

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0240

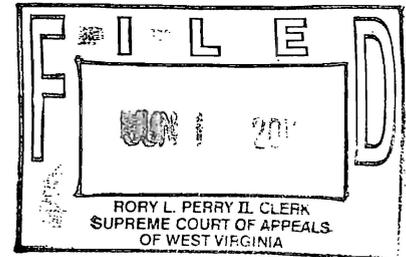
DAVID BALLARD, WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,

*Respondent Below,
Petitioner,*

v.

PHILLIP REESE BUSH,

*Petitioner Below,
Respondent.*



BRIEF ON BEHALF
OF THE PETITIONER

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**BRIEF ON BEHALF
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Comes now the Petitioner, David Ballard in his capacity as Warden of the Mount Olive Correctional Complex, by counsel, Laura Young, Assistant Attorney General, and pursuant to Rule 10(c) of the West Virginia Revised Rules of Appellate Procedure and a scheduling order from this Court dated March 21, 2013, files the within brief on behalf of the State of West Virginia, appealing the granting of a petition for writ of habeas corpus by the Circuit Court of Ohio County.

I.

STATEMENT OF THE CASE

Phillip Reese Bush (hereinafter “the respondent” or “Bush”) was indicted, and subsequently reindicted for two felony counts of murder in the first degree. (App. at 2.) The victims were Charles Goff and Kathleen Williams. (*Id.*) Before trial, venue was changed from Marion County to Ohio County. (App. at 3, 4, 5.) Following jury selection and pre-trial motions, the substance of the trial

started on March 22, 1982, with opening statements. (App. vol. II, Trial Tr., March 22, 1983 at 5.) In opening, the male victim, Charles Goff, was described as a bail bondsman, married with three children. Kathleen Williams, the female victim, was a secretary at West Virginia University. They were shot to death in Marion County on September 18 or 19, 1982. (*Id.*) Their bodies were found in a black Corvette parked in Evergreen Cemetery. Mr. Goff had been shot twice in the chest, and his body was shoved behind the driver's seat. Kathleen Williams was shot four times and was found seated in the passenger seat. (*Id.* at 6-7.) In opening statements, both the prosecuting attorney and defense attorney referred to the underlying felonies in the matter being robbery of Mr. Goff and sexual assault of Ms. Williams (*see, for example, Id.* at 12-13, 15, 20.) In fact, defense counsel explicitly stated in opening that the state had to prove either "robbery or sexual assault beyond a reasonable doubt." (*Id.* at 20.)

Clarrington Brown was called by the State. Mr. Brown is the respondent's second cousin. (*Id.* at 22.) On September 13, 1982, Brown and Bush were both inmates in jail in Ohio. (*Id.* at 23.) Brown related that Bush had called the male victim, Charles Goff, to bond out the respondent, but Goff refused. Bush was upset at that refusal. (*Id.*) Bush later told Brown that he was "going to fix Charlie once he got out." (*Id.* at 24.) In a conversation the next day, Bush told the witness that "he thought what he was going to do and he was going to set Charlie up and kill him when he got out." (*Id.*) The plan was that the respondent was "gonna call Charlie and tell Charlie he had something to sell to him and how he would have Charlie bring the money. After Charlie brought the money he wouldn't have any merchandise, he was just going to off and take the money." (*Id.*) Brown explained that meant Bush was going to kill Mr. Goff and that Bush had represented that he had previous financial dealings with Mr. Goff. (*Id.*)

Bush got out of jail. (*Id.* at 26.) Brown made collect phone calls from jail to the respondent at his home in Fairmont. The substance of the first phone call was that Bush had set things up and that things would be taken care of by the following Monday. Bush specifically referenced that he was talking about what the two had discussed while both were in jail. (*Id.* at 25-26.)

In a later phone conversation, Bush told Brown that “. . . he had taken care of business and that he had some diamonds that he had to get rid of.” (*Id.* at 26.) Bush, in referencing “the business he had taken care of” mentioned there were two people there, and later noted one of those was a woman. (*Id.* at 29, 57.)

With specific reference to the plan to set Charlie Goff up, Brown indicated that while Bush and Brown were both in jail, Bush indicated that he was going to set up Goff by having a young lady, Gina Brown, pose as a prostitute. Bush also referenced using jewelry to set the victim up. (*Id.* at 30.)

On cross-examination, Mr. Brown indicated that he was very close to the respondent. (*Id.* at 34.) Although Brown acknowledged reaching a plea deal with prosecutors about some pending charges, he denied being told what kind of information the prosecutors needed to make such a deal. (*Id.* at 50.) Mr. Brown denied having any anger or ill will toward his cousin, the respondent. (*Id.* at 58.)

John Cox was a bail bondsman. Bush requested that Cox write a bond for him. Bush told Cox that Goff, the victim, would guarantee his appearance. (*Id.* at 64.) After he was bonded out, Bush complained to Cox that Goff had told him that Goff would get Bush out of jail anywhere, and that he could not get him out of the Ohio jail. Bush also commented that “he was going to go and turn around and get even.” (*Id.* at 66.) Cox didn’t know the respondent well enough to know if he

was or was not upset, and the comment caused no particular concern to Cox, noting that bail bondsmen are threatened all the time. (*Id.* at 67.)

Mary Jo Goff, the male victim's widow, testified. (*Id.* at 71.) She identified her husband's body. (*Id.* at 72.) Shortly before her husband was killed, she received several phone calls at her home from Philip Bush. (*Id.* at 73.) Her husband told her that Bush wanted a bond, and that he, Goff, could not write it. (*Id.* at 76.) On the day of her husband's murder, September 18, 1982, Philip Bush called the house, left his name and wanted to speak with her husband. (*Id.* at 77.) Sometime around noon that same day, her husband, the victim, spoke to Philip Bush, who wanted Goff to come to Washington. The victim refused to go to Washington, but did agree to meet him in either Fairmont or Morgantown. Mr. Goff told his wife that Bush wanted him to come alone to Washington. (*Id.* at 79-80.) Mrs. Goff identified an exhibit, which was her husband's ring. He was wearing it the day of his death. Further, Mrs. Goff testified that her husband habitually never left the house without wearing a watch and carrying his wallet. She described the watch he was wearing the date of his death as a gold watch with diamonds. (*Id.* at 81-82.)

Tammy Goff, the victim's daughter, also saw the victim wearing his watch and ring the day of his death. (*Id.* at 91-92.)

Corky Springer identified the aforementioned exhibit as a ring he had sold to the victim. (*Id.* at 96.) He could also identify the diamond in the ring because of some occlusions in the stone. (*Id.* at 97.) The ring was sold to Goff for \$3400.00, and the worth of the diamond at the time of trial was estimated at \$5000.00. (*Id.* at 99.)

