

14-1023

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA  
CIRCUIT CLERK  
NICHOLAS COUNTY, WV

STATE OF WEST VIRGINIA, ex. rel.  
ERIC FOSTER,

2014 SEP 10 A 8:59

Petitioner,

v.

CIVIL ACTION NO. 08-C-139

DAVID BALLARD, Warden,  
MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

**FINAL ORDER DENYING WRIT OF HABEAS CORPUS AND DISMISSING CASE**

This matter came before this Court on the petition of Eric Foster, and was brought under the provisions of West Virginia Code § 53-4A-1, *et seq.*, as amended. The Petitioner seeks to obtain post-conviction habeas corpus relief from a sentence imposed by this Court on the 19<sup>th</sup> day of November, 2004.

**I. Factual and Procedural Background**

1. The Petitioner was arrested on the charges at issue herein on the night of December 31, 2003, into the morning of January 1, 2004, and had an initial appearance before the Magistrate on January 1, 2004.

2. On or about January 6, 2004, Gregory S. Hurley was appointed to represent the Petitioner. Mr. Hurley appeared on behalf of the Petitioner at Petitioner's Preliminary Hearing on that same date.

3. On January 13, 2004, Mr. Hurley filed a Motion to Set Bond, which was heard and denied by this Court on January 21, 2004.

4. Based on the records maintained by the Regional Jail Authority, Mr. Hurley first visited Petitioner in jail during April 2004.<sup>1</sup>

5. On May 12, 2004, the Grand Jury indicted the Petitioner, along with Matthew Bush and Jeffrey Stewart, on two (2) counts of Murder, two (2) counts of Malicious Assault, and three (3) counts of Wanton Endangerment Involving a Firearm, for the deaths of Michael Murphy and Travis Painter.<sup>2</sup>

6. Mr. Hurley represented the Petitioner at his Arraignment on May 18, 2004.

7. Mr. Hurley represented the Petitioner at pre-trial and Admissibility Hearings on (a) June 14, 2004; (b) July 9, 2004; (c) July 22, 2004; (d) July 30, 2004; (e) August 9, 2004; (f) August 18, 2004; and (g) September 22, 2004.

8. On or about September 29, 2004, the Prosecutor sent a written plea offer to Mr. Hurley, offering the Defendant a plea to (a) Second Degree Murder for the death of Travis Painter, as contained in Count One of the Indictment; and (b) Voluntary Manslaughter for the death of Michael Murphy, as contained in Count Two of the Indictment. The written plea letter indicated that the plea offer would be available until September 30, 2004.<sup>3</sup> Mr. Foster testified that he was never advised of this plea offer. Mr. Hurley testified that he believed he had communicated the plea offer, as it was his practice to do so, but he did not have any proof or specific recollection.

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<sup>1</sup> See Petitioner's Exhibit 4 from the hearing on September 12, 2013.

<sup>2</sup> The facts underlying the charges are summarized by the West Virginia Supreme Court of Appeals in *State v. Foster*, 221 W. Va. 629, 634, 656 S.E.2d 74, 79 (2007).

<sup>3</sup> See Petitioner's Exhibit 1 from the hearing on September 12, 2013.

9. On October 5, 2004, the first day of Petitioner's trial, Mr. Hurley communicated to Petitioner a final plea offer of a plea to one (1) count of Second Degree Murder. Petitioner refused the offer and proceeded to trial.

10. Petitioner's criminal case (Case No. 04-F-48) proceeded to trial beginning on October 5, 2004. At trial, the State proceeded only on the two (2) murder counts.

11. On October 7, 2004, the jury returned a verdict of guilty on two (2) counts of Second-Degree Murder, lesser included offenses as contained in Counts One and Two of the indictment.

12. Following the jury trial, on October 15, 2004, Mr. Hurley filed a Motion for a Judgment of Acquittal or, in the Alternative, a New Trial.<sup>4</sup>

13. On November 19, 2004, the Court sentenced Petitioner to the maximum sentence of forty (40) years on each count, with said sentences to run consecutively.

14. After sentencing, in January 2005, Mr. Hurley filed a motion to recuse the newly elected Prosecuting Attorney from further actions in this case, which motion was granted by this Court on February 1, 2005.

15. Post-sentencing, Mr. Hurley filed a Motion for Reconsideration of Sentence, on behalf of the Petitioner, which motion was heard and denied on April 7, 2005.

16. Upon Mr. Hurley's motion, on May 1, 2006, this Court resentenced the Petitioner for purposes of appeal.

17. Margaret L. Workman was then substituted as counsel for the Petitioner, and she prepared and argued the Petitioner's appeal to the Supreme Court of Appeals of West

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<sup>4</sup> On that same date, Mr. Hurley made arrangements for the Petitioner to be released to attend his mother's funeral on October 16, 2004. See Order Authorizing Transport of Defendant for His Mother's Wake and Funeral, entered on October 15, 2004.

Virginia. By written opinion filed on November 19, 2007, the Supreme Court affirmed Petitioner's conviction and sentence. *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007).

18. By order entered on January 29, 2008, this Court appointed the Kanawha County Public Defender's Office to represent the Petitioner in filing a petition for writ of habeas corpus.<sup>5</sup>

19. However, the Petitioner initiated this case *pro se* on August 6, 2008, by filing a *Pro Se* Petition for Writ of Habeas Corpus Under West Virginia Code 53-4A-1 [Doc. No. 1] (the "*Pro Se* Petition"), raising the following five (5) grounds for relief:

- a. Sentence Disparate to That of Co-Defendant Matthew Bush
- b. Ineffective Assistance of Counsel
- c. Error in Jury Instruction (Malice Inference)
- d. Prosecutorial Misconduct
- e. Abuse of Discretion in Admitting Autopsy Photos

20. On July 11, 2012, Petitioner, by counsel, filed Petitioner's Amended Petition for Writ of Habeas Corpus [Doc. No. 8] and a Memorandum in Support [Doc. No. 6] (collectively referred to herein as the "Amended Petition"), which raised the following two (2) grounds and incorporated Petitioner's remaining grounds by reference<sup>6</sup>:

- a. Failure to Properly Advise Petitioner of Plea Offer
- b. Ineffective Assistance of Counsel

21. A status hearing was held on November 13, 2012. At that time, the omnibus hearing was set for January 16, 2013.

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<sup>5</sup> That order was filed in the Petitioner's underlying criminal case, Case Number 04-F-48 as Doc. No. 171.

<sup>6</sup> See Amended Petition, p. 5, n.3.

22. By order entered on January 17, 2013 [Doc. No. 11], the Court granted Petitioner's motion to continue the omnibus hearing to March 26, 2013, and directed the Respondent to file a Response by February 15, 2013. The Response [Doc. No. 15] was filed on March 1, 2013.

23. On March 21, 2013, Petitioner, by counsel, again moved to continue the omnibus hearing [Doc. No. 18]. Therefore, the hearing on March 26, 2013, was a status hearing, and the evidentiary hearing was re-set.

24. The omnibus evidentiary hearing was held on September 12, 2013. At that hearing, Petitioner's counsel had the Petitioner thoroughly review a Habeas Corpus Notification Form [Doc. No. 50], which included a list of possible grounds for relief, pursuant to *Losh v. McKenzie*, 166 W. Va. 752, 277 S.E.2d 606 (1981). The Petitioner initialed each of the following grounds for habeas corpus relief as grounds he claimed for relief:

- a. Denial of counsel [*due to counsel's ineffectiveness*<sup>7</sup>]
- b. Ineffective assistance of counsel
- c. Constitutional errors in evidentiary rulings

Thereafter, counsel for Petitioner proceeded to put on evidence in support of Petitioner's petition for habeas corpus relief.

25. At the omnibus evidentiary hearing on September 12, 2013, the following witnesses testified:

- a. Petitioner, Eric Foster
- b. Petitioner's expert, Gregory Campbell
- c. Jeremy Hannah, by telephone
- d. Greg Hurley, Petitioner's trial counsel

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<sup>7</sup> This notation was hand-written on the form by the Petitioner.

e. Franklin Hamrick, an employee of CRJ

f. Eric Foster's sister, Valena R. Kidd

26. The evidentiary hearing was continued to October 18, 2013.<sup>8</sup> At that time, the Petitioner presented only one (1) additional witness, Ricky Johnson.

27. Following the taking of the evidence, the Court entered a briefing schedule [Doc. No. 64], directing the Petitioner to submit a brief on or before December 2, 2013, and the Respondent to submit a brief on or before January 3, 2014.

