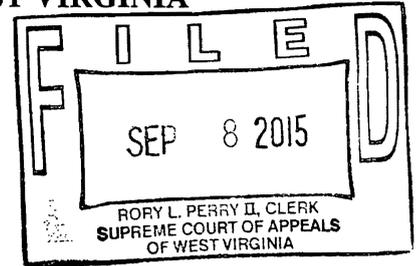


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0343



STATE OF WEST VIRGINIA

Plaintiff Below, Respondent,

vs.

JESSE LEE HEATER,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

DAVID A. STACKPOLE
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 11082
Email: David.A.Stackpole@wvago.gov

Counsel for Respondent

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COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief.

I.

STATEMENT OF THE CASE

On January 23, 2012, Robert Eugene Siron, III (hereinafter "Mr. Siron") had been "out driving around drinking" when he saw Petitioner. (App. 1 at 147-49.) Petitioner "asked if he could come along" and Mr. Siron agreed. (App. 1 at 149.) Mr. Siron bought a case of beer and he and Petitioner drove out by the river and drank some in the truck. (App. 1 at 150.)

Petitioner wanted to go to the home of Josh Oberg (hereinafter "Mr. Oberg") and drink. *Id.* When they arrived at Mr. Oberg's apartment, they went inside and drank and talked about video games. (App. 1 at 151.) Mr. Oberg asked for a ride to the store to buy cigarettes, so all three (3) of them got into the truck and drove to the store. (App. 1 at 152.) On the way back to

Mr. Oberg's home, Petitioner "pull[ed] out a bag of weed" and suggested that they all go somewhere else. (App. 1 at 153.) They all agreed and Petitioner directed Mr. Siron to drive to a very remote spot. (App. 1 at 153-54.) They all got out of the truck and were drinking and smoking "pot." (App. 1 at 154.)

Mr. Siron "saw a bright flash and heard a boom . . . like a firecracker had gone off, and heard a sound like a bag of potatoes hitting the floor." (App. 1 at 155.) Mr. Oberg asked "[w]hy?" two (2) or three (3) times and then Petitioner said, "[t]hat's what you get for fucking someone's wife." *Id.* Mr. Siron ran toward the truck, but Petitioner tackled him and hit him with the pistol. (App. 1 at 156.)

Petitioner put the gun under Mr. Siron's chin and told Mr. Siron that he had to "help him get rid of Oberg or he'll get rid of [Mr. Siron] too." *Id.* They put Mr. Oberg's body in the back of the truck. (App. 1 at 157.) Another vehicle came up the road, so Mr. Siron drove off "at a high rate of speed." (App. 1 at 158-59.) When they got down the hill, they took some cardboard and covered the body up. (App. 1 at 159.) Then they drove to Lowes and Mr. Siron went inside and bought a shovel. (App. 1 at 160.) They made a quick stop at Go Mart to buy some more beer and then a stop at the General Store to use the "porta-potty." (App. 1 at 162.)

Eventually, they drove to Bull Run Road, "a county road" with "no houses on it and very little traffic." (App. 1 at 163.) Mr. Siron dug a shallow grave. (App. 1 at 163-64.) Petitioner wanted Mr. Siron to dig the grave deeper, but Mr. Siron was afraid that if he did that Petitioner might shoot him as well. *Id.* They put Mr. Oberg's body in the grave and Petitioner used Mr. Siron's phone to take a picture of the body in the grave. (App. 1 at 164.) Mr. Siron filled the grave in and then they drove to Mr. Siron's house. (App. 1 at 165.) On the trip, Petitioner used Mr. Siron's phone to call someone and told that person that "[i]t's done." *Id.*

When they arrived at Mr. Siron's house, they told Mr. Siron's wife that they had gotten stuck down at the river and that they had gotten into an argument and Petitioner had pushed Mr. Siron and that Mr. Siron fell against the truck, so that she would not be suspicious about the mud on them or about the marks on Mr. Siron's face from being pistol whipped. (App. 1 at 166.) They both spent the night at Mr. Siron's house. (App. 1 at 167.)

The next day, they took all of their clothes and everything burnable out of the back of the truck and put it on a "burn pile" and "set it all on fire." (App. 1 at 167-68.) Petitioner had two (2) Zippo lighters and a knife with blood on it. (App. 1 at 168-69.) Petitioner threw them into the river behind Mr. Siron's house. (App. 1 at 169-71.) Petitioner showed Mr. Siron "the butt of the gun, where the handle was cracked and [] bragged that he had broke (sic) that smacking [Mr. Siron] in the head with the gun." (App. 1 at 171.)

Petitioner wanted to burn the truck, but Mr. Siron convinced him that they could burn the bed liner instead. (App. 1 at 171-72.) They drove to Freeman Creek to the home of Eric Skaggs (hereinafter "Mr. Skaggs"). (App. 1 at 172.) Mr. Skaggs was not home, so they set the bed liner on fire on Mr. Skaggs' burn pile. *Id.* The left concrete blocks from the back of the truck and the shovel at Mr. Skaggs' house. (App. 1 at 172-73.)