Norman Young identified the respondent as an individual he met in Washington in September 1982. Young accepted a ride to West Virginia from the respondent on Sunday,

September 19, 1982. In the respondent's car, he saw a watch on the dashboard and a gold ring with a big diamond. Mr. Young identified the aforementioned State's exhibit previously identified by Mary Jo Goff as her husband's ring as the ring that was on the respondent's dashboard. (*Id.* at 104-105.) Young was with Bush when Bush pawned the gold from the watch and the ring. (*Id.* at 108-109.) During the trip, Bush told Young that the police were after him for something heavy. (*Id.* at 110.) David Weiner bought the ring on September 20, 1982. (*Id.* at 118.) He did not buy the diamond, only the setting. He identified Bush as one of the two individuals who brought the ring in and sold it. (*Id.* at 119.) He also bought a watch. The two gentlemen came back and insisted that he break the watch crystal and get some small diamonds out of the face. (*Id.* at 121.) Mr. Weiner turned the ring over to the police. (*Id.*)

Matthew Bartnicki identified the diamond as one that he saw in a bar when a man named David Minor showed it to him and asked if he were interested in buying the stone. (*Id.* at 124.) Minor, accompanied by Bush, came to Bartnicki's apartment the following day. Bush claimed the stone belonged to him and said it came from his mother. (*Id.* at 127.) However, rather than eventually consummating the sale, Bartnicki turned the diamond over to some police officers who came to his apartment with Mr. Minor. (*Id.*)

Bobbie Lee from C & P Telephone Company identified several phone calls to and from the victim's phone on September 13 and September 18, 1982 as coming from those associated with Bush. (*Id.* at 134, 136.)

Victor Probst saw the victims together at a bar in Morgantown during the evening hours of September 18, 1982. (*Id.* at 141.) Mr. Goff was wearing the aforementioned ring that night. (*Id.* at 142.) After a telephone call from a number later identified with the respondent, Mr. Goff stated

that he was going to buy some gold coins, and asked Probst for a knife. Probst identified State's exhibit "8" as his knife. (*Id.* at 144.) Probst loaned that knife to the victim the night he was killed. (*Id.* at 145.) The victim said he would bring the knife back before closing. The victim did not return the knife and Mr. Probst never saw Mr. Goff or Ms. Williams alive again. (*Id.* at 145-46.)

Gina Brown testified that on the Thursday before the murders she talked to the respondent at her home. Bush told her that he was in need of money. (*Id.* at 183.) Ms. Brown apparently advised the respondent to just hit somebody over the head. Ms. Brown acknowledged that she told the police that she had agreed to accompany Bush in his scheme to get money via robbery but that Bush was "to only hit the guy over the head." (*Id.* at 188.) She said she tried to talk him out of robbing whoever it was he had in mind. (*Id.*) Ms. Brown knew that Bush talked to Mr. Goff around noon on the Saturday immediately before he was murdered. (*Id.* at 196.) She very reluctantly admitted seeing Mr. Bush in the possession of a watch and ring. She further stated she saw him with a necklace described as a four leaf clover necklace with diamonds. (*Id.* at 199, 202.) In fact, she was so reluctant that when asked to identify the ring that had been admitted into evidence she stated, "Even before you pull that out I've never seen nothing like that before." (*Id.*)

Detective Offutt of the Fairmont police reported to the crime scene. He found Mr. Goff prone in the rear deck of the Corvette, and the female victim was slumped in the passenger's seat. Mr. Goff did not have any identification, wallet or money on his person. Detective Offutt removed from Mr. Goff's body the knife that Mr. Goff had borrowed from Victor Probst. (App. Trial Tr. Day 3, March 23, 1983 at 46.) Ms. Williams was shot 4 times and Mr. Goff twice. (*Id.* at 50.) He noted that, unusually, Ms. Williams did not have a skirt or panties on and that all through her panty hose and on her skin were a lot of grass clippings where she apparently had been pulled on or been in

contact with cut grass. (*Id.* at 52.) Her slacks were found underneath some debris behind the drivers seat. (*Id.* at 53.) Detective Offutt determined in the course of his investigation that the respondent was living at 113 Chicago Street. Some of the phone records indicating calls placed to the victim came from the phone number at that address. The phone was in the name of the respondent's wife. (*Id.* at 55.)

Detective Offutt noted that when Mr. Goff's widow and daughter were informed of his death, each noted that the victim had received calls from Philip Bush to come to Washington or Fairmont. Mrs. Goff described the ring and watch her husband had on when last she saw him, and Detective Offutt further described that relatives of Ms. Williams described that she wore a necklace that was a four leaf clover with diamonds. The ring, watch, wallet and necklace were not found with the bodies. (*Id.* at 58.) He related that Gina Brown had told police in Pennsylvania that she was with Bush on the 17th and 18th and that they planned a robbery. (*Id.*) Offutt accompanied David Minor to Wheeling and recovered the diamond from Matthew Bartnicki. (*Id.* at 59.) That was the same diamond previously admitted into evidence and identified as belonging to Mr. Goff and sold to Bartnicki, with the ring being sold in Pittsburgh by Young and Bush. (*Id.* at 60.) The ring recovered from David Weiner was identified by Corky Springer as the ring sold to Mr. Goff. Mrs. Goff also identified that ring. (*Id.* at 61.)

Regarding an oral statement made by Bush to the Fairmont police officers, and the waiver of Miranda, Bush acknowledged that he had been arrested several times. (*Id.* at 88.) (Parenthetically, the respondent was convicted of rape in Marion County in 1979, although that conviction was reversed for failure to grant a continuance. (*See State v. Bush*, 163 W. Va. 168 (1979.))

Although denying involvement in the homicides, Bush did admit that he had business dealings with Mr. Goff, and further that he saw Goff at a McDonald's on September 18. (*Id.* at 95.) Detective Offutt showed him the victim's diamond ring which circumstantially had been tied to Bush by Norman Young and David Weiner. Bush was visibly shaken and denied ever seeing that item before. (*Id.* at 96.)

Dr. Frost, a medical examiner, was accepted as an expert witness. (*Id.* at 136.) It appeared from the position of Ms. Williams' body that she was killed in the car, because one bullet had gone through her body and struck the car. (*Id.* at 139.) An examination of the panty hose found on Ms. Williams' body revealed a lot of grass clippings on the inside of the panty hose over her legs, the crotch, the seat, and on the outside of the panty hose. (*Id.* at 140.)

The autopsy revealed that Ms. Williams had suffered gunshot wounds to her head, and the chest. The head wound would have been almost instantaneously fatal. (*Id.* at 143-44.) The wound to her chest near the shoulder was a contact wound; that is, the gun was right against her clothing and skin when fired. A wound to the upper inner aspect of her right breast was also a contact wound. The fourth chest wound perforated her lung and chest wall and was a lethal wound. (*Id.* at 146-47.) The medical examiner believed that she was shot inside the car, with the shooter directly beside her. Although he found no sperm upon microscopic evaluation of the fluid in Ms. Williams' vaginal vault, such was not inconsistent with the laboratory finding that there was seminal fluid present. (*Id.* at 151.) Mr. Goff suffered two gunshot wounds to his chest. Although the wounds were lethal, it would have taken him several minutes to die. (*Id.* at 154-55.) Mr. Goff also suffered bodily injuries after he died, on the underside of his neck and on the right knee. Dr. Frost concluded that Mr. Goff was shot outside the car and put in the automobile after. (*Id.* at 157-58.) Dr. Frost estimated that

the range for the times of death prior to his arrival at the cemetery at about 5:00 p.m. on Sunday, was greater than eight hours earlier, and possibly even sixteen hours before then. (*Id.* at 159.)

Sabrina Midkiff with the state police crime laboratory examined the vaginal swabs. The swabs tested presumptively positive for seminal fluids. (*Id.* at 172.) She did not find spermatozoa, but that was not unusual. (*Id.* at 173.)

Officer Stutler was present at the Fairmont police detachment. He observed other officers informing Bush of his Miranda rights. He saw and heard Bush deny any knowledge of the aforementioned diamond and ring, and noted that Bush became disturbed when shown those items and refused to talk any longer. (*Id.* at 183-84.)