28. On December 12, 2013, Petitioner filed Petitioner's Brief [Doc. No. 63].

29. On January 9, 2014, the Respondent filed the State's Response to Petitioner's Brief, which was mistakenly filed in the underlying criminal case, Case No. 04-F-48, but was properly filed in this case on March 3, 2014 [Doc. No. 65].

## **II. Petitioner's Grounds for Habeas Corpus Relief**

Based upon Petitioner's *Pro Se* Petition, the Amended Petition and the completed *Losh* list, the Court finds that Petitioner's grounds for habeas corpus relief are:

- A. Disparate Sentence
- B. Error in Jury Instructions Related to Malice Instruction
- C. Prosecutorial Misconduct
- D. Abuse of Discretion in Admitting Gruesome Photos
- E. Ineffective Assistance of Counsel

A petition for a writ of habeas corpus pursuant to West Virginia Code Sections 53-4A-1, *et seq.* "serves as a collateral attack upon a conviction under the claim that the conviction was obtained in violation of the state or federal constitution." *Edwards v. Leverette*, 163 W. Va. 571, 576, 258 S.E.2d 436, 439 (1979). To prevail in post-conviction habeas corpus proceedings, the "petitioner has the burden of proving by a preponderance of the evidence the

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<sup>8</sup> Neither party requested a transcript of the two (2) evidentiary hearings. Therefore, all references in this order to the proceedings on September 12, 2013, and October 16, 2013, are based on (a) the exhibits admitted during those hearings, and (b) the detailed notes taken by this Court.

allegations contained in his petition or affidavit which would warrant his release.” Syl. Pt. 1, *in part, Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486 (1966). After carefully considering the parties’ pleadings, along with all of the evidence and arguments presented in connection therewith, for the reasons explained below, the Court concludes that the Petitioner has failed to establish any basis for the requested post-conviction relief.

### **III. Discussion**

#### **A. Disparate Sentence**

Petitioner argues that his sentence was disparate to that of his co-defendants. Although raised in Petitioner’s *Pro Se* Petition, the ground for relief based on disparate sentences was not raised in the Amended Petition and was not initialed by the Petitioner on the *Losh* list. Additionally, at the evidentiary hearings, Petitioner had a full opportunity to present evidence on each of his grounds for relief but failed to produce any evidence or argument regarding the allegedly disparate sentences. Nevertheless, the Court considers the arguments Petitioner raised on this issue in his *Pro Se* Petition, as they were incorporated in the Amended Petition by reference.<sup>9</sup>

The jury found Petitioner guilty of two (2) counts of Second Degree Murder, and he was sentenced to the maximum sentence of forty (40) years on each count, pursuant to West Virginia Code Section 61-2-3, with said sentences to run consecutively. As a result, Petitioner’s combined sentence is eighty (80) years. The Petitioner was indicted along with two (2) co-defendants: Jeffrey Stewart and Matthew Bush. Petitioner’s co-defendant Jeffrey

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<sup>9</sup> Although this opinion addresses the grounds raised in the *Pro Se* Petition, this issue could properly be denied as having been waived because it was not raised in the Amended Petition. *See, Walker v. Ballard*, 2013 WL 1632113, 26-27 (W. Va., April 16, 2013) (“Neither W. Va. Code § 53-4A-1, *et seq.*, nor the *W.V.R. Governing Post-conviction Habeas Corpus Proceedings* authorize the attachment of the Petitioner’s original *pro se* Petition to the Amended Petition as a means to bring the *pro se* matters forward without further support. The Court finds all such allegations unsupported by factual or legal allegation and denies each.”).

Stewart was also found guilty of two (2) counts of Second Degree Murder, and Jeffrey Stewart was also sentenced to forty (40) years on each count, pursuant to West Virginia Code Section 61-2-3, with said sentences to run consecutively. As a result, Petitioner and his co-defendant Jeffery Stewart were both sentenced to a total of eighty (80) years. Unlike Petitioner and Jeffrey Stewart, Matthew Bush entered a plea of no contest to two (2) counts of Voluntary Manslaughter. On February 3, 2005, Matthew Bush was sentenced to fifteen (15) years on each count, pursuant to West Virginia Code Section 61-2-4, with the sentences to run consecutively. Each of the three (3) co-defendants was sentenced to the maximum sentence for the crimes for which each was convicted.

Although all three co-defendants were sentenced to the maximum sentence for the crimes with which they were convicted, Petitioner maintains that his sentence was disparate.

The West Virginia Supreme Court has stated that:

Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each defendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.

Syl. Pt. 2, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984), *quoted in* Syl. Pt. 3, *State v. Robey*, 233 W. Va. 1, 754 S.E.2d 577 (2014). The West Virginia Supreme Court has further explained that "where the co-defendants differ in their criminal backgrounds or in their role or participation in the offense, disparate sentences are justified." *Smoot v. McKenzie*, 166 W.Va. 790,792, 277 S.E.2d 624, 625 (1981).

Petitioner states that his sentence is disparate because Matthew Bush was the prime mover in the crime, and Matthew Bush received a lesser sentence. Petitioner further argues

that his finger prints were not found on any of the weapons used at the crime and that he had no part in the kidnapping of Kimberly Halstead and Jeremy Hanna, which followed the murders. Additionally, Petitioner states that he had no prior criminal history, was a high school graduate and a father. Petitioner raised these same arguments on appeal, when he alleged that his sentence was unconstitutional. *See, State v. Foster*, 221 W. Va. 629, 645, 656 S.E. 2d 74, 90 (2007). In reviewing the constitutionality of Petitioner's sentence on appeal, the West Virginia Supreme Court stated:

While the appellant was sentenced to the maximum penalty for second degree murder permitted under W.Va.Code § 61-2-3 (1994), which is certainly a significant sentence, this Court is unable to find that the sentence shocks the conscience under the circumstances. There was sufficient evidence for the jury to determine that the appellant was present at and aided and abetted the intentional and violent killing of two persons with the use of firearms. In light of the fact that the appellant's crimes resulted in two deaths, we cannot conclude that the appellant's sentences are constitutionally improper.

*Foster*, 221 W. Va. at 645, 656 S.E. 2d at 90.

Having reviewed all of the facts and evidence presented, this Court does not agree with Petitioner's assertion that Matthew Bush was the prime mover in the crime and that Petitioner's sentence was impermissibly disparate. Evidence adduced at trial indicated that there had previously been animosity between Petitioner and one of the victims, Travis Painter; that earlier on the day at issue, an argument between the two occurred; and that Painter had pulled a gun on Petitioner. *See, Foster*, 221 W. Va. at 634, 656 S.E.2d at 79. There was testimony that, at the conclusion of that confrontation, Painter invited Petitioner to come to the residence of Mike Murphy that evening to talk things out. *Id.* Later that evening, Petitioner drove his truck to Murphy's residence. With him were his co-defendants Matt Bush and Jeffery Stewart, who was in possession of a shotgun. *Id.* Petitioner testified that he knew

that Stewart had the shotgun with him when they traveled to Murphy's residence. *Id.* When petitioner pulled his truck up to Murphy's residence, both Murphy and Painter approached the truck and were armed. Eyewitness testimony suggested that the first shots came from Petitioner's truck. *Id.*

Upon consideration of Petitioner's appeal, the West Virginia Supreme Court concluded that this evidence was sufficient to support the jury's verdict of guilty on two (2) counts of Second Degree Murder.<sup>10</sup> *Id.* Similarly, the evidence adduced at trial was sufficient to show that the Petitioner acted with the same culpability as his co-defendants, and there is ample justification for the convictions and sentences imposed upon the three (3) co-defendants. The maximum sentence provided for by the applicable statutes was imposed on each of the defendants, and their sentences were not dissimilar. Accordingly, no evidence or argument shows that Petitioner is entitled to relief on the ground of disparate sentences.

#### **B. Error in Jury Instructions Related to Malice Instruction**

Although raised in Petitioner's *Pro Se* Petition, the ground for relief based on the malice instruction was not raised in the Amended Petition,<sup>11</sup> was not initialed by the Petitioner on the *Losh* list, and was not supported by any evidence or argument at the evidentiary hearings. Additionally, "there were no objections to the jury instructions [during the trial] below" (*See, Foster*, 221 W.Va. at 640, 656 S.E.2d at 85), and Petitioner never raised the

<sup>10</sup> The West Virginia Supreme Court concisely summarized the convicting evidence as follows:  
... the evidence indicates that the appellant was not only present at the scene of the crime but that he transported the shooter(s) to the crime scene and then assisted them in fleeing the scene after the killing of Murphy and Painter. Further evidence from which a rationale trier of fact could find the intent on the part of the appellant is the enmity between the appellant and Painter and their confrontation on the day of the crimes; the appellant's close friendship with the co-defendant Bush; and the appellant's knowledge that Jeff Stewart took a shotgun to Murphy's residence.

