IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES R. MEADOWS,
PETITIONER BELOW, PETITIONER

vs.) No. 18-0418
(13-C-69)

RALPH TERRY, ACTING WARDEN,
MT. OLIVE CORRECTIONAL COMPLEX,
RESPONDENT BELOW, RESPONDENT

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF BASED UPON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.
2. THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF BASED UPON CUMULATIVE ERROR.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

By an indictment returned by the November 2010 term of the grand jury of Summers County, James Meadows was indicted on murder in the first-degree, death of a child by guardian or custodian, and child abuse resulting in injury. (A21–23). Petitioner proceeded to a jury trial and was ultimately convicted of murder in the second degree, death of a child by guardian or custodian, and child abuse resulting in injury. (A62–670). Petitioner was sentenced to concurrent definite terms of imprisonment of forty (40) years on the first two counts and an indeterminate sentence of one to five years on the third count. (A24–25). The original criminal case was appealed to this Court. *State v. Meadows*, 231 W.Va. 10, 743 S.E.2d 318 (2013). This Court upheld the conviction.[1]

On October 17, 2013, Petitioner filed a *pro se habeas corpus* petition. (A869–899). After the appointment of present counsel, an "Amended Petition for Writ of Habeas Corpus" was filed on May 1, 2014. (A1-685). An omnibus *Habeas Corpus* hearing was held on January 7, 2016. (A743–820). Thereafter, Petitioner filed his "Supplemental Memorandum in Further Support of

[1] In the opinion, the Court expressly left open the issue of ineffective assistance of counsel.

Amended Petition for Writ of Habeas Corpus." (A731–855). By order filed April 5, 2018, the circuit court denied the amended petition. (A856–868). This is an appeal of that order.

STATEMENT OF FACTS

Mr. Meadows was convicted of murdering I. H., the young daughter of Mr. Meadows' then girlfriend, C.H. Mr. Meadows asserts that C.H. is responsible for the child's death. A summary of the entire trial testimony is not necessary for the purposes of this appeal. In addition, this Court has already provided a summary of the trial testimony in its prior opinion concerning the criminal appeal. *See State v. Meadows*, 231 W.Va. 10, 743 S.E.2d 318 (2013). The facts discussed herein are those relevant to this appeal.

At the trial in this matter, it became clear that there were only two persons who were around the deceased at the time of the injuries that eventually caused her death, Petitioner and C.H. The focus of the State's case was to demonstrate that Mr. Meadows was responsible for the injuries that caused the child's death. The focus of the defense should have been on the fact that Mr. Meadows was not responsible for the death and that it was far more likely that C.H. had caused the injuries that led to the child's demise.

Unfortunately, petitioner's trial counsel did not adequately prepare the case for trial.[2] Trial counsel was called to testify at the omnibus habeas corpus hearing in this matter as was Petitioner concerning the representation. Mr. Meadows testified that the only discussions he had with trial counsel were before and after court hearings for five to ten minutes each. (A806-807). Trial counsel also confirmed that the only meetings with his client, that took place after the arrest, occurred at hearings scheduled in the case. (A748–749, A758–763). Mr. Meadows never

[2] Petitioner's trial counsel was Randolph McGraw.

got to speak to his counsel over the phone because his office would not accept calls from the jail. (A806). Trial counsel cannot recall setting up any telephone calls with Mr. Meadows while he was incarcerated. (A762–763). Additionally, Mr. Meadows' trial attorney never visited with Mr. Meadows at the jail despite the fact that Mr. Meadows was incarcerated throughout the vast majority of the representation. (A763, A703–730). In fact, Petitioner's trial counsel testified at the omnibus hearing that he "never saw anything magical about going to the jail to speak to anyone." (A758–759). Furthermore, counsel cannot recall sending Mr. Meadows even one letter or other written communication. (A764). Mr. Meadows confirmed that he never received any correspondence whatsoever from his attorney. (A810).

Because of the extremely limited contact with his attorney, Mr. Meadows had very few discussions about key points of this case. He had no discussions with his lawyer about the witnesses that were going to be called. (A807). There were no discussions about trial strategy. (A807–808). Trial counsel never discussed the State's evidence and did not even provide a copy of the discovery to Mr. Meadows. This fact is supported by Mr. Meadows' complaint at trial about not having received the discovery. (A607, A808). Trial counsel asserted that he prepared Mr. Meadows for his testimony at trial by speaking to him while the trial was ongoing. (A766–767). Petitioner denies that his lawyer spent any time preparing him to testify and confirms that his lawyer also did not discuss the legal issues he faced, did not provide him with any tips before testifying, did not address possible subjects of cross-examination, and did not discuss the benefits and risks of testifying. (A809–810).

