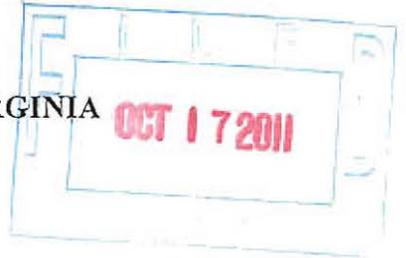


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NO. 11-0816

DAVID BALLARD, WARDEN

*Respondent Below,
Petitioner,*

v.

DAVID LEE HURT,

*Petitioner Below,
Respondent.*

BRIEF ON BEHALF OF THE PETITIONER

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BRIEF ON BEHALF OF THE PETITIONER

Comes now the Petitioner, David Ballard, Warden, by counsel, Laura Young, Assistant Attorney General, and files the within brief on behalf of the Petitioner appealing the grant of the Respondent's petition for writ of habeas corpus.

I.

ASSIGNMENTS OF ERROR

I. The habeas court erred in determining that the failure of the trial court to advise the Respondent of his *Neuman* "rights" was error of constitutional dimension, and that trial counsel was ineffective in failing to force the trial court to so advise.

II. The habeas court erred in determining that ultimately Mr. Hopkins recanted his testimony and that there was substantial credible corroborating evidence to support such recantation.

III. The habeas court erred in finding ineffective assistance of trial counsel "on all the basis of all the individual and cumulative reasons set forth in the Third State Petition" (sic) when

there was no evidence supporting those “reasons” and no specific findings and conclusions about those “reasons.” Such blanket adoption of the Respondent’s petition suggests that the habeas court engaged in a results-oriented proceeding. The habeas court’s order both in its specific findings of fact and conclusions of law, and in the absence of specific findings of fact and conclusions of law on many of the raised claims is not supported by the evidence.

II.

STATEMENT OF THE CASE

The Respondent was initially tried for murder in the Circuit Court of Mercer County on September 16-18, 1997. That trial ended in a mistrial. At that trial, the Petitioner’s co-defendant, Michale “Mikey” Hopkins was placed under oath and testified. Mr. Hopkins testified that he entered a plea of guilty regarding the murder of Freddie Lester which occurred on August 21, 1995. Mr. Hopkins entered a plea of guilty to murder in the second degree and aggravated robbery. (App., vol. I, 4-6.) He testified that sometime around 1:00 a.m., he met the Respondent, and that the Respondent inquired as to whether Mr. Hopkins wanted to help the Respondent rob the Red Head Station. (Throughout the trial transcripts, the terms “Red Head Station” and “Rich Oil Station” are used interchangeably.) (*Id.* at 6-7.) The Respondent informed the Petitioner as to the location of the video camera. According to Mr. Hopkins, he entered the store, and left claiming he couldn’t participate in the robbery. (*Id.* at 8-9.) After Mr. Hurt called Mr. Hopkins a “punk”, Mr. Hopkins returned to the store and shot the victim. (*Id.* at 9-10.) Mr. Hopkins indicated that he had received the murder weapon from Mr. Hurt at sometime prior to the murder. Mr. Hopkins stated that he shot the clerk in the back of the head and took cash from him. (*Id.* at 11-12.) Mr. Hopkins split the proceeds, approximately \$157.00, with the Respondent. (*Id.* at 12.) Mr. Hopkins hid the gun in the

woods and then gave it to Marcus Toney. (*Id.* at 13-14.) Mr. Hopkins admitted that his first statement to the police had been a lie and that he gave a second statement. (*Id.* at 16-17.) Mr. Hopkins was aggressively cross-examined about his plea agreement and about the inconsistent statements he had given the police. (*Id.* at 22-24; 31-34.) Further, Mr. Hopkins essentially stated that he shot Mr. Lester because of “my reputation.” (*Id.* at 50.) Mr. Muncy, the manager of the station, testified that he confirmed that approximately \$150 was taken in the robbery/murder, and further testified that he alerted the police to the Respondent as a suspect because of previous incidents. He stated that the Respondent and the victim had words over the use of the station’s pay phone, and that the Respondent stated “you’ll pay for this.” (*Id.* at 66-68.) He further testified that the Respondent was familiar with the surveillance system at the station. (*Id.* at 71.) The victim’s widow testified that after her husband was shot the Respondent came to her house and stated that the victim had been shot because someone needed \$150, and was shot with a .22. This was approximately 12 hours after the crime and before the police had released any information to the family. (*Id.* at 79-81.) She further witnessed the phone incident between the Respondent and the victim. (*Id.* at 82.) The Respondent testified at the first trial. As the possibility of the Respondent having been on the telephone at the time of the murder became an issue at the habeas hearing and order, it is important to note that nowhere in the testimony at the first trial does he mention a telephone call occurring the night of the murder after he came home and before his mother woke him. (*Id.* at 91-102.) As stated previously, this trial ended in a hung jury and a mistrial.

The Respondent had a subsequent trial. Venue was changed to Pocahontas County, Judge Rowe presiding. Trial commenced on May 27, 1998. New counsel represented the Petitioner.

Although many of the witnesses and exhibits presented at the second trial had been presented at the first proceeding, there were some significant changes and additions to the testimony.

Trooper W. B. Davis of the North Carolina Highway Patrol testified that on August 22, 1995, in Guildford County, North Carolina, he stopped a speeding vehicle. The Respondent was a passenger in the vehicle, which was stolen. Although a warrant for possession of a stolen vehicle was issued for the Respondent, that was later dismissed. (*Id.* at 103:61-64.) Some time prior to the murder, Kelly Walls, then a police officer investigated an incident at the Rich Oil Station. The Respondent had entered the closed station. Although unsure of the date, the officer knew the incident preceded the murder, because Freddie Lester, the murder victim, came to the station that night. Mr. Hurt watched the surveillance video with Officer Walls and observed Officer Walls find the video in a storage room. (*Id.* at 67-70.)

Clarence Woodford testified that in the early morning hours of August 21, 1995, he stopped at the station between 2:10 and 2:15 a.m. and had a conversation with Mr. Lester. However, after prompting from both the prosecution and defense attorneys, Mr. Woodford determined that the time he stopped was actually around 3:10. (*Id.* at 73-79.)

Officer Simmons of the Bluefield Police Department testified that during the early morning hours of August 21, he saw Michael Hopkins and another individual in the vicinity of the Rich Oil Station. (*Id.* at 81-82.) Officer Simmons also was the first officer to the murder scene. He observed Mr. Lester lying on the floor, and his body was still warm. (*Id.* at 85.)

Timothy Joyce testified that at approximately 3:30 a.m. on the date of the murder, he stopped at the station. He stepped inside and saw Mr. Lester lying on the floor. After waiting for a couple

of minutes for help, he drove to the police station because he saw Mr. Lester lying on the floor among spilled cigarettes. (*Id.* at 108-109.)