*Foster*, 221 W. Va. at 639-40, 656 S.E.2d at 84-85; *see also, Foster*, 221 W. Va. at 636, 656 S.E.2d at 81.

<sup>11</sup> The *Pro Se* Petition was incorporated by reference into the Amended Petitioner. However, *see n. 9, supra.*

malice instruction on appeal, even though Petitioner raised other alleged errors with the jury instructions on appeal. When considering the jury instructions on appeal, the West Virginia Supreme Court found "no error in the instructions given to the jury." *Foster*, 221 W.Va. at 641, 656 S.E.2d at 86.<sup>12</sup> Although this ground for relief could be denied on the foregoing alone, this Court briefly considers the arguments Petitioner raised on this issue in his *Pro Se* Petition.

At Petitioner's trial, the Court gave the jury the following instruction as it relates to malice, which instruction had been thoroughly reviewed and revised by counsel:

#### MALICE

The word malice, as used in these instructions, is used in a technical sense. It may be either expressed or implied and it includes not only anger, hatred and revenge, but other unjustifiable motives. It may be inferred or implied by you from all of the evidence in this case, if you find such inference is reasonable from the facts and circumstances in this case which have been proven to your satisfaction beyond a reasonable doubt. It may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden. Malice is not confined to ill-will toward any one or more particular persons, but malice is every evil design in general; and by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart, regardless of social duty, fatally bent upon mischief. It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time.

Judge's Charge to Jury, p. 13 [Doc. No. 121 in 04-F-48]. Petitioner alleges that the trial court abused its discretion by instructing the jury that malice could be inferred and implied, when there was no evidence that Petitioner used a deadly weapon. In support of his position,

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<sup>12</sup> On consideration of Petitioner's appeal, the West Virginia Supreme Court also stated that "[w]ith regard to any alleged ineffectiveness in failing to offer jury instructions, we have found no error in the instructions given at trial." *Foster*, 221 W. Va. at 644, 656 S.E.2d at 89.

Petitioner incorrectly relies upon *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). At no point in *Miller* did the Court ever indicate that the use of a deadly weapon was required for an inference of malice instruction. Rather, the Court in *Miller* examined, at length, when malice could be inferred vs. presumed when a deadly weapon was used.

Additionally, the malice instruction must be read in the context of the entire jury charge. The West Virginia Supreme Court of Appeals has made clear that jury instructions are to be reviewed as a whole, and “the entire instruction is looked at when determining its accuracy.” *State v. Bradshaw*, 193 W. Va. 519, 543, 457 S.E.2d 456, 480 (1995), *quoted in State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995). An entire reading of the Court’s charge shows that the jury was given an accurate instruction on malice. The Court chose a working, within its discretion, which best explained the principles of law as they related to the evidence presented at trial. Therefore, the instruction, as a whole, accurately reflects the law as it related to the case, and the Petitioner is not entitled to relief on the basis of the jury charge.

### C. Prosecutorial Misconduct

Alleged prosecutorial misconduct is the third ground for relief that was raised in Petitioner’s *Pro Se* Petition but was not raised in the Amended Petition and was not initialed by the Petitioner on the *Losh* list. Additionally, at the evidentiary hearings, Petitioner had a full opportunity to present evidence on each of his grounds for relief but failed to produce any evidence or argument regarding the alleged prosecutorial misconduct. Nevertheless, the Court considers the arguments Petitioner raised on this issue in his *Pro Se* Petition, as they were incorporated in the Amended Petitioner by reference.<sup>13</sup>

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<sup>13</sup> See n. 9, *supra*.

In his *Pro Se* Petition, the Petitioner raises two separate issues, which he claims were error, both of which relate to statements about and evidence of the victim's families. First, Petitioner contends that the Prosecutor made statements calculated to inflame, prejudice and distract the jury when he indicated during opening statements that the victim Mike Murphy was survived by a wife and children. Specifically, during his opening statement, the Prosecutor stated:

... Both dead, and both leaving behind family.  
Mike Murphy was the father of two and the grandparent of one.  
He had a six-month old grandchild at that time, and that's how  
their year ended in 2003. They never saw 2004.

Transcript, Vol. I, p. 127. Petitioner argues that this statement was prosecutorial misconduct that should warrant habeas corpus relief.

With respect to a claim for prosecutorial misconduct, the West Virginia Supreme Court of Appeals has repeatedly stated that "[a] judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *State v. Sparks*, 171 W. Va. 320, 298 S.E.2d 857 (1982), quoting Syl. Pt. 5, *State v. Ocheltree*, 170 W. Va. 68, 289 S.E.2d 742 (1982). More recently, the West Virginia Supreme Court of Appeals has given the further guidance that:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. Syllabus Point 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Syl. Pt. 8, *State ex rel. Kitchen v. Painter*, 226 W.Va. 278, 700 S.E.2d 489 (2010). Therefore, the Petitioner's allegations are addressed on the basis of these four (4) factors.

The Prosecutor's remark during opening was a brief, isolated statement. It is unlikely that the statement would have misled or influenced the jury, because competent proof was introduced to establish the guilt of the accused.<sup>14</sup> The statement was so brief and benign that it did not draw the attention of Petitioner's counsel at trial. Counsel for the Petitioner did not object to the prosecutor's comment during the opening statements.<sup>15</sup> *See, e.g., State v. Coulter*, 169 W. Va. 526, 530, 288 S.E.2d 819, 821 (1982). Additionally, this Court correctly instructed the jury that nothing said by the lawyers, including their opening statements, may be considered as evidence.<sup>16</sup>

Even if the Prosecutor's comment was improper, the Petitioner failed to put forth any evidence to show that it was clearly prejudicial or resulted in manifest injustice. *See*, Syl. Pt. 5, *Sparks*, 171 W. Va. 320, 298 S.E.2d 857. No evidence was introduced to show that the

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<sup>14</sup> On appeal, the West Virginia Supreme Court concisely summarized the convicting evidence. *State v. Foster*, 221 W. Va. at 639-40, 656 S.E.2d at 84-85. *See* n. 10, *supra*.

<sup>15</sup> In Petitioner's *Pro Se* Petition, he claimed that counsel was ineffective due to his failure to object to improper statements made by the prosecuting attorney. However, this allegation was not discussed in the Amended Petition or in Petitioner's Brief, and no evidence or argument was presented on the issue during the evidentiary hearings. Therefore, the Court finds that this allegation is not supported by any argument or evidence, and therefore, declines to address the matter. *See also*, n. 9, *supra*.

<sup>16</sup> The Judge's Charge to Jury provided in relevant part:

You must not permit yourself to be influenced by sympathy, passion, prejudice or public sentiment for or against this defendant or for or against any witness.

Nothing said or done by the lawyers who have tried this case can be considered by you as evidence of any fact in this case. Opening statements of the lawyers are intended to give you a brief outline of what each side expects to prove so that you may better understand the testimony of witnesses. \* \* \*

The function of the lawyers is to point out those things they believe are most significant or most helpful to their side of the case, and in doing so, to call to your attention certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls this case.

Judge's Charge to Jury, pp. 2-3 [Doc. No. 121 in 04-F-48].

from the prior question, that she and Mike Murphy had two children. The remainder of the Prosecutor's questions were related to Diane Murphy's last conversation with Mike Murphy on the night of the shooting, as well as related to Mike Murphy's rat-tail and denim jacket, which were also at issue. Transcript, Vol. II, pp. 47-49.

The Petitioner argues that Diane Murphy's testimony "infected the Petitioner's underlying trial" such that his conviction should be reversed. This Court does not agree. It is true that the West Virginia Supreme Court has held that:

Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury. For this reason, courts tend to look upon testimony by a surviving spouse with disfavor. However, the admission of such evidence does not necessarily constitute reversible error.