Trial counsel's lack of preparation was also further exemplified by his failure to have pretrial contact with defense witnesses. Counsel asserts that he did talk to witnesses and disputes the assertion that he did not speak to the witnesses. (A766). Numerous witnesses at the omnibus

hearing confirmed that counsel spent no time preparing them for trial because he did not speak to them before they testified. Witnesses Teresa Pack, Teresa Ripley, Teresa Worrells and Cameron Mann all confirmed that counsel never spoke to them before they testified. (A801, A816, A817, A818).

Counsel's lack of effective representation extended to two very critical witnesses who squarely placed the blame upon C.H. Stephanie Witham and Indie Riley both confirmed that C.H. had admitted responsibility for the death of the child. These admissions came from an investigation conducted by Gary Wheeler, the former Sheriff of Summers County, who was hired by the prosecution to investigate the underlying criminal case. (A789–790). Working as an investigator for the prosecution, Mr. Wheeler located, interviewed and obtained a statement from Stephanie Witham. (A671-685, A789–790). Mr. Wheeler, an extremely qualified, experienced law enforcement officer, found Ms. Witham to be a credible and persuasive witness. (A791). Petitioner asserts that his trial attorney advised him that Ms. Witham was his "number one" witness. (A810).

In her statement, Stephanie Witham claimed that C.H. had admitted responsibility for the death of the victim. Ms. Witham came to know C.H. when they were in the same jail pod from November 19, 2010 until January 20, 2011. (A671). Ms. Witham became C.H.'s friend due to the fact that the remainder of the pod was treating C.H. badly because of the nature of her crimes. (A671–672). According to Ms. Witham, C.H. became extremely upset after seeing an autopsy report that discussed the fact that the child's arm had been broken two days before her dying. C.H. stated that she "just went too far". (A672). Also in reference to the autopsy report, C.H. stated that "I just could not get her to shut up. All she wanted to do was cry." (A673). C.H. confided in Ms. Witham that she was confident that Petitioner would never do anything to hurt

her. She was also convinced that Petitioner was going to "sit and say he did something he didn't do." (A674–675). She confirmed that Petitioner was always kind to the victim. (A675). Through all of her interactions with C.H., Ms. Witham ultimately believed that C.H. was simply trying to "get someone to take the blame for something she did and maybe continue to tell him she loved him to keep him going." (A676). Throughout the time that C.H. was in jail with Ms. Witham, she was attempting to contact Petitioner and provide letters to him in various ways. (A675–676). Ms. Witham read two or three notes that had been given to Petitioner. (A676–677). With regard to the day of her daughter's injury at issue in this case, C.H. told her that she had to go to the welfare office and that she contacted Petitioner the night before to borrow his car. (A682). On the morning she went to the welfare office, she stated to Ms. Witham that Petitioner was asleep on the couch and C.H. "laid the baby" on his chest and told him that the baby had been up "all night crying" and she could not "shut" the child "up." (A682). She advised that she told Petitioner that the baby was having a hard time breathing. (A681–683). Then, C.H. left Petitioner with the baby as "she just shrugged her shoulders and walked out and said you can deal with it and she walked out an left." (A682). Ms. Witham confirmed that she would testify. (A685).

Stephanie Witham was present to testify at trial. However, trial counsel simply asked C.H. if she knew Ms. Witham but never followed up when C.H. denied it. Trial counsel then attempted to get the statement admitted, but failed to do so because he laid an inadequate foundation to impeach with the statement and could not recall C.H. to lay that foundation as she had been released as a witness. (A398–399, A481–487). Trial counsel inexplicably and ineffectively failed to confront C.H. with her incriminating statements. Had trial counsel laid the proper foundation, the direct testimony of Ms. Whitman would have been admissible to impeach C.H. But, because of the inadequate foundation, Ms. Witham could not testify about the

admissions. At the omnibus hearing, trial counsel unconvincingly asserted that despite his efforts to get the admissions made to Stephanie Witham by C.H. into evidence and his attempt to recall C.H. for that purpose, he never really wanted to question her about them. (A750–752, A769–772).

