

13-0240

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA
OF OHIO COUNTY

STATE OF WEST VIRGINIA ex rel.
PHILLIP REESE BUSH,

2013 FEB 15 PM 3 21

BRENDA L. MILLER

Petitioner,

CASE NO. 06-C-342

05-C-442

v.

DAVID BALLARD, in his capacity as
Warden of Mount Olive Correctional
Complex,

RECEIVED

FEB 25 2013

Respondent.

ATTORNEY GENERAL'S OFFICE

ORDER

On a previous day came Petitioner, Phillip Reese Bush (hereinafter "Petitioner") with a Petition for Writ of Habeas Corpus. After considering Petitioner's Petition for Writ of Habeas Corpus, Respondent, David Ballard's (hereinafter "Respondent") response, the applicable law, the evidence presented and the Court file, the Court is prepared to issue its decision.

I.

FACTUAL/PROCEDURAL HISTORY

On March 24, 1983, Petitioner was convicted of two counts of murder for the September 1982 deaths of Charles Goff and Kathleen Jane Williams. During a pretrial conference in the case, the State announced its intention to pursue at trial a theory of felony murder pursuant to W. Va. Code § 61-2-1 [1882]. The State further indicated that it would be relying upon, among other things, the enumerated felony of "rape". After some discussion regarding this

revelation, it appears that the trial judge pointed out to the parties on the record that the felony murder statute had not yet been amended to comport with the new Sexual Assault Act. The prosecuting attorney agreed with the trial judge's understanding of the state of the law as it existed at that time.

Regardless of the above-noted discussion, at the conclusion of the trial the jury was instructed that they could find Petitioner guilty of murder if they found that Petitioner killed Charles Goff and Kathleen Jane Williams during the commission of or the attempt to commit robbery or sexual assault.¹ After being so instructed, the jury returned a general verdict to convict Petitioner, finding Petitioner had killed Charles Goff and Kathleen Jane Williams during the commission of or the attempt to commit robbery "and/or" sexual assault.²

After he was convicted, Petitioner appealed to the West Virginia Supreme Court of Appeals, but his appeal was refused in January 1984. On September 29, 1986, Petitioner filed his first state Petition for Writ of Habeas Corpus.³ Petitioner was represented by counsel during the prosecution of this Petition for Writ of Habeas Corpus, which was amended three (3) times. This Petition was denied in an Order entered October 13, 1988. Petitioner appealed the denial of this Petition to the West Virginia Supreme Court of Appeals on October 11, 1989, but the appeal was summarily refused. Neither Petitioner's

¹ During trial, the State presented evidence and argument in support of its theory that Petitioner had committed "sexual assault" in addition to killing Charles Goff and Kathleen Jane Williams.

² The "and/or" language is lifted from the general verdict form used to convict Petitioner.

³ Petitioner filed several Petitions for Writ of Habeas Corpus in Federal Court. Said Petitions were denied. According to the representations of Petitioner's attorney, none of the Petitions filed in Federal Court raised the issue *sub judice*. Additionally, the Court notes that there is no evidence to contradict the above-noted representations of Petitioner's counsel.

initial Petition, nor any of the Amended Petitions advanced the arguments which are being advanced in the instant Petition for Writ of Habeas Corpus.

On January 6, 1995, Petitioner filed, *pro se*, his second state Petition for Writ of Habeas Corpus in which Petitioner relied upon the *Zain*⁴ line of cases and argued that the forensic evidence with regard to the sexual assault component of his case was falsified.⁵ Counsel was appointed to represent Petitioner during the prosecution of this Petition. After counsel was appointed, counsel filed an Amended Petition for Writ of Habeas Corpus. According to Petitioner's second habeas counsel, the scope of her representation was confined to the *Zain* issues. Petitioner's 1995 Petition for Writ of Habeas Corpus did not advance the arguments that are being advanced instantly. The West Virginia Supreme Court of Appeals denied Petitioner's Petition for Writ of Habeas Corpus on November 30, 2001.

