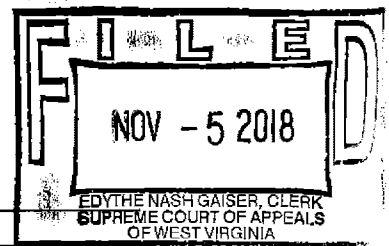


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0418

JAMES R. MEADOWS,
Petitioner Below, Petitioner,

v.

RALPH TERRY, ACTING WARDEN,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

RESPONDENT'S BRIEF

Appeal from an April 30, 2018, Order
Circuit Court of Monroe County, West Virginia
Case No. 13-C-69

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v.

RALPH TERRY, ACTING WARDEN,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

RESPONDENT'S BRIEF

Respondent Ralph Terry, Acting Warden of the Mount Olive Correctional Complex, by counsel, Holly M. Flanigan, Assistant Attorney General, respectfully responds to Petitioner's Brief in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error, and, therefore, the Circuit Court of Monroe County's April 30, 2018, Order Denying Petitioner's Petition for Writ of Habeas Corpus should be affirmed.

I. RESPONSES TO ASSIGNMENTS OF ERROR

The Circuit Court neither erred nor abused its discretion in denying relief on Petitioner's claim of ineffective assistance of trial counsel.

The Circuit Court neither erred nor abuse its discretion in denying relief on Petitioner's claim of cumulative error.

II. STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, the respondent includes the following additions to the petitioner's Statement of the Case.

In November 2010, seventeen-month-old I.H.¹ died from “profound abuse” consisting of repeated blows to her head and body on November 4, 2010. (Appendix Record² [“App”] 49)³ Petitioner and the child’s mother, Cristen H., were the only two people around the child during the time period of the injuries that eventually caused her death. (*Id.*)

Trial counsel, Randall McGraw, began representing Petitioner from the outset. (App 748) To help him prepare the case, trial counsel hired a private investigator, Bradford Vaughan, to speak with witnesses and to meet with Petitioner at the jail. (App 711; 714; 716; 749; 762) As far as meeting with Petitioner himself, trial counsel could not articulate an exact number of face-to-face meetings, but estimated, “[t]wenty. I mean, a lot. I had plenty,” (App 759) including telephone conversations and face-to-face discussions prior to or after every hearing. (App 748-749) Petitioner confirms he met with counsel on at least seven different occasions, though he downplays the amount of time spent. (App 807)⁴ In addition to these meetings, trial counsel also represented Petitioner in the corresponding abuse and neglect proceedings over “numerous days.” (App 749) Counsel also spoke with member of Petitioner’s family and friends “pretty close to a daily basis,” “probably about every day for months leading up to this” and “they [his family]

¹ Following the traditional practice in cases involving sensitive facts and Rule 40(e) of the Rules of Appellate Procedure, to protect confidentiality the State will refer to children by their initials or descriptive terms and adult parties by their first names and last initials. See *State ex rel. W.Va. Dept. of Human Resources v. Yoder*, 226 W.Va. 520, 522 n. 1, 703 S.E.2d 292, 294 n. 1 (2010).

² “Appendix Record” refers to the Appendix Petitioner filed with his appellate brief. It will be hereinafter referenced as “App” followed by the page(s) being cited.

³ Petitioner directly appealed his conviction of second-degree murder, death of a child by a guardian or custodian, and child abuse resulting in injury. This Court issued *State v. Meadows*, 231 W.Va. 10, 743 S.E.2d 318 (2013), a *per curiam* opinion affirming the conviction.

⁴ The Respondent consulted the State’s case files alone, and has found that there were at least a minimum of seven (7) pre-trial status hearings conducted from the time of the Petitioner’s arraignment until the time of trial. (App 688)

were in pretty regular contact with him.” (App 749-750; 762) Trial counsel continued discussing the case with Petitioner during trial (App 760), and “[t]here were no questions left unanswered in my mind or any information that I needed.” (App 762)

Given the publicity surrounding this case, prior to trial, counsel hired an organization to poll Summers County to determine whether a motion to change venue was needed. (App 753-754) Based on that poll and discussions with the family, counsel then filed a motion for change of venue. (*Id.*) The trial court ultimately granted the motion, transferring the case to Monroe County,

so that we could have a panel of jurors to pick from who probably knew little or nothing about this case. This case had publicity in Summers County. And it was transferred here so that we have a pool of people who really don't - hopefully don't know anything about this case.

(App 79-80) Petitioner challenged the change of venue on direct appeal. This Court found it meritless, particularly noting that Petitioner was fully able to present his case to the jury, secure his witnesses, and obtain his evidence even though the location of the trial changed. (App 38-39); *Meadows*, 231 W.Va. at 20, 743 S.E.2d at 328.

In addition to the motion to change venue, trial counsel prepared and filed other non-frivolous, well-supported motions, including the suppression of statements, exclusion of photographs and polygraph examinations, and exclusion of expert witness testimony. (App 689) Specifically in regard to photographs, trial counsel objected to the use or admission of any photographs by the State, particularly those depicting the victim's injuries. (App 33); *Meadows*, 231 W.Va. at 15, 743 S.E.2d at 324. The State argued that the photographs were being used to show the condition of the victim. The trial court admitted the photographs, finding the probative

value outweighed the prejudicial effect. The State used the photographs to cross-examine Petitioner. (App 587-610; 864)

At trial, counsel called twelve witnesses on Petitioner's behalf, reflected in approximately 225 pages of trial transcript. (See App 64-66) The testimony ranges from expert testimony attacking the voluntariness of Petitioner's statement to police and Petitioner's ability to form criminal intent because of his marijuana use (App 371-386) to witnesses supporting Petitioner's character and credibility while attacking the credibility of Cristen H. and portraying her as a neglectful, abusive, incapable mother and "pathological liar." (App 446-455; 455-462; 490-506; 508-516; 520-524; 528-532) Petitioner chose to testify at trial. And, according to trial counsel, Petitioner was "very good" on the witness stand to the point of being part of "the reason that he was only convicted of second-degree murder." (App 773-774)

Throughout trial, counsel made strategic decisions regarding who to call as witnesses. Two potential witnesses at issue are Indie Riley and Stephanie Witham, both of whom Petitioner claims could have testified to his actual innocence. (Petr. Br. 13-16). According to Ms. Riley, Cristen H. told her, "I can't believe I did this," (App 803-804) which Ms. Riley interpreted as a confession of guilt. (App 804). However, after speaking with Ms. Riley, trial counsel decided not to call her as a witness because "she wasn't going to say what we had hoped that she would say." (App 778-779)

Although trial counsel initial wanted Ms. Witham to testify regarding statements Cristen H. made to her, his efforts to lay foundation for her testimony were stymied by Cristen H. denying she knew Ms. Witham. (App 398-399) Counsel could have pressed Cristen H. on the issue, but it was a reasonable strategic call to avoid an argument with the witness who "evoked great

sympathy" (App 751) since it may have caused the jury to identify even more with the mother of the dead child. (App 751) Notably, Cristen H. did not admit guilt to Ms. Witham. Ms. Witham told Mr. Wheeler, an investigator for the prosecutor's office, that Cristen H. told her, "I didn't realize her arm was broke two days prior to her dying. She said I went too far. She said Stephanie, I just went too far" and that the child would not stop crying or "shut up." (App 672-673; 682) Contrary to the dire picture Petitioner attempts to paint, Cristen H.'s comments were not in regard to the child's death; they were in regard to the child's broken arm. (App 672-673) Cristen H. did not admit to or otherwise take responsibility for her child's death. (App 671-685)