Gary Wheeler, while serving as the investigator for the prosecution, also located and interviewed Indie Riley. (A789–790). Indie Riley provided extraordinary testimony at the omnibus hearing. She confirmed that she was C.H.'s "cellie" and, then roommate when the two were released from jail. (A802). She eventually came to have concerns about C.H.'s behavior because she was not acting appropriately for someone who had lost a child. (A803). Ultimately, C.H. admitted to Ms. Riley that "I can't believe I did this." (A803–804). Ms. Riley took that to mean that "she killed that baby." (A804). Petitioner's trial counsel also asserts that he spoke with Indie Riley before trial and determined that her testimony was not helpful. (A778–781). Trial counsel never mentioned anything about Ms. Riley to Petitioner. (A811–812). Ms. Riley denies ever speaking to trial counsel or his investigator. (A804). Petitioner's counsel also asserts that he had a copy of the statement Ms. Riley had provided to Mr. Wheeler. (A779). Mr. Wheeler confirmed that no one had a copy of the statement because he only recently found it again. (A794–795). At trial, neither the prosecutor, defense counsel, nor defendant had any knowledge of the statement. (A486–487, A489–490). Petitioner's trial counsel also asserts that he spoke to Mr. Wheeler at least a couple of times about the case. (A766, A769). Mr. Wheeler confirmed that Trial counsel never had any significant contact with him and never asked about Ms. Riley or Ms. Witham. (A795–796).

Mr. Wheeler, with his years of law enforcement experience, found Ms. Riley and Ms. Witham to be credible and persuasive. (A796). According to Mr. Wheeler, the combination of

witnesses Riley and Witham, both confirming that C.H. had admitted to going "too far" when neither had contact with each other, reinforce the validity of each of their statements. (A796–797). According to Mr. Wheeler, when he began the investigation he was expecting to find evidence supporting Mr. Meadows' guilt, but the evidence he gathered from these witnesses shows that the investigation "was going really wrong at that point because everything was in the wrong direction." (A797). According to Mr. Wheeler, the issues that he uncovered were never presented to the jury because neither Petitioner's trial attorney nor anyone else asked. (A799–800). Mr. Wheeler confirmed that had he been asked, he would have had all the witnesses at court for the defense attorney, but Petitioner's trial counsel never requested to speak or spoke with him. (A800).

Improper evidence was also used to boost C.H.'s credibility at trial. In response to questions from Petitioner's trial counsel, C.H. repeatedly referenced that she had passed a polygraph test. (A394, A395, A405–406). At the omnibus hearing, trial counsel's only response to this issue is to assert that he did not solicit evidence of the polygraph from C.H. (A752–753, A773).

Trial counsel also failed to object to the fact that photos showing the injuries to the victim were displayed throughout Petitioner's cross examination. (A589–590). Trial counsel asserts that although he objected to the autopsy pictures of the victim, he did not object to the pictures being displayed throughout Petitioner's testimony. (A753, A773–774). Trial counsel, despite making extremely few objections throughout the trial, asserts that he did not object because of the possible effect on the jury. (A774–775). He acknowledges that the court permits objections to be made outside of the hearing of the jury. (A775–776). At the omnibus hearing, Petitioner confirmed that the disturbing autopsy photo remained displayed to both him and the jury

throughout his testimony and that the photo had a tremendous effect on his ability to testify. (A812-813).

Trial counsel also could not provide any additional information concerning important legal issues that were not properly addressed at trial. Trial counsel cannot recall how the change of venue from Summers County to Monroe County had taken place and disputed this Court's finding that there was no record of how the change of venue had occurred. (A753–754, A776–777). Petitioner testified that he was notified by phone of the transfer and that the only decision on the record was the denial of the change of venue motion. (A814). In the criminal appeal, this Court stated that there was "nothing in the record which documents when the decision to change venue was made, how the parties were notified of the change or any other circumstances surrounding the transfer." *State v. Meadows*, 231 W.Va. 10, 15, 743 S.E.2d 318, 323 (2013). Because defense counsel "made no objection" and there was inadequate record as to the decision, appellate review was precluded. *Id.* at 327–328.

The State sought to strengthen its argument that Petitioner had committed these offenses by introducing the testimony of Steve Ferris. Mr. Ferris was allowed to testify about observations made from engaging with the victim's brother during play therapy sessions conducted to allow the child to deal with his sister's death. Petitioner's criminal trial appellate counsel attempted to assert on appeal that Mr. Ferris' testimony was comprised of conclusions based on mere speculation and conjecture. Appellate counsel further asserted that the testimony was not based on statements made by the brother, but that the psychologist's testimony consisted solely of his interpretations. *State v. Meadows*, 231 W.Va. 10, 21, 743 S.E.2d 318, 329 (2013). On appeal, this Court determined that:

> Trial counsel did not argue that the testimony was not based on statements that brother made to the psychologist, that the brother's statements were inconsistent with the purpose of providing treatment, or that the statements were not relied upon by the psychologist for the purpose of treatment or diagnosis.

