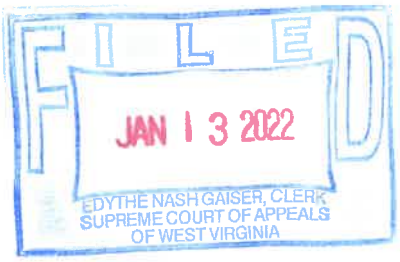
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0536




**MARK SOWARDS**

*Petitioner,*

**v.**

**DONNIE AMES, Superintendent,**
**Mt. Olive Correctional Complex,**

*Respondent.*

FILE COPY

# RESPONDENT'S BRIEF

Appeal from the June 11, 2021, Order
Circuit Court of Cabell County
Case No. 18-C-325

DO NOT REMOVE
FROM FILE

**PATRICK MORRISEY**
**ATTORNEY GENERAL**

**LARA K. BISSETT**
**ASSISTANT ATTORNEY GENERAL**
**1900 Kanawha Blvd. E.**
**State Capitol, Bldg. 6, Ste. 406**
**Charleston, WV 25305**
**Telephone: (304) 558-5830**
**Facsimile: (304) 558-5833**
**State Bar No. 9102**
**Email:** ***Lara.K.Bissett@wvago.gov***

## TABLE OF CONTENTS


Page

Table of Contents ..... i

Table of Authorities ..... ii

I. Introduction ..... 1

II. Assignments of Error ..... 1

III. Statement of the Case ..... 1

A. Indictment and underlying crime ..... 1

B. Procedural history ..... 3

C. Direct appeal ..... 9

D. Habeas Corpus Proceeding ..... 9

IV. Statement Regarding Oral Argument ..... 11

V. Summary of the Argument ..... 12

VI. Argument ..... 13

A. Standard of Review ..... 13

B. Petitioner was not denied his right to a speedy trial ..... 13

C. The evidence adduced at trial neither necessitated nor supported the giving of an instruction for battery ..... 20

D. Petitioner has failed to demonstrate that he was entitled to a change of venue ..... 22

E. Trial counsel was not ineffective for failing to pursue a "voluntary intoxication" defense ..... 24

F. Petitioner has failed to demonstrate *any* error, let alone *cumulative* errors ..... 28

VII. Conclusion ..... 28

## TABLE OF AUTHORITIES

**Cases** **Page**

*Good v. Handlan*,
176 W. Va. 145, 342 S.E.2d 111 (1986) ..... 14, 15, 16, 17, 18

*Harrington v. Richter*,
562 U.S. 86 (2011) ..... 26

*Mathena v. Haines*,
219 W. Va. 417, 633 S.E.2d 771 (2006) ..... 13

*State ex rel. Daniel v. Legursky*,
195 W. Va. 314, 465 S.E.2d 416 (1995) ..... 24, 26

*State ex rel. Murray v. Sanders*,
208 W. Va. 258, 539 S.E.2d 765 (2000) ..... 14

*State ex. rel. Myers v. Painter*,
213 W. Va. 32, 576 S.E.2d 277 (2002) ..... 26

*State ex rel. Stines v. Locke*,
159 W. Va. 292, 220 S.E.2d 443 (1975) ..... 16

*State ex rel. Vernatter v. Warden, W. Va. Penitentiary*,
207 W. Va. 11, 528 S.E.2d 207 (1999) ..... 24, 28

*State ex rel. Waldron v. Stephens*,
193 W. Va. 440, 457 S.E.2d 117 (1995) ..... 14

*State v. Ballenger*,
No. 16-0986, 2017 WL 5632824 (W. Va. Supreme Court, Nov. 22,
2017)(memorandum decision) ..... 16

*State v. Bias*,
177 W. Va. 302, 352 S.E.2d 52 (1986) ..... 15

*State v. Damron*,
213 W. Va. 8, 576 S.E.2d 253 (2002) ..... 14

*State v. Derr*,
192 W. Va. 165, 451 S.E.2d 731 (1994) ..... 22, 23

*State v. Fender*,
165 W. Va. 440, 268 S.E.2d 120 (1980) ..... 15, 17, 18

*State v. Glaspell*,
No. 12-0685, 2013 WL 3184918 (W. Va. Supreme Court, June 24, 2013)(memorandum decision) ..... 19

*State v. Hatfield*,
169 W. Va. 191, 286 S.E.2d 402 (1982) ..... 26

*State v. Jordan*,
No. 13-0616, 2014 WL 1672951 (W.Va. Supreme Court, April 25, 2014) ..... 16, 17, 18

*State v. Kilmer*,
190 W. Va. 617, 439 S.E.2d 881 (1993) ..... 26

*State v. Knuckles*,
196 W. Va. 416, 473 S.E.2d 131 (1996) ..... 28

*State v. Lassiter*,
177 W. Va. 499, 354 S.E.2d 595 (1987) ..... 22

*State v. Louk*,
169 W.Va. 24, 285 S.E.2d 432 (1981) ..... 20

*State v. Miller*,
194 W. Va. 3, 459 S.E.2d 114 (1995) ..... 24, 25, 26, 28

*State v. Neider*,
170 W. Va. 662, 295 S.E.2d 902 (1982) ..... 20, 22

*State v. Pratt*,
161 W. Va. 530, 244 S.E.2d 227 (1978) ..... 22

*State v. Sowards*,
No. 12-0660, 2013 WL 1632567 (W. Va. Supreme Court, Apr. 16, 2013)(memorandum decision) ..... 9

*Strickland v. Washington*,
466 U.S. 668 (1984) ..... 24, 25, 26, 28

*Town of Star City v. Trovato*,
155 W. Va. 253, 183 S.E.2d 560 (1971) ..... 14

**Rules**

W. Va. R. App. P. 18(a)(3) and (4) ..... 11

W. Va. R. Crim. P. 21 ..... 23

W. Va. T.C.R. 2.06 ..... 16

**Statutes**

W. Va. Code § 61-2-9(a).....21

W. Va. Code § 61-2-9(c).....21

W. Va. Code § 62-3-21 .....14, 15, 16

## I. INTRODUCTION

Respondent, Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel, Lara K. Bissett, Assistant Attorney General, responds to Mark Sowards' ("Petitioner") brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, this Court should affirm the ruling of the circuit court.

## II. ASSIGNMENTS OF ERROR

Petitioner advances five assignments of error in his brief:

I. The Circuit Court Erred in Denying Relief Upon "Ground 1" of the Petition for Writ of Habeas Corpus, Inordinate Delay of Trial.

II. The Circuit Court Erred in Denying Relief Upon "Ground 2" of the Petition for Writ of Habeas Corpus, Failure to Instruct the Jury on a Lesser Included Offense.