Linda Lester, the victim's widow, testified again at the second trial. A day or two before her husband was murdered, she saw her husband "put David off the phone." (*Id.* at 124.) She further testified that she spoke to her husband sometime between 2:00 and 2:25 a.m., and called back sometime around 3:00 a.m. She received no answer and called back several times. (*Id.* at 126.) The Respondent came to her house after the murder and accused an individual named Mark Williams of committing the crime because he (Williams) needed \$150. The Respondent also (before the autopsy) correctly informed Ms. Lester that her husband died from a .22 caliber gunshot wound. (*Id.* at 127-28.) Dianne Gills corroborated the conversation wherein the Respondent informed Ms. Lester of the size of the bullet before the autopsy and before she received information from the police that at the time of his death the victim had been stocking cigarettes and that \$150 was taken. (*Id.* at 148.) Cherri Mitchem also corroborated that conversation. (*Id.* at 161.) Eldon Muncy, the store manager, testified that upon being called to the station and seeing Mr. Lester dead, he immediately suspected the Respondent. (*Id.* at 173.) Mr. Muncy had witnessed the telephone incident, saw Mr. Lester escort the Petitioner out of the store, and overheard the Respondent say something to the effect of "you'll pay for this." (*Id.* at 174.) Mr. Muncy further explained that it was the practice of the store for the attendants to carry the sales and gas cash receipts on their person until dropping them in a safe. (*Id.* at 179-80.) Approximately \$150.00 was taken, although the police were not made aware of that information until sometime later the next day. (*Id.* at 182.) Latonya Colloway spent the early morning hours of August 22, 1995, with the Respondent, among others. She stated that he was not

acting like himself, that he sat in the bathtub with the lights out and said his conscience was bothering him from something that happened the night before. (*Id.* at 204-06.)

Clarence "Rocky" Lane testified as an expert in firearms and tool mark identification. Mr. Lane received a bullet on September 6, 1995, from Dr. Sopher of the medical examiner's office. (*Id.* at 223.) Mr Lane was able to determine that the bullet was a .22 Rem fire. (*Id.* at 224.) The bullet had the same class characteristics as a firearm received from the Bluefield Police Department, but the barrel of that firearm was too damaged for a positive match comparison. (*Id.* at 225-26.) Scott Myers of the police department testified that there was no surveillance tape found in the security system the morning of the murder. (*Id.* at 234.) Officer Myers retrieved the weapon from Marcus Toney. Marcus Toney was the individual to whom Michael Hopkins gave the gun that Hopkins represented to be the murder weapon. (*Id.* at 240-241.) Officer Myers described the first statement Hopkins gave, which turned out to be untrue, and the circumstances of Hopkins changing his story. (*Id.* at 245.) Without objection, Myers related the second Hopkins statement, which maintained, essentially, that Hurt met Hopkins about 1:00 a.m. A discussion was held about robbing the Red Head, and Hurt advised Hopkins that Hopkins needed to surprise the victim. Hopkins entered the store, and left without killing Mr. Lester. Hurt called Hopkins names, at which time Hopkins reentered the store and killed Mr. Lester, removing money from his breast pocket. Hopkins took the surveillance tape, the location of which he obtained from Hurt. (*Id.* at 246.) Officer Myers stated that the police learned of the amount of money that had been taken sometime in the afternoon of August 22. (*Id.* at 251.)

Dr. Sopher testified about the autopsy performed on the victim. The cause of death was a gunshot wound to the head. The entrance was in the mid-portion of the back of the head, almost

dead center. The gunshot was close range. (*Id.* at 275.) There was no exit wound. Dr. Sopher recovered the bullet from Mr. Lester's brain. (*Id.* at 276.)

Detective Ferrell noted that the victim was lying on his back, with the cigarette rack pulled down to stock it, and numerous packs of cigarettes scattered around. (*Id.* at 285.) Detective Ferrell testified that from information at the scene it was impossible to determine the caliber of bullet used or the amount of money, if any, taken. (*Id.* at 287.) Detective Ferrell stated that he was the first to receive that information and that he did not find out the amount of money taken until the evening of August 22. (Of note, the Lester family testified that the Respondent came to their house in the afternoon of the August 22 and informed them that \$150 was taken and that Mr. Lester was shot with a .22 caliber weapon. This was before, apparently, even the police had that information. However, the record also indicates that different police officers stated, in general times, when the information was received by the department and those estimates varied.) Detective Ferrell testified that the Lester family relayed to him the conversation they had with Davie Hurt and that at the time he received that information, he was unaware of the money missing and the caliber of the gun. (*Id.* at 294.) Detective Ferrell testified that the Respondent stated he was at home all night, arriving prior to 11:30, and that the Respondent denied the conversation with the Lester family. (*Id.* at 297.) (No mention was made of a phone conversation with Ginger Wheeler.) Detective Ferrell outlined the two statements given by Michael Hopkins—the first implicating Davie Hurt, Jamaal Wallace and Keith Powell, and the second in which he implicated himself and Hurt. (*Id.* at 300-05.) The prosecution pointed out that no promises of lenient treatment or plea bargain had been offered to Hopkins at the time of his second statement. (*Id.* at 305.) Detective Ferrell also testified that

Michael Hopkins had expressed a reluctance to testify against the Respondent because Mr. Hopkins was incarcerated and expressed a concern for his safety. (*Id.* at 330.)

Michael Hopkins testified, again, at the second trial. At the time of that trial, he was incarcerated at Mount Olive. (*Id.* at 375.) He informed the jury that he had pursuant to a plea agreement, pled guilty and had entered a plea to second degree murder and aggravated robbery and received forty years, with parole eligibility in approximately 13 years. (*Id.* at 377-78.) Hopkins testified that Davie, the Respondent, approached him and asked if Hopkins had a gun. Hopkins stated he did, and at trial identified the gun. Hopkins retrieved the gun and he and the Respondent began walking. The Respondent asked if Hopkins wanted to help him rob the Red Head. (*Id.* at 378-80.) Hurt stated that he needed money. Hurt told Hopkins about the surveillance system and where the tape was located. (*Id.* at 381.) Hurt directed Hopkins to shoot Lester and get the money from his shirt pocket. (*Id.* at 382-83.) Hopkins entered the store and exited without shooting the victim. Hurt called Hopkins a “punk” and stated he would tell all the guys that he was a “punk.” (*Id.* at 383.) Hopkins then returned to the store and shot Mr. Lester. (*Id.* at 384.) He took the money from the victim’s shirt pocket and removed the VCR tape. (*Id.* at 385.) Hopkins stated that he burned the videotape and gave the gun to Marcus Toney. (*Id.* at 386-87.) He split the money with the Respondent. (*Id.* at 388.) He testified that \$150 was taken. (*Id.* at 389.) Hopkins testified about the first, untrue statement. (*Id.* at 391.) He testified that his second statement given in September of 1995 was the truth, and that the police had promised him nothing in return for that statement. (*Id.* at 395.) Mr. Hopkins was confronted on cross-examination with the many lies in his statement. (*Id.* at 398-402.) On cross-examination, he admitted lying to the police on more than one occasion. (*Id.* at 413.) Hopkins reiterated that Hurt’s role in the robbery was a lookout. (*Id.* at 456.)

Tresa Neal testified that prior to the murder Michael Hopkins had told her he was going to rob the station and that on two occasions after the murder she heard him agree that he had committed the crime. (*Id.* at 480-84.) However, she admitted that she never told the police about Mr. Hopkins' admission. (*Id.* at 487.)

Ginger Wheeler, the Respondent's girlfriend, testified, at the second trial, but not the first, that she was on the telephone continuously with the Petitioner from 11:30 p.m. through 3:44 a.m. August 20-21, 1995. (*Id.* at 530.) She also stated that even though she knew her boyfriend had been arrested and indicted for murder, she did not inform the police that Hurt could not have committed the crime. because of the phone call "alibi". (Of note, she did not state that her father interrupted her conversation, as was claimed fifteen years later at the habeas hearing.) The Respondent's mother testified that her son returned home before midnight. (*Id.* at 542.) She did admit he could have sneaked out of the house and returned and did not state that she saw or heard him on the telephone. (*Id.* at 543; 546.)