Id. at 21, 329.

Therefore even though objection to the testimony was articulable pursuant to the test identified by this Court, appellate review was precluded due to counsel's failure to raise the issue before the trial court. At the omnibus hearing, Petitioner's trial counsel could not remember any specifics about the testimony of Steve Ferris or any objections that he may have asserted. (A754–755). *Id.* at 21-22, 329-330. However, trial counsel acknowledged that the opinions to which Mr. Ferris testified would not be admissible. (A781–783).

Trial counsel also asked the opinion of one of the State Police troopers who had been involved in the case as to why the Petitioner's statements were inconsistent, resulting in the trooper to respond "I believe that he was trying to cover up the actions of what he did to this child." (A2-3). At the time of this hearing, Trial counsel could not remember anything about Trooper Smith's testimony at the omnibus hearing. (A755, A783–74).

SUMMARY OF THE ARGUMENT

Trial counsel failed Mr. Meadows. The first failure occurred when counsel chose to have no meaningful contact with his client...never visiting Petitioner at the jail to perform any of the duties of an attorney/client representation. Counsel then failed to prepare the witnesses in the case by not even talking to them before the trial, much less actually preparing them. Counsel did not properly investigate the case...never locating Indie Riley who offers startling testimony that C.H. had admitted to being responsible for the death of her child. Counsel then failed to perform at trial by bungling the impeachment of C.H. with the admissions she made to Stephanie Witham

of her responsibility for the death of her child such that those admissions were never presented to the jury. After that, trial counsel allowed C.H. to reference passing a polygraph on three separate occasions, buttressing her testimony and undermining Petitioner's testimony that it was really C.H. that caused the child's death. Then, trial counsel allowed the State to demonize Petitioner through speculative and inadmissible opinions and interpretations by a therapist that were clearly inadmissible, but never properly objected to by counsel. The end result was a conviction obtained not by the State's evidence, but rather as a result of the ineffective assistance of counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is requested. Counsel contends that argument could be granted by the Court pursuant to W.Va.R.App.P. 19(a)(1), R. 19(a)(4), R. 20(a)(2) or R. 20(a)(3). This case may be appropriate for a memorandum decision.

ARGUMENT

STANDARD OF REVIEW

According to precedent from this Court, "[i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995)(*citing Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995)).

1. THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF BASED UPON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Trial counsel ineffectively represented Petitioner. The core of effective representation is adequate investigation and preparation. Here, trial counsel's investigation and representation

were startlingly deficient. Trial counsel did not involve Petitioner in the case and failed to locate, interview and prepare witnesses. Then, counsel committed legal errors that kept key defense evidence from the jury while allowing the prosecutor to use impermissible evidence to bolster the State's case.

This Court has recognized that the Sixth Amendment to the Constitution of the United States and Article 3, Section 14 of the Constitution of West Virginia mandate that a defendant, in a criminal proceeding receive "competent and effective assistance of counsel." *State ex. rel. Strogen v. Trent,* 196 W.Va. 148, 152, 469 S.E.2d 7, 9-10 (1996)(numerous citations omitted). Claims of ineffective assistance of counsel are to be governed by the two prong test established by the United States Supreme Court in *Strickland v. Washington,* 466 US 668 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 152, 12.

In reviewing counsel's performance, trial courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id.* "Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Id.* (citations omitted).

This Court has also stated that "counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *State ex. rel. Daniel v. Legursky*, 195 W.Va. 314, 320, 465 S.E. 2d 416, 422 (1995). "[C]ourts . . . have found no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so." *Id.* at 320, 422.

a. TRIAL COUNSEL CONDUCTED AN INADEQUATE INVESTIGATION.

The trial court in the *habeas corpus* proceeding (hereinafter "*habeas* court") denied Petitioner's claim that his counsel ineffectively investigated his case based upon a finding that "the contact between Petition (sic) and his trial counsel was sufficient in that it afforded Petitioner's trial counsel the opportunity to familiarize himself with the evidence and the witnesses, and provided him with the necessary prerequisite knowledge to prepare for trial as a reasonable attorney would under the circumstances." (A862).