III. The Circuit Court Erred in Denying Relief Upon "Ground 3" of the Petition for Writ of Habeas Corpus, Reversible Evidentiary Rulings.

IV. The Circuit Court Erred in Denying Relief Upon "Ground 4" of the Petition for Writ of Habeas Corpus, Ineffective Assistance of Counsel.

IV. The Circuit Court Erred in Denying Relief Upon "Ground 6" of the Petition for Writ of Habeas Corpus, Cumulative Effect of Multiple Trial Errors.

Pet'r Br. 1.

## III. STATEMENT OF THE CASE

### A. Indictment and underlying crime.

Petitioner was indicted on October 7, 2008, in Cabell County case number 08-F-334 on one count of first degree robbery and one count of malicious wounding. App. 3, 12. The victim in the case was Tim Rosinsky, App. 12, who is a long-time Cabell County attorney. At trial, the victim testified as to the events underlying the indictment as follows: On August 11, 2008, Mr. Rosinsky joined Petitioner and others in a poker game at Blackhawk Grille in Barboursville, West

Virginia. App. 466-67. Mr. Rosinsky was sitting at the poker table immediately to the right of Petitioner. App. 469. Mr. Rosinsky had never met Petitioner before that night. App. 469. At one point, Mr. Rosinsky took out his wallet from his back pocket and removed $300.00 to buy back into the game after he had lost all of his initial chips. App. 470-71. He was left with $10.00 in his wallet. App. 472.

He recalled that, at that point, Petitioner "had amassed a fairly large chip count." App. 473. Petitioner "was up well over a Thousand Dollars." App. 473. But then Mr. Rosinsky began winning, and Petitioner began losing. App. 472-73. Around midnight, Mr. Rosinsky and Petitioner were engaged in a hand wherein Mr. Rosinsky raised the bet to the point that Petitioner folded. App. 474. After Petitioner folded, Mr. Rosinsky tossed his own cards down and said, "That's weird." App. 474. Petitioner grabbed Mr. Rosinsky's hand and said, "Did you just call me a queer?" Mr. Rosinsky and another player explained that Mr. Rosinsky did not call Petitioner a queer and demanded that he let go of Mr. Rosinsky. App. 475. The poker game continued for another hour or two after that, with Mr. Rosinsky "whittling away [Petitioner's] chips and [Petitioner] getting, you know, nervous and upset about it." App. 475-76. Mr. Rosinsky eventually "wiped [Petitioner] out in the game" and Petitioner had to buy back into the game. App. 476. Petitioner did not have the money necessary to buy more chips, but he was given $200.00 in chips nonetheless. App. 477. When the game ended, Petitioner had $190.00 in chips, but since he hadn't paid for those chips, he actually owed the house $10.00. App. 479.

Petitioner left, and Mr. Rosinsky stayed behind to collect his winnings, which amounted to "several Thousand Dollars." App. 480. The house was short the full amount of money, however, and Mr. Rosinsky left with only $1,400.00. App. 480-81. The money would not fit in his wallet, so Mr. Rosinsky put the money in one of his front pockets. App. 481.

As Mr. Rosinsky walked out of the Blackhawk Grille toward the parking lot, he saw Petitioner standing in the parking lot, facing the restaurant. App. 486-87. Mr. Rosinsky continued to the parking lot, and Petitioner said something to him. App. 489. As Mr. Rosinsky turned to see what Petitioner was trying to say, Petitioner punched him in the face. App. 489. Mr. Rosinsky buckled from the strike. App. 490. He could not defend himself because he had his right hand—his dominant hand—in his pocket. App. 490. Petitioner held Mr. Rosinsky up

> and just started hitting [Mr. Rosinsky] in the face to the point where [he] kind of collapsed, and [he] landed on the ground kind of face down in a clump, defenseless. And then [Petitioner] started playing a game of kick ball with [Mr. Rosinsky's] head and he started kicking [Mr. Rosinsky] with his feet when [Mr. Rosinsky] was laying on the ground.

App. 490. Petitioner did not kick Mr. Rosinsky anywhere but in his head, and Mr. Rosinsky was not able to fight back. App. 491. Mr. Rosinsky thought Petitioner was going to kill him. App. 491. When the kicks finally stopped, Mr. Rosinsky felt Petitioner "fumbling" around in Mr. Rosinsky's back right pocket, where his wallet was. App. 492-93.

Mr. Rosinsky eventually mustered the strength to stumble back across the street to the Blackhawk where he told one of the other players that Petitioner had beaten him. App. 494-96. He suffered a concussion, a broken nose, several broken bones in his face, and a laceration over his left eye. App. 496-97.

**B. Procedural history.**

On December 10, 2008, the parties[1] jointly agreed and jointly moved to reset the trial, with Petitioner waiving his right to a trial in that term of court. App. 128. The parties came again on February 24, 2009, to jointly move to reset the trial. App. 129. On April 6, 2009, the parties again

[1] Petitioner was then represented by Luke Styer. App. 128.

jointly agreed and jointly moved to reset the trial, with Petitioner waiving his right to a trial in that term of court. App. 130. Yet another joint motion to continue was filed on June 3, 2009. App. 131. A fifth joint motion to reset the trial was filed on July 14, 2009. App. 133. Petitioner, again, waived his right to trial in that term of court. App. 133. At that time, trial was set for October 20, 2009. App. 133.

Petitioner was appointed new counsel (Matt Woelfel) on August 28, 2009. App. 135. A conflict of interest led to Petitioner being appointed new counsel (Jason Spears) on September 10, 2009. App. 137. Mr. Spears was subsequently appointed to a position as an Assistant Prosecuting attorney, so new counsel (Jeff Stevens) was appointed on October 2, 2009. App. 138. Just a week later, Mr. Stevens moved to withdraw, and Adrian Hoosier was appointed in his place on October 20, 2009, which was the day of trial. App. 133, 141. Necessarily, then, the trial was reset upon joint motion of the parties. App. 142. The parties again jointly agreed and jointly moved to reset the trial on December 11, 2009. App. 143. Again, Petitioner waived his right to a trial in that term of court. App. 143.

On March 3, 2010, Petitioner moved for a change of venue, citing "substantial prejudice presently existing against the Defendant." App. 144. The trial court denied the motion *nunc pro tunc* on March 31, 2010, after a hearing on that and other motions. App. 146-147.

The parties filed yet another jointly agreed motion to reset the trial on May 13, 2010. App. 148. On July 12, 2010—one week before the scheduled trial date of July 19, 2010, App. 148—Petitioner moved to continue due to an upcoming surgical procedure he was set to undergo. App. 149. On July 15, 2010, Petitioner moved to disqualify the Cabell County Prosecuting Attorney, citing Mr. Spears' prior representation of Petitioner. App. 151-52. The trial court granted the motion to disqualify on September 1, 2010. App. 156. Trial was set to begin on

September 27, 2010, but was continued. App. 157. The Putnam County Prosecuting Attorney was appointed as Special Prosecutor on September 29, 2010. App. 158-59.