Mr. Hurt testified, and it is clear from the absence in the record, that he was not informed by the Court about his decision to testify or not. Contrary, or perhaps in addition to what he testified to in the first trial, he stated that he came in at 11:30, turned the TV on in the living room and called his girlfriend. He did not recall the length of that telephone conversation. (*Id.* at 548-49.) The Respondent admitted on cross-examination that he never mentioned his "alibi" at the first trial. (*Id.* at 552.) He denied making any of the statements that the Lester family testified about. (*Id.* at 554-55.) He stated that both Officer Sylvester and Mr. Muncy were mistaken when they stated they saw him at the station. (*Id.* at 556.) Mr. Hurt was convicted of murder in the first degree and the jury recommended mercy. (*Id.* at 656.)

A direct appeal of the Respondent's conviction and sentence was refused by this Honorable Court on June 3, 1999. (App., vol II, 104.)

Following the refusal of the direct appeal, a petition for a writ of habeas corpus was filed, and attorneys were appointed to assist the Respondent. On April 9, 2002, Judge Rowe entered an order denying that petition for writ. (*Id.* at 117.) An appeal from that denial was refused by this Honorable Court on March 21, 2003.

Among the grounds presented in the first petition for writ of habeas corpus in 00-C-7 were newly discovered evidence; ineffective assistance of trial counsel, specifically dealing with the failure to warn Mr. Hurt about testifying; transfer of the Respondent to adult jurisdiction; change of venue; prosecutorial misconduct; error in the admission of evidence and cumulative error. (*Id.*)

Mr. Hurt had the benefit of an evidentiary hearing on that petition for writ. Michael Hopkins testified. At that hearing, Mr. Hopkins stated that he was alone when he killed Mr. Lester. (*Id.* at 116:31.) Further, Mr. Hopkins acknowledged signing an affidavit and writing a letter to the judge regarding his trial testimony. (*Id.* at 36.) Although Mr. Hopkins indicated that the reason he had lied was because he wanted someone to go to jail with him, he further stated that he had no reason to pick the Respondent to be that person. (*Id.* at 56.) Further, even though he wanted someone to go to jail with him, he was frightened of Mr. Hurt and wanted to move to Huttonsville. (*Id.* at 59-60.) He further stated that he relied on the state to protect him from "David Hurt or other individuals." (*Id.* at 60.) He had concerns that either Mr. Hurt or someone could get to him because he testified. He did not represent that he had lied at trial until after the Respondent was an inmate at Mount Olive and he talked to the Respondent there. Mr. Hopkins was concerned that people would find out he

was a rat and was afraid of certain consequences. Mr. Hopkins and Mr. Hurt were in the same facility for a period of time. (*Id.* at 61-63.)

Judge Rowe, who had presided over and witnessed the trial testimony, as well as the first habeas hearing, wrote an order with findings of fact and conclusions of law denying the petition for writ of habeas corpus. The recantation of Michael Hopkins had been listed as “newly discovered evidence.” The court cited decisions of this Honorable Court denoting that such a motion is rarely granted and the circumstances must be unusual or special. New trials are granted when recantation is involved only under circumstances where there are credible corroborating circumstances leading the trial court to conclude that the witness did lie. Judge Rowe reviewed the testimony from the trial including Mr. Hopkins’ testimony, that Mr. Hurt knew facts and circumstances about the murder before such became public, and that information was such that only a participant could know; that the Respondent had something on his conscience, and that there were witnesses at trial who testified as to the Respondent’s alibi. The court noted that there were not such credible corroborating circumstances. The court acknowledged that Hopkins was capable of lying and giving false testimony, but that the testimony of two inmates as to what Hopkins told them is not credible corroborating evidence that Hopkins lied at trial.

With regard to trial counsel being ineffective because of the failure to engage in the *Neuman* colloquy, the court noted that the rule is a procedural and prophylactic rule, and that the decision clarified applicable procedural law only and not substantive or constitutional law. A violation is subject to a harmless error analysis. A rebuttable presumption exists that a defendant represented by counsel has been informed of his right to testify. The violation is harmless error in the absence of evidence that counsel failed to inform him of his right to testify.

Judge Rowe analyzed the violation and found that Mr. Hurt alleged that he incriminated himself through three issues: stolen vehicles, conveyance of information to Mrs. Lester and flight. However, other witnesses testified to those issues at trial. The Respondent denied the theft, and denied the conveyance of information. Further, there was no evidence that the Respondent's counsel failed to inform him of his right to testify or that the Respondent was coerced or misled into giving up his right to testify, or in this case where Mr. Hurt testified, there was no evidence that counsel failed to inform him of his right not to testify. Therefore, the presumption that counsel correctly informed the Respondent of his rights regarding testifying was not rebutted. (*Id.* at 117-31.)

Apparently, yet another petition for writ of habeas corpus was filed. Judge Rowe is still on the bench and assigned to Judge Pomponio, who determined after an initial review of the second petition and the record that Mr. Hurt was entitled to yet another omnibus hearing on the limited issue of the ineffective assistance of counsel in not developing corroboration of the "alibi" and recantation. Judge Pomponio determined that the affidavits of Ginger Wheeler's parents would corroborate her testimony that she was on the phone with the Petitioner. No mention is made in that initial review that the testimony of her parents is hearsay, and hearsay upon hearsay, and that they are the grandparents of the Respondent's child. Judge Pomponio determined that the affidavits did not constitute newly discovered evidence. However, the judge did find that the failure of previous habeas counsel to have obtained said affidavits might have been ineffective assistance of counsel as the existence of those affidavits might have persuaded Judge Rowe to grant relief. Therefore, the order granted an evidentiary hearing on the limited issue of whether habeas counsel committed "reversible error" by failing to obtain affidavits to corroborate the alleged recantation. (*Id.* at 142.)

However, yet another petition for writ of habeas corpus was filed. The issues raised were actual innocence, with sub-claims dealing with ineffective assistance of counsel in several areas: failure to research the alleged alibi; failure to object to the presentation of witnesses; failure to subpoena witnesses; seeking a change of venue; failing to object to Pocahontas County as the venue based upon its racial composition and the organization the National Alliance being housed there; haphazard voir dire; and the *Neuman* issue. (App., vol. II at 163.)

An evidentiary hearing was held. Michael Hopkins was called as a witness in Mr. Hurt's behalf. (*Id.* at 199:2.) At the time of the hearing, Mr. Hopkins had been out on parole for approximately six months. (*Id.* at 3.) He testified that he knew the Respondent from around the neighborhood but did not know the victim personally. (*Id.* at 4-5.) When questioned, Mr. Hopkins admitted that he had been untruthful in his first statement, but that Davie Hurt had in fact been at the station with him. (*Id.* at 7.) He stated "I won't sit here and tell you, Ms. Hurt, at all, that your son wasn't there with me. Your son knows he was there with me," and added, by inference, that his recantation was because to be in prison as a rat was "death words." (*Id.* at 8-9.) He stated he was afraid for his life because of the Respondent. (*Id.* at 9.) Mr. Hopkins said that he accepted his responsibilities and that he wasn't going to tell anyone that Mr. Hurt didn't do this. Mr. Hopkins acknowledged that he was a murderer. He stated that the only thing he ever said was that Mr. Hurt did not commit the murder. (*Id.* at 10-11.) Judge Pomponio noted that the Mr. Hurt's habeas testimony was consistent with his trial testimony. (*Id.* at 14.) He further stated that Mr. Hopkins was not recanting his testimony. (*Id.* at 15.) Mr. Hopkins reiterated he was threatened in prison and stated that Davey Hurt was behind it. (*Id.* at 19.) The Respondent denied ever threatening Hopkins

or having him threatened. (*Id.* at 34.) As regards the transfer from juvenile jurisdiction, the Respondent stated that he just wanted everything over with. (*Id.* at 36.)