Robert Williams, Ms. Williams' brother, testified that his sister owned a gold necklace with a four leaf design and a diamond in the middle of it. He searched and inventoried his sister's apartment and the necklace never was found. (*Id.* at 208.) He saw his sister wearing the necklace "probably the weekend before she was killed." (*Id.* at 209.)

The respondent's wife testified that on the Saturday night in question, her husband left their apartment around or about midnight. (*Id.* at 223.) He returned around four in the morning, left again, and returned several minutes later. (*Id.* at 225.) Of note, this testimony, if believed, would not be a perfect alibi because the time of death for the victims could have been, according to the medical examiner as early as 1:00 a.m. However, this witness also admitted that in determining times, she had failed to inform the police that she had gone to church on Saturday, and also failed to tell that to the grand jury. (*Id.* at 232.)

At the conference regarding the instructions, defense counsel was specifically asked by the court what objections were made to the charge. (App., Trial Tr. Day 4, March 24, 1983 at 65.) The

sole objection as to the instructions regarding felony murder, and the underlying felonies of first degree sexual assault was “The reference to felony murder rule based upon first degree sexual assault and robbery and not being supported by the evidence.” (*Id.*)

Therefore, it is clear that trial counsel only objected to the felony murder instruction as being unsupported by the evidence, not as to the correctness or incorrectness legally of the instruction as given. A copy of the charge as given, and the proffered instructions by trial counsel are included in the Appendix. (*See App. at 12-61.*) The defense did proffer an instruction that told the jury that if a robbery was completed or a sexual assault was completed, and only after that the victim was killed, then there could be no felony murder. The defense had no law to support that concept, and as noted by the prosecuting attorney, if a criminal episode or single transaction is involved then the sequence of events is not necessarily determinative of whether the legal requirements of felony murder have been satisfied. (*App., Trial Tr., March 24, 1983 at 72.*)

The jury was instructed that as to each death, it could return a verdict of guilty of murder in the first degree (murder committed in the commission or attempt to commit a robbery and/or first degree sexual assault) as charged in Counts 1 and 2, that it could find the respondent not guilty, or guilty with a recommendation of mercy. (*Id. at 85.*)

As to felony murder, the jury was instructed that a murder in the commission of or attempt to commit first degree sexual assault or robbery does not require proof of the elements of malice, premeditation or specific intent to kill. The jury was also instructed on the elements of the offenses of aggravated robbery and first degree sexual assault. (*Id. at 86.*)

Following closing arguments, the respondent was convicted of the first degree murders of the victims, and the jury did not recommend mercy. (*Id. at 154-55.*) The respondent was sentenced

to two terms of life in prison, without the possibility of parole, in accordance with the verdict. (App. vol. I at 61.)

In post-trial motions, the defense raised the issue of insufficiency of evidence to submit the case to the jury on the felony murder rule involving the first degree sexual assault. (*Id.* at 65.) Further, the defense was that Bush didn't do it. Obviously, the jury vehemently disagreed, as according to defense counsel, the jury deliberated for a total of an hour and fifteen minutes. (*Id.* at 67.) While the court acknowledged that it could not find any case specifically on point where the verdict form had the conjunctive and disjunctive, that in appraising the sufficiency of the evidence, the court was of the opinion that there was substantial evidence in regard to both felonies, and that it did not in any way vitiate the verdict if the jury only found that there was a robbery, beyond a reasonable doubt. (*Id.* at 66.)

The respondent, and some lawyers, have kept very busy during the ensuing years by filing petitions for writ of habeas corpus in the state and federal courts. None of these filings resulted in relief, until the instant order which is being appealed.

Bush filed original and supplemental petitions for writ of habeas corpus in the Circuit Court of Ohio County (Case No. 86-C-775). Relief was denied by a detailed order which indicated the grounds raised and waived, recited the trial testimony, noted the witness testimony from the omnibus hearing, and eventually denied relief. (*Id.* at 68-114.) As to challenges to the instructions in the first state habeas, the judge noted that Bush contended that the alibi instruction was burden shifting, a conclusion with which the habeas court disagreed. (*Id.* at 113.) As to the felony murder rule and sexual assault, any insufficiency of the instructions was not raised as a ground for habeas relief. The habeas court noted specifically that Bush asserted that there was insufficient evidence to convict the

respondent under the felony murder rule for rape/sexual assault, and that “based upon the facts as presented to the trial court, there was more than sufficient evidence for the jury to consider sexual assault for the felony murder rule.” (*Id.*)

The respondent turned to the federal court system. Apparently, the respondent objected to the felony murder, sexual assault issue only on the grounds, again of sufficiency of the evidence. The only substantive ground raised as to the instructions was the “burden shifting” nature of the alibi instruction. Ultimately, the Fourth Circuit denied relief. *Bush v. Legursky*, 966 F.2d 897 (1992). (*Id.* at 115-19.)

In 1995, the respondent filed a petition for writ of habeas corpus in the Circuit Court of Ohio County (Case No. 95-C-43). Following evidentiary hearings, the circuit court denied relief. (*Id.* at 120-39.) Although styled as a *Zain* habeas, and although serological evidence was considered in that proceeding, the respondent, apparently for the first time essayed an argument that his convictions for felony murder must be reversed because they rested on an unconstitutional basis and the jury returned a general verdict on both counts of felony murder, thereby violating *Stromberg v. California*, 283 U.S. 359 (1931). It was asserted it is uncertain from the evidence and the arguments presented on which underlying felony the jury relied upon in its verdict. Further, since one conviction was bad, both were. However, the circuit court specifically rejected that contention. The court noted that the verdict form gave the jurors alternative underlying felonies with which to convict Bush for each victim. Under West Virginia law, the only way a conviction could be deemed invalid under such a verdict form is if one of the underlying felonies were declared unconstitutional. Bush showed no such constitutional error. Therefore, relief in habeas was denied. (Order and amended order.) An appeal from those orders was refused. (*Id.*)

Finally (and it is at long last), we arrive at the instant proceeding, a petition for writ of habeas corpus filed in Ohio County Circuit Court (Case Nos. 06-C-342, 05-C-442). In a *pro se* petition, which frankly is more than successive, the respondent raised the issue that the jurors in his trial were instructed that as to one of the underlying felonies, the respondent could be convicted of felony murder if the deaths of Charles Goff and Kathleen Williams occurred during the commission of, or the attempt to commit, aggravated robbery and/or sexual assault. It is undisputed that the substantive offense formerly called “rape” was amended before respondent’s trial to the substantive offense “first degree sexual assault.” Further, the felony murder statute was not amended until after respondent’s trial. The amended petition for habeas corpus incorrectly states that trial counsel objected to the substance of the instruction of felony murder, when in fact the sole objection was the sufficiency of the evidence to support such an instruction, i.e., the State hadn’t proved that Bush raped or sexually assaulted Kathleen Williams and hadn’t proven, in fact, that Ms. Williams had been sexually interfered with in any manner by any person, except possibly having consensual intercourse with Mr. Goff. (*Id.* at 163-246.)

Following depositions, the habeas court ignored the arguments of the State that the issue had been waived at the first petition for writ of habeas corpus and waived again at the second State petition. The order determined that first and second habeas counsel were ineffective, that the issues were not fully and fairly litigated, and further not waived. In sum, the court vacated the convictions because sexual assault was not, at the time of the conviction an enumerated felony in the felony murder statute, and therefore the conviction must be vacated under *Stromberg, supra*. The order further found trial counsel ineffective for failure to object to that instruction. (*Id.* at 144-62.)

