STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Bradley Lester,
Petitioner Below, Petitioner

vs) No. 101159 (Mingo County 06-C-199)

Thomas L. McBride, Warden
Respondent Below, Respondent

FILED
March 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the circuit court's denial of an omnibus petition for *habeas corpus* relief filed by petitioner, Bradley Lester. This appeal was timely filed with the entire record designated for purposes of the appeal. A timely response was filed by Respondent Thomas McBride, Warden. Petitioner seeks a reversal of the circuit court's decision, a vacation of his conviction, and a remand to the circuit court for a new trial.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was convicted by a jury of first degree murder without mercy, and he was sentenced by the circuit court to life without mercy. Thereafter, petitioner filed a direct criminal appeal from his conviction, and his petition was heard on this Court's January 24, 2006, Motion Docket. On January 26, 2006, this Court refused the petition for appeal.

Thereafter, petitioner filed a *pro se* petition for a writ of *habeas corpus* in the circuit court, after which he was appointed *habeas* counsel. An amended petition for *habeas* relief was filed, and an omnibus hearing was held over several days during which petitioner, as well as his trial counsel, testified. Subsequently, the circuit court entered a forty-six page "Final Order Denying Petitioner's Omnibus Petition for *Habeas Corpus* Relief." Petitioner

appeals from that Order and raises multiple issues, several of which involve the admission of Rule 404(b) evidence during his murder trial.

"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).

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal, and has reviewed the record designated on appeal. Finding no error in the denial of *habeas corpus* relief, the Court affirms the decision of the circuit court and fully incorporates and adopts, herein, the lower court's detailed and well-reasoned "Final Order Denying Petitioner's Omnibus Petition for *Habeas Corpus* Relief" entered on February 9, 2010. The Clerk of Court is directed to attach a copy of the same hereto.

Affirmed.

ISSUED: March 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

Appendix to Memorandum Decision
Supreme Court of Appeals Case No. 101159

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

BRADLEY LESTER,

Petitioner,

v.

Civil Action No.: 06-C-199
Chief Judge Michael Thornsbury

THOMAS McBRIDE, Warden,

Respondent.

FINAL ORDER DENYING PETITIONER'S OMNIBUS PETITION FOR *HABEAS CORPUS* RELIEF

This matter came before the Court pursuant to the Petitioner, Bradley Lester's Motion for Habeas Corpus relief pursuant to the West Virginia Post Conviction Habeas Corpus Act, West Virginia Code § 53-4A-1, et seq. (1994). Previously the Court ordered this matter to be an Omnibus Habeas Corpus action and directed counsel to address all Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981). The parties appeared as follows the Petitioner, Bradley Lester, in person by teleconferencing, and through counsel, Mark Hobbs; and the Respondent, Thomas McBride, through counsel, C. Michael Sparks, Prosecuting Attorney. The Court now makes the following Findings of Fact, Conclusions of Law, and Judgment, to-wit:

Findings of Fact

1. On February 25, 2005, the Mingo Circuit Court Petit Jury found the Petitioner guilty of First-Degree Murder and recommended a sentence of life without parole. On March 14, 2005 the Petitioner was sentenced to life without parole. Mr. Lester then sought direct appeal to the West Virginia Supreme Court of Appeals asserting that the Court failed to require the State to make a showing of relevancy for the West Virginia Rules of Evidence Rule 404(b) evidence admitted at trial; the State's rationale for admission of the Rule

404(b) evidence was vague, conclusory, and unpersuasive; the testimony of Earl Stewart was insufficient for admission of the Rule 404(b) evidence; and the Court's limiting instructions were insufficient to cure the unfair prejudice of admission of the Rule 404(b) evidence. The West Virginia Supreme Court of Appeals denied Mr. Lester's direct appeal without hearing on January 26, 2006. Thereafter, Mr. Lester petitioned the West Virginia Supreme Court of Appeals for a rehearing to renew the appeal on March 11, 2006.

2. Mr. Lester then filed a pro se Petition for Writ of Habeas Corpus with this Court asserting ineffective assistance of trial counsel, violation of due process rights by the State's failure to preserve DNA material from his pants during arrest; State's failure to disclose exculpatory evidence; violation of due process rights when the Court admitted and published to the jury gruesome photographs of the victim; violation of due process rights through the Court's failure to grant a change of venue due to excessive pre-trial publicity; the Court's failure to require the State to identify the issues for which the Rule 404(b) evidence was relevant at trial; the State's rationale for admission of the Rule 404(b) evidence was vague, conclusory, and unpersuasive; the Court committed reversible error in allowing the testimony of Earl Stewart during the trial; the limiting instructions regarding the Rule 404(b) evidence was insufificient to cure the unfair prejudice suffered by Mr. Lester; the Court's failure to suppress DNA evidence; and denial of fair trial due to the cumulative effect of numerous errors at trial.

3. At the Omnibus Hearing in this matter John R. Mitchell, Sr., Mr. Lester's trial counsel, testified as follows:

   a. That Mr. Lester was charged with First Degree Murder;

b. That Mr. Lester was sentenced to life without mercy;

c. That the defense at trial was actual innocence and alibi;

d. That Mr. Lester's mental competency was not an issue;

e. That the only issue was whether Mr. Lester was intoxicated at the time he gave statements to the investigating officers;

f. That the Rule 404(b) evidence of the prior conviction of homicide was allowed into testimony and occurred approximately nine (9) years prior to Mr. Lester's trial;

g. Mr. Mitchell asserted that he provided effective assistance of counsel while representing Mr. Lester during the trial;

h. Mr. Mitchell asserted that he investigated the case and hired a private investigator;

i. Mr. Mitchell acknowledged he did not conduct any independent DNA testing because he expected the victim's blood to be on the clothing due to an acknowledged fight between Mr. Lester and the victim earlier that day;

j. That the prosecutor's entire summation at trial revolved around the prior murder conviction;

k. That the Court allowed the testimony of an inmate during the trial;

l. Mr. Mitchell testified that he has been a practicing attorney for forty-eight (48) years and as a criminal defense attorney in thirty (30) to forty (40) murder cases and six hundred (600) to seven hundred (700) criminal cases;

m. Mr. Mitchell acknowledged that the State offered evidence of victim's blood on Mr. Lester's clothing;

n. Mr. Mitchell acknowledged Mr. Lester admitted to being in a physical altercation with the victim earlier on the date of the victim's death;

o. That Mr. Lester gave numerous statements to the investigating officers;

p. Mr. Mitchell acknowledged that two eyewitnesses saw the victim in the back of Mr. Lester's truck and the victim was barely breathing;

q. Mr. Mitchell acknowledged there was a Rule 404(b) hearing and that the Court did a good job during the hearing but he disagrees with the result;

r. That Mr. Lester's pants were introduced as evidence at trial;

s. That evidence was introduced at trial that the victim and Mr. Lester's blood were on the pants;

t. Mr. Mitchell acknowledged that swatches were cut out of the pants and he was not concerned with the pants or the testing;

u. Mr. Mitchell acknowledged that he expected to find the victim's blood on the pants because Mr. Lester acknowledged there was a fight with the victim earlier in the day;

v. That he told Mr. Lester that DNA testing was not useful in his defense and counsel made the decision as part of trial strategy;

w. That the jury was shown cutouts of pants;

x. Mr. Mitchell acknowledged that he showed Mr. Lester photographs of the pants before they were cut on and before the pants were submitted to the lab;

y. That Mr. Lester told him that he had a fight with the victim over cigarettes or liquor and admitted to striking the victim;

z. That Mr. Lester admitted to putting the victim in the back of the truck;

aa. That he believed it was a waste of money to do DNA testing since Mr. Lester acknowledged having a fight with the victim.

