STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Alfred Gray,
Petitioner Below, Petitioner

vs) No. 11-1327 (Raleigh County 09-C-169-H)

David Ballard, Warden
Mount Olive Correctional Complex,
Respondent Below, Respondent

FILED
November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Alfred Gray, by counsel Stephen P. New, appeals from the Circuit Court of Raleigh County's "Order Denying Relief Requested by the Petitioner, Alfred Gray, in his Petition for Writ of Habeas Corpus Ad Subjiciendum" entered on August 19, 2011. The State of West Virginia, by counsel, Thomas W. Rodd, filed a summary response on behalf of Respondent David Ballard, Warden.[1]

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented 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, we find that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On October 31, 2002, petitioner shot his girlfriend, Stephanie Adkins, in the back of the head at close range. Petitioner claimed the shooting was accidental. Petitioner was indicted on two counts: (1) first degree murder, (2) with the use of a firearm. On October 29, 2003, petitioner was convicted by a jury of first degree murder, with a recommendation of mercy, with the use of a firearm. On December 5, 2003, petitioner was sentenced to life in prison with parole eligibility. Petitioner's trial counsel appealed his conviction. On July 6, 2005, the Court issued its opinion affirming petitioner's conviction. *See State v. Gray*, 217 W.Va. 591, 619 S.E.2d 104 (2005).

On February 9, 2009, petitioner filed a pro se petition for a writ of habeas corpus. The circuit court appointed petitioner habeas counsel, who filed an amended petition and a supplement to the amended petition. The circuit court held petitioner's omnibus hearing on February 16, 2010, and entered its order denying relief on August 19, 2011. That order is the subject of the present appeal.

[1] Pursuant to Rule 41(c) of the West Virginia Revised Rules of Appellate Procedure, we have replaced the respondent's name with David Ballard, Warden. The initial respondent on appeal, Thomas McBride, is no longer the warden at the Mount Olive Correctional Complex.

Petitioner asserts four assignments of error, including the trial court's failure to exclude testimonial evidence that violated his Sixth Amendment right to confront a witness against him; its failure to exclude untimely disclosed evidence; ineffective assistance of counsel; and prosecutorial misconduct. All of these issues were addressed by the circuit court in its August 19, 2011, order.

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

The Court has considered the merits of the arguments set forth in petitioner's amended brief and in respondent's summary response, and has reviewed the appendix record. Having reviewed the circuit court's "Order Denying Relief Requested by the Petitioner, Alfred Gray, in his Petition for Writ of Habeas Corpus Ad Subjiciendum" entered on August 19, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in the appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

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

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
ALFRED GRAY,

Petitioner,

v.

Civil Action No. 09-C-169-H
Honorable John A. Hutchison

THOMAS McBRIDE, Warden,
Mount Olive Correctional Complex,

Respondent.

ORDER DENYING RELIEF REQUESTED BY THE PETITIONER, ALFRED GRAY, IN HIS PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

The Court having reviewed all pleadings, having heard the testimony and the arguments of counsel, and having reviewed the pertinent case law, denies the requested relief by the Petitioner, Alfred Gray, and makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This case was begun with the filing of a Petition for a Writ of Habeas Corpus Ad Subjiciendum on February 25, 2009. On April 13, 2009, an order was entered granting the motion for appointment of counsel and ordering appointed counsel to file an amended petition.
2. The order appointing counsel and ordering an amended petition ordered counsel to follow all procedures set forth in the case *Losh* v. *McKenzie*, 116 W.Va. 762, 277 S.E.2d 606 (1981). The Court specifically ordered counsel to raise every

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potential ground for relief conceivably applicable to the Petitioner's case. Counsel was further admonished to make sure that the Petitioner understood that any grounds for relief not raised would be waived.