Syl. Pt. 5, *State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992). Unlike the facts in *State v. McCausland*, 82 W.Va. 525, 96 S.E. 938 (1918), which was discussed in *Wheeler* and relied upon by Petitioner, the testimony of Diane Murphy in the present case was relevant to multiple issues involved in the case. She testified regarding Mike Murphy's intent to return home later that evening, and she also testified regarding his rat-tail and denim jacket, which were both damaged during the shooting. The Prosecutor's questions related to Diane Murphy's relationship to the victims were direct and brief and were not introduced for the purpose of creating sympathy in the minds of the jury.

As in *Wheeler*, the "review of the record confirms that [Diana Murphy's] testimony was indeed limited in this respect. Furthermore, we can discern no attempts by the prosecution to exploit her grief so as to tug at the heartstrings of the jury. . . . Because of the great latitude that counsel is permitted in presenting its case, and because the State presented

comments misled or improperly influenced the jury's ability to weigh the evidence or that the remarks were deliberately placed before the jury to divert the jury's attention to extraneous matters. See, Syl. Pt. 8, *State ex rel. Kitchen v. Painter*, 226 W.Va. 278, 700 S.E.2d 489 (2010). Moreover, absent the remarks, ample, competent proof was introduced at the trial of this case to establish the guilt of the Petitioner. *Id.* Accordingly, the Petitioner is not entitled to habeas corpus relief based on any allegedly improper remarks by the prosecution related to the victims' families.

In his *Pro Se* Petition, the Petitioner also contends that Prosecutor improperly called as a witness the victim's widow, Diane Murphy. Petitioner argues that Diane Murphy's testimony served no relevant purpose but to prejudice the jury. Diane Murphy was called as a witness on the second day of trial. The Prosecutor's initial questions established that she was Mike Murphy's wife and Travis Painter's sister. Upon the Prosecutor asking if she and Mr. Murphy have any children together, Petitioner's counsel asked to approach the bench. At that time, the following exchange took place out of the jury's hearing:

MR. HURLEY: I don't see the relevance of getting a family background of Murphy and Painter.

MR. MILAM: That's just how I started. I was going to ask her about the children, if she had the children that night, and that she talked to Mike right before - - She was the last one to talk to Mike other than the ones that were up there.

MR. HURLEY: I don't see the relevance other than she -

MR. MILAM: To show that she talked to him and what type of mood he was in. She talked to him, and he didn't seem like there were any problems.

THE COURT: Okay, go ahead. I'll overrule the objection.

Transcript, Vol. II, p. 47. After this exchange, the Prosecutor resumed his direct examination of Diane Murphy. The Prosecutor asked one last question to clarify Ms. Murphy's answer

overwhelming evidence of [Petitioner's] guilt, we do not believe that the fact that [Ms. Murphy] was permitted to testify constitutes adequate grounds for reversal." *State v. Wheeler*, 187 W.Va. at 387-389, 419 S.E.2d at 455 – 457. Accordingly, the Petitioner is not entitled to habeas corpus relief on the basis of the State calling Diane Murphy as a witness during the trial below.

**D. Abuse of Discretion in Admitting Gruesome Photos**

In the Petitioner's *Pro Se* Petition, he alleged that the court abused its discretion in allowing the State to show (a) photos of the victims' bodies at the crime scene, and (b) photos of the autopsies over defense counsel's objections as to relevancy and gruesomeness. On the *Losh* list, the Petitioner also initialed the blank for "constitutional errors in evidentiary rulings." However, the photographs were not discussed in the Amended Petition,<sup>17</sup> and Petitioner failed to produce any evidence or argument related to the allegedly gruesome photographs during the evidentiary hearings. Additionally, the admission of the photos was not raised on appeal. Nevertheless, the Court considers the arguments Petitioner raised on this issue in his *Pro Se* Petition, as they were incorporated in the Amended Petition by reference.<sup>18</sup>

First, Petitioner does not specify the photos of the scene to which he has an objection. However, the Court believes they are State's Exhibits 7 and 8. Only four (4) photographs of the bodies at the scene were admitted, and defense counsel had no objection to the photographs labeled State's Exhibits 5 and 6. Transcript, Vol. I, pp. 173-174. However,

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<sup>17</sup> One mention of the gruesome photographs was included in Paragraph 10 of Petitioner's Amended Petition. However, no additional argument was made in the supporting memorandum, during evidentiary hearings, or in Petitioner's Brief.

<sup>18</sup> See n. 9, *supra*.

defense counsel did object to the admissibility of State's Exhibits 7 and 8 on the basis that those photographs were far more gruesome. Transcript, Vol. I, pp. 174-175. The Court conducted two (2) separate bench conferences regarding the admissibility of the photographs. Transcript, Vol. I, pp. 175, 178-180.

The Prosecuting Attorney represented that the photos would be used to show the actual injuries, which is what led the investigating officers to believe it was a homicide. He further stated that those were the same injuries seen by the county coroner, who identified the deaths as a homicide. *Id.* The Prosecuting Attorney represented that there were no less gruesome photographs, and that those four (4) photographs were the only ones he sought to admit of the bodies. Transcript, Vol. I, pp. 175, 179. The court carefully considered the photographs labeled State's Exhibits 7 and 8 and heard the arguments of counsel. The court then conducted the required balancing test and weighed the probative value of the photographs over their prejudicial effect. Transcript, Vol. I, pp. 178-180. On that basis, the Court concluded, on the record, that the photographs were not particularly gruesome, that he did not believe they were being introduced for the purpose of prejudicing the jury, and that they showed the bullet holes on the bodies as they were found. Transcript, Vol. I, pp. 179-180.

Contrary to the Petitioner's assertion, the Prosecuting Attorney informed the court that, when the photos marked State's Exhibits 7 and 8 were taken, Murphy's body had been flipped over to where they could see the wound. Transcript, Vol. I, pp. 180. Therefore, the court made its evidentiary ruling with full knowledge that the body shown in the photograph had been moved. Additionally, when the photographs were introduced through the testimony

of Deputy Shafer, it was made clear to the jury that Mike Murphy's body had been rolled over prior to the photograph being taken. Transcript, Vol. I, pp. 181-183.

As evidenced by the foregoing, the Court conducted the required balancing test prior to admitting the photographs and determined that the pictures of the victims' bodies at the crime scene were relevant and not overly prejudicial. Accordingly, the Court did not err in admitting the photographs, and the Petitioner is not entitled to habeas corpus relief on the basis of the photographs of the bodies and the scene.

Second, Petitioner alleges that the pictures of the autopsies did not support any disputed fact and only worked to prejudice the Petitioner by inflaming the jury. Petitioner further argued that the court did not make the required determination regarding the admissibility of the photographs. Contrary to Petitioner's assertion, on the second day of trial, the court conducted a hearing outside the presence of the jury to review the admissibility of each of the autopsy photographs. The court reviewed each photograph to determine if the prejudicial effect would outweigh the probative value. Transcript, Vol. II, pp. 111-116. With respect to each photograph, the Court ruled as follows:

<u>State's Exhibit #</u>	<u>Defense Counsel Position</u>	<u>Ruling</u>
54	No objection	Admitted
55	Objection	Sustained. Prejudicial effect would outweigh probative value.
56	No objection, as altered	Admitted, but cutting off portions
57	No objection, as altered	Admitted, but cutting off portions
58	No objection, as altered	Admitted, but cutting off portions
59	No objection	Admitted
60	Objection	Sustained. Prejudicial effect would outweigh probative value.

*See*, Transcript, Vol. II, pp. 111-116. Accordingly, Petitioner's contention that the court did not conduct the required balancing test is without merit.

The photographs as issue in this case were admitted into evidence during Dr. Sabat's testimony, when Dr. Sabet testified about the position and distance of the shooter from the victims. Transcript, Vol. II, pp. 130-138. Dr. Sabaet's testimony "was corroborated by aid of the photograph[s] in that he was able to not only describe what he observed and how his observation aided in forming an opinion, but was able to show the jury firsthand what he saw." *See State v. Jenkins*, 229 W. Va. 415, 434, 729 S.E.2d 250, 269 (2012). Additionally, the photographs introduced were previously determined by the court to not be overly gruesome, and several of the photographs had been cropped to eliminate any unnecessarily gruesome portions. Accordingly, the photographs

" . . . were relevant and probative in showing the jury the condition, identity, and location of wounds on the body, and any speculative prejudicial effect was outweighed." *State v. Waldron*, 218 W.Va. 450, 458, 624 S.E.2d 887, 895 (2005) (per curiam). As this Court noted in *Derr*, "[g]ruesome photographs simply do not have the prejudicial impact on jurors as once believed by most courts. 'The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced.... [G]ruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.'" *Derr*, 192 W.Va. at 177 n. 12, 451 S.E.2d at 743 n. 12 (quoting *People v. Long*, 38 Cal.App.3d 680, 689, 113 Cal.Rptr. 530, 537 (1974)).