Here, Petitioner was charged with the most serious crime recognized under our laws, Murder in the First Degree. It is hard to imagine any reasonable attorney failing to meet with a client facing those charge in a comprehensive, in-person fashion. But, that is exactly what happened here. The only discussions between attorney and client were before and after court hearings for five to ten (5-10) minutes each. (A806-807, A748-749, A758-763). The jail visitation logs confirm that Petitioner was incarcerated just days after this incident all the way until trial and his attorney never once visited him. (A704-730).[3] There was no phone contact because trial counsel's office would not accept calls from the jail and trial counsel never set up any calls. (A762-763, A806). Counsel asserted that he "never saw anything magical about going to the jail to speak to anyone." (A758-759). Perhaps that might be defensible if there was other comprehensive contact. Communication is required in effective representation. Here, counsel did not make up for his lack of face to face contact with his client by using written communication. Counsel cannot recall sending and Mr. Meadows confirms that he never

[3] Mr. Meadows was visited by a defense investigator on two occasions.

received any written communication from his lawyer. (A764, A810).

The extremely limited contact between Petitioner and his counsel prevented any real discussion of any of the important issues. Mr. Meadows asserts that he had no discussions with his lawyer about the witnesses, trial strategy, or the state's evidence.[4] (A807-808). While, trial counsel asserts that he prepared Mr. Meadows for his testimony at trial by speaking to him while the trial was ongoing (A766-767), Mr. Meadows credibly asserts that his lawyer did not prepare him to testify, did not discuss the legal issues he faced, did not provide him with any tips before testifying, did not address possible subjects of cross-examination, and did not discuss the benefits or risks of testifying. (A809-810). Trial counsel also failed to meet with or prepare the defense witnesses. At the omnibus hearing, in addition to Petitioner, five of the ten lay witnesses called in the criminal trial confirmed that counsel never spoke to them before they testified.[5] (A801, A816, A817, A818, A795-796).

Based on all of these facts, the *habeas* court's finding is simply wrong. Effective representation cannot be built without a minimal foundation of client contact, witness contact, and preparation. Multiple witnesses confirm that did not happen in this case.

b. TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO EVIDENCE OF ACTUAL INNOCENCE.

Trial counsel's inadequate investigation also prevented him from offering explosive testimony from a witness that did not testify at trial, Indie Riley. Ms. Riley was located before the original trial in this matter by Garry Wheeler, the former Sheriff of Summers County, West Virginia, who was at that time serving as an investigator for the prosecution. (A789-790). Indie

[4] Mr. Meadows was not provided a copy of the discovery...a fact that is supported by the fact that Mr. Meadows complained at trial about not having received the discovery. (A607, A808).

[5] The witnesses referenced are Teresa Pack, Teresa Ripley, Teresa Worrells, Cameron Mann , and Garry Wheeler.

Riley provided critical testimony at the omnibus hearing. She confirmed that she was C.H.'s "cellie" and, then roommate when the two were released from jail. (A802).[6] She eventually came to have concerns about C.H.'s behavior because she was not acting appropriately for someone who had lost a child. (A803). Ultimately, C.H. admitted to Ms. Riley that "I can't believe I did this." (A803–804). Ms. Riley understood that statement to mean that "she killed that baby." (A804). While trial counsel insists that he spoke with Ms. Riley before trial and had a copy of her statement from the prosecution's investigator, Ms. Riley denies ever speaking to anyone from counsel's office and Mr. Wheeler confirmed that no one had a copy of the statement at the time of the trial. (A778-781, A794-795, A804).[7] Ultimately, the only conclusion that can be drawn is that counsel was incorrect in his testimony and his failure to investigate the case precluded him from offering valuable and exculpatory evidence. The *habeas* court did not address this evidence at all in its order even though it was thoroughly presented in the *habeas corpus* proceeding. (A10 at fn. 2, A735-736, A802-805). This issue alone warrants relief in the form of a new trial or a remand to require the *habeas* court to address it.

In addition, trial counsel missed out on the opportunity to offer extremely similar evidence from another witness, Stephanie Witham. Garry Wheeler's investigation also identified Ms. Witham as a key defense witness. As described in the Statement of Facts herein, Ms. Witham was confined in the same pod as C.H. at the jail after the baby's death. (A671). They became friends over the two-month period that they were in the jail together. According to Ms. Witham, on the night before the child died, C.H. admitted that the child had spent "all night crying" and that she could not get the child to "shut up." (A862). The next morning, she had to

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[6] She met C.H. shortly after the death of the victim in this matter.

