vol. 2, p. 634.)
- The defendant was in possession of a black and a dark blue "hoodie", the clothing described by witnesses as being worn by the shooter. One of the witnesses at the rec center subsequently observed Brian Ferguson wearing dark sweatpants, also described as the shooter's clothing, which Ferguson had denied wearing or possessing. (App. Vol. 2, pp. 634, 740.)
- Testimony at trial included a pre-death declaration by Jerry Wilkins to Solomon Wright implicating Ferguson. (App. Vol. 4, p. 629.)
- Although Ebony Gibson testified that the knife incident in the car had never happened, a rebuttal witness was called by the State to testify that, contemporaneous with the knife incident, Ebony Gibson had told the witness about the knife incident. (App. Vol. 2, p. 631.)

In contrast to the circuit court's low standard for acceptance of the Linville-King testimony at the habeas hearing, the circuit court minimized the strength of the State's trial evidence without specifying of the effect of the purported error on said evidence, as required by *Strickland*. The court stated in particular that the State's case was a circumstantial evidence case, thereby implying that circumstantial evidence is somehow inferior to other forms of evidence, contrary to West Virginia law. *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163, (1995). The circuit court also stated the following in minimization of the State's trial evidence:

As for motive, the State presented evidence to demonstrate that the conflict between Mr. Ferguson and Mr. Wilkins started, and centered on, Ebony Gibson. The State focused its motive evidence on two events: one occurring in Ebony Gibson's vehicle in the fall of 2000 (over a year prior to the shooting), the other taking place at a fraternity party in the fall of 2001 (one year

after the 2000 event and several months prior to the shooting).

Not only are these events temporarily removed from each other, as well as from the shooting, but they involve relatively brief encounters between Mr. Wilkins and Mr. Ferguson. There was no physical confrontation between Mr. Ferguson and Mr. Wilkins during the fraternity party. Moreover, the evidence demonstrates that Mr. Ferguson did not value his relationship with Ms. Gibson *nearly as much as the State would like the jury to believe. In sum, the State asked the jury to believe that a student with a 4.0 GPA shot and killed Mr. Wilkins because Mr. Wilkins showed an interest in Ebony Gibson, and because the men engaged in, at most, two verbal confrontations over the course of approximately seventeen months.* (Emphasis added.) (App. Vol. 1, pp. 45-46.)

The circuit court's language is a text for a defense closing argument, in fact very similar to the closing argument made by Mr. Zimarowski. Nonetheless, three days of omnibus hearing testimony did not reveal a single piece of evidence linking Robbie Coles to Jerry Wilkins, nor in any way diminish the connection between Ferguson and Wilkins which provided the State's trial evidence of motive for the murder. The jury did indeed believe the State's circumstantial evidence beyond a reasonable doubt, being so thoroughly convinced of the defendant's guilt, that no recommendation for mercy was made despite Brian Ferguson's youthful, clean cut presentation and his G.P.A. Moreover, on the appeal of the conviction, the West Virginia Supreme Court of Appeals found that the State's evidence was clearly sufficient to support the conviction. *State v. Ferguson*, 216 W.Va. 420, 607 S.E.2d 526 (2004).

Seemingly indicative of the circuit court's abandonment of his role as habeas decision maker, in a footnote of its order, the court purports to make evidentiary rulings regarding the

admissibility of evidence under WVRE 803(2) in a future re-trial, based upon witness testimony at the omnibus hearing. However, the testimony by witnesses Linville and King bears no resemblance to the testimony that would or could have been elicited from them during the criminal trial in 2002, given that fact that Linville's first disclosure was that Coles visited the trailer two days after the murder at 3:00 to 4:00 a.m., not early on the evening of the murder. Under those circumstances Coles' alleged declaration never could have qualified as an excited utterance.

The Respondent has not presented evidence that undermines confidence in the jury's verdict. He has not identified an act or omission by trial counsel that cannot be characterized as the result of reasonable professional judgment. The utilization of information regarding Robert Coles, whether in the form known to Mr. Zimarowski prior to the trial, or in the form developed during the habeas proceedings and the omnibus hearing, would not have affected the outcome in Ferguson's favor. The analysis of the evidence as portrayed by legal expert J. Michael Benninger in this regard, is correct.

The opinion of attorney Stephen Jory to the effect that presenting the Robert Coles defense could have resulted in a verdict for a lesser-degree of homicide, or even some form of nullification, is wrong. (App. Vol. 2, p. 470.) In the Respondent's trial, he sought no lesser-included verdict or instructions for lesser offenses. In any event, the proper question is whether there is a reasonable probability that, absent the alleged error, the jury would have had a reasonable doubt respecting guilt, not whether the jury would have returned a lesser-included offense verdict. *Strickland*.

Further, as stated in *Strickland*, an assessment of the likelihood of a result favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and

the like. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. The circuit court should have rejected the testimony by Stephen Jory, the Respondent's legal expert who had represented only one murder defendant, that presenting the Robert Coles defense might have caused the jury to suppose a motive such as "road rage" for Robert Coles killing Jerry Wilkins. (App. Vol. 2, pp. 460 and 470.) Such speculation and theorizing is not a proper basis for the prejudice determination. However, the circuit court appears to have incorrectly embraced such theorizing by its language, "...a reasonable juror could have credited the testimony of Ms. Linville and Ms. King in such a way as to a change that juror's perspective as to the issue of mercy." (App. Vol. 1, p. 48, Circuit Court Order.)

CONCLUSION

The Petitioner asks this Court to find that the circuit court *abused its discretion* by finding trial counsel ineffective in the representation of the Respondent. The Petitioner asks the Court to find that trial counsel had shared all discovery information with the Respondent, that trial counsel adequately evaluated evidence and that trial counsel had a rationale for the strategic decisions, which fell within the wide range of reasonable representation by competent counsel.

The Petitioner also asks the Court to find that the circuit court's order was *clearly erroneous* in assessing the credibility of the Respondent's witnesses at the omnibus hearing and thereby concluding that the evidence and arguments presented by the Respondent during the omnibus proceedings would have had a reasonable likelihood of affecting the outcome of the criminal case if presented at trial.

Therefore, the Petitioner asks this Court to reverse the circuit court's order and reinstate the Respondent's conviction for first degree murder with no recommendation for mercy.

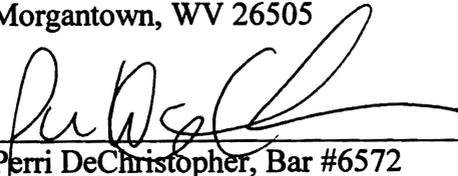
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CERTIFICATE OF SERVICE

I, Marcia L. Ashdown, hereby certify that on this 12th day of December 2012, I served a copy of the foregoing Petitioner's Brief upon Mr. Paul Schmidt, Attorney for Respondent, 1201 Pennsylvania Avenue, North West, Washington, DC 20004-2401; and to Mr. Darrell (Dan) Ringer, Attorney for Respondent, 114 High Street, Morgantown, WV 26505-5413, by mailing a copy of the same to their respective offices.



Marcia L. Ashdown
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