Then they drove back to the place where Petitioner shot Mr. Oberg. (App. 1 at 173.) They threw the beer bottles that they had left there into the woods and looked for "the spent brass," but never found it. *Id.* Petitioner took a hammer and "churned the earth up" where there was "a large spot of blood on the ground" so that "you couldn't tell there was anything there, just loose dirt." *Id.*

Petitioner and Mr. Siron came "up with a story about dropping Oberg off at the bowling alley and him getting into a green Jeep." (App. 1 at 174.) Petitioner stayed another night with

Mr. Siron. (App. 1 at 173.) The next day, Mr. Siron drove Petitioner into town and they went to a Mexican restaurant named “Michoacan.” (App. 1 at 174.) The first time there, Mr. Siron waited in the truck as Petitioner went in. *Id.* They went back at lunch time and both went inside. *Id.* Petitioner went up to talk to Chino Villagomez (hereinafter “Mr. Villagomez”). (App. 1 at 175.) Petitioner took Mr. Siron’s phone with him. *Id.* After “a few moments,” Petitioner “motioned for [Mr. Siron] to come up to the counter” because “he was having problems” trying “to bring up the pictures.” *Id.* Petitioner asked Mr. Siron to bring up the picture of Mr. Oberg in the grave. *Id.* Mr. Villagomez “was upset that he couldn’t see [Mr. Oberg’s] face.” *Id.* Petitioner told Mr. Villagomez that “[i]t’s him, it’s him” and “[t]rust me, you’ll never see him again, it’s him.” *Id.* Petitioner and Mr. Villagomez both told Mr. Siron that he “was part of this now and if [he] ever said anything, they wouldn’t just come after [him], they would come after [his] son and [his] wife.” (App. 1 at 176.) Mr. Villagomez handed Petitioner “an envelope with some money in it.” *Id.*

After they left, Mr. Siron told Petitioner that he was “pissed off that [Petitioner had] gotten [Mr. Siron] involved in something that [Mr. Siron] never wanted to be part of” and asked Petitioner “[w]hy’d you get me in the middle of it?” *Id.* Petitioner told Mr. Siron to “[j]ust shut up, it’ll be fine, shut up” and “opened up the envelope and gave [Mr. Siron] \$500.00.” *Id.*

On January 14, 2013, Petitioner and Mr. Siron were indicted on one (1) count of Murder, one (1) count of Conspiracy to Commit Murder, one (1) count of Attempt to Conceal a Deceased Human Body, and one (1) count of Conspiracy to Conceal a Deceased Human Body. (App. 2 at 569-70.)

The first couple of times that the police questioned Mr. Siron, he lied to them and told them the story that he and Petitioner had made up about dropping Mr. Oberg off at the bowling

alley. (App. 1 at 179-81.) It was not until later that Mr. Siron told the police the entire story as part of a plea agreement. (App. 1 at 181.) Mr. Siron pled guilty to Involuntary Manslaughter and Conspiracy to Improperly Dispose of a Body. (App. 1 at 146.)

On June 19, 2013, there was a Motions Hearing in Petitioner's case. (App. 2 at 580-81.) The State had filed a Motion to Determine Whether Defense Counsel Should Be Disqualified Due to Conflict of Interest. (App. 2 at 934.) The basis of the Motion was that Petitioner's trial counsel represented another person who would be a witness for the State in the case against Petitioner. (App. 2 at 934-35.) At the Motions Hearing, Petitioner's trial counsel was frustrated that he was "getting bumped off" of cases. (App. 2 at 582.) The Trial Court recognized that the possibility of a conflict is greater and "not surprising" where "there is a relatively small Bar." (App. 2 at 583.) Petitioner was sworn in and questioned regarding the possible conflict. (App. 2 at 584.) Petitioner stated that he wanted his trial counsel to stay on the case. (App. 2 at 585.)

On June 21, 2013, the Court held another Hearing regarding the issue. (App. 2 at 593-98.) Petitioner's trial counsel informed the Trial Court that a conflict did in fact exist:

MR. HAWKINS: Thank you, Your Honor, may it please the Court and counsel, since the last time we were here, I looked into and investigated further the issue of whether or not there is a conflict of interest, so I went to Mr. Reger's office and reviewed the statement of the alleged witness, and also listened to the audio recorded statement as well. There is no question in my mind, after doing that, that this is the individual that Mr. Reger identified, and I will disclose to the Court that I have represented, I know, on at least five occasions and am still involved in a case, not representing him, but representing his ex-wife, with whom he still maintains contact, so I still have contact through him, potentially as a witness in that case, assisting her.

In addition, looking at the written statement, there is another potential witness by the name of Brandon Shreve, who is indicted, who was supposed to be present during the time that Mr. Roy overheard these statements purported to [Petitioner]. The State has advised me that they intend to follow up on that as well, and so he may become a witness, potentially. The State has also indicated to me that Mr. Roy – they do intend to try to use him as a witness in this case.

So I have tried to do everything possible to avoid being conflicted out of this case. As the Court is aware, I have a really good rapport with [Petitioner]. I have represented him in the past and we had good results in that case, so the long and short of it is, Your Honor, I'd really like to stay on this case. [Petitioner] would really like to keep me in this case. I'm invested in it as far as being prepared and working on it, and trying to go forward. However, when I take that and consider it in conjunction with the ethical rules of professional conduct, I don't see how I can avoid this conflict, and have gone every which way around the block trying to find a way and I just don't see how I can do that.

