STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State ex. rel.
Roger L. Bowers, Jr.,
Petitioner Below, Petitioner

vs) No. 101458 (Berkeley County 03-C-10)

Thomas L. McBride, Warden
Respondent Below, Respondent

FILED
February 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Berkeley County, wherein the Petitioner's petition for *habeas corpus* relief was denied following an omnibus hearing. The appeal was timely filed by the Petitioner, with the entire record accompanying the Petitioner's petition for appeal. A timely response was filed by the Respondent Thomas McBride. The Petitioner seeks a reversal of the circuit court's decision.

Pursuant to Revised 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 felony murder and distribution of a controlled substance and sentenced to life with mercy and a concurrent one-fifteen year prison term. He filed a petition for *habeas corpus* in the circuit court and counsel was appointed. An amended petition for *habeas corpus* was filed. In this habeas action, Petitioner raises multiple issues including ineffective assistance of his trial counsel. The circuit court held a two-day omnibus hearing at which time witnesses, including Petitioner's trial counsel, presented testimony. Subsequently, the circuit court entered a forty-seven page "Final Order Denying Petition for Habeas Corpus."

The Court has carefully considered the merits of each of the Petitioner's arguments as set forth in his petition for appeal. Finding no error in the denial of *habeas corpus* relief, the Court fully incorporates and adopts the circuit court's detailed and well-reasoned "Final Order Denying Habeas Corpus," dated May 21, 2010, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 25, 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. 101458

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE ex rel. ROGER L. BOWERS, JR.,
Petitioner,

v.

Case No.: 03-C-10
(Division I)

THOMAS L. MCBRIDE, Warden,
Mount Olive Correctional Complex,
Respondent.

FINAL ORDER DENYING PETITION FOR HABEAS CORPUS

On a previous date came the Petitioner, by counsel, Robert C. Stone, Jr.; and the Respondent, by counsel, Christopher C. Quasebarth, Chief Deputy Prosecuting Attorney, upon the Amended Petition for Writ of Habeas Corpus, the Respondent's Reply and Motion to Dismiss, the evidence taken at the hearings on December 22, 2009, and February 5, 2010, and such other pleadings and papers as may appear on the record. Upon mature consideration of these pleadings and the record of the underlying criminal case, State v. Roger L. Bowers, Jr.; Case No.: 01-F-78, the Court DENIES the Amended Petition for Habeas Corpus.

FINDINGS OF FACT.

A. Trial Proceedings.

1. Jason Gettel turned purple after six or seven injections of heroin purchased from the Petitioner at the Petitioner's house. As Mr. Gettel turned purple, the Petitioner told Gettel's friends, Jonathan Ware and George Karn, to get him out of the house because he's dying. They shoved Gettel into the backseat of Ware's car and then abandoned Gettel in the car at a road intersection. When emergency personnel arrived at the car, Gettel's body was blue and cold. Ware and Karn told police that they brought Gettel to the Petitioner to purchase narcotics and then Gettel purchased heroin from the Petitioner. Kyra Heleine injected Gettel with the purchased heroin. [Criminal Complaint, 5/16/01.]

2. The Petitioner was indicted on three felony counts: Felony Murder, for aiding and abetting Kyra Heleine in the delivery of a controlled substance (heroin) resulting in the death of Jason Gettel; Aiding and Abetting Delivery of a Controlled Substance (heroin); and Distribution

of a Controlled Substance (heroin). [Indictment, 5/16/01, State v. Roger Lee Bowers, Jr., No: 01-F-78.]

3. The Court released the Petitioner on bail with conditions including home incarceration. [Order of Bond Reduction, 6/6/01.]

4. About two weeks later, the Court's Probation Office moved to revoke the bail conditions upon the Petitioner's violation. [Order Revoking Home Confinement Bond Status, 8/29/01; Order, 6/25/01; Petition for Revocation of Home Incarceration Status, 6/25/01.]

4a. The Petitioner's co-defendant, Kyra Heliene, died in a car wreck while awaiting trial.

5. On the Petitioner's motion, the trial was bifurcated between guilt and sentencing. [Order, 10/22/01.]

6. Immunity was granted by the Court to eyewitnesses George Karn, Jennifer Gorman, and Jonathan Ware. [Orders, 11/1/01.]

7. At pre-trial, the State elected to proceed on the Felony Murder charge of Count I and dismissed the Delivery of a Controlled Substance charge of Count II (being the act underlying the Felony Murder charge). [Pre-trial Order, 11/16/01.]

8. At the pre-trial, Myron Gebhardt testified that he is a chemist at the West Virginia Medical Examiner's Office and did the preliminary testing of Mr. Gettel's blood on a Cobas Mira instrument. [Tr., 10/25/01, 26-70, 106-110.]

9. At pre-trial, David Clay, Assistant Toxicologist at the West Virginia Medical Examiner's Office, testified to additional testing procedures and results he performed for analyzing Mr. Gettel's blood for alcohol and opiates. The blood alcohol results from the gas chromatagraph were .09. The opiate results from the gas chromatograph mass spectrometer demonstrated 282 micrograms of morphine per liter with traces of monoacetylmorphine. Diacetylmorphine is heroin; monoacetylmorphine is the first metabolite of heroin as the body breaks it down; morphine is the second metabolite and is much longer-lived then monoacetylmorphine. [Id., 111-165, 115-126.]

10. At the pre-trial, County Coroner David Brining testified to his observations of the

body of Mr. Gettel made with Sandra Brining, his obtaining blood and vitreous fluid samples from the body and sending them for analysis, his observations of needle puncture marks on the victim's arm, and the limitations of his point-and-shoot camera in being unable to take close-up photos of those needle marks. [Id., 165-192.]

11. At the pre-trial, County Coroner Sandra Brining testified to her observations of the body of Mr. Gettel made with David Brining, her observations of needle puncture marks on the victim's arm, her receiving information from the police that the victim was injected with heroin shortly before his death, her consultation with State Medical Examiner Dr. Frost that an autopsy was not necessary because he felt that toxicology would give them the information they needed, David Brining's obtaining blood and vitreous fluid samples from the body and sending them for analysis, and why she listed the cause of death as positional asphyxiation with alcohol and heroin use contributing. [Id., 192-234, 195-207, 216, 231-232; Tr., 10/26/01, 3-83.]

12. At the pre-trial, Dr. Donald Cash, Chief Toxicologist for the West Virginia Medical Examiner's Office, testified as to the testing procedures and results from testing Mr. Gettel's blood. He testified that the Cobas Mira test was a preliminary test and that the more accurate secondary testing was performed for alcohol on the gas chromatagraph and for opiates on the gas chromatograph mass spectrometer. The blood alcohol results from the gas chromatagraph were .09. The opiate results from the gas chromatograph mass spectrometer demonstrated 282 micrograms of morphine per liter with traces of monoacetylmorphine. That concentration of alcohol could result in loss of judgment and impaired perception. That concentration of morphine has been reported in fatalities. The combination of alcohol and heroin may be contributing factors in the death. [Tr., 10/26/01, 83-175, 101-105.]

13. Based on that testimony, the Court permitted the testimony and evidence regarding the alcohol and opiate concentrations found in Mr. Gettel's blood and the opinion evidence as to the cause of death. [Pre-trial Order, 11/16/01.]

14. At jury selection during individual *voir dire*, the Court granted the State's motion to strike potential juror Keith Johnston after Mr. Johnston related his family history of dealing with

his sister's "pretty bad heroin problem." Mr. Johnston felt that a person who dies from taking heroin is at fault and not the one who gave the heroin:

> The Juror: One of your questions was whether somebody that gives somebody else heroin and subsequently dies, whether they are at fault. My opinion is, no. As far as I'm concerned, my sister was looking for it. If there wasn't one person, it was going to be somebody else. If she had died from it, than that was–
>
> The Court: So–
>
> The Juror: –her choice.
>
> [...]
>
> The Juror: [...] It was her choice. She went to NA for awhile and she had a lot of opportunity to straighten up and she just chose not to. My opinion is if she would have died from it, you know, I couldn't rightfully blame anybody but her.

[Tr., 11/6/01, 110-120, 113-114.]

15. During opening, the State referenced evidence that, on the night of his death, Mr. Gettel went with his friends, Ware and Karn, to the Petitioner's to obtain cocaine. Instead, they received heroin and, upon being injected, Gettel immediately began to pass out and turn purple. The Petitioner ordered them to take Gettel out of the house because he's dying. Gettel was stuffed into the backseat of a car. He was found by police in that abandoned car. His death was ruled caused by positional asphyxiation with alcohol and heroin use as contributing factors. [Tr., 11/6/01, 198-199.]

16. At trial, Jonathan Ware testified that on the night of January 30-31, 2001, he, Mr. Gettel, and Gettel's nephew, George Karn, were out drinking at several clubs and decided to purchase some cocaine. They contacted the Petitioner. The Petitioner met them at a certain location and then took them to his house. The Petitioner did not have cocaine but had heroin. Gettel and Karn decided to try it. Kyra Heleine cooked up the heroin. Kyra injected Gettel who complained that she was trying to kill him because she injected him six or seven times. The Petitioner injected Karn. Gettel then passed out and turned purple. The Petitioner said he's dying, get him out of my house. He and the Petitioner dragged Gettel out and the Petitioner got

Gettel in the car. Karn drove. The next thing Ware knew, the Petitioner was telling him that Karn left the car in the ditch with Gettel still in the back. Ware tried to move the car but it would not go. The Petitioner and Kyra took him to his house, leaving Gettel in the car. He asked his girlfriend to call the police and report the car as stolen. [Id., 208-222.]

17. On cross-examination, Ware testified that he obtained the Petitioner's phone number around 11:00 p.m. that night, maybe later. Ware did not know what time he later got to the Petitioner's house. Petitioner's counsel nailed down specifics of Ware's testimony and then sought to impeach that testimony with different and contradictory statements that Ware had provided to police. After confirming with Ware that the first statement he gave to the police was blatantly false and the others not wholly accurate, Petitioner's counsel further attacked his credibility with the fact that Ware was granted immunity to testify. [Id., 250, 259, 271, 280, 290-292, 295-298; Tr., 11/7/01, 6-17, 29-66; Def. Exhs. 6-8.]

18. George Karn was Mr. Gettel's nephew. Karn's testimony was consistent with Ware's about the events of the evening, including the drinking before meeting the Petitioner and then going to the Petitioner's house in an attempt to obtain cocaine and, instead, getting heroin from the Petitioner. The Petitioner told Kyra to cook the heroin. Kyra injected Gettel. He did a line of heroin the Petitioner gave him and blacked out. He next remembers the car being wrecked and the Petitioner being there. [11/7/01, 78-100.]