During trial counsel's cross-examination of Cristen H., Cristen H. made three references to passing a polygraph after being thoroughly impeached with her multiple inconsistent statements denying that she ever harmed the victim. (392-399; 405-406) Instead of drawing any attention to these statements, trial counsel altered his line of questioning and did not request a curative instruction. (392-399; 405-406) Petitioner then challenged the polygraph evidence in his direct appeal. (App 26) This Court found the references to be error, but concluded it did not merit a mistrial and was not reversible error because the references were not in any way related to the Petitioner. (App 39-40)

During the second day of trial, an *in camera* hearing was held to determine the admissibility of the testimony of the play therapist who treated the victim's brother. (App 35); *Meadows*, 231 W.Va. at 23-34, 743 S.E.2d at 324-325. The trial court ruled all the testimony admissible subject to a limiting instruction that the evidence could only be used for the purposes of determining whether the victim's injuries were the result of an accident or mistake, and for determining the identity of the individual who inflicted the injuries. (App 59); *Meadows*, 231 W.Va. at 35-36, 743 S.E.2d at 330-331. This testimony, too, was challenged on direct appeal.

While this Court found no error in admission as 404(b) evidence, it noted that trial counsel had not specifically objected to the testimony as violative of Rule of Evidence 803(4), thereby leaving the question open for habeas purposes. (App 59); *Meadows*, 231 W.Va. at 35-36, 743 S.E.2d at 330-331.

Petitioner was the last witness to testify at trial. (App 37); *Meadows*, 231 W.Va. at 21, 743 S.E.2d at 326. According to trial counsel, he prepared Petitioner to testify from day one. (App 767) Trial counsel was concerned Petitioner would get on the stand and lose his temper. (App 767) But Petitioner ended up doing a "very good job" his testimony being "in part the reason that he was only convicted of second-degree murder." (App 767)

The jury ultimately convicted Petitioner of the lesser included offense of second degree murder, death of a child by parent, and child abuse resulting in injury. (App 37); *Meadows*, 231 W.Va. at 21, 743 S.E.2d at 326. Petitioner appealed, and this Court affirmed the conviction. (*Id.*) Petitioner then filed the instant habeas, attacking trial counsel's representation as ineffective and claiming cumulative error denied him a fair trial. (Petr. Br. 9)

The Circuit Court concluded each of Petitioner's assignments of error were meritless and denied relief. (App 856-868) Unsatisfied with this ruling, Petitioner appealed.

III. SUMMARY OF ARGUMENT

In this appeal, Petitioner asserts that trial counsel provided ineffective assistance of counsel and that cumulative error occurred, denying him a fair trial. Both contentions are meritless.

A. No Ineffective Assistance of Counsel

In regard to the assignment of error based on ineffective assistance of counsel, Petitioner contends that: (1) trial counsel failed to investigate, failed to meet with him at his place of

incarceration, and failed to prepare Petitioner and defense witnesses for their trial testimony; (2) trial counsel failed to present evidence of actual innocence; (3) Trial counsel failed to request a curative jury instruction after eliciting testimony from Cristen H's. regarding her polygraph results; (4) trial counsel permitted photographs of the victim to be displayed during Petitioner's cross-examination; (5) trial counsel moved for a change of venue without consulting Petitioner; and (6) trial counsel failed to properly address play therapy testimony. The Circuit Court soundly exercised its discretion in denying relief because Petitioner cannot satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); Syl. Pt. 5 and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114, 117 (1995) (citing *Strickland v. Washington*, 466 U.S. 668) on any of these alleged errors.

First, Petitioner contends he was denied effective assistance of counsel because trial counsel did not meet with him at his place of incarceration or telephone him, and purportedly failed to prepare him and the defense witnesses for their trial testimony. (Petitioner's Brief ["Petr. Br."] 10) However, Petitioner offers no legal authority suggesting that such "failures" constituted constitutionally deficient assistance of counsel, and, regardless, the record contradicts his assertions. Further, applying the *Strickland/Miller* test to trial counsel's performance shows that counsel's representation was objectively reasonable and that Petitioner was not prejudiced by any of trial counsel's alleged shortcomings. Trial counsel met with Petitioner numerous times, hired a private investigator to question witnesses and meet with Petitioner, and prepared Petitioner for his testimony during the course of the proceedings. Throughout the proceedings he filed non-frivolous, well-supported motions, which he would not have been able to do without proper investigation and understanding of the case. Additionally, whether to prepare witnesses for testimony falls within the broad ambit of trial counsel's

discretion, as a jury may very well discount testimony that sounds rehearsed. Lastly, assuming for the sake of argument that trial counsel did not meet with the witnesses to prepare them to testify, Petitioner offers nothing showing he was prejudiced by it.

Second, the Circuit Court correctly concluded that the so-called evidence of "actual innocence" was naught but speculation and assumptions. Petitioner claims the testimony of Indie Riley and Stephanie Witham was proof of his innocence. (Petr. Br. 13) The record, however, refutes this. In regard to the "explosive testimony" of Indie Riley, trial counsel made a strategic call to not call her as a witness because she "was not going to say what we hoped that she would say," which was that Cristen H. admitted culpability. (App 778-779). Trial counsel's decision was sound, because in addition to Cristen H not actually admitting guilt, Ms. Riley's full statement to Mr. Wheeler included Cristen H blaming Petitioner, stating she loved him but he needed to pay for what he did. (App 826; 851-852) Ms. Riley's testimony could have been quite damaging to Petitioner. Thus, trial counsel made an objectively sound and reasonable decision to exclude her as a witness. Further, despite Petitioner's characterization of Ms. Riley's testimony as "explosive," it certainly could have backfired and resulted in Petitioner being convicted of first-degree murder instead of second degree.

As to the testimony of Stephanie Witham, Petitioner grossly mischaracterizes it. According to Petitioner, Cristen H. "admitted responsibility for the death of the victim and that an innocent man was going to jail," as Petitioner asserts in his Amended Petition for Writ of Habeas Corpus. (App 2) Contrary to the dire picture Petitioner attempts to paint, Cristen H.'s purported comments that she "went too far" were not in regard to the child's death; they were in regard to the child's broken arm. (App 672-673) Cristen H. did not in any fashion express responsibility for her child's death. (App 671-685) And, trial counsel's efforts to elicit favorable testimony

from Ms. Witham were hindered by multiple factors, much of which centered on Cristen H. denying she knew Ms. Witham. Ultimately, trial counsel made a strategic decision that the risk of re-calling Cristen H., whom he deemed to be the State's best witness, to challenge her denial outweighed the benefits of Ms. Witham's testimony. Even assuming for the purposes of analysis that trial counsel's strategy fell short of the threshold for objectively reasonable representation, Petitioner has not shown the outcome of trial would have been different had the testimony been elicited.

