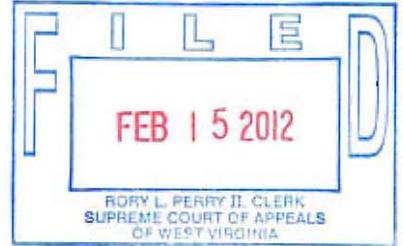


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0816



DAVID BALLARD, WARDEN

*Respondent Below,
Petitioner,*

v.

DAVID LEE HURT,

*Petitioner Below,
Respondent.*

REPLY BRIEF ON BEHALF OF THE PETITIONER

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ATTORNEY GENERAL

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Comes now the Petitioner, David Ballard, Warden, by counsel, Laura Young, Assistant Attorney General, and files the within Reply Brief on Behalf of the Petitioner.

I.

ARGUMENT

A. **The Petitioner’s reply to the Respondent’s Argument A: the habeas court erred in finding trial counsel ineffective with regards to the *Neuman* issue.**

The Petitioner first notes a distinction made by the habeas court—the error under *Neuman* for failing to advise the Respondent of his right to testify/not testify was an error on the part of the trial court, not on the part of trial counsel. Trial counsel’s alleged ineffective assistance rested not in his failure to advise the Respondent of his right to testify/not testify, but in trial counsel’s failure to force the trial court to give such an instruction to the Respondent. The habeas court erred in finding that the Respondent’s trial counsel was ineffective for failing to “enforce” the *Neuman* decision upon the

trial court and “protect those rights and insist—or at least politely remind” the trial court to give the Respondent the *Neuman* instruction. App. vol. II at 159-60.

Neuman dealt with responsibilities of a trial court, not trial counsel. Under *Neuman*, “[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)). Syl. Pt. 7, *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988). *Neuman* concerns the actions of the trial court, not the actions of trial counsel to enforce the *Neuman* decision upon a trial court.

It is true that the Respondent testified at the April 15, 2011, habeas hearing that, although he knew he had the right to testify and would likely be subject to cross-examination in the second trial as he was in the first, no one advised him of his *Neuman* rights concerning the instruction not to testify, App. vol. II 199 at 43-45, and the habeas court found “[t]he record does not reflect that [the Respondent] was advised of these rights by his Trial Counsel.” App. vol. II 159. However, trial counsel’s alleged failure to advise the Respondent of his right not to testify was not the basis for the habeas court’s findings. The habeas court found that the *Neuman* error was an error of the trial court, and trial counsel merely “compounded” that error by failing to “insist” or “politely remind” the trial court to give the *Neuman* instruction. *Id.* This alleged “compounding” of the trial court’s error by failing to “politely remind” the trial court to give an instruction cannot be the basis of a constitutional violation of the right to counsel. Moreover, the Respondent had four counsel in two trials, and this Court has held that a rebuttable presumption exists that a defendant represented by counsel has been informed of his right to testify/not testify. Syl. Pt. 15, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

Furthermore, the *Neuman* instruction is not of constitutional dimension. The habeas court ignored the evolution of *Neuman* since 1988. In *State v. Blake*, this Court explained that the *Neuman* “rights” are neither constitutional in nature, nor substantive law. *State v. Blake*, 197 W. Va. 700, 713, 478 S.E.2d 550, 563 (1996). 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).

Therefore, the habeas court should not have found trial counsel constitutionally ineffective for failing to force the trial court to recite non-constitutional “rights.” The *Neuman* decision concerns the non-constitutional error of a trial court, not counsel. Failure of trial counsel to enforce *Neuman* and the trial court’s error for not advising the Respondent under *Neuman* were not errors of constitutional dimension.

B. The Petitioner’s reply to the Respondent’s Argument B: the Michael Hopkins issue.

The habeas court specifically found in its April 18, 2011, order that witness Michael Hopkins was not credible based on the entire record. App. vol. II at 161. The credibility of a witness is a jury issue, and the jury in this case sided with the testimony of witness Hopkins. According to the record, Mr. Hopkins changed his story prior to the Respondent’s trials as reflected in various statements to the police. App. vol. I 103 at 301-04. Mr. Hopkins did, however, testify consistently at the Respondent’s first and second trials that Respondent was the instigator and a co-conspirator during the robbery that led to the death of Freddie Hopkins, and Mr. Hopkins was cross examined on these inconsistent statements and his changed story. App. vol. I at 7-11, 103:378-89; App. vol

II at 119. After hearing cross examination about Mr. Hopkins' inconsistent statements, the jury returned a guilty verdict against the Respondent, apparently deeming Mr. Hopkins' testimony credible.