Let's remember: A jury heard from competent witnesses (Brown and Cox) that Phillip Bush threatened the life of Charles Goff. The jury heard that Phillip Bush discussed with Gina Brown a plan to rob someone, and that Gina tried to convince him only to injure the person. The jury heard that Bush repeatedly called Charles Goff, and wanted to meet him alone. The jury heard that Bush told Brown that the matter they discussed in jail would be taken care of by Monday, and the victims died on Sunday. The jury heard that Bush told Norman Young that the police were after him for something heavy. The jury heard that Mr. Goff habitually had a watch with small diamonds in it, and a large diamond ring. The jury heard that he always carried a wallet. The jury heard that Kathleen Williams had a four leaf clover diamond necklace, which was never found after her death. The jury heard that Kathleen Williams was covered in grass clippings and a picture of Mr. Goff did not reveal any grass clippings on him. Kathleen Williams had seminal fluid in her vaginal vault. Kathleen Williams was shot twice, and died as a result of gunshot wounds. Charles Goff was shot four times and died as a result of gunshot wounds. Gina Brown saw a four leaf clover diamond necklace, large diamond ring, and watch in Bush's possession. Norman Young saw the ring and watch, and actually participated in the sale of the ring, the diamond, and watch. Bush was identified as trying to sell a large diamond, which was identified as Mr. Goff's. The evidence, although circumstantial, was overwhelming as to the respondent's guilt of the felony murder of Ms. Williams and Mr. Goff.

The notice of appeal and Scheduling Order ensued.

II.

SUMMARY OF THE ARGUMENT

In short, the lower court got it completely wrong as both a matter of the a law on the *Stromberg* issue and as a matter of waiver. The issue regarding jury instructions was in fact waived in the direct appeal, waived in the first state habeas, waived in the second state habeas, and not addressed in the federal habeas. The order bootstraps ineffective assistance of counsel at the second habeas, on top of ineffective assistance of counsel at the second habeas, and finally ineffective assistance of counsel at trial into an order granting relief to the luckiest individual on the face of post-conviction litigation—Bush, who had a rape conviction reversed, nearly got relief until the Fourth Circuit restored sanity to the federal habeas proceedings, has obtained relief from the Circuit Court—totally unwarranted—while being indicted for three, yes three more murders.

None of the counsel were ineffective. The order regarding effectiveness simply ignores the second prong of the *Strickland/Miller* standard. The objective prong: should trial counsel have objected to the words “first degree sexual assault” in the jury instructions? Should habeas counsel have asserted trial counsel ineffective for such failure? Then, subjectively, did that failure make any difference in the result? Here, the answer to the subjective prong is a resounding no. The jury deliberated less than two hours. It found Bush guilty beyond a reasonable doubt of the felony murder of Charles Goff and the felony murder of Kathleen Williams with the underlying felonies being sexual assault (first degree) and/or robbery. Had trial counsel said, “hey, it’s got to be rape,” and the jury instructed on rape as opposed to sexual assault, the verdict would have been exactly the same. Further, the conviction resting, perhaps, on the unconstitutional ground of sexual assault, is simply an incorrect analysis. In looking at the case through the *Stromberg* lens, the lower court is incorrect.

The jury verdicts do not rest on an unconstitutional ground. Further, this issue was waived thirty years ago. The lawyers representing Bush at trial and in the ongoing habeas proceedings have been effective. The lower court's order should be reversed.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for a memorandum decision. However, as the circuit court's decision granting habeas relief is error in the application of settled law and the final decision was an abuse of the judge's discretion, the respondent requests the opportunity to present oral argument under the criteria of Rule 19 of the Revised Rules of Appellate Procedure.

IV.

ARGUMENT

A. THE LOWER COURT'S FINDINGS ARE WRONG AS A MATTER OF LAW.

1. 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."

Syllabus Point 1, *Mathena v. Haines, Warden*, 219 W. Va. 417 (2006).

2. Findings and Reasoning of the Lower Court.

As noted above, the jury in the case at bar was instructed on a predicate offense of the felony murder statute that was no longer in effect *as worded*, at the time of the respondent's trial - although it was still a crime. Specifically, the jury was instructed on the predicate offense of sexual assault

even though the felony murder statute still enumerated “rape” which did not reflect the repeal of W. Va. Code, § 61-2-15, by the Sexual Assault Act, W. Va. Code, § 61-8B-1 *et seq.*

In vacating the respondent’s conviction, the habeas court found that the word “sexual assault” rather than “rape” in the jury instructions was an *unconstitutional* element of the offense within the meaning of *Stromberg v. California*, 283 U.S. 359 (1931).

The lower court’s reasoning on this point consisted in its *entirety*, of the following:

Where a general verdict is used to convict a defendant of a crime which has multiple alternate grounds for conviction, the conviction is void and must be overturned where one of the alternate grounds for conviction is unconstitutional and where the conviction may have rested upon said unconstitutional ground. *See Stromberg v. California*, 283 U.S. 359, 51 S.Ct 532 (1931). In *Stromberg*, the defendant was convicted for violating a San Bernadino county code which prohibited the display of a red flag and banner in public as “a sign, symbol or emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propoganda that is and was out of a seditious character.” *Stromberg, supra* at 361. Prior to her conviction, defendant filed a demurrer, or objection, to the charge as violating the 14th amendment of the U.S. onstitution. Defendant’s demurrer was overruled, and she pled not guilty. After she was convicted, motions for a new trial were denied. *See id.* While the details of the statute and the nature of its unconstitutionality are too complicated to succinctly discuss here, it is of note that the statute under which defendant was convicted was treated disjunctively by the parties and by the Court.¹ That is, in the statute used to convict defendant, there were three (3) parts, any one of which could have been independently used to convict defendant. The case was appealed to the U.S. Supreme Court, which found, among other things, that one of those statutory grounds was unconstitutional and because defendant was convicted with a general verdict, it was impossible to discern upon which ground the jury relied to convict defendant. Because the jury could have relied upon the unconstitutional ground for its conviction, defendant’s conviction had to be overturned as unconstitutional. The same situation exists in the case at bar.

Specifically, Petitioner was convicted of felony murder. During the trial, the jury was instructed, with no objection from Petitioner’s trial counsel, that they could find Petitioner guilty of felony murder if they believed beyond a reasonable doubt that

¹We, however, *will* discuss the specifics of *Stromberg* and its significance more succinctly below.

he had killed Charles Goff and Kathleen Jane Williams during the commission of or the attempt to commit robbery or sexual assault. The jury found Petitioner guilty of murder for the deaths of Charles Goff and Kathleen Jane Williams, which the jury found occurred during he commission of or the attempt to commit robbery **and/or** sexual assault. The “and/or” language is taken directly from the verdict form and is extremely important because it binds the guilty verdict to both robbery and sexual assault. Therefore, Petitioner’s conviction may rest upon the fact that the jury believed Petitioner committed or attempted to commit “sexual assault” when the decedents were killed. however sexual assault was not an enumerated felony in the felony murder statute either at the time of the crime or at the time of the Petitioner’s trial.

Indeed, at the time of Petitioner’s conviction, the felony murder statute, W. Va. Code § 61-2-1 [1882], contained “rape” as an enumerated felony, but the crime of “rape” had been repealed in 1976. Therefore, “rape” was a non-existent crime at the time of Petitioner’s conviction. Also in 1976, the West Virginia Legislature passed the Sexual Assault Act. Notwithstanding, this change in the law, the West Virginia, legislature failed to amend the felony murder statute to replace the enumerated felony “rape” with eh enumerated felony “sexual assault,” until 1987 - eleven (11) years after the crime of “rape” had been repealed.