4. At the Omnibus Hearing in this matter the Petitioner, Bradley Lester, testified as follows:

a. That he is currently incarcerated in Mt. Olive Correctional Facility;

b. Mr. Lester acknowledged that he was convicted of First Degree Murder;

c. That there was a direct appeal filed on his behalf;

d. That an Omnibus Petition was filed in this matter;

e. That he received ineffective assistance of counsel during his underlying trial;

f. That his trial counsel did not investigate the case—specifically did not conduct DNA testing on his clothing;

g. That there was no blood in his clothing and he wanted testing done on his clothing;

h. That Mr. Mitchell failed to prosecute the motion that the State used clothing with holes (State argues samples taken from clothes);

i. That Trooper Myers acknowledged that the clothing samples were not consumed;

j. That the DNA reports indicated that Wade Davis was the victim and referred to shotgun;

k. That the State alleged the errors regarding the victim and mode of death in the DNA report were clerical errors;

l. Mr. Lester asserted that the DNA report mentioning different victims and different M.O. was not clerical errors;

m. That there was no evidence at trial of a shotgun in any other case;

n. That the State relied too heavily on the autopsy report;

o. That he was not involved in the victim's murder but he told his attorney the details of the crime and told his attorney that he was with the victim on March 12;

p. Mr. Lester asserted that he witnessed another individual murder the victim;

q. Mr. Lester asserted that there were errors in the DNA testing and the State failed to preserve the pants;

r. That Trooper Myers testified a trial that the samples were not consumed;

s. Mr. Lester asserted that the State failed to disclose exculpatory evidence that there was no DNA evidence on the clothing;

t. Mr. Lester asserted that he wanted to show there was no blood present on the clothing;

u. Mr. Lester asserts the Court erred in admitting and publishing to the jury gruesome photographs of the victim;

v. That the photographs do not accurately depict the victim at the time of death as the photographs were taken three weeks later after decomposition;

w. Mr. Lester acknowledged that his trial counsel did not raise the decomposition issue but did object to the photographs;

x. Mr. Lester asserted that the Court erred in failing to grant a change of venue in his case;

y. Mr. Lester acknowledged that no pre-trial polling was done regarding juror bias but his trial counsel promised to get a polling company;

z. That there was no hearing held on the change of venue;

aa. Mr. Lester acknowledged that the Court conducted jury voir dire in the underlying case;

bb. Mr. Lester acknowledged that all jurors with knowledge of his prior second degree murder conviction were stricken;

cc. Mr. Lester asserted the Court erred in the Rule 404(b) evidence during the trial;

dd. That the Rule 404(b) evidence was unduly prejudicial;

ee. That he only learned of the Rule 404(b) evidence the morning of the trial;

ff. That during Earl Stewart's testimony he made a statement to the jury that "he will kill again if you let him go.";

gg. That the State brought the prior murder conviction in during the cross examination of Donna Smith;

hh. Mr. Lester denied the statement of Earl Stewart;

ii. That his trial was "colored" with the prior murder of Owen Harvey;

jj. That the State referred to the prior conviction in closing argument;

kk. That he was asked on cross examination about how he murdered Owen Harvey;

ll. Mr. Lester asserted that the Court erred in denying his Motion to Suppress the DNA evidence;

mm. That George Weekly hit Mr. Davis, the victim during two (2) separate events;

nn. Mr. Lester acknowledged that he hit the victim three (3) or four (4) times after finding the victim getting in his pill bottles;

oo. Mr. Lester acknowledged that Mr. Davis was bleeding;

pp. That Kenny Toler testified at trial because he "was looking at one (1) to five (5) years";

qq. Mr. Lester acknowledged that he never mentioned Mr. Weekly in his testimony during trial;

rr. That the first time he ever mentioned Mr. Weekly was during his testimony in the Omnibus Hearing;

ss. Mr. Lester acknowledged that he has no evidence that Trooper Myers committed fraud;

tt. That there was no blood on the clothing and Trooper Myers is not credible;

uu. That the Court held a Rule 404(b) hearing and had notice before trial but was ambushed by the Rule 404(b) evidence;

vv. That the State told the Court that Earl Stewart would say one thing at trial and he said something different during the trial;

ww. That there may have been blood from the altercation but prosecutor overstated the evidence to gain a conviction;

xx. Mr. Lester asserted he wanted additional testing to see EDTA on swatches;

yy. That he does not know if trial counsel objected to the swatches;

zz. That EDTA is a new test that was available in 2005 but "I didn't learn about until went to prison";

aaa. Mr. Lester acknowledged that the photographs of the clothes before the testing were introduced at trial;

bbb. That Trooper H. B. Myers was in trouble in State v. Meyers;

ccc. Mr. Lester acknowledged that trial counsel cross-examined concerning the Zain case issues;

ddd. Mr. Lester acknowledged that he does not dispute that trial witnesses said victim was motionless in back of truck;

eee. That the first lab report said Wade Davis and not William Davis and acknowledged that the report was amended and changed;

fff. Mr. Lester acknowledged that trial counsel was given the opportunity to and did submit photographs of clothing before testing;

ggg. Mr. Lester acknowledged that samples not consumed and trial counsel did not seek to introduce samples;

hhh. That trial counsel told him that admitting the swatches would have further incriminated him at trial;

iii. Mr. Lester acknowledged there is no newly discovered evidence.

Conclusions of Law

1. West Virginia Code § 53-4A-1(a) provides, in relevant part:

> Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the

provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

2. West Virginia Code §53-4A-3, directs that a writ of habeas corpus be granted if it appears to the court that there is probable cause to believe that the petitioner may be entitled to some relief, and the contentions or grounds advanced have not been previously and finally adjudicated or waived.

A. Violation of Due Process Rights in State's Failure to Preserve DNA Material from Pants During Arrest

3. The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. W.Va. Const. Article III, § 6, provides that "[t]he rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized."

5. The Defendant asserts that the State failed to preserve the DNA evidence found on his clothing at the time of his arrest.

6. During Mr. Lester's trial the Sergeant Jeff White testified as follows:

A: So, at that point we began taking—we began photographing Mr. Lester's with his clothing on at that time and after that we secured the clothes from him. He took the clothes off for us and we collected those as evidence.
Q: What did you do? Did you put them in a bag or something?

A: We photographed it first on his person. I can't recall if we photographed them after he removed them from his body, but at that point the clothing was placed separately and secured in individual bags and the bag was sealed.
Q: And it was ultimately sent to the West Virginia State Police Forensic Laboratory?
A: Yes, sir. (Trial Transcript, Vol. 1, pp. 152:22 – 153:12.

7. Howard Myers further testified regarding the testing conducted on Mr. Lester's clothing with the West Virginia State Police Forensic Laboratory.

Q: And so there were samples – which ones were the 12 samples from the truck, five samples from the shirt, one from a bag, one from another bag, one from a cooler, three from a left shoe lace and two from a right shoe lace, and one from a right sock. Is that reference samples or the other samples?
A: Those are the evidence samples that were collected by Sgt. Francis from the items submitted. Trial Transcript, Vol. 2, pp. 76: 23 – 77:6.

8. Mr. Myers further testified during the trial that he did not consume the samples collected from Mr. Lester's clothing and there was enough for repeat testing. Once the DNA is removed from the item for testing it is kept in a sealed tube in a fluid, with the DNA in one tube and the material the sample was collected from in another tube. Id., pp. 87-88.

