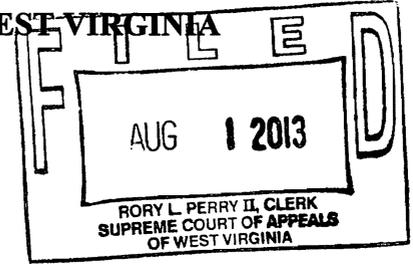


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0240



**DAVID BALLARD, WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,**

*Respondent Below,
Petitioner,*

v.

PHILLIP REESE BUSH,

*Petitioner Below,
Respondent.*

**BRIEF ON BEHALF
OF THE RESPONDENT**

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*Respondent Below,
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v.

PHILLIP REESE BUSH,

*Petitioner Below,
Respondent.*

**BRIEF ON BEHALF
OF THE RESPONDENT**

COMES NOW the Respondent, Phillip Reese Bush, by counsel, Donald J. Tennant, Jr., Esq., and pursuant to Rule 10(c) of the West Virginia Revised Rules of Appellate Procedure and a scheduling order from this Court dated March 21, 2013, files the within brief on behalf of the Respondent in response to the Appeal filed by Petitioner seeking to reverse the granting of a Petition for Writ of Habeas Corpus by the Circuit Court of Ohio County.

**I.
STATEMENT OF THE CASE**

The Petitioner's "Statement of the Case" wherein the gory details of the alleged event are re-hashed at great length is largely an attempt to "hoodwink" this Court. It is an unadulterated attempt to inflame the Court against the Respondent even despite the unconstitutional instructional error. The United States and West Virginia Constitutions apply to all of us, good

and bad alike. You can't throw out the Constitution because you believe a person is a bad actor. The Constitution must be applied equally to all.

The Petitioner's injection of information related to a subsequent and recent indictment of Respondent is an outrageous and shameless act void of professional conduct. This attempt is the equivalent to a low blow in each of the 15 rounds of a championship prize fight. It should not be rewarded. The recent events are totally irrelevant to the pending proceedings and nothing but a sleazy attempt to prejudice the minds of the Judges of this Court against the Respondent. The Court must empower its guard not to think differently of the pending issues based on recent, unrelated and here irrelevant and immaterial information.

A. Trial and Direct Appeal:

Respondent was indicted by a Marion County grand jury on two (2) counts of murder relative to Charles Goff and Kathleen Jane Williams for events alleged to have occurred in Marion County West Virginia on September 18 or 19, 1982.¹ The two (2) Indictments in 82-F-94 and 82-F-95 provided, respectively, as follows:

That on the ___ day of September, 1982, in the County of Marion, State of West Virginia, Philip Reese Bush, committed the offense of "First Degree Murder", by feloniously, willfully, maliciously, deliberately, premeditatedly, and unlawfully slaying, killing and murdering one Kathleen Jane Williams, against the peace and dignity of the State.

That on the ___ day of September, 1982, in the County of Marion, State of West Virginia, Philip Reese Bush, committed the offense of "First Degree Murder", by feloniously, willfully, maliciously, deliberately, premeditatedly, and unlawfully slaying, killing and murdering one Charles Dale Goff, against the peace and dignity of the State.²

¹ Respondent was subsequently indicted again in February, 1983 on substantially the same allegations as those alleged in the original indictment. Those new cases charging murder in 83-F-26 and 83-F-27 were ultimately merged into a single case in 83-F-30.

² The State's inclusion in the Indictments of the term "First" was unnecessary and irrelevant, as "[u]nder the law of West Virginia, there is no such thing as an indictment for first degree murder or second degree murder. *State v. Schmelle*, 24 W. Va. 767 (1884). An indictment is for 'murder,' and the degree of

Due to extensive pretrial publicity, venue for the trial of the matter was changed to Ohio County. *See, e.g.*, Supp. Appendix p. 1. Although the grand jury returned only true bills on a general charge of murder, the State elected to proceed exclusively on theory of felony murder. *Id.* at p. 2-3; *see, too*, Appendix Vol. IV pp. 69-70.

The West Virginia murder statute applicable in 1982 and under which Respondent was indicted provided as follows:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt, to commit arson, *rape*, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree.

W. Va. Code 61-2-1 [1882]. (Emphasis added). *See, too*, syl. pt 4, *State v. Sims*, 162 W. Va. 212, 248 S.E.2d 834 (1978) (“W.Va. Code, 61-2-1, alters the scope of the common law felony-murder rule by confining its application to the crimes of arson, rape, robbery or burglary, or the attempt to commit such crimes.”).

At a pretrial hearing occurring less than one (1) week before trial began, the following exchange occurred between Respondent’s counsel, the Court, and the counsel for the State:

Mr. Holmes:
(Respondent’s
counsel) “Again, I would like to put on the record although the State does not have to pick a theory today is the first day that I’ve heard anything about felony murder rule using rape as the felony involved. Therefore, if I might put that on the record.”

The Court: “What evidence will [the State] have regarding any first degree sexual assault which would have to be the, I presume, I don’t know – Has there been any cases decided under the felony murder rule? ***I don’t think the felony murder rule was amended to comport to the new sexual assault act, has it been?*** So are we talking about rape or first degree sexual assault?”

murder depends upon the proof adduced at trial. *State v. Johnson*, 49 W. Va. 684, 39 S.E. 665 (1901).” *State v. Justice* 191 W. Va. 261, 267, 445 S.E.2d 202, 208 (1994). Regardless, the State, as was its right, abandoned its efforts to prosecute Respondent for malicious premeditated homicide and elected, instead, to proceed on a theory of felony murder.

Prosecutor Brown: ***“That was the only understanding I had of it.*** The evidence would be that the position of Miss Williams in respect to her clothing and particularly the grass clippings found in her clothing, the finding of seminal fluid about the vaginal area and her pantyhose, I think the condition of her body in reference to the bullet wound gives us our use of a deadly weapon.”

See Supp. Appendix pp. 4-7. (Emphasis added).

Respondent was thereafter tried between March, 21, 1983, and March 24, 1983.

Following the presentation of evidence, the jury was instructed, in relevant part, as follows:

The Court instructs the jury that two (2) of six (6) verdicts may be found under the indictment in this case as the evidence so warrants. They are: (1) not guilty of first degree murder as charged in the first count of the indictment; (2) guilty of murder in the first degree (***murder committed in the commission or attempt to commit a robbery and/or first degree sexual assault***) as charged in the first count of the indictment; (3) guilty of murder in the first degree (***murder committed in the commission of, or attempt to commit, a robbery and/or first degree sexual assault***) as charged in the first count of the indictment with a recommendation of mercy; (4) not guilty of first degree murder as charged in the second count of the indictment; (5) guilty of murder in the first degree (***murder committed in the commission or attempt to commit a robbery and/or first degree sexual assault***) as charged in the second count of the indictment; and (6) guilty of murder in the first degree (***murder committed in the commission of, or attempt to commit, a robbery and/or first degree sexual assault***) as charged in the second count of the indictment with a recommendation of mercy.

See Appendix Vol. IV pp. 84-85. (Emphasis supplied).