At the January 18, 2002, habeas hearing, Mr. Hopkins recanted his earlier trial testimony and testified that the Respondent Mr. Hurt was not involved in the murder. App. vol. II at 116:39-40. The 2002 habeas court could not find any "credible corroborating circumstances that lead this court to conclude that the Hopkins [sic] did, indeed, lie at the trial or that he did tell the truth when he testified in the habeas corpus proceeding in this matter on January 18, 2002." *Id.* at 120.

This Court has held that "[o]nly under circumstances where there are credible corroborating circumstances that would lead the trial court to conclude that the witness did, indeed, lie at the first trial, can it be concluded that the fourth criterion of *Stewart* has been met." *State v. Dudley*, 178 W. Va. 122, 126, 358 S.E.2d 206, 210 (1987), citing Syl. Pt. 2, *State v. Stewart*, 161 W. Va. 127, 239 S.E.2d 777 (1977). *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, citing *Stewart* for the law regarding newly discovered evidence, and it should be done only in the most unusual or compelling circumstances. The *Dudley* Court also cited case law for the proposition that most courts regard recantations as exceedingly unreliable and untrustworthy. *Id.* at 125, 358 S.E.2d at 209.

At the April 15, 2011, habeas hearing, Mr. Hopkins again testified in line with his original trial testimony that the Respondent Mr. Hurt was involved in the robbery that led to the murder. App. vol. II 199 at 7-14. Mr. Hopkins effectively recanted his recantation, thus supporting his trial testimony. Therefore, ultimately, no actual recantation occurred because Mr. Hopkins testified at the 2011 hearing in conformity with his original account of the murder given at trial, and Mr.

Hopkins explained that his earlier recantation was due to threats while he was incarcerated. *Id.* at 7, 17-19. Mr. Hopkins' credibility as a witness should not have been a factor in the decision to grant the Respondent habeas relief, given that recantations are suspect and Mr. Hopkins ultimately recanted his recantation with an explanation that he was threatened while in prison and did not want to be considered a "rat" because that was "death words." *Id.* at 8-9.

C. The Petitioner's reply to the Respondent's Argument C: the habeas court failed to set forth specific findings of fact and conclusions of law regarding other ineffective assistance claims.

Again, as stated in the Brief on Behalf of the Petitioner, the 2011 habeas court erred in making a broad finding of ineffective assistance of trial counsel based on "all of the individual and cumulative reasons" set forth in the Respondent's habeas petition. App. vol. II at 159. No evidence was presented on many of the ineffective claims in the petition, and the habeas court failed to make specific findings and conclusions, as required by statute and by this Court, as to all but one such claim. The record does not support the finding of ineffective assistance of trial counsel on any claim, but where no new evidence was presented as to several issues, the 2002 order of the first habeas court explaining and confronting the same issues is informative and helpful. The 2011 habeas court erred in making such a broad finding, contrary to the 2002 habeas order, without new evidence and without making specific findings and conclusions, as required by law.

II.

CONCLUSION

For all the foregoing reasons, the Petitioner again 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

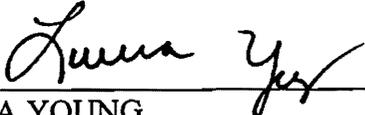
verdict of guilty of murder in the first degree, and the sentencing order of life in the penitentiary with mercy. The Respondent requests that the jury verdict and sentence in Criminal Action No. 97-F-10 be reinstated.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent Below, Petitioner

by counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



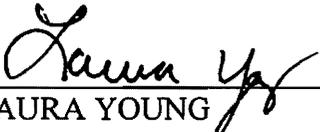
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Counsel for Petitioner

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 *Reply 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 15th day of February, 2012, addressed as follows:

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


LAURA YOUNG