II. ASSIGNMENTS OF ERROR

A. Petitioner's Arguments Re: Underlying Criminal Conviction and the Representation of Trial Counsel

Petitioner contends that his conviction is void under *Stromberg v. California*⁶ and its progeny because it rests upon an unconstitutional basis. Specifically, at the time of his conviction, the jury was instructed that they could find Petitioner guilty of murder if they found that, when the Charles Goff

⁴ *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division (Zain I)*, 190 W. Va. 321, 438 S.E.2d 501 (1993); and *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division, (Zain II)*, 191 W. Va. 224, 445 S.E.2d 165 (1994).

⁵ The *Zain* cases addressed the falsification of serology evidence by Fred Zain, then later the West Virginia State crime lab, in general.

⁶ 283 U.S. 359, 51 S.Ct. 532 (1931).

and Kathleen Jane Williams were killed, they were killed during the commission or the attempt to commit robbery and/or sexual assault.⁷ However, at the time of Petitioner's alleged crimes, sexual assault was not an enumerated felony under the felony murder statute, W. Va. Code § 61-2-1. Consequently, the jury which convicted Petitioner was instructed with an incorrect statement of the law as it existed at the time of Petitioner's alleged crime and trial. Additionally, because the jury's verdict was a general one, it is impossible to discern on which enumerated crime the jury's verdict was predicated, i.e. robbery, sexual assault or both. It therefore follows that Petitioner may have been convicted of murder as a result of the jury's belief that he committed a crime, which was not actually a qualifying crime under the felony-murder rule at the time of the acts at issue in the underlying criminal matter. Consequently, Petitioner's conviction rests on an unconstitutional ground and is therefore void pursuant to *Stromberg v. California*. Accordingly, Petitioner's conviction must be vacated and a new trial must be granted.

Petitioner also contends that trial counsel was ineffective for failing to object to the improper statement of the law to the jury, i.e. the substitution of "sexual assault" for the enumerated felony "rape" when the felony murder statute had not yet been amended by the legislature to include the enumerated felony "sexual assault". Further, Petitioner argues that but for this failure, there exists a reasonable probability that the verdict would have been different.

⁷ The Court is paraphrasing the instructions given to the jury from the filings in the case and the representations of the parties.

B. Respondent's Arguments in Opposition to Petitioner's Petition for Writ of Habeas Corpus

Respondent contends that Petitioner waived the above-noted arguments because he did not raise them in either of the two state Petitions for Writ of Habeas Corpus that he filed previously. Respondent points out that, on Petitioner's first Petition for Writ of Habeas Corpus, Petitioner was granted a *Losh*⁸ hearing, and in preparation for the same, his appointed counsel completed the *Losh* checklist, which included instructional errors, but this particular instructional error was never raised. Because Petitioner was represented by counsel during the prosecution of his first state Petition for Writ of Habeas Corpus, and because he was granted a *Losh* hearing, but failed to raise the instantly claimed defect, Respondent maintains that the above-noted arguments were knowingly and voluntarily waived.

Respondent further contends that these arguments were again waived during the prosecution of Petitioner's second state Petition for Writ of Habeas Corpus because, during the prosecution of the same, counsel was appointed to represent Petitioner but counsel failed to raise the instant argument, despite amending Petitioner's *pro se* Petition for Writ of Habeas Corpus several times. Therefore, and because Petitioner was represented and his Petitions were amended several times, the argument instantly raised was knowingly and voluntarily waived.

⁸ *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981).

C. Petitioner's Arguments Re: Ineffective Assistance of Counsel During Habeas Corpus Proceedings

Petitioner avers that, although he received a *Losh* omnibus hearing during the prosecution of his first state Petition for Writ of Habeas Corpus, his habeas counsel was ineffective because his attorney did not raise as an issue the fact that Petitioner's conviction may have been based on a non-existent crime, which is unconstitutional, and pursuant to *Stromberg v. California*, voids Petitioner's conviction. Additionally, Petitioner argues that during the prosecution of his second Petition for Writ of Habeas Corpus, his counsel was ineffective because his second Habeas Corpus counsel did not raise the above-noted issue, either. Petitioner acknowledges second-counsel's contention that her appointment for Petitioner's Habeas Corpus Petition was confined to *Zane* issues, and that she was not appointed to conduct an overarching review of the file for Habeas Corpus purposes. However, Petitioner contends that, even if this is the case, this does not alter the fact that he is entitled to proceed with prosecution of this Petition for Writ of Habeas Corpus because he received ineffective assistance of counsel during the prosecution of his first Petition for Writ of Habeas Corpus, in which he was granted a *Losh* omnibus habeas corpus proceeding.