Third, the Circuit Court properly rejected Petitioner's claim regarding Cristen H.'s mention of her polygraph, recognizing there is no requirement for a curative instruction, and, even if one was required, Petitioner presented no evidence that such an instruction would have altered the outcome of trial. The record reflects that trial counsel attacked Cristen H.'s credibility through nearly every witness who testified on Petitioner's behalf. (App 590) Thus, Petitioner did not and cannot demonstrate that but for counsel's errors the outcome of trial would have been different.

Fourth, the Circuit Court correctly concluded Petitioner failed to demonstrate the display of photographs of the victim during his cross examination had a detrimental effect on his ability to testify. Even if it did, the State's use of the photographs on cross-examination was proper. The Circuit Court also correctly concluded that Petitioner offered no evidence the photographs distracted the jury. Thus, Petitioner's failure to show prejudice defeats this contention.⁵

⁵ The State does not concede that trial counsel performed deficiently in this regard. Rather, failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim, and Petitioner clearly cannot satisfy the prejudice prong of *Strickland/Miller*. See *Vernatter*, 207 W. Va. 11, 528 S.E. 2d 207.

Fifth, Petitioner cannot show trial counsel acted objectively unreasonable by moving for a change of venue based on the results of a professionally conducted poll of the community. Nor can Petitioner demonstrate prejudice by the trial being conducted in Monroe County instead of Summers County. *State v. Meadows*, 231 W.Va. 10, 20 743 S.E.2d 318, 328 (2013)(concluding the change in venue did not deprive Petitioner of a fair trial as guaranteed by our State Constitution.)

Lastly, Petitioner fails to demonstrate reversible error regarding trial counsel's lack of specific objections to the expert testimony of a play therapist pursuant to rule 803(4) of the West Virginia Rules of Evidence. Petitioner bases this claim on a legally unsupported, conclusory assertion that trial counsel's performance was objectively unreasonable because the testimony from Mr. Ferris was not "statements made for the purpose of medical diagnosis or treatment." In accordance with the long-standing position that "issues which are . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal," *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996), this Court should decline to consider the issue. However, if this Court does consider the issue, Petitioner's claim fails because he cannot show prejudice.⁶ Specifically, he cannot demonstrate that had trial counsel objected "properly" to the testimony, either the trial court would have excluded Mr. Ferris's opinions and explanations of the therapy sessions with the victim's brother at issue herein or on appeal this Court would have reversed the trial court's admission of those opinions and explanations.

⁶ Again, Petitioner's failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim. See *Vernatter*, 207 W. Va. 11, 528 S.E. 2d 207.

Additionally, in regard to Petitioner's contention the Circuit Court erroneously concluded that Mr. Ferris's contested statements were given "to provide a context as to the entirety of the therapy session and to frame his interactions" with the child, Petitioner's claim is conclusory and should be disregarded. Yet, should it be considered, it is meritless because viewing Mr. Ferris's testimony as a whole instead of in snippets conveniently taken out of context for appeal purposes, his comments are clearly contextual and testimony permitted by Rule 702 of the West Virginia Rules of Evidence. Further, Petitioner failed to show that the contested statements satisfy the prejudice prong of *Strickland/Miller*.

B. No cumulative error

Petitioner's skeletal argument warrants no consideration. Even if this assignment of error is considered, it is meritless because Petitioner has failed to demonstrate the Circuit Court abused its discretion in concluding that the cumulative error doctrine does not apply.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the issues presented have been authoritatively decided, and the facts and issues are adequately presented in the record and the briefs. This case is appropriate for resolution by memorandum decision affirming the Circuit Court's order.

V. ARGUMENT⁷

⁷ In addition to the specific arguments set forth below, the State notes that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

In this case, Petitioner erroneously contends the Circuit Court erred by denying relief on his Amended Petition for habeas corpus relief. He assigns two primary errors: ineffective assistance of counsel and cumulative error. Petitioner cannot, however, demonstrate any clear error or abuse of discretion by the Circuit Court's decision. For the following reasons, the Circuit Court's denial of relief was correct and should be affirmed.

A. Standard of Review

This Court has long held that “[a] writ of habeas corpus is not a substitution for a writ of error, and 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 895 (1979), *cert. denied*, 464 U.S. 831 (1983). When such error is alleged, this Court's review of a circuit court's denial of a petition for habeas corpus relief is three-pronged: “the final order and the ultimate disposition [are reviewed] under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). Additionally, a habeas corpus proceeding is civil in nature, and the general standard of proof a petitioner must meet is a preponderance of the evidence. *Sharon B. W. V. George B. W.*, 203 W.Va. 300, 303, 507 S.E.2d 401, 404 (1998).

B. Petitioner fails to demonstrate reversible error in regard to the Circuit Court's denial of relief based on ineffective assistance of trial counsel.

Petitioner asserts trial counsel provided constitutionally defective assistance in six ways: (1) trial counsel failed to investigate and failed to meet with him at his place of incarceration; (2) trial counsel failed to present evidence of actual innocence; (3) Trial counsel failed to request a curative jury instruction after eliciting testimony on cross-examination of Cristen H. regarding the results of her polygraph testing; (4) trial counsel permitted photographs of the victim to be

displayed during Petitioner's cross-examination; (5) trial counsel moved for a change of venue; and (6) trial counsel failed in regard to addressing play therapy testimony.

In West Virginia, ineffective assistance of counsel claims are assessed under the two-prong standard articulated by the Supreme Court in *Strickland v. Washington*. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114, 117 (1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To succeed on such a claim, a petitioner must establish that (1) trial 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 would have been different." *Id.* "Failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Vernatter v. Warden, W Va. Penitentiary*, 207 W. Va. 11, 528 S.E. 2d 207 (1999).

The *Strickland/Miller* standard is a demanding one. See *Miller*, 194 W. Va. at 16, 459 S.E. 2d at 127 ("[T]he cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between."); *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 319, 465 S.E. 2d 416, 421 (1995) (ineffective assistance claims are "rarely" granted and only when a claim has "substantial merit"). Review of defense counsel's performance is "highly deferential" and begins with the strong presumption that "counsel's performance was reasonable and adequate." *Miller*, 194 W.Va. at 16, 459 S.E.2d at 127.

A petitioner claiming ineffective assistance must identify the specific "acts or omissions" of his counsel believed to be "outside the broad range of professionally competent assistance." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128. Identifying a mere mistake by trial counsel is not enough. As the *Miller* court noted, "with [the] luxury of time and the opportunity to focus resources on specific facts of a made record, [habeas counsel] inevitably will identify

shortcomings in the performance of prior counsel”; however, just identifying some mundane mistake does not establish ineffectiveness because “perfection is not the standard for ineffective assistance of counsel.” *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128. Only if an identified error is “so serious that [the defense attorney] was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment” has the first prong of the *Strickland/Miller* test been satisfied. *Strickland*, 466 U.S. at 687. If such an error can be shown, the reviewing court is then tasked with determining, “in light of all the circumstances” but without “engaging in hindsight,” if that conduct was so objectively unreasonable as to be constitutionally inadequate. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

Assuming that trial counsel's conduct is deemed to have been objectively unreasonable (thereby satisfying the first prong of *Strickland/Miller*), such conduct does not constitute ineffective assistance unless it can also be established that the conduct had such impact that there is a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *Miller*, 194 W. Va. at Syl. Pt. 5, 459 S.E.2d at 117. As the Supreme Court explained in *Strickland*, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. Thus, satisfying the “prejudice prong” of *Strickland/Miller* requires a showing that counsel's deficient performance was so serious and detrimental that it “adversely [a]ffected the outcome in a given case[.]” *Myers*, 213 W. Va. at 36, 576 S.E.2d at 281. The likelihood of a different result must be *substantial*, not just conceivable. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). (emphasis supplied). There is no precise formula applicable in every case that can be used to determine if a given instance of constitutionally-inadequate conduct so significantly degraded the reliability of the trial (or other proceeding) such

that the prejudice prong is satisfied. See *Daniel*, 195 W. Va. at 325, 465 S.E.2d at 427 ("Assessments of prejudice are necessarily fact-intensive determinations peculiar to the circumstances of each case."). The burden of demonstrating prejudice lies with the petitioner claiming ineffective assistance. *State v. Hatfield*, 169 W. Va. 191, 209, 286 S.E.2d 402, 413 (1982) ("[T]he burden is on the defendant to prove ineffective assistance"); see also *Strickland*, 466 U.S. at 693; *Daniel*, 195 W. Va. at 319, 465 S.E.2d at 421.