On cross-examination, Mr. Hurt acknowledged that he had testified in the first trial, that he had been cross-examined in the first trial, and that he knew that he would probably be cross-examined and questioned in Pocahontas County. (*Id.* 43-45.) The habeas court announced from the bench that he was vacating the conviction based upon the ineffective assistance of trial counsel on the *Neuman* issue. (*Id.* 66-67.)

No evidence was proffered as to the failure of counsel to challenge the venue in Pocahontas County because of racial composition, being the home of the National Alliance, *lax voir dire*, and very limited evidence put forward on the juvenile transfer issue.

Nonetheless, Judge Pomponio found ineffective assistance of trial counsel on all the reasons set forth in the petition, even those where no evidence was proffered. The habeas order dealt specifically with the *Neuman* issue, finding that the Respondent was harmed in exactly the three areas where Judge Rowe found the Respondent was not harmed. No additional testimony was adduced before Judge Pomponio which justified the substitution of his opinion for Judge Rowe, who actually tried the case. Further, Judge Pomponio made a specific finding of fact that Michael Hopkins was not a credible witness. Expressing that opinion may well preclude the State from having the opportunity to retry this matter, if this appeal is not granted.

A notice of intent to appeal was filed within the time limits specified. After motions to extend the time to perfect the appeal were granted, an order was entered ordering the appeal to be perfected on or before October 17, 2011.

III.

SUMMARY OF ARGUMENT

The issues raised in the third amended petition for habeas corpus were actual innocence, with sub claims dealing with failure to research the alleged alibi; failure to object to the presentation of witnesses; failure to subpoena witnesses; seeking a change of venue; failing to object to Pocahontas County as the venue based upon its racial composition and the organization the National Alliance being housed there; haphazard *voir dire*; and the *Neuman* issue. (App., vol. II, 163.) As noted, the habeas court granted relief on each and every ground raised, although there was no testimony apparent in the record dealing with the failure to object to the presentation of witnesses, failure to subpoena witnesses, a change of venue; failure to object to Pocahontas County as the venue based upon its racial composition and the home for the National Alliance, and haphazard *voir dire*. For the habeas court to have granted relief on those grounds, without any evidence and without specific findings of fact and conclusions of law is error, and error which suggests the habeas court was determined to reach a particular result.

Clearly, Mr. Hurt was not advised of his rights as set forth in *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988.) Of first import, however, this issue was fully litigated in the first habeas before Judge Rowe, and Judge Rowe determined this issue adversely to the Respondent. While Judge Pomponio did set aside Judge Rowe's habeas order, he did so on the limited basis that habeas counsel was ineffective for failing to research the alibi witnesses. No additional evidence was submitted to Judge Pomponio on this issue. Therefore, at least factually, the *Neuman* issue was *res judicata*. Further, the habeas court ignored the fact that the *Neuman* "rights" are neither

constitutional in nature nor substantive law. As this was not error of constitutional dimension, and the error was ultimately harmless, the order granting the writ of habeas corpus should be reversed.

The habeas court also erred in that the Respondent's trial counsel was not constitutionally ineffective under the *Strickland/Miller* test for failure to force the trial court to instruct the Respondent pursuant to *Neuman*. This failure was not deficient performance, and even if deficient, the outcome would not have been different but for that deficiency.

Further, Judge Pomponio erred in determining that Michael Hopkins recanted and such recantation was supported by credible corroborating circumstances. Recanted testimony is suspect, to say the least. Only by determining that Mr. Hopkins had recanted and that habeas counsel had not researched his alibi—one of the grounds bolstering the claim of “actual innocence” and the basis for the order which Judge Pomponio entered granting another habeas hearing—was Judge Pomponio able to order a habeas hearing. Ultimately, Mr. Hopkins did not recant. As regards to Mr. Hopkins testimonial credibility, his credibility was sorely tested before the jury at trial, and the jury determined that issue adversely to Mr. Hurt. Mr. Hopkins gave an explanation as to why he had recanted, and reaffirmed his trial testimony. The “credible corroborating circumstances” which the habeas court labeled as supporting the recantation was a hearsay statement from Ginger Wheeler's father (the grandfather of the Respondent's child) emanating in 2008 that he remembered seeing his daughter on the phone a decade and a half earlier and asked who was on the other end and she said “Davie,” and an affidavit from his wife in which she stated that Mr. Wheeler said that “Davie” was on the phone. That is hearsay, and double hearsay which would never have been heard by a jury, and which would not have persuaded Judge Rowe to determine that Michael Hopkins lied. Judge Rowe presided over the trial, heard all the contradictions and stories that Michael Hopkins told, heard his

recantation, heard testimony from prisoners that Michael Hopkins recanted, and determined that the conviction should stand. The hearsay and double hearsay which purports to support the Respondent's alibi does not, even if believed (and the Petitioner asserts such is unworthy of belief) corroborate the recantation. Of note, Ginger Wheeler did not come forward and testify at the first trial, had not told the police about the "alibi", and in fact admitted on the stand that she had not told anybody about the alleged "alibi" until she testified. Further, the Respondent did not claim the telephone call as an alibi at the first trial, and his mother, who testified at both trials that she knew the Respondent was in the home all night never mentioned a four and a half hour long telephone conversation. Therefore, the habeas court erred in re-litigating the *Neuman* issue, and finding that the error was of constitutional dimension requiring relief on the habeas petition, further erred in determining the recantation issue, and erred in granting blanket relief with no support evidence, findings or conclusions.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner does not request oral argument. It appears as if the dispositive issues have been authoritatively decided. Further, the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This matter is appropriate for a memorandum decision.

V.

ARGUMENT

In *State ex rel. Tune*, this Court explained that "[t]he sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by due process of law." Syl. Pt.

1, *State ex rel. Tune v. Thompson*, 151 W. Va. 282, 151 S.E.2d 732 (1966). A petition for writ of habeas corpus is advanced to review errors of constitutional dimension, and a habeas corpus action is not a substitute for judicial review of ordinary trial error. Syllabus Point 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979); Syl. Pt. 4, *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 700 S.E.2d 489 (2010). The standard of review employed to review an order granting or denying a writ of habeas corpus is three-fold:

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). With those concepts in mind, the arguments of the State of West Virginia are as follows:

A. THE HABEAS COURT ERRED IN FINDING THAT THE FAILURE TO ADVISE THE RESPONDENT ABOUT TESTIFYING AT TRIAL CONSTITUTED ERROR OF CONSTITUTIONAL DIMENSION, AND FURTHER ERRED IN FINDING THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO FORCE THE TRIAL COURT TO SO ADVISE THE RESPONDENT.