*State v. Berry*, 227 W.Va. 221, 231, 707 S.E.2d 831, 841 (2011). For all of the foregoing reasons, this Court concludes that it was not error to admit the autopsy photographs. Even if there had been an error in their admission, any such error would have been nothing more than a harmless error. The record establishes that the State could have proven its case beyond a reasonable doubt without the introduction of the evidence, and Petitioner provided no

argument or evidence to show any prejudicial effect of the photographs. *See, e.g., State v. Radabaugh*, 2013 WL 3283842, 2 (W.Va. 2013), *citing* Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979). Therefore, the Petitioner is not entitled to habeas corpus relief on the basis of the admission of the autopsy photographs.

**E. Ineffective Assistance of Counsel**

Ineffective assistance of counsel was the only ground for relief raised in the Amended Petition or argued at the evidentiary hearings. Petitioner essentially divides the issue into two (2) claims: the first related to counsel's alleged failure to properly advise Petitioner of the plea offer, and the second related to counsel's alleged failure to prepare for trial and perform adequately at trial. Both of those claims are addressed in detail below.

In the State of West Virginia, claims of ineffective assistance of counsel are evaluated by the standards set forth in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In *Miller*, the Supreme Court of Appeals of West Virginia adopted the two-prong test established by the United States Supreme Court's ruling in *Strickland v. Washington*, which held that a petitioner must prove that:

- (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 results of the proceedings would have been different.

Syl. Pt. 5, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

With respect to the first, performance-prong, the *Miller* Court offered the additional guidance that:

[i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. Pt. 6, *Id.* Where counsel's alleged ineffective assistance arises from trial "strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests; unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640 (1974)." Syl. Pt. 3, *State v. Frye*, 221 W.Va. 154, 650 S.E.2d 574 (2006).

Quoting *Strickland*, the West Virginia Supreme Court noted that, in reviewing counsel's performance, a court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* 194 W. Va. at 15, 459 S.E.2d at 126, quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 90 L.Ed.2d at 694.

That presumption was further explained in the *Miller* opinion, with the court stating that:

. . . we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a "wide range." The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

*Miller*, 194 W. Va. at 16, 459 S.E.2d at 127.

Given this guidance, the Court has carefully considered the pleadings and evidence adduced at the evidentiary hearings, through which Petitioner argues various reasons he believes he was denied effective assistance of counsel. The Court addresses each of the Petitioner's claims below, first addressing claims related to the plea bargaining stage of the proceedings, and then addressing claims related to counsel's preparation for and performance at trial.

**1. Ineffective Assistance of Counsel During Plea Bargaining Stage**

**a. Initial, written plea offer**

Petitioner contends that he was denied effective assistance of counsel during the plea bargaining stage of his proceeding due to the fact that Mr. Hurley failed to inform him of or discuss with him the written plea offer made by the State in late September 2004. In its letter dated September 29, 2004, the State offered to let Petitioner plead guilty to one (1) count of Second Degree Murder and one (1) count of Voluntary Manslaughter. Although the Petitioner testified that this offer was never communicated to him, Mr. Hurley testified that he believed he had communicated the plea offer. However, he did not have any proof or any specific recollection.

Assuming that the initial plea offer was not communicated to the Petitioner, the State agreed that Mr. Hurley was deficient, and this Court finds that the failure to communicate the written plea offer to Petitioner constituted ineffective assistance of counsel. *See* Syl. Pt. 3, *Becton v. Hun*, 205 W. Va. 139, 516 S.E.2d 762 (1999). However, under the standard set forth in *Miller*, counsel's deficiency alone does not justify habeas corpus relief. Petitioner must also prove, by a preponderance of the evidence, that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been

different.” Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114; *see also*, Syl. Pts. 1, 4, *Becton*, 205 W. Va. 139, 516 S.E.2d 762.

In this case, Petitioner has failed to prove the second prong of the *Miller* standard. Petitioner produced no evidence that the results of the proceedings would have been different if Mr. Hurley had communicated the written plea offer. Specifically, the Petitioner produced no evidence that he would have taken that plea offer. At the hearing on September 12, 2013, years after his conviction and sentencing, Petitioner testified that he would have accepted that original plea. However, this Court questions the veracity of Petitioner’s testimony because, when the Petitioner was offered an even more advantageous plea on the first day of trial (to only one (1) count of second degree murder), he refused that offer. Accordingly, Petitioner has failed to prove that the results of the proceedings would have been different but-for Mr. Hurley’s failure to communicate to him the initial plea offer in September 2004.<sup>19</sup>

**b. Plea offer made on the first day of trial**

With respect to the plea offer made on the first day of trial, Petitioner argues that he was denied effective assistance of counsel because Mr. Hurley failed to keep him advised of the status of his case and to discuss with him the strengths and weaknesses of his case. He argues that this failure prevented him from being able to knowingly and intelligently consider the State’s plea offer made on the first day of trial, which was an offer of a plea to one (1) count of second degree murder with all other charges to be dismissed. Petitioner contends that he refused the State’s final plea offer because he did not understand that he could be convicted of murder even though he did not shoot or possess a gun during the incident.

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<sup>19</sup> The Court also notes that “[b]ecause it is clear the trial counsel’s ineffectiveness in failing to communicate the plea offer to the [Petitioner] had no impact on the fairness of the [Petitioner’s] trial, the new trial sought by the [Petitioner] is not the appropriate remedy.” *Becton*, 205 W. Va. at 145, 516 S.E.2d at 768. Even if Petitioner had proven both prongs of the *Miller* inquiry, he would only be entitled to enter a guilty plea equivalent to the initial plea offered in the State’s September 2004 letter. *Id.*

Petitioner argues that he would have accepted that plea had he been properly advised concerning his case.

Despite the Petitioner's assertions, the Petitioner is unable to prove the two (2) prongs of the *Miller* inquiry. First, it is undisputed that Mr. Hurley communicated the plea offer to the Petitioner and explained that it was an offer to plea to one (1) count of second degree murder, which could be a sentence of forty (40) years. Mr. Hurley testified that he believed that offer was fully discussed, and the Petitioner admitted that he did not ask his counsel any questions. The Petitioner testified that he refused the plea offer because he felt like forty (40) years was too long, but that he would have taken the plea offer if he had known the strength of the State's case.

Petitioner's argument exemplifies the adage that "hindsight is 20/20." Petitioner alleges that he could have made a better informed decision about the plea offer if Mr. Hurley had better communicated with him regarding the case. However, based on the evidence presented, Petitioner has failed to show that Mr. Hurley's performance was deficient under an objective standard of reasonableness. The Petitioner testified that his counsel did visit him at the jail and that he also spoke with his counsel at five or six court appearances. Mr. Hurley testified that he recalled attending the jail three to four times. Although the jail records reflected only one visit in April 2004, Mr. Hurley testified that he usually visited multiple clients at one time. Additionally, Mr. Hurley testified that he did go over the discovery in the case with the Petitioner at the jail and also when the Petitioner was transported to court for hearings.<sup>20</sup> Mr. Hurley stated that the Petitioner was correct that he did not give Petitioner a copy of the discovery but that was only because it could "get loose" in jail. With respect to

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<sup>20</sup> The Court finds Mr. Hurley's testimony credible based on the painful honesty exhibited by him in testifying about his alcoholism and personal struggles that affected these proceedings.

the charges against Petitioner, Mr. Hurley testified that he believed the Petitioner had understood the concept of "acting in concert." Similarly, Petitioner did admit that he had known that he was charged with First Degree Murder, so he knew it was serious. Based on the foregoing, Mr. Hurley fully discussed the plea offer with the Petitioner, and the Petitioner made a conscious decision to not accept that offer. Although Mr. Hurley's communication with Petitioner may not have been as frequent or effective as the Petitioner would have liked, the Petitioner has not proven that Mr. Hurley's performance was deficient.

Even if Mr. Hurley had performed deficiently, Petitioner produced no evidence to show that but for counsel's deficiency, the results of the proceedings would have been different. Now, after conviction and sentencing, Petitioner testified that he would have taken the plea had he known more about his case. However, at the time that he rejected the plea, the Petitioner did so without asking his counsel any questions and with the knowledge that he was charged with First Degree Murder. Additionally, based on Mr. Hurley's testimony, the plea had been discussed and the Petitioner seemed to understand the concept of "acting in concert." Petitioner's post-sentencing reflection that he should have taken the plea offer is not evidence that the outcome would have been different in the case.