Because “sexual assault” was not an enumerated felony in the felony murder statute at the time of either the crime or Petitioners’ trial, the jury instruction advised the jury that they could convict Petitioner if they found him guilty of an act which was not included in the felony murder statute, therefore making.

(Emphasis included.)

3. **The Lower Court Applied the Incorrect Standards.**

In finding error, the lower court granted relief under the wrong analysis, the wrong standards of review, the wrong state authority (that would be none, by the way, according to the lower court), the wrong legal theory, the wrong precedent and the wrong constitutional authority.

Without so much as conducting even a cursory analysis of the existing law in effect at the present time, the state court cited to the 1931 case of *Stromberg v. California*, 283 U.S. 359 as its *sole* authority to vacate the respondent’s conviction. In so doing, the lower court opened the prison doors to a vicious, predatory killer who was convicted of two counts of murder in the case at bar, has

previously been indicted for rape, and is now under indictment for three additional murders committed prior to his conviction in the case *sub judice*.²

The lower court arrived at its determination in a total of sixty four lines of text that was utterly void of any legal reasoning suggesting that the court had contemplated the effect of its decision on not only the legacy of the victims and their families but on society at large, before handing the respondent a legally unsound windfall.

The defendant in the case of *Stromberg v. California*, was tried and convicted under a California State statute criminalizing the raising of a red flag as being symbolic of anarchy, revolution and sedition.

“The appellant was convicted in the superior court of San Bernardino county, California, for violation of section 403a of the Penal Code of that State. That section provides:

‘Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.’”

283 U.S. at 361.

The charges against the defendant in *Stromberg* stemmed from the activities of the defendant while acting as a leader of children attending summer camp in the foothills of the San Bernardino mountains. In a rather radical departure from the usual macaroni art classes more typical of summer camps, the defendant counseled her young running capitalist pups on Marxist beliefs as an alternative to the principles of democracy that would later form the foundation of her successful appeal:

²The Marion County, West Virginia Grand Jury indicted the respondent on three counts of first degree murder, Case No. 13-F-73.

It appears that the appellant, a young woman of nineteen, a citizen of the United States by birth, was one of the supervisors of a summer camp for children, between ten and fifteen years of age, in the foothills of the San Bernardino mountains. Appellant led the children in their daily study, teaching them history and economics. 'Among other things the children were taught class-consciousness, the solidarity of the workers and the theory that the workers of the world are of one blood and brothers all.' Appellant was a member of the Young Communist League, an international organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at the camp, in which the appellant supervised and directed the children in raising a red flag, 'a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States.' In connection with the flag-raising, there was a ritual at which the children stood at salute and recited a pledge of allegiance 'to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class.'

283 U.S. at 362.³

After the camp was raided by concerned local authorities, the defendant in *Stromberg* was charged with one count of displaying a red flag for any *one* of three purposes: (a) as a symbol of opposition to organized government; (b) as an invitation to anarchistic action; or (c) as an aid to seditious propaganda. (283 U.S. at 361.) ("The information, in its first count, charged that the appellant and other defendants, at the time and place set forth, 'did wilfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character.'")

The jury was instructed that it could convict if it found the defendant guilty of violating any one purpose of the statute.

³The summer camp where the defendant in *Stromberg* acted as camp leader was actually a camp specifically for the children of communist sympathizers. See "The California Red Flag Case" *New York Chapter of the American Civil Liberties Union.* *Stromberg* is viewed generally as a pivotal Free Speech decision because it was the first U.S. Supreme Court case to expressly exercise the Fourteenth Amendment to extend the First Amendment in a state criminal prosecution. See http://debs.indstate.edu/a505c3_1930.pdf

The charge in the information, as to the purposes for which the flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. But in the instructions to the jury, the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named.

283 U.S. at 363–64.

The jury returned a general verdict of guilty. Stromberg appealed and the California appellate court upheld her conviction on grounds that even though it questioned the constitutionality of one element of the statute (the flag as a symbol of government opposition) the remaining portions were sufficient to salvage the conviction without running afoul of the defendant's due process rights. The defendant appealed to the U.S. Supreme Court citing as grounds, that her First Amendment rights to free speech as guaranteed by the Fourteenth Amendment and Due Process had been violated (democracy comes in handy).

The Supreme Court agreed in part and reversed on grounds that the "red flag" law (as it later came to be known in the context of a watershed moment in Free Speech) violated the defendant's constitutional right of Free Speech as extended to the states under the Fourteenth Amendment. The Court further found that even though only one portion of the three elements of the statute was unconstitutional as argued by the defendant, two other elements of the statute were valid within the context of sedition. 283 U.S. at 369-70. But the Court reversed and vacated the entire conviction on grounds that because there was no possible way to determine if the verdict rested on the unconstitutional charge, the conviction must be reversed:

As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is *impossible* to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that instead of its being permissible to hold,

with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.”

283 U.S. at 368 (emphasis added).

It is important to note that the Court in *Stromberg* distinguished the grounds for reversal as resting on the unconstitutional nature of the statute the defendant was charged with violating rather than the instructions being an *incorrect statement of the law*. 283 U.S. at 369-70.

a. *Stromberg* does not apply to the present case.

The *Stromberg* of today is a mere shadow of the *Stromberg* that was decided when prohibition and bread lines were the order of the day. Through changes, modifications, narrowing in some areas and expanding in others, a pure *Stromberg* ground as announced in 1931 is virtually non-existent.

The Court restated the reasoning of *Stromberg* a few years after it was issued in the case of *Williams v. North Carolina*, 317 U.S. 287 (1942) and found that “[t]o say that a general verdict of guilty should be upheld though we *cannot know* that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.” (*Id.* at 292 (emphasis added)). In *Williams*, the defendant was convicted of bigamous cohabitation after the jury had been instructed that it could disregard the divorce obtained by the parties in Nevada because a Nevada divorce was not recognized in North Carolina. The Court found that the instruction violated the Full Faith and Credit Clause and reversed:

“[T]he verdict of the jury for all we know may have been rendered on that [unconstitutional] ground alone, since it did not specify the basis on which it rested.... No reason has been suggested why the rule of the *Stromberg* case is inapplicable here. Nor has any reason been advanced why the rule of the *Stromberg* case is not both appropriate and necessary for the protection of rights of the accused. To say that a

general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.”

317 U.S. at 292.

In *Williams*, however, the error lay in the instruction and not the statute forming the foundation of the charges. The error cited by the Court in both *Williams* and *Stromberg* were inexorably intertwined with the jury instruction but the two separate underlying issues (error in jury instructions and a general verdict resting on an unconstitutional ground among multiple theories of guilt) ran parallel paths for many years to come in subsequent *Stromberg* cases.

The Court began to somewhat clarify the application of *Stromberg/Williams* in the case of *Yates v. United States*, 354 U.S. 298, 312 (1957). Although the Court further extended *Stromberg*, it nonetheless emphasized the narrow circumstances that require reversal of a conviction in *Stromberg* cases: “[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is *impossible* to tell which ground the jury selected.” *Id.* at 312 (emphasis added , *overruled on other grounds*).

A distinction between unconstitutional theories imbedded solely in a statute, and the factual evidence of guilt to support a general guilty verdict resting on multiple theories of guilt, began to emerge when the Supreme Court issued its decision in *Turner v. United States*, 396 U.S. 398 (1970). In *Turner*, the defendant challenged the sufficiency of the evidence at trial to sustain the jury’s guilty verdict on each and every element of a one count indictment charging him with knowingly purchasing, possessing, dispensing, and distributing heroine. The Court opined that it was not necessary to vacate a conviction in general verdict case when multiple acts are alleged in one count so long as there is sufficient evidence as to one of the acts. *Id.* at 419-21. In *Turner* the Court upheld

the defendant's conviction finding that it survived on evidence sufficient to support the distribution element of the charge alone: "[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 420.