19. On cross-examination, Petitioner's counsel nailed down specifics of Karn's testimony and then sought to impeach that testimony with different and contradictory statements that Karn had provided to police. After confirming with Karn that the first statement was blatantly false and the other not wholly accurate, Petitioner's counsel further attacked his credibility with the fact that Karn was granted immunity to testify. Karn was asked about Gettel attempting suicide with pills a couple of years earlier, but denied knowledge of any attempt by Gettel to slash his wrists. [Id., 100-168; St. Exh. 13-14.]

20. Jennifer Gorman, Ware's girlfriend, confirmed that she was awakened about 1:15 a.m., and told to call the police and report Ware's car as stolen, which she did. [Id., 171-175.]

21. Margaret Hoogland testified as a records keeper from Central Dispatch and as to the relevant 911 calls made the night in question. The first call came in at 0053:06; the next at 0115:09; and a third at 0139:33. The tapes were played. [Id., 174-183.]

22. Karen Roksandich, paramedic, testified about responding to the vehicle with Mike Jenkins and finding the victim, a very large man, in the back seat. She received the dispatch call at 0112 and arrived at the scene at 0127. The victim was bluish and cold and had no pulse. They called law enforcement and spoke with Coroner Sandra Brining. She noted her observations. [Id., 183-200.]

23. Mike Jenkins testified consistently with Ms. Roksandich's testimony. [Id., 200-204.]

24. Kim Gettel, the victim's wife, testified without objection that the night of Gettel's death they were both home with her four children and then he went out. He was six feet, three hundred pounds. He had an alcohol problem. He was seriously injured at work in about 1997. About two years ago, he took some pills and they called an ambulance. He has not had any problems like that since. His mood was fine that night. She identified an ATM receipt showing that her husband withdrew one hundred dollars shortly before his death. On cross-examination, she answered that she had no knowledge when asked if he had ever attempted suicide by slashing his wrists. [Id., 205-215; State's Exh. 24.]

25. County Coroner Sandra Brining testified consistently with her pre-trial testimony. [Id., 220-292; Tr. 11/8/01, 3-83.]

26. Chief Toxicologist Dr. Cash testified consistently with his pre-trial testimony. [Id., 84-101, 101-191.]

27. State Police Trooper Olack testified as to his investigation of the facts surrounding Mr. Gettels' death, including the showing of a videotape to the jury of the decedent going into a Sheetz store at 10:51:26 p.m. on January 30, 2001, after which the State rested. [Id., 192-247, 207-212; St. Exh. 35.]

28. The parties argued the acquittal motion, which was denied. [Id., 249-263.]

29. Instructions were argued. [Id., 265-end; Tr. 11/9/01, 3-35.]

30. The defense rested. [Tr., 9/11/01, 37.]

31. Instructions were read to the jury, including the appropriate Felony Murder and Aiding and Abetting instructions. [Id., 41-53, 46-49.]

32. At closing, the Petitioner's counsel argued that there was evidence that Mr. Gettel committed suicide. The State responded in rebuttal that there was no such evidence presented. [Id., 75, 103.]

33. During deliberations, the jury had a question regarding the wording of the instructions. The parties agreed that the question could not be answered and that the jury needed to apply common English usage to the wording. [Id., 109-111.]

34. The jury returned a verdict of guilty on the Felony Murder count for Mr. Gettel's death and on the Delivery of Heroin Count for the delivery to Mr. Karn. The jury recommended mercy for the murder conviction following the State's recommendation that mercy should attach. [Id., 113, 125-128; Verdict Form, 11/13/01; Supplemental Verdict form, 11/13/01.]

35. With the recommendation of mercy, the Court proceeded directly to sentencing and imposed the statutory life with mercy sentence on the murder conviction, with a concurrent statutory one-to-fifteen for the delivery conviction. [Conviction and Sentencing Order, 11/16/01.]

36. Newly retained counsel for the Petitioner filed a Notice of Intent to Appeal, raising no grounds. [Notice of Intent to Appeal, 11/26/01; Order Substituting Counsel, 11/26/01.]

37. The State moved to disqualify the Petitioner's new counsel since he previously represented trial witness Jonathan Ware. After hearing, the Court denied the motion. [Order Denying State's Motion, 12/19/01; Motion to Disqualify, 11/27/01.]

38. Despite the fact that newly retained counsel was in the case, the Petitioner's former trial counsel filed a Motion for New Trial on his behalf. [Motion for New Trial, 12/3/01.]

39. More than five months after the jury's verdict, the Petitioner filed post-trial motions. [Motion for Judgment of Acquittal and New Trial, 3/18/02 and 4/23/02.]

40. After argument at hearing, the Court denied the Petitioner's post-trial motions. These denied arguments included: the use of the written statements of testifying witnesses Ware

and Karn; the State's use of toxicology evidence without an autopsy or urine sample; the State's not excising tissue from Mr. Gettel's arm at the location of needle puncture marks or photographing those marks; the State not obtaining or testing Mr. Gettel's urine, gastric fluids, liver or vomit; the State not testing fluids, fingerprints or "other evidence" from the car; the State not conducting an autopsy; the Court not providing an unrequested "missing evidence" instruction; and the unobjected-to testimony of Mr. Gettel's widow that on the night of his death he had been home with she and their children before going out. [Order Partially Denying Defendant's Motion for Judgment of Acquittal and Rescheduling Conclusion of Argument, 5/16/02.]

B. The Direct Appeal Refused.

1. On October 30, 2002, the West Virginia Supreme Court of Appeals refused the Petitioner's direct appeal. [Order, 11/8/02.]

2. In January 2003, the Petitioner filed a *pro se* Petition for Post-conviction Habeas Corpus. [Petition, 1/8/03.]

C. The Current Habeas Proceeding.

1. Following the Petitioner's failure to cooperate with a succession of appointed attorneys, in January 2006, the Petitioner retained former appellate counsel to represent him on his habeas. Retained counsel was subsequently appointed. [Order Appointing Counsel, 11/16/06; Order Substituting Counsel, 1/27/06; Order To Withdraw, 3/17/05; Order Granting Motion to Withdraw, 8/5/03.]

2. With the assistance of counsel, the Petitioner filed an Amended Petition for Writ of Habeas Corpus, and a supplement. [Amended Petition, 6/2/08; Supplemental Argument, 8/7/08.]

3. The Petitioner later filed a Losh list. [Checklist of Grounds, 10/30/08.]

4. The Court directed the Respondent to file a return to the Petition. [Order, 10/1/08.]

5. The Respondent filed its Reply and Motion to Dismiss.

6. The Court denied the Amended Petition by written Order, based on the record and without taking additional evidence. [Order Denying Petition for Habeas Corpus, 12/18/08.]

7. The Court subsequently granted the Petitioner's Motion for Reconsideration for the purpose of permitting the presentation of evidence and testimony. [Order Granting Motion to Alter Judgment, 6/24/09.]

8. The Court heard from witnesses on December 22, 2009, and February 5, 2010. [Orders from Omnibus Hearing, 1/14/10 and 2/25/10.]

9. William Manion, M.D., was called by the Petitioner, qualified as an expert in forensic pathology, and testified on direct that:

a. He reviewed the discovery, the trial and pretrial transcripts, and the testing results for this case. [Tr. 12/22/09, 15.]

b. He does not agree with the county coroner's determination that the victim died as a result of positional asphyxia with alcohol and heroin as contributing factors because no autopsy was performed. [Id., 16, 34.]

c. Foam on the victim's face indicates to him that the victim did not die of positional asphyxia. [Id., 17-19.]

d. Since the victim was obese, he listed heart disease and diabetes as potential other causes, or a blood clot or sleep apnea or aspiration of vomit or an aneurysm, that could not be excluded without an autopsy. [Id., 19-23.]

e. He disagreed with the toxicology testing results from the victim. He does not supervise a toxicilogy lab. He does not do drug testing at the hospital where he works. He believed that the blood testing of the victim in this case should not have been done on the Roche Coba Mira, as that is a machine designed to test urine. [Id., 24-32.]

10. On cross-examination, Dr. Manion testified that:

a. He did not perform an autopsy on the victim. [Id., 34.]

b. He agreed that there was trial testimony that the victim was injected with heroin and consuming alcohol the night of his death. [Id, 35.]

c. Heroin can cause disorientation, respiratory depression and sudden death in people. The lethal range is wide. Alcohol can make the heroin effects more powerful, including

respiratory depression. [Id., 35-36.]

d. He agreed that there was trial testimony that the decedent lost consciousness almost immediately after he was injected with heroin. He agreed that there was trial testimony that the decedent was stuffed into the back of a small car, but feels the victim was "thrown" into the backseat rather than "stuffed". He agreed that Assistant Coroner Brining testified that the decedent's chin was pressed against his chest, but he personally did not see anything pushing the head down in the photos. He agreed that a complete obstruction of the airway is not necessary for positional asphyxiation but that a significant obstruction could kill a person in a matter of minutes. The foam around the decedent's mouth he believed might take hours to develop, but he could not recall how long a time elapsed between the decedent being injected with heroin and his discovery by emergency personnel but assumed it was hours. [Id., 36-39.]

e. He agreed that there was medical evidence of the victim's heart failure and that heart failure could be a secondary affect of respiratory depression from heroin use. [Id., 40-41.]

f. He agreed that there was no evidence that the decedent had a blood clot but agreed that a hematoma could have been caused by his being dragged to the car unconscious or stuffed in the car. A hematoma could have been formed by falling and hitting his head. He agreed that there was no evidence that the decedent had diabetes. He agreed that the combined effect of alcohol and heroin could cause one to vomit. [Id., 42-46.]

g. He agreed that the victim's blood level of 0.28 micrograms of morphine could be lethal. He agreed that mixing alcohol and heroin is a potentially fatal mix. [Id., 46-47.]

h. He hasn't seen a Cobas Mira machine in years. He claimed to have reviewed the pretrial and trial testimony of the toxicologists but could not recall the testimony of Dr. Cash, Mr. Gebhardt and Mr. Clay that the Cobas Mira was used for preliminary toxicology testing and that the final testing was done on a gas chromatograph and a gas chromatograph mass spectrometer. He stated that the gas chromatograph mass spectrometer was the "gold standard." He agreed that using the Cobas Mira for a preliminary test before the testing was confirmed was not a problem. He said he did not know a gas chromatograph mass spectrometer was used. [Id., 48-52.]