So, unfortunately, at this point in time, I feel that I have no other recourse other than, after this conflict is brought to the Court's attention, to respectfully, although reluctantly, ask the Court to be permitted to withdraw as counsel in the case and to seek the Court find, as quickly and practically as possible, substitute counsel to assist [Petitioner], so the case can go forward.

(App. 2 at 594-95.) As a result, the Trial Court ordered that Petitioner's trial counsel, James E. Hawkins, Jr., be withdrawn as trial counsel and that Thomas Dyer and Zachary Dyer be appointed as Petitioner's new trial counsel. (App. 2 at 924, 936.)

Petitioner never moved for a bifurcated trial and mercy phase and so the Trial Court held a unitary trial in the matter.

At the beginning of the trial, the Trial Court was informed that a woman, Ms. Stout, was in the courtroom wearing a button with a picture of her missing son on it. (App. 1 at 35-6.) The Trial Court instructed Ms. Stout and all other spectators that "there is not going to be any outbursts, there's not going to be any talking during trial" or else "you are going to be promptly removed from the Courtroom" because Petitioner "is going to get a fair trial and there's not going to be any outbursts." (App. 1 at 36.) Then the Trial Court instructed Ms. Stout to remove the button and to give it to the Bailiff "because the Court's not going to allow any evidence or any notion or anything to enter into this trial that deals with the disappearance of your son." (App. 1 at 37.) The Trial Court went on to explain that "[t]his case is not about the disappearance of your son." (App. 1 at 38.)

Petitioner insisted that the jury be questioned “about whether [Ms. Stout] had a conversation with any of the jurors on her way in.” (App. 1 at 43.) Petitioner’s trial counsel even stated that “it might be that bad of an idea.” *Id.* The Trial Court decided to question the Bailiffs:

BY THE COURT: Okay, yeah, ask him to come in would you? Chief Deputy, we were discussing at the Bench, Ms. Stout had came (sic) in wearing a – some kind of a sign that reflected some information about her son. Did – were you outside when the jury was shown in?

CHIEF DEPUTY MILLER: Yes, sir.

BY THE COURT: Did – was she in a position where the jury could have seen that?

CHIEF DEPUTY MILLER: Possibly.

BY THE COURT: Okay.

CHIEF DEPUTY MILLER: She was seated to the left of the aisle way. The jury was in the Family Courtroom, and they filed past her.

BY THE COURT: Okay. As far as you know, did any of them look down at Ms. Stout?

CHIEF DEPUTY MILLER: Not as far as I know.

BY THE COURT: Was there any eye contact with Ms. Stout?

CHIEF DEPUTY MILLER: Not as I’m aware of.

BY THE COURT: Okay. I guess my question is why – did anybody see that sign on her before she came into the Courtroom?

CHIEF DEPUTY MILLER: Yes, sir, I saw it.

BY THE COURT: Okay, well, I wish somebody would have informed me of that and taken that away from her before we brought the jury out, but is it your belief that anybody had made contact with her or had any conversation with her, no matter how brief?

CHIEF DEPUTY MILLER: No, the jury was secluded, sir.

...

BY THE COURT: I don't want to ask the jury because then it's just going to – then it's going to wreck the whole –

MR. DYER: Oh, yeah, obviously –

(App. 1 at 45-7.)

On August 14, 2014, there was a Post-Trial Motions and Sentencing Hearing. (App. 2 at 628-45.) At the beginning of the Hearing, Petitioner stated that he filed a disciplinary complaint against his trial counsel, Mr. Dyer; was requesting a new attorney; and told the Court that he did not “think it would be appropriate for Mr. Dyer to represent [him] at this proceeding.” (App. 2 at 630.) In light of the disciplinary complaint and the fact that Petitioner expressly stated that he did not believe it was appropriate for his trial counsel to represent him at the Sentencing Hearing, when the Trial Court asked Mr. Dyer if he had something to say regarding sentencing, Mr. Dyer deferred to his client:

BY THE COURT: Okay, Mr. Dyer, on behalf of your client?

MR. DYER: Your Honor, under the present circumstances, I think it's best if I say nothing. I don't believe I have anything to add, in any event, given the verdict in this case, but under the current circumstances, I'll just leave it to [Petitioner], who I know does want to address the Court.

(App. 2 at 642.)

On February 11, 2015, the Trial Court held a Hearing where the sign issue was raised. (App. 2 at 767-93.) Chief Deputy Miller was again questioned under oath about the sign:

Q: Okay. Did she have some kind of button or sign, you know, reflecting an issue with Mr. Stout's disappearance?

A: I recall, on her left chest area, she had a button that had a picture on it, that said “missing”, if I remember correctly.

Q: It had a picture of Mr. Luke Stout, I guess?

A: I think that's what it was, I just remember it had a picture.

Q: Okay, did she have anything else or just that button? Did she have a sign of any kind?

A: I don't recall a sign, no.

Q: You don't recall? Okay. And was she in a position where the jury could have seen that, potentially, the particular button you are talking about?

A: I suppose if you said "potentially". Potentially, I assume they could have.

...

Q: Okay and she was sitting there, then, and how big was this button? How big was it?

A: Pretty big.

...

BY THE COURT: About this big?

WITNESS: Six inches diameter, maybe, something like that.

BY THE COURT: Or, at least six inches, maybe seven.

WITNESS: Somewhere like that.

...

Q: Would I have had to look down or back to see her button?

A: Yes.