9. The Court **FINDS** that the evidence presented at trial indicates that the clothing was collected by the Gilbert State Police Detachment and forwarded to the West Virginia State Police Forensic Laboratory for testing.

10. The Court **FINDS** that Trooper Myers testified during the trial that he tested samples from Mr. Lester's clothing, that the samples were not consumed, and that the DNA evidence collected was available for repeat testing.

11. The Court **FINDS** that the testimony at trial indicates that the DNA evidence was not destroyed nor did the State fail to preserve the evidence collected during Mr. Lester's arrest. Further, trial counsel testified he did not seek DNA testing because he fully expected the blood to be there.

12. Accordingly, Petitioner's asserted ground for relief regarding failure to present evidence is without merit and the instant Petition is **DENIED**.

B. State's Failure to Disclose Exculpatory Evidence

13. Mr. Lester asserts that the State failed to disclose (1) exculpatory DNA test results from the blood stains allegedly found on Mr. Lester's pants; (2) statements made by two eyewitnesses, Chad and Brandy Mullins, who reported seeing the victim alive on a specific date and time; (3) exculpatory forensic pathology evidence proving multiple times of death were tailored to frame Mr. Lester; and (4) exculpatory evidence of false and inconsistent statements made by the witness, Earl Stewart.

14. "There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 91963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syllabus Point 2, State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).

15. "The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which might have exonerated the defendant." Arizona v. Youngblood, 488 U.S. 51, 57 (1988).

16. In State v. Osakalumi, 194 W.Va. 758, 764, 461 S.E.2d 504, 510 (1995), the West Virginia Supreme Court of Appeals held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

17. "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilty violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syllabus Point 4, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

18. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley, 473 U.S. 667, 682 (1985)(internal quotations omitted).

19. Under Brady in order for the exculpatory evidence to be admissible and thus result in constitutional error in the failure to admit the same the defendant must make a showing that the evidence was material to his case and he was prejudice by the State failure to disclose.

20. Mr. Lester first asserts that the State failed to present exculpatory DNA test results from the blood samples allegedly taken from various items of clothing and his pick up truck.

21. During the trial the State presented evidence regarding forensic testing conducted by the West Virginia State Police Forensic Laboratory as well as the results of the blood testing conducted on the instant samples.

22. At that time Mr. Lester's trial counsel questioned Trooper Myers about the testing procedures and the inconsistencies in the two reports submitted to Mr. Lester prior to the trial indicating the wrong individual and mode of death for the victim.

23. Trooper Myers testified at trial regarding these inconsistencies. Further, the testing results indicated that the blood came from the victim and Mr. Lester.

24. Mr. Lester has put forth no evidence that the test results were fabricated other than the clerical errors present in the report which was later amended prior to trial in this matter and fully disclosed to Mr. Lester and his trial counsel.

25. Second, Mr. Lester asserts that the State failed to disclose two witnesses, Chad & Brandy Mullins, who reported to the State Police that they saw the victim several days after his alleged death.

26. Under Brady in order for evidence not previously disclosed at trial to be material the Defendant must make a showing that had the evidence been presented at trial the outcome would have been different.

27. In the underlying cause of action Mr. Lester presented the witness testimony of two separate individuals who indicated that they saw the victim several days after his alleged death.

28. During the trial Mr. Lester's trial counsel called James Travis as a witness and Mr. Travis testified as follows:

> Q: After March 12th did you have occasion on Saturday, the 13th or Sunday, the 14th of March, did you see Bert Davis?
> A: Yes.
> Q: Where was he?
> A: Coming toward Horsepen from the BP on Horsepen Mountain. Trial Transcript, Vol. 2, p. 186:16-21.

29. Scott A. Cline also testified during the underlying cause of action that he saw Bert Davis after his alleged death, to-wit:

> Q: Did you have any thoughts about that on the 14th of March—That would be on Sunday, right?
> A: Yes, sir.
> Q: What, if anything else, happened to you on or about that day in reference to Bert?
> A: On that day, sir, I was on my way to work and Bert was almost in the middle of the road at the football field and I almost—I said, "Bert, you're going to get me put in jail. I can go to jail for homicide, vehicular homicide," and there was another boy with him. Id., p. 194:6-16.

30. Mr. Lester asserts that the potential testimony of Chad and Brandy Mullins would indicate that the victim was alive after Mr. Lester's arrest, thus proving that Mr. Lester did not murder the victim.

31. The Court **FINDS** that Mr. Lester presented testimony of two witnesses, James Travis and Scott A. Cline substantially similar to that he sets forth as Chad and Brandy Mullins' testimony.

32. The Court **FINDS** that the witness testimony would merely add to the previous testimony by James Travis and Scott A Cline without adding any new evidence to Mr. Lester's case and would have been cumulative in nature.

33. The Court **FINDS** that the instant evidence does not rise to the level required by Brady for materiality and had the evidence been presented at trial it is highly unlikely that the result would have been any different had the witnesses been available at trial in the underlying cause of action.

34. Third, Mr. Lester asserts that the State failed to produce exculpatory evidence related to the forensic pathology report asserting it shows multiple times of death and was tailored in order to allegedly frame him for the victim's death.

35. Mr. Lester has presented no specific evidence related to any potential exculpatory evidence related to the forensic pathology report other than his bald assertion that the State concealed information relating to the same.

36. During the trial in the underlying cause of action Mr. Lester's trial counsel questioned James Kaplan, Chief Medical Examiner, about the various dates of death listed in the autopsy report and the reasons for the same both on direct and cross-examination.

37. The Court **FINDS** that Mr. Lester has presented no evidence sufficient for a showing that Brady was violated in terms of the forensic pathology report and his assertion of the same is without merit.

38. Finally, Mr. Lester asserts that Earl Stewart lied prior to and during his testimony and the State had knowledge of the same.

39. "In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." Syllabus Point 2, State ex rel. Franklin v. McBride, ___ W.Va. ___, ___ S.E.2d ___, 2009 WL 3255136 (W.Va. 2009)

40. "Prosecutors have a duty to the court not to knowingly encourage or present false testimony." Id. (quoting State v. Rivera, 109 P.3d 83, 89 (Ariz.2005)).

41. Under the first prong of Franklin Mr. Lester must make a showing that the State presented false testimony. Mr. Lester has presented no evidence either in his habeas motion or during the Omnibus hearing to make a sufficient showing that the State presented perjured testimony during the trial.

42. The Court **FINDS** that Mr. Lester is unable to meet the first requirement under Franklin to make a showing that the prosecutor presented false testimony.

43. Since Mr. Lester is unable to meet the first prong of Franklin it is not necessary to further analyze the remaining two prongs of Franklin.

44. Accordingly, the Petitioner's asserted grounds for relief for failure to disclose exculpatory evidence is without merit and the instant Petition is **DENIED**.

C. Gruesome Photographs

45. "Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syllabus Point 10, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994).

46. "Even if the photographs could be considered to be gruesome...gruesomeness alone does not justify the exclusion of the photographs from a trial. The exclusion is justified only if the prejudicial effect outweighs the probative value of the photographs." Id.

47. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." W.Va. Rules of Evid. Rule 401.

48. "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." W.Va. Rules of Evid. Rule 403.