As noted, the Court instructed the jury that “the crime of felony murder . . . is murder in the commission of, or attempt to commit *first degree sexual assault . . .*” *Id.* Although the Supreme Court of Appeals would not expressly mandate such a charge until it decided *State v. Stacy*, 181 W. Va. 736, 384 S.E.2d 347 (1989), the Court also proceeded to define for the jury the elements of first degree sexual assault. *Id.* at p.p. 86-87. Respondent’s trial counsel objected to the Court’s felony murder instruction, although the same was framed as a challenge to the sufficiency of the evidence to sustain it. *Id.* at p. 65. See, too, Appendix Vol. I pp. 68-114. No challenge, constitutional or otherwise, was raised to the instruction by Respondent’s trial counsel, despite the fact that the Court instructed the jury on a first degree sexual assault theory

of felony murder that did not then exist under the statute and given the disparity in the elements of the offenses of “rape” and “first degree sexual assault.”³

Following argument and deliberations, the jury returned a verdict of guilty against Respondent to the charge of “murder in the first degree (murder committed in the commission or attempt to commit a robbery and/or first degree sexual assault) as charged in the first count of the indictment” *See* Appendix Vol. IV p. 154. A verdict of guilty was also returned against Respondent as to count two of the indictment on the line of the verdict form worded identically to that pertaining to count one of the indictment. *Id.* at p. 155. Respondent was thereafter sentenced in accord with verdicts to two (2) life terms without the possibility of parole.

During post-trial motions, the issue of the general verdict, *i.e.*, a verdict wherein it was impossible to parse out from the verdict form which of the two felonies the jury predicated its verdict, was explicitly raised by the Court. *See* Supp. Appendix pp. 8-10. Specifically, the court questioned counsel as to whether the general nature of the verdict was objectionable if there existed any basis upon which the jury could have rested its verdict. *Id.* Respondent’s trial counsel did, in fact, raise an objection to general nature of the verdict, but the objection was

³ The offenses of “rape,” which was abolished in 1976, and “first degree sexual assault,” are, of course, qualitatively different and implicate entirely separate elements of proof. West Virginia Code § 61-2-15 [1931] provided, in relevant part, as follows: “If any male person carnally know a female person, not his wife, against her will by force . . . he shall be guilty of a felony.” *See, State ex rel. Cain v. Skeen*, 137 W. Va. 806, 74 S.E.2d 413 (1953). Contrariwise, the crime of first degree sexual assault initially passed by West Virginia’s Legislature in 1976 and codified at W. Va. Code § 61-8B-3(a) provided, *inter alia*, that the offense is committed when “[a] person . . . engages in sexual intercourse with another person by forcible compulsion and . . . inflicts serious bodily injury upon anyone . . . or . . . employ[s] a deadly weapon in the commission of the crime[.]” In turn, W. Va. Code § 61-8B-1 defines “forcible compulsion” as “physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances . . . or a “threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped[.]” The statute defines “resistance” as including physical resistance or any clear communication of the victim’s lack of consent. A “deadly weapon” is defined under the same statute as “any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.”

rooted in a complaint on the weight and sufficiency of the evidence, not on any notion that the jury was instructed on an offense that did not then exist in the felony murder statute. *Id.* at p. 10.

Respondent thereafter timely petitioned for appeal. However, that petition for appeal was summarily refused by the Supreme Court of Appeals without argument on January 11, 1984, despite the capital sentence imposed.⁴

B. The First Petition for Writ of *Habeas Corpus* (1986):

Respondent *pro se* then initiated a petition for writ of *habeas corpus* alleging various trial court errors on October 8, 1986. *See* Supp. Appendix pp. 11-13. The Court thereafter appointed Paul McKay, Esq., as Respondent's habeas counsel. At the time of his appointment, Mr. McKay had extremely minimal criminal trial experience, had not litigated any capital case, and had represented only one (1) habeas petitioner, who alleged that he was improvidently committed by the mental hygiene commissioner and who had not raised any issues pertaining to criminal law or criminal procedure. *See* Supp. Appendix pp. 14-15.

Following Mr. McKay's appointment as *habeas* counsel, an amended petition and three (3) subsequent supplemental petitions were filed by Respondent raising numerous grounds generally not relevant here; at no time did Mr. McKay ever file in his own right a supplement to the original *pro se* Petition or any of the *pro se* supplements thereto. However, for purposes of this proceeding, several of the grounds raised in the original petition and subsequently filed supplemental petitions warrant mention: an ineffective assistance of counsel (hereafter referred to as "IAC") claim relative to: (1) defense counsel's failure to challenge the racial composition

⁴ The issues raised by Respondent on direct appeal are irrelevant to any subsequent habeas petition filed by him, as the summary refusal of the Supreme Court of Appeals to hear his petition did not act to bar him from raising literally any issue germane to his indictment, prosecution, trial, conviction or representation. *See, e.g., syllabus, Smith v. Hedrick*, 181 W. Va. 394, 382 S.E.2d 588 (1989) ("This Court's rejection of a petition for appeal is not a decision of the merits precluding all future consideration of the issues raised therein . . .").

of the jury; and (2) the failure of his trial counsel to conduct effective cross-examination of West Virginia State Trooper Gayle Midkiff, a forensic biologist. No additional IAC claims were raised.⁵ As well, in his fourth supplemental petition, Respondent alleged a lack of sufficiency of the evidence upon which to predicate a finding of felony murder based upon the offense of rape. *Id.* at p. 7. Significantly, Respondent's first habeas counsel failed to identify or challenge the trial court's instruction of the jury on a theory of felony murder that did not exist in the statute as error rooted in grounds of ineffective assistance of trial counsel.⁶

Evidentiary hearings on Respondent's claims were conducted on August 27, 1987, September 17, 1987, and April 18, 1988. In a laboriously lengthy, meticulously detailed forty-seven (47) page opinion, the Circuit Court of Ohio County, per the late Honorable Craig M. Broadwater, denied Respondent's *habeas* relief on October 13, 1988. See Appendix Vol. I pp. 68-114. The Circuit Court thereafter relieved Mr. McKay of his responsibilities to Respondent and appointed Wray V. Voegelin as appellate counsel concerning the denial of his *habeas* petition. Respondent thereafter appealed the denial of habeas relief, and the Supreme Court of Appeals again summarily refused Respondent's petition for appeal of the denial of his habeas relief.

C. The Zain-Related Petitions for Writ of Habeas Corpus (1995-2001):

⁵ Concededly, Respondent's *Losh* checklist, completed in conjunction with his first *habeas* petition, did not raise IAC as a ground for reversal of his convictions. This fact, however, is irrelevant, as he ultimately did raise IAC claims concerning his trial counsel at the omnibus hearings, albeit on grounds differing from the ones raised herein.

⁶ The Supreme Court of Appeals has long made clear that the duty to properly instruct the jury in conformity with the Constitution rests with the trial court entirely independently of the actions of counsel. See syl.pt. 2, *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979) ("When given, instructions to a jury are the court's instructions and, irrespective of who requests them, the court must see to it that all instructions conform to constitutional requirements.").