11. Assistant Public Defender Thomas Delaney testified on direct:

a. As the Petitioner's counsel at trial eight years earlier, with no autopsy, a motion for disinterment was considered but not pursued since the court probably would not grant it and the defense toxicology expert, Dr. Pape, did not think it would be helpful to the case. [Id., 57-60.]

b. He does not recall testing vitreous fluids from the victim. [Id., 61-62.]

c. He does not recall why they did not hire a forensic pathologist but believed that the State could not meet their burden of proof without an autopsy. [Id., 62-63.]

d. He believes that Dr. Pape was not called as a witness at trial because his testimony, as an expert, must not have been helpful. [Id., 63-65.]

e. He believes the defense strategy was to go all or nothing, and not ask for lesser included instructions, because they believed that the State could not prove the heroin caused the decedent's death. [Id., 65- 68.]

f. The use of the word "or" in the instruction may be error, but does not remember in the lengthy instruction discussions whether they discussed that. He is sure that a motion for acquittal was made at the close of the State's case. (The Respondent objected to the Petitioner's inquiring of counsel's conduct regarding the felony murder instruction, where no such allegation was made in the Petition. The Court overruled the objection.) [Id., 68-75.]

g. The defense should have filed a motion to dismiss indictment. The defense theory was that the State had to prove that heroin from the Petitioner killed the decedent. It was a fact-based case and the defense was based on the facts. [Id., 76-79.]

h. It was a correct statement of law not to allow the jury a dictionary when they requested one to determine what "directly" meant in the instruction. He believed that the State had to prove that heroin was the sole, solitary, single and only cause of death, and he does not think that the jury instruction reflected that. [Id., 80-81.]

i. He recalls that State witnesses Ware and Karn changed their stories and the defense thought the statements would speak for themselves as being inconsistent and that somebody was lying. The defense wanted the jury to take that away from all of the statements and testimony. It

was a conscious decision to admit the statements. [Id., 82-89.]

j. He should have objected to the reference to crack cocaine as improper 404(b) evidence. [Id., 90-91.]

k. He did not object to the victim's widow's testimony that they had four children because he did not want to draw attention to it and have the jury think they were picking on the widow. [Id., 91-93.]

l. If "aiding and abetting" was not referenced in the instructions as "intentional" that was an error. [Id., 93-94.]

m. He had no recollection of the cross-examination of Coroner Brining; he thinks co-counsel did that cross. [Id., 94-95.]

n. He has no specific recollection of the discussion with the Petitioner about testifying at trial but, since you have to do that, he is sure that it happened. He does not recall a discussion with the Petitioner about testifying to 911 calls. [Id., 95-96.]

12. On cross-examination, Mr. Delaney testified.

a. He does not have specific recollection of conversations that he must have had with the Petitioner in preparation for trial. [Id., 110.]

b. If the "aiding and abetting" instruction in the record included a "shared intent," the jury was properly instructed. [Id., 111-112.]

c. The defense presented a theory that the decedent committed suicide. The decision to not object to the answer about her children that the decedent's widow to a question by the State was tactical since attacking her would be counterproductive. [Id., 112-114.]

d. He believes that Karn and Ware are liars and that any mention of cocaine at trial was improper, but he has no recollection of why the victim was with the Petitioner on that night. [Id., 114-115.]

e. Since the victim and the co-defendant were dead, the defense tried to discredit Karn and Ware as the only eyewitnesses. The way they tried that was to show all of their inconsistent statements. This tactic would have been discussed with co-counsel and was probably discussed

within the office amongst colleagues. [Id., 115-118.]

f. The trial court informing the jury that it can't explain wording in the instruction and for the jury to give words their plain English meaning was not objectionable. [Id., 118-120.]

g. Regarding the indictment, he believes the language is confusingly written but he does not recall that being an issue at trial. He agreed that the elements of felony murder are the commission, or attempt to commit, one of the enumerated felonies, a defendant's participation in that offense, and the death of a victim as a result of the injuries received during that commission or attempt. He agreed that those elements are present in the indictment of the Petitioner. [Id., 120-124.]

h. He agreed that if the felony murder instruction on the Supreme Court's website at the time of trial included the phrase "accidently or otherwise as a result of injuries received," then the use of the same phrasing in the instruction given in the Petitioner's trial is fine. (The Petitioner objected.) [Id., 124-128.]

i. As to lesser-included instructions, his memory is that it was an all or nothing defense. The defense theory was one, the heroin was the co-defendant's, the Petitioner's girlfriend, and that she delivered it; and two, the heroin had to have killed the victim by itself and not in combination with alcohol, marijuana or any other drug. Under the circumstances, it was reasonable to not present the jury with any lesser included offenses to felony murder. [Id., 128-132.]

j. The defense believed that without an autopsy the State could not prove that heroin alone killed the victim. The defense expert told them the tissue would be degraded so a disinterment for a new autopsy would not be helpful. Practically, with the expense and pain to the family, disinterment was not going to be granted by the Court. [Id., 131-133.]

k. His recollection is that Dr. Pape was not called as a witness because he would not be helpful. He does not recall that there was any other material to be tested. He does not recall Dr. Pape suggesting that there was any irregularity in the State's testing but that, if Pape had, they would have pursued that. [Id., 133-136.]

13. Former County Coroner Sandra Brining testified that she was the coroner in the Petitioner's criminal case and testified at the pretrial and trial. She agreed that the 1976 medical examiner handbook, in effect in January 2001, set forth guidelines for autopsies for, among other things, suspected homicides and drug abuse. [Id., 98-102.]

14. On cross-examination, Ms. Brining testified that the decision to not conduct an autopsy of the decedent was made after speaking with the police investigating the case, and in consultation with Dr. Frost [the associate State Medical Examiner in Morgantown]. [Id., 102-104.]

15. The Petitioner testified:

a. He expressed to his trial counsel that he felt comfortable asking for an autopsy but was told it might not be in his best interest. He did not feel that he got a full explanation why it would not be in his best interest. He does not recall any discussion about hiring a forensic pathologist. His recollection of why trial counsel did not call Dr. Pape [the defense toxicologist] as a witness was because Dr. Pape could not offer anything other than what was in the reports. [Id., 138-140.]

b. His understanding of his defense at trial was that the State can't prove that: he was there; the heroin killed the victim; or that he gave the heroin to the victim. He did not have a discussion about lesser-included offenses. He does not recall a discussion about dismissing the indictment. Mr. Stanley told him that it was not in his best interest to testify at trial. They discussed his testifying about the 911 calls, and counsel wanted to use his being on the 911 tape to get mercy. He covered everything he wanted to bring to light. [Id., 140-143.]

c. His version of the events of the night of January 30-31, 2001, follows. He and [co-defendant] Kyra were together. Kyra received a page from Jon [Jonathan Ware]. The Petitioner returned the call and invited Jon and G.R. [George Karn] over to "drink a couple of beers, whatever." He explained where he lived. He met them at the stone bridge near his apartment and went to the apartment. He and Kyra went in the kitchen to get high and injected heroin. The heroin was Kyra's, she purchased it but gave him half. G.R., Jon and Jason [Gettel, the

decedent] walked in. It was obvious what he and Kyra were doing. He left the kitchen for the living room but overheard discussion about Jason wanting Kyra to inject him. He [the Petitioner] objected to this injection. He could not see into the kitchen. G.R. came into the living room. He cut a line of heroin for G.R., who snorted it. Jason came out and sat down on the couch. He [the Petitioner] was then under the influence of the heroin. He looked at Jason and Jason's head was back and Jason was a shade of gray. He did not know what Jon, G.R. or Jason were doing before they came over, except partying. He, Jon and G.R. were friends since high school. Jon pulled Jason off the couch and, he thinks, checked for a pulse. He [the Petitioner] smacked Jason in the face to wake him up but there was no response. G.R. would not let him use G.R.'s cell phone and there was no phone in the house. He and Jon pulled Jason out of the apartment and pushed and pulled Jason into the backseat. The plan was to take Jason to City Hospital. Jon and G.R. got the car stuck in the mud and snow. He helped push the car out. He and Kyra took Kyra's car and followed them. Jon and G.R. quickly ran off the road and flattened a front tire. The spare was flat. He and Kyra drove to a 7-11 and called 911. He did not give 911 his name, but told them that his name was Robert Brown. He was returning and found that G.R. and Jon had moved the car to the stone bridge. They were scared. He went back to the 7-11 and called 911 again. When he returned, Jon and the car were gone. G.R. then ran off into the fields. They found Jon driving the car nearby with the flashers on and sparks coming from the rim. They got Jon to stop and put Jon in their car. They returned to 7-11 and called 911 again and then took Jon home. [Id., 147-157.]

d. He thinks it would have helped his case if the jury had heard this testimony so they would not think he was an animal. He does not recall speaking with trial counsel about how this may have helped with lesser-included instructions. [Id., 157-158.]

16. On cross-examination, the Petitioner testified:

a. On the night Jason Gettel died, he [the Petitioner] and Kyra Heleine were together. Jonathan Ware or George Karn paged her. He returned the call and Jon picked up. Jon asked the Petitioner if he had cocaine, he did not have any. He invited them to his house and told them

how to get there. He did not know that Jason Gettel was coming and had not met Gettel before. He and Kyra did heroin purchased earlier that day, injecting themselves. They had everything laid out on the counter and split up what was hers and what was his. There was about a gram that they split. Jon and Jason stayed in the kitchen with Kyra. He went to the living room with G.R. He gave G.R. a line of heroin. After five or ten minutes G.R. started nodding. Jason came in and sat down beside him [the Petitioner.] Just before, he heard Jason asking Kyra why she could not find a vein, indicating to him that she was injecting Jason after he told her not to. He [the Petitioner] was pretty heavily intoxicated and nodding out. He noticed Jason turning gray. He did not give Jon any heroin. Jason was slumped, his head was back and he did not look good. Jon pulled Jason off the couch and either checked for a pulse or to see if Jason was breathing. There was no response except a groaning noise. He and Jon pulled Jason to the car and pushed and pulled Jason into it. The car was a two-door Chevy Cavalier, the front seat folded down, and they were pushing and pulling Jason into the back seat. He reitereated the car getting stuck in the mud and then running off the road and getting a flat tire. He admitted that when he called 911 he gave them a false name and a false report about a drunk driver. He reiterated the return to the car at the bridge, recalling 911, returning to find the car gone and finding it a half mile away. He understood that using drugs was a crime but did not undersatnd that what happened was a crime. He did not give his name because he was scared that someone might ask questions, scared of driving around with a body in the back of a car. He knew it was a possibility that Jason was dead. He took Jon, called 911 again and took Jon home, leaving Jason in the car. [Id., 158-179.]

b. He discussed this entire story with his trial counsel. Mr. Stanley told him that testifying would not be in his best interest. He remembered the judge telling him it was his own decision not to testify, and made that decision with the advice of his attorneys. He spoke with his attorneys about an autopsy and exhuming the body. He can't recall the conversations but there were several. He did not have a discussion about hiring a forensic pathologist. He did have conversations about Dr. Pape. Dr. Pape was present at the pre-trial hearing, passing trial counsel notes. Trial counsel did not use Dr. Pape because he could not offer anything different from the

State toxicologist. The defense theory was that the State could not prove that he supplied the heroin, gave the heroin to Kyra or that [Gettel] died from the heroin. He did not have any discussion about lesser-included instructions or indictment defects. He wanted voice analysis done on the 911 tapes since he had given a false name during those calls. [Id., 179-188.]