Some further guidance was provided by *Zant v. Stephens*, 462 U.S. 862 (1983) when the Court considered the *Stromberg* line of cases and observed:

One rule derived from the *Stromberg* case requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied *all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested.*

Id. at 881 (emphasis added). Citing *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Cramer v. United States*, 325 U.S. 1, 36 n. 45, (1945); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Yates v. United States*, 354 U.S. 298, 311-312 (1957).

Id. at 881.

In *Zant*, the Court further observed and emphasized that *Stromberg* error requires reversal of a conviction *only* in cases where there is no way to be certain which theory the jury relied on to convict. *Id.* In other words, the courts needn't throw the baby out with the bath water in *Stromberg* cases where there is sufficient evidence to convict on any of the valid grounds submitted to the jury.⁴

⁴An offshoot of the Supreme Court's retreat from *Stromberg* was a line of cases applying *Griffin* and *Zant* to determine what evidence could have supported the verdict under the "impossible" to determine or "uncertain" standards for evaluating the evidence the jury relied on in finding guilt. Although the Supreme Court has yet to apply the seminal case announcing the standards for sufficiency of evidence to convict - *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) - to *Stromberg* cases via the *Griffin* line, the courts have generally found that a verdict can be upheld when a court can conclusively determine that the jury relied on the valid ground. See this Court's discussion of the sufficiency analysis in *Stromberg* cases in *State v. Berry* 227 W. Va. 221, 229 (2011).

The Court then began to turn on *Stromberg* in the case of *Griffin v. United States*, 502 U.S. 46 (1991) when it narrowed *Stromberg*'s application to cases where the grounds for conviction are "legally inadequate" rather than "factually inadequate." *Id.* at 59. The Supreme Court in *Griffin* openly questioned the widely held view and application of the *Stromberg* line of cases by first citing to its own conclusions in *Yates v. United States*, 354 U.S. 298 (1957) then roundly dismissing *Yates* and the other cases extending *Stromberg* as vague and irrelevant:

"In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Stromberg v. California*, 283 U.S. 359, 367-368 [51 S.Ct. 532, 535, 75 L.Ed. 1117]; *Williams v. North Carolina*, 317 U.S. 287, 291-292 [63 S.Ct. 207, 209-210, 87 L.Ed. 279]; *Cramer v. United States*, 325 U.S. 1, 36, n. 45 [65 S.Ct. 918, 935, n. 45, 89 L.Ed. 1441]." *Id.*, at 312, 77 S.Ct., at 1073.

None of the three authorities cited for that expansive proposition in fact establishes it. The first of them, *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), is the fountainhead of decisions departing from the common law with respect to the point at issue here.

Id. at 52 citing *Yates*, 354 U.S. at 312.

Griffin continued its drubbing of *Stromberg* by finding that it did not "stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin*, 502 U.S. at 53 citing *Stromberg* 283 U.S. at 368.

Although the Supreme Court had previously found in its jurisprudence that jury instructions were subject to a harmless error analysis (*Neder v. United States*, 527 U.S. 1, 7 (1999)) the Court had yet to apply a harmless error analysis to *Stromberg* cases until its opinion in the case of *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curium). In *Pulido*, the Court explicitly clarified that instructional

errors occurring in the context of a general verdict conviction must be reviewed for harmless error: “Both *Stromberg* and *Yates* were decided before we concluded in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that constitutional errors can be harmless.” *Pulido*, 555 U.S. 59. Finally the two parallel issues of jury instructions and flawed general verdict convictions were merged and the Court applied harmless error to jury instructions in *Stromberg* cases.

In *Pulido*, the Supreme Court reversed a decision by the Ninth Circuit on grounds that a conviction based on a general verdict is structural error. *Id.* at 555 U.S. at 62. In *Pulido*, the instructions included an unconstitutional error that permitted the jury to convict based on an invalid theory of guilt. After being convicted of felony murder by a California State jury, Pulido appealed arguing that the jury was instructed on an illegal theory of guilt. The California State appeals court agreed that the instruction was invalid but upheld the conviction on the grounds that the error was harmless. The Ninth Circuit disagreed (*See Pulido v. Chrones*, 487 F.3d 669 (9th Cir.2007) (*per curiam*)) and reversed finding that the error was structural and did not require a showing of prejudice. 555 U.S. at 58.

The Supreme Court reversed and remanded the case for a determination of whether the defendant was prejudiced by the error.

In this case the Court of Appeals for the Ninth Circuit held that such an error is “structural error,” requiring that the conviction be set aside on collateral review without regard to whether the flaw in the instructions prejudiced the defendant. The parties now agree that the Court of Appeals was wrong to categorize this type of error as “structural.” They further agree that a reviewing court finding such error should ask whether the flaw in the instructions “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks omitted). We agree as well and so hold.

Pulido, 555 U.S. at 59.⁵

In rejecting the Ninth Circuit’s analysis, the Supreme Court noted that the circuit court had based its finding of “structural error” on *Stromberg* and found that instructional error in cases of multiple theories of guilt “no more vitiates all the jury’s findings than does omission or misstatement of an element of the offense when only one theory is submitted.” (*Id.* at 61) (internal quotes and citations omitted)). The Court, however, stopped short of setting forth a standard for demonstrating prejudice for instructional error flowing from a *Stromberg* claim but instead remanded *Pulido* to the Ninth Circuit which then applied *Brecht* and found no prejudice. See *Pulido v. Chrones* 629 F.3d 1007 (9th Cir. 2010).

Which now brings us to the standard the habeas court *should* have applied rather than relying solely on *Stromberg* . . . - *Brecht*.

b. Harmless Error Standard.

A different level of review occurs when an instruction has been found to be constitutionally defective, as the question then becomes whether the instructional error can be cured under the constitutional harmless error rule of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). There the Supreme Court held that a constitutional error could be deemed harmless if the state “prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710. We have adopted this rule as evidenced by Syllabus Point 5 of *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975):

“Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.”

⁵*Pulido* reached the U.S. Supreme Court through 28 U.S.C. § 2254 habeas corpus proceedings. The defendant was convicted in state court. After the defendant’s conviction was upheld by the state courts, the defendant pursued relief in collateral proceedings in federal court. The Supreme Court remanded *Pulido* to the Ninth Circuit for analysis of error within the parameters of federal review of state court convictions (28 U.S.C. 2254).

See also Syllabus Point 1, *Maxey v. Bordenkircher*, --- W. Va. ----, 330 S.E.2d 859 (1985); Syllabus Point 5, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977).

Morrison v. Holland, 177 W. Va. 297, 300 (1986).