Q: Did you witness any jurors do that?

A: No, sir, I did not. The jury seemed, if I may say, they seemed to focus on coming into the Courtroom as they were instructed. They weren't looking around and probably, I'm guessing there were eight to ten people in that lobby/foyer area, including Mrs. Stout and her two sons.

Q: Did you hear any discussions, statements, anything that was addressed to the jury?

A: By who?

Q: By anybody in that foyer?

A: Nobody said a word as the jury went through.

Q: So Mrs. Stout didn't say, "Hey, look at my button."?

A: No.

Q: "I think that guy killed my son, too."? Didn't say anything about –

A: No.

...

Q: So you told the Judge that it was possible that a juror had seen it, but from your observations, was it likely?

A: No. No indication, that I saw.

Q: You didn't see anybody look down at it or back and you didn't hear any discussion.

A: No.

Q: Now, when the jury came in this Courtroom from the door back there, where did they go?

A: Straight to the jury room.

Q: And was the door closed?

A: The jury door was closed and I think Officer Kitzmiller, Bailiff Kitzmiller was outside of it.

...

BY THE COURT: Having had the pleasure of trying a number of jury trials before I took the Bench and I think a couple hundred after I took the Bench, it's – the – my opinion that the Court must make every attempt to provide the – a courtroom that's unbiased and untainted by any prejudicial matter. By the same token, it's impossible to cover every possible small event and this, in my opinion, was just that, a small event. There is no evidence that it was even observed by the jury, much less that it had any prejudicial effect upon the jury.

The Court, upon being advised by the Bailiff, of the button, the significance of which is perhaps even unknown to the jury, even if they had observed it, there's no evidence they observed it, or that it had any significance to them, and the Court dealt with it properly, ordering that it be removed, and that the individual wearing it sit in a location that was almost as far removed from the direct vision of the jury as possible.

So I find no reason whatsoever that this was in any way prejudicial, that – no evidence. So that – as far as that individual one – the button motion is denied.

(App. 2 at 780-93.)

Also at the February 11, 2015 Hearing, Petitioner raised the issue of failure to bifurcate.

(App. 2 at 767-95.) However, even Petitioner's counsel admitted that it was not error on the part of the Trial Court, but was at most his trial counsel's fault. (App. 2 at 795)

The Court denied Petitioner's Motion for a New Trial, including Petitioner's argument regarding the button and the argument regarding bifurcation. (App. 2 at 897-98, 915.)

The Trial Court sentenced Petitioner, based upon the jury's recommendation to a term of life in prison without the possibility of parole for the Murder conviction, to a term of one (1) to five (5) years for the Conspiracy to Commit Murder conviction, to a term of one (1) to five (5) years for the Attempt to Conceal A Deceased Human Body conviction, and to a term of one (1) to five (5) years for the Conspiracy to Conceal a Deceased Human Body conviction, with all sentences to run consecutively. (App. 2 at 643-44.) This appeal followed.

II.

SUMMARY OF THE ARGUMENT

The Prosecutor had standing to seek disqualification of Petitioner's original trial counsel based upon a conflict of interest. The Trial Court held two (2) separate Hearings on the matter and gave Petitioner's trial counsel time to investigate the issue. Petitioner's trial counsel admitted that he was required to withdraw based upon a conflict of interest because he was also

counsel for a witness for the State who actually testified at trial regarding Petitioner's confession. Such a conflict cannot be waived by Petitioner and would have presented a basis for an ineffective assistance of counsel claim had Petitioner's trial counsel been permitted to continue representation. As soon as Petitioner's trial counsel withdrew, the Trial Court appointed him new counsel. Petitioner's claims that his subsequent trial counsel was ineffective are improper on direct appeal.

The Trial Court exercised sound discretion in dealing with the issue regarding the button. Petitioner did not request a mistrial at that time and did not request a jury instruction. Rather, Petitioner wanted the jury polled regarding whether Ms. Stout spoke to any of the jurors. The Trial Court had the Bailiff testify regarding the issues and discovered that nobody spoke to the jury and that it was possible that a juror could have seen the button, but that he was watching the jury as they passed Ms. Stout on the way to the jury room and he did not see anyone look in that direction. The jurors would have had to look down and back in order to have seen the button. The Trial Court felt that polling the jury would only highlight the issue when there was no evidence that any of the jurors actually saw the button. The Trial Court ordered Ms. Stout to remove the button and not wear it in the courtroom again.

Petitioner never moved for a bifurcated trial and the Trial Court did not have an obligation to bifurcate the mercy phase *sua sponte*. The decision to have a unitary trial was most likely a strategic decision regarding the potential aggravating factors that could be used against Petitioner. This Court should affirm previous decisions upholding the constitutionality of unitary trials and should reject Petitioner's request for a one-size-fits-all rule regarding bifurcation.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument. This matter is appropriate for a Memorandum Decision.

IV.

ARGUMENT

Petitioner raises three (3) assignments of error: [1] error to remove Petitioner's original trial counsel; [2] error not to poll the jury, offer a curative instruction, or declare a mistrial based upon a spectator wearing a button; and [3] error to have unitary rather than bifurcated trial regarding mercy. Pet'r's Br. at . All of Petitioner's claims fail.