For all of the foregoing reasons, the Petitioner has failed to show that he is entitled to habeas corpus relief on the basis of his counsel's allegedly ineffective representation regarding the plea offers.

## **2. Ineffective Assistance of Counsel at Trial and During Preparation for Trial**

Petitioner also contends that he was denied effective assistance of counsel due to his counsel's allegedly deficient preparation for and performance at trial. During the evidentiary hearing and in the Petitioner's Brief, Petitioner's arguments focused on several specific areas including investigation, witness preparation, communication with the Petitioner, appearance at trial, failure to allege self-defense, and closing statements. Each of those grounds is discussed below. In his *Pro Se* Petition, the Petitioner raised several other claims related to ineffective assistance of counsel.<sup>21</sup> However, those grounds were not addressed in the Amended Petition, during the evidentiary hearings or in Petitioner's Brief. Therefore, the Court finds that those allegations are not supported by any argument or evidence and need not be addressed.

### **a. Alleged Failure to Conduct Meaningful Investigation or to Prepare Witnesses for Trial**

Petitioner contends that he was denied effective assistance of counsel because his counsel, Mr. Hurley, failed to investigate the case and to interview or prepare any witness for trial, including the Petitioner himself. With respect to investigations and trial preparation, the West Virginia Supreme Court has held that:

3. The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

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<sup>21</sup> In his *Pro Se* Petition, Petitioner additionally claimed that Mr. Hurley was ineffective for failing to request individual voir dire of the jurors; and for failing to object to allegedly improper statements made throughout the trial by the Prosecuting Attorney

Syl. Pt. 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995). The Court gave the further guidance that:

4. In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. 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 according to what was known and reasonable at the time the attorney made his or her choices.

Syl. Pt. 4, *Id.* Based on the holdings in *Legursky*, this Court must determine, without using hindsight, whether or not Mr. Hurley made an adequate investigation according to what was known and reasonable at the time he made his decisions.

Petitioner first claims that Mr. Hurley did not employ an investigator or conduct any investigation on his own. In support of this allegation, Petitioner states that Mr. Hurley did not contact anyone listed on the police report or any members of Petitioner's family. Petitioner further contends that, as a result of Mr. Hurley alleged failure to investigate, Mr. Hurley failed to call key witnesses. Specifically, Petitioner claims that Mr. Hurley should have called witnesses such as Jeremy Hanna, Ricky Johnson and Petitioner's sister. Petitioner states that Jeremy Hanna was at Mike Murphy's trailer when Petitioner and his co-defendants arrived, and that Mr. Hanna could have testified as to the victims' use of illegal drugs on the night of the incident; about what was said in the trailer prior to the shooting; and regarding the circumstances surrounding the shooting.<sup>22</sup> With respect to Ricky Johnson, Petitioner states that he was an eyewitness to the events following the shooting and could have testified on Petitioner's behalf. Finally, Petitioner further claimed that Mr. Hurley failed to interview or

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<sup>22</sup> Petitioner notes that the State subpoenaed Jeremy Hanna to trial but determined not to call him as a witness. Petitioner claims that this indicates that Mr. Hanna's testimony may have been dis-favorable to the State and beneficial to defense. However, no testimony or facts support this assertion.

to call his family members as witnesses, and Petitioner's sister testified that she was never interviewed.

In response to these allegations, Mr. Hurley testified that he did investigate the case and was aware of all of the witnesses. He further stated that he is not a note-taker, so the file-size does not reflect his lack of investigation. Although the Petitioner now contests Mr. Hurley's decision to not call various witnesses, at the time of the trial in this matter, the Court specifically addressed this issue with the Petitioner, and the Petitioner informed the Court that he agreed not to call the witnesses. Before the trial commenced, the following exchange took place:

THE COURT: . . . Now, let me - - Mr. Foster, I want to make sure. There was a motion for a continuance filed in this case because there was a request to interview some additional witnesses. Have you interviewed those witnesses now, or have you decided not to use them?

MR. HURLEY: I've decided not to use them, Your Honor, because we have a different theory of the case than at the time I filed that.

THE COURT: And, Mr. Foster, that's been discussed with you; and you agree with that, and you also agree to withdraw the motion for a continuance. Is that right?

THE DEFENDANT: Yes.

THE COURT: And you've had a full chance to discuss that with your lawyer?

THE DEFENDANT: Yeah.

THE COURT: And you made that decision also?

THE DEFENDANT: Yeah.

Trial Transcript, Vol. I, pp. 108-109.

Additionally, the Court does not find any support for Petitioner's argument that the failure to call witnesses reflects any lack of investigation of the case by Mr. Hurley. To the contrary, the Court finds that the proposed witnesses' testimony would not have added anything and could even have hurt the Petitioner's case. Mr. Hurley testified that he did not

interview Jeremy Hannah because he was confident in what he would say at trial. Ricky Johnson testified that he only saw the parties after the shooting and that he was present when Petitioner called 911 and when officers came and questioned the Petitioner. His testimony could have been harmful to Petitioner because he further testified that Petitioner only reported that he was involved in a shoot-out and did not tell 911 or the officers about the victims being shot. Finally, Mr. Hurley testified that he did talk to the Petitioner's sister, but that he did not interview her because it was not his practice to discuss a case with family members. Furthermore, the information to which she would have testified (that she was present when the two victims pulled a gun on Petitioner) was already admitted through other witnesses and was not really helpful anyway.

At the evidentiary hearing, this Court pointed out that the Supreme Court in *Foster* said that the evidence presented at the Petitioner's trial was sufficient for a reasonable jury to find the Petitioner guilty based on the following facts:

1. The Petitioner was at the scene of the crime;
2. The Petitioner transported the shooter(s) to the crime scene;
3. Petitioner assisted the shooter(s) in fleeing the scene after the killing of Murphy and Painter;
4. Enmity between the Petitioner and Painter;
5. The confrontation between Petitioner and Painter on the day of the crimes;
6. The close friendship with the co-defendant Bush; and
7. Petitioner's knowledge that co-defendant Stewart took a shotgun to Murphy's residence.

*See, Foster*, 221 W. Va. at 639, 656 S.E.2d at 84. The Court asked the Petitioner what the proposed witnesses would have said to change any of those facts, and the Petitioner only responded "I don't know." Moreover, Petitioner admitted that the eyewitnesses would have said that the gunfire and shots were fired from the truck. Even Petitioner's expert, Mr. Campbell, admitted on cross examination that he could see reasons to not call witnesses

such as Jeremy Hanna whose testimony could both help and hurt.

The facts of Petitioner's case are easily distinguishable from the facts underlying *Ballard v. Ferguson*, 2013 WL 581430 (Oct. 25, 2013), which is relied upon by the Petitioner. In *Ferguson*, the two witnesses that were not interviewed both gave statements that someone other than the defendant was the shooter. Accordingly, the Supreme Court ultimately found that there was a reasonable probability that the result of the proceedings in *Ferguson* would have been different if the jury had heard the testimony by the two witnesses who would have testified that someone else was the shooter. There is no such evidence in this case. If Jeremy Hanna, Ricky Johnson and/or the Petitioner's sister had been called as witnesses during the Petitioner's trial, they would not have testified to anything that was not already before the jury.

For all of the foregoing reasons plus the evidence adduced at trial (discussed in detail below), this Court concludes that Petitioner has failed to establish a reasonable probability that the result of the proceedings would have been different if Mr. Hurley had conducted his investigation differently or if he had called the other witnesses to testify. For example, Petitioner argued that counsel for his co-defendant, Jeffrey Stewart, called additional witnesses such as Jeremy Hanna. However, while that statement is true, the testimony of the additional witnesses does not appear to have had any beneficial effect on Jeffrey Stewart's trial because he was also convicted of two (2) counts of Second Degree Murder and received the same sentence as the Petitioner.