Although this Court has not adopted or applied *Brecht* to claims of instructional error it has nonetheless adopted a harmless error for challenges to jury instructions, albeit under *Chapman v. California*, 386 U.S. 18 (1967).⁶ *Morrison, supra*. In *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) the Court held that the harmless error standard announced in *Kotteakos v. United States*, 328 U.S. 750 (1946), applies in the context of habeas review. *Brecht* 507 U.S. at 638. Under the *Brecht* standard, “an error requires reversal only if it ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Id.* at 631 (quoting *Kotteakos*, 328 U.S. at 776 (emphasis added)). The Supreme Court has consistently held that when examining state cases for federal constitutional error that respondents are not entitled to relief based on a constitutional error at trial unless “they can

⁶The history of the harmless error standards announced by the Supreme Court takes on significance when viewed in light of the Anti Terrorism and Effective Death Penalty Act of 1995 which effected the standards of review of state convictions by federal courts in 28 U.S.C. 2254 habeas proceedings. In harmless error cases prior to the AEDPA, the *Chapman* standard required proof “beyond a reasonable doubt” that the challenged error effected the verdict rather than the more liberal “injurious effect” standard of *Brecht*. In *Brecht*, the Court examined *Chapman* and “rejected the argument that the Constitution requires a blanket rule of automatic reversal in the case of constitutional error, and concluded instead that ‘there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless.’” *Brecht*, 507 U.S. at 630 quoting *Chapman*, 386 U.S. at 22. *Brecht* then categorized defects as: (1) “structural defects,” that merit unconditional reversal without an analysis for prejudice or (2) “trial errors,” which are subject to harmless error analysis. *Id.* at 629-30. *Chapman* was a direct-appeal case, and not a habeas proceeding and until *Brecht*, post-AEDPA, the Court had not examined harmless error “beyond a reasonable doubt” in habeas proceedings. *Brecht* rejected the *Chapman* standard in collateral review. *Brecht* at 630-38.

establish that it resulted in ‘actual prejudice.’” *Brecht* 507 U.S. at 637 (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)).

But most significantly, it must be shown under the *Brecht/Kotteakos* standard, that the error contributed to the verdict and conviction in light of the proceedings at a whole:

[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 765.

But among the many relevant cases issued by the courts since 1931 when it decided *Stromberg*, (including *Brecht/Kotteakos*) was the case of *Arizona v. Fulminante*, 499 U.S. 279 (1991), wherein the Supreme Court has defined “structural error” as error that affects “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. However, *Fulminante* is inapplicable under the present set of facts in light of the Supreme Court’s application of *Brecht* to *Stromberg* cases; a fact not considered by the lower court.

c. The Conviction is valid under *State v. Berry*, 227 W. Va. 221 (2011).

When a defendant is prosecuted on alternative theories of first-degree murder, a verdict against the defendant will stand if the evidence is sufficient to establish guilt beyond a reasonable doubt on any of the alternative first-degree murder theories.

Syllabus Point 4. *State v. Berry*, 227 W. Va. 221 (2011).

In the case of *State v. Berry*, this Court applied *Stromberg* and its progeny in the case of a defendant challenging his conviction based on the sufficiency of evidence to support one of the alternative theories the jury was instructed it could rely on in finding guilt.

In *Berry*, the defendant waited in his car, outside the home of his former girlfriend until she and her lover arrived whereupon he shot and killed them both. 227 W. Va at 223. The defendant was charged with both a “lying in wait” and “premeditation” theory of murder and was convicted on a general verdict. *Id.* at 227. Berry appealed claiming there was insufficient evidence to support the “lying in wait” element of the instruction and therefore, under *Stromberg*, his conviction was invalid. *Id.*

The defendant in *Berry* argued that under the *Stromberg/Yates*, “a conviction must be reversed when evidence is insufficient as to one theory of murder and the verdict form fails to show which theory was relied upon by the jury.” *Berry* 227 W. Va. at 227. This Court was unimpressed and flatly rejected the defendant’s *Stromberg/Yates* argument finding that “[n]either case stands for such a proposition.” *Id.*

Instead, this Court turned to *Griffin*:

Under the decision in *Griffin*, when a defendant is convicted of a crime that is prosecuted under two liability theories, and a jury returns a general verdict of guilty, the conviction is valid even though the evidence was insufficient as to one of the liability theories. Most courts addressing this issue have reached the same conclusion. *See Terry v. State*, 371 Ark. 50, 263 S.W.3d 528, 533 (2007) (holding that where the jury was instructed on charges of capital murder under two theories and rendered a general verdict of guilty on capital murder, the verdict could be affirmed if there was sufficient evidence supporting a conviction under either theory); *People v. Silva*, 25 Cal.4th 345, 106 Cal.Rptr.2d 93, 114, 21 P.3d 769 (2001) (“[A]ssuming ... that the evidence was insufficient to support the felony-murder theory, we conclude that defendant was not prejudiced because ... [t]he evidence here is more than adequate to support the verdict of first degree murder in the killing of [the victim] on the theory of premeditation and deliberation.”); *People v. Dunaway*, 88 P.3d 619, 631 (Colo.2004) (upholding conviction where only one alternative theory of liability for a child abuse charge was supported by the evidence beyond a reasonable doubt); *White v. United States*, 714 A.2d 115, 118 n. 5 (D.C.1998) (holding that, since the jury returned a general verdict of guilty on the charge of carrying a concealed weapon, the conviction may be affirmed if the evidence was sufficient to support either theory of liability-actual possession or constructive possession); *San Martin v. State*, 717 So.2d 462, 469 (Fla.1998) (holding that murder conviction was valid even though

evidence was insufficient on theory of premeditated murder, because evidence was sufficient for felony murder theory); *Commonwealth v. Candelario*, 446 Mass. 847, 848 N.E.2d 769, 778 (2006) (holding that the issue of the sufficiency of evidence to support a theory of murder with extreme atrocity or cruelty was moot where there was no dispute that evidence was sufficient to support the alternative theory of deliberate, premeditated murder); *People v. Ponnappula*, 229 A.D.2d 257, 655 N.Y.S.2d 750, 760 (1997) (“[W]hen disjunctive theories of criminality are submitted to the jury and a general verdict of guilt is rendered, a challenge based on evidentiary insufficiency will be rejected as long as there was sufficient evidence to support any of the theories submitted.”); *Sanchez v. State*, No. PD-0961-07, 2010 WL 3894640, at *9 (Tex.Crim.App. Oct. 6, 2010) (“When a jury returns a general guilty verdict on an indictment charging alternate methods of committing the same offense ..., [i]f the evidence is sufficient to support a finding of guilt based on at least one of the alternative theories, the verdict stands.”); *State v. Hecht*, 116 Wis.2d 605, 342 N.W.2d 721, 729 (1984) (holding that conviction will stand even though evidence may be insufficient on one of several liability theories for committing a crime).

This Court previously never has addressed a claim of insufficiency of evidence as to one of two alternative murder theories. However, in the context of felony murder and premeditated murder charges, this Court has held that a verdict form does not have to distinguish between the two theories of murder, so long as the State does not intend to seek a conviction for the underlying felony murder theory. *See State v. Hughes*, 225 W. Va. 218, 226, 691 S.E.2d 813, 821 (2010) (“[T]he verdict form in the instant case did not make a distinction between felony murder and premeditated murder because the State did not seek a conviction for the underlying burglary felony.”); Syl. Pt. 5, *Stuckey v. Trent*, 202 W. Va. 498, 505 S.E.2d 417 (1998) (“In West Virginia, (1) murder by any willful, deliberate and premeditated killing, and (2) felony-murder constitute alternative means ... of committing the statutory offense of murder of the first degree; consequently, the State's reliance upon both theories at a trial for murder of the first degree does not, per se, offend the principles of due process, provided that the two theories are distinguished for the jury through court instructions; nor does the absence of a jury verdict form distinguishing the two theories violate due process, where the State does not proceed against the defendant upon the underlying felony.”). Implicit in this Court's recognition that a verdict form does not have to distinguish between felony murder and premeditated murder, with one exception as noted above, is an acknowledgment of the common law rule that a verdict will stand when evidence is sufficient as to only one of two or more theories of liability for a single offense. *Thus, we now make clear and hold that, when a defendant is prosecuted on alternative theories of first-degree murder, a verdict against the defendant will stand if the evidence is sufficient to establish guilt beyond a reasonable doubt on any of the alternative first degree murder theories.*

Berry 227 W. Va. at 228-30 (emphasis added).