3. The Court also set forth timelines for the filing of the amended petition and any responses to be filed by the Respondent.
4. On February 16, 2010, the parties appeared before this Court and presented all their evidence and made their closing arguments. Thereafter, the Court ordered both the Petitioner and the Respondent to file proposed findings of fact and conclusions of law for consideration by the Court in preparing its final ruling.
5. The crimes for which the Petitioner was charged allegedly occurred on or about October 31, 2002, in the area of Beckley, Raleigh County, West Virginia.
6. On October 31, 2002, the Petitioner was charged with Count 1: first degree murder, W.Va. Code § 61-2-1, and Count 2: use of a firearm. W.Va. Code § 62-12-2.
7. After indictment by the grand jury, the Petitioner was convicted of first degree murder with use of a firearm at trial on August 29, 2003, and was sentenced on December 3, 2003.
8. On September 4, 2009, Petitioner filed an Amended Petition for Writ of Habeas Corpus and Memorandum in Support, by counsel, Stephen P. New.
9. Petitioner's Writ of Habeas Corpus alleged and asserted the following: (a) thirteen grounds of ineffective assistance of counsel; (b) Raleigh County Circuit Court's violation of Petitioner's constitutional rights by failing to exclude certain State's untimely disclosure of evidence under the open-file policy; (c)

prosecutorial misconduct; (d) improperly having held no preliminary hearing; (e) indictment showing no offense committed; and (f) a claim alleging and asserting there exists a constitutional defect based upon instructions that were provided to the jury.

10. On December 16, 2009, Petitioner, by counsel, Stephen P. New, filed the Petitioner's Supplement to Petition for Writ of Habeas Corpus, alleging and asserting a claim there exists a constitutional defect based upon the violation of the Petitioner's right to confront witnesses at trial.

11. On February 10, 2010, Petitioner, by counsel, Stephen P. New, filed Petitioner's Second Supplement to Petition for Writ of Habeas Corpus, further presenting evidence alleging and asserting prosecutorial misconduct based upon the violation of the Petitioner's right to confront witnesses at trial.

12. The essential facts which resulted in the first degree murder (with mercy) conviction of the Petitioner, Alfred Gray, are summarized in *State v. Gray*, 619 S.E. 2d 104 (W.Va. 2005), affirming Petitioner's August 29, 2003, conviction and the December 5, 2003, sentence of life imprisonment (with parole eligibility) imposed by this Court.

13. On direct appeal, Petitioner made no claim of insufficiency of the evidence and no claim of trial court error regarding issues raised for the first time in this habeas proceeding, as more fully discussed below.

14. As directed by this Court, the Respondent Warden, by counsel (hereinafter "the State"), filed the "State's Response to Amended Petition . . ." on November 25, 2009.

15. During the omnibus habeas hearing the State addressed the fact that Petitioner had filed a "Supplement to Petition" and a "Second Supplement to Petition," both of which the State believed were disallowed by W.Va. Code §53-4A-6. This Court ruled that it would hear evidence offered in support of such additional pleadings and then would determine whether the State should respond. T. 4-8.

16. At the conclusion of the hearing, this Court ruled that the State should respond to the first "Supplement" but that the State did not "need to respond to the Second Supplemental Petition." T. 148.

17. The Court finds as fact that the "Second Supplement" to which this Court referred was untimely filed pursuant to W.Va. Code §53-4A-6; Rule 6.01(c), W.V.T.C.R.; and Rule 6(a), W.V.R. Civ. Pro. Further, both the form and the substance of the "Second Supplement" confirm that it was not authored by Petitioner's counsel and Petitioner admitted during the omnibus hearing that it was researched and prepared by a fellow prison inmate and that "it came out of a newspaper mostly." T. 129-132. Accordingly, Petitioner waived the claim raised in the "Second Supplement," but even if such claim had not been waived, the document contains only conclusory allegations lacking "detailed factual support" or citations to applicable law, and therefore is not reviewable in habeas corpus. *Losh v. McKenzie*, 277 S.E. 2d 606, 612 (W.Va. 1981).

18. As directed by this Court, the State filed its response to the first "Supplement" on March 16, 2010. Accordingly, the Court makes the following findings of fact concerning the claims set forth in the Petition and the first "Supplement."

19. The grounds for relief set forth in the Petition and the first "Supplement" are unsupported by both the record of Petitioner's murder trial and of the omnibus habeas hearing.

20. The Petition's assertion that Petitioner's trial counsel "had never before tried a criminal case" is untrue. T. 11-15.

21. The Petition's assertion that this Court "abused its discretion" by failing *sua sponte* to appoint co-counsel is unsupported by any factual basis or pertinent authority.