49. During an in camera suppression hearing the Court addressed the issue of photographs the prosecution intended to admit into evidence during the trial. At that time the Court ruled on the admissibility of the evidence in light of W.Va. Rules of Evid. Rule 401 and 403, to-wit:

> THE COURT: The Court has looked at the photographs and they show different views. Exhibit 1, for example, shows the left side of the face, left shoulder area and alleged injuries in that portion of the body. Exhibit 2 demonstrates alleged injuries to the right side of the face and head. Exhibit 3 shows the condition of the face prior to shaving the head, and Exhibit 1 and 2 are different than 3. 4 shows alleged injuries to a right arm area. 5 has been withdrawn and if it hadn't been withdrawn the Court would probably have made a gruesome finding, in any event. Exhibits 1, 2, 3, 4 and 6 are relevant and the probative value outweighs any prejudicial effect and they are not gruesome. They've been offered for the purpose of demonstrating areas and nature and extent of injuries. 5 had been withdrawn. Trial Transcript, Vol. 1, p. 15:7-22.

50. The Court **FINDS** that an inquiry into the relevancy and potential prejudicial impact of the photographs at Mr. Lester's trial was properly considered by the Court.

51. The Court **FINDS** that an examination of each of the proposed photographs was made and a determination that the photographs were not gruesome was made at that time.

52. The Court further **FINDS** that an appropriate pre-trial hearing was conducted regarding the probative value and the potential prejudice to Mr. Lester in admitting the photographs at trial and found that the photographs probative value outweighed the potential prejudice and were not gruesome.

53. Accordingly, Petitioner's asserted ground for relief regarding gruesome photographs is without merit and the instant Petition is **DENIED**.

D. Failure to Grant Change of Venue Due to Pre-Trial Publicity

54. Mr. Lester asserts that the local newspapers reported extensively on the underlying case and subsequent trial, and that as a result of the excessive pre-trial publicity his rights to a fair and impartial jury were violated.

55. West Virginia Rules of Criminal Procedure Rule 21(a) provides that:

> "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."

56. "To warrant a change of venue in a criminal case, there must be a showing of good cause therefore, 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." Syllabus Point 2, State v. Wooldridge, 129 W.Va. 448, 40 S.E.2d 899 (1946).

57. "A present hostile sentiment against an accused, extending throughout the entire county in which he brought to trial, is good cause for removing the case to another county." Syllabus Point 1, State v. Siers, 103 W.Va. 30, 136 S.E. 503 (1927).

58. Mr. Lester has presented the Court with a sampling of the various newspaper articles published about the underlying case in this matter. During the Omnibus Hearing Mr. Lester testified that his trial counsel did not conduct a jury poll prior to the commencement of the trial. Additionally, Mr. Lester also acknowledged that the Court conducted jury voir dire during the underlying trial and that all potential jurors with

knowledge of his prior conviction were stricken and the jurors were specifically asked about their knowledge of the charges against Mr. Lester. A properly qualified jury was then selected and served.

59. During the Jury Voir Dire the Court inquired of the potential jurors regarding their knowledge of the case through the news media and whether they had previously discussed the case with anyone.

> THE COURT: Have any of you read or heard about this case in the news media, either the newspaper or on the radio or in any other news media outlet? The jurors have remained silent.
> Have any of you discussed this case with anyone, anywhere, anytime, for any reason whatsoever, including today's date with any other member of the jury panel? The jurors have remained silent. Trial Transcript. Vol. 1, p. 32:9-16.

60. The Court **FINDS** that Mr. Lester bears the burden of making a showing that there was a present hostile sentiment against him in the county that was so pervasive that he was unable to receive a fair trial.

61. The Court **FINDS** that Mr. Lester has presented evidence that there was some pre-trial publicity of the underlying case.

62. The Court **FINDS** that the jury voir dire did not reveal any jurors who had knowledge of Mr. Lester's case through the news media or through word of mouth discussions outside the courtroom.

63. The Court **FINDS** that potential jurors with knowledge of Mr. Lester's prior criminal record and who knew Mr. Davis, the victim, were excused for cause by the Court.

64. The Court **FINDS** that Mr. Lester has failed to make any showing that the pre-trial publicity of the underlying case was so pervasive that there was present hostile sentiment against him as would warrant a change of venue.

65. Accordingly, Petitioner's asserted ground for relief regarding prejudicial pre-trial publicity is without merit and the instant Petition is **DENIED**.

E. Admission of Rule 404(b) Evidence

66. Mr. Lester asserts numerous grounds that the Court erred in allowing the State to present evidence under West Virginia Rules of Evidence Rule 404(b) during the underlying trial of Mr. Lester's case. These grounds include the Court's failure to require the State to present a rationale for admission of the evidence during trial; that State's rationale was vague, conclusory, and unpersuasive; and the limiting instruction given by the Court was insufficient to cure the unfair prejudice suffered by Mr. Lester.

67. West Virginia Rules of Evidence Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

68. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Syllabus Point 1, State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990).

69. In Syllabus Point 2, State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), the West Virginia Supreme Court of Appeals held that:

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the

trial court should conduct an *in camera* hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence."

70. "When offering evidence under rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose of which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus Point 1, Id.

71. Prior to the commencement of Mr. Lester's trial the Court held an in camera hearing regarding Rule 404(b) evidence which the State intended to present at trial.

MR. MITCHELL: Also, there's one other thing, Your Honor. I know you're going to cover it later, but just in order to avoid – the State has made a 404(b) motion. We have a counter motion in the form of a motion *in limine* and I don't know if the Court wants to take that up at this time. I just wanted to make sure the Court – I'll hand you a copy of that.
MR. SPARKS: Thank you.
THE COURT: Is this 404(b) going to be by way of evidence or a proffer?
MR. SPARKS: It's going to be an indictment. It really doesn't have to be. I just put that in the discovery. It will be a report from the office of the chief medical examiner in an order of the Court where he pled guilty, and what we attempted to do here is conform with the new case law. A lot of similarities in the cases. The

victim in the other case received multiple blunt force injuries and the manner of death was homicide. Both are the same – it's the same in this case. It does show motive, intent, identity, absence of mistake or accident. In particular, it shows premeditation and deliberation because he'd done it before.
MR. MITCHELL: He wasn't convicted of premeditation before.
MR. SPARKS: I know.
THE COURT: He was convicted of second degree.
MR. MITCHELL: I'm sorry, Your Honor.
THE COURT: That's fine.
MR. SPARKS: It shows that someone else died before at his hands. He knew that beating someone else to death with multiple blunt force injuries you can kill someone and that was the manner of death in this case. The mode of operation is strikingly similar. He consumed mild quantities of alcohol prior to both cases, another factual similarity. Finally, the evidence will corroborate Earl Stewart's testimony. Earl Stewart will testify that the defendant has made a statement that when he killed again that he got rid of body by throwing it in a body of water, throwing it in the river, which is exactly where they found the body in this case in a river and so – and you can't, with that testimony, and the defendant's statement, the other has to come in as a frame of reference. You know, if I ever kill again I will make sure I dispose of the body by throwing it in the river and that's a summation. That's the summary of what he will testify to. Trial Transcript, Vol. One, pp. 8:16 –10:15.

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THE COURT: I'm talking about the prior conviction.
MR. SPARKS: Yes. Well, to show intent, mode of operation. It's strikingly similar in both cases. The manner of death was the same. Both victims received multiple blunt force injuries. The defendant consumed mild quantities of alcohol prior to both. It's just strikingly similar, and through our disclosure, the State, in conformity with the case law, showed exactly the issues to which this evidence is relevant and it shows a motive. It shows intent specifically and strongest. It shows identity, that he is the person who did this crime. Again, mode of operation and manner of death the same, and the two major issues, it shows intent and absence of mistake, because someone had died before from multiple blunt force injuries and this is the mode of operation in the current case. He knew by past experience that by doing this someone could die.
THE COURT: Mr. Mitchell, any argument?
MR. MITCHELL: Your Honor, we have filed a memorandum which we believe correctly illustrates the law of West Virginia in reference to this situation. I think it's fairly well explanatory under 404(b) they specifically prohibit the use of evidence – use of past crimes, wrongs or actions of showing the person acted in conformity thereafter with prior situations. We believe that's expressly prohibited. Basically, it's an attack on his character and that's specifically prohibited unless there are certain findings – I don't think there's any point in me spending a lot of time briefing it or arguing it. The memorandum is – I think

detailed and concise with cases which we believe are applicable and we would, at least in the beginning of the case, Your Honor, until the Court has had an opportunity to read those cases, I would ask that the Court not allow it to be mentioned in openings. Id., pp. 11:6 – 12:17.