Although the defendant in *Berry* appealed on grounds that his conviction rested on a general verdict unsupported by the evidence rather than on a claim that the jury instructions rested on an unconstitutional element in the charge (as found by the lower court in the present case), the reasoning in *Berry* not only applies to the case at bar but is sufficient alone to merit reversal of the lower court's findings irrespective of the reams of federal authority holding the same.

B. THE LOWER COURT'S FINDINGS IN LIGHT OF BOTH STATE AND FEDERAL LAW ON THIS ISSUE ARE ERRONEOUS, CLEARLY WRONG AND AN ABUSE OF DISCRETION.

In light of the evolution of *Stromberg* cases; the *Brecht* standard announced in *Pulido*; and in this Court's decision in *Berry*, the issue in contention in the case at bar amounts to no more than one of a simple technical defect in a jury instruction. No more, no less.

Neither *Stromberg* nor any of the cases following until *Pulido* apply to the case at bar. In fact, to say that the jury instructions in the case *sub judice* rested on an unconstitutional theory of guilt is simply wrong within the meaning of *Stromberg*. No element of the West Virginia felony murder statute has been held by the courts to be a violation of any federally guaranteed constitutional right as applied to the States through the Fourteenth Amendment as was the case in *Stromberg*. Nor did the instructions in the present case violate the defendant's constitutional rights as was the case in *Yates* or *Williams*. It cannot even be said that the challenged instruction in this case was unconstitutionally incorrect given that the lower court's findings rested solely on a matter of semantics in finding that because the jury instruction included "sexual assault" rather than "rape" (irrespective of the evidence at trial to support both rape under the former statute and sexual assault under the later statute) the respondent's conviction rested on a crime that didn't exist.

Under the lower court's theory, the jury should have been instructed on the crime of "rape" which was a crime that had been repealed by the Sexual Assault Act even though any such wording would have result in the same argument and same claim of error given that the rape statute had been repealed. Arguably, any such claim would be precluded by West Virginia's Savings Statute, aside from being ludicrous from a constitutional standpoint:

§ 2-2-8. Effect of repeal or expiration of law

The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specially provided; and that if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect.

See State v. Payne 167 W. Va. 262, 263 (1981) ("[W]e have recognized that W. Va. Code, § 2-2-8, may apply to the repeal of W. Va. Code, § 61-2-15, by the Sexual Assault Act, W. Va. Code, § 61-8B-1 et seq." Citing *State ex rel. Miller v. Bordenkircher*, 166 W. Va. 169) (1980)); ("When the Legislature enacted the Sexual Assault Act it did not include therein a savings clause. Therefore, W. Va. Code, § 2-2-8, the general savings statute, is applicable." *Miller* at 170-171.)

Taken to its logical conclusion, the reasoning of the lower court would invalidate the rape predicate offense in the felony murder statute during the eleven years between 1976 when the rape statute was repealed, and 1987 when the felony-murder statute was amended. In other words the problem would be the same if the State had used the word "rape" in the instruction given that "rape" was no longer a crime according to the lower court. Under the Savings Clause, the wiser decision would have been to instruct the jury on "sexual assault." Likewise, under the lower court's reasoning, because rape was not a crime within the context of the felony murder statute for eleven years, murder

in the commission of a sexual assault was not a crime either. So any perpetrator who committed a sexual assault during the commission of a murder could not be prosecuted under the for felony murder statute no matter what.

But given that the lower court did not see the need to explore this chicken-and-the-egg dichotomy in its reasoning, this glaring flaw in the court's findings does little more than muddy the already murky waters of this issue. This is but to digress into surplusage in an already overwhelming amount of authority demonstrating the incorrectness of the lower court's findings. There are plenty of other reasons to reverse the lower court.

But returning to the authorities discussed above, under *Griffin/Pulido/Berry* there need only be sufficient evidence to support one of the charges in the instruction on a general verdict conviction. The instructions in this case clearly stated that the jury could convict the respondent for felony murder on a finding of sufficient of evidence of rape *and/or* robbery. A simple reading of the evidence introduced at trial clearly demonstrates there was sufficient evidence for the jury to return a guilty verdict on the predicate offense of robbery.

Given the sufficiency of the evidence to support robbery as the predicate offense, it cannot be said that the use of the word "sexual assault" rather than "rape" in the instructions caused the jury to return a guilty verdict of felony murder premised on the evidence of robbery. *Brecht, supra* at 623. (The error must have "had substantial and injurious effect or *influence* in determining the jury's verdict.") Not even close. Nor can it even be said that the trial court gave an erroneous instruction but rather only offered an instruction that contained a technical defect that could not have had any discernable effect on the jury's verdict under any analysis. Technical defects alone cannot support a finding of prejudice. *See e.g. Jaradat v. Williams*, 591 F.3d 863 (6th Cir. 2010) ("The harmless

error standard emerged in the twentieth century in response to the behavior of appellate courts in reversing many cases on technical errors.”) *Id* at 869 citing Jeffrey O. Cooper, Searching for Harmlessness: Method and Madness in the Supreme Court’s Harmless Constitutional Error Doctrine, 50 U. KAN. L.REV. 309, 314 (2002).

In finding that the respondent was entitled to relief, the lower court issued findings recommending that a cold-blooded killer with a proven history of rape, murder and mayhem, including three recent murder charges, walk out of the jailhouse doors and onto the streets of society. The lower court did this in less than three pages of analysis. Aside from being woefully lacking in foundation and reason when viewed in light of the ultimate results, the lower court’s findings meet every standard announced by this Court for reversal of its findings.

With regard to the lower court’s findings of ineffective assistance of counsel for failure to object to the instruction (as a way to circumvent waiver and *res judicata* by couching the *Stromberg* claim in an ineffectiveness of counsel argument). Given that the instruction was not unconstitutional or prejudicial, and the use of the word “rape” instead of “sexual assault” could not have effected the verdict, or the soundness of the instructions, there can be no finding of ineffectiveness. Without a finding of ineffectiveness, there can be no finding of resulting prejudice.

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

Syllabus Point 5, *State v. Miller*, 194 W. Va. 3 (1995).

Therefore, without a finding of ineffectiveness for failing to object to the instruction, this claim is also waived in light of the lack of merit in the lower court’s findings. “One of the most

familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue.” *State v. LaRock*, 196 W. Va. 294, 316 (1996) (citations and quotations omitted.)

V.

CONCLUSION

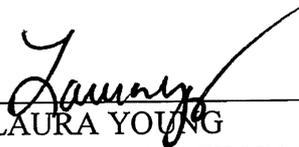
Your petitioner respectfully requests that the order of the Circuit Court of Ohio County, granting Philip Reese Bush relief in habeas corpus be reversed, and that the convictions for the first degree murders of Kathleen Williams and Charles Goff be reinstated and the sentences, consecutively, of life without mercy be ratified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the petitioner, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE PETITIONER* upon counsel for the respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 17th day of June, 2013, addressed as follows:

To: Donald Tennant, Jr. Esquire
Tennant Law Offices
38 15th Street, Suite 100
Wheeling, WV 26003


LAURA YOUNG