17. Assistant Public Defender Thomas Stanley testified.

a. He was one of the Petitioner's trial counsel in 2001. They were aware early that there was no autopsy. They discussed getting the body exhumed, but their expert [Dr. Pape] thought that it would not be helpful or would be inconclusive. They discussed hiring a forensic patholgist but determined that the benfit would be minimal, and they could cross the coroner on why an autopsy wasn't done. They believed that the State had to prove that heroin was the sole cause of death and he covered other possible causes [of death on cross]. Since there was no evidence of a crushed larynx, the other things that would have caused death were matters to come from the toxicology reports. They did not request independent testing on the vitreous fluid because Dr. Pape, after reviewing the State's evidence and graphs from the gas chromatography-mass spectrometer, felt his results would be the same, given the level of sophistication of the equipment. He does not recall a specific discussion with the Petitioner about getting an autopsy or a pathologist, but they did discuss all of the evidence. They did not call Dr. Pape as a witness because Pape indicated that he would back up the State's toxicology reports if asked the right questions. [Tr. 2/5/10, 3-13.]

b. The defense was all or nothing since if the State proved the felony, they got the murder. He agreed that the felony of delivery of a controlled substance could be a lesser-included offense, but believed that if the jury found the felony the probability of the jury finding the murder could not be avoided. Given the evidence, he did not see simple possession as a viable option. He does not recall discussing a lesser-included for Count Three, delivery of a controlled substance. [Id., 13-18.]

c. He asserted that Mr. Delaney took the lead on arguing instructions, but thought that an "or" should not have been in the felony urder instruction. The indictment does not specify first

or second degree murder, it just says murder. He believes that first degree murder elements in a felony murder indictment must be proved for a conviction. He does not recall whether a motion to dismiss the indictment was discussed. They did not believe that the State could prove that but for the heroin there would have been a death. He does not recall whether they discussed more clearly defining "directly resulted" in the instruction. [Id., 18-29.]

d. They wanted the jury to see all of the changes in Ware's and Karn's statements. Ware and Karn were granted immunity. Ware and Karn hauled Gettel around, facilitated getting the drugs, and were as much a part of this as the Petitioner. They wanted the jury to see that Ware and Karn went from outright lying to putting it all on the Petitioner. He does not recall whether they discussed having a cautionary instruction about the statements. He does not recall why no objection was made to the State's reference to cocaine. They did not object to Mrs. Gettel's testimony that she has four children because it would make an issue of it and turn the jury against the Petitioner for beating up on the widow. [Id., 29-34.]

e. He agreed that "intentional' needs to be in an "aiding and abetting" instruction. He doesn't recall the change in the Medical Examiner handbook regarding autopsies. They did not put the Petitioner on the stand because the Petitioner had outlined in writing his entire participation in the whole scheme; putting the Petitioner on the stand would have supported the State's theory. [Id., 34-41.]

18. On cross-examination, Mr. Stanley testified.

a. They did not get an autopsy because the State did not have one, Dr. Pape did not think one would be beneficial because the body had already been embalmed, and the sensitive nature of an exhumation. They reviewed the evidence, including the toxicology reports showing heroin metabolites in the decedent's bloodstream, and eyewitness testimony about the decedent being injected with heroin at the Petitioner's residence and having an immediate adverse reaction to it. The body fluids were gone and the tissue degraded. [Id., 42-47.]

b. The State's toxicology was performed on a gas chromatography-mass spectrometer, the gold standard of testing. The Cobas Mira was used for probable cause to go forward with

more testing, but the results from the secondary testing were testified to at trial. They did not call Dr. Pape as a witness because he would agree with the State's toxicology report. He does not recall having discussions with the Petitioner about an autopsy or independent testing or hiring a forensic pathologist, outside of a pathologist being necessary for an autopsy. [Id., 47-51.]

c. As to lesser-included offenses, delivery of a controlled substance, being an underlying offense for felony murder, if the State proved delivery then they would get the murder. He does not specifically recall discussing this with the Petitioner, but during trial preparation everything that counsel knew the Petitioner knew. The all or nothing approach was discussed with the Petitioner. It is not an unusual strategy to not ask for lesser-included instructions and hold the State's burden to the higher standard. He could not see the jury convicting of simple possession of heroin and ignoring the rest of the evidence. [Id., 51-55.]

d. Upon review of the transcript of the trial court instructing the jury on the elements of felony murder, the three major elements are covered. It makes more sense to him that an "and" rather than an "or" should have been in the instruction but he will defer to counsel's representations on the law. [Id., 55-63.]

e. Looking at Count 1 of the indictment, he believes that the State should have proved that Mr. Gettel was deliberately murdered. He agreed that felony murder can be charged in an indictment by using the usual first degree murder language. If he believed that the indictment were defective during trial, he would have moved to dismiss it. It is possible that if the indictment had been dismissed that the State could have re-indicted. [Id., 63-67, 71-72.]

f. A jury should not be given a dictionary in the jury room. Discrediting Ware and Karn over their changing statements was a strategy for the defense. He agreed that the testimony that Ware and Karn were looking for cocaine from the Petitioner that night was part of the *res gestae* at trial. He agreed that, perhaps, the State could rebut the defense theory of suicide with a question of what the decedent was doing at home the night of his death. The instruction on "aiding and abetting" uses the phrase "shared intent" and then alleges that Kyra Hyleine "intentionally" delivered heroin. He agreed that an autopsy is not always necessary to sustain a

murder conviction. He advised the Petitioner not to testify at trial, but it was the Petitioner's choice not to testify. The Petitioner never expressed a desire to testify. [Id., 72-84.]

19. The Court directed the parties to submit their proposed orders.

CONCLUSIONS OF LAW.

1. A habeas corpus procedure is "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." State ex rel. Harrison v. Coiner, 154 W.Va. 467, 176 S.E.2d 677 (1970); **W. Va. Code** § 53-4A-1(a).

2. A convicted criminal has the right to one omnibus post-conviction habeas proceeding. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606, 609 (1981).

3. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed. Syl. Pt. 4, State ex rel. McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. den.*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983)." Syl. Pt. 9, State ex rel. Azeez v. Mangum, 195 W. Va. 163, 465 S.E.2d 163 (1995); Syl. Pt., State ex rel. Phillips v. Legursky, 187 W. Va. 607, 420 S.E.2d 743 (1992).

4. "There is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed." Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963).

5. Due to this strong presumption of regularity, statutory law requires that a petition for writ of habeas corpus ad subjiciendum shall "specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based[.]" **W. Va. Code** § 53-4A-2.

6. The reviewing court shall refuse, by written order, to grant a writ of habeas corpus if the petition, along with the record from the proceeding resulting in the conviction and the record

from any proceeding wherein the petitioner sought relief from the conviction show that the petitioner is entitled to no relief or that the contentions have been previously adjudicated or waived. **W. Va. Code** § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49 (2004); Perdue v. Coiner, 156 W.Va. 467, 194 S.E.2d 657 (1979).

7. In order to prevail on an issue previously adjudicated during the criminal proceeding, the petitioner must prove that the trial court's ruling is "clearly wrong". **W. Va. Code** § 53-4A-1(b).

8. Grounds not raised by a petitioner in his petition are waived. Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606, 612 (1981); *see also*: State ex rel. Farmer v. Trent, 206 W. Va. 231, 523 S.E.2d 547 (1999), at 550, n. 9.

9. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pts. 1 & 2, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972).

10. **W. Va. Code** § 53-4A-1, *et seq.*, "contemplates the exercise of discretion by the court", authorizing even the denial of a writ without hearing or the appointment of counsel. Perdue v. Coiner, *supra.*

11. When denying or granting relief in a habeas corpus proceeding, the court must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. State ex rel. Watson v. Hill, 200 W. Va. 201, 488 S.E.2d 476 (1997).

12. Grounds Expressly Waived.

The Petitioner expressly waived on his filed, signed and verified Losh list the following grounds: 1-6, 9-15, 18-20, 22-27, 29, 31-36, 38-40, 43, 47-53. [Losh List.] Losh v. McKenzie, *supra.* The record is plain that the Petitioner is not entitled to any relief on the above expressly waived grounds. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.* No reservation of claims may be made since **W. Va. Code** § 53-4A-2 requires specificity in habeas pleadings.

13. The Petitioner Does Not Demonstrate that Trial Counsel Was Ineffective for not Ordering an Autopsy of the Decedent or Calling an Expert as to Autopsies.

The Petitioner fails to meet either prong of the two-prong standard necessary to prove ineffective assistance claims: 1) counsel's performance was deficient under an objective standard of reasonableness; and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. Pt. 1, State ex rel. Bailey v. Legursky, 200 W. Va. 770, 490 S.E.2d 858 (1997); Syl. Pt. 5, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

In post-trial motions, the trial court determined that there was no abuse of discretion in the State not performing an autopsy, pursuant to **W. Va. Code** § 61-12-10, because of the eyewitness accounts and the other tangible evidence demonstrating the cause of the death of Mr. Gettel. The Petitioner does not prove that the trial court was clearly wrong in this ruling. **W. Va. Code** § 53-4A-1(b). A review of the trial testimony reveals that the jury had sufficient evidence before them that an intoxicating amount of alcohol and a potentially lethal amount of heroin metabolites were scientifically found in Mr. Gettel's bloodstream. Medical personnel determined the cause of death to be positional asphyxiation–airway blocked by the way Mr. Gettel was crammed into the backseat–with contributing factors of alcohol and heroin use rendering Mr. Gettel unable to change his position.