22. The Petition's complaint that Petitioner's trial counsel "conducted no investigation" is untrue, based upon this Court's observation of counsel's conduct during pre-trial motions, trial and post-conviction proceedings, as well as by the testimony of counsel and counsel's investigator after they were called by Petitioner as witnesses during the omnibus habeas hearing.

23. Petitioner's trial counsel employed a veteran West Virginia State Police trooper and seasoned private investigator who investigated the case, gathered defense witnesses, maintained continuous contact with Petitioner and his family, and joined trial counsel in reviewing the State's entire file in the Prosecuting Attorney's Office. T. 88-100.

24. The Petition's claim of ineffectiveness of counsel includes allegations that trial counsel was "ineffective for failing to hire expert witnesses." Based upon the record of the trial and the omnibus habeas hearing, this Court would not have been justified in approving funds for additional expert witnesses pursuant to

Rule 35, W.V.T.C.R., and *State ex rel. Foster v. Luff*, 264 S.E. 2d 477, 480 (W.Va. 1980).

25. The Petition's claim that trial counsel was ineffective for failing to obtain the services of a firearms expert is belied by the fact that, in fact, the defense did obtain such services and did call the defense firearms expert as a witness at trial. Tr. T. 506-516.

26. Further, during the omnibus hearing, Petitioner himself confirmed that he'd "always known" that "there was nothing wrong with (the) gun" that was used in this murder and that he "never said the gun was malfunctioning." and that he had informed his counsel that the gun did not malfunction. T. 134-135.

27. The Petition's speculation that a forensic pathologist or toxicologist might have testified about "the effects of drunkenness. . . on intent: the presence or absence of fingerprints on the weapon, the shoes, this victim or elsewhere. . . analysis of gunshot pellets, wadding, etc." invites nothing more than sheer conjecture as to what, if any, exculpatory evidence might have been discovered by a forensic pathologist or toxicologist. This finding of conjecture and speculation might appear to be an issue tending to favor the Petitioner's allegations of ineffective assistance except that, as will be discussed later, a tactical decision was made by competent counsel to refrain from presenting evidence in these areas.

28. During the omnibus hearing, Petitioner's trial counsel testified that he had made a tactical decision that (a) an intoxication defense was incompatible with the admissible evidence of Petitioner's condition and conduct after the killing; (b) an intoxication defense would only reduce the degree of homicide, while a

defense of accident potentially could result in acquittal: and (c) if Petitioner were to claim that he was so intoxicated that he was incapable of forming intent, then the jury likely would disbelieve his account to police and his trial testimony describing an accidental shooting, by which he had to claim sufficient clear memory to credibly describe such accident. T. 54-55. 59-64. 86-87.

29. Trial counsel's decision to forego using an expert witness to support an intoxication defense was a reasonable tactical decision: further. in light of the entirety of the evidence, it is not reasonably probable that defense expert testimony speculating about Petitioner's degree of intoxication -- if admissible at all -- would have resulted in a different trial verdict.

30. Trial counsel made a reasonable tactical decision that. even if a defense expert had been able to recover prints from the murder weapon or the scene or from other objects seized by deputies, there would have been no exculpatory evidence resulting therefrom. Petitioner never disputed handling the weapon. and whether or not the victim's prints were recovered from it would have neither enhanced nor rebutted Petitioner's claim of accident. Further. based upon the entirety of the evidence at trial, it is not reasonably probable that the presence or absence of prints on the murder weapon or at the scene or from any other items would have resulted in a different verdict.

31. Trial counsel made a reasonable tactical decision to refrain from seeking court approval for the services of a forensic pathologist to investigate matters about which "there was (n)ever any issue," such as footprints and paramedic and Medical Examiner determinations of the nature of the fatal injury, or as to

matters about which there were a number of lay witnesses who testified for the defense. T. 27-31, 59, 82-85. Further, the Court finds that in light of the entirety of the evidence at trial, it is not reasonably probable that the services or testimony of a defense forensic pathologist would have resulted in a different outcome at trial.

32. Petitioner's trial counsel made a reasonable tactical decision to rely upon lay witness testimony to rebut the Medical Examiner's testimony and Deputy Rakes' testimony that the victim had been beaten immediately before she was shot and killed. T. 31, 82-85.