72. After the in camera hearing regarding the Rule 404(b) evidence the Court issued a written Order regarding the same. This Order set forth findings that the State proffered a basis for admissibility of the evidence of other crimes in the Notice of Intent to Utilize the 404(b) evidence.

73. The Court **FINDS** that a proper basis for admission of the Rule 404(b) evidence was given by the State during Mr. Lester's trial.

74. The Court **FINDS** that the Court properly considered the relevancy of the evidence and the probative value against the prejudicial impact on the Defendant pursuant to Rules 401 and 403 of the West Virginia Rules of Evidence.

75. The Court **FINDS** that the purpose indicated by the State for use of the Rule 404(b) evidence was not vague, conclusory, and unpersuasive as asserted by Mr. Lester.

76. Mr. Lester also asserts that the Court's limiting instruction was insufficient to cure the unfair prejudice suffered by Mr. Lester during the underlying trial.

77. After Earl Stewart testified during Mr. Lester's trial the Court instructed the Jury through a limiting instruction regarding the evidence presented during his testimony.

> You have heard evidence thru a witness that talked about alleged conduct or other acts of the defendant and, particularly related to a 1995 second degree murder conviction of the defendant. That is an act not charged in this indictment. You are instructed that such evidence is not admitted as proof of the defendant's guilt on the present charge. This evidence is admitted for a limited purpose only and may by considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. In this instance, evidence of the 1995 murder conviction and the acts surrounding that conviction – evidence related to Mr. Harvey, those acts may be considered by you in this case only for the purpose of establishing proof of motive, opportunity, intent, identity, modus operandi, and absence of mistake or accident. You may not use this evidence in

consideration of whether the state has established the act charged in this indictment. In addition, such evidence is not relevant to any other matter such as the character of the defendant, whether the defendant is a bad person or whether the defendant had the propensity or the disposition to commit the acts charged in the indictment. This evidence may not be considered in that regard since the defendant's character is not in issue in this case.

In addition, it is not proper for the State to attempt to prove the charge against the defendant in this case by evidence that the defendant may have committed other acts or that the defendant may be a bad person. Therefore, it may only be considered for the limited purpose of motive, opportunity, intent, identity, modus operandi, and absence of mistake or accident. Id., pp. 209:3 – 210:12.

78. The Court further instructed the jury regarding Rule 404(b) evidence during Mr. Lester's own testimony. Trial Transcript, Vol. 2, pp. 159-60.

79. The Court **FINDS** that an extensive and exhaustive limiting instruction was given to the jury on two separate occasions during Mr. Lester's trial, wherein the jurors were instructed on the proper considerations to be made regarding the Rule 404(b) evidence.

80. The Court **FINDS** that the limiting instructions informed the jurors that they were not to consider the Rule 404(b) evidence as evidence of Mr. Lester's character, but were solely limited to considering the evidence in light of proving a specific issue or element relevant to the present charge.

81. The Court **FINDS** that there was no error committed in the giving of the limiting instruction and Mr. Lester did not suffer undue prejudice in the admission of the Rule 404(b) evidence.

82. The Court **FINDS** that Mr. Lester's due process rights were not violated in the admission of the Rule 404(b) evidence at trial.

83. Accordingly, Petitioner's asserted ground for relief regarding Rule 404(b) evidence is without merit and the instant Petition is **DENIED**.

E. Testimony of Earl Stewart

84. Mr. Lester asserts that the Court improperly allowed the testimony of Earl Stewart during the underlying trial based upon Mr. Stewarts alleged failure to testify as the Prosecuting Attorney informed the Court during the in camera hearing regarding the Rule 404(b) evidence.

85. During the underlying trial Mr. Stewart testified as follows:

> Q: Did Brad Lester ever talk to you about disposing of a dead body, a murdered body?
> A: I walked in a room one night and he was talking to man named Cantrell, another inmate, and I walked in and Brad was saying, "If someone would put somebody in a river up here by the time he washed thru the rocks you couldn't tell what happened to him." He always had a favorite saying that "If someone ever tells on me or does me wrong I'll disfigure them. I'll break their back. I'll mutilate them." Trial Transcript, Vol. 1, p. 187:13-22.
>
> ***
>
> Q: So, his mode of operation was not you can shoot someone or anything. His mode of operation was to beat them?
> A: Physical force; He was very physical. Id., p. 188:1-4.

86. The Prosecuting Attorney asserted during the Rule 404(b) in camera hearing that Mr. Stewart would testify regarding Mr. Lester's alleged statements regarding disposing of a body if he killed again.

> "Earl Stewart will testify that the defendant has made a statement that when he killed again that he got rid of the body by throwing it in a body of water, throwing it in the river, which is exactly where they found the body in this case in a river and so – and you can't, with that testimony, and the defendant's statement, the other has to come in as a frame of reference. You know, if I ever kill again I will make sure I dispose of the body by throwing it in the river and that's a summation. That's the summary of what he will testify to." Id., p. 10:5-15.

87. The Court **FINDS** that the Prosecuting Attorney presented to the Court a basis for admission of Mr. Stewart's testimony during the trial that Mr. Lester had previously made statements regarding how he would dispose of a body in a body of water so as to make determination of the cause of death more difficult.

88. The Court **FINDS** that Mr. Stewart testified during trial of statements allegedly made by Mr. Lester while an inmate at Denmar Correctional Facility to another inmate.

89. The Court **FINDS** that the difference in asserted testimony and the actual testimony did not unduly prejudice Mr. Lester, nor did the State's asserted purpose and Mr. Stewart's actual testimony vary to such a degree that the overall purpose of the testimony was unclear.

90. The Court **FINDS** that the basis of the testimony was Mr. Lester's statement regarding the disposal of a body and the actual disposal of a body in the underlying trial.

91. Accordingly, Petitioner's asserted ground for relief regarding Earl Stewart's testimony is without merit and the instant Petition is **DENIED**.

F. Court's Failure to Suppress DNA Evidence

92. Mr. Lester asserts that the trial Court erred in failing to suppress DNA evidence which he asserts was seized in violation of his Federal and State Constitutional right to be from unreasonable searches and seizures.

93. Prior to the trial in the underlying case Mr. Lester provided blood and saliva samples for testing with the State Police Forensic Laboratory. Mr. Lester asserts that his original arrest was based upon a pretextual or a pretext arrest and the arresting officers did not have probable cause to arrest him at that time.

94. After Mr. Lester's arrest the arresting officers obtained a search warrant for blood and saliva samples while Mr. Lester was still in police custody.

95. During the in camera suppression hearing Sgt. J.B. Frye testified that the West Virginia State Police in Logan received a phone call alleging that Mr. Lester was driving with a badly beaten subject in the back of his truck. February 7, 1994 Hearing, p. 8:9-12. Sgt.