The Petitioner also claims that he was denied effective assistance of counsel because Mr. Hurley failed to prepare him to testify on his own behalf. At the evidentiary hearing in this case, Petitioner stated that he did not even know he was going to testify until his trial and

that he was not prepared for his testimony or for cross-examination. Contrary to Petitioner's assertion, Mr. Hurley testified that it was up to the Petitioner to decide if he wanted to testify at trial and that he did prepare the Petitioner. Additionally, on cross-examination, Petitioner admitted that he did know he would be cross-examined when he took the stand because, at that point, he had sat through two (2) days of trial. Finally, even assuming that Mr. Hurley did not adequately prepare the Petitioner to testify, the Petitioner makes no argument that he would have testified differently at his trial if he had been better prepared. He has presented no evidence or argument to suggest that the outcome of his testimony or the trial would have been different if Mr. Hurley had better prepared him to testify.

Petitioner next contends that, as a result of Mr. Hurley's allegedly defective preparation, Mr. Hurley failed to submit jury instructions. However, Mr. Hurley testified that he did not prepare jury instructions because he had practiced before the Court and was familiar with Judge Johnson's standard charge. Petitioner submitted no argument or evidence to support this claim, and he suggested no jury instructions that should have been submitted. On appeal, the West Virginia Supreme Court of Appeals even stated that "we have found no error in the instructions given at trial." *Foster*, 221 W. Va. at 644, 656 S.E.2d at 89. Therefore, there is no evidence or argument that the instructions given or results of the proceedings would have been any different if Mr. Hurley had submitted proposed jury instructions.

In conclusion, Petitioner makes numerous allegations of ways he claims Mr. Hurley's investigation and trial preparation were inadequate. However, Petitioner has failed to prove that Mr. Hurley's "performance was deficient under an objective standard of reasonableness." *See*, Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, citing *Strickland*, 466 U.S. 668,

104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner's expert witness, Mr. Campbell, testified at length regarding professional standards with which Mr. Hurley should have complied. However, his testimony regarding the specific facts of this case was undermined by his admission that he had only gone through the file. He had not read the transcripts or talked to Mr. Hurley, the Petitioner, or the eye witnesses. Therefore, Mr. Campbell was unable to prove that Mr. Hurley failed to satisfy any professional standards.

Even if Mr. Hurley's investigation and trial preparation had been deficient, Petitioner never explains how the outcome of the trial would have been different had Mr. Hurley conducted the trial differently. Petitioner presented no evidence that any additional or better investigation would have uncovered facts or witnesses that would have assisted Petitioner's case. As noted above, there is no evidence that the proposed witnesses would have testified to anything additional or beneficial to Petitioner's case. Moreover, as discussed in detail below, an overwhelming weight of evidence supported the jury's conviction. Therefore, this Court concludes that Petitioner has not and is unable to satisfy the second prong of the *Miller* standard, which requires that there be "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different." *See*, Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, *citing Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. Petitioner cannot prove this and he is not entitled to habeas corpus relief on the basis of counsel's allegedly deficient investigation and pre-trial preparation.

**b. Alleged Failure to Keep Petitioner Informed of Developments**

Petitioner also contends that he was denied effective assistance of counsel because Mr. Hurley failed to adequately communicate with the Petitioner and discuss the case and trial strategy with the Petitioner. Petitioner states that, on the first day of trial, he did not know

what evidence the State had against him, his theory of defense, if witnesses were prepared on his behalf, and if he was going to testify. During the evidentiary hearing, Petitioner testified to Mr. Hurley's failure to communicate with him prior to trial.

Mr. Hurley disputes Petitioner's allegations. Mr. Hurley testified that he recalled attending the jail three to four times,<sup>23</sup> although he admitted that he did not recall talking to the Petitioner over the phone. He also met with Petitioner prior to numerous hearings. Mr. Hurley stated that he did speak to Petitioner's sister, but she wanted to talk about the case, which he does not do with relatives. Mr. Hurley further testified that he did go over discovery with the Petitioner but that he did not give Petitioner a copy of the discovery because it could get loose in jail. Upon cross examination, Petitioner even admitted that he discussed the case with Mr. Hurley enough to give Mr. Hurley a list of potential witnesses.

Petitioner may not have been happy with the amount or extent of communication with his counsel. However, he failed to prove that Mr. Hurley's communication with him was deficient under an objective standard of reasonableness. *See*, Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Petitioner's expert witness, Mr. Campell, even admitted on cross-examination that there may be circumstances where a lawyer may not want to meet with a client more than once, such as when a client is going to say something that is not true. Moreover, the Petitioner never made any argument as to how improved communication would have resulted in a different outcome for his case. Therefore, even if Mr. Hurley's communication with the Petitioner was deficient, there is no argument or proof that the results of the trial would have been different had Mr. Hurley communicated with the Petitioner more frequently or in a different manner. *See, Id.*

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<sup>23</sup> Although the jail visitation records showed only the one visit in April 2004, Mr. Hurley testified that he usually visited multiple clients at one time. However, Petitioner's witness from CRJ, Franklin Hamrick, testified that when counsel visited clients, they were to log in their visit with each client.

**c. Alleged Inappropriate Presence At Trial**

Petitioner contends that Mr. Hurley smelled of alcohol during the trial, appeared in disheveled clothes and was not groomed. Petitioner further stated that it also appeared that Mr. Hurley wore the same clothes for all three (3) days of trial. During his testimony, Mr. Hurley did admit that he was drinking heavily at the time of Petitioner's trial, that he suffered from an addiction, and that he may have smelled of alcohol or appeared disheveled during the trial.

However, Mr. Hurley testified that he was only drinking at night but not during the trial. He admitted that he may have been hung-over during the trial but was not intoxicated. On cross-examination, Petitioner testified that he was not accusing Mr. Hurley of drinking during the trial and that he had no knowledge of Mr. Hurley actually drinking during the trial beyond his appearance of being hung-over. Additionally, Petitioner conceded that, during the trial, he never expressed any concern regarding Mr. Hurley's behavior or appearance. In conclusion, although the Petitioner may not have been completely satisfied with Mr. Hurley's appearance or conduct, the Petitioner failed to show that Mr. Hurley did anything at trial that was objectively wrong.

Based on the foregoing, this Court concludes that Petitioner failed to prove that Mr. Hurley's appearance and behavior at trial were deficient under an objective standard of reasonableness. See Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Even if Petitioner had been able to show that Mr. Hurley's appearance and behavior at trial constituted deficient performance, the Petitioner is unable to satisfy the second prong of the *Miller* test. As discussed in more detail below, the Petitioner's conviction was supported by ample evidence

at trial. Additionally, the Petitioner was tried on two (2) counts of First Degree Murder, and the matter was hotly contested. Mr. Hurley was successful at trial in defending Petitioner, reducing the charges of two (2) counts of First Degree Murder to two (2) counts of Second Degree Murder. Accordingly, Petitioner has failed to show that there is a reasonable probability that, but for the alleged unprofessional errors, the results of the proceedings would have been different. *Id.*

**d. Failure to Assert Alternate Theory of Self Defense**

Petitioner also contends that Mr. Hurley erred in failing to assert an alternate theory of self-defense on Petitioner's behalf. Petitioner states that he was never consulted regarding this decision and that he did not even know self-defense was an option. Petitioner claims that there was more than enough evidence at his trial that could have supported an argument for self-defense or defense of another; namely, because both Petitioner and Kim Halstead testified at trial that the victims came out with fully loaded weapons. Petitioner states that Mr. Hurley should have used that testimony to argue self-defense under the rationale that his co-defendants did not fire their weapons until they determined that their lives were in danger.

In reviewing Petitioner's appeal, the West Virginia Supreme Court noted that "counsel's decision not to assert self-defense as an alternative defense is the type of tactical decision that counsel should have the opportunity to explain in a habeas corpus hearing." *Foster*, 221 W. Va. at 644, 656 S.E.2d at 89. During the evidentiary hearing, Mr. Hurley did explain his decision. Specifically, Mr. Hurley testified that he felt that it was better to have one theory of defense rather than several. Additionally, Mr. Hurley stated that he felt that self-defense was not a viable theory in this case because the Petitioner drove his co-

defendants, Bush and Stewart, to the victim's house in the middle of the night, with firearms, and after the prior altercation between the Petitioner and Travis Painter.