The trial testimony of Jonathan Ware and George Karn is consistent on the following points: a) they were out drinking with Mr. Gettle on the night of his death when the decided to purchase some cocaine; b) they then contacted the Petitioner, who met them at a certain location and then took them to his house; c) the Petitioner did not have cocaine but had heroin; d) Gettel and Karn decided to try it; e) Kyra Heleine cooked up the heroin; and f) Kyra injected Gettel. [Tr. 11/6/01, 208-222; Tr. 11/7/01, 78-100.] The further testimony of Ware was that: Gettel complained that Heleine was trying to kill him because she injected him six or seven times; Gettel then passed out and turned purple; the Petitioner said [Gettel]'s dying, get him out of my house; Ware and the Petitioner dragged Gettel out and the Petitioner got Gettel in the car; Karn

drove; the next thing Ware knew, the Petitioner was telling him that Karn left the car in the ditch with Gettel still in the back; Ware tried to move the car but it would not go; the Petitioner and Kyra took Ware to his house, leaving Gettel in the car. [Tr. 11/6/01, 208-222.] Karn's further testimony was that he did a line of heroin that the Petitioner gave him and blacked out. He next remembers the car being wrecked and the Petitioner being there. [11/7/01, 78-100.]

The two responding paramedics testified consistently about responding to the vehicle and finding the victim, a very large man, in the back seat. The victim was bluish and cold and had no pulse. They called law enforcement and spoke with Coroner Sandra Brining. [Id., 183-200, 200-204.]

County Coroner Sandra Brining testified to her observations of the body of Mr. Gettel, her observations of needle puncture marks on the victim's arm, her receiving information from the police that the victim was injected with heroin shortly before his death, her consultation with State Medical Examiner Dr. Frost that an autopsy was not necessary because he felt that toxicology would give them the information they needed, her observation of blood and vitreous fluid samples drawn from the body and sent for analysis, and why she listed the cause of death as positional asphyxiation with alcohol and heroin use contributing. She was cross-examined extensively on the lack of an autopsy. [Id., 220-292; Tr. 11/8/01, 3-83.] Dr. Donald Cash, Chief Toxicologist for the West Virginia Medical Examiner's Office, testified as to the testing procedures and results from testing Mr. Gettel's blood. The blood alcohol results were 0.09. The opiate results were 0.28 milligrams of morphine per liter with traces of monoacetylmorphine. That concentration of alcohol could result in loss of judgment and impaired perception. That concentration of morphine has been reported in fatalities. The combination of alcohol and heroin may be contributing factors in the death. Preliminary drug screen was done on the Cobas Mira. Opiate results came from the gas chromatograph mass spectrometer. He was cross-examined extensively on the lack of an autopsy. [Tr. 11/8/01, 84-101, 101-191.]

The Petitioner offers no factual basis that an autopsy would have revealed a cause of

death unrelated to the delivery of heroin. No autopsy was ever conducted by either side. The Petitioner's expert at the habeas hearing, Dr. Manion, testified that he personally would not reach a conclusion on cause of death without an autopsy, and offered only speculation as to other possible causes of death. He disagreed with Coroner Brining's conclusion that the cause of death was positional asphyxiation, with heroin and alcohol as contributing factors. His primary basis for dispute with Ms. Brining's conclusion was the foam on the decedent's face, which he testified would have taken hours to develop and indicated that the airway was not completely obstructed. Dr. Manion, however, agreed that a substantial airway obstruction could cause asphyxiation. Evidence at trial indicates that less than two hours passed from when the decedent was alive obtaining money from an ATM at around 10:51 p.m., to when the first call to 911 came in at 12:53 a.m. The decedent was dead when emergency personnel arrived at the scene at about 1:23 a.m. Dr. Manion did not testify as to how many hours would have been necessary to create the foam, and had no recollection of how much time actually elapsed. Dr. Manion testified that the amount of heroin metabolites in the decedent's blood is in the fatal range. Dr. Manion offered no opinion on the significance of the eyewitness testimony of the decedent's injection with heroin and immediate adverse reaction thereto. Dr. Manion's plainly had a mistaken belief regarding the trial evidence of the scientific testing procedures used in determining the presence of alcohol and heroin metabolites in Mr. Gettel's blood, not recollecting at all that those results were determined by the use of a gas chromotograph and a gas chromotograph-mass spectrometer, which latter device he referred to as the "gold standard" for such testing. [Tr. 12/22/09, 15-55.]

The Petitioner's trial counsel each testified at the habeas hearing that they did not obtain an autopsy, after consuting with their toxicology expert, because it would not be beneficial. Mr. Stanley testified that he grilled the coroner pretty well on the lack of an autopsy.

That the medical examiner guidelines then in place may have required the performance of an autopsy does not overcome the evidence at trial establishing the decedent's death from the delivery of heroin.

The Petitioner offers no factual basis that testimony from a forensic pathologist about the

absence of an autopsy, without proving a different cause of death, would have changed the outcome of the trial. Without these, the Petitioner cannot claim that trial counsel acted unreasonably or that, had counsel put on such evidence, the outcome of the trial would have different. The Petitioner's speculation over other possible causes of death does not refute the combined eyewitness observations and the scientific toxicology testing and does not demonstrate the trial court was "clearly wrong" in its earlier ruling. **W. Va. Code** § 53-4A-1(b). The Petitioner's speculation that an autopsy would have refuted the combined eyewitness observations and the scientific toxicology testing does not demonstrate that the Petitioner's trial counsel acted below an objectively reasonable standard in not moving for an independent autopsy or that, had the trial court exercised its discretion to order such an autopsy, that the results of the proceeding would have been different. Bailey, *supra*; Miller, *supra*. Nor has the Petitioner demonstrated that the Court had the authority to, *sua sponte*, order an independent autopsy, or that the failure to do so was a due process violation, as alleged.

The record is plain that the Petitioner is not entitled to any relief on this allegation of counsel's conduct or trial court error regarding an autopsy. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

14. The Petitioner Does Not Demonstrate that Trial Counsel was Ineffective for not Requesting Lesser-included Instructions.

The Petitioner fails to meet either prong of the two-prong standard necessary to prove ineffective assistance claims. Syl. Pt. 1, State ex rel. Bailey v. Legursky, *supra*, 200 W. Va. 770, 490 S.E.2d 858 (1997); Syl. Pt. 5, State v. Miller, *supra*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

"Errors of counsel are not deemed to be ineffective assistance if those errors are arguably a matter of trial tactics or strategy." State v. Pelfrey, 163 W.Va. 408, 256 S.E.2d 438 (1979). The evidence placed before the jury was sufficient for the jury to make a determination that the Petitioner was guilty of the Felony Murder count as to Mr. Gettel and the Delivery of Heroin count as to Mr. Karn. The Petitioner concedes in his Petition that the all-or-nothing approach by his trial counsel was a matter of strategy–the jury was forced to find murder or acquit; the jury

was forced to find delivery or acquit. Successful or not, matters of strategy are not ineffective assistance unless no reasonable counsel would have so acted. Miller, *supra.* This court cannot say that counsel acted unreasonably under the circumstances.

The trial court is only obligated to give lesser-included instructions if requested by defense counsel. *See* Syl. Pt. 4, State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987). *See also* State v. Dellinger, 178 W.Va. 265, 358 S.E.2d 826, 829 n. 4 (1987), noting that Bartlett involved a strategic move to not request lesser-included instructions. The Petitioner admits that, as a matter of strategy, counsel did not request such instructions.

The Petitioner's trial counsel testified that their strategy was an all or nothing strategy, to hold the State to a higher standard. They testified that lesser-included instructions were not viable since, if the jury found delivery of a controlled substance, they would find felony murder, and that to arrive at simple possession would require the jury to ignore all of the other evidence. Mr. Stanley testified that it is not an unusual strategy to not request lesser-included offenses. The Court agrees.

The record is plain that the Petitioner is not entitled to any relief on this allegation of counsel's conduct or trial court error regarding lesser-included instructions. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.*

15. The Petitioner Does Not Demonstrate that the Trial Court Erroneously Instructed the Jury on the Elements of Felony Murder or that Trial Counsel were Ineffective in this.

The standard for reviewing jury instructions is:

> "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so that they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, as long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syl. Pt. 4, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 5, State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999); Syl. Pt. 1, State v. Boggess, 204 W. Va. 267, 512 S.E.2d 189 (1998).

Under the felony-murder doctrine, the State is required to prove (1) the commission of or attempt to commit one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; (3) the death of the victim as a result of injuries received during the course of such commission or attempt. State v. Mayle, 178 W. Va. 26, 31-32, 357 S.E.2d 219, 224-225 (1987); State v. Williams, 172 W. Va. 295, 311, 305 S.E.2d 251, 267 (1983).

Included among the felonies enumerated by statute is "delivering of a controlled substance." **W. Va. Code** § 61-2-1.

The parties vigorously argued the felony murder instruction to be given the jury. [Tr., 11/8/01, 265-end; Tr. 11/9/01, 3-35.] The instruction read to the jury by the trial court comports with the model Felony Murder instruction provided by the West Virginia Supreme Court of Appeals and meets the elemental requirements of Mayle and Williams.

In pertinent part, the instruction read to the jury informed them:

> Under West Virginia law a homicide is also considered first degree murder if it occurs accidentally or otherwise during the commission of, or the attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, and/or manufacturing or delivering of a controlled substance.
>
> Where the defendant participated in such commission or attempted commission, or where the death of the victim occurs accidentally or otherwise as a direct result of injuries received as a result of the Defendant's commission or attempt to commit one of those enumerated felony offenses.
>
> This concept known as the Felony Murder Doctrine applies where the commission or the attempt to commit the enumerated felony and the death of the victim were part of one continuous transaction and were closely related in point of time and there is a direct causal connection.

[Tr., 11/9/01, 46-47.]

The jury was further properly instructed on aiding and abetting and that heroin is a controlled substance. [Id., 48-49.]

The jury was then also properly instructed:

> Before the Defendant, Roger Bowers, Jr., can be convicted of aiding and abetting felony murder based on the delivery of a controlled substance, the State must overcome the presumption that he is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that, one, the Defendant, Roger Lee Bowers, Jr.; two, in Berkeley County, West Virginia; three, on or about the 31st day of January, 2001; four, was present and did aid and abet another, to wit, Kyra Heleine; five, which Kyra Heleine did knowingly and intentionally deliver to Jason Scott Gettel a Schedule I controlled substance, to wit, heroin; six, which directly resulted in the death of Jason Scott Gettel; seven, in Berkeley County, West Virginia; eight, on or about the 31st day of January, 2001.