A. **The Trial Court Did Not Err In Allowing Petitioner's Original Trial Counsel To Withdraw Based On A Conflict Of Interest.**

Petitioner argues that the proper standard of review for his claim that the Trial Court erred by disqualifying his initial trial counsel for conflict of interest is *de novo*. Pet'r's Br. at 17. However, this Court has held that the proper standard of review for conflict of interest disqualification cases is abuse of discretion:

[T]he United States Supreme Court found the trial court should be afforded considerable latitude in making its determination to disqualify a criminal defense attorney due to a conflict of interest. Recognizing the trial court's need for latitude, several courts have applied an abuse of discretion standard when reviewing decisions on disqualification motions. We agree that this is the appropriate standard of review.

State ex rel. Blake v. Hatcher, 218 W. Va. 407, 417-18, 624 S.E.2d 844, 854-55 (2005) (citations omitted).

In this case, the Prosecutor properly moved for disqualification of Petitioner's trial counsel, the Trial Court held two (2) Hearings on the Motion, and Petitioner's own trial counsel admitted that withdrawal was required. A Prosecutor may move to have defense counsel disqualified when there is a conflict of interest:

The State of West Virginia, through a prosecuting attorney, has standing to move for disqualification of defense counsel in a criminal proceeding in limited circumstances where there appears to be an actual conflict of interest or where there is a significant potential for a serious conflict of interest involving defense counsel's former (or current) representation of a State witness.

Syl. Pt. 3, *State ex rel. Blake v. Hatcher*, 218 W. Va. at 409-10, 624 S.E.2d at 846-47. Following the Prosecutor's motion, the Trial Court may disqualify a lawyer where there is a conflict of interest:

"A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship."

Syl. Pt. 2, *State ex rel. Blake*, 218 W. Va. at 409, 624 S.E.2d at 846 (quoting Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991)). When determining whether or not to disqualify counsel for a conflict of interest, the Trial Court must first hold a Hearing:

A circuit court presented with a motion by the State to disqualify a criminal defense counsel due to a conflict of interest arising from counsel's former representation of a State witness shall hold a hearing to afford the State, the defendant and the State's witness an opportunity to present evidence regarding their competing interests. The circuit court shall not require the client to disclose confidential information during the hearing, but may, in appropriate circumstance where there is a significant question regarding the possibility of disclosure of confidential information at trial, conduct an *in camera* review of the purported confidential information. The circuit court shall set forth the findings in a manner adequate for review.

Syl. Pt. 6, *State ex rel. Blake*, 218 W. Va. at 410, 624 S.E.2d at 847.

Here, the matter came up when the Prosecutor filed a Motion to Determine Whether Defense Counsel Should Be Disqualified Due to Conflict of Interest, which asserted that Petitioner's trial counsel had been counsel for other potential witnesses. (App. 2 at 934-35.) The Trial Court held the first Hearing on June 19, 2013 regarding the matter. (App. 2 at 580-81.) At that Hearing, Petitioner's trial counsel was frustrated that he might be disqualified and Petitioner affirmed, under oath, that he wanted to keep his trial counsel. (App. 2 at 582-85.) While the Trial Court recognized that with the local Bar being small, it was not surprising that such conflicts would arise, the Trial Court did not rule on the Motion in order to let Petitioner's counsel investigate the matter further. *Id.*

Petitioner's trial counsel investigated further and determined that there were at least two (2) persons that he had represented were going to be witnesses for the State. (App. 2 at 594-95.) Petitioner's trial counsel recognized that he was required to withdraw under the rules of professional conduct. *Id.* Petitioner's trial counsel disclosed this information to the Trial Court at the second Hearing on the matter, which occurred on June 21, 2013. (App. 2 at 593-95.) Following Petitioner's trial counsel's disclosure, the Trial Court ordered that Petitioner's trial counsel, James E. Hawkins, Jr., be withdrawn as trial counsel and that Thomas Dyer and Zachary Dyer be appointed as Petitioner's new trial counsel. (App. 2 at 924, 936.)

Petitioner cites to *Brewer v. Williams*, 430 U.S. 387 (1977), for the proposition that he has a constitutional right to counsel. Pet'r's Br. at 17. While Respondent agrees that Petitioner has a constitutional right to counsel, Respondent asserts that *Brewer* is inapposite and that Petitioner was never denied a right to counsel.

First, *Brewer* is a case about a defendant who had counsel, but who was being transported by police and was given the "Christian Burial Speech" while his counsel was not present.

Brewer, 430 U.S. at 390-93, 97 S. Ct. at 1235-37. The Supreme Court in *Brewer* held that the defendant had a right to have counsel present, but was denied that right. *Brewer*, 430 U.S. at 405-06, 97 S. Ct. at 1243. This case is not *Brewer*. There are no facts to suggest that Petitioner was questioned or given the “Christian Burial Speech” outside the presence of an attorney. This is a case where there was an actual conflict of interest, where even Petitioner’s trial counsel understood that he was required to withdraw under the circumstances, and where Petitioner was immediately provided new trial counsel to replace his original trial counsel.

Second, Petitioner was never denied his right to counsel as Petitioner was appointed new counsel when his original trial counsel was allowed to withdraw due to a conflict. (App. 2 at 924.) Petitioner was never without counsel.