In 1995, fully aware of the decisions of the Supreme Court of Appeals in the *Matter of West Virginia State Police Crime Lab* (“*Zain I*”), 190 W. Va. 321, 438 S.E.2d 501 (1993), and *Matter of W.Va. State Police Crime Lab*. (“*Zain II*”), 191 W. Va. 224, 445 S.E.2d 165 (1994), Respondent sought habeas relief rooted in his contentions that the testimony of State’s witness Trooper Sabrina Midkiff of the State Police Crime Lab to the effect that she recovered seminal fluid from the vaginal vault of Kathleen Williams was false.⁷ Proceeding *pro se*, Respondent was initially appointed counsel in the person of Heather (nee’ Robertson) Wood, who later withdrew as counsel. On August 14, 1998, George Castelle of the Kanawha County Public Defender’s Office was appointed to represent Respondent, and he, in turn, eventually delegated the matter to one of his assistants, Diana K. Panucci, Esq. Ms. Panucci, in turn, confined the scope of her representation to Respondent’s *Zain*-related issues in accord with her perception that she was mandated only to reviewing the lab and serology related issues. See Supp. Appendix pp. 16-18.

On October 12, 2001, a hearing was held on the lab-related issues before the Circuit Court. Counsel established through expert witness testimony, the lab notes generated in the early 1980s in conjunction with the testing of the forensic evidence used against Respondent, and independent laboratory testing that the evidence of Trooper Midkiff offered against Respondent at trial to the extent of having presumptively identified seminal fluid in Ms. Williams’s body was false and fraudulent, and, in fact, all that had been recovered from her body was vaginal fluid. See Supp. Appendix pp. 19-24.

⁷ In *Zain I*, the Court held that any convictions had upon the testimony of disgraced former serologist Fred Zain of the West Virginia State Police crime lab were to be vacated in conjunction with pending habeas petitions unless there also existed sufficient evidence upon which to otherwise convict. In *Zain II*, the Court addressed the issue of whether serologists employed by the State Police, other than Zain, had deliberately falsified evidence in criminal prosecutions.

Although the Circuit Court found that the science substantiating Respondent's claims to be accurate, it nevertheless denied him habeas relief by Order dated November 30, 2001.

Respondent, with appointed counsel Robert G. McCoid, filed an Amended Petition for Writ of Habeas Corpus Ad Subjiciendum on or about September 21, 2011 in the Circuit Court of Ohio County. Said case was assigned to Honorable James P. Mazzone.

The amended petition for writ of *habeas corpus* was, by Respondent's calculation, his third effort seeking *habeas* relief. The first was filed *pro se* in 1987 following which four supplemental *pro se* petitions were filed. Although the Circuit Court appointed Paul V. McKay, Esq., to represent Respondent in his 1987 habeas proceeding, Mr. McKay never filed any amended petition on Respondent's behalf. Respondent's second habeas petition was brought in 1995 *pro se* (following which counsel was appointed for the limited purpose of addressing serology issues).

However, consistent with *Losh's* exception regarding ineffective assistance of prior *habeas* counsel, *supra*, no procedural bar under either Rule 4(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia or common law principles of *res judicata* exists to the prosecution of the amended claim, inasmuch as Respondent's amended claim was neither raised by trial counsel nor raised by any of Respondent's subsequent appellate or *habeas* counsel and was, thus, never fully, finally, and fairly litigated. Stated otherwise, Respondent's amended claim was raised *for the first time* in the Amended Petition filed on or about September 21, 2011.

The thrust of Respondent's amended claim was, at its essence, a very simple, albeit it compelling one: (a) the trial court consciously and deliberately permitted the State to advance a theory of felony murder premised on a non-enumerated felony (murder committed by first

degree sexual assault) despite the trial court's express, affirmative recognition that the State's theory of prosecution had not been authorized by the Legislature; **(b)** the trial court thereafter improperly and unconstitutionally instructed the jury on a non-existent felony murder theory, *inter alia*, of murder committed by first degree sexual assault; **(c)** the Court called to the attention of counsel the fact that the Legislature had not amended the felony murder statute to reflect that the statutory crime of "rape" had been abolished until years after Respondent's trial and conviction; **(d)** the jury returned a general verdict of felony murder committed by robbery *and/or* first degree sexual assault, and no special verdict form was provided to the jury that enables anyone to determine the basis upon which the jury returned its verdict; **(e)** by improperly moulding the felony murder statute to include a non-enumerated felony (first degree sexual assault) as a basis upon which to found criminal liability (felony murder), the trial court abrogated Respondent's rights secured and guaranteed to him by U.S. CONST. AMD. XIV and W. VA. CONST. ART. III, § 10; **(f)** trial counsel neglected to object to the trial court's improper conduct despite it having been expressly raised on the record, which neglect was professionally deficient under an objective standard of reasonableness; **(g)** there exists a reasonable probability that, but for trial counsel's neglect, the verdict would have been different, or, alternatively, it is irrelevant whether the outcome would have been different, because the verdict was premised upon a potentially unconstitutional ground; and **(h)** Respondent's sundry appellate and *habeas* counsel were collectively ineffective for having neglected to properly identify the manifest error raised on the trial record and the concomitant error of trial counsel.

Respondent's new court appointed *habeas* counsel, Robert G. McCoid, Esq., aggressively pursued the Amended Petition by conducting exhaustive discovery by depositions of Respondent's prior counsel inquiring on the issues of effective assistance of counsel, particularly

digging to confirm that none of Respondent's prior counsel advised him about the unconstitutional instructional error where waiver could be implicated. Also, *habeas* counsel engaged, with the Circuit Court's approval, an attorney to review the record and give expert opinions on the issues of effective assistance of counsel.

Judge Mazzone held two hearings of consequence; (1) May 30, 2012 wherein the Respondent presented through counsel the testimony of Attorney/Expert Martin P. Sheehan (see Supp. Appendix pp. 61-138) and (2) March 6, 2012 wherein the Court held an argument hearing where in part the State stated no objection to the following stipulation stated in the record by Respondent's *habeas* counsel:

. . . One last thing, and I don't know if the State is prepared to stipulate to this or not, Mr. Bush is - - I'm going to proffer this and if the State objects to the proffer, we can have Mr. Bush sworn in and testify. Mr. Bush would testify that he has - - that no one ever explained this instructional error on the rape versus sexual assault issue to him before. Mr. McKay didn't discuss it. Certainly Mr. Janes and - - or Judge Janes and Mr. Holmes didn't discuss it. And Ms. Panucci didn't discuss it with him. And I think that's proven up through their deposition testimony and the burden rests with the - - the burden rests with the party resisting the habeas relief to establish the knowing, voluntary, and intelligent waiver. So I don't think we would even have an affirmative burden of proof here, but we're prepared to offer that, if need be. If the State takes issue with my representations, we can have Mr. Bush put in the box.

Ms. Nuzum-Wise: No objection, Your Honor. I've also sat through the depositions and read the transcripts.

The Court: Okay. Thank you.

See Supp. Appendix pp. 25-26

Thereafter, on February 15, 2013 Judge Mazzone issued a 19 page Order Granting Respondent's Amended Petition for Habeas Corpus and reversing Respondent's convictions and granting a new trial. See Appendix Vol. I pp. 144-162. In summary, the Circuit Court was convinced that Respondent's prior counsel at every level were ineffective and failed to recognize

the unconstitutional instructional error and object to it and also that appellate and *habeas* counsel failed to raise it as error and thus the same was not fully and fairly litigated in a prior proceeding. Further, the Circuit Court held that Respondent had not waived the issue of the instructional error since there was no evidence that the Respondent was aware of the issue and voluntarily waived the same. The Circuit Court relied, in part, on the Stipulation of Counsel aforesated.