Petitioner was re-indicted on October 19, 2010,[2] in Cabell County case number 10-F-351 on one count of first degree robbery and one count of malicious assault, App. 15, in order "to more particularly describe the property that was taken," App. 166-67.

Though the record does not make clear when, at some point thereafter, the case was transferred from Judge Dan O'Hanlon to Judge John L. Cummings. *See* App. 160. Thereafter, on December 15, 2010, the case was transferred to Judge Alfred E. Ferguson. App. 160.

A suppression hearing was held on April 8, 2011, at which time Sgt. Larry D'Alessio of the Barboursville Police Department testified that he first encountered Petitioner in the emergency room of the hospital. App. 199. Sgt. D'Alessio described Petitioner's demeanor at that time as "fairly rational" and "coherent" and noted that Petitioner did not appear to be intoxicated or slurring his speech. App. 207-09.

At that same hearing, the trial court noted, "I am going to go ahead and set this for trial and I will set one more date. This case has been going too long now." App. 216. The trial was set for June 7, 2011. App. 217.

Petitioner moved to disqualify Judge Ferguson on May 27, 2011, based on the fact that the victim practices before the judge. App. 225-26. The trial court denied the motion, noting that it was filed "a mere 12 calendar days" from the trial date. App. 231-32. The trial court further found that it had no personal relationship with the victim and held no prejudice either for or against Petitioner or the victim. App. 232. Petitioner then moved to continue the trial on June 3, 2011,

---

[2] A *nolle prosequi* was entered in 08-F-334. *See* App. 167, 224.

alleging that counsel had "health issues which are currently preventing him from working for more than three hours at a time for the next ten (10) days." App. 234. Trial was reset for September 20, 2011. App. 238.

On September 6, 2011—just two weeks prior to trial—Petitioner requested new counsel. App. 238. The trial was necessarily continued again. App. 238. Jack Laishley was appointed to represent Petitioner on November 8, 2011. App. 240.

Yet another joint motion to continue trial into the next term of court was made on December 13, 2011. App. 241. Petitioner remained on bond. App. 241.

On January 31, 2012, Petitioner filed a "Motion to Dismiss Indictment for Failure to Prosecute," App. 243-44, with trial scheduled for February 23, 2012, App. 241. He further filed "Retroactive Demands for Trial in Same Term"[3] on the same day. App. 248-49. A hearing was held on the motions on February 8, 2012. App. 254. At that time, the State pointed out that Petitioner had waived his rights to trial in each continued term. App. 274-75. The State further noted, "In every one of these terms the Defendant was getting exactly what he wanted, which was a continuance. If he didn't specifically waive the term, what he did is he brought up something close to the trial that caused the delay and us having to move the trial." App. 276. The State explained the reasoning behind each term continuance. App. 276-77. The trial court recounted every continuance of trial, noting that they were all granted based on agreed motions. App. 281-90. The trial court found no violation of the three-term rule. App. 290, 377-79.

The case proceeded to trial February 23, 2012. App. 380.

Sgt. D'Allessio testified that on the night of the robbery and malicious assault, Petitioner told him that he and Mr. Rosinsky had been attacked by two people. App. 587. Petitioner offered

[3] He filed his "Second Retroactive Demands for Trial in Same Term" the same day. App. 251-52.

Sgt. D'Allessio "very generic" descriptions of the supposed attackers. App. 587. Fellow poker player Craig Brumfield also testified that Petitioner told him (Mr. Brumfield) that he (Petitioner) "didn't do this; there were some guys that jumped them." App. 709.

There was testimony from witness Patrick Carter that Petitioner had been drinking "beer and maybe some mixed drinks" during the poker game. App. 697.

Witnesses Steve Pay, Mr. Brumfield, and Lisa Lawson described Mr. Rosinsky as unrecognizable after the assault. *See* App. 667 (Mr. Pay testified, "He just didn't look like Tim. I mean, he looked unrecognizable. I didn't know him."), App. 707 (Mr. Brumfield testified, "I mean, he was – he was messed up pretty bad."), App. 716 (Ms. Lawson, Mr. Rosinsky's then-wife, described Mr. Rosinsky as "unrecognizable" because "[h]is face was beat to a pulp."). Mr. Pay testified that Mr. Rosinsky was "just a bloody mess. I mean, I was just in awe. I couldn't – ." App. 668. Mr. Rosinsky told Mr. Pay that Petitioner was his attacker, App. 668, which Mr. Carter, App. 690, also heard. Mr. Carter testified that they periodically had to check to make sure Mr. Rosinsky was still breathing. App. 691. Mr. Brumfield testified that Mr. Rosinsky "was bleeding pretty bad" so the men rolled Mr. Rosinsky over from his back because Mr. Brumfield was afraid he would inhale or swallow the blood. App. 708. Upon arriving at the hospital, Ms. Lawson found Mr. Rosinsky's face to be "probably double the size," with his eyes "pretty much swelled shut" and "tons of blood." App. 716.

Petitioner's wife, Judy Sowards, testified that she received a phone call from Petitioner, who was "hysterical" at St. Mary's Hospital, telling her that "he had been jumped by some guys in the parking lot across from the Blackhawk Grille. He was trying to help someone and he ended up in the middle of it." App. 739. Mrs. Sowards testified that the day after the assault, she took

photographs of Petitioner's hands (to show they "had no marks whatsoever on them") and his face (to show "knots on his head and he had a black eye"). App. 740.

Petitioner testified on his own behalf, asserting that Mr. Rosinsky had been drinking before he arrived at the poker game. App. 759. Petitioner testified that after their disagreement at the table, Mr. Rosinsky bought him a vodka and cranberry juice to apologize. App. 763. He testified that after he cashed out, he stopped to urinate next to a building on his way to his car, at which point he "heard the commotion. I mean, it was yelling." App. 767. Petitioner testified that he looked over and saw "two people fighting on the ground. That's exactly what I seen." App. 768. He testified that he "walked over and kind of – I pushed the guy off of him . . . [a]nd right when I did that I got punched across my nose from the left side, and the individual started attacking me." App. 768. Petitioner testified that he ran to his car, but "he reached me again, hit me in the back of the head." App. 768-69. He asserted that the attacker was still in his car as he drove away, but he could not say what happened to the man. App. 769.