Petitioner makes a bald assertion that “the State’s motion in truth was merely a pretext to remove Mr. Hawkins from representing” Petitioner. Pet’r’s Br. at 16. To the extent that Petitioner claims that “the Prosecuting Attorney went to great lengths to deprive [Petitioner] of his court-appointed counsel,” Petitioner’s only bases for asserting such an accusation against the Prosecutor is that his original trial counsel had been conflicted off another case before due to a conflict of interest and that the witness list was lengthy. Pet’r’s Br. at 16-8. However, Petitioner admits that one (1) of the witnesses, James Roy, actually testified for the State “at trial that he overheard [Petitioner] confessing his involvement in this murder, during a period of time when he was incarcerated at the Tygart Regional Jail along with [Petitioner].” Pet’r’s Br. at 20. This admission shows that this was an actual rather than potential conflict of interest. Had Petitioner’s original trial counsel been permitted to continue, then he would have been required to cross-examine a witness with whom he had an attorney-client relationship. As such, Petitioner’s trial counsel would have been faced with the dilemma of being less than zealous in

his cross-examination of the State's witness at Petitioner's expense or of being zealous in his cross-examination at the expense of his attorney-client relationship with the State's witness. Such a conflict of interest was too great of an obstacle to justice and withdrawal was the proper procedure.

To the extent that Petitioner believes that he had a right to continue using counsel who had a conflict of interest, Petitioner is wrong. Petitioner may have "had a good attorney-client relationship with" his original trial counsel, but that does not change the fact that an actual conflict existed. Pet'r's Br. at 16. Petitioner's right to counsel does not permit him to keep his counsel where there is an actual conflict of interest. Moreover, to the extent that Petitioner argues that he waived any conflict, such conflicts cannot be waived by Petitioner. Pet'r's Br. at 16. Petitioner cannot waive the attorney-client privilege and knowledge that the State's witness had with Petitioner's trial counsel. Petitioner's claim that "the conflict of interest belongs to the client, not to the attorney" is correct. Pet'r's Br. at 22. However, the client in this situation, who was likely to be harmed, is not Petitioner, but rather Petitioner's trial counsel's client who was serving as a State witness. There is nothing in the record to suggest that the State's witness was waving any conflict or any attorney-client privilege that he had with Petitioner's trial counsel.

Petitioner argues that if his original trial counsel would have been permitted to continue on the matter, then there would have been no basis for him to appeal the matter. Pet'r's Br. at 23. Petitioner ignores the law on this issue which is clear that "once an actual conflict is found which affects the adequacy of representation, ineffective assistance of counsel is deemed to occur and the defendant need not demonstrate prejudice." Syl. Pt. 4, *Cole v. White*, 180 W. Va. 393, 394, 376 S.E.2d 599, 600 (1988). In other words, had Petitioner's original trial counsel have been permitted to continue representing Petitioner, because there was an actual conflict,

once Petitioner was convicted, ineffective assistance would have been presumed. As such, there was a high likelihood that allowing Petitioner's trial counsel to continue representing Petitioner would have resulted in grounds for overturning a conviction.

To the extent that Petitioner is claiming that his new trial counsel was ineffective, such claim is not proper on appeal. Pet'r's Br. at 16. Petitioner's ineffective assistance of counsel claims include claims that "his subsequent counsel failed to proffer any defense of [Petitioner] despite the nature of the charges;" that his subsequent trial counsel "failed to move for a change of venue due to serious prejudicial pretrial publicity;" and that his subsequent trial counsel "failed to retain the services of a private investigator as previously granted by the Court." Pet'r's Br. at 16. Petitioner characterizes his trial counsel's representation as "reprehensible" and asserts that his trial counsel "did not even bother to submit a scintilla of evidence on behalf of [Petitioner]." Pet'r's Br. at 20. All of Petitioner's claims relate to issues of trial strategy and cannot be determined without an Omnibus Hearing, where Petitioner's trial counsel is given an opportunity to testify as to the basis for such decisions. Thus, all such claims are proper at in a *Habeas* matter rather than on direct appeal. *See State v. Miller* , 194 W. Va. 3, 14-5, 459 S.E.2d 114, 125-26 (1995) (reasoning that "[i]n cases involving ineffective assistance on direct appeals, intelligent review is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior;" that "we have held with a regularity bordering on monotonous that if the record provided to us on direct appeal proves to be so deficient as to preclude us from reaching a reasoned determination on the merits of the ineffective assistance claim, it is the defendant who must bear the brunt of an insufficient record on appeal;" and that "[t]he very nature of an

ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal”).

Therefore, because the Prosecutor had standing to bring a Motion to Disqualify; because the Trial Court held two (2) separate Hearings to determine whether disqualification was required; because Petitioner’s trial counsel, after further investigation, determined that withdrawal was required; because Petitioner’s trial counsel had an attorney-client relationship with one (1) of the State’s actual witnesses; because an actual conflict of interest existed; because Petitioner was immediately provided new counsel; because Petitioner was never without counsel; because Petitioner’s claim that the State’s Motion to Disqualify was pre-textual is without merit; because Petitioner cannot waive a conflict that exists between a State witness and his counsel; because ineffective assistance would have been presumed if Petitioner had been allowed to keep his original trial counsel and then been convicted; and because ineffective assistance of counsel is not proper in a direct appeal, this Court should affirm Petitioner’s conviction and sentence.

B. The Trial Court Did Not Err By Denying Petitioner’s Request To Poll The Jury And By Denying Petitioner Motion For A New Trial.