II. SUMMARY OF ARGUMENT

The Ohio County Circuit Court got it right after the Respondent's persistence to travel a long and twisted road. Finally, after all previous counsel were demonstrated to have been ineffective in recognizing the unconstitutional instructional error, Respondent was appointed Robert G. McCoid who diligently, aggressively and intelligently demonstrated effective assistance of counsel. Mr. McCoid proved that prior counsel failed to identify the unconstitutional instructional error, even despite the fact that the sitting trial judge, less than a week prior to trial trial, brought the issue forward to counsel as if he was branding a steer with a hot iron. Also, after the trial the Trial Judge again asked pointed questions regarding the reliance on sexual assault as the underlying felony in the felony/murder theory. Further, Mr. McCoid proved under cross examination that Respondent was not advised of the error and thus had not waived the issue since it clearly was not fully and fairly litigated. This level of proof left the State with no option other than to stipulate that Respondent was not advised and therefore could not have waived the issue.

Further, and most importantly, the State of West Virginia failed to carry its burden of proving beyond a reasonable doubt that the instructional error did not contribute to the verdict obtained.

III.
STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent agrees that the case is appropriate for a memorandum decision. The Respondent does not agree that the grounds set forth by Petitioner for oral argument are correct; however, given the complexity of the history of this matter and the importance to Respondent of confirmation of the Circuit Court ruling, Respondent respectfully requests oral argument.

IV.
ARGUMENT

1. The Lower Court’s findings were correct as a matter of Law.

A. Standard of Review

1. Appeal

“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, Warden*, 219 W.Va. 417 (2006).

2. Habeas Corpus Limitations:

The Supreme Court of Appeals has generally restricted habeas petitioners seeking relief via a writ of habeas corpus to one (1) petition. As the Court has noted, “Our post-conviction habeas corpus statute . . . clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding[.]” Syllabus Point 1, in part, *Gibson v. Dale*, 173 W. Va. 681, 319 S.E.2d 806 (1984). Consistent with this rule, the Supreme Court of Appeals has noted that a *habeas* petitioner is not

“entitled to *habeas corpus* upon *habeas corpus*.” *Losh v. McKenzie*, 166 W. Va. 762, 766-767, 277 S.E.2d 606, 610 (1981) (citations omitted).

However, the Court’s limitation on the pursuit of habeas relief is a qualified one, as the Court has further held that it will not “invoke *res judicata* principles until the prisoner has had a full and fair opportunity *with the assistance of counsel* to litigate all issues at some stage of the proceedings.” *Id.* Accordingly, a *habeas* “applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus *habeas corpus* hearing[.]” Syl. pt. 4 (in part), *Losh* 166 W.Va. 762, 277 S.E.2d 606 (Emphasis added).⁸

These decisions, of course, merely amplify and refine the Legislature’s efforts to define what a “previously and finally adjudicated” matter is:

[A] contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated *only* when at some point in the proceedings which resulted in the conviction and sentence, or in a *proceeding or proceedings on a prior petition or petitions filed under this article*, or in any other proceedings instituted by the petitioner to secure relief from his conviction or sentence, *there was a decision on the merits thereof after a full and fair hearing thereon*

W.Va. Code §53-4A-1(b). (Emphasis added).⁹

3. Standards for Ineffective Assistance of Counsel Claims:

⁸ This exception, of course, is an eminently fair one extended to often uneducated and unsophisticated habeas petitioners left to the mercy of the competence of their habeas counsel. Indeed, the exception effectively and properly limits subsequent habeas claims to only those issues, including IAC claims, that should have been raised by original habeas counsel but were not and, at the same time, prohibits the re-litigation of issues that were fairly and fully decided either on direct appeal or on habeas consistent with the principles of *res judicata*. Stated otherwise, such relief is available, because they are separate issues. *See, e.g., Lozada v. Warden, State Prison*, 613 A.2d 818, 824 (Conn. 1992) (claim of ineffective assistance of habeas counsel, when added to the claim of ineffective assistance of trial counsel, results in a different issue); *Engesser v. Dooley*, 759 N.W.2d 309 (S.D. 2008) (relief available to habeas petitioner on second petition who can demonstrate ineffectiveness by both trial counsel and first habeas counsel).

⁹ Quite obviously, the Legislature envisioned circumstances wherein multiple habeas petitions could properly be filed provided that no decision on the merits had been reached following a full hearing on the same as evidenced by the statute’s employment of language referring to prior “proceedings” and “petitions”.

Concerning IAC claims raised by habeas petitioners, the Supreme Court of

Appeals has held that:

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, 80 L.Ed.2d 674 (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.

Syl. pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The *Miller* Court further held that:

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

Syllabus Point 6, *State v. Miller*, *id.*

2. The Lower Court Correctly Ruled that Respondent's Underlying Convictions Were "Void" as Illegal.

The Trial Court's initial violation of Respondent's right to due process of law guaranteed by U.S. CONST. AMD V and XIV and W. VA. CONST. ART. III, § 10 centers upon the Court's implicit permission extended to the State authorizing Respondent's prosecution for felony murder based upon a non-enumerated predicate felony, to-wit: first degree sexual assault. Indisputably, first degree sexual assault was *not* a listed felony under W. Va. Code § 61-2-1 during the events alleged to have been committed by Respondent in 1982.

During the critical exchange between the Trial Court and counsel on March 15, 1983, Respondent's trial counsel expressed surprise that the State would proceed on a theory of felony murder committed by "rape," and the trial court immediately thereafter noted that he did

not believe that the provisions of the murder statute addressing felony murder had been amended to add “sexual assault,” a proposition with which the prosecuting attorney agreed. *See* Supp. Appendix pp. 4-7. Nevertheless, despite the Trial Court’s *express* recognition that a prosecution under such a theory of felony murder had *not* been authorized by the Legislature, it permitted the admission of such evidence at trial.

The trial record is rife with evidence elicited from State’s witnesses by the prosecution, such as medical examiner Dr. James Frost and forensic biologist /State Trooper Sabrina Midkiff, offered in furtherance of the State’s theory of felony murder committed during the course of sexual assault despite the fact that it was not a valid one. *See, e.g.,* Appendix Vol. III p. 149. (Q. “Dr. Frost, did you also conduct an examination which involved the taking of certain vaginal swabs?” A. “I did, yes.”); *Id.* 151 (Q. “Now, doctor [Frost], . . . [d]o you in the course of your profession, does this include examination of victims of sexual assault?” A. “Yes, it does.”); *Id.* 152 (Q. “Doctor [Frost] . . . did you find any evidence of physical trauma in [Ms. Williams’s] crotch area?” A. “No, I did not.” Q. “Is that negative finding . . . inconsistent with . . . sexual assault upon Miss Williams?” A. “No, it is not, depending on the circumstances.”); *Id.* 172 (Q. “And in this case [Trooper Midkiff] did you examine the vaginal swab?” A. “Yes, sir, I did.” Q. “What kind of test did you perform on the vaginal swab?” A. “The first test is a presumptive test for seminal fluids If it turns a purplish color . . . it indicates that this would probably be seminal fluid. And it did.”) *Id.* 140.¹⁰ Dr. Frost also testified as to finding grass clippings in the victim’s pantyhose. *Id.*

¹⁰ Parenthetically, it warrants comment that in the third supplemental petition filed in 2001 on behalf of Petitioner in his third habeas corpus proceeding, it was definitively established that Midkiff’s testimony was pure bunk and that there was not, in fact, any material recovered from Ms. Williams’s vaginal vault save her own vaginal fluid.