Despite having just testified to one unidentified attacker, Petitioner went on to testify that he described *two* attackers to Sgt. D'Allessio at the hospital. App. 773. He maintained, though, that "[his] story has been the same since Day One." App. 774.

At the close of testimony, Petitioner requested a lesser-included offense instruction for battery. App. 816. The trial court found that there was no evidence to support a battery charge, noting, "I don't think the facts of this case would justify the Battery." App. 817. The trial court did, however, give a lesser-included offense instruction for unlawful assault. App. 835, 852.

The jury returned a verdict of guilty on both first degree robbery and malicious assault. App. 894. He was sentenced to consecutive terms of forty years in prison for robbery and not less than two nor more than ten years in prison for malicious assault. App. 107-08.

### C. Direct appeal.

Petitioner appealed his conviction, alleging plain error in the amendment of the indictment and disproportionate sentence. *State v. Sowards*, No. 12-0660, 2013 WL 1632567, at *1-*2 (W. Va. Supreme Court, Apr. 16, 2013) (memorandum decision). This Court rejected his claims and affirmed his conviction and sentence on April 16, 2013. *Id.* at *3.

### D. Habeas Corpus Proceeding.

On December 3, 2019, Petitioner filed a *pro se* petition for writ of habeas corpus,[4] alleging (1) inordinate delay of trial, (2) failure to instruct on a lesser-included offense, (3) erroneous evidentiary rulings, (4) ineffective assistance of counsel, and (5) cumulative error. App. 17-56. Counsel subsequently filed what amounted to an amended petition entitled "Habeas Corpus Brief on Behalf of Mark Sowards" on March 8, 2021, alleging (1) inordinate delay of trial, (2) failure to instruct on a lesser-included offense, (3) erroneous evidentiary rulings, (4) ineffective assistance of counsel, (5) failure to grant credit for post-conviction home confinement pending appeal, and (6) cumulative error. App. 57-90. The State filed a written response to the petition. App. 91-104.

An omnibus hearing was held on May 12, 2021. App. 105. Trial counsel, Jack Laishley, testified at that hearing, as did Petitioner and his wife. App. 106. Mr. Laishley testified that he had retired in 2014 and no longer had Petitioner's file. App. 113. He recalled many details of the case nonetheless. App. 114-115. In particular, he recalled a color photograph of Mr. Rosinsky in the hospital, which Mr. Laishley described as showing a "brutalized" Mr. Rosinsky. App. 115. Mr. Laishley further recalled that Petitioner denied committing the crime all along. App. 115.

---

[4] Petitioner was previously represented by Robert P. Dunlap, II, who filed a petition on Petitioner's behalf on June 14, 2018. App. 105. That petition is not part of the record. Mr. Dunlap was allowed to withdraw from the case on December 16, 2019. App. 105. Petitioner was then represented by Owen Reynolds, but he was granted permission to withdraw from the case on May 22, 2020. App. 105. Current counsel was appointed to the case on June 2, 2020. App. 105.

Mr. Laishley was clear that Mr. Rosinsky, a practicing attorney in Cabell County, being the victim in the case did not cause him any concern that Petitioner could receive a fair trial. App. 115.

Mr. Laishley testified that the defense theory was that Petitioner had not committed the robbery or the assault. App. 116. When asked why he didn't pursue a diminished capacity defense in light of Petitioner's consumption of alcohol, Mr. Laishley testified, "Well, I thought that voluntarily [sic] intoxication is not a defense, but whatever." App. 116. Moreover, Petitioner's wife later testified that it was Mr. Rosinsky who was grossly intoxicated, noting, "I didn't read that my husband had any." App. 125.

Petitioner testified that he had been released on $30,000.00 bond shortly after his September 2008 indictment. App. 118, 120. He testified that, in total, seven lawyers represented him. App. 119. Petitioner testified that throughout that time—until Mr. Laishley was appointed to his case—no one had ever advised him of his right to a speedy trial. App. 119. Petitioner testified that he, personally, never agreed to any of the continuances of his trial. App. 120.

Petitioner further testified that "every single" attorney he had, except Mr. Laishley, moved to change the venue of the trial. App. 121. Regarding other concerns about Mr. Laishley's representation, Petitioner noted that he found Mr. Laishley unprofessional and "kind of mad and stuff." App. 121.

Regarding the trial court, Petitioner took issue with the judge denying "every single thing that we wanted suppressed," asserting that he "felt like there was a conflict there." App. 121.

Petitioner maintained his innocence, claiming to be a victim himself. App. 124.

On June 11, 2021, the habeas court entered its order denying Petitioner relief. App. 111. Regarding inordinate delay of trial, the habeas court found that, pursuant to the testimony at the

omnibus hearing, "[Petitioner] and/or his counsel requested and/or agreed to many of the continuances that were granted in the underlying action." App. 109. The habeas court further found that Petitioner was not prejudiced by any delay. App. 109. Regarding the jury instructions, the habeas court found that "[t]he record reflects that there was ample evidence presented at trial supporting the jury instructions as given and further there is nothing to suggest that the trial court abused its discretion in refusing to instruct the jury as requested by [Petitioner's] trial counsel." App. 109-110.

The habeas court further found that

> "[t]here was not a showing the trial court abused its discretion in its rulings with regard to trial counsel's motion to dismiss based on violation of [Petitioner's] right to speedy trial, trial counsel's motion to change venue, allowing [Petitioner's] statement and clothes into evidence, and the [c]ourt's questioning of a witness."

App. 110. As to ineffective assistance of counsel, the habeas court found that "there was no evidence that Mr. Laishley's representation of [Petitioner] was deficient under an objective standard of reasonableness and there is no evidence that but for his unprofessional errors that the outcome of the underlying trial would have been different." App. 110.

The habeas court did grant Petitioner relief regarding his claim for credit for time served while on home confinement pending appeal. App. 110. The habeas court found, however, that, aside from the time served issue, the evidence did not warrant a finding of cumulative error. App. 111. Accordingly, the habeas court granted the petition in part and denied the petition in part. Petitioner now appeals.

## IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

## V. SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate that the habeas court abused its discretion or otherwise erred in denying him habeas relief on the five grounds cited in his brief. First, Petitioner's right to a speedy trial was not violated by the State. Petitioner agreed to and jointly moved for seven continuances in this case and moved for three more on his own. Yet another continuance was necessitated by Petitioner's motion to recuse the Cabell County Prosecuting Attorney's Office and the need to appoint a Special Prosecutor. Furthermore, Petitioner waived his right to a trial in each of the terms of court in which trial was continued. The law is clear that a defendant cannot cause or agree to a continuance of trial and then invoke his right to a speedy trial. Accordingly, Petitioner's "inordinate delay" argument fails.