Moreover, Mr. Hurley testified that he did discuss his trial strategy with the Petitioner and that the Petitioner told him that he put faith in his counsel. Mr. Hurley's testimony is supported by the trial transcript. On the first day of trial, the State moved to prohibit Petitioner from using self-defense as an affirmative defense "under the concept, if you place yourself in that position and you're the initial aggressor, you cannot later claim self-defense." Trial Transcript, Vol. I, pp. 105-106. In the presence of the Petitioner, Mr. Hurley informed the court that they did not object to the State's motion. *Id.*

Based on the foregoing, this Court finds that Petitioner has failed to prove that Mr. Hurley was deficient, under an objective standard of reasonableness, for not asserting self-defense as an alternate theory of defense. *See*, Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, *citing Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Hurley explained his tactical decision and also indicated that the Petitioner understood and agreed at the time of trial. No argument or evidence demonstrates that Mr. Hurley's decision not to use self-defense as a theory in this case was "outside the broad range of professionally competent assistance". *See*, Syl. Pt. 6, *Miller*, 194 W. Va. 3, 459 S.E.2d 114.

Additionally, Petitioner is unable to show that there is a reasonable probability that the results of the proceedings would have been different if Mr. Hurley had argued a theory of self-defense. *See*, Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, *citing Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. As discussed in detail below, ample evidence was adduced at trial to support the jury's verdict. Further suggesting that the results of the proceeding would not have been different is the fact that counsel for Petitioner's co-defendant

Jeffery Stewart made a self-defense argument to no avail, and Jeffery Stewart received the same verdict and sentence as the Petitioner.

**e. Alleged Inadequate Closing Statement.**

Finally, Petitioner contends that Mr. Hurley's closing statement was deficient. On appeal, appellate counsel argued that Mr. Hurley failed to argue the issues of intent, malice and concerted action during closing. The West Virginia Supreme Court of Appeals did note that "counsel's closing argument was admittedly brief and failed to refer to elements of concerted action liability." *Foster*, 221 W. Va. at 644, 656 S.E.2d at 89. However, the Supreme Court further noted that "the jury was properly instructed on the elements of concerted action," so they could not "say that counsel's conduct at trial constituted ineffective assistance of counsel *per se*." *Id.*

This Court has now reviewed Petitioner's arguments as well as the trial transcript of Mr. Hurley's closing argument. Although Mr. Hurley's closing statement was not detailed or lengthy, the Petitioner has not proven that the statement was "deficient under an objective standard of reasonableness." Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. As the West Virginia Supreme Court stated in *Miller*, "[t]he test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done." *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127. Mr. Hurley's closing argument may not have been as thorough as an argument made by "the *best* lawyers" or even "most good lawyers." However, Petitioner has not shown, by a preponderance of the evidence, that no "reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Id.*

Even if Mr. Hurley's closing statement had been deficient, the Petitioner has not proven that, but for the allegedly deficient closing argument, the results of the proceedings would have been different. Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114, citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. As discussed in detail below, the evidence adduced at trial was more than sufficient to support the jury's verdict. The closing statement is a final summary of the evidence presented during the trial, and Mr. Hurley could only make arguments based on the evidence before the jury.

In conclusion, having carefully reviewed each of the Petitioner's claims of ineffective assistance of counsel and the evidence presented during the evidentiary hearings, it is clear that Mr. Hurley's performance during the proceedings below suffered due to his personal difficulties at the time. However, the Petitioner was unable to prove by a preponderance of the evidence that Mr. Hurley's assistance was deficient or ineffective under the standard set forth in *Miller*. Mr. Hurley was successful in preventing all of the charges against the Petitioner<sup>24</sup> from being presented at trial and in reducing the charges of two (2) counts of First Degree Murder to two (2) counts of Second Degree Murder. On the first day of trial, he communicated to the Petitioner the plea offer to one (1) count of Second Degree Murder, which the Petitioner refused. Mr. Hurley adequately investigated the case, prepared for trial, made tactical decisions regarding what witnesses to call, communicated with his client during the proceedings, and gave a justifiable explanation for not asserting self-defense as an alternate theory of defense. Additionally, even after the trial, Mr. Hurley made proper post-trial motions and continued his representation of the Petitioner.

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<sup>24</sup> In the Indictment, the Petitioner was also charged with two (2) counts of Malicious Assault and three (3) counts of Wanton Endangerment Involving a Firearm. None of these charges were presented to the jury.

Significantly, even if the Petitioner's counsel had provided ineffective, incompetent assistance, the Petitioner's claim for relief on this basis would nevertheless fail, because the Petitioner suffered no prejudice as a result of any alleged conduct on the part of his counsel. Specifically, after consideration of the first, performance-prong, if it is determined that defense counsel acted incompetently, then it is necessary to address the second prong of the *Miller/Strickland* test: to determine whether such incompetence resulted in any prejudice to the defendant. See, Syl. Pt. 5, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. "To demonstrate prejudice, a defendant must prove there is a 'reasonable probability' that, absent the errors, the jury would have reached a different result." *Id.*, 194 W. Va. at 15, 459 S.E.2d at 126, citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L.Ed.2d at 698. The Petitioner has failed to meet this burden by failing to produce any evidence to show that, but for counsel's errors, the results of the proceedings would have been different. Syl. Pt. 5, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Absent any prejudice to the Petitioner as a result of some conduct or omission on the part of his counsel, the Petitioner cannot prevail on his claim for post-conviction relief on the basis of ineffective assistance of counsel.

After reviewing all pertinent evidence and arguments, this Court now concludes, as a matter of law, that any errors or deficiencies in counsel's performance were harmless and did not cause any prejudice to the Petitioner. There was no reasonable probability that the proceeding would have ended differently if not for such alleged errors or tactical decisions.

As the West Virginia Supreme Court of Appeals summarized in *State v. Foster*,

. . . the evidence indicates that the [Petitioner] was not only present at the scene of the crime but that he transported the shooter(s) to the crime scene and then assisted them in fleeing the scene after the killing of Murphy and Painter. Further evidence from which a rationale trier of fact could find the intent on the part of the [Petitioner] is the enmity between the

[Petitioner] and Painter and their confrontation on the day of the crimes; the [Petitioner's] close friendship with the co-defendant Bush; and the [Petitioner's] knowledge that Jeff Stewart took a shotgun to Murphy's residence.

*Foster*, 221 W. Va. at 639-40, 656 S.E.2d at 84-85; *see also*, *Foster*, 221 W. Va. at 636, 656 S.E.2d at 81. Accordingly, the Court finds that the Petitioner has failed to meet his burden of proving that he is entitled to habeas corpus relief on the basis of his claims of ineffective assistance of counsel.

Based on the foregoing findings of fact and discussion, this Court now concludes as a matter of law that the Petitioner's claims for a new trial are without merit. The Court finds that the Petitioner has failed to meet his burden of proving that he is entitled to habeas corpus relief.

Accordingly, the Court does hereby **ORDER** that:

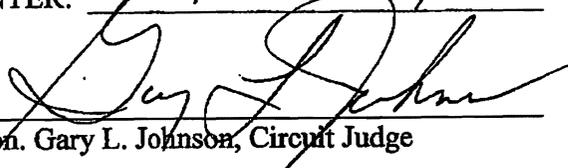
1. Petitioner's *Pro Se* Petition and Amended Petition are **DENIED**; and
2. The Writ of Habeas Corpus sought by the Petitioner is refused; and
3. It is further **ORDERED** that this case is hereby **DISMISSED** from the docket of this Court.
4. If the Petitioner desires to appeal this dismissal to the Supreme Court of Appeals of West Virginia, the Petitioner shall file with this Court a properly completed Notice of Appeal pursuant to the RULES OF APPELLATE PROCEDURE; and, if necessary, a properly completed Application To Proceed *In Forma Pauper* and Affidavit as set forth in Appendix B of THE RULES GOVERNING POST-CONVICTION HABEAS CORPUS PROCEEDINGS. These materials are to be filed with the Office of the Clerk of the Supreme

Court of Appeals of West Virginia no later than thirty (30) days from the entry of this Order.

- 5. **This is a Final Order.** The Clerk of the Circuit Court shall remove this matter from the docket and send a certified copy of this Order to: Crystal L. Walden, Office of the Public Defender, P.O. Box 2827, Charleston, WV 25330; and James R. Milam, II, Nicholas County Prosecuting Attorney, 511 Church Street, 203 Courthouse Annex, Summersville, WV 26651.

*Done  
9-10-14  
aeh*

ENTER:

*9-10-14*  
  
 Hon. Gary L. Johnson, Circuit Judge

A true copy, certified this  
*10* day of *Sept*, 20 *14*  
*Debbie Face*  
 DEBBIE FACEMIRE CIRCUIT CLERK  
 Nicholas County Circuit Court  
 Summersville, WV 26651  
 By *aeh*, Deputy

RECEIVED  
 SEP 15 PM 1 11  
 PUBLIC DEFENDER'S OFFICE