This evidence formed the very heart of the prosecution for felony murder and was relied upon virtually exclusively by the prosecution in its closing argument. *See* Appendix Vol. IV pp. 105-106. (Prosecuting Attorney J. Montgomery Brown: “What happened in the cemetery? * * * Kathleen Jane Williams was taken out of the car and at gun point and submitted to rape at gun point.”).¹¹ *Id.* 105. However, by permitting Defendant’s prosecution based upon a non-existent crime, *i.e.*, felony murder committed by first degree sexual assault, the Trial Court trammled Respondent’s Federal Fourteenth Amendment right to due process of law. *See Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981) (affirming district court’s grant of habeas relief on Federal due process grounds where trial court instructed jury on a non-existent offense and noting that “only a legislature can denounce crimes. * * * Nowhere in this country can any man be condemned for a nonexistent crime.”); *Suniga v. Bunnell*, 998 F.2d 664 (9th Cir. 1993) (instruction in state murder prosecution authorizing conviction of nonexistent offense of felony-murder based upon assault with a deadly weapon was error so serious that instruction by itself affected entire trial to extent that resulting conviction violated due process.); *Ex parte Royall*, 117 U.S. 241, 248, 6 S.Ct. 734, 738, 29 L.Ed. 868 (1886) (conviction under an unconstitutional law is void).

Summarily, by authorizing the State’s theory of prosecution, *i.e.*, felony murder committed by first degree sexual assault, the Trial Court abrogated Respondent’s constitutional

¹¹ Although not directly germane to the claims in the instant petition, the outrageousness of this argument far exceeds any boundaries of ethical conduct by a prosecuting attorney and deviates substantially from the non-negotiable duty of fairness a prosecutor owes to an accused, because it was predicated on pure, unadulterated, rank speculation. *See* syl. pt. 3, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977) (“The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor’s duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State’s case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.”). Indeed, no evidence of sexual trauma was indicated at autopsy. *See* March 23, 1983, trial tr. at p. 152.

right to due process of law, thereby requiring vacation of his 1983 conviction and an award of a new trial.

Respondent's conviction for the offense of felony murder was, inarguably, procured pursuant to a general verdict in which the jury was instructed on two (2) potential theories of criminal liability: robbery and first degree sexual assault. Such instruction violated Respondent's inalienable Federal and State constitutional rights to due process of law guaranteed by the Federal and West Virginia Constitutions.

It follows that when Judge Recht instructed the jury on a non-existent felony offense (first degree sexual assault) as forming a basis for felony murder, he engaged in a *de facto, ex post facto* moulding of the felony murder statute. The giving of such instruction was patently unconstitutional.

Of course, the *Ex Post Facto* Clause embodied in U.S. CONST. ART. I, § 9 imposes a limitation upon the exercise of legislative power by prohibiting retroactive changes to the legal consequences of acts committed prior to the enactment of a given statute. *See, e.g., Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). The Supreme Court has held that the federal constitutional prohibition does not *per se* apply to judicial acts. *See Frank v. Mangum*, 237 U.S. 309, 344, 35 S.Ct. 582, 593, 59 L.Ed. 969 (1915). But the high court has

recognized that the principle upon which the [*Ex Post Facto*] Clause is based, the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties, is fundamental to our concept of constitutional liberty. * * * As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court: '(A)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court

is barred by the Due Process Clause from achieving precisely the same result by judicial construction.' *Id.*, at 353-354, 84 S.Ct., at 1703.

Marks v. U.S., 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L.Ed.2d 260, ___ (1992).

Yet engage in an unauthorized judicial enlargement of an existing statute is precisely what the Trial Court did when it instructed the jury that felony murder could be committed through first degree sexual assault. *See* Appendix Vol. IV pp. 84-86. (“The Court instructs the jury . . . [the] verdicts [which] may be found under the indictment in this case as the evidence so warrants . . . are . . . guilty of murder in the first degree (murder committed in the commission or attempt to commit . . . first degree sexual assault) as charged in the . . . indictment[.]”). No legislative enactment existed for this unwarranted expansion of the felony murder statute. While it is accurate that the Legislature did not amend the felony murder provisions of W. Va. Code § 61-2-1 to substitute “sexual assault” for “rape” until 1987, it was not within the purview of a judicial officer’s authority to exercise the Legislature’s power. The Legislature’s failure in 1976 failing to concomitantly amend W. Va. Code § 61-2-1’s felony murder provisions to include “sexual assault” as an enumerated felony at the same time that it abolished the offense of “rape” and concurrently adopted the Sexual Assault Act, W. Va. Code § 61-8B-1, *et seq.*, does not justify a trial court legislating from the bench. Indeed, the Supreme Court of Appeals has expressly forbidden such conduct, and a review of their relevant decisions is instructive on this point.

In *State v. Hensler*, 187 W. Va. 81, 415 S.E.2d 885 (1992) (*per curiam*), the Supreme Court of Appeals addressed a case wherein the defendant had been tried on several counts for first degree sexual abuse in violation of W. Va. Code § 61-8B-7 for acts alleged to have occurred in 1985-1986. When tried in 1990, the trial court instructed the jury on the term “forcible compulsion” embodied in W. Va. Code § 61-8B-1(1)(c), the definitions section of the

Sexual Assault Act which defined that term despite the fact that it had not been enacted until 1986. On appeal, the defendant argued that the application of the definition constituted an unconstitutional application of an *ex post facto* law to his case and otherwise amounted to a denial of due process of law. In agreeing with the defendant's position and in vacating his conviction and awarding a new trial on that count, the Supreme Court of Appeals held that

both the United States Supreme Court and this Court have recognized that the principle on which the prohibition against *ex post facto* action is based is a fundamental concept of constitutional liberty embodied in the due process clauses of the respective Constitutions. *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *State v. R.H.*, *supra*. As indicated in the *R.H.* case, due process places a limitation on retroactive judicial application of statutory enactments which precludes the court from effecting a result which the legislature is barred from achieving as a result of the *ex post facto* prohibition.

Hensler, 187 W. Va. at 87, 415 S.E.2d at 883.

Of critical note in *Hensler* are the Court's observations that *ex post facto* principles bar judicial action by virtue of due process guarantees and that that principle is embodied equally under *both* West Virginia and Federal law. The Court has subsequently affirmed this rule. *See State v. George W.H.*, 190 W. Va. 558, 439 S.E.2d 423 (1993) (reversing conviction for first degree sexual abuse where jury was instructed on definition of "forcible compulsion" in sexual assault act's definitions section that did not exist at the time of the events alleged in the indictment).

The egregiousness of the Trial Court's gratuitous moulding of the felony murder statute to substitute "first degree sexual assault" for "rape" is even more pronounced than the actions of both of the trial courts in *Hensler* and *George W.H.* when the elements of "first degree sexual assault" and "rape" are compared. To recapitulate, "rape" was defined in West Virginia Code § 61-2-15 [1931], thusly: "If any male person carnally know a female person, not his wife, against her will by force . . . he shall be guilty of a felony." "First degree sexual assault is

defined in W. Va. Code § 61-8B-3(a) as occurring when “[a] person . . . engages in sexual intercourse with another person by forcible compulsion and . . . inflicts serious bodily injury upon anyone . . . or . . . employ[s] a deadly weapon in the commission of the crime[.]” West Virginia Code § 61-8B-1, in turn, defines "forcible compulsion" as “physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances . . . or a “threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped[.]”¹²

Summarily, by instructing the jury that felony murder could be a murder committed during the course of the commission of first degree sexual assault, the Trial Court improperly judicially enlarged the felony murder statute and violated Respondent’s right to due process of law guaranteed under U.S. CONST. AMD. XIV and W. VA. CONST. ART. III, § 10, thereby requiring vacation of his 1983 convictions and the award of a new trial.