Significantly, strategic choices and tactical decisions, with very limited exception, fall outside the scope of this inquiry and cannot form the basis of an ineffective assistance claim. *Daniel*, 195 W. Va. at 328, 465 S.E.2d at 430 ("A decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness.") (internal quotation marks omitted). This Court has consistently held that "[w]here a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused. Syl. Pt. 12, *State v. Kilmer*, 190 W.Va. 617 (1993) (citing Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640 (1974)); *Miller*, 194 W.Va. at 16, 459 S.E.2d at 127 ("What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.").

1. Trial counsel was not ineffective in his investigation and preparation of the case.

Petitioner attempts to circumvent punishment for his crimes by attacking the quality of trial counsel's investigation. It has long been recognized that

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

Syl. Pt. 3, *Daniel*, 195 W. Va. 314, 465 S.E.2d 416, 419; *see also Ballard v. Ferguson*, 232 W. Va. 196, 201, 751 S.E.2d 716, 721 (2013) (suggesting reliance on police reports without independent investigation can be deficient performance). Petitioner contends he was denied effective assistance of counsel because trial counsel did not meet with him at his place of incarceration or telephone him, and purportedly failed to prepare him and the defense witnesses for their trial testimony. (Petr. Br. 10) However, Petitioner offers no legal authority suggesting that such "failures" constituted constitutionally deficient assistance of counsel, and, regardless, the record contradicts his assertions.

First and foremost, trial counsel was a seasoned lawyer with twenty-five years' experience in criminal law at the time of Petitioner's trial. (App 757-758) He had prosecuted first-degree murder charges, defended as many as twelve first-degree murder charges, and conducted over one hundred jury trials. His extensive experience alone equips him to zealously defend his clients. Plus, trial counsel was involved in this case from the outset (App 758-759) and was in the best position to determine if more or less investigation was needed in order to build an effective defense.

Next, although Petitioner paints a dire picture of neglectful counsel who did naught but twiddle his thumbs and dawdle about while Petitioner faced life imprisonment, a cursory perusal of the trial record portrays exactly how thorough trial counsel's performance was. (App 62-671)

Throughout the case, trial counsel prepared and filed non-frivolous, well-supported motions including change of venue, suppression of statements, exclusion of photographs and polygraph examinations, and exclusion of expert witness testimony. (App 689) He could not and would not have been able to do so without understanding the issues of the case and the evidence both for and against Petitioner. Furthermore, trial counsel called twelve witnesses on Petitioner's behalf, reflected in approximately 225 pages of trial transcript. (See App 64-66) The testimony ranges from expert testimony attacking the voluntariness of Petitioner's statement to police and his ability to form criminal intent because of his marijuana use (App 371-386) to witnesses supporting his character and credibility while attacking the credibility of Cristen H. and portraying her as a neglectful, abusive, incapable mother and "pathological liar." (App 446-455; 455-462; 490-506; 508-516; 520-524; 528-532) With such evidence as this presented at trial, Petitioner cannot show that trial counsel's investigation and preparation were deficient. Nor can he show that the outcome of trial would have been different had trial counsel met with him or the witnesses more.

Furthermore, the record of the omnibus evidentiary hearing contradicts Petitioner's contention that trial counsel failed to meet with him. Trial counsel testified that although he could not give an exact number of face-to-face meetings with Petitioner, he estimated, "Twenty. I mean, a lot. I had plenty," (App 759) including telephone conversations and face-to-face discussions prior to or after every hearing. (App 748-749) Petitioner confirms he met with counsel on at least seven different occasions, though he downplays the amount of time spent. (App 807) In addition to these meetings, Mr. McGraw also represented Petitioner in the corresponding abuse and neglect proceedings over "numerous days." (App 749) Counsel testified he spoke with member of Petitioner's family and friends "pretty close to a daily basis," "probably about every

day for months leading up to this” and “they [his family] were in pretty regular contact with him.”
(App 749-750; 762)

Going above and beyond this direct communication, counsel hired a private investigator, Bradford Vaughan, to assist him in speaking to witnesses and meeting with Petitioner. (App 749; App 762) The visitation logs Petitioner submitted at the omnibus hearing confirms Mr. McGraw’s testimony that Mr. Vaughan met with Petitioner at the jail several times. (App 762; App 711, 714, 716) These meetings between the Petitioner and the investigator were, undoubtedly, reported to Mr. McGraw and used by him to prepare the case. Ultimately, Mr. McGraw unequivocally testified “[t]here were no questions left unanswered in my mind or any information that I needed.” (App 762) He was familiar with the evidence and the witnesses and as prepared for trial as any reasonable attorney. (App 749) In addition to all the meetings, conferences, and discussions throughout the course of the case, trial counsel continued discussing the case with Petitioner during trial. (App 760)

Despite Petitioner’s assertion counsel failed to prepare him for trial (App 808), according to trial counsel, not only did he discuss Petitioner testifying and prepare him to do so, it was the high quality of Petitioner’s testimony that convinced the jury to return a verdict of second-degree murder instead of life without mercy. (App 773-774)

Q Did you ever have occasion to specifically meet with Mr. Meadows to discuss with him his testimony in the case?

A I spoke to Mr. Meadows numerous times about his testimony in the case. Yes. I mean, many times and –

Q Did you –

A Like I said –

Q Did you -- I'm sorry –

A The whole - the whole week of the trial, as we sat there, we discussed what his testimony might be if he were to testify, which he ultimately did.

Q Did you prepare him for his testimony?

A Yes, sir.

Q Did you speak to him about the likely subjects of cross-examination?

A Oh, yes, sir, at length.

Q When did you do that?

A Throughout the whole course of these - starting back from the very first day or so that I talked to him leading up to right before he testified, we spoke in that room there that you're seated in today. And then he and his grandfather and I spoke - his grandfather and I spoke to him in the room at length because I was worried he would get on the witness stand and lose his temper. And he did not. He did a very good job.

(App 767)

A As I said earlier, I thought he was - he was very good. And perhaps in part the reason that he was only convicted of second-degree murder was because of his testimony. Frankly, he surprised me. He did a very good job. It's just - I've always found it to be a very difficult thing for defendants to testify. And like I say, I thought he did a very good job.