This Court has held that the decision regarding declaring a mistrial is within the discretion of the Trial Court:

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a “manifest necessity” for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Williams, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citations omitted).

The Trial Court properly exercised discretion in denying a mistrial on the basis of Ms. Stout's button as there was no evidence that anyone on the jury saw the button. In this case, Ms. Stout, at the beginning of trial and before the jury was in the courtroom, wore a six (6) or seven (7) inch button with a picture of her son on it with the word "Missing." (App. 1 at 35-6; App. 2 at 780-93.) Ms. Stout's missing son was not the victim in this matter and it is unclear if the jury would have even attributed any significance to the button, even if they had seen it. (App. 2 at 792-93.) The jury filed past where Ms. Stout was located on their way to the jury room to be sequestered. In order to have seen the button, the jury would have had to look down and back. (App. 2 at 780-93.) The Bailiff testified that he saw the button, but that none of the jury looked down or back and he did not believe that any of the jury saw the button. (App. 1 at 45-7; App. 2 at 780-93.) The Bailiff testified that no one spoke to the jury. *Id.* At most, the Bailiff testified that it was possible for a juror to have seen the button. *Id.* The Trial Court, not wanting to draw attention to the matter, did not instruct the jury or poll the jury on the issue as there was no evidence that any of the jurors actually saw the button. *Id.* Ms. Stout was instructed to remove the button and did not wear it again during trial. (App. 1 at 36-8.)

Petitioner did request a new trial following his conviction, but did not demand a mistrial at the time that the issue occurred. Neither did Petitioner request an instruction be given to the jury. Petitioner insisted that the jury be questioned "about whether [Ms. Stout] had a conversation with any of the jurors on her way in." (App. 1 at 43.) Petitioner did not even request the jury be polled regarding whether they saw the button, merely whether anyone spoke to Ms. Stout. *Id.* The evidence was clear that no one spoke to any of the jurors. (App. 1 at 45-7; App. 2 at 780-93.)

Petitioner claims that this case is analogous to *State v. Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985). Pet'r's Br. at 30-1. Petitioner is incorrect. In *Franklin*, the Sheriff was passing out buttons to jurors and spectators that had the letters "MADD" on them. *Franklin*, 174 W. Va. at 474, 327 S.E.2d at 454. *Franklin* was a DUI case and "MADD" stands for Mothers Against Drunk Driving. *Id.* While the Trial Court in *Franklin* excused the juror and censured the Sheriff, the Sheriff and spectators were permitted to stay in the Courtroom throughout the trial, sitting directly in front of the jury, wearing the buttons the entire time. *Id.* Unlike in *Franklin*, there was only one (1) person with a button on in this case. Unlike in *Franklin*, the person wearing the button was forced to remove the button. Unlike in *Franklin*, the person never wore the button while the jury was in the jury box. Unlike in *Franklin*, there was no evidence that the jury even saw the button as they filed by on their way to the jury room.

Petitioner also cites to *State v. Moss*, 180 W. Va. 363, 376 S.E.2d 569 (1988). Pet'r's Br. at 30. *Moss* is inapposite. *Moss* involved a Prosecutor who, during a day when the trial was in recess, told the media that he had no doubt that the Defendant was the murderer. *Moss*, 180 W. Va. at 366-67, 376 S.E.2d at 572-73. The *Moss* Court held that the Trial Court should have polled the jury to determine whether or not they had heard the Prosecutor's remark in the media. *Id.* Here, unlike in *Moss*, there was no statement regarding the Prosecutor's belief as to the Petitioner's guilt. Unlike in *Moss*, the jury was in a controlled environment where they were sequestered and merely walked past a woman wearing a button. Unlike in *Moss*, the button the woman wore was not even directly connected to the trial. In this case, the Trial Court determined that polling the jury would highlight the matter as there was absolutely no indication any juror even saw the button let alone made a connection to the case. (App. 2 at 792-93.)

Petitioner also cites to *State v. Lowery*, 222 W. Va. 284, 664 S.E.2d 169 (2008). Pet'r's Br. at 30. *Lowery* involved a spectator shouting out "You bastard! You bastard!" during trial. *Lowery*, 222 W. Va. at 287, 664 S.E.2d at 172. The Trial Court, in *Lowery*, had the spectator removed and instructed the jury to disregard. *Id.* Here, unlike in *Lowery*, the jury never heard any outburst. Unlike in *Lowery*, there is no evidence that the jury even saw the button worn by the spectator as they filed by on their way to the jury room. In this case, the Trial Court did not offer any instruction, because it would have had to be explained to the jury that a spectator was wearing a button as there was no indication the jury even knew about it. (App. 2 at 792-93.) Additionally, Petitioner never offered a proposed instruction regarding the button issue. As such, by instructing the jury, the Trial Court would have been highlighting an issue that was a non-issue. *Id.*

Therefore, because the decision to declare a mistrial is within the sound discretion of the Trial Court; because there was no evidence that any member of the jury saw the button; because the button was not directly linked to the trial; because the evidence showed that no one spoke to anyone on the jury; because the evidence showed that it was only possible that a juror could have seen the button, but that the Bailiff did not see anyone look in that direction; because the jurors would have had to look back and down to have seen the button; because polling the jury would have highlighted the matter; because instructing the jury would have drawn attention to the matter; because Petitioner never requested a jury instruction; because Ms. Stout was instructed to remove the button; and because Ms. Stout never wore the button again during trial, this Court should affirm Petitioner's conviction and sentence.