3. The Lower Court’s Reliance on *Stromberg* was correct.

In the matter *sub judice*, Respondent’s trial jury returned a general verdict of guilty following their instruction, without objection by trial counsel, upon alternative theories of conviction, one (first degree sexual assault) but not all (robbery) of which permitted guilt to rest upon an unconstitutional ground. *See* Part B, *supra*. Pursuant to *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d 1117 (1931), and its progeny, such a conviction must be reversed.

In *Stromberg*, the defendant stood trial under a statute (and accompanying jury

¹² The trial court in the matter at bar did instruct the jury on the definition of the term “forcible compulsion,” which the courts in both *Hensler* and *George W. H.* did, albeit erroneously. Likewise, the trial court instructed the jury on the term “deadly weapon.” *See* Appendix Vol. IV p. 87. These elements appear nowhere in the rape statute.

instructions) criminalizing the public display of a red flag for any of three (3) specified reasons. The United States Supreme Court held that the description of one (1) of the enumerated purposes violated the First Amendment freedom of speech provisions. Despite the fact that there existed alternative, constitutionally permissible grounds upon which the jurors *might* have based their general verdict, the Court refused to let the verdict stand, noting that

“[t]he verdict . . . did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. * * * [T]he necessary conclusion from the manner in which the case was sent to the jury is that, ***if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.***”

283 U.S. at 367–368, 51. (Emphasis added).

In *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), the Supreme Court refined *Stromberg's* application, noting that it “stand for . . . the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.” *Griffin*, 502 U.S. at 53, 112 S.Ct. at 471, 116 L.Ed.2d at 379. *Griffin* differentiated between general verdicts returned on multi-count indictments where one or more of the counts were *legally* defective, which the Court found to be valid so long as the general verdict was legally supportable on one of the submitted grounds, even though there was no assurance that the valid ground, rather than the invalid one, formed the basis of the jury's action. *Griffin*, 502 U.S. at 49-51, 112 S.Ct. at 469-70, 116 L.Ed.2d at 376-77.

Thus, *Griffin* distinguished between counts that were invalid because they violated a provision of the constitution as opposed to counts that were merely invalid because

they were legally defective. Stated otherwise, an unconstitutional ground in a general verdict implicating two or more theories of criminal liability requires the voiding of the entire verdict, but a potential ground in such a verdict that is merely legally defective does not require reversal. The West Virginia Supreme Court of Appeals has recently discussed this distinction. *State v. Berry*, 227 W. Va. 221, ___, 707 S.E.2d 831, 837-838 (2011).

Just prior to Respondent's conviction in 1983, the Fourth Circuit expressly adopted the *Stromberg* standard requiring reversal of a general jury verdict where it is impossible to identify whether the defendant was convicted under an erroneous or valid view of the law. *State v. Head*, 641 F.2d 174, 179 (4th Cir. 1981) (reversing conviction where one of two potential bases for the conviction was barred by the statute of limitations and declining to engage in speculation as to which of the grounds upon which the conviction rested). Other federal circuits are in accord with this rule. For example, the Eleventh Circuit held in *Adams v. Wainwright*, 764 F.2d 1356, 1363 (11th Cir. 1985), that

[t]he proper approach is to examine only the trial court's instructions and the jury's verdict, not the sufficiency of the evidence to support the verdict. *Stromberg* does not suggest a harmless error standard based on overwhelming evidence of guilt under the valid portion of the jury charge. Rather, *Stromberg* states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed. *Stromberg v. California, supra*, 283 U.S. at 368, 51 S.Ct. at 535.

The Petitioner herein argues that *Stromberg* does not apply to this case. It certainly does. In applying *Stromberg* to a structural unconstitutional instruction error calls for an automatic reversal of the illegal conviction with no further analysis. *Stromberg* applies as controlling law since it has never been overruled. The Petitioner relies heavily on the Per Curium opinion of the United States Supreme Court of *Hedgpeth v. Pulido*, 555 U.S. 57 (2008). *Hedgpeth* was a per curium decision and thus is law only controlling the *Hedgpeth* case itself.

Even, assuming *arguendo*, that *Hedgpeth* is controlling law, it only means that a reviewing court can not automatically reverse but must place the case facts in the meat grinder to determine if the error was harmless. This may be the Federal Standard, but it only sets the “floor” for constitutional review for due process analysis. In West Virginia, the Supreme Court of Appeals has well established law that sets the “ceiling” for harmless error analysis. *See State v. Bevel*, 11-1675 (June 13, 2013) wherein the West Virginia Supreme Court stated where both Federal Law and West Virginia law is implicated, especially under the respective Constitutions, that under the primary tenant of federalism – on which West Virginia’s government is based – West Virginia may place higher standards pursuant to its own laws than those required by the Federal Government. Citing *Syl. pt. 2 Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979). (“The provisions of the Constitution of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution”.) West Virginia has a more restrictive standard that requires the beneficiary of the constitutional error to carry the burden of proof by proving beyond a reasonable doubt that the constitutional error did not contribute to the verdict obtained. *See State v. Frazier* 229, W.Va. 724, 735 S.E.2d 707 (2012).

In the case at bar, the Petitioner put forward no evidence at any of the proceedings to carry the aforementioned burden. NONE. See Supp. Appendix pp. 61-138. The Petitioner called no witnesses, proffered no evidence, failed to cross examine any witness except Respondent’s expert, and failed to utilize an expert on any issues. Why? Because the Petitioner knows that he can not reasonably argue that the Constitutional error in the instruction of law did not at all contribute to the verdict convicting Respondent. It did. The Prosecutor relied heavily on the sexual assault evidence to convict the Respondent as referenced above.

Assuming that the Court agrees that *Hedgpeth* is not controlling law, then applying *Stromberg's* rule to the matter *sub judice*, it is apparent that Respondent's conviction must be voided. The Trial Court's submission to the jury of instructions permitting a potential verdict of felony murder based upon sexual assault ("murder committed in the commission or attempt to commit a robbery and/or first degree sexual assault," *see* Appendix Vol. I, p. 21 (emphasis added)), which was *not*, as noted, an enumerated felony under W. Va. Code § 61-2-1, violated Respondent's constitutional right to due process of law, because both the instructions and the verdict form were general in nature such that it is impossible to ascertain which ground the jury predicated its verdict ("We, the jury, find the defendant guilty of murder in the in the first degree (murder committed in the commission or attempt to commit a robbery and/or first degree sexual assault) as charged in the first count of the indictment[,] signed, Michael V. O'Kane, foreman."). *See* Appendix Vol. IV p. 154.¹³

Summarily, because: (1) the Court's instructions to the jury were general; (2) because the verdict was general in nature; (3) given that one of the two (2) bases of criminal liability rested upon an unconstitutional ground, i.e. felony murder committed by sexual assault); and (4) as it is impossible to determine upon which basis the jury intended its criminal liability finding to rest, the Trial Court correctly decided that Respondent's conviction must be vacated and he must be awarded a new trial. Even if "harmless error" analysis is required, the Petitioner failed to carry his burden beyond a reasonable doubt that the constitutional error did not contribute to the conviction.