33. The Petition's assertion that trial counsel was ineffective because the State allegedly made late disclosures in discovery is rebutted by trial counsel's testimony at the omnibus hearing that the defense was not surprised by any of the evidence with the exception of "the late turning over the gun" and "the policeman's testimony that there were no cans around." and by the defense investigator's testimony that he "wasn't too surprised by anything" the State introduced at trial. T. 76-77, 98. As the defense at trial moved to suppress C.I.B. evidence concerning the gun, and also contested the deputies' testimony that there were no cans present for target shooting, trial counsel's conduct in this regard cannot be deemed ineffective. T. 77, 8/26/03 Pre-Trial Hearing at 16.

34. The Petition's claim that trial counsel was ineffective for failing to move for a continuance "at least for several months" must fail, as the Court upon a review of the pre-trial proceedings to which the Petition refers can assure the parties

that any such motion, by either the defense or the State, would have been denied.

35. The Petition's claim that trial counsel was ineffective for "permitting" a paramedic to testify as to the nature of the fatal injury he observed is without merit, as the Petition admits that the defendant at trial objected to the testimony about which the Petition complains. 8/26/03 Pre-Trial Hearing at 129: Tr. T. 211-213.

36. The Petition's claim that trial counsel was ineffective in his impeachment of State's witnesses is an entirely conclusory claim unsupported by the trial record, and accordingly is not reviewable in habeas corpus.

37. The Petition's claim that there was unspecified evidence withheld by the *State* cannot support a claim of ineffectiveness of defense counsel. Further, the Petition promised that "Stevie Williams will testify at the (omnibus) hearing that a large trash bag of evidence was left . . . ." No such evidence -- and no such witness -- was offered during the omnibus hearing. T. 140-141.

38. The Petition's claim that "Deputy Rakes then (went) on to falsely testify" concerning the so-called missing evidence is unsupported by any factual basis: indeed, when Steve "Stevie" Williams testified at trial, he made no mention of the same. Tr. T. 430-440.

39. The Petition's claim that trial counsel failed to effectively cross-examine witnesses is unsupported by any information to persuade the Court that counsel's conduct in this regard was unreasonable or that there is a reasonable

probability that different or more extensive cross-examination would have resulted in a different outcome at trial.

40. The Petition's charge that trial counsel was ineffective includes an accusation of "police gamesmanship" regarding Petitioner's statements made during transport. As trial counsel succeeded in having such statements suppressed, there can be no legitimate claim of ineffectiveness in this regard. 8/26/03 Pre-Trial hearing at 105.

41. The Petition's claim that trial counsel was ineffective for failing to convince this Court to suppress evidence of Petitioner's *conduct* during transport must fail, as the Petition fails to support such claim by any pertinent authority holding that evidence of the conduct of the accused after a killing is inadmissible. See *State v. Mills*, 566 S.E. 2d 891, 905 (W.Va. 2002).

42. The Petition's claim that trial counsel was ineffective for failing to move to exclude the brief mention of Petitioner's marital status is without merit, as the status of the relationship between the parties was relevant evidence; further, there is utterly no reason to believe that the outcome of the trial would have been different in the absence of the limited testimony in this regard.

43. The Petition's claim that trial counsel was ineffective for failing to object to "hearsay" refers solely to threatening statements made by Petitioner. Such statements are not hearsay. Rule 801(d)(2), W.V.R.E.

44. The Petition's claim that trial counsel was ineffective for failing to "move *in limine* to exclude every witness on the State's witness list whose testimony (sic) was not provided prior to Trail (sic)" is contrary to Rule 26.2, W.V.R.E.

Further, by open file discovery the defense had received the pre-trial statements of the two witnesses who testified about Petitioner's threats, and trial counsel confirmed that their trial testimony was not a surprise. 8/26/03 Pre-Trial hearing at 5-7, T. 76-77.

45. The Petition's claim that trial counsel was ineffective for failing to suppress evidence admitted under Rule 404(b), W.V.R.E., is without merit, as no Rule 404(b) evidence was admitted into evidence.

46. The Petition's claim that "trial counsel should have called witnesses . . . to rehabilitate (Petitioner's) reputed character" is negated by the fact that the defense was able to exclude from the jury's consideration evidence of Petitioner's prior domestic violence by keeping the door to his character closed. Preventing the State from presenting character evidence of the Petitioner was clearly a tactical decision made by competent counsel. 8/26/03 Pre-Trial Hearing at 5-7.