(App 773-774) A review of Petitioner's testimony at trial demonstrates exactly what counsel was referring to. (App 541-613)

The record shows trial counsel's conduct made informed decisions as to the best possible trial tactics and strategies to use at trial to represent the Petitioner's best interests. For instance, Mr. McGraw went so far as to hire a media company in Charleston to poll Summers County to assess whether Petitioner could receive a fair trial there. (App 776). It was the results of that poll that led to the motion for a change of venue because "we felt like he could not get a fair trial in Summers County because of what he and his family and I and the media group out of Charleston, what everyone uncovered." (App 776) Additionally, trial counsel presented a constant theory

throughout the case that the victim's mother, not the Petitioner, had murdered the victim. Trial counsel supported this argument by presenting numerous witnesses to challenge Cristen H.'s credibility and exploit her negative treatment of the victim, and to portray the Petitioner's interaction with the child as positive and caring.

It is not enough, according to Petitioner, for counsel to meet with him prior to or after every single meeting, stay in frequent contact with his family and friends, and hire a private investigator to speak with him at his place of incarceration as well as to speak with witnesses. He claims his Constitutional right to counsel requires counsel to engage in face-to-face contact at the defendant's place of incarceration or written communication. Neither the State nor federal Constitution requires such a thing. The Circuit Court recognized this, rejecting Petitioner's argument and expressly noting the record demonstrates that counsel not only had sufficient contact with Petitioner to familiarize himself with the evidence and witnesses and obtain necessary knowledge to prepare for trial, counsel also hired a private investigator to gather evidence and to speak with Petitioner and conducted enough preparation that he elicited favorable testimony regarding Petitioner's character and conducted reasonable direct and cross-examination of witnesses. (App 862) Even if Petitioner's allegations are taken as true, he fails to show that the result of trial would have been different but for counsel's supposed deficiencies.

Ultimately, Petitioner's contentions do not satisfy either prong of the *Strickland/Miller* test, and the Circuit Court concluded Petitioner's allegations fell within the ambit of trial counsel's broad discretion and trial strategy. (App 18) Thus, this Court should affirm the Circuit Court's denial of habeas relief predicated on ineffective assistance of counsel.

- 2. Trial counsel was not ineffective in the presentation of evidence, as the alleged evidence of "actual innocence" was not "explosive testimony" that would have altered the outcome of trial.**

Petitioner next claims trial counsel failed to present “explosive testimony” from Indie Riley and Stephanie Witham that would have shown his “actual innocence.” What the record shows, however, is that the purported testimony was naught but speculation and assumptions and that trial counsel made strategic decisions regarding both women’s testimony. Thus, the Circuit Court correctly concluded Petitioner failed to satisfy either prong of the *Strickland/Miller* test.

a. Cristen H.’s statement to Indie Riley was not an admission of guilt.

Despite Petitioner’s efforts to paint trial counsel’s decision as ineffective for choosing to forego calling Indie Riley as a trial witness, counsel made a strategic decision not to have her testify. Counsel knew either from his own private investigator or Mr. Wheeler that Ms. Riley, who had been Cristen H.’s cellmate and eventual roommate, had potentially favorable testimony. According to Ms. Riley, Cristen H. told her, “I can’t believe I did this,” (App 803-804) which Ms. Riley interpreted as a confession of guilt. (App 804). However, after speaking with Ms. Riley, trial counsel decided not to call her as a witness.

Q And that was a witness named Indie Riley. She would have also been in the pod with Ms. Hurley and then later had resided with Ms. Hurley. Do you remember Miss Riley?

A I spoke to Miss Riley. I do remember the name Indie, yes.⁸

Q And did you attempt to secure her appearance at trial?

A It depends on what you term as secure her appearance. I spoke to her before the trial. *And she wasn't going to say what we had hoped that she would say.* And so at that point, I did not - did not attempt to bring her to the trial.

Q Did you have a copy of her statement?

⁸ Although Ms. Riley denied speaking to anyone from the defense prior to trial, Mr. McGraw expressly recalled speaking with her. (App 778)

A I think that I did, yes. I think that's what led me to call her on the telephone and talk to her. And Mr. Vaughn might've gone to speak to her from the office, but I'm not positive of that. I remember speaking to her because I remember the name Indie and Riley. And I thought she might've been a Wyoming County Riley, where I'm from, but she was not.

(App 778-779)(emphasis supplied) Such a decision falls directly within the strategic choices and tactical decisions of trial counsel. As this Court has recognized, trial counsel is in the best position to determine how to build an effective defense, and this Court will not second-guess it unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness. *Daniel*, 195 W. Va. at 328, 465 S.E.2d at 430. Counsel's decision was by no means ill chosen. As demonstrated in Ms. Riley's statement to Mr. Wheeler in July 2011, Cristen H. also denied fault and directly implicated Petitioner:

"the only blame... I think one time she told me that she felt like it was her fault... And I'm like well Cristen H., if you was honestly not there and you honestly did not know nothing about it then it cannot be your fault. And she was like I just feel like it was my fault." (App 851-852)

"And, she was like, well, I'm afraid to talk to you about R.L. because people say I take up for him. And, you know he's in here for killing my baby...And then that part she even told me that she loved R.L. and that she hated to see him in there [jail] but he needed to pay for what happened to B.M."⁹

(App 826) Clearly, trial counsel made an objectively reasonable and sound decision to exclude Ms. Riley from the defense. Even assuming, *arguendo*, that counsel should have called Ms. Riley to testify, Petitioner cannot show the outcome of trial would have been different or that a change in outcome would have been in his favor. Indeed, Ms. Riley's recounting of Cristen H's statements could just as likely have resulted in a more severe conviction.

b. Cristen H.'s statements to Stephanie Witham were not admissions of guilt.

⁹ "B.M." is referring to "I.M." by her nickname.

Next, Petitioner attacks counsel's "missed opportunity" to offer "similar evidence" from Stephanie Witham, a woman who was confined in the same pod as Cristen H. at the jail after the child's death. (App 671) Petitioner's contention fails for multiple reasons. But, first and foremost, Petitioner grossly mischaracterizes Ms. Witham's statements. According to Petitioner, Cristen H. "admitted responsibility for the death of the victim and that an innocent man was going to jail," as Petitioner asserts in his Amended Petition for Writ of Habeas Corpus. (App 2) However, the transcript of Ms. Witham's May 27, 2011, interview with Mr. Wheeler, includes no such statement. Ms. Witham told the investigator Cristen H. said "I didn't realize her arm was broke two days prior to her dying. She said I went too far. She said Stephanie, I just went too far" and that the child would not stop crying or "shut up." (App 672-673; 682) Contrary to the dire picture Petitioner attempts to paint, Cristen H.'s comments were not in regard to the child's death; they were in regard to the child's broken arm. (App 672-673) Cristen H. did not admit to or otherwise take responsibility for her child's death. (App 671-685) The transcript demonstrates Ms. Witham believed Cristen H. killed the child based on her interpretation of Cristen H.'s statements about the broken arm. Ms. Witham states "...everything that she told me and then I put it together, you know, it made perfect sense to me, you know what she had done." (App 673) Had Petitioner attempted to elicit such testimony at trial, the State would have objected to it as speculative evidence or improper opinion testimony. (App 691) Even if it was admitted at trial, the testimony is not so "explosive" as to change the outcome of the Petitioner's conviction.