¹³ Although, as stated, it is impossible to discern from either the instructions or the verdict form whether the jury's verdict was based upon the constitutionally infirm charge of first degree sexual assault or the permissible basis of robbery, a review of the trial transcript generally as well as the closing argument of the State, *see* Appendix Vol. IV p.p. 105-107, 116, 151, indicates that the State focused heavily on its theory that the felony murder was perpetrated in the course of the commission of a "sexual assault," *i.e.*, the *unconstitutional* basis.

4. The Petitioner Failed to Prove Beyond a Reasonable Doubt that the Error Complained of Did Not Contribute to the Verdict Obtained.

In its brief, the Petitioner concedes that West Virginia has adopted the harmless error standard requiring proof beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Petitioner's Brief at p. 27. Citing *State ex rel Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction. Syl. pt. 20 *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

In a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Syl. pt. 3, *State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727 (2012).

In *Frazier*, the State on appeal conceded two constitutional violations (right of confrontation and failure to disclose exculpatory evidence) but contended that both were harmless. The West Virginia Supreme Court of Appeals held that the State failed to prove the constitutional violations were harmless beyond a reasonable doubt. The defendant's conviction was reversed and the case was remanded for a new trial.

While not conceded in the case at bar, it is unquestionable that Respondent's convictions were secured with significant contribution from the unconstitutional instructional error. As noted above, the prosecution at trial relied heavily upon the sexual assault evidence during its case in chief and during closing argument.

At no time during the underlying *habeas* proceedings did the Petitioner proffer evidence coming anywhere close to meeting his burden of proving beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the conviction.

The reason for this lack of even an attempt to put forth such evidence is obvious, the Petitioner knows that he can't meet his burden and thus the Petitioner just has ignored this important point as if it doesn't exist.

Therefore, the Circuit Court correctly ruled that unconstitutional instructional error was not harmless.

5. The Lower Court Correctly Ruled that Respondent's Trial Counsel Were Ineffective in (1) Neglecting to Challenge the State's Theory of Felony Murder Based Upon a Non-Enumerated Felony and (2) Failing to challenge the Court's Instructions and Verdict Forms for the Same Reasons.

The initial portion of this Brief addresses thoroughly the significance of the Trial Court (a) permitting the prosecution to proceed on an illegal theory at trial and (b) instructing the jury on such an illegal theory. However, this Court must now focus with equal intensity on the competence of both Respondent's trial counsel and his prior appellate and *habeas* counsel, because, as A follows B, if Respondent's trial counsel were ineffective, so, too, was Respondent's appellate and *habeas* counsel if he neglected to identify such incompetence at Respondent's omnibus hearings conducted on August 27, 1987, September 17, 1987, and April 18, 1988. Thus, any analysis of concerning the effectiveness of habeas counsel must necessarily begin with an assessment of the effectiveness of trial counsel, and, in this regard, the Court's inquiry need not be far-ranging.

The Supreme Court of Appeals has held that a

defendant is not constitutionally guaranteed the assistance of the best attorney at the bar or to such assistance as will result in an acquittal[;] he is entitled to such assistance as will afford him a meaningful and fair trial. Th[is] Court, in [*State v. Thomas*, 157 W. Va. 640, 665, 203 S.E.2d 445, 461 (1974)], said that such representation is constitutionally adequate if counsel "exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law."

State ex rel. Wine v. Bordenkircher, 160 W. Va. 27, 30, 230 S.E.2d 747, 750 (1976).

But Respondent's complaint with his trial counsel is not that they were not "the best attorn[ies] at the bar[.]" Rather, his complaint with them is that they neglected to challenge the very basis for the State's case, which was founded upon a constitutionally impermissible theory (felony murder committed by sexual assault), and that the severity of their error is magnified manifold in light of the trial court expressly raising the issue on the record before trial. In this respect, they were patently ineffective.¹⁴

Indeed, the Fourteenth Amendment/*Stromberg* issue raised by Respondent is not some obscure, convoluted, or arcane legal principle that managed, somehow, to escape the attention of Respondent's otherwise fully engaged trial counsel; it was thrust into their faces at the March 15, 1983, pretrial hearing, when the Circuit Court *expressly* raised the issue of the fact that the felony murder statute did not include sexual assault *on the record* (see Supp. Appendix pp. 4-7) and in their presence.

Both of Respondent's trial counsel have now candidly conceded their error in failing to identify this issue and object to it, or, more accurately, address the issue by objecting once the Court had identified it for them. The following exchanges during depositions taken during *habeas* discovery make this assertion clear.

| | |
|-------------------------|--|
| Mr. McCoid: (Amended | "Do you believe that you had a duty . . . to register an objection to the instruction being given on felony murder as |
|-------------------------|--|

¹⁴ Of course, under the standard for ineffective assistance of counsel claims that existed prior to the adoption of the standard enunciated by the United State Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a habeas petitioner in West Virginia was required to demonstrate (1) that counsel did not exhibit the normal and customary degree of skill possessed by knowledgeable criminal attorneys and (2) such ineffectiveness resulted in his conviction. *Wine*, 160 W. Va. at 30-31, 230 S.E.2d at 750. *Strickland*, as adopted by West Virginia, adopts a two prong-standard for IAC claims: (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. See syl. pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Fairly stated, the pre- and post-*Strickland* standard for IAC claims in West Virginia are virtually identical.

Habeas counsel) committed in the form of sexual assault, if that was not an enumerated felony under the felony murder rule?”

Mr. Holmes:
(Respondent’s
former trial
counsel) “If the Court thought there was a problem with the State’s case, I think it’s my duty to explore that and try to widen the crack . . . and I, you know, I’d say yes, it’s my duty to drive the wedge, if you will.”

August 2, 2010, deposition tr. of William T. Holmes at p. 25, which is appended hereto in relevant part as Supp. Appendix pp. 27-30.

Mr. McCoid:
(Amended
Habeas counsel) “Would you agree that Mr. Bush’s defense should have objected to the jury instruction on felony murder predicated, in part, on the theory of sexual assault if sexual assault was not one of the enumerated felonies under the felony murder rule?”

Mr. (Judge) Jane:
(Respondent’s
former trial counsel) “Probably, yeah.”

August 2, 2010, deposition tr. of David Jane at p. 38, which is appended hereto in relevant part as Supp. Appendix pp. 31-34.

Respondent’s trial counsels’ failure to object to the nature of the State’s case or, specifically, the instructions themselves constitutes ineffective assistance of counsel. As the Fourth Circuit Court of Appeals has held,

an erroneous jury charge may form the basis of a habeas petition, either independently or in conjunction with an ineffective assistance of counsel claim, where the instruction “so infected the entire trial that the resulting conviction violates due process” by rendering the trial fundamentally unfair. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

Luchenburg v. Smith, 79 F.3d 388, 391 (4th Cir. 1996).