[Id., 48-49.]

The instruction read is an accurate reflection of the law. Deference is given to the trial court on the specific wording of an instruction. Davis, *supra*; Boggess, *supra*. "'An instruction for a statutory offense is sufficient if it adopts and follows the language of the statute, or uses substantially equivalent language and plainly informs the jury of the particular offense for which the defendant is charged.' Syllabus Point 8, *State v. Slie,* 158 W.Va. 672, 213 S.E.2d 109 (1975)." Syl. Pt. 10, State v. Slater, 222 W.Va. 499, 665 S.E.2d 674 (2008).

The instruction does not provide a disjunctive that would permit the jury to infer that it could return a verdict of guilt merely because a death occurred. Rather, the instruction clearly requires that before the jury may return a verdict of guilty, it must find that the defendant participated in the enumerated felony and that a death occurred--accidentally or otherwise (ie., non-accidentally)--as a direct result thereof. The broken clause of which the Petitioner complains: "Where the defendant participated in such commission or attempted commission, or where the death of the victim occurs accidentally or otherwise as a direct result of injuries received as a result of the Defendant's commission or attempt to commit one of those enumerated felony offenses" meets the elemental requirement. That same clause read in the context of the instruction as a whole, as required when reviewing instructions, leaves no doubt as to its elemental certitude. Davis, *supra*; Boggess, *supra*.

The record is plain that the Petitioner is not entitled to any relief on this allegation of trial

court error in instructing the jury on the elements of felony murder. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.*

The Respondent objected to the Petitioner orally amending his Petition during the habeas hearing to include an allegation of ineffective assistance of counsel as to this allegation on the instruction. However, since there is no error proven in the instruction, the Petitioner fails to demonstrate that trial counsel were ineffective in this regard. The Petitioner fails to meet either prong of the two-prong standard necessary to prove ineffective assistance claims. Syl. Pt. 1, State ex rel. Bailey v. Legursky, *supra*, 200 W. Va. 770, 490 S.E.2d 858 (1997); Syl. Pt. 5, State v. Miller, *supra*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The record is plain that the Petitioner is not entitled to any relief on this allegation of ineffective assistance of counsel in instructing the jury on the elements of felony murder. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.*

16. The Petitioner Does Not Demonstrate that Indictment is Insufficient.

This is the first time this issue has been raised. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pts. 1 & 2, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972).

In addition,

> Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. Pt. 1, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Even were this issue not waived for failure to previously raise, the indictment in this case is plainly sufficient. "An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl.

Pt. 2, State v. Miller, *supra*, 197 W.Va. 588, 476 S.E.2d 535 (1996). "'In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.' Syllabus Point 1, *State ex rel. Combs v. Boles*, 151 W.Va. 194, 151 S.E.2d 115 (1966)." Syl. Pt. 4, State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001). "'An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.' Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983)." Syl. Pt. 8, State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998).

A felony murder indictment which charges the feloniously, maliciously, deliberately, and unlawfully slaying, killing, and murdering of a victim is proper, without the necessity of specifically charging felony murder or reflecting that murder occurred during one of the enumerated underlying offenses. State v. Satterfield, 193 W. Va. 503, 457 S.E.2d 440 (1995); State v. Justice, 191 W. Va. 261, 445 S.E.2d 202 (1994); State v. Young, 173 W. Va. 1, 311 S.E.2d 118 (1983).

There is a distinction between what need be proved for a first degree murder conviction and a felony murder conviction:

> Unlike traditional first degree murder, felony-murder does not "require proof of the elements of malice, premeditation, or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies." Syllabus Point 7, in part, *State v. Sims,* 162 W.Va. 212, 248 S.E.2d 834 (1978). Thus, the State was required to prove "(1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt." *State v. Williams,* 172 W.Va. 295, 311, 305 S.E.2d 251, 267 (1983) (*citing State v. Beale,* 104 W.Va. 617, 141 S.E. 7 (1927)).

State v. Lanham, 219 W.Va. 710, 639 S.E.2d 802 (2006).

Under the felony-murder doctrine, the State is required to prove: (1) the commission of or

attempt to commit one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; (3) the death of the victim as a result of injuries received during the course of such commission or attempt. State v. Mayle, *supra*, 178 W. Va. 26, 31-32, 357 S.E.2d 219, 224-225 (1987); State v. Williams, *supra*, 172 W. Va. 295, 311, 305 S.E.2d 251, 267 (1983). Delivery of a controlled substance is one of the enumerated offenses forming the basis for felony murder. **W. Va. Code** § 61-2-1; State v. Rodoussakis, *supra*, 204 W.Va. 58, 511 S.E.2d 469 (1998).

Each of these essential elements of felony murder–enumerated felony, defendant's participation, death of the victim as a result--is included in Count One of the Indictment:

> That ROGER LEE BOWERS, JR. On or about the __ day of January 2001 in the said County of Berkeley and the State of West Virginia, did then and there unlawfully, intentionally and feloniously aid and abet one Kyra Heleine in the commission of felony murder, in that the said ROGER LEE BOWERS, JR. was present and did assist in the delivery of heroin for the said Kyra Heleine, when the said Krya Heliene did deliberately slay, kill and murder, one Jason Scott Gettel, in the commission of delivery of a controlled substance, to-wit: heroin a Schedule I controlled substance, in violation of Chapter 61, Article 2, Section 1, of the Code of West Virginia, as amended, against the peace and dignity of the State.

Any unnecessary words in the indictment may be treated as surplusage. "An unnecessary allegation in an indictment is surplusage and may be stricken or ignored." State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911, 920 (1998) [citations omitted]. Since the surplusage was never stricken, those words may be ignored and were not required to be proved by the State.

The Indictment clearly charges the Petitioner with "intentionally" aiding and abetting the commission of felony murder through the delivery of heroin, a controlled substance. No other reference to intent need be averred in an indictment for the delivery of a controlled substance. State v. Trogdon, 168 W.Va. 204, 283 S.E.2d 849, 851 (1981).

As to Count Three, the Delivery of Heroin charge need not name the person to whom the heroin was delivered. The delivery and distribution of a controlled substance means that it was

delivered to another person. **W. Va. Code** § 60A-4-101(g) and (j). The intentional delivery of a controlled substance is a criminal offense regardless of to whom the substance is delivered. In a similar circumstance, the West Virginia Supreme Court of Appeals recognized long ago that "An indictment against a druggist for the sale of intoxicating liquor is not bad for not naming the person to whom the sale was made." Syl., State v. Davis, 68 W.Va. 184, 69 S.E. 644 (1910). *See* State v. Ferrell, 30 W.Va. 683, 5 S.E. 155 (1888).

In the case *sub judice*, there was no surprise to the Petitioner since the discovery provided amply identified George Karn as the person to whom the heroin was delivered. The jury was instructed, without objection, that the delivery of heroin charged in Count Three was by the Petitioner to George Karn. *See also*: **W. Va. Code** § 62-2-11, which operates to cure any technical defect in an indictment upon verdict. "W. Va. Code § 62-2-11 cures any technical defect in an indictment when the indictment sufficiently apprises the accused of the charge which he must face." State v. Casdorph, 159 W. Va. 909, 230 S.E.2d 476, 479 (1976).

The record is plain that the Petitioner is not entitled to any relief on this allegation regarding the sufficiency of Counts One and Three of the Indictment. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

17. The Petitioner Does Not Demonstrate that Trial Counsel were Ineffective for Not Moving to Dismiss Counts One and Three of the Indictment.

Since there was no error proven by the Petitioner as to the language of Counts One and Three of the Indictment, the Petitioner fails to prove that trial counsel were ineffective for not moving to dismiss them. Bailey, *supra*; Miller, *supra*. Petitioner's trial counsel testified at the habeas hearing to now finding the wording of Count One to be confusing but asserted that they did not find the indictment defective at the time of trial or they would have moved to dismiss.

The record is plain that the Petitioner is not entitled to any relief on this allegation of counsel's conduct regarding Counts One or Three of the Indictment. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

18. The Petitioner Does Not Demonstrate that Trial Counsel were Ineffective by Agreeing that a Question from the Jury During Deliberations Could Not be Answered.

As to the giving of instructions, the West Virginia Supreme Court holds:

> 1. " 'Where instructions given clearly and fairly lay down the law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given.' Syl. pt. 4, *State v. Bingham*, 42 W.Va. 234, 24 S.E. 883 (1896)." Syl. pt. 4, *State v. Johnson*, 157 W.Va. 341, 201 S.E.2d 309 (1973).
>
> 2. A term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction.

Syl. Pts. 1 and 2, State v. Bartlett, *supra*, 177 W.Va. 663, 355 S.E.2d 913 (1987).

Under the felony-murder doctrine, the State is required to prove (1) the commission of or attempt to commit one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; (3) the death of the victim as a result of injuries received during the course of such commission or attempt. State v. Mayle, *supra*, 178 W. Va. 26, 31-32, 357 S.E.2d 219, 224-225 (1987); State v. Williams, *supra*, 172 W. Va. 295, 311, 305 S.E.2d 251, 267 (1983).

The jury's question during deliberation asked the trial court for further explanation of the element "directly resulted in the death of Jason Scott Gettel." The instructions given the jury followed the requirements of State v. Mayle, *supra*; State v. Williams, *supra*. The parties agreed that they could not answer the question except to advise the jury that they must give the words their plain English usage. [Tr., 11/9/01, 109-111.] That agreement complies with Syllabus Point 2 of State v. Bartlett, *supra*. Trial counsel stood by that decision in their habeas testimony. There was no ineffective assistance of counsel demonstrated by the Petitioner.

A trial court has an obligation to *re-read* an instruction to the jury *if the defendant requests that the court do so*. *See* State v. Slater, *supra*, 222 W.Va. 499, 665 S.E.2d 674, 684

(2008). The Petitioner did not request that the instruction be re-read. Regardless, the Petitioner does not now allege, or provide any factual or legal basis to support, that whatever concern the jury had about that element would have been alleviated by a re-reading of the instruction. The Petitioner offers no legal basis that the trial court or counsel were in any way obligated to further explain words to which the jury could apply plain English usage. The Petitioner does not demonstrate that his trial counsel were unreasonably deficient in not asking the Court to re-read the instruction or that the outcome of the trial would have been changed by a re-reading. Bailey, *supra*; Miller, *supra*.