The habeas court based its 2011 decision to grant the Respondent habeas relief on *State v. Neuman*. See *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988) (“A trial court exercising appropriate judicial concern for the constitutional right to testify *should* seek to assure that a defendant’s waiver is voluntary, knowing, and intelligent. . . . the defendant *should* also be advised that he has a right not to testify”(emphasis added)). However, the habeas court ignored what this Honorable Court has clearly stated about the *Neuman* decision and its evolution since 1988. As noted in *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996), the *Neuman* “rights” are neither

constitutional in nature, nor substantive law. The rule is “merely a procedural/prophylactic” rule. (*Id.* at 712, 478 S.E.2d at 562.) A habeas corpus proceeding is not a substitute for an appeal in that ordinary trial errors not involving constitutional violations will not be reviewed. *Edwards v. Leverette*, 163 W. Va. 571, 258 S.E.2d 436 (1979).

Further, the failure to engage in the *Neuman* colloquy is subject to a harmless-error analysis, and there is a rebuttal presumption that a defendant, when represented by counsel, has been advised of his right to testify by that counsel. Syl. Pt. 15, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998). The Court again noted in Syl. Pt. 3 of *State ex rel. Hall v. Liller*, 207 W. Va. 696, 536 S.E.2d 129 (2000), when it denied a writ of habeas corpus on a claim that the trial court failed to advise the defendant of his right to testify, that the failure to engage in the *Neuman* colloquy does not rise to the level of constitutional error. The Court stated: “Having determined in *Salmons*, *supra*, that the failure to give a *Neuman* instruction does not rise to constitutional error, we find that the circuit court was not clearly wrong in its denial of Ms. Hall’s petition for a writ of habeas corpus.” (*Id.* at 701, 536 S.E.2d at 125.) *Hall* is also another case in the long line of West Virginia cases which stand for the proposition that a proceeding in habeas corpus is not a substitute for a writ of error, and that a habeas writ should not issue when, as in the instant case, there was no constitutional error.

The habeas court also found that “Trial Counsel’s failure to assure that the [Respondent] was advised of his *Neuman* rights” at the second trial was ineffective assistance of trial counsel. (App., vol. II, 160.) To determine whether counsel is constitutionally ineffective, the West Virginia Supreme Court adopted the United States Supreme Court’s *Strickland* test in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In Syl. Pt. 5, the *Miller* Court held that:

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

Id. at Syl. Pt. 5. The *Miller* Court also noted that:

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.

Id. at Syl. Pt. 6. Justice Cleckley also quoted *Strickland* to show that courts ““must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]”” *Id.* at 15, 459 S.E.2d at 126, quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

In the case at bar, the trial court did not engage with the Respondent prior to his testifying at his second trial and inform him of his right not to testify. Of course, prior to the second trial, the Respondent had testified at his first trial and been subject to the dangers of cross-examination. Nonetheless, he testified at his second trial. The habeas court granting the Mr. Hurt's third habeas petition made this omission a basis of his decision to set aside the jury verdict and release the Respondent from custody under that verdict and sentence.

However, the failure by the court to instruct the Respondent under *Neuman* was harmless. Mr. Hurt testified in his own behalf at not one but two trials. He was represented by two attorneys at his first trial, and two different attorneys at his second trial. Mr. Hurt's complaint was that he incriminated himself by implicating himself as regards to a stolen van and a stolen jeep, conveying facts to the widow about the crime before such were known to the public or in fact before such were

even known to the police investigating the murder, and flight. As to each of those issues, other witnesses than Mr. Hurt testified about each area. Further, Mr. Hurt denied involvement in the vehicle theft and denied the incriminating conversation with the Lester family. As those were the areas of proffered harm, and as Mr. Hurt did not admit those in his testimony, the failure to instruct the Respondent that he had a right not to testify was harmless.

Additionally, a rebuttable presumption exists that a defendant represented by legal counsel has been informed of the constitutional right to testify/not testify. A *Neuman* violation is harmless in the absence of evidence that a defendant's legal counsel failed to inform him of the right to testify, or that the defendant was coerced or misled into giving up the right to testify. Syllabus Point 15, *Salmons, supra*. Logically, where as here, the Respondent elected to testify (having already testified and been subject to cross-examination at his previous trial), the same test regarding harmless error should apply. That is, where the Respondent was represented by legal counsel, a *Neuman* violation should be regarded as harmless in the absence of evidence that counsel failed to inform him of the right not to testify, or that he was coerced or misled into giving up the right not to testify. There is no evidence of record to rebut the presumption that the Respondent had been informed of his rights regarding testimony.

Further, the habeas court erred in determining that the Respondent's trial counsel was ineffective for failing to force the trial court to recite the *Neuman* "rights." Under the *Strickland/Miller* test, counsel is ineffective if: 1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceedings would have been different. Syllabus Point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114. In this case, failure of trial counsel to force the trial court

to advise the Respondent of his *Neuman* “rights” is not deficient performance, and the outcome of the trial would not have been different but for the trial counsel’s failure to force the trial court to advise the Respondent about his right not to testify.

First, trial counsel was not deficient for the court’s failure to advise the Respondent under *Neuman*. The *Neuman* Court held that a trial court should advise the defendant about his right to testify or refuse to testify. *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77. *Neuman* does not mandate under the constitutional charge that a trial court *must* recite those rights to the defendant, and the *Neuman* holding does not apply to the trial counsel; the holding clearly applies to the trial court’s procedural responsibilities. The habeas court erred in finding that trial counsel was deficient due to a *Neuman* violation by the trial court. Whether or not the trial court gives a procedural instruction to the Respondent does not bear on the performance of trial counsel. The *Neuman* “rights” are not constitutional protections themselves, and as such the trial counsel did not fail to safeguard the Respondent’s constitutional rights by failing to force the trial court to inform the Respondent of his *Neuman* “rights.” The *Neuman* decision itself presumes the trial counsel will advise the defendant about testifying and places no burden on trial counsel to request the trial court instruction. Therefore, failure of the trial counsel in this case to force the trial court to give the Respondent *Neuman* instructions was not deficient performance.

Second, even if trial counsel’s failure amounted to deficiency, which it did not, the outcome of the trial would not have been different but for that deficiency. It is presumed that the Respondent was instructed as to testifying or not testifying by one of his four trial counsel. It cannot be presumed that the Respondent would have refrained from testifying if given the *Neuman* instructions by the trial court. The Respondent might have testified regardless. Even if the Respondent had been given

the *Neuman* instructions by the trial court and decided not to testify, the Respondent's testimony was not so critical in this trial as to overcome the weight of the co-conspirator's testimony. The co-conspirator, Mr. Hopkins, testified that the Respondent was, in essence, the mastermind and lookout for the murder. The Respondent contradicted the eye-witness testimony and testified to an alleged alibi. Removing the Respondent's testimony contradicting Hopkins and concerning an alleged alibi would not have made the Respondent's case stronger, but it would, instead, have made the Respondent's case weaker. Without the Respondent's testimony, the outcome of the case would not have been different because the Respondent's case would have been weaker without his testimony contradicting a State's witness and expressing an alibi. It cannot be said that if the Respondent had been given his *Neuman* instructions, he would not have testified and he would have been acquitted of the charges. But for the alleged deficiency, the outcome would not have been different.

Therefore, the Respondent's trial counsel was not constitutionally ineffective under the *Strickland/Miller* test for failure to force the trial court to instruct the Respondent pursuant to *Neuman*. This failure was not deficient performance, and even if deficient, the outcome would not have been different but for that deficiency. The claim fails both prongs of the *Strickland/Miller* test.