Respondent’s trial counsels’ failure to object to the very basis of the prosecution, *i.e.*, one founded upon a theory of felony murder committed by sexual assault, as well as the instructions offered by the State, constitutes a manifestly deficient professional performance

when evaluated under an objective standard of reasonableness.

Reaching this conclusion requires no stretch of the imagination, because of the non-negotiable duty of trial counsel to thoroughly investigate the government's case and raise all defenses relevant to the same. *See Strickland v. Washington*, 466 U.S. 668, 680, 104 S.Ct. 2052, 2061, 80 L.Ed.2d 674 (1984) ("The . . . duty [to investigate] exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include "*an independent examination of the facts, circumstances, pleadings and laws involved.*" * * * (quoting *Rummel v. Estelle*, 590 F.2d 103, 104 (CA 1979)).") (Other citation omitted) (emphasis in original). Respondent's trial counsel failed him utterly in this respect.

At an evidentiary hearing held by the final *habeas* Trial Court (Judge Mazzone) on May 30, 2012, (see generally Supp. A; endix pp. 61-138) counsel for the Respondent proffered the only expert in the case, Martin P. Sheehan. Expert Sheehan opined that Respondent's trial counsel (Holmes and Janes) were ineffective and said ineffectiveness was outcome determinative. See Supp. Appendix pp. 39-40.

6. The Lower Court Correctly Ruled that Respondent's Habeas Counsel Was Ineffective in Neglecting to Identify the Ineffectiveness of Respondent's Trial Counsel in Neglecting to Challenge the State's Theory of Felony Murder and the Court's Instructions and Verdict Form Pertaining to the Same.

Having now established that Respondent's trial counsel were ineffective under an objective standard of professional conduct and that such ineffectiveness unfairly affected the outcome of Respondent's trial under *Stromberg*, it is now necessary to address whether Respondent's *habeas* counsel were ineffective in order to surmount the usual limitation to one post-conviction habeas corpus hearing. Syl. Pt. 1, *Gibson*, 173 W. Va. 681, 319 S.E.2d 806. This requirement is readily satisfied.

Respondent's first *habeas* counsel acknowledged that it was improper to instruct the jury on first degree sexual assault, because the same was not a codified felony offense under the felony murder statute and that, under an objective standard of reasonableness, Respondent's trial counsel should have identified the issue, particularly in that the trial court had expressly raised the issue on the record. See Supp. Appendix p. 35. As to the salient question of whether Respondent's first *habeas* counsel was himself ineffective in failing to raise or identify this issue, see Syl. pt. 4 (in part), *Losh*, 166 W. Va. 762, 277 S.E.2d 606, the following exchange between Respondent's amended *habeas* counsel and Mr. McKay resolves any doubt whatsoever on this point in Respondent's favor:

Mr. McCoid:
(Amended
Habeas counsel) “So again, respectfully to some extent, is it a fair inference though that if [the *Stromberg* issue] wasn't raised or advanced in any of his amended petitions, that it wasn't an issue that you identified or he identified or that you two had discussed together?”

Mr. McKay:
(Respondent's
former first
habeas counsel) “That's correct.”

Mr. McCoid: “Would you agree that you should have identified that issue as his *habeas* counsel.”

Mr. McKay: “Yes.”

Mr. McCoid: “Would you agree – I am not insensitive about the question I am about to ask at all. But would you agree that it was ineffective for you not to have identified that issue and raised it?”

Mr. McKay: “With a qualified yes, I would agree. I am not positive what our discussions were with Mr. Bush and myself. I can't remember. ***But by mere fact it isn't properly raised, and it was my responsibility as trial (sic) counsel, then I would say yes, the fault lies with me.***”

See Supp. Appendix p. 36. (Emphasis added).¹⁵

Mr. McKay candidly conceded his professional error as habeas counsel in failing to identify and raise the *Stromberg* issue concerning the jury's instruction on first degree sexual assault. To this extent, Respondent has amply satisfied the *Losh* requirement of identifying ineffectiveness by his first habeas counsel, thus entitling him to habeas relief in the instant matter.

At the same evidentiary hearing cited above, Expert Sheehan opined that first *habeas* attorney (McKay) was ineffective. Supp. Appendix p. 40.

7. The Lower Court Correctly Ruled that Respondent's Second Habeas Counsel Was Ineffective in Neglecting to Identify the Trial Court's Error in Instructing the Jury on a Theory of Felony Murder Advanced under a Non-existent Statute.

Although Respondent adamantly asserts that the ineffectiveness of his initial habeas counsel, standing alone, justifies an award of *habeas* relief, Respondent also asserts that, in like manner to his first *habeas* counsel, his second *habeas* counsel, Diana Panucci, was also ineffective in neglecting to identify or raise the issue of the erroneous jury instruction. Ms. Panucci asserted in her deposition that she was functioning pursuant to a so-called mandate limiting the scope of her duties to Respondent to serology matters raised by the Supreme Court of Appeals in the case styled *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 191 W. Va. 224, 445 S.E.2d 165 (1994) ("*Zain II*").

However, while Ms. Panucci was appointed to address *Zain II* issues, she was also charged with a non-negotiable duty owed to Respondent to raise *all* issues that would afford him habeas relief, including the *Stromberg* issue addressed above. Although Ms. Panucci contended in her testimony that she had reviewed Respondent's entire trial transcript and that she "vaguely

¹⁵ Of course, it is irrelevant whether Mr. McKay recalls any discussions with Petitioner on this point inasmuch as he conceded that it was his responsibility to identify and raise the issue.

remember[ed] reading about [the instructional issue],” *see* Supp. Appendix pp. 37-38, had she thoroughly reviewed and investigated the transcript, she necessarily would have identified the issue and should have raised it; her failure to do so simply amounts to ineffective representation.

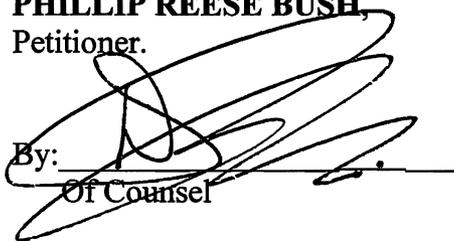
Again, at the same evidentiary hearing cited above, Expert Sheehan opined that second *habeas* attorney Panucci was ineffective. Supp. Appendix pp. 40-41.

VII. CONCLUSION

For the foregoing reasons and any others that may be apparent to this Court, your Respondent, Phillip Reese Bush, respectfully prays that this Court affirm the Lower Court’s decision granting habeas corpus relief and Order that he be awarded a new trial.

Respectfully submitted,

PHILLIP REESE BUSH,
Petitioner.

By: 
Of Counsel

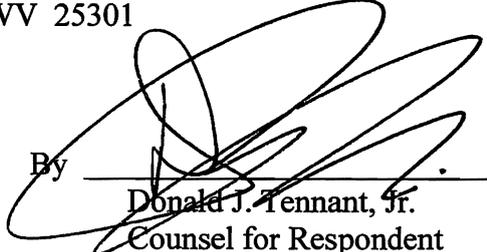
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CERTIFICATE OF SERVICE

I, Donald J. Tennant, Jr., counsel for the Respondent, do hereby verify that I have served a true and accurate copy of the Respondent's Brief upon counsel for the Petitioner by mailing the same by U.S. Mail, First Class postage pre-paid, on the 1st day of August, 2013, to:

Laura Young, Esq.
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

By



Donald J. Tennant, Jr.
Counsel for Respondent