Second, the jury was properly instructed by the trial court. The evidence adduced at trial neither necessitated nor supported the giving of an instruction for misdemeanor battery. On the contrary, the graphic testimony of the victim and other witnesses at trial fully supported the distinct elements of the greater offense of malicious assault, vitiating any right to a lesser-included offense instruction for battery. Moreover, the jury soundly rejected the lesser-included offense of unlawful assault that was presented. Petitioner's argument is meritless.

Third, Petitioner has failed to demonstrate that he was entitled to a change of venue. Petitioner's testimony at the omnibus hearing clearly indicated that he felt that his trial was unfair due to the victim's relationship as a practicing attorney with other attorneys and court personnel in Cabell County. As the Special Prosecutor pointed out at the omnibus hearing, however, there is nothing in the record to indicate that the *jurors* who delivered the verdict in this case had any relationship with the victim or any bias against Petitioner. Again, his argument fails.

Fourth, trial counsel did not perform below the standard of a reasonable attorney when he failed to put forth a defense of voluntary intoxication. To begin, there is nothing in the record to indicate that Petitioner was intoxicated on the night in question, let alone that he was *so* intoxicated that it diminished his capacity to act maliciously. Furthermore, Petitioner's defense was—and remains—that he did not attack the victim at all but, rather, was a victim himself of some unidentified attacker(s). Petitioner's argument is without merit.

Finally, because Petitioner has failed to demonstrate *any* error by the trial court or habeas court, he cannot demonstrate *cumulative* error. This Court should affirm the ruling of the habeas court.

## VI. ARGUMENT

### A. Standard of Review.

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

### B. Petitioner was not denied his right to a speedy trial.

Petitioner argues that he was denied his right to a speedy trial, arguing that though the continuance orders were titled "Agreed Order," he did not agree to any continuances beyond those for his attorney's surgery, his own surgery, and when the Special Prosecutor was appointed. Pet. 7-9. Petitioner's argument is not supported by the record in this case. This Court should affirm the decision of the habeas court.

West Virginia Code § 62-3-21 provides that a criminal defendant indicted on a felony offense shall be tried within three terms of court unless:

> the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; *or by a continuance granted on the motion of the accused*; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict . . . .

*Id.* (emphasis added). The purpose of this statute is to ensure that the State diligently pursues its case against a defendant. *See Good v. Handlan*, 176 W. Va. 145, 149, 342 S.E.2d 111, 115 (1986) (gathering authorities and noting that "[u]nder the three-term rule, we have held that it is the duty of the State to provide a trial without unreasonable delay and an accused is not required to demand a prompt trial as a prerequisite to invoking the benefit of this rule."); *State ex rel. Waldron v. Stephens*, 193 W. Va. 440, 442, 457 S.E.2d 117, 119 (1995) (noting that "[i]n syllabus point 2 of *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993), we held that '[i]t is the three-term rule, W. Va. Code § 62-3-21 [1959], which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution.'"); *Town of Star City v. Trovato*, 155 W. Va. 253, 257, 183 S.E.2d 560, 562 (1971) (noting that the purpose of § 62-3-21 "is to assure the defendant a speedy trial").

As this Court has recognized on a number of occasions, "[t]he three-term rule provides that a post-indictment delay cannot be much longer than a year without an act on the defendant's part to extend the term between indictment and trial[.]" *State ex rel. Murray v. Sanders*, 208 W. Va. 258, 262, 539 S.E.2d 765, 769 (2000); *see also* Syl. Pt. 1, *State v. Damron*, 213 W. Va. 8, 10, 576 S.E.2d 253, 255 (2002) ("[W]hen an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the

exceptions enumerated in the statute." (quoting Syllabus, *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998)). Thus, if a defendant is not tried timely, the remedy under West Virginia Code § 62-3-21 is a dismissal of the indictment with prejudice.

With this context in mind, there are four exceptions to the three term rule which apply to the matter at hand. First, the term in which the indictment is returned does not count. *State v. Fender*, 165 W. Va. 440, 446, 268 S.E.2d 120, 124 (1980) (citing *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 120 S.E.2d 504 (1961) ("In computing the three-term rule we do not count the term at which the indictment is returned.")). Second, agreed continuances do not count toward the three-term limit. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118 ("Since the May 1985 term was continued by agreement of the parties, it cannot be counted and, consequently, the relator has failed to show three terms excluding the term of the indictment that are countable under W. Va. Code, 62-3-21."). Third, when a criminal defendant delays trial, the term does not count. "Any term at which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three terms in favor of discharge from prosecution under the provisions of Code, 62-3-21, as amended." Syl. Pt. 3, *Fender*, 165 W. Va. at 441, 268 S.E.2d at 121 (quoting Syl. pt. 2, *State ex rel. Spadafore v. Fox*, 155 W. Va. 674, 186 S.E.2d 833 (1972)). Fourth, "[w]here a court does not have time for the disposition of motions or pleas filed by the accused and a term passes as a result thereafter, such term cannot be counted as one of the three terms under the provisions of Code, 62-3-21, as amended." *State v. Bias*, 177 W. Va. 302, 316, 352 S.E.2d 52, 66 (1986) (citations omitted).

When a trial is not held on the charges against the accused during a certain term of court due to no fault on the part of the accused, and where no exception set forth above or in West Virginia Code § 62-3-21 exists, such term is an "unexcused term" chargeable to the State under

West Virginia Code § 62-3-21. *See State ex rel. Stines v. Locke*, 159 W. Va. 292, 220 S.E.2d 443 (1975).

Here, the terms of court of the Circuit Court of Cabell County begin on the first Monday of January and May and the second Tuesday of September each year. W. Va. T.C.R. 2.06. Petitioner was indicted on October 7, 2008, during the *September 2008 term* of court. App. 3, 12. It is well-established that the term during which a defendant is indicted does not count towards the three-term rule, *e.g.*, *Handlan*, 176 W. Va. at 152, 342 S.E.2d at 118; *State v. Ballenger*, No. 16-0986, 2017 WL 5632824, at *3 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision). Therefore, the September 2008 term of court is excused and does not count toward the three-term rule. Moreover, trial was set for December 15, 2008, but was continued on the agreed and joint motion of the State and Petitioner, with "the defendant having waived his right to a trial in this term of Court." App. 128.

In the *January 2009 term* of court, trial was set for February 24, 2009, but was continued on the joint motion of both parties. App. 129. Trial was reset for April 13, 2009, but was again continued upon the joint motion of the parties. App. 130. Again, the record reflects "the defendant's waiver of his right to trial in this term of Court." App. 130. Thus, the January 2009 term of court is excused and does not count toward the three-term rule because it was an agreed continuance. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118; *State v. Jordan*, No. 13-0616, 2014 WL 1672951, at *2 (W. Va. Supreme Court, April 25, 2014) (memorandum decision).