[7] Mr. Wheeler's recollection that no one had the statement at the time of the trial is confirmed by the trial transcript. (A486-490).

go to the welfare office, so she "laid the baby" on Petitioner's chest and told him that the baby was having a hard time breathing. (A681-683). Then, C.H. left Petitioner with the baby as "she just shrugged her shoulders and walked out and said you can deal with it and she walked out an left." (A682). According to Ms. Witham, C.H. became extremely upset after seeing the autopsy report that discussed the fact that the child's arm had been broken two days before her dying, stating that she "just went too far" and that "I just could not get her to shut up. All she wanted to do was cry." (A672-673). As previously explained in the Statement of Facts herein, trial counsel attempted to offer the statement into evidence at the trial, but was prevented from doing so because he had failed to lay an appropriate foundation to offer the evidence because he had not confronted C.H. with it. *See* W.Va.R.Evid. 613(b); *State v. King*, 183 W.Va. 440, 396 S.E.2d 402 (1990).

In its order, the *habeas* court found that Petitioner had "overstated the potential exculpatory value of the statements made by Witham" and had failed to "demonstrate that the admission of the speculative statement would have a reasonable probability of changing the outcome of the trial." The *habeas* court is simply incorrect in its analysis. As an initial matter, the State's highly experienced investigator found Ms. Riley and Ms. Witham to be credible and persuasive. (A796). According to Mr. Wheeler, the combination of witnesses Riley and Witham, both confirming that C.H. had admitted to going "too far," when neither had contact with each other, reinforces the validity of each of their statements. (A796–797). The evidence would also directly contradict the trial evidence from prosecution witnesses C.H. and her mother who insisted that the child was fine when she left her with Petitioner on the morning in question and had not been crying the night before. (A259-260, A264-265, A346-349, A366). The evidence would also confirm Mr. Meadows' testimony that C.H. had told him that I.H. had been up all

night crying and that he discovered that the child was having difficulty breathing after C.H. gave her to him. (A564, 566-570). The statements would also contradict C.H.'s claim at trial that she believed Petitioner had injured the child after reading the autopsy report. (A361). The admissions made by C.H. to each of these witnesses are not speculative, rather they are highly inculpatory and consistent with the defense argument that C.H. killed the child, not Petitioner.

c. TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO ELICITING EVIDENCE OF POLYGRAPH TESTING.

As previously stated, Petitioner contends that the child victim in this matter was injured, and later died, from the injuries caused by the victim's mother, C.H. In response to questions from trial counsel, C.H. repeatedly referenced that she had passed a polygraph test wherein she denied injuring the child. (A394-395, A405-406). This Court noted in the appeal that such evidence was clearly inadmissible. *State v. Meadows*, 231 W.Va. 10, 20, 743 S.E.2d 318, 328 (2013). This Court also stated that "absolutely no effort was made by defense counsel to have the initial polygraph reference withdrawn; rather, defense counsel proceeded with the line of questioning which elicited two more references to the witness's polygraph test results, without objection or request that the jury be instructed to disregard any of the testimony about a polygraph." According to the Court's finding, only at the conclusion of the evidence, did trial counsel move for a mistrial. When that motion was denied, trial counsel did not request a curative instruction or offer an instruction for inclusion in the jury charge. *State v. Meadows*, 231 W.Va. 10, 20, 743 S.E.2d 318, 328 (2013). In addition, counsel's ineffectiveness also prevented any meaningful appellate review because Petitioner's trial counsel "invited error" by his actions. *Id.* at 21, 329.

All competent trial attorneys know that polygraph evidence is inadmissible because it is a "well-established" rule. *State v. Meadows*, 231 W.Va. 10, 20, 743 S.E.2d 318, 328 (2013). Thus, failing to object to the introduction of that type of evidence or to seek a curative instruction if accidently admitted is clearly deficient under an objective standard of reasonableness. The prejudicial effect of the admittance of polygraph evidence cannot be overstated. As noted in a federal district court opinion, polygraph evidence presents a substantial risk that the jury would tend to place undue weight upon the test results and would tend to be misled and improperly influenced..." thereby undermining "the core function of the jury to assess evidence and make its own determinations with respect to truthfulness and veracity, as well as determination of credibility in general." *United States v. Bishop*, 64 F. Supp. 2d 1149 (D.Utah 1999). Here, Petitioner's credibility was crucial to his defense and C.H.'s lack of credibility was likewise crucial. The bolstering of her testimony clearly had to impact the proceeding for the very reasons cited in *Bishop*.