Moreover, Judge Rowe determined in Respondent's first habeas petition, Civil Action 00-C-7, that the failure to engage in the *Neuman* colloquy was neither error of constitutional dimension, nor was counsel fatally ineffective for not forcing that issue with the trial judge. This issue was previously and finally litigated in that prior habeas proceeding in 2002 filed by Mr. Hurt. No further evidence was taken regarding the *Neuman* issue during the hearing(s) held by Judge Pomponio, in Civil Action 09-C-7, in 2009-2011 wherein Judge Pomponio determined that prior habeas counsel was ineffective. Once a claim has been fairly and fully litigated in either the criminal trial or in a

prior habeas corpus action, such claim may not be re-litigated unless the decision on the merits was clearly wrong. W. Va. Code §53-4A-1(b) and (c); *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975). As no additional evidence was developed in the subsequent habeas proceeding regarding the *Neuman* issue, Judge Pomponio had no additional evidence from which he could conclude that Judge Rowe's finding was "clearly wrong." Therefore, that claim being fully and fairly litigated in the prior habeas corpus action, it could not be re-litigated in the instant habeas.

Therefore, the failure of the court to inform the Respondent concerning his testimony at trial was not constitutional error demanding habeas relief. The error was harmless, and it should be presumed that one of his four attorneys in two separate trials informed him that he had a right not to testify. Further, the failure of trial counsel to force the trial court to instruct the Respondent pursuant to *Neuman* was not ineffective assistance.

B. THE HABEAS COURT ERRED IN DETERMINING THAT THERE WAS AN ACTUAL RECANTATION AND SUBSTANTIAL CORROBORATING EVIDENCE SUPPORTED SUCH RECANTATION.

Reviewing courts, with good reason, view recantations of testimony as very suspect. Those courts require "credible corroborating circumstances" to determine that the witness lied at trial. *See State v. Dudley*, 178 W. Va. 122, 124, 358 S.E.2d 206, 210 (1987). *Dudley* noted that granting a new trial on the basis of recantation is analogous to granting a new trial on the basis of newly discovered evidence, and should be done only in the most unusual or compelling circumstances. Further, the *Dudley* court noted that most courts regard recantations as exceedingly unreliable and untrustworthy. *Id.* at 125, 358 S.E.2d at 209.

Similarly, this Court held in *State v. Stewart* that a new trial will generally not be granted for new evidence when the sole object is to discredit or impeach a witness:

A new trial on the basis of newly-discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. However, when the newly-discovered impeachment evidence comes within the following rules, a new trial will be granted: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained; (2) the facts must appear in his affidavit that the party was diligent in ascertaining and securing it before the verdict; (3) the evidence must be new and material, and not merely cumulative; (4) the evidence must be such as ought to produce an opposite result at a second trial on the merits.

Syl. Pt. 2, *State v. Stewart*, 161 W. Va. 127, 239 S.E.2d 777 (1977). In *State v. Crouch*, the Court again held:

A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: . . . (4) and the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Syl. Pt. 1, *State v. Crouch*, 191 W. Va. 272, 445 S.E.2d 213 (1994). See also *State ex rel. Smith v. McBride*, 224 W. Va. 196, 681 S.E.2d 81 (2009) (habeas court denied relief where confession by another inmate to underlying murders was not credible evidence and would not have resulted in different outcome at a new trial; affirmed).

In this case, Michael “Mickey” Hopkins was the co-defendant, and the actual shooter in this matter. Mr. Hopkins gave to the police a first statement inculpatory of the Respondent and two other individuals. He then stated that first statement was incorrect, and gave a second statement inculpatory of Hurt as the lookout for the robbery and the instigator of the plan. Hopkins testified at trial—both trials—consistently with that second statement, and was cross-examined vigorously as to the inconsistencies and lies in the statements. Nonetheless, the Pocahontas County jury convicted the Respondent. Mr. Hopkins, while an inmate, and apparently while an inmate serving at the same facility as the Respondent recanted his trial testimony in a letter and testimony in the prior habeas.

Also proffered was the testimony of two inmates who stated that they were in holding cells with Hopkins during trial, that he lied to them about a number of things, but that he did state that Hurt was not involved in the robbery. Judge Rowe did not grant the first habeas petition against a newly discovered evidence challenge claiming recantation evidence that discredited Hopkins' testimony. (App., vol II, 117.) Judge Pomponio, however, determined that counsel in the previous habeas proceeding had been ineffective for failing to determine sufficient corroborating circumstances to bolster the recantation, which would have allowed Judge Rowe to arrive at a different result in the first habeas.

No credible corroborating evidence existed of the recantation, such that the first habeas counsel was ineffective for failing to discover it, and the affidavits at issue fail the new-trial tests in *Dudley, Stewart, and Crouch, Supra*. In *Dudley*, this Court noted that there were no credible corroborating circumstances in that case where the witness repudiated her recantation and stated that she had recanted because of family pressure. *Dudley* is analogous to the case at bar wherein the witness repudiated his recantation and stated that the recantation was a result of threats received by him while incarcerated. At the instant habeas proceeding, Judge Pomponio needed to determine whether in fact Mr. Hopkins recanted his trial testimony and whether sufficient credible corroborating circumstances existed to support a belief that Mr. Hopkins lied at trial. The defense at the first trial was alibi—that the Respondent was home all night, as corroborated by his mother. Neither the Respondent nor the Respondent's mother mentioned a four-hour telephone conversation as an alibi during the first trial. The defense at the second trial was also alibi, only this time Ginger Wheeler, the Petitioner's then girlfriend who was pregnant with his child at the time of the murder, testified that she had been on the phone with the Respondent from 11:00 p.m. until 3:44 a.m. She

did not mention that her father had seen her on the phone, and had no explanation as to why it had taken the Respondent's arrest, indictment, first trial, change of venue, and finally second trial to come forward with the information that could save her child's father from life in prison. She admitted that she hadn't told the police, the prosecutors, or the first attorneys about the phone call.

As "credible corroborating circumstances" to demonstrate that Mr. Hopkins lied at trial the habeas court relied upon the affidavits of the Wheelers. It is impossible to credit those affidavits of being worthy of any belief as they purport to remember the circumstances of a telephone call which happened 15 years before and that first came to light long after the Respondent's conviction.

Moreover, the affidavits of the Wheelers fail the new-trial test under *Stewart*. Under *Stewart*, a new trial based on newly-discovered evidence will be granted only when "the evidence must be such as ought to produce an opposite result at a second trial on the merits." Syl. Pt. 2, *Stewart*, 161 W. Va. 127, 239 S.E.2d 777. Factually, the affidavits state that Ginger told Mr. Wheeler that she was talking to the Respondent, and Mr. Wheeler informed his wife she was talking to the Respondent. The affidavits of Mr. and Mrs. Wheeler are presented for the truth of the matter asserted. The information contained in the affidavits is both single and double hearsay, and such hearsay could never have been introduced at trial. Therefore, such hearsay would not be evidence "such as ought to produce an opposite result at a second trial on the merits." It should not have been evidence upon which the habeas court relied to reverse a murder conviction upon a jury verdict and grant a new trial.

Further, Hopkins ultimately did not recant his trial testimony. In the latest evidentiary hearing, counsel for Mr. Hurt called Hopkins as a witness on Hurt's behalf, presumably to repeat his recantation. Hopkins had been paroled and was no longer an inmate. Hopkins told Judge Pomponio

that his trial testimony was truthful, and that he had only recanted because of threats to his well being. Now that he was free, and away from the threats, he could reiterate the truth: Mr. Hurt was a party to the robbery which resulted in Freddie Lester's death.