Frye testified that he eventually located Mr. Lester at the home of Marcella Smith where he proceeded to question Mr. Lester. At that time Sgt. Frye asserted that he observed what appeared to be blood splatters on Mr. Lester's clothing and in the back of Mr. Lester's pickup truck. Id. Sgt. Frye further asserted that during the questioning Mr. Lester took a threatening stance towards him and Mr. Lester was arrested for Obstructing an Officer. Id., p. 9.

96. Sgt. Frye testified during the suppression hearing that he attempted to find Mr. Lester after receiving a phone call that Mr. Lester was drinking and driving with an injured individual in the back of his truck.

Q: What were you looking for?
A: I was looking for Mr. Lester to try to find out if it was true that there was a body in the back of his truck.
Q: You also wanted to know—they probably came in and said that Mr. Lester was driving his truck he was drunk, didn't they?
A: The call from the Lester residence, yes.
Q: When you got there where you found him, he was drunk, wasn't he?
A: He didn't figure he was drunk, but he did smell of alcohol.
Q: He apparently talked kind of rough to you there, didn't he?
A: At the end, yes.
Q: Beg pardon?
A: At the end. Right before I arrested him. February 17, 2004, Hearing Transcript, pp. 22:19 – 23:11.

97. Sgt. Frye further testified that he arrested Mr. Lester with obstructing and assault based upon his refusal to cooperate and calm down to let Sgt. Frye talk to anyone else in the residence and stood up and took a threatening stance towards Sgt. Frye. Id., p. 24.

98. At the Suppression Hearing the Court issued the following ruling on the Motion to Suppress the statement made by Mr. Lester at the same time the DNA evidence was seized:

THE COURT: The Court will make the following findings of fact and conclusions of law and judgment with regard to the suppression issues.

The Court finds as a matter of fact that Sgt. J.B. Frye of the West Virginia State Police had received, according to his testimony, received a telephone call from dispatch. Later a call was also received from the Lester residence. The substance of the call was that the defendant was driving a vehicle with a badly beaten person in the back.

The defendant was located at the residence of Marcella Smith. Trooper Frye testified that he observed blood on the defendant's clothing and what appeared to be blood in the back of the truck.

There was some conversation and then what Sgt. Frye described as a threatening stance.

The defendant was arrested for obstructing a police officer, perhaps other matters. He was taken to the Gilbert Detachment, Miranda was giving at 11:14 p.m. The statement was taken at 11:40 p.m.

Sgt. Frye testified that the defendant indicated that he could read and understand the English language. He was advised he was under arrest for obstruction but was being questioned with regard to murder. Id., pp. 52:6 – 53: 6.

99. "It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause-evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed." Wong Sun v. U.S., 371 U.S. 471, 479 (1963)(internal citations omitted).

100. "[T]he exclusionary rules reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." It "extends as well to the indirect as the direct products" of unconstitutional conduct. Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was "come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of primary taint." Segura v. U.S., 468 U.S. 796, 804-5 (1984)(internal quotations omitted).

101. "For the purpose of a search incident to an arrest, the validity of the arrest does not depend on whether the suspect is ultimately convicted of the crime. The test of the validity of the arrest is whether, at the moment of arrest, the officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense had been committed." Syllabus Point 3, State v. Hefner, 180 W.Va. 441, 376 S.E.2d 647 (1988).

102. "The use of the arrest power as a sham to apprehend a person for purposes of further investigation on another charge is so dangerous an intrusion of privacy as to require exclusion of any evidence seized as an incident of such pretextual arrest." Syllabus Point 4, Id.

103. "When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police." Syllabus Point 2, State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).

104. "A warrantless arrest in the home must be justified not only by probable cause, but by exigent circumstances which make an immediate arrest imperative." Syllabus Point 2, State v. Mullins, 177 W.Va. 531, 355 S.E.2d 24 (1987).

105. "The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an

objective test based on what a reasonable, well-trained police officer would believe." Syllabus Point 2, State v. Canby, 162 W.Va. 666, 252 S.E.2d 164 (1979).

106. Sgt. Frye testified during the suppression hearing and at trial that the Logan State Police Dispatch received at least one phone call regarding Mr. Lester driving drunk and having a severely injured individual in the back of his truck. This information was confirmed by Mr. Lester's father. When Sgt. Frye located Mr. Lester he observed what appeared to be blood on his pants and in the back of the pickup truck belonging to Mr. Lester. During the questioning Sgt. Frye asserted that Mr. Lester became belligerent and took a threatening stance towards him.

107. Mr. Lester was then charged with obstructing and was informed that he was being questioned about a potential murder.

108. The Court previously found that the Sgt. Frye had probable cause to arrest Mr. Lester in the home and to question him about the possible murder.

109. The Court **FINDS** that the arresting officers received several accounts related to Mr. Lester's activities on the evening of his arrest.

110. The Court **FINDS** that as a result of these reports the arresting officer sought out Mr. Lester for questioning and at that time Mr. Lester refused to cooperate in the questioning, to allow any other individuals in the residence to be questioned and took a threatening stance towards Sgt. Frye.

111. The Court **FINDS** that Mr. Lester was not arrested on a pretext, but that the arresting officer had probable cause to arrest Mr. Lester at the time of his arrest.

112. The Court **FINDS** that the DNA evidence seized after Mr. Lester's arrest was admissible and not recovered as a result of a violation of Mr. Lester's Fourth Amendment rights.

113. Accordingly, Petitioner's asserted ground for relief regarding the Court's failure to suppress DNA evidence is without merit and the instant Petition is **DENIED**.

G. Ineffective Assistance of Counsel

114. Mr. Lester asserts that he received ineffective assistance of counsel from his trial attorney during the course of his trial.

115. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

116. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id., p. 687 *see also*, Syllabuse Point 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995); State ex rel. Shelton v. Painter, 221, W.Va. 578, 655 S.E.2d 794 (2007).

117. "In 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, Miller.

118. "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case will be regarded as harmless error." Syllabus Point 19, State v. Thomas, 203 S.E.2d 445 (1974).

119. Mr. Lester asserts that trial counsel was deficient in (1) failing to call witnesses who could have provided Brady material and exculpatory evidence at trial; (2) that trial counsel was deficient in arguing that various evidence was inadmissible under Rule 404(b); (3) trial counsel was deficient in arguing against the admissibility of DNA evidence; (4) trial counsel failed to file a motion with the Court for independent DNA testing or retesting of the DNA evidence; (5) trial counsel failed to motion the Court for independent forensic pathology review and/or expert scientific witness rebuttal testimony; (6) trial counsel failed to reasonably investigate the case; (7) trial counsel failed to inform Mr. Lester of his right to motion the Court for bifurcation; (8) trial counsel failed to obtain records from Logan General Hospital about how Mr. Lester's blood came to be on the inside cab of his truck; (9) trial counsel failed to present alibi testimony at trial; (10) trial counsel failed to file motions regarding the unreasonable

search and seizure of evidence; (11) trial counsel failed to motion the Court regarding the illegality of evidence based upon the arrest; and (12) trial counsel failed to object to proper examination of witnesses by the State.

120. Under Strickland there must first be a showing that trial counsel's performance was deficient and the errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.

121. During the Omnibus Hearing Mr. Lester's trial counsel testified regarding his preparation and presentation of Mr. Lester's case during the trial.

122. Mr. Mitchell testified that he did not conduct independent DNA testing because he did not feel that it would be helpful to Mr. Lester's case, that he hired a private investigator to investigate the case, that he felt that the forensic lab report and autopsy report could be handled adequately on cross-examination and that independent testing and experts were unnecessary, that he presented the necessary witnesses and defenses at trial,

123. During the trial Mr. Mitchell called several individuals to present exculpatory Brady material including Frank Lester, Dottie Lou Lester, Tina Cline, Dana Jo Smith, James Travis Brown, and Scott A. Cline.