47. The Petition's claim that defense counsel's failure to object to the testimony of Ms. Buco and Ms. Cheselka on the grounds that they allegedly committed "destruction of evidence" is unsupported by any factual basis. The fact that these witnesses deleted threatening messages left by Petitioner before the murder does not affect the admissibility of their testimony reciting what they heard from Petitioner on such messages.

48. The Petition's claim concerning the testimony of Deputy Rakes regarding prior violence by Petitioner against the victim entitles Petitioner to no habeas relief

because it was "previously and finally adjudicated" in *Gray*, *supra* at 113-114. W.Va. Code §53-4A-3(a).

49. In its repetition of the prior claim concerning an intoxication defense, the Petition claims that Petitioner consumed valium and hydrocodone at the time of the murder. As he made no such claim at trial, including during his own testimony, any claim in this regard is waived. W.Va. Code §53-4A-3(a).

50. While testifying at the omnibus hearing, Petitioner admitted that there was no defense claim at trial that he had consumed hydrocodone and valium but asserted that the prosecution elicited such evidence during the testimony of "(the) guy – the gun – the C.I.B. guy, gun guy." T. 142-143. Review of the State's examination of C.I.B. firearms expert Matthew White confirms that the State never elicited any testimony concerning hydrocodone or valium. Tr. T. 302-312, 317-318.

51. The Petition's claim that trial counsel was ineffective for failing to offer an intoxication instruction based upon Syl. Pt. 2, *State v. Keeton*, 272 S.E. 2d 817 (W.Va. 1980), is without merit, as (a) the defense had made a reasonable tactical decision to forego an intoxication defense and instead to rely on a "pure" defense of accident, and (b) an intoxication defense under *Keeton* would have "opened the door" to evidence of Petitioner's anti-social conduct which "antedated the intoxication."

52. Further, the Court gave an intoxication instruction, about which the Petition makes no claim of error. Tr. T. "Instructions Given" at 613-614 (15-16 in original).

53. The Petition's unsupported claim that trial counsel was ineffective because the Court committed instructional error concerning "presumptions" is belied by the fact that the sole mention of any "presumption" in the instructions concerned the presumption of innocence. Further, the Petition's claim that the instructions omitted the "excuse, justification or provocation" exceptions to the inference to be drawn by the intentional use of a firearm also is belied by the record. Tr. T "Instructions Given" 599-624 (1-26 in original).

54. The Petition's claim that trial counsel "should have argued more" for a mistrial based upon press coverage is groundless, as neither at trial nor in this habeas proceeding has there been any evidence that the jury disobeyed the Court's instructions concerning press coverage. Further, Petitioner's claim of juror misconduct was "previously and finally adjudicated" on direct appeal. *Gray*, *supra* at 111-112.

55. The Petition's laundry list of motions that, it is suggested, trial counsel "should have filed" is unsupported by any showing that such motions -- if they had been granted -- would have resulted in a different outcome at trial: indeed, the more persuasive argument is that essential, meritorious motions would have become lost in such a sea of unnecessary rote motions.

56. The Petition's claim that the Court failed to give Petitioner the *Newman* instructions is belied by the record. Tr. T. 106-107.

57. The Petition's assertion that this Court "violated (Petitioner's) constitutional rights by failing to exclude the State's untimely disclosed evidence" is without merit because (a) the admission or exclusion of evidence is alleged "ordinary"

trial error not amounting to error of constitutional dimension cognizable in a habeas proceeding; (b) the Petition identifies *no* exculpatory evidence that the State withheld; (c) there is no suggestion that the defense was either surprised or hampered by late disclosure of evidence; (d) the claim concerning the murder weapon was "previously and finally adjudicated" in *Gray, supra* at 114-115; and (e) the Petition errs in claiming that there is a Rule 16, W.V.R. Crim. Pro., requirement that the "State must identify . . . what (the witnesses) are likely to say."

58. The Petition's claim there was a "prejudice outburst (sic)" by the prosecutor during a bench conference is unsupported by the record. Further, there is no showing that the jury heard anything that was said during bench conferences and, accordingly, there is no showing of prejudice.