Trial counsel efforts to elicit evidence of "actual innocence" from Ms. Witham were hindered by multiple factors. To begin, Cristen H. testified before Ms. Witham, and she denied knowing Ms. Witham, which prevented him from laying a foundation for Ms. Witham's

testimony. (App 398-399) Counsel could have pressed Cristen H. on the issue, but it was a reasonable strategic call to avoid an argument with the witness who “evoked great sympathy” (App 751) since it may have caused the jury to sympathize even more with the mother of the dead child. (App 751) Next, counsel attempted at least “five times” to introduce Cristen H.’s statements through Ms. Witham’s testimony, to no avail. (App 691) Ultimately, trial counsel could have recalled Cristen H. in further attempt to lay the foundation for the extrinsic evidence from Ms. Witham. However, counsel again made a strategic decision not to:

A When Cristen H. was on the stand, I remember she was a very sympathetic - in my mind, she was perhaps the best witness, I thought - one of the best witnesses, if not the best witness, for the state. She, how should I say, evoked great sympathy, I felt like. It was just crushing to our side, frankly. And I didn't want her back on the stand. I also knew -- there was some strategy involved in that. I knew what she was going to say. If she had the opportunity to read the statement, she was going to say that what she meant by the statement was she made a big mistake in giving - leaving the child with Mr. Meadows. And I didn't want her really to clarify that, frankly. And I didn't want her back on the stand.

Q And the only way that Witham would've been able to testify would've been if you had recalled Cristen H.; is that correct?

A I thought Ms. Witham did testify a little bit.

Q Well, she did a little bit. But I think the Court did not allow her –

A There was maybe an objection to her testifying about the actual statement because Ms. Hurley didn't read the statement?

Q Correct.

A Yes.

(App 751-752). And, again, if he did recall Cristen H., he not only placed the State’s best witness in front of the jury again, he risked alienating the jury by. Trial counsel’s decision was sound strategy.

Finally, even assuming for the purposes of analysis that trial counsel's strategy fell short of the constitutional threshold for objectively reasonable representation, Petitioner has not shown the outcome of trial would have been different. As discussed, supra, trial counsel called twelve witnesses on Petitioner's behalf, presenting testimony ranging from Petitioner's inability to form criminal intent because of his marijuana use (App 371-386) to Petitioner's good character and impeccable credibility evidence while portraying Cristen H. as a horrible mother and compulsive liar. (App 446-455; 455-462; 490-506; 508-516; 520-524; 528-532) With such evidence as this presented at trial, Petitioner cannot show that one more instance of testimony implicating Cristen H. would have altered the outcome of trial.¹⁰

For these reasons, the Circuit Court aptly recognized Petitioner had "overstated the potential exculpatory value" of the statements, that the conclusions of guilt were based on speculation rather than direct admissions by Cristen H., that trial counsel's decision was not unreasonable, and that Petitioner failed to demonstrate the admission of the speculative testimony would have altered the outcome of trial. (App 863) Petitioner cursorily points out the Circuit Court Order did not specifically address his allegations regarding Indie Riley and thus warrants a remand. (Petr. Br. 14) While it is true the Order does not identify Ms. Riley by name, the same findings and conclusions regarding Ms. Witham's testimony should likewise apply to Ms. Riley's testimony, as that, too, was a decision falling clearly within trial counsel's broad strategic and tactical decision making autonomy and Petitioner failed to show a reasonable probability the testimony would have altered the outcome of trial in his favor.

¹⁰ These witnesses and the quality of their testimony further reinforces the thoroughness of trial counsel's investigation and preparation for trial.

3. Trial counsel was not ineffective in regard to eliciting evidence of a witness's polygraph results.

Petitioner next asserts that the Circuit Court erred by denying habeas relief on trial counsel's failure to request a curative jury instruction after eliciting testimony on cross-examination of Cristen H. regarding the results of her polygraph testing. (Petr. Br. 16-18) Specifically, during cross-examination at trial Cristen H. made three references to passing a polygraph after trial counsel thoroughly impeached her with multiple inconsistent statements in which she denied harming the victim. (392-399; 405-406) Petitioner first challenged these polygraph references on direct appeal, arguing plain error in the trial court's denial of his motion for a mistrial and failure to offer a curative instruction regarding the polygraph testimony. *Meadows*, 231 W.Va. at 20, 743 S.E.2d at 328. Despite finding error did in fact occur when the polygraph evidence was introduced, this Court concluded no grounds for mistrial existed because the polygraph references related to a witness, not the defendant himself. (App 39-40); *Meadows*, 231 W.Va. at 20-21, 743 S.E.2d at 328-329. The Court further articulated that "*it was not reversible error because the evidence was not elicited from or about the defendant*" and the defendant challenged the witness's credibility through several defense witnesses. *Id.* (emphasis added) Just as Cristen H.'s polygraph references were not considered reversible error on direct appeal, and they are not reversible error in this habeas.

Even if trial counsel's performance regarding the polygraph references was objectively unreasonable, Petitioner has not and cannot show prejudice. Assessments of prejudice are fact-intensive determinations peculiar to the circumstances of each case. *See Daniel*, 195 W. Va. at 325, 465 S.E.2d at 427. In this case, Petitioner attacked Cristen H.'s credibility through every witness who testified on his behalf. (App 590) Debra Parks, who lived with Cristen H. for a time,

described Cristen H. physically abusing the child and when trial counsel asked Ms. Parks if she would characterize Cristen H. as truthful, Ms. Parks stated, "[t]ruthfully, absolutely not." (App 446-450) John Mann testified to seeing Cristen H. physically abuse the victim and characterized her as "dishonest" and a person who could not be believed. (App 465-468) Teresa Park testified to seeing Cristen H. physically abusing the victim (App 496-498) Dusty Hurley characterized Cristen H. as a dishonest person whom he saw physically abuse the victim. (App 512-513) Blace Hutchens also saw Cristen H. physically abuse the victim, and described her as "an angry, a pessimist-type person. She was deceitful. And I didn't trust her." (App 520; 523) Jeremiah Yancey had known both Petitioner and Cristen H. since they were very young. He stated Petitioner had "never lied to me. He's always been honest with me. I've always known him to be honest with everyone. Either they like it or don't. That's how he is." As for Cristen H.'s veracity, Mr. Yancey described her as a "pathological liar." (App 528) With the jury hearing overwhelming evidence that Cristen H. lies, Petitioner has not shown that Cristen H.'s polygraph references -which were elicited prior to the testimony of the defense witnesses- impacted the jury in any manner whatsoever.

As to Petitioner's claim that trial counsel was ineffective in failing to ask for a curative instruction, he points to no authority requiring counsel to ask for said instruction to avoid a claim of ineffective assistance of counsel. In fact, as recognized by the Circuit Court, there is no "hard and fast rule that a curative instruction is always required regardless if objection is raised." (App 863 referencing *State v. Meadows*, 231 W.Va. 10, 743 S.E.2d 318 (2013)). Further, in light of the repeated and consistent testimony directly discrediting Cristen H., even if a curative instruction was given, Petitioner has not and cannot demonstrate any likelihood, much less a reasonable one, that the instruction would have altered the outcome of trial.