Trial was reset to June 8, 2009, which fell in the *May 2009 term* of court. App. 130. That trial date was reset to August 3, 2009, on the joint motion of the parties. App. 131. That August trial date, too, was continued on the joint motion of the parties, with Petitioner waiving "his right to a trial in this term of Court." App. 133. Accordingly, the May 2009 term of court is excused

and does not count toward the three-term rule because it was an agreed continuance. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118; *Jordan*, 2014 WL 1672951, at *2.

In the *September 2009 term* of court, trial was set for October 20, 2009. App. 133. Defense counsel moved to withdraw on October 9, 2009, however, and new counsel was appointed a mere eleven days before trial. App. 141. Four days later, the parties filed an agreed and joint motion to reset the trial to December 15, 2009. App. 142. The parties, however, filed an agreed and joint motion to continue the trial on December 11, 2009, which was granted "after the defendant waived his right to trial in this term of court." App. 143. The September 2009 term of court, then, is excused and does not count toward the three-term rule because it was an agreed continuance. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118; *Jordan*, 2014 WL 1672951, at *2.

Trial was next set for April 19, 2010, during the *January 2010 term* of court. App. 143. Petitioner moved to continue that trial date, waiving his right to trial in that term of court. App. 146. Thus, the January 2010 term is excused and does not count toward the three-term rule. Syl. Pt. 3, *Fender*, 165 W. Va. at 441, 268 S.E.2d at 121.

The next term of court occurred in *May 2010*, with trial set for June 28, 2010. App. 147. That trial was continued to July 19, 2010, by agreement of the parties. The July trial date was then continued on motion of Petitioner, citing a surgical procedure that he was scheduled to undergo. App. 149. Petitioner, again, waived his right to a trial in that term of court. App. 154. Therefore, the May 2010 term is excused and does not count toward the three-term rule. Syl. Pt. 3, *Fender*, 165 W. Va. at 441, 268 S.E.2d at 121.

Trial was reset to September 27, 2010—in the *September 2010 term* of court—however, the Cabell County Prosecuting Attorney's Office was disqualified on the July 15, 2010, motion of

Petitioner; so, the trial was continued to allow a Special Prosecutor to appear. App. 154-57. Trial was reset to December 10, 2010. App. 157.

In the meantime, the presiding judge retired. App. 120. The case was re-assigned to Judge John L. Cummings, who recused himself due to his relationship with the victim. App. 120. The case was then re-assigned to Judge Alfred E. Ferguson on December 15, 2010. App. 160. The record indicates that the next action in the case was a suppression hearing on April 8, 2011, App. 161, at which time the trial was set for June 7, 2011. App. 217. That took the trial into the *May 2011 term* of court.

Petitioner then filed a motion to disqualify Judge Ferguson on May 25, 2011. App. 229-30. The motion was denied on June 6, 2011. App. 231-33. In the meantime, Petitioner moved to continue trial on June 3, 2011, citing health challenges faced by trial counsel. App. 234. Trial was continued to "a later date" on June 6, 2011. App. 237. Trial was ultimately reset to September 20, 2011. App. 238. Because the continuance was requested by Petitioner, the May 2011 term of court is excused. Syl. Pt. 3, *Fender*, 165 W. Va. at 441, 268 S.E.2d at 121.

In the *September 2011 term* of court, just fourteen days before the scheduled trial, Petitioner requested new counsel. App. 238. New counsel was appointed on November 7, 2011. App. 240. Thereafter, the parties jointly moved to continue the December 13, 2011, trial date into the next term of court. App. 241. The September 2011 term of court, then, is excused and does not count toward the three-term rule because it was an agreed continuance. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118; *Jordan*, 2014 WL 1672951, at *2.

Trial was reset to and began on February 23, 2012, in the *January 2012 term* of court. App. 241.

The record makes clear that only two terms of court passed which, arguably, cannot be attributed to Petitioner's actions: the September 2010 term, in which Judge O'Hanlon retired and the case had to be reassigned twice, App. 120 and 160, and the January 2011 term, in which it appears Judge Ferguson did not take any action in the case until April 2011, just a month before the term ended. App. 161. Petitioner's argument that he was not afforded a speedy trial pursuant to the three-term rule is meritless.

While Petitioner testified at the omnibus hearing that he did not, in fact, agree to any of the continuances of his trial or waive his rights to trial in any term of court, App. 120, his testimony is entirely self-serving. All but two of the orders granting continuances into the next term of court, App. 238 and 241, specifically reflect that Petitioner waived his right to trial in those terms, App. 128, 130, 133, 143, 146, 154. Petitioner did not, however, call any of his prior attorneys at the omnibus hearing to corroborate his testimony, nor has he included in the appendix record any transcripts of any of those motion hearings to demonstrate that he objected to the continuances.

Furthermore, this Court has rejected claims invoking the speedy trial rule where continuances of trial "had no impact on the length of time petitioner was detained in jail prior to trial." *State v. Glaspell*, No. 12-0685, 2013 WL 3184918, at *5 (W. Va. Supreme Court, June 24, 2013) (memorandum decision). Here, Petitioner testified at the omnibus hearing that he had been released on $30,000.00 bond shortly after his September 2008 indictment. App. 118, 120. Accordingly, Petitioner cannot demonstrate that the continuances of his trial left him incarcerated for an inordinate amount of time.

For all of these reasons, this Court should affirm the habeas court's ruling.

### C. The evidence adduced at trial neither necessitated nor supported the giving of an instruction for battery.

Petitioner next argues that the jury was not properly instructed because the trial court declined to give a lesser-included offense instruction for battery. Pet. 10-12. The record demonstrates that the evidence presented at trial did not support such an instruction. Moreover, the jury specifically rejected the lesser-included offense that *was* offered before it—unlawful assault—further impugning the merit of Petitioner's argument. This Court should affirm the decision of the habeas court.

This Court has held:

> The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.

Syl. Pt. 1, *State v. Louk,* 169 W.Va. 24, 285 S.E.2d 432 (1981). *However*, "[w]here there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syl. Pt. 2, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982). Here, Petitioner does not even dispute that the evidence adduced at trial was sufficient to support the distinct elements of the greater offense. Rather, he simply argues that the evidence supported the lesser offense. Pet. 11-12.

The evidence at the underlying criminal trial was more than sufficient to prove the elements of the greater offense of malicious assault:

> If any person maliciously shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury *with intent to maim, disfigure, disable or kill*, he or she, except where it is otherwise provided, is guilty of a felony . . . .