C. The Trial Court Did Not Err By Failing To *Sua Sponte* Order Bifurcation Of The Mercy Phase Of The Trial When Petitioner Did Not Move For Bifurcation And Where Such Decision Was Most Likely Strategic.

Trial Courts have discretion regarding whether to bifurcate the mercy phase of a trial:

The decision to bifurcate involves mostly trial management; thus, the trial court has enormous discretion and rarely will its ruling constitute reversible error. To demonstrate that the trial court abused its discretion, a showing of “compelling prejudice” is required. “Compelling prejudice” exists where a defendant can demonstrate that without bifurcation he or she was unable to receive a fair trial regarding the finding of mercy and that the trial court could afford no protection from the prejudice suffered. In short, this Court will grant relief only if the appellant can show prejudice amounting to fundamental unfairness.

State v. LaRock, 196 W. Va. 294, 315, 470 S.E.2d 613, 634 (1996).

The Trial Court had no duty to bifurcate the mercy phase of the trial, when neither party moved for bifurcation. “A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.” Syl. Pt. 6, *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 195, 691 S.E.2d 183, 186 (2010) (quoting Syl. Pt. 4, *LaRock*, 196 W. Va. at 294, 470 S.E.2d at 613).

Generally, failure to object at the trial court level amounts to forfeiture of right to claim error. *LaRock*, 196 W. Va. at 316, 470 S.E.2d at 635 (stating that “[w]hen a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time”). However, failure to object will not result in a forfeiture of right if there is plain error. *Id.* There are four (4) elements to plain error:

To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995).

In this case, Petitioner never moved for bifurcation of the mercy phase and failed to object to a unitary trial. Such a decision was likely a strategic decision made because a bifurcated mercy phase would allow the State to put on aggravating evidence as much as Petitioner could have put on mitigating evidence. Moreover, the Trial Court did not have a duty to bifurcate the trial *sua sponte*.

If Petitioner wanted a bifurcated mercy phase, then such motion should have been made prior to trial or an objection to a unitary trial should have been made. Petitioner's failure to do so does not convert the unitary trial into plain error as unitary trials are constitutional and within the sound discretion of the Trial Court. Syl. Pt. 6, *State ex rel. Dunlap*, 225 W. Va. at 195, 691 S.E.2d at 186.

Petitioner's argument regarding the jury questions is a red herring. Pet'r's Br. at 33. While the jury had a question regarding the difference between first degree and second degree murder, the jury never had any questions about the issue of mercy. (App. 1 at 547.) Petitioner would have this Court assume that the jury did not give consideration to the mercy issue. Pet'r's Br. at 34 (stating that "one can only conclude that fair and just consideration of the mercy issue was not afforded to the defendant by the jury). However, there is no evidence in the record that the jury failed to consider the mercy decision.

This Court should refuse Petitioner's suggestion that the Court should "rule that the Constitution commands a bi-furcated mercy hearing in cases of First Degree Murder." Pet'r's Br. at 36. Petitioner ignores the fact that the very case on which he bases his reasoning for changing the law is the very case that established the law. *See id.* Petitioner waxes poetic regarding Justice Cleckley's words that "[t]he judiciary, like every other institution, must be open to discarding habits that have outlived their usefulness and must bend under the pressures

of modern life to find the most effective procedure in accomplishing its mission.” *LaRock*, 196 W. Va. at 313-14, 470 S.E.2d at 632-33 (1996); Pet’r’s Br. at 36. However, Petitioner ignores Justice Cleckley’s statement that “[o]n the other hand, when enormous savings of expense and gains of efficiency can be accomplished without sacrificing justice, courts must adopt the procedure that produces the greater efficiency.” *LaRock*, 196 W. Va. at 314, 470 S.E.2d at 633. The *LaRock* Court found bifurcation and unitary trials both to be constitutional and proper and left the decision about when to bifurcate within the discretion of the Trial Court. *Id.* This Court should affirm *LaRock*’s holding and reasoning and deny Petitioner’s request for a one-size-fits-all type of judicial system.

Therefore, because Trial Courts have discretion regarding bifurcation; because Petitioner has not shown compelling prejudice; because Petitioner did not move to bifurcate; because the Trial Court did not have a duty to bifurcate *sua sponte*; because Petitioner never objected to a unitary trial; because holding a unitary trial is not unconstitutional; because holding a unitary trial is not plain error; because Petitioner’s decision to have a unitary trial was most likely a strategic decision; because there is no evidence that the jury did not properly consider the mercy issue; because a one-size-fits-all rule regarding bifurcation would promote inefficiency, this Court should affirm Petitioner’s conviction and sentence.

V.

CONCLUSION

For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner’s conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



DAVID A. STACKPOLE
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 11082
Email: David.A.Stackpole@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of September, 2015, addressed as follows:

Brian W. Bailey, Esquire
25 West Main Street
Buckhannon, WV 26201
Counsel for Petitioner

and

G. Phillip Davis, Esquire
P.O. Box 203
Arthurdale, WV 26520
Counsel for Petitioner



DAVID A. STACKPOLE
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 11082
Email: David.A.Stackpole@wvago.gov
Counsel for Respondent