The record is plain that the Petitioner is not entitled to any relief on this allegation of counsel's conduct regarding the jury's question during deliberations. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

19. The Petitioner Does Not Demonstrate that there was Error in the Denial of the Motion for Acquittal as to Count One at the Close of the State's Case.

The standard of review when reviewing the denial of a motion for acquittal is:

> "'Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.' *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969)." Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 3, State v. Taylor, 200 W. Va. 661, 490 S.E.2d 748 (1997).

Since the Petitioner offered no evidence at trial, the Petitioner's argument in this habeas is the same as questioning the sufficiency of the evidence to support the conviction. The standard for reviewing the sufficiency of evidence to support a conviction is :

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and

> must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Point 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, State v. Slater, *supra*, 222 W.Va. 499, 665 S.E.2d 674 (2008); Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

The specific inquiry of the appellate court in reviewing the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syl. Pt. 1, *State v. Guthrie*, [*supra*].

Syl. Pt. 1, State v. Hughes, *supra*.

The evidence placed before the jury was sufficient to convince any reasonable person of the Petitioner's guilt of the indicted offense of Felony Murder. Mr. Gettel was out drinking heavily with friends and went to the Petitioner's house to obtain cocaine. The Petitioner had no cocaine but provided heroin to Mr. Gettel. The Petitioner directed Kyra Heleine to cook the heroin. Kyra Heleiene injected Gettel with that heroin. Immediately upon receiving the injections, Gettel passed out and turned purple. The Petitioner, not wanting Gettel to die in his home, directed that Gettel be removed. Gettel, a very large man over three hundred pounds, was dragged out to a small car by the Petitioner and one of Gettel's friends and stuffed headfirst into

the backseat. Gettel was abandoned in the backseat of that car when the car was disabled and the Petitioner removed Gettel's friend from the scene.[1] An intoxicating amount of alcohol and a potentially lethal amount of heroin metabolites were scientifically found in the Petitioner's bloodstream. Medical personnel determined the cause of death to be positional asphyxiation–airway blocked by the way Mr. Gettel was crammed into the backseat–with contributing factors of alcohol and heroin use rendering Mr. Gettel unable to change his position.

This evidence was sufficient for the jury to find beyond a reasonable doubt that the Petitioner aided and abetted Kyra Heleine in delivering heroin to Mr. Gettel and that Mr. Gettel died as a result of that heroin delivery. Taylor, *supra*; Miller, *supra*; Williams, *supra*; Hughes, *supra*.

The record is plain that the Petitioner is not entitled to any relief on this allegation of trial court error in denying the motion for acquittal as to Count One. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

20. The Petitioner Does Not Demonstrate that Trial Counsel were Ineffective by Trying to Impeach the State's Witnesses Ware and Karn with their own Contradictory and Inconsistent Prior Statements.

The Petitioner's trial counsel each testified at the habeas hearing that their strategy was to discredit Ware and Karn before the jury by providing the jury with all of the inconsistent statements, from their outright lying to placing all of the blame on the Petitioner. They knew that discrediting these eyewitnesses to the delivery of heroin and the decedent's immediate death was the key to defeating the State's case inasmuch as the only other eyewitnesses to the events, the decedent and Ms. Heliene, were dead.

"The credibility of a witness may be attacked and impeached by any party, including the

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[1]It is noted that the Petitioner's testimony at the habeas hearing as to the events of that fatal night is substantially consistent with the trial testimony of Ware and Karn. The only key differences being that the Petitioner asserts that he invited Ware and Karn to come over to drink beers, not for drugs, and that he advised Heleine not to give any of her heroin to Gettle. This testimony, coming eight years after trial, must be viewed by the Court as self-serving as to the Petitioner's culpability for the death of Mr. Gettle.

party calling the witness." **W.V.R.E.** 607. "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the non-party witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." **W.V.R.E.** 611(b)(2).

Ware and Karn each had provided earlier statements inconsistent in whole or in part with their trial testimony. The Petitioner's trial counsel sought to impeach Ware and Karn on these inconsistencies on cross-examination. Successful or not, matters of strategy are not ineffective assistance unless no reasonable counsel would have so acted. Miller, *supra*. This court cannot say that trial counsel were unreasonable in trying to so impeach Ware and Karn. Nor can this court say that the Petitioner has shown where these efforts of the Petitioner's trial counsel led to the introduction of substantive evidence that was not otherwise before the jury, the absence of which would have required a different outcome to the trial.

The Petitioner fails to prove that trial counsel were ineffective for utilizing the inconsistencies in witness Ware's and Karn's prior statements against them when attacking those witnesses' credibility. Bailey, *supra*; Miller, *supra*. The Petitioner fails to demonstrate that his trial counsel's use of these statements was anything more than proper impeachment. The trial court's instructions to the jury as to witness credibility and the means by which they were to weigh and credit that testimony, [Tr., 11/9/01, 43], set the parameters for the jury's consideration.

Ruling on the Petitioner's post-trial motions, the trial court denied the Petitioner's allegation of error in the admission of the statements and the lack of a limiting instruction. The court found that the Petitioner freely utilized the statements in his cross-examination of the witnesses and that neither party objected to the use of the statements or requested a limiting instruction. [Order Partially Denying Defendant's Motion for Judgment of Acquittal and Rescheduling Conclusion of Argument, 5/16/02.] To the extent that some of these witnesses' prior statements were consistent with their trial testimony, the information was then already before the jury such that the Petitioner does not demonstrate that a limiting instruction, had it

been requested or given, would have produced a different outcome at trial. The Petitioner does not prove that the trial court was clearly wrong in this ruling. **W. Va. Code** § 53-4A-1(b).

The record is plain that the Petitioner is not entitled to any relief on this allegation of counsel's, or the trial court's discretionary, conduct regarding the impeachment of the State's primary witnesses. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

21. The Petitioner Does Not Demonstrate that There was Error in Denying the Motion for Acquittal or Suppressing the Evidence or Not Giving an Unrequested "Missing Evidence" Instruction.

The sufficiency of the evidence supporting the Petitioner's conviction is addressed above. The record is plain that the Petitioner is not entitled to any relief on this allegation of trial court error in denying the motion for acquittal. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

The trial court heard the toxicology testimony at the pre-trial suppression hearing and ruled it admissible. The Petitioner does not prove that the trial court was clearly wrong in this ruling. **W. Va. Code** § 53-4A-1(b).

The record demonstrates that, in post-trial motions, the trial court denied the Petitioner's same allegations regarding an autopsy, other fluids and tissues that the Petitioner would have liked to have seen collected and tested, and an unrequested instruction regarding these matters. The trial court found that the discretion to conduct an autopsy, pursuant to **W. Va. Code** § 61-12-10, was not abused by the local coroner who, in consultation with the Chief Medical Examiner, and based on the eyewitness accounts of the victim's adverse reaction to the heroin injections and the other circumstances concerning the victim's death, found plain that cause of death. The trial court further found that the victim's blood was collected, tested and provided the basis for the scientific evidence of the presence of heroin metabolites in the victim's blood. The trial court further found that there is no evidence that the State did not make a good faith effort to collect and preserve all necessary evidence, nor is there any evidence that the State made any

effort to hide or destroy evidence. The trial court further found that no instruction regarding "missing evidence" was requested by the parties. [Order Partially Denying Defendant's Motion for Judgment of Acquittal and Rescheduling Conclusion of Argument, 5/16/02.] The Petitioner presented no evidence at the habeas hearing that would cause the Court to divert from that ruling. The Petitioner does not prove that the trial court was clearly wrong in this ruling. **W. Va. Code** § 53-4A-1(b). Without any "missing evidence," there was no reason to offer or give a "missing evidence" instruction.

The record is plain that the Petitioner is not entitled to any relief on this allegation of trial court error in denying the acquittal motion, suppressing the toxicology evidence or not giving an unrequested instruction. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.*

22. The Petitioner Does Not Demonstrate that the State's Reference to Testimony that Gettel went to the Petitioner's for Cocaine but Instead Received the Fatal Heroin from the Petitioner Required a 404(b) Hearing.

Evidence that is *intrinsic* to a crime is not "other crimes, wrongs, or acts" for the purposes of **W.V.R.E.** 404(b). *See*: State v. Cyrus, 222 W. Va. 214, 664 S.E.2d 99 (2008); and State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613, 631 n. 29 (1996). Evidence and reference to the fact that the Petitioner was contacted by Ware, Karn and the decedent, on the night of the decedent's death, for the purpose of obtaining cocaine and, when the Petitioner had no cocaine the Petitioner delivered heroin, is *intrinsic* to the Petitioner's indicted charges of Felony Murder and felony Distribution of a Controlled Substance. (Tr. 11/6/01, 198, 212; Tr. 11/9/02, 56-57.) No 404(b) notice is required in this situation; no 404(b) hearing is required. Cyrus; LaRock.

The record is plain that the Petitioner is not entitled to any relief on this allegation of missing 404(b) hearing. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.*

23. The Petitioner Does not Demonstrate that Potential Juror Johnston was Improperly Struck for Cause.

The Petitioner's claim of error by the trial court for granting the State's motion to strike for cause potential juror Johnston is also unsupported by the record. During individual *voir dire* Mr. Johnston voiced a very strong personal opinion, based on his own close family experience, that someone who dies as a result of voluntary drug use bears that responsibility alone. [Tr., 11/6/01, 111-116.] "You know, my personal opinion is that somebody who has got a history of doing it [drugs], and they end up dying from it, somebody made a choice somewhere along the line." [*Id.*, 116.] Mr. Johnston also hedged on his ability to listen to the evidence and follow the instructions of the Court: "Well, yeah, I believe that I could look at it under the law. Now, how much my opinion comes into play as far as, you know, I don't know the person that died, their background, or anything about them, if it is, you know, something they have been doing." [*Id.*]

"[T]he trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight." Miller, *supra*, 476 S.E.2d at 553. *See also*: State v. Williams, 206 W. Va. 300, 524 S.E.2d 655, 658-659 (1999). Here, potential juror Johnston plainly stated that he would bring his personal opinion in to bear on whether the murder victim brought his death upon himself through his drug use. The trial court properly sustained the State's motion to strike.

The Petitioner does not prove that the trial court was clearly wrong in this ruling or the trial court's subsequent review of this issue in post-trial motions. **W. Va. Code** § 53-4A-1(b).