W. Va. Code § 61-2-9(a). Battery, on the other hand, is defined as "physical contact of an insulting or provoking nature to the person of another or unlawfully and intentionally caus[ing] physical harm to another person." W. Va. Code § 61-2-9(c). Here the testimony clearly demonstrated an "intent to maim, disfigure, disable or kill" Mr. Rosinsky.

Mr. Rosinsky testified extensively to Petitioner's repeated blows, first with his hands and then with his feet, all aimed at Mr. Rosinsky's head and face. Mr. Rosinsky graphically described the abuse, stating that it was like Petitioner was playing a game of kickball with his head, App. 490, and that he feared Petitioner would kill him, App. 491. Likewise, witnesses Steve Pay, Chris Brumfield, and Lisa Lawson described Mr. Rosinsky's gruesome injuries, noting that he was unrecognizable after the assault. *See* App. 667, 668, 707, 716. Witness Pat Carter testified that he periodically checked to make sure Mr. Rosinsky was still breathing because his injuries were so extensive. App. 691. Mr. Brumfield testified that Mr. Rosinsky "was bleeding pretty bad" so the men rolled Mr. Rosinsky over from his back because Mr. Brumfield was afraid he would inhale or swallow the blood. App. 708. Ms. Lawson testified that when she saw her then-husband in the hospital after the assault, Mr. Rosinsky's face was "probably double the size," with his eyes "pretty much swelled shut" and "tons of blood." App. 716. Such brutal injuries go well beyond "physical contact of an insulting or provoking nature" and surely demonstrate an "intent to maim, disfigure, disable or kill." W. Va. Code § 61-2-9(a) and (c).

Furthermore, the jury was offered a verdict of the lesser-included offense of unlawful assault, App. 852-53, and squarely rejected it, App. 894. It defies logic that the jury would reject an unlawful assault verdict but seize on the much lesser battery verdict.

Accordingly, Petitioner was not entitled to a lesser-included offense instruction for battery. Syl. Pt. 2, *Neider*, 170 W. Va. 662, 295 S.E.2d 902. Therefore, the habeas court did not abuse its discretion or otherwise err in denying Petitioner relief on this claim.

**D. Petitioner has failed to demonstrate that he was entitled to a change of venue.**

While Petitioner categorizes his next assignment of error as "Reversible Evidentiary Rulings," neither of his sub-allegations implicate evidentiary rulings. Pet. 12. First, Petitioner cites his speedy trial argument. Pet. 12. He does not discuss the matter further but, rather, references his prior argument. Pet. 12. Neither will Respondent discuss the matter further. Second, he argues that the trial court abused its discretion in denying his motion for a change of venue. Pet. 13. That argument is meritless and should be rejected.

This Court has addressed change of venue numerous times, and has discussed at length the requirements for granting such a motion:

> "'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.' Point 2, Syllabus, *State v. Wooldridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946)." Syllabus Point 1, *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978).

Syl. Pt. 1, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). "'"Good cause shown" for change of venue, as the phrase is used in W. Va. Constitution, Article III, Section 14 and W.Va. Code 62–3–13, means proof that a defendant cannot get a fair trial in the county where the offense occurred because of the existence of a locally extensive present hostile sentiment against him.' Syl. Pt. 1, *State v. Pratt*, 161 W. Va. 530, 244 S.E.2d 227 (1978)." Syl. Pt. 1, *State v. Lassiter*, 177 W. Va. 499, 354 S.E.2d 595 (1987). "A present hostile sentiment against an accused,

extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county." Syl. Pt. 2, *Derr*, 192 W. Va. 165, 451 S.E.2d 731 (quoting Syl. Pt. 2, *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978) (additional internal quotations and citations omitted)). Further, Rule 21 of the West Virginia Rules of Criminal Procedure states:

> The circuit court upon motion of the defendant shall transfer the proceedings as to that defendant to another county if the circuit court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he or she cannot obtain a fair and impartial trial at the place fixed by law for holding the trial.

W. Va. R. Crim. P. 21. Petitioner has failed to show that he could not obtain a fair and impartial trial in this matter.

Petitioner's March 3, 2010, "Motion for a Change of Venue" did not cite to any present hostile *community* sentiment against him, extending throughout the entire county. *See* Syl. Pt. 2, *Derr*, 192 W. Va. 165, 451 S.E.2d 731. It merely cited "the existence of substantial prejudice presently existing against the Defendant, and that such prejudice constitutes good cause for removal of the case herein to another county." App. 144. By his own admission, Petitioner's testimony at the omnibus hearing was "that his top, if not his main concern, with the trial was the victim's relationship with the *court system*, as he was a practicing attorney in Cabell County." Pet. 13 (emphasis added). When the Special Prosecutor asked, "But you understand that there were 12 jurors who didn't work here at the courthouse that decided you were guilty?" Petitioner answered, "Yes, ma'am." App. 124. He further acknowledged that those twelve jurors were duly vetted through *voir dire* and that they all indicated that they had no knowledge of or relationship with Mr. Rosinsky. App. 124-25. Petitioner produced no evidence to show that Mr. Rosinsky's career as a Cabell County attorney in any way affected the deliberations or the verdict of those twelve

jurors. Therefore, he failed to demonstrate to the habeas court that the trial court had abused its discretion in denying his motion for a change of venue.

Accordingly, then, this Court should affirm the ruling of the habeas court denying Petitioner relief on this claim.

**E. Trial counsel was not ineffective for failing to pursue a "voluntary intoxication" defense.**

Petitioner argues that trial counsel, Jack Laishley, was ineffective because he did not understand that "voluntary intoxication" was a valid defense to the crimes charged in the indictment and, thus, did not pursue such a defense. Pet. 15-16. The evidence at both the trial and the omnibus hearing belies Petitioner's argument. The argument fails, and this Court should affirm the decision of the lower court.

In West Virginia, ineffective assistance of counsel claims are assessed under the two-prong standard articulated by the Supreme Court in *Strickland v. Washington*. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (citing *Strickland*, 466 U.S. 668 (1984)). To succeed on such a claim, a petitioner must establish that "(1) [c]ounsel'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 would have been different." *Id.* "Failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999).

The *Strickland/Miller* standard is a demanding one. *See Miller*, 194 W. Va. at 16, 459 S.E.2d at 127 ("[T]he cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another."); *SER Daniel v. Legursky*, 195 W. Va. 314, 319, 465 S.E.2d 416, 421 (1995) (providing that ineffective assistance claims are "rarely"

granted and only when a claim has "substantial merit"). Review of defense counsel's performance is "highly deferential" and begins with the strong presumption that "counsel's performance was reasonable and adequate." *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127 (internal quotation omitted).