Therefore, ultimately there was no recantation, but rather a very credible explanation as to why an inmate would state that another inmate was not involved in the crime. What the habeas court determined to be credible corroborating circumstances showing that Hopkins lied at trial were nothing more than hearsay and double hearsay statements about a fifteen-year-old telephone conversation involving the Respondent's girlfriend. . . . "most courts hold that recantation testimony is exceedingly unreliable and untrustworthy, especially when it involves an admission of perjury." *State v. Nicholson*, 170 W. Va. 701, 703, 296 S.E.2d 342, 344 (1982). Further, the hearsay cannot be credible corroborating circumstances. The West Virginia Rules of Evidence do not permit the admission of hearsay as substantive testimony, absent a well-recognized exception. These affidavits do not fit into any hearsay exception. Hearsay is not admissible because it is "untrustworthy." *State v. Browning*, 199 W. Va. 417, 423, 485 S.E.2d 1, 7 (1997).

As noted in Judge Rowe's order denying the first petition, the jury was able to observe Hopkins while he testified—as did Judge Rowe—and the jury made a credibility decision and rejected the alibi testimony of Ginger Wheeler. The jury at trial heard Hopkins' conflicting statements and inconsistent testimony. Judge Rowe also noted that the Respondent fled the jurisdiction after the crime and after he had been told the police wanted to talk to him, that he informed friends that he had something on his conscience, and that he accurately informed the Lester family of the amount of money stolen and the caliber of weapon used in the robbery before the police were aware of those facts and before the autopsy. Judge Pomponio found that Hopkins was not a credible witness, but

credibility had already been found by the jury. The jury weighed Hopkins' credibility at the second trial, and the jury decided against the Respondent.

Therefore, no recantation ultimately occurred, and recantation evidence, like newly discovered evidence that solely impeached or contradicts trial testimony, is regarded as very suspect. It requires credible corroborating circumstances to be accepted. Here, the affidavits generally will not be the basis of a new trial because they were not credible. The Respondent's girlfriend, Ginger Wheeler, first mentioned a four-hour-long telephone conversation with the Respondent on the night of the murder at the second trial. It had not been mentioned to police or during the first trial. Even at the second trial, Ginger Wheeler did not state that her parents had known of the phone call. Fifteen years later, the Wheelers make statements about their knowledge of the phone call. Those statements are not credible evidence corroborating Hopkins' recantation, if one ultimately existed. The affidavits were also introduced solely to discredit the testimony of Hopkins, and they would not have produced a different result at a second trial as required by *Stewart* because they were inadmissible hearsay and double hearsay. It is clear that Judge Pomponio erred because Mr. Hopkins did not recant, and because he found that the Wheelers' hearsay affidavits formed years after the conviction credibly corroborated the non-existent recantation.

C. THE HABEAS COURT ERRED IN FINDING TRIAL COUNSEL INEFFECTIVE ON ALL GROUNDS RAISED IN THE THIRD PETITION, INDIVIDUALLY AND CUMULATIVELY, WHEN HE HEARD NO EVIDENCE REGARDING THOSE GROUNDS, SOME WERE PREVIOUSLY LITIGATED, SOME WERE SUPPORTED BY NO EVIDENCE, AND THE HABEAS COURT MADE NO SPECIFIC FINDINGS OF FACT OR CONCLUSIONS OF LAW.

Without taking new evidence on many of these issues, the habeas court issued an order on April 18, 2011, granting relief on all of the Respondent's sub-claims, "find[ing] ineffective

assistance of Counsel on all the basis [sic] of all of the individual and cumulative reasons set forth in the Third State Petition [sic].” (App., vol. II, 159.) The State argues that the order’s blanket adoption of reasons set forth in the Respondent’s third petition was error because it failed to make specific findings of fact and conclusions of law as to each contention; no new evidence was taken on many of these issues and some were previously litigated and adjudicated; and the Respondent’s trial counsel was not ineffective for the reasons set forth in the Respondent’s third petition.

This Court has held that, by statute, a habeas court is required to make specific findings and conclusions concerning each contention. This Court has held:

West Virginia Code section 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the Petitioner, and to state the grounds upon which the matter was determined.

Syl. Pt. 1, *State ex rel. Watson v. Hill*, 200 W. Va. 201, 488 S.E.2d 476 (1997); *see also* W. Va. Code § 53-4A-7(c). “Specific” does not mean extensive or verbose, but by statute each contention must be addressed with its own finding and conclusion. In *State ex rel. Watson*, for example, this Court reversed a habeas court where the habeas court failed to hold a hearing or make specific findings and conclusions wherein the order was two sentences. Syl. Pt. 1, *State ex rel. Watson v. Hill*, 200 W. Va. 201, 488 S.E.2d 476 (1997). *See also* *Banks v. Trent*, 206 W. Va. 255, 523 S.E.2d 846 (1999). Acting pursuant to its *de novo* review power, this Court has affirmed a habeas court’s order that failed to make a specific finding or conclusion on a “purely legal” issue, but that is distinguishable from the case at bar because ineffective assistance of counsel is generally a factual determination—not a purely legal one—requiring a specific finding and conclusion. *See State ex rel. Gordon v. McBride*, 218 W. Va. 745, 747, 630 S.E.2d 55, 56-57 (2006) (“This Court may, on appeal, affirm the judgment

of the lower court when it appears that such judgment is correct on any *legal* ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.” (emphasis added)).

As to ineffective assistance, the law in West Virginia follows the law of the United States Supreme Court. To determine whether counsel is constitutionally ineffective, the West Virginia Supreme Court adopted the United States Supreme Court’s *Strickland* test in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In Syllabus Point 5, the *Miller* Court held that:

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

Id. at Syl. Pt. 5. The *Miller* Court also noted that:

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.

Id. at Syl. Pt. 6. Justice Cleckley also quoted *Strickland* to show that courts ““must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]”” *Id.* at 15, 459 S.E.2d at 126, *quoting Strickland*, 466 U.S. at 689, 104.

In the instance case, the third petition for habeas corpus rested upon the claim of actual innocence, with sub-grounds involving ineffective assistance of trial counsel for eight designated reasons including the aforementioned recantation and credible corroborating circumstances; failure to object to the state’s presentation of witnesses; failure to subpoena necessary witnesses; ineffective

assistance of counsel in changing venue; failure to object to Pocahontas County as venue based upon its racial composition and being the home of a neo-Nazi white supremacist organization; “haphazard” *voir dire*; improper transfer to juvenile jurisdiction and cumulative error; and the aforementioned *Neuman* issue.

Judge Rowe’s 2002 order in the first habeas found, as to the state’s witnesses, that the counsel for the state represented that witnesses were formally disclosed to the defense, that other witnesses would be disclosed, that Mercer County has an open file policy, and that the defense is apprised of everything when the state receives it. Judge Pomponio took no evidence on this issue. Therefore, Judge Rowe’s order finding that trial counsel knew of the existence of those witnesses was not refuted at any subsequent habeas hearing and no further evidence was presented at that issue. For Judge Pomponio to reverse Judge Rowe’s order on this ground without additional evidence is improper, and to grant a petition for habeas corpus without making specific findings and conclusions concerning this issue would be contrary to the habeas corpus statutes and the holding of this Court in *State ex rel Watson Supre*. Further, the State provided defense counsel at the second trial its list of witnesses on December 12, 1997, in advance of the January 6, 1998 cutoff date. That list included both Dianne Gills and Cherry Mitchum.