Thus, the Circuit Court correctly and soundly concluded Petitioner did not meet his burden of showing a reasonable probability that but for counsel's unprofessional errors the outcome of the trial would have been different. (App 863)

4. Trial Counsel was not ineffective in regard to the display of victim's photograph during Petitioner's cross-examination.

Petitioner next contends that trial counsel rendered constitutionally defective assistance by failing to object to the display of photographs of the victim while the State cross-examined him. According to Petitioner, the photos interfered with his ability to provide "meaningful testimony" and "distracted the jurors from the substance of his account." (Petr. Br. 804) Assuming a photograph of the victim was visible to both Petitioner and the jury during Petitioner's testimony, Petitioner fails to demonstrate the outcome of the trial would have been different had counsel objected.

First, the transcript of Petitioner's trial testimony lacks any indication the photographs distracted him or interfered with any part of his testimony. (App 587-610; 864)

Second, assuming a photograph the victim did in fact distract Petitioner, he has not shown that it negatively affected his testimony. Indeed it is more likely that Petitioner showing emotion while he testified caused the jury to view him sympathetically, turning the tide of trial in his favor. As trial counsel noted, Petitioner's testimony "was very good. And perhaps in part the reason that he was only convicted of second-degree murder was because of his testimony." (App 773-774)

Third, the record is devoid of evidence to suggest the jury was distracted by the photographs and was unable to consider or listen to the Petitioner's testimony.

Fourth, Petitioner cannot demonstrate that trial counsel's decision was anything other than a strategic decision to avoid drawing additional attention to the photographs by repeatedly objecting. To be the basis for a claim of ineffective assistance of counsel, Petitioner must show counsel's tactic in deciding to forego objecting to the display of photographs was so ill chosen that it permeated the entire trial with obvious unfairness. *Daniel*, 195 W. Va. at 328, 465 S.E.2d at 430. Trial counsel testified at the omnibus evidentiary hearing as follows:

Q If you had noticed that they remained up during the entire course of his testimony, is that something you would've objected to?

A It's hard to say sitting here years later because, you know, that's a fine line. And there's a lot of art to it, so to speak, trying a case. I know that I objected to those photos being used at some point in this trial: And at some point, I think it becomes, how should I say, maybe overkill or becomes too - if you just keep objecting over and over and over and the judge keeps overruling you, I think that's not a good tactic at trial.

(App 774-775) While there is certainly a distinction between objecting to the use of the photographs and objecting to the display of the photographs after cross-examination thereon, trial counsel was in the best position to determine how to best minimize the impact of the photographs on the jury. Here, Petitioner cannot and did not show the photographs caused pervasive unfairness to permeate trial.

Fifth, even if trial counsel had objected to the display of photographs, Petitioner cannot show that any such objections would have been sustained. Trial counsel moved to exclude the photographs from trial as non-probative and highly prejudicial. (App 101-102) The trial court weighed the probative value against the prejudicial effect of the photographs, and ultimately ruled

the State's theory of the case, at least, is that the child was in reasonably good health early that morning when the mother left home and that the child suffered life-ending injuries while she was in the custody of the defendant. And

the Court feels that there's - if I understand correctly, there's pictures of the child before the day in question, in which the child appeared to be fairly normal. Then, there's pictures after the child was taken to the hospital that showed extensive injuries.

And the Court feels that there would be a great deal of probative value here because of that, because they would show that the child was initially uninjured, and then later was injured. So, there's a great deal of probative value...

(App 103-104) Under the guidelines of this ruling, the State then used the photographs during its cross-examination of Petitioner to rebut his testimony as to who inflicted the injuries on the victim, where the injuries were inflicted on the child's body, and what the child's injuries looked like when the Petitioner came into contact with her as compared to when the child was in her mother's custody the night before the crime. (App 587-588) Notably, the Circuit Court presiding in the instant habeas proceeding also presided over the trial, and its ruling on this issue in the April 30, 2018, Order indicates any such objection at trial would have been overruled. Specifically, the Circuit Court found this contention to be meritless "because of the relevancy of the photos, and the limited scope of their use, in attempt to rebut testimony." (App 804)

For these reasons, Petitioner fails to demonstrate that had trial counsel objected to the display of the photographs the outcome of trial would have different.

5. Trial counsel was not ineffective in moving for a change of venue based on the results of a professionally conduct poll of the community; and this Court previously determined Petitioner suffered no prejudice from the venue change.

This ineffective assistance of counsel predicate also fails because Petitioner cannot satisfy either prong of the *Strickland/Miller* test. To begin, Petitioner's claim of ignorance regarding the motion is disingenuous. The record reflects that trial counsel initially made the motion for a change of venue at a hearing where Petitioner was in fact present. (App 865) The

record further shows Petitioner (and his family) were the driving force behind the motion for the change in venue. During the omnibus evidentiary hearing, trial counsel testified:

A We did make a motion. In fact, we hired an organization from Charleston to do a survey to support our motion to change the venue. The family - Mr. Meadows and his family felt very strongly that he couldn't get a fair trial in Summers County, that it needed to be somewhere else because of all the pretrial publicity and because of the nature of the case.

Q So I think early on, you made that motion?

A I think so, yes, ma'am, near the beginning.

Q And at that time, did the judge grant the motion?

A I don't remember the exact mechanics of that. I thought the judge maybe took it under advisement. I just don't remember the exact mechanics of how all of that happened. At some point, he agreed, I guess. I don't know if he agreed or just - if he agreed it should be moved because of the possible pretrial prejudicial stuff that had happened or if he just felt like it was more comfortable to do the trial in Monroe County. I don't remember the exact mechanics and timing of all of that. But in any event, I know that it was moved to Monroe County at some point.

Q When you found out that it was going to be moved to Monroe County, did you feel that that in any way would prejudice your client?

A No. I mean, that was - like I say, that was what we wanted actually. I think we filed the motion to have it moved.

(App 753-754). For Petitioner to now claim it was done against his wishes is flatly wrong. Furthermore, in ruling on the motion the trial court specifically articulated it would hold its final ruling in abeyance pending further consideration, as the court believed that it may be possible that people in Monroe County were less likely to know the Defendant or have heard about the case. (App 865). The court ultimately granted the motion for change of venue, explaining

the reason that the case was transferred to Monroe County was that we anticipated there would be some difficulty in selecting a jury in Summers County. And it was felt that it would be prudent to transfer the case to Monroe County for trial purposes so that we could have a panel of jurors to pick from who probably knew little or nothing about this case. This case had publicity in Summers County. And it was transferred here so that we have a pool of people who really don't - hopefully don't know anything about this case.

(App 79-80) Clearly, there was a legitimate risk of a tainted jury pool in Summers County, and it was not only objectively reasonable for trial counsel to move for a venue change, it was prudent and wise. Had counsel failed to request a change of venue or had the trial court not moved the trial to Monroe County, Petitioner would no doubt be challenging those decisions now.

Moreover, Petitioner was not prejudiced by the change in venue. Although the Petitioner claims that he is well known, liked, and an involved citizen in the Summers County community, the jury panel hearing the evidence would not have had independent knowledge thereof. Statutory and case law holds that the "object of law regarding jury selection is to secure juror whose minds are wholly free from bias or prejudice." W.Va. Code §62-3-3; *State v. West*, 157 W.Va. 209 (1979). Petitioner's assertions are the exact type of personal knowledge and biases that would prevent a person from sitting on his jury. The Court, by State's objection for cause, would not have allowed any juror to sit on the jury that had prior knowledge of the Petitioner's good reputation or allowed them to consider their personal opinion in its deliberations.