A petitioner claiming ineffective assistance must identify the specific "acts or omissions" of counsel believed to be "outside the broad range of professionally competent assistance." *Id.* at 17, 459 S.E.2d at 128. Identifying a mere mistake by trial counsel is not enough. As the *Miller* Court noted, "with [the] luxury of time and the opportunity to focus resources on specific facts of a made record, [habeas counsel] inevitably will identify shortcomings in the performance of prior counsel"; however, merely identifying some mundane mistake does not establish ineffectiveness because "perfection is not the standard for ineffective assistance of counsel." *Id.* Only if an identified error is "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment" has the first prong of the *Strickland/Miller* test been satisfied. *See Strickland*, 466 U.S. at 687. If such an error can be shown, the reviewing court is then tasked with determining, "in light of all the circumstances" but without "engaging in hindsight," whether that conduct was so objectively unreasonable as to be constitutionally inadequate. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

Assuming that trial counsel's conduct is deemed to have been objectively unreasonable (thereby satisfying the first prong of *Strickland/Miller*), such conduct does not constitute ineffective assistance unless it can also be established that the conduct had such impact that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at Syl. Pt. 5. As the Supreme Court explained in *Strickland*, "An error by counsel, even if professionally unreasonable, does not warrant setting

aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691. Thus, satisfying the "prejudice prong" of *Strickland/Miller* requires a showing that counsel's deficient performance was so serious and detrimental that it "adversely [a]ffected the outcome in a given case." *State ex. rel. Myers v. Painter*, 213 W. Va. 32, 36, 576 S.E.2d 277, 281 (2002). "The likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (emphasis added) (citing *Strickland*, 466 U.S. at 693).

The burden of demonstrating prejudice lies with the petitioner claiming ineffective assistance. *State v. Hatfield*, 169 W. Va. 191, 209, 286 S.E.2d 402, 413 (1982) (providing that "the burden is on the defendant to prove ineffective assistance"); *see also Strickland*, 466 U.S. at 693; *Daniel*, 195 W. Va. at 319, 465 S.E.2d at 421. Significantly, strategic choices and tactical decisions, with very limited exception, fall outside the scope of this inquiry and cannot form the basis of an ineffective assistance claim. *See SER Daniel*, 195 W. Va. at 328, 465 S.E.2d at 430 ("A decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness." (internal quotation marks and citations omitted)). This Court has consistently held that "[w]here a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 12, *State v. Kilmer*, 190 W. Va. 617, 439 S.E.2d 881 (1993) (internal quotation omitted) (quoting Syl. Pt. 21, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)).

Here, the record simply does not support Petitioner's allegations of ineffective assistance of counsel. He argues that trial counsel could have pursued a diminished capacity defense based on voluntary intoxication; however, such a defense was not available in this case. Petitioner erroneously relies on language in *State v. Joseph*, in which this Court noted:

> In *State v. Keeton,* 166 W.Va. 77, 82–83, 272 S.E.2d 817, 820 (W.Va.1980), this Court observed that "[w]hile it is true that voluntary drunkenness does not ordinarily excuse a crime, ... it may reduce the degree of the crime or negative a specific intent." (Citation omitted). *The Court also commented that it had generally held that "the level of intoxication must be 'such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation.'"* *Id.* at 83, 272 S.E.2d at 821 (quoting syllabus point 1, *State v. Davis,* 52 W.Va. 224, 43 S.E. 99 (1902)). *See also State v. Brant,* 162 W.Va. 762, 252 S.E.2d 901 (1979) (*finding that level of intoxication so incapacitated defendant that giving of first-degree and second-degree murder instructions was erroneous, but cautioning that case presented unique factual circumstances not likely to arise again*).

214 W. Va. 525, 531, 590 S.E.2d 718, 724 (emphasis added). That is not the situation presented to Mr. Laishley. There was no testimony from anyone, nor is there anything in the record to support, that Petitioner was intoxicated, let alone "so incapacitated" "such as to render [him] incapable of . . . acting with malice." *Joseph*, 214 W. Va. at 531, 590 S.E.2d at 724. To the contrary, Sgt. D'Allessio recounted in pre-trial proceedings that, upon encountering Petitioner at the hospital immediately after his car accident, Petitioner appeared "coherent" and that they "had a fairly rational conversation." App. 206-07. He further testified that Petitioner did not seem intoxicated—his speech was not slurred and he responded easily to questions. App. 208-09.

In a further blow to his argument, Petitioner's own wife testified at the omnibus hearing that it was Mr. Rosinsky who was grossly intoxicated, requiring two "banana bags," noting, "I didn't read that my husband had any." App. 125.

Moreover, a diminished capacity defense would have totally undermined Petitioner's contention that he was not the perpetrator. Mr. Laishley testified that the defense theory was that

Petitioner had not committed the robbery or the assault *at all*. App. 116. One cannot argue that he did not possess the necessary mental state to be convicted while simultaneously maintaining that he did not commit the crime at all.

Petitioner cannot meet the first prong of the *Strickland/Miller* test and, so, his claim fails. *SER Vernatter*, 207 W. Va. at 17, 528 S.E.2d at 213. The record fully supports the circuit court's rulings, and this Court should affirm its decision.

**F. Petitioner has failed to demonstrate *any* error, let alone *cumulative* errors.**

Petitioner's final argument is that the habeas court erred in failing to grant him relief on the basis of cumulative errors at trial. Pet. 16-17. His argument is meritless. There can be no cumulative error where there are no distinct errors. *State v. Knuckles*, 196 W. Va. 416, 425, 473 S.E.2d 131, 140 (1996). ("Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Accordingly, in the absence of any demonstrable error in the preceding assignments of error, Petitioner's claim of cumulative error must fail.

## VII. CONCLUSION

For the foregoing reasons, this Court should affirm the June 11, 2021, Order of the Circuit Court of Cabell County denying Petitioner habeas corpus relief.

Respectfully submitted,

DONNIE AMES, SUPERINTENDENT,
MT. OLIVE CORRECTIONAL COMPLEX,
*Respondent, by Counsel.*

PATRICK MORRISEY
ATTORNEY GENERAL

LARA K. BISSETT
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar # 9102
1900 Kanawha Blvd., East
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Email: Lara.K.Bissett@wvago.gov
*Counsel for Respondent*

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 21-0536**

**MARK SOWARDS**

*Petitioner,*

v.

**DONNIE AMES, Superintendent,**
**Mt. Olive Correctional Complex,**

*Respondent.*

## CERTIFICATE OF SERVICE

I, Lara K. Bissett, counsel for the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon pro se Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, January 13, 2022, and addressed as follows:

Juston H. Moore, Esq.
Juston H. Moore, PLLC
P.O. Box 278
Wayne, WV 25570

Lara K. Bissett (State Bar No. 9102)
Assistant Attorney General