**III.
APPLICABLE LAW**

West Virginia Code § 53-4A-1 provides those persons convicted and incarcerated pursuant to said conviction the ability to file a Petition for Writ of Habeas Corpus if they believe that:

there was such a denial or infringement of [their] rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State.

Such a person can file a Petition for Writ of Habeas Corpus, and seek release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

The contention or contentions raised in the Petition for Writ of Habeas Corpus will be considered waived or previously adjudicated if:

the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver.

If such contention or contentions are considered waived, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds. See W.Va. Code § 53-4A-1.

A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

IV. **DISCUSSION**

After reviewing Petitioner's Petition for Writ of Habeas Corpus, Respondent's opposition, the applicable law, and after considering the arguments made during the multiple hearings held in this matter, the evidence submitted during those hearings, and the underlying criminal file, the Court is satisfied that (1) Petitioner received ineffective assistance of prior habeas counsel, therefore Petitioner is entitled to maintain the instant successive habeas petition; (2) the issues raised by Petitioner's instant habeas petition have not been previously fully and fairly litigated or waived; and (3) Petitioner's conviction is void and must be reversed because it may rest on an unconstitutional ground, i.e. a non-existent crime.

A. Viability of the Instant Petition for Writ of Habeas Corpus

In order to maintain the instant Petition for Writ of Habeas Corpus, which is Petitioner's third, Petitioner must establish one of the following: (1) he received ineffective assistance of habeas counsel; (2) the existence of newly discovered evidence; (3) or a change in the law which is favorable to Petitioner and which is to be applied retroactively. *See Losh, supra*. For the reasons that

follow, the Court is satisfied that Petitioner received ineffective assistance of habeas counsel such that Petitioner may properly maintain the instant successive Petition for Writ of Habeas Corpus.

1. Ineffective Assistance of First Habeas Counsel

Petitioner filed his first state Petition for Writ of Habeas Corpus in 1986. At that time, the West Virginia Supreme Court had not yet adopted the two-pronged test for evaluating ineffective assistance of counsel claims that we currently utilize today, which is set forth in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Rather, the prevailing standard in effect at the time is set forth in Syl. pt. 1, *State ex rel. Wine v. Bordenkircher*, 160 W. Va. 27, 230 S.E.2d 747 (1976), and is as follows: (1) whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law; and (2) whether such ineffectiveness resulted in defendant's conviction. Therefore, and out of an abundance of caution, the Court shall utilize the standard set forth in *Bordenkircher, supra* to evaluate Petitioner's ineffective assistance of counsel claim as it relates to Petitioner's first habeas counsel.⁹

A review of all of the pertinent materials reveals that Petitioner's first habeas corpus counsel was ineffective for his failure to raise the issues currently raised by Petitioner's instant Petition, i.e. that his conviction is void because it may rest on an unconstitutional ground - a non-existent crime; and

⁹ Even though the Court elects to use the prevailing standard in effect in 1986 to evaluate Petitioner's ineffective assistance of counsel relative to his first habeas corpus counsel, the Court acknowledges that the prevailing standard in effect in 1986 is substantially similar to that standard in place today, i.e. a standard of reasonableness.

that Petitioner's trial counsel was ineffective for failing to object to jury instructions which contained an incorrect statement of the felony murder statute as it existed at the time of Petitioner's alleged crimes and trial.