59. The Petition's claim that there was "prosecutorial misconduct" in the introduction of "highly inflammatory irrelevant evidence" is without merit, as (a) both this Court and the West Virginia Supreme Court of Appeals found no "highly inflammatory irrelevant" evidence introduced by the State, and (b) the Petition fails to articulate how it is "misconduct" for any trial counsel -- including a prosecutor -- to seek to introduce evidence which counsel deems to be relevant and admissible.

60. The Petition's claim that the prosecutor engaged in "misconduct" by her failure to "acknowledge . . . that evidence was left at the scene . . . and that important forensic evidence was not gathered" is a baseless charge, as there never has been reason to believe that evidence was left behind or that "important forensic

evidence was not gathered." Even given the opportunity to produce evidence in support of this claim during the omnibus hearing, Petitioner and his counsel utterly failed to do so.

61. The Petition's claim that the "indictment shows on face no offense was committed" is without merit, as (a) any such claim was waived by operation of Rule 12(b), W.V.R. Crim. Pro.; (b) the word "premeditation" added to the statutory murder language set forth in W.Va. Code §61-2-1 did not invalidate the indictment, as it was mere surplusage pursuant to W.Va. Code §62-2-10; (c) the words "premeditation" and "deliberation" as used under §61-2-1 are synonymous, *State v. Miller*, 476 S.E. 2d 535, 547(W. Va. 1996). *State v. Bragg*, 235 S.E. 2d 466, 472 (W.Va. 1977); and (d) even if the addition of the word "premeditation" had been a "defect" -- which it was not -- it was "cured" by the verdict pursuant to W.Va. Code §62-2-11.

62. The Petition's claim that Petitioner is entitled to post-conviction habeas relief because -- for reasons unspecified -- he did not have a preliminary hearing prior to indictment is unsupported by any explanation of how he was prejudiced thereby or how such pre-indictment circumstance constituted *trial* error of constitutional dimension. Further, the Petition cites no authority for the claim that a convicted murderer is entitled to habeas relief because he had no preliminary hearing.

63. The Petition's final complaint entitled "Instructions to the Jury" is repetitive of the claim discussed above, and the same findings of fact apply.

64. The Supplement to Petition's claim is based entirely upon *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and fails to acknowledge that *Crawford* was decided several months after Petitioner's trial. The Supplement makes no argument for the retroactive application of *Crawford* and cites no authority in this regard.

65. The Supplement's claim that this Court admitted the victim's statements made shortly before the murder under a "forfeiture by wrongdoing" theory is belied by the record: obviously, prior to *Crawford* the "forfeiture by wrongdoing" exception to *Crawford* was nonexistent. Tr. T. 102-105.

66. The victim's statements about which the Supplement complains were recited with no finding of plain error by the W.Va. Supreme Court of Appeals in *Gray*, *supra* at 108. If the admission of such statements constituted error of constitutional dimension, the appellate court presumably would have found plain error.

67. The Supplement makes no claim that this Court erred in the hearsay analysis upon which the victim's statements were admitted, and there was no assignment of error in this regard on direct appeal.

68. Even if this Court applies *Crawford* retroactively, the Supplement's claim that the victim's statements were barred by *Crawford* is without merit, because the Supplement makes no claim, and certainly no showing, that the victim's statements were "testimonial," and *Crawford* applies solely to "testimonial" hearsay.

69. The victim's statements, about which Ms. Buco and Ms. Cheselka testified, were not "testimonial": according to *Crawford* and subsequent authority, to conclude that the victim's statements were "testimonial" would demand the impossible finding that the victim knew that Petitioner soon would be murdering her and that she made the statements to Ms. Buco and Ms. Cheselka -- not to police -- under the precognitive assumption that such statements would be used in Petitioner's murder trial.

Conclusions of Law

1. The Petition, the Supplement and the evidence presented at the omnibus habeas corpus hearing fail to demonstrate that trial counsel's performance fell below "an objective standard of reasonableness" and that "there is a probability that, but for counsel's unprofessional errors the result of the proceedings would have been different." *State ex rel. Daniel v. Legursky*, 465 S.E. 2d 416, 421-429 (W.Va. 1995), *State v. Miller*, 459 S.E. 2d 114 (1995). *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
2. Our Supreme Court of Appeals has cautioned that a "charge of ineffective assistance is not to be made lightly" and that the "burden of persuasion (is) placed on the petitioner" to prove ineffective assistance. That burden has not been met here. *Daniel* at 421, citing *State v. Baker*, 287 S.E. 2d 497, 502 (W.Va. 1982).
3. Even when trial counsel's performance has been found to be incompetent, "the Supreme Court . . . stated 'prejudice' is whether the result of the proceedings

was fundamentally unfair or unreliable." *Daniel, supra*, at 426, citing *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 180 (1993). Upon the record of this trial, the allegations set forth in the Petition and the Supplement, and the evidence adduced during the omnibus hearing, this Court concludes as a matter of law that Petitioner's conviction for first degree murder was neither unfair nor unreliable.