124. Prior to commencement of the trial the Court heard arguments and made rulings regarding the admissibility of various pieces of evidence including the statements made to the State Police, admissibility of Mr. Lester's clothing, and the legality of the evidence produced from the arrest of Mr. Lester. All these motions were adequately and properly argued before the Court by Mr. Mitchell.

125. Mr. Mitchell also objected to witness testimony and admission of various pieces of evidence during Mr. Lester's trial.

126. The Court **FINDS** that to succeed under a claim for ineffective assistance of counsel Mr. Lester must make a showing that counsel made errors so serious that counsel was not functioning as the "counsel" granted by the Sixth Amendment of the United States Constitution. See Miller.

127. The Court **FINDS** that Mr. Mitchell was retained by Mr. Lester's family to represent him in the underling cause of action.

128. The Court **FINDS** that Mr. Mitchell has tried numerous criminal matters in the State of West Virginia and has an adequate understanding of criminal trials.

129. The Court **FINDS** that Mr. Mitchell's performance during the underlying cause of action was not deficient.

130. The Court **FINDS** that as Mr. Mitchell's representation was adequate under the first prong of Miller Mr. Lester cannot make a showing that Mr. Mitchell's performance prejudiced his defense at trial.

131. The Court **FINDS** that in reviewing the performance of counsel the Court must apply an objective standard and must not engage in hindsight or second-guessing of trial counsel's strategic decisions.

132. The court **FINDS** that there is no reasonable likelihood that the Jury Verdict would have been different had trial counsel performed differently at the trial pursuant to the second standard of Strickland.

133. Accordingly, Petitioner's asserted grounds for relief regarding ineffective assistance of counsel is without merit and the instant Petition is **DENIED**.

H. Other Matters Raised in Losh Checklist

134. Pursuant to Losh v. McKenzie, Mr. Lester completed an appropriate Losh checklist setting forth the matters he asserts are pertinent in the instant habeas corpus action.

135. First, Mr. Lester asserts that his mental competency at the time of trial is cognizable even thought it was not asserted at a proper time or if resolution is not adequate.

136. West Virginia Code § 27-6A-2(a) provides, in pertinent part:

> "Whenever a court of record has reasonable cause to believe that a defendant in which an indictment has been returned, or a warrant or summons issued, may be incompetent to stand trial it shall, sua sponte, or upon motion filed by the state or by or on behalf of the defendant, at any stage of the proceedings order a forensic evaluation of the defendant's competency to stand trial to be conducted by one or more qualified forensic psychiatrists, or one or more qualified forensic psychologists. If a court of record or other judicial officer orders both a competency evaluation and a criminal responsibility or diminished capacity evaluation, the competency evaluation shall be performed first, and if a qualified forensic evaluator is of the opinion that a defendant is not competent to stand trial, no criminal responsibility or diminished capacity evaluation may be conducted without further order of the court."

137. "To be competent to stand trial, a defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him." Syllabus Point 2, State v. Arnold, 159 W.Va. 158, 219 S.E.2d 922 (1975).

138. During the trial of the underlying cause of action Mr. Lester did not raise the issue of his mental competency to stand trial and there were never any questions regarding the same presented.

139. Mr. Lester has not asserted any basis for making his competency at trial an issue in this habeas corpus.

140. Accordingly, Petitioner's asserted grounds for relief regarding mental competency is without merit and the instant Petition is **DENIED**.

141. Second, Mr. Lester asserts there were errors made in the composition of the grand jury and/or the procedures utilized before the grand jury.

142. West Virginia Code § 52-1-15(a) (1993) provides that:

> "Within seven days after the moving party discovers , or by the exercise of due diligence could have discovered, the grounds therefore, and in any event before the petit jury is sworn to the case, a party may move to stay the proceedings, quash the indictment or more for other relief as may be appropriate under the circumstances or the nature of the case. The motion shall set forth the facts which support the party's contention that there has been a substantial failure to comply with this article in selecting the jury."

143. West Virginia Code § 52-2-2 (1986) further provides that "[t]he provisions of article one of this chapter to petit juries, so far as applicable and not inconsistent with the provisions of this article, shall be observed and govern grand juries."

144. Mr. Lester has provided the Court with absolutely no specific grounds for challenging the composition and/or procedures of the grand jury pursuant to W.Va. Code § 52-1-15.

145. Accordingly, Petitioner's asserted grounds for relief regarding composition and/or procedures of the grand jury is without merit and the instant Petition is **DENIED**.

146. Third, Mr. Lester asserts that the grand jury minutes were never released in the underlying cause of action.

147. West Virginia Rules of Criminal Procedure Rule 6(e)(1) provides that:

> "All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any potion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall be filed with the clerk of the circuit court and shall not be made public except on order of the court."

148. West Virginia Rules of Criminal Procedure Rule 6(e)(3)(C)(i) – (ii) provides that:

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

149. "A defendant must make a showing of particularized need, to obtain pretrial disclosure of grand jury minutes and testimony other than his own." Syllabus Point 4, State v. Louk, 171 W.Va. 639, 301 S.E.2d 596 (1983), *overruled on other grounds by*, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

150. On October 4, 2004, the Court entered an Order for Grand Jury Transcript in Mr. Lester's underlying case. On October 14, 2004, the Grand Jury Transcript was filed and made available to Mr. Lester and his trial counsel without further need to petition the Court for release of the Grand Jury Transcript.

151. Mr. Lester has made no showing of particularized need for the grand jury minutes, nor has Mr. Lester made a showing that he was prejudiced in any manner in the alleged failure of the Grand Jury minutes to be given to him.

152. Accordingly, Petitioner's asserted grounds for relief non-disclosure of grand jury minutes are without merit and the instant Petition is **DENIED**.

153. Finally, Mr. Lester asserts error with the giving of the jury instructions during the underlying trial, however, Mr. Lester does not provide any evidence regarding which instructions were improper nor does Mr. Lester set forth any evidence regarding omitted necessary instructions.

154. Accordingly, Petitioner's asserted grounds for relief for error in jury instructions are without merit and the instant Petition is **DENIED**.

I. Request for Production of Photographs and Production of Clothing Used at Trial

155. Mr. Lester presented a Motion to the Court during the proceeding of this Habeas Corpus requesting that the State produce the photographs and clothing used during the underlying trial.

156. West Virginia Code § 15-2B-14(a) (2004) provides that:

> A person convicted of a felony currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction for performance (DNA) testing.

157. Such motion for DNA testing must be verified and set forth the following:

> (A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
> (B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
> (C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.
> (D) Reveal the results of any DNA or other biological testing previously conducted by either the prosecution or defense, if known.
> (E) State whether any motion for testing under this section has been filed previously and the results of that motion, if known. W.Va. Code § 15-2B-14(c)(1)(A)-(E).

158. The motion for DNA testing may only be granted if it is established that:

> (1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;
> (2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;
> (3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case;
> (4) The convicted person has made a prima facie showing that the evidence should for testing is material to the issue of the convicted person's identity as the perpetrator of or accomplice to, the crime, special circumstance, or enhancement allegation resulting in the conviction or sentence;
> (5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction.

The court in its discretion may consider any evidence regardless of whether it was introduced at trial;

(6) The evidence sought for testing meets either of the following conditions:
   (A) The evidence was not previously tested;
   (B) the evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;

(7) The testing requested employs a method generally accepted within in the relevant scientific community;

(8) The evidence or the presently desired method of testing DNA were not available to the defendant at the time of trial or a court has found ineffective assistance of counsel at the trial court level;

(9) The motion is not made solely for the purpose of delay. W.Va. Code § 15-2B-14(f).