Petitioner was granted an omnibus habeas corpus hearing upon the filing of his first state Petitioner for Writ of Habeas Corpus in September 1986, and was appointed counsel to prosecute this habeas corpus petition. His appointed counsel, as is customary, amended Petitioner's original *pro se* Petition for Writ of Habeas Corpus.¹⁰ Further, and as appointed habeas corpus counsel are customarily instructed pursuant to *Losh v McKenzie, supra*, the amended petition should have included every cognizable issue which could have been raised during Petitioner's omnibus habeas corpus proceeding. However, Petitioner's first habeas corpus counsel failed to raise the issues which have been raised by the instant Petition. The Court is satisfied that such a failure is unreasonable because habeas counsel did not have to look far to find this glaring error - a simple review of the pretrial and trial transcripts would have revealed the issues raised in the instant petition because the trial judge himself, on the record before both the prosecuting attorney and Petitioner's trial counsel, highlighted the issue regarding the legislature's failure to amend the felony murder statute to comport with the new Sexual Assault Act.

Because the above-noted instructional error should have been apparent to Petitioner's first habeas corpus counsel, but was nevertheless not raised

¹⁰ In fact, Petitioner's first habeas corpus counsel amended Petitioner's original *pro se* Petition three (3) times.

during the prosecution of Petitioner's first Petition for Writ of Habeas Corpus, and in light of the requirement that each and every cognizable claim must be raised during an omnibus habeas corpus proceeding, the Court is satisfied that Petitioner's first habeas corpus counsel failed to demonstrate the normal and customary degree of skill possessed by attorneys reasonably knowledgeable in criminal law. Further, the Court is satisfied that, but for counsel's failure to raise the issues *sub judice* during the prosecution of Petitioner's first Petition for Writ of Habeas Corpus, Petitioner's first Petition for Writ of Habeas Corpus would likely have been granted. Consequently, the Court **FINDS** that Petitioner's first habeas corpus counsel was ineffective pursuant to *State ex rel. Wine v. Bordenkircher, supra*.

2. Ineffectiveness of Petitioner's Second Habeas Counsel

When Petitioner filed his second state Petition for Writ of Habeas Corpus on January 6, 1995, the West Virginia Supreme Court of Appeals had still not adopted the two-pronged test for evaluating ineffective assistance of counsel set forth in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). *State v. Miller* was not decided until May 18, 1995 – over four (4) months after Petitioner filed his second Petition for Writ of Habeas Corpus. Rather, the prevailing standard was still that standard set forth in *State ex rel. Wine v. Bordenkircher*, 160 W. Va. 27, 230 S.E.2d 747 (1976). Again, out of an abundance of caution, the Court shall utilize the standard set forth in *Bordenkircher* to evaluate Petitioner's ineffective assistance of counsel claim as it relates to Petitioner's second habeas counsel.

After reviewing all of the pertinent materials relative to this case, the Court is satisfied that the representation provided by Petitioner's second habeas corpus counsel does not prevent Petitioner from maintaining the instant successive Petition for Writ of Habeas Corpus. Indeed, Petitioner filed a second state Petition for Writ of Habeas Corpus in 1995. Said Petition was premised upon the *Zain* issues relating to falsification of serology results from the West Virginia State crime lab. Counsel was appointed to represent Petitioner during the prosecution of this Petition; however, Petitioner's second habeas corpus counsel contends that the scope of her representation was limited to include only those issues relating to the *Zain* line of cases, i.e. issues with serology evidence. If this representation is true, then Petitioner's counsel could not be ineffective as her performance relates to the issue raised herein. That is, if Petitioner's second habeas corpus counsel's representation was limited in scope to only the *Zain* issues regarding serology evidence, then the effectiveness or ineffectiveness of Petitioner's second habeas corpus counsel would not affect Petitioner's ability to bring the instant habeas corpus petition because Petitioner's second habeas corpus counsel would not have been responsible for detecting and raising the instant issue. Therefore, second habeas counsel's performance would not be impactful on whether Petitioner is able to maintain the instant Petition for Writ of Habeas Corpus.