4. Given the weight of the admissible State's evidence, trial counsel reasonably "suggested to Mr. Gray that he accept (the) offer" of a plea to second degree murder. Petitioner declined that pre-trial offer and then, as discussed in *Gray, supra* 115-116, demanded that he be permitted to enter a mid-trial plea to second degree murder. It is apparent that if Petitioner had followed his counsel's very reasonable advice to accept the State's pre-trial offer, there now would be no claim of ineffective assistance of counsel. T. 78-79.

5. In light of the evidence summarized by the West Virginia Supreme Court of Appeals in *Gray, supra*, trial counsel reasonably had "more than concerns" that a jury would decline to recommend mercy and correctly considered the verdict of first degree murder with mercy a success. Given that the West Virginia Supreme Court of Appeals characterized this case as the "brutal murder" of a young mother, the "mercy" verdict was, indeed, a success for the defense accomplished by Petitioner's trial counsel. *Gray, supra* at 114.

6. As discussed above, the Petition, the Supplement and the evidence adduced at the omnibus habeas hearing all negate the Petition's claim that trial counsel conducted "no investigation" and instead establish that the defense was not

surprised by any material evidence at trial; indeed, Petitioner himself confirmed that there was no surprise when the C.I.B. report confirmed that the murder weapon was not "broken." T. 135. The record clearly demonstrates that trial counsel "conduct(ed) a reasonable investigation enabling him . . . to make informed decisions about how best to represent" his client. *Daniels, supra* at 422.

7. The Petition's claim that trial counsel should have sought to employ additional experts merely leaves "this Court . . . to speculate regarding what, if any, exculpatory evidence might have been discovered . . . . Unfortunately, this does not carry the day in a habeas proceeding . . . ." *State ex rel. Wensell v. Trent*, 625 S.E. 2d 291, 296 (W.Va. 2005), *State v. Taylor*, 490 S.E. 2d 748, 753 (W.Va. 1997).

8. Although given the opportunity at the omnibus hearing to sustain his burden of persuading the Court that additional investigation might have changed the verdict in this case, Petitioner and his counsel failed to offer any evidence to support this claim.[1]

9. The Petition's claims alleging a deficiency in trial counsel's demands for compliance with discovery rules demonstrate a lack of comprehension of Rule 16, W.V.R. Crim. Pro., and Rule 26.2, W.V.R. Crim. Pro. Further, as discussed above, because there is no showing that the defense was either surprised or

[1] No expert witnesses were called by Gray at the omnibus habeas hearing. When Gray himself was asked by his habeas counsel if there was "anything else you believe Mr. McGraw should have done in his defense of you," Gray answered:

> A: He should have done more of an investigation into what really went on.
> Q: Can you be more specific . . .
> A: Pretty much a little bit of everything. I talked more with Mr. Vaughn than I did Mr. McGraw the whole time, so I really – I really don't know what to say. T. 118.

hampered by any failure to disclose exculpatory evidence, there can be no finding that Petitioner was prejudiced by his trial counsel's conduct regarding discovery.