The *habeas* court's order denies relief based on the fact that this Court has not established a hard and fast rule that a curative instruction is always required and that Petitioner did not assert any evidence that the failures of trial counsel affected the outcome of the trial. (A863). Here, trial counsel repeatedly permitted C.H. to reference passing the polygraph examination. (A394, ln. 13, A395, ln. 15, A406, ln. 9). For all the reasons described above, the references impermissibly bolstered the testimony of the only other person that could have caused the injury to and death of the child. Counsel's performance in addressing the initial mention of the polygraph and then allowing her to reference it again on two more occasions was clearly ineffective and prejudicial for all the reasons stated above.

d. TRIAL COUNSEL WAS INEFFECTIVE IN ALLOWING THE CONTINUOS DISPLAY OF THE VICTIM'S PHOTOGRAPH.

Trial counsel also failed to object to the fact that photos showing the injuries to the victim were displayed throughout Petitioner's cross examination. (A589–590). Trial counsel asserts that although he objected to the autopsy pictures of the victim, he did not object to the pictures being displayed throughout Petitioner's testimony. (A753, A773–774). Trial counsel, despite making extremely few objections throughout the trial, asserts that he did not object because of the possible effect on the jury. (A774–775). He acknowledges that the court permits objections to be made outside of the hearing of the jury. (A775–776). At the omnibus hearing, Petitioner confirmed that the disturbing autopsy photo remained displayed to both him and the jury throughout his testimony and that the photo had a tremendous effect on his ability to testify. (A812-813).

The *habeas* court denied Petitioner's claim for relief under the mistaken belief that Petitioner was objecting to the admission into evidence of the photograph. (A864). That issue was addressed by this Court in the criminal appeal. The issue presented by Petitioner is that the photograph was left visible to Petitioner and the jury throughout Petitioner's testimony...far in excess of when it was actually being used by the prosecution. The *habeas* court did not address that issue and this case should be remanded for a ruling on the issue presented because no reasonable trial attorney would allow the display of these disturbing photos longer than necessary for testimony due to the effect on the Petitioner and the jury from viewing the photo over a protracted period of time.

e. TRIAL COUNSEL WAS INEFFECTIVE IN ASCERTAINING PETITIONER'S WISHES CONCERNING A CHANGE OF VENUE AND ENSURING THAT A PROPER RECORD WAS MADE OF THE DECISION TO CHANGE VENUE.

Trial counsel did not consult with his client concerning a change of venue from Summers to Monroe County. Trial counsel had a duty to keep his reasonably informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions. *W.Va.R.Prof.Cond. 1.4.* This ethical obligation is part of the investigation and diligence requirements for effective representation. On appeal, counsel was unable to challenge the change of venue because "there [was] nothing in the record which documents when the decision to change venue was made, how the parties were notified of the change or any other circumstances surrounding the transfer." *State v. Meadows*, 231 W.Va. 10, 15, 743 S.E.2d 318, 323 (2013). Because defense counsel "made no objection" and there was an inadequate record as to the decision, appellate review was precluded. *State v. Meadows*, 231 W.Va. 10, 15, 19-20, 743 S.E.2d 318, 327-328 (2013).

The *habeas* court denied relief based on its belief that counsel's actions regarding venue did not affect the outcome of the case. However, that reasoning ignores the fact that the lack of a record prevented Petitioner's right to seek appellate review of the venue issue. Pursuant to Article III, Sections 10 and 17 of the West Virginia Constitution, "[a]n indigent criminal defendant has a right to appeal his conviction." *Rhodes v. Leverette. Syl. Pt 1*, 160 W. Va. 781, 239 S.E.2d 136 (1977). Counsel's interference with that right by failing to ensure that a proper record was made prejudiced Petitioner.

f. TRIAL COUNSEL WAS INEFFECTIVE IN ADDRESSING PLAY THERAPY EVIDENCE.

In this case, Steve Ferris was allowed to testify about observations made from engaging with the victim's brother during play therapy sessions conducted to allow the child to deal with his sister's death. Petitioner's appellate counsel attempted to assert on appeal that "Mr. Ferris's testimony represents conclusions based on 'mere speculation and conjecture' as there were 'no real statements' made by the brother [and that]...the psychologist's testimony consisted solely of his interpretations of the brother's activities." *State v. Meadows*, 231 W.Va. 10, 21, 743 S.E.2d 318, 329 (2013). This Court determined that:

> Trial counsel did not argue that the testimony was not based on statements the brother made to the psychologist, that the brother's statements were inconsistent with the purpose of providing treatment, or that the statements were not relied upon by the psychologist for the purposes of treatment or diagnosis. *See Syl. Pt. 4, State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010) (quoting *Syl. Pt. 5, State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990)) (providing test for determining admissibility of evidence pursuant to Rule 803(4)).