159. "Serology reports prepared by employees of the Serology Division of the West Virginia State Police Crime Laboratory, other than Trooper Fred S. Zain, are not subject to the invalidation and other strictures contained in In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 438 S.E.2d 501 (1993). Syllabus Point 3, Matter of W.Va. State Police Crime Lab., 191 W.Va. 224, 445 S.E.2d 165 (1994).

160. "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must

be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.' Syllabus Point 1, Halstead v. Horton, 38 W.Va. 727, 18 S.E. 953 (1894)." Syllabus, State v. Frazier, 162 W.Va. 935, 253 S.E.2d 534 (1979).

161. A prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence and who challenges his or her conviction based on the serology evidence is to be granted a full habeas corpus hearing on the issue of the serology evidence. The prisoner is to be represented by counsel unless he or she knowingly and intelligently waives that right. The circuit court is to review the serology evidence presented by the prisoner with searching and painstaking scrutiny. At the close of the evidence, the circuit court is to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence is found to be false, whether the prisoner has shown the necessity of a new trial based on the five factors set forth in the syllabus of State v. Frazier, 162 W.Va. 935, 253 S.E.2d 534 (1979). Syllabus Point 4, In re Renewed Investigation of State Police Crime Laboratory, Serology Div., 219 W.Va. 408, 633 S.E.2d 762 (2006).

162. "A circuit court that receives a petition for a writ of habeas corpus from a prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence, and whose request for relief is grounded on the serology evidence, is to hear the prisoner's challenge in as timely a manner as is reasonably possible." Syllabus Point 5, Id.

163. The Supreme Court of Appeals further held in Zain III, that "[i]n order to guarantee that the serology evidence offered in each prisoner's prosecution will be subject to searching and painstaking scrutiny, this Court now holds that a prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence may bring a petition for a writ of habeas corpus based on the serology evidence despite the fact that the prisoner brought a prior habeas corpus challenge to the same serology evidence, and the challenge was fully adjudicated." Id., p. 219 W.Va. at 416, 633 S.E.2d at 770.

164. During the Omnibus Hearing in this matter Mr. Lester testified that he was requesting DNA testing to see the EDTA on the swatches. EDTA is a new test but was available in 2005 but Mr. Lester asserts he did not learn about the test until he was in prison.

165. Further, Mr. Lester asserts that Trooper H.B. Myers was in trouble in State v. Myers and "he's no saint and he lied before." Mr. Lester further acknowledged that Mr. Mitchell questioned Trooper Myers extensively about the Zain case during the trial.

166. Mr. Lester acknowledged during his trial testimony that he had been in an altercation with the victim and that he observed the victim getting into his pill bottle and hit the victim three or four times.

167. Mr. Lester acknowledged that the samples were not consumed and that Mr. Mitchell informed him that he did not seek to introduce the samples because it could have further incriminated him during the trial.

168. Mr. Lester acknowledged that there was no newly discovered evidence that there was no blood on his pants.

169. Mr. Lester's request for additional DNA testing rests on the original lab report indicating that Wade Davis with a shotgun, State said was a clerical error.

170. Additionally, Mr. Lester claimed he had no involvement with the murder of the victim but was with the victim on March 12, but a third party murdered the victim.

171. Prior to the trial in this matter Mr. Lester gave conflicting reports regarding the activities surrounding the death of the victim.

172. During the trial several individuals testified to seeing the victim in the back of Mr. Lester's truck and that he was having difficulty breathing and looked as if he had been beaten up.

173. Mr. Lester states that an additional basis for his request for additional DNA testing is the alleged loss of the evidence by the West Virginia State Police Crime Laboratory and that the Court should order the samples to be found for performance of the EDTA test to determine whether the blood evidence was planted by the police and if the results offered by Tooper Myers are true, false, or tainted.

174. Under W.Va. Code § 15-2B-14 the Court must conduct a thorough hearing regarding the request for DNA testing and set forth a detailed Order regarding the same.

175. First, Mr. Lester failed to present a verified petition setting forth the requirements of W.Va. Code § 15-2B-14(c)(1)(A)-(E).

176. In order to grant a motion for new DNA testing the requesting party must establish each of the requirements pursuant to W.Va. Code § 15-2B-14(f)(1)-(9).

177. The Court will now consider each of these individual requirements to determine if Mr. Lester has met the requirements for new DNA testing in this matter.

178. First, Mr. Lester asserts that the DNA material has allegedly been lost and is unavailable for testing, however, Mr. Lester seeks to have this Court compel the State to produce the same for testing.

179. It is unclear whether the instant DNA material would be available for testing from the testimony of Mr. Lester.

180. Second, there must be evidence that the DNA material requested for testing has been subjected to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

181. Again, Mr. Lester asserts that the DNA material is allegedly lost and it is presumed that the State will be unable to adequately establish the necessary chain of custody for further testing.

182. Third, the identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

183. During the trial Mr. Lester testified that he struck the victim on at least four occasions after allegedly finding him getting into his pill bottle and then had the victim ride in the back of his truck so that he would not get blood in the cab of the truck.

184. Additionally, witnesses at trial testified that Mr. Lester was driving around with the victim in the bed of his truck and that the victim was breathing heavily and appeared to be injured.

185. There was sufficient evidence presented at trial to establish that the identity of the perpetrator is not sufficiently in question and that Mr. Lester was tied to the victim on the date of his alleged death.

186. Fourth, there is a prima facie showing that the evidence sought for testing is material to the issue of the convicted person's identity as the perpetrator or accomplice to the crime.

187. Again, Mr. Lester testified during the trial that he struck the individual and may have had the victim's blood on his clothing. Additional, DNA testing will not establish material evidence that another individual was the perpetrator of the murder of the victim.

188. Fifth, the requested DNA test results would raise a reasonable probability that, in light of the evidence, the convicted person's verdict or sentence would have been more favorable if DNA testing results were available at the time of conviction.

189. Mr. Lester failed to establish this standard as he admitted that the victim's blood was on his clothing and that he engaged in an altercation with the victim.

190. Sixth, the evidence must not have previously been tested or the evidence was tested previously but the requested DNA test could provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting the previous results.

191. Mr. Lester has requested that the Court allow him to have the DNA material to conduct EDTA tests to see if blood preservatives was used on the material to show that the evidence was potentially planted by the State Police Lab to frame him for the crime.

192. This EDTA test was available at the time of Mr. Lester's conviction and is not likely to result in material change in the prior DNA testing results.

193. Seventh, EDTA testing is generally accepted in the medical community for testing for preservatives.

194. Eighth, The EDTA testing was available for testing during Mr. Lester's trial but was not conducted as Mr. Lester's trial counsel did not feel that additional testing was necessary prior to trial.

195. Finally, the motion does not appear to be solely for the purpose of delay.

196. This argument and ground is without merit and is therefore **DENIED**.

Judgment

WHEREFORE, the Court having reviewed the entire record below and in the post-conviction proceedings does hereby **DENY** the Petitioner's Omnibus Writ of Habeas Corpus for all grounds asserted and the matter is ordered **STRICKEN** from the Court's docket.

The Clerk is **DIRECTED** to send attested copies of this Order to all parties of record in this matter.

ENTERED this the 9th day of February 2010.

The Honorable Michael Thornsbury
Chief Judge, 30th Judicial Circuit

A COPY TESTE
Grant Preece
CIRCUIT CLERK, MINGO COUNTY, W.VA.