10. There has been no evidence presented that would warrant a finding that trial counsel's cross-examination of State's witnesses fell below an objective standard of reasonableness: "Counsel's tactical decisions at trial, such as refraining from cross-examining . . . or from asking a particular line of questions, are given great deference . . . ." *State v. Frye*, 650 S.E. 2d 574, 577 (W.Va. 2006) (citations omitted).
11. The Petition's claims alleging "ordinary" trial error, such as the claim that Petitioner's marital status should have been mentioned, "do not implicate (Petitioner's) constitutional rights in such a manner as to be reviewable in habeas corpus . . . ." Syl. Pt. 4, *State ex rel. Farmer v. McBride*, 686 S.E. 2d 609 (W.Va. 2009), Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 254 S.E. 2d 805 (W.Va. 1979).
12. The Petition's claim concerning the testimony of Deputy Rakes does not "implicate (Petitioner's) constitutional rights," and the appellate court found that such testimony did not constitute even "ordinary" trial error. Accordingly, it is not reviewable in habeas corpus. *Gray, supra* at 113-114.
13. There was no instructional error, as the instructions correctly stated the permissible inference the jury could draw from the intentional use of a firearm. Syl. Pt. 4, *State ex rel. Hall v. Liller*, 536 S.E. 2d 120, 127 (W.Va. 2000).

14. The Petition's claims that the trial court "violated Petitioner's constitutional rights" and that "the Court . . . erroneously protected the State's prejudice and discovery abuse" are allegations unsupported by any factual basis.

15. Similarly, as discussed above, no factual basis exists to support the charge of prosecutorial misconduct and there is no showing that Petitioner was unfairly prejudiced by evidence introduced by the State at trial. "Rulings respecting the admission of evidence are cognizable in habeas corpus only to the extent that they violate specific constitutional provisions or are so egregious as to render the entire trial fundamentally unfair . . . ." *Hatcher v. McBride*, 650 S.E. 2d 104, 110 (W.Va. 2006). There is no factual basis to support a contention that the prosecutor's conduct violated any "specific constitutional provision" or rendered Petitioner's trial "fundamentally unfair." *Id.*

16. The indictment was proper, and even if it had been improper, any claim in this regard has been waived. W.Va. Code §61-2-1; §62-2-10; §62-2-11; Rule 12(b), W.V.R. Crim. Pro.; *State v. Miller*, 476 S.E. 2d 535, 537 (W.Va. 1996); *State v. Bragg*, 235 S.E. 2d 466, 472 (W.Va. 1977).

17. *Crawford, supra*, has no applicability here, as (a) there is no authority presented in support of *Crawford's* retroactive application to Petitioner's trial, and (b) even if this Court applied *Crawford* retroactively, the victim's statements at issue were not "testimonial" and "only *testimonial* statements are excluded by the confrontation clause" pursuant to *Crawford*: "(s)tatements to friends and neighbors about abuse and intimidation" are not "testimonial." *Giles v.*

California, ___U.S. _____, 128 S. Ct. 2678, 2692-2693, 171 L. Ed 2d 488 (2008). (Italics in original).

18. Further, even if this Court applied *Crawford* retroactively and even if the victim's statements had been "testimonial," their admission into evidence still would have been proper because they were introduced as evidence of state of mind rather than for the truth of the matter asserted, and "*Crawford* made clear that the Sixth Amendment right to confrontation 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *State v. Reed*, 674 S.E. 2d 18, 28 n. 34 (W.Va. 2009); *Gray*, *supra* at 108 (characterizing the victim's statements as "her expression of fear").

19. The Court has reviewed the proposed findings of fact and conclusions of law provided by counsel for the Petitioner and the State. To the extent that the proposed findings and conclusions are not included in this Order, they are deemed to have been unsupported by the facts or contrary to established law or otherwise included in this Court's findings and conclusions.

20. The Petition, the Supplement, and the State's responses, as well as the arguments of counsel and the evidence adduced at the omnibus habeas hearing all demonstrate that there was no error of constitutional dimension -- nor even "ordinary" error -- in Petitioner's trial. Accordingly, he has no grounds for relief in habeas corpus.

It is therefore **ORDERED** that the Petition for Writ of Habeas Corpus Ad Subjiciendum is hereby **DENIED** and this matter is ordered **DISMISSED** and **STRICKEN** from the docket of this Court.

The Clerk is **ORDERED** to send a copy of this Order to the Raleigh County Prosecuting Attorney and to counsel for the Petitioner.

All of the above is hereby **ORDERED** this the 19th day of August, 2011.

Enter:

Judge John A. Hutchison
Tenth Judicial Circuit

8/ 21/ 11

The foregoing is a true copy of an order entered in this office on the 19th day of AUGUST, 2011.
PAUL H. FLANAGAN, Circuit Clerk of
Raleigh County, West Virginia
By: _____
Deputy

Remove From Docket
By Order Of JAH