Present habeas counsel states that witnesses should have been called to testify live and their testimony was read into the record. No particular witness’ testimony is referenced in the petition for writ of habeas corpus, and no evidence was taken on who did or did not testify “live” at the second trial, what effect, if any, that had on the trial, and for what reasons—absent the assertion in the habeas petition, unsupported by evidence, that it was too “expensive” to bring the witnesses to Pocahontas County. There being no evidence to support these assertions anywhere in the record, for Judge

Pomponio to include this ground as demonstrating ineffective assistance of counsel was clearly erroneous and an abuse of discretion.

Present habeas counsel asserts that trial counsel should not have sought a change of venue, and when venue was changed should have objected to Pocahontas County as the new site for trial based upon the racial composition of that county and its being the home of a neo-Nazi organization. Again, no testimony has ever been taken from trial counsel as to why he believed such a change in venue was appropriate, and whether that was a strategic decision. Indeed, no evidence has been taken on these claims as well as the “haphazard” *voir dire* claim. However, a change of venue is granted only where one cannot receive a fair trial because of hostile local sentiment. As a strategic decision, because there had already been one trial, a change of venue may well have been the choice a reasonably competent lawyer would make. However, in the absence of any evidence about why venue was changed, Judge Pomponio was incorrect to include the charge of venue as ineffective assistance of counsel. Again, no specific findings of fact and conclusions of law support the judge’s decision on this ground.

Again, as to the racial composition of Pocahontas County, and whether it is rife with neo-Nazis who were eager to serve on the trial of an African-American male, there is nothing in the record to suggest that the jury was not comprised of the Respondent’s peers. *Voir dire* did address the issue of the victim’s race, and no juror responded that racial prejudices existed. Further, Michael Hopkins was also black. Presumably, if the jury was full of racists, they would not have credited his testimony. But, this is all speculation without proof. Again, Judge Pomponio erred in finding ineffective assistance of counsel on this claim, unsubstantiated by any evidence and without making specific findings.

No testimony was taken on the issue of whether or not trial counsel made a strategic decision to object to a fleeing remark in the prosecutor's closing argument about the use of the telephone at the station and "drug deals." The habeas petition speculates that failure to object could not have been a strategic decision by trial counsel and that no competent lawyer would have failed to object. Again, this is sheer speculation unsupported by any evidence. Sometimes, as a matter of trial strategy, it is far better not to object—and risk calling further attention to the objectionable material or to stay silent. This decision must be made in seconds. Counsel made a choice not to object, and in hindsight, such choice is not necessarily wrong. The reference by the prosecutor was isolated and not emphasized. Any prejudice was minimal. To object would have highlighted the offending remark, and the only remedy would be to instruct the jury to disregard the remark. Failure to object cannot be said to unreasonable under the circumstances, and again there is no evidence of record to indicate why an objection was not lodged. In the absence of any evidence, Judge Pomponio erred in finding ineffective assistance of counsel on this claim.

The Respondent states that his transfer to adult jurisdiction was improper. However, the record from trial proceedings, as reflected in Judge Rowe's order, is that the Respondent waived any procedural defects in the transfer process. Under the statute in force at the time of the criminal proceedings in this matter, W. Va. Code § 49-5-10 provided that transfer to adult status was automatic in those instances in which the State could establish probable cause and the youth was at least 14 years of age. The statute used the mandatory term "shall transfer". On the date of the status hearing, all parties were in agreement that the grand jury had lacked jurisdiction to return the indictment. However, Mr. Hurt, after given an opportunity to confer with counsel waived his right to a transfer hearing. The state established probable cause through the return of two indictments, one

by the February grand jury which lacked jurisdiction, and again by the return of an indictment by the June grand jury which had jurisdiction. The state had ample probable cause to establish that the Petitioner was involved in the crime. The evidence which convinced the jury to return a guilty verdict would have been available at the *pro forma* transfer hearing. (App., vol. II, 117-31.)

As noted in Judge Rowe's order denying the initial petition for habeas corpus, Mr. Hurt was charged with the crime in a juvenile petition, which was dismissed. The Respondent was then indicted by the Grand Jury. The transfer issue was raised and the case remanded to the juvenile docket. However, Mr. Hurt agrees that he indicated at the February, 1997, hearing to proceed to adult jurisdiction. (*Id.*)

Judge Rowe noted that at the February 1997 hearing, Mr. Hurt was 19 years of age, that he conferred with counsel during the hearing for the purpose of advising Mr. Hurt on the transfer, that the Respondent was advised of certain of his juvenile rights, that Mr. Hurt stated under oath he wished to be tried in criminal jurisdiction as an adult, that the transfer request was discussed with the Respondent's mother, and that Respondent's counsel believed the decision to transfer was knowing and intelligent on Mr. Hurt's part. Further, W. Va. Code §49-5-10(j) provided that an order of transfer could be directly appealed to this Honorable Court, but in default thereof, the right of appeal and the right to object to such transfer is waived and may not thereafter be asserted. Therefore, the Respondent waived to the criminal jurisdiction of the court. (*Id.*)

None of the above reasons—as argued in the Respondent's third habeas petition and as adopted without specific findings and conclusions by the habeas court—rise to the level of ineffective assistance of counsel. Applying the *Strickland/Miller* test, the Respondent's trial counsel was not deficient as alleged in failing to object to the state's presentation of witnesses; failing to subpoena

necessary witnesses; allowing for a change of venue; failing to object to Pocahontas County as the venue due to racial composition and being the home of a neo-Nazi white supremacist organization; regarding any contention of a “haphazard” *voir dire*; and allowing an allegedly improper transfer from juvenile jurisdiction. The trial counsel was not deficient in these factual areas. Moreover, even if deficient in one or more of these areas, the result of the case would not necessarily have been different but for that deficiency. The Respondent’s trial counsel’s performance does not fail the *Strickland/Miller* test because he was not constitutionally ineffective.

Therefore, the habeas court erred in finding trial counsel ineffective for all of the reasons raised in the petition without making specific findings and conclusions concerning each contention. By statute and by direction of this Court, the habeas court was required to make specific findings, and the habeas court failed to do so. Moreover, the result is incorrect. The record does not support the conclusion that trial counsel was ineffective.

VI.

CONCLUSION

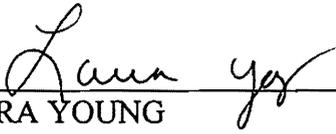
For all the foregoing reasons, the Petitioner respectfully requests that this Honorable Court reverse the order of the Circuit Court of Pocahontas County in Civil Action No. 09-C-07, entered April 18, 2011, granting the petition for writ of habeas corpus and setting aside the jury verdict of guilty of murder in the first degree, and the sentencing order of life in the penitentiary with mercy. The Respondent requests that the jury verdict and sentence in Criminal Action No. 97-F-10 be reinstated.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent Below, Petitioner

by counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

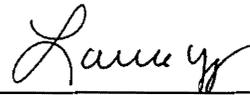

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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney general and counsel for the Petitioner herein, do hereby certify that I have served a true copy of the *Brief on Behalf of the Petitioner* upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 17th day of October, 2011, addressed as follows:

to: Robert G. Catlett, Esq.
P.O. Box 2827
Charleston, West Virginia 25330



LAURA YOUNG