If, however, the scope of Petitioner's second habeas counsel's representation was not limited to only *Zain* issues, then Petitioner's second counsel was ineffective for having failed to raise the instant issue because a simple review of the record, including the trial transcript, reasonably should

have revealed the instantly raised issue to competent defense/habeas corpus counsel.¹¹ As the Court has noted, the trial judge pointed out this glaring error on the record. Therefore, one need look no further than the transcripts themselves for evidence of this issue. Consequently, either way one looks at the representation rendered by Petitioner's second habeas corpus counsel, the same does not extinguish Petitioner's ability to bring the instant Petition for Writ of Habeas Corpus because Petitioner's second habeas corpus counsel was either ineffective, as was his first habeas corpus counsel, which is a condition precedent for bringing a successive habeas corpus petition; or, Petitioner's second habeas corpus counsel's representation was limited to *Zain* issues, which would in effect remove Petitioner's second habeas corpus petition from consideration as it relates to Petitioner's ability to maintain successive habeas corpus petitions. Accordingly, and as a result of the foregoing, the Court **FINDS** that the failure of Petitioner's prior habeas counsel to raise the issues raised in Petitioner's instant Petition constitutes ineffective assistance of Petitioner's previously appointed habeas corpus counsel.¹² Additionally, the Court **FINDS** that, because the issues raised in Petitioner's instant Petition have not been raised by prior habeas counsel, they have not been fully and fairly litigated in a prior proceeding. Moreover, the Court **FINDS** that the issues raised in the instant Petition have not been waived because there is no

¹¹ It is notable that Petitioner's second habeas corpus counsel included in her amended Petition for Writ of Habeas Corpus, alleged errors which were outside of the scope of the *Zain* issues, but none of the issues involved the issue *sub judice*.

¹² To the extent that it was the responsibility of prior counsel to raise it. See e.g. Court's discussion relative to Petitioner's second habeas corpus counsel.

evidence that Petitioner was aware of these issues, yet knowledgeably and voluntarily waived the same.¹³

Because these issues have not been previously fully and finally adjudicated or waived, and because Petitioner received ineffective assistance of counsel during the prosecution of one, if not both, of his previous Petitions for Writ of Habeas Corpus, the Court **FINDS** that these issues are properly raised in this successive Petition. *See Losh v. McKenzie, supra*. As a result, the Court will now consider the substance of Petitioner's current Petition for Writ of Habeas Corpus, i.e. the constitutionality of his conviction and whether Petitioner received ineffective assistance of trial counsel.

B. Underlying Trial and Conviction

After reviewing Petitioner's Petition for Writ of Habeas Corpus, the State's response, the applicable law, the evidence presented and the Court files, the Court is satisfied that Petitioner's Petition for Writ of Habeas Corpus should be granted, his conviction vacated, and a new trial ordered because Petitioner's underlying conviction may rest upon an unconstitutional ground, and he received ineffective assistance of trial counsel.

1. Illegality of Conviction

Where a general verdict is used to convict a defendant of a crime which has multiple alternate grounds for conviction, the conviction is void and must be overturned where one of the alternate grounds for conviction is unconstitutional and where the conviction may have rested upon said

¹³ Counsel has agreed via stipulation that there is no evidence of a knowing and voluntary waiver by Petitioner of the issues raised herein.

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

Specifically, Petitioner was convicted of felony murder. During the trial, the jury was instructed, with no objection from Petitioner’s trial counsel, that

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

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

Because “sexual assault” was not an enumerated felony in the felony murder statute at the time of either the crime or Petitioner’s trial, the jury

instruction advised the jury that they could convict Petitioner if they found him guilty of an act which was not included in the felony murder statute, therefore making said instruction unconstitutional. Given the general verdict, it is impossible to tell whether the jury believed Petitioner committed robbery, sexual assault, or both when Charles Goff and Kathleen Jane Williams were killed. Because Petitioner's conviction may rest upon the unconstitutional basis of "sexual assault," the Court **FINDS** that Petitioner's conviction must be vacated pursuant to *Stromberg, supra*.

Having established that Petitioner's conviction must be vacated pursuant to *Stromberg, supra*, the Court will now examine whether Petitioner's trial counsel was ineffective for failing to object to the instructions given to the jury which included an incorrect statement of the law as it existed at the time of the crime and Petitioner's trial.