State v. Meadows, 231 W.Va. 10, 21, 743 S.E.2d 318, 329 (2013). Therefore, even though such considerations were articulable under the test identified by this Court, appellate review was precluded due to counsel's failure to raise the issue before the trial court.

In its ruling denying relief, the *habeas* court did not address the failings of trial counsel identified by this Court. Rather, the *habeas* court noted, but did not identify, that trial counsel had "made several objections to the introduction of the testimony in question" and that the nature of the evidence objected to was to provide context and permissible under R. 803(b). (A866).

As an initial matter, this Court has already found that trial counsel failed to properly articulate an objection on this issue. Trial counsel's failure to argue this point was deficient under an objective standard of reasonableness because the testimony solicited from Mr. Ferris was not in the form of "statements made for the purpose of medical diagnosis or treatment" as required by W.Va.R.Evid. 803(4). The statements also were not "context." Rather, they were interpretations of statements, observations of conduct, and opinions:

> The other dominant theme that came out in the sessions - and this was one of the things that Isaiah liked to play with, was some little toy figures, about this high, that boys typically play with- was he called it - called him, from what I understood initially - and, again, he was three and then just turned four - Ro-Ro or Ro-Ro or something like that. But I think that was - as his speech got clearer, it seemed like it was R.L. And, so, he talked about R.L. being, in **my interpretation of him** - it was a very clear interpretation, I think - being somewhat violent in the home.

(A418)(emphasis added).

> These children, they're very angry at someone, but they can also feel powerless against that person, often will make up these stories of hurting this person or beating this person up. **So, I've seen it** repeatedly probably - I'm not exaggerating -15 100 times, where male children, particularly, will sometimes talk about beating up someone that has hurt their mother, they've seen abusive situations where their mother's been hurt or they've - someone that hurt their brother or sister.

(A421)(emphasis added).

> **How I try to distinguish** between imagination with a four-year-old and what is reality -- and it's not, **I don't think, the easiest job.** But what **I look at** is what I call consistent themes. And the consistent theme is what they talk about over and over and over again. And if they talk about something over and over and over again and give explanations in various ways to where it's pretty much consistent, **I generally think that that's probably pretty consistent with reality**...So but most of the time **if they're very,**

> **very consistent, then I think there's** probably some significant element of truth in that.

(A421-422)(emphasis added)

> **I interpreted** a whipping tree as getting a switch off of a tree and attempting to whip her or, again, he was mimicking or talking about behavior that he had observed happen towards his sister or perhaps himself.

(A424-425)(emphasis added).

> The first theme, obviously, I think, was his grieving over his sister. That was a very dominant theme. He brought up his Sissy over and over again. And his affect would change. Sometimes, you could tell he was very sad about that, very confused about that, which would be very common for a boy his age, and not knowing exactly, I think, why she is dead and even sometimes what the concept of being dead meant and the permanency of that. And **I think** he was beginning to grasp that in some later sessions, when he was showing a lot more anger there. The second theme that come out - and this was something that he spontaneously did - was this anger toward Ro-Ro, and talking about, as I've just explained, some of the behaviors of Ro-Ro in the home. And **I think** this was something that, again, was a consistent theme. It bothered him. **I'm not sure if he linked that to his sister's death. Sometimes, he seemed to link that.** Sometimes, he did not seem to link that. **But there was obviously something that scared him, I think,** and bothered him and created some anxiety for him.

(A427)(emphasis added).

Ultimately, Mr. Ferris, in the guise of talking about "statements made of the purpose of medical diagnosis or treatment" as allowed by W.Va.R.Evid. 803(4), really gave broad based, non-scientifically supported opinions wrongfully analyzing and actually interpreting statements made by the child rather than just recounting them. This highly prejudicial testimony clearly affected the outcome of the proceedings. Trial counsel was wholly ineffective in failing to

challenge it appropriately and the *habeas* court erred by not granting relief for the ineffective assistance of counsel in addressing the issue.

2. THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF BASED UPON CUMULATIVE ERROR.

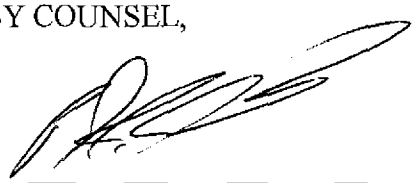
This Court has held that "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." *Syl. pt. 5, State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). Here, the multiple errors cited herein warrant relief.

CONCLUSION

For all these reasons, Petitioner respectfully requests that this Court grant his appeal and provide that relief which is deemed just and appropriate.

RESPECTFULLY SUBMITTED,
JAMES MEADOWS,

PETITIONER,
BY COUNSEL,



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