The record is plain that the Petitioner is not entitled to any relief on this allegation of error in striking potential juror Johnston for cause. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

24. The Petitioner Makes No Cognizable Claim of Error in Mr. Gettel's Wife's Testimony.

One of the defense theories was that the decedent committed suicide by heroin. The State rebutted that suggestion before the jury when Mrs. Gettel testified that, on the night of her husband's death, he had been home with she and her children before going out with friends. She testified that his mood was fine that night. This testimony was relevant to the Petitioner's theory of suicide. The testimony was not objected to by the Peititoner.

Post-trial, the Petitioner asserted error. "'Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury.' Syllabus point 5, in part, *State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992)." State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997).

The trial court, at post-trial motions, found that the State did not elicit the testimony to inflame jury prejudice; the jury could have found the reference prejudicial to the *victim*, for leaving a wife and children at home while he went out; and the testimony was not clear that the children were the victim's children and not the wife's alone. The trial court denied the Petitioner's motion. [Order Partially Denying Defendant's Motion for Judgment of Acquittal and Rescheduling Conclusion of Argument, 5/16/02.] The Petitioner does not prove that the trial court was clearly wrong in this ruling. **W. Va. Code** § 53-4A-1(b).

Each of the Petitioner's trial counsel testified at the habeas hearing that they did not object because they did not want to draw attention to the testimony or appear to the jury that they were beating up on the widow. These are reasonable defense strategies for not objecting. State v. Pelfrey, *supra*, 163 W.Va. 408, 256 S.E.2d 438 (1979). Mr. Stanley further testified that he believed it relevant, given the Petitioner's theory of the decedent's suicide that night.

Since the testimony was relevant, the Petitioner fails to demonstrate that trial counsel were ineffective for not objecting to this one utterance or that, had they objected, the outcome of

the trial would have changed. Bailey, *supra*; Miller, *supra*.

The record is plain that the Petitioner is not entitled to any relief on this allegation of error in Mrs. Gettel's testimony. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

25. The Petitioner Does Not Demonstrate that the Trial Court Erred in not Declaring a Mistrial During Closing Remarks.

This issue is not subject to review in a habeas corpus proceeding. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed. Syl. Pt. 4, State ex rel. McMannis v. Mohn, *supra*, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. den.*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983)." Syl. Pt. 9, State ex rel. Azeez v. Mangum, *supra*, 195 W. Va. 163, 465 S.E.2d 163 (1995); Syl. Pt., State ex rel. Phillips v. Legursky, *supra*, 187 W. Va. 607, 420 S.E.2d 743 (1992). Prosecutorial remarks alleged improper are not constitutional error. State ex rel. Wimmer v. Trent, 199 W. Va. 644, 487 S.E.2d 302, 306 (1997)(claim of prosecutorial misconduct by allegedly improper remarks does not "implicate the appellant's constitutional rights in such a manner as to be reviewable on habeas corpus"); State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163, 190 (1997)(citing improper prosecutorial remarks in State v. Hobbs, 178 W. Va. 128, 358 S.E.2d 212 (1987), as an example of nonconstitutional error).

Even were this issue subject to review in this proceeding, the Petitioner fails to establish that he is entitled to relief. The Petitioner fails to establish that the statement was objectionable, that the trial court abused its discretion, or that the trial court was requested by the Petitioner to exercise that discretion. The decision to declare a mistrial is discretionary with the trial court. State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002), *citing* State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983). "In order to take advantage of remarks made during an opening statement or closing argument which are considered improper, an objection must be made and counsel must request the court to instruct the jury to disregard them." Copen, *id.*, *quoting* State v. Coulter, 169 W.Va. 526, 530, 288 S.E.2d 819, 821 (1982).

At closing, the Petitioner's counsel argued that there was evidence that Mr. Gettel committed suicide. The State responded in rebuttal, without objection, that there was no such evidence presented. [11/9/01, 75, 103.]

There was nothing objectionable about the Prosecuting Attorney's rebuttal. Mrs. Gettel testified about her husband taking pills about two years earlier and that her husband's mood was fine the night of his death. Mrs. Gettel denied knowledge on cross-examination of a suicide attempt by wrist-slashing. George Karn testified similarly on cross-examination. Petitioner's counsel wanted the jury to infer that Gettel committed suicide; the Prosecutor responded directly and appropriately that there was no evidence from which the jury could make such an inference. "A prosecutor is allowed to argue all reasonable inferences from the facts." State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891, 896 (1992), *quoted in* State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469, 486 (1995). There was no reference whatsoever by the State to the Petitioner not testifying.

The record is plain that the Petitioner is not entitled to any relief on this allegation of trial court error regarding the State's proper remarks at closing. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

26. The Petitioner Does Not Demonstrate that there was Cumulative Error.

The cumulative error doctrine does not apply where no error is shown. State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996).

The record is plain that the Petitioner is not entitled to any relief on this allegation of cumulative error. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

27. The Petitioner Does Not Demonstrate that the Trial Court Erroneously Instructed the Jury on the Elements of Felony Murder or that Trial Counsel were Ineffective.

This is simply a variation of the same flawed argument the Petitioner made earlier in this proceeding.

The trial court's instructions were properly given. Under the felony-murder doctrine, the

State is required to prove (1) the commission of or attempt to commit one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; (3) the death of the victim as a result of injuries received during the course of such commission or attempt. State v. Mayle, *supra*, 178 W. Va. 26, 31-32, 357 S.E.2d 219, 224-225 (1987); State v. Williams, *supra*, 172 W. Va. 295, 311, 305 S.E.2d 251, 267 (1983).

In pertinent part, the instruction read to the jury informed them:

> Under West Virginia law a homicide is also considered first degree murder if it occurs accidentally or otherwise during the commission of, or the attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, and/or manufacturing or delivering of a controlled substance.
>
> Where the defendant participated in such commission or attempted commission, or where the death of the victim occurs accidentally or otherwise as a direct result of injuries received as a result of the Defendant's commission or attempt to commit one of those enumerated felony offenses.
>
> This concept known as the Felony Murder Doctrine applies where the commission or the attempt to commit the enumerated felony and the death of the victim were part of one continuous transaction and were closely related in point of time and there is a direct causal connection.

[Tr., 11/9/01, 46-47.] The instruction's use of the words "direct result" and "direct causal connection" are specifically used to link the underlying offense to the death.

The evidence at trial established that Mr. Gettel went to the Petitioner's to obtain cocaine. The Petitioner had no cocaine and, instead, offered heroin. The Petitioner directed Kyra Heleine to cook the heroin. Kyra Heleine then injected Gettel with the heroin. Gettel had an immediate adverse reaction to the injections of heroin. Gettel passed out. Gettel was stuffed into a small car by the Petitioner. Expert toxicology testimony was that the amount of heroin metabolites on Gettel's blood has been demonstrated to be lethal. The medical opinion was that Gettel died of positional asphyxiation with contributing factors of alcohol and heroin use rendering Mr. Gettel

unable to change his position. The jury was properly instructed that they could find the Petitioner guilty of felony murder where Gettel died as a result of the injuries received from the Petitioner's participation in the commission of the felony of delivery of heroin. Mayle, *supra*; Williams, *supra*,

The Petitioner cites no West Virginia cases in his Amended Petition that support his argument. The out-of-jurisdiction cases cited by the Petitioner in the Amended Petition actually support the instruction given by the trial court. The instruction given the jury by the trial court complies with the elements required by Mayles, *supra*; and Williams, *supra*.

The record is plain that the Petitioner is not entitled to any relief on this allegation of trial court error regarding the "result" aspect of the felony murder instruction. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

The Respondent objected to the Petitioner orally amending his Petition during the habeas hearing to include an allegation of ineffective assistance of counsel as to this allegation on the instruction. However, since there is no error proven in the instruction, the Petitioner fails to demonstrate that trial counsel were ineffective in this regard. The Petitioner fails to meet either prong of the two-prong standard necessary to prove ineffective assistance claims. Syl. Pt. 1, State ex rel. Bailey v. Legursky, *supra*, 200 W. Va. 770, 490 S.E.2d 858 (1997); Syl. Pt. 5, State v. Miller, *supra*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The record is plain that the Petitioner is not entitled to any relief on this allegation of ineffective assistance of counsel in instructing the jury on the elements of felony murder. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

28. The Petitioner Does Not Demonstrate that the Trial Court Erroneously Instructed the Jury on the Elements of Aiding and Abetting.

The trial court instructed the jury that an aider and abetter is one "who was actually or constructively present at the scene of the crime at the same time as the absolute perpetrator who acts with shared criminal intent...of the absolute perpetrator." [Tr., 11/9/01, 47.] The trial court

further instructed the jury that they could find the Petitioner guilty of aiding and abetting felony murder if they found, among other elements, that the Petitioner "four, was present and did aid and abet another, to-wit, Kyra Heleine; five, which Kyra Heleine did knowingly and intentionally deliver to Jason Scott Gettel a Schedule I controlled substance, to-wit, heroin; six, which directly resulted in the death of Jason Scott Gettel[.]" [Id., 49.]

Since the element of shared criminal intent is covered for the jury in the definition of what an aider and abetter is, there is no requirement to set forth again that there is a shared criminal intent. The instruction clearly sets forth co-defendant Kyra Heleine's "knowing and intentional" delivery of the heroin. The instruction given follows the West Virginia Supreme Court's model instruction for aiding and abetting, which does not require a redundant repetition of "shared criminal intent." No trial court error is shown.

Each of the Petitioner's trial counsel testified at the habeas hearing that the element of intent was properly covered in the instruction.

Since the instruction is not objectionable, the Petitioner fails to demonstrate that trial counsel were ineffective for not objecting to it or that, had they objected, the outcome of the trial would have changed. Bailey, *supra*; Miller, *supra.*

The record is plain that the Petitioner is not entitled to any relief on this allegation of trial court error regarding the aiding and abetting aspect of the felony murder instruction. **W. Va. Code** § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra.*

ACCORDINGLY, it is hereby ORDERED that the allegations made in the Amended Petition for Writ of Habeas Corpus are DENIED.

The Clerk shall enter this Order as of the date noted below and transmit attested copies to: Mr. Stone; Mr. Quasebarth; Thomas McBride, Warden, Mount Olive Correctional Complex, One Mountainside Way, Mount Olive, West Virginia 25185; and the Clerk, West Virginia Supreme

Court of Appeals, State Capitol Complex, Building One, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

ENTERED: 5/18/10

HONORABLE DAVID H. SANDERS
CIRCUIT JUDGE

Prepared by:

Christopher C. Quasebarth, Esq.
Chief Deputy Prosecuting Attorney
State Bar No.: 4676

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: _____
Deputy Clerk