3. Ineffective Assistance of Trial Counsel

At the time of Petitioner's trial, the standard for evaluating ineffective assistance of counsel claims was that set forth in *State ex rel. Wine v. Bordenkircher, supra*. Consequently, and out of an abundance of caution, the Court will use the standard set forth in *State ex rel. Bordenkircher* to evaluate the performance of Petitioner's trial counsel.

After reviewing Petitioner's instant Petition for Writ of Habeas Corpus, the State's response, the applicable law, the evidence presented to the Court and the Court files pertaining to Petitioner, the Court is satisfied that Petitioner's trial counsel was ineffective during the underlying criminal prosecution because Petitioner's trial counsel should have objected to the

inclusion in the jury instructions of sexual assault as an enumerated felony in the felony murder statute. Indeed, the trial judge pointed out in open court and on the record the fact that, at the time of the relevant events, the felony murder statute had not yet been amended to comport with the sexual assault act. The Prosecutor agreed with the trial judge's assessment of the state of the law as it existed at that time. Regardless of the above-noted discussion, which essentially pointed out to Petitioner's trial counsel that the jury instruction contained a glaring misstatement of the law, Petitioner's trial counsel failed to object when the jury was instructed that felony murder included the enumerated felony "sexual assault," which it clearly did not at the time of the crime or at the time of Petitioner's trial.

In light of the above, the Court **FINDS** that Petitioner's trial counsel, by failing to object to such a blatantly incorrect set of jury instructions (and, indeed, theory of the case), Petitioner's counsel failed to "exhibit the normal and customary degree of skill possessed by reasonably knowledgeable criminal attorneys." See *Bordenkircher, supra*. Given the general verdict, it is impossible to determine to what extent the jury's verdict rested upon their belief that the deaths of Charles Goff and Kathleen Jane Williams occurred during the commission or attempt to commit sexual assault. Therefore, it is reasonable to conclude that trial counsel's failure to object to the jury instructions resulted, or at least may have resulted, in Petitioner's conviction. Certainly, trial counsel's failure to object to such an incorrect statement of the law, or theory of the case, cannot be considered harmless error. As a result, the Court is satisfied that Petitioner's trial counsel was ineffective during trial.

Consequently, Petitioner's Petition for Writ of Habeas Corpus should be **GRANTED**.

V.
CONCLUSION

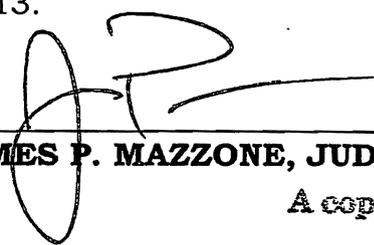
Accordingly, and for all of the foregoing reasons, Petitioner's Petition for Writ of Habeas Corpus is hereby **GRANTED** and Petitioner's conviction is hereby **REVERSED** and Petitioner is granted a **NEW TRIAL**.

It is so **ORDERED**.

All objections and exceptions are hereby noted and preserved.

It is further **ORDERED** that the clerk of the Court shall send attested copies of this Order to Blaire Nuzum-Wise, Esq., Assistant Prosecuting Attorney, Marion County Prosecuting Attorney's Office, 213 Jackson Street, Fairmont, WV 26554; Robert McCoid, Esq., 56 Fourteenth Street, Wheeling, WV 26003.

ENTER this 15th day of February, 2013.



JAMES P. MAZZONE, JUDGE

A copy, Teste:

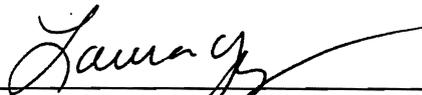


Circuit Clerk

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the petitioner, do hereby verify that I have served a true copy of the *NOTICE OF APPEAL* upon counsel for the respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of March, 2013, address as follows:

To: Robert G. McCoid, Esq.
McCamic, Sacco, Pizzuite & McCoid PLLC
56-58 Fourteenth Street
P.O. Box 151
Wheeling, WV 26003



LAURA YOUNG