Additionally, on Petitioner's direct appeal of his conviction, this Court recognized the lack of prejudice caused by the change of venue. It particularly noted that Petitioner was fully able to present his case to the jury, secure his witnesses, and obtain his evidence even though the location of the trial changed. *Meadows*, 231 W.Va. at 20, 743 S.E.2d at 328.

For this reason, no doubt, Petitioner now asserts trial counsel effectively denied him his right to appeal the change in venue by failing to make a record thereon. (Petr. Br. 19) Unfortunately for Petitioner, he did, in fact, directly appeal the change in venue. This Court had no trouble articulating that Meadows failed to show prejudice by the transfer and that he received a fair trial as guaranteed by the State Constitution. *Meadows*, 231 W.Va. at 20, 743 S.E.2d at 328.

Accordingly, this claim fails both prongs of the *Strickland/Miller* test.

6. Trial counsel was not ineffective in addressing play therapy evidence.

Petitioner's last contention is two-fold. First, he claims trial counsel was ineffective because his objections to the admissibility of play therapist Steve Ferris's testimony did not allow for appellate review on whether the child's statements fell within the purview of Rule 803(4) of the West Virginia Rules of Evidence. Second, he contends the Circuit Court erred in concluding that "Ferris's contested statements were given to provide a context as to the entirety of the therapy session and to frame his interactions" with the child. (App 866)

As an initial matter, trial counsel did in fact object to the admissibility of Mr. Ferris's testimony. (App 267-295) Trial counsel termed Mr. Ferris's testimony objectionable "on every level" and "completely improper," and he objected to it as being beyond any hearsay exception permitted under Rule 803(4) of the West Virginia Rules of Evidence¹¹ and as a violation of the Sixth Amendment confrontation clause. (App 35; 290-292) He did not, however, specifically

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

¹¹ *Meadows*, 231 W.Va. at 16, 743 S.E.2d at 324; App 35.

by the psychologist for the purpose 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)).

Meadows, 231 W. Va. at 21, 743 S.E.2d at 329. As a result, because trial counsel did not articulate these specific objections at the trial court level, this Court declined to assess the admissibility of Mr. Ferris's opinions pursuant to Rule 803(4) on Petitioner's direct appeal of his conviction. *Id.*¹²

In the current appeal, Petitioner gives the issue cursory treatment. He makes a conclusory assertion that trial counsel's performance was objectively unreasonable because the testimony from Mr. Ferris was not "statements made for the purpose of medical diagnosis or treatment." He bases this conclusion on Mr. Ferris's choice of wording, which includes "in my interpretation," "I think/don't think," and "I'm not sure." (Petr. Br. 21-22) However, Petitioner fails to proffer any legal authority supporting his conclusion that Mr. Ferris's use of these phrases transforms his 803(4) testimony into impermissible testimony. Thus, in accordance with the long-standing position that "issues which are . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal," *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996), this Court should decline to consider the issue.

Should the Court nonetheless consider it, Petitioner fails to show any prejudice from the lack of the specific objections set forth above. Assuming trial counsel had made those objections at trial, for habeas relief Petitioner would need to demonstrate either that the trial court would have excluded the testimony at issue or that this Court would have reversed the trial court's decision to allow the Mr. Ferris to testify about his treatment of the victim's four-year-old brother

¹² It appears appellate counsel did not challenge the trial court's ruling on the grounds articulated in the objection. See *Meadows*, 231 W.Va. 10, 743 S.E.2d 318.

pursuant to the Rule 803(4) hearsay exception for statements made for medical diagnosis or treatment. He has not and cannot show either.

It has long been recognized that a play therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. *State v Pettrey*, 209 W.Va. 449, 460, 549 S.E.2d 323, 333 (2001). Here, the trial court expressly concluded the child's statements *were* made for medical diagnosis or treatment:

[u]nder *Mechling*, this would not appear to be testimonial statement. It's a statement made for medical purposes of treatment. There doesn't appear to be anything about the testimony from Mr. Ferris to the effect that the circumstances were such that it would lead an objective witness to reasonably believe that the statement was made to be available for use at trial. It was made for therapy.

(App 292) Clearly, then, the trial court found the child's statements to Mr. Ferris to be within the purview of Rule 803(4), and Petitioner cannot demonstrate that the trial court's ruling would have changed had counsel raised the three objections identified above.

Taking this analysis one step further, this Court would then have reviewed on direct appeal whether the trial court erred in allowing the play therapist to opine and explain his therapy sessions with the child pursuant to the Rule 803(4) hearsay exception. Petitioner has not offered any fact, law, or argument showing that the admission of this evidence per 803(4) would have been reversed on appeal. Under the governing standard of review, the admissibility of evidence is largely within the trial court's sound discretion, and the trial court's ruling will not be disturbed on appeal unless there has been an abuse of discretion. Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983) citing *State v. Louk*, 171 W.Va. 639, 301

S.E.2d 596 (1983). Additionally, Rule 702(a) of the Rules of Evidence permits an expert witness to testify in the form of an opinion or otherwise, and Mr. Ferris was qualified as an expert in the field of psychology. (App 270) Relying on these legal tenets, Petitioner simply cannot and has not demonstrated that this Court would have reversed the trial court's ruling allowing Mr. Ferris's opinion testimony. Thus, Petitioner fails to show prejudice from trial counsel's choice of objections.

Next, Petitioner again makes a conclusory statement, claiming the Circuit Court erred in finding "Ferris's contested statements were given to provide a context as to the entirety of the therapy session and to frame his interactions" with the child. (App 866) However, Petitioner offers no fact, law, or argument to support the conclusion. Even if he did, it would be to no avail. Viewing Mr. Ferris's testimony as a whole (as opposed to the snippets conveniently removed from context for appeal purposes) demonstrates that although Mr. Ferris stated opinions and beliefs through phrases like "in my interpretation," "I think/don't think," and "I'm not sure," they were made in the context of how he treated, assessed, and diagnosed the child during the play therapy sessions. (App 413-435) Thus, the Circuit Court neither erred nor abused its discretion in its decision in this regard. (See App 856, 866)

C. Petitioner fails to demonstrate reversible error in regard to the Circuit Court's denial of relief based on cumulative error.

Petitioner's last assignment of error asserts the Circuit Court erred in failing to grant relief based upon cumulative error. (Pet'r's Brief 23). The problem with this claim is twofold. First and foremost, Petitioner's contention is "skeletal," consisting of a single statement of law and no legal analysis whatsoever, thereby implicating this Court's "truffle doctrine." *Sergeant v. City of Charleston*, 209 W.Va. 437, 549 S.E.2d 311 (2001) ("judges are not like pigs, hunting for truffles in

briefs.”) Cursory treatment of issues is insufficient to preserve the issue on appeal. *Id.*; *Johnson v. Garlow*, 197 W.Va. 674, 478 S.E.2d 347 (1996). Therefore, the claim has not been preserved for appellate review.

Second, even assuming this claim received thorough legal analysis, Petitioner has failed to demonstrate the Circuit Court abused its discretion in concluding that the cumulative error doctrine does not apply. *E.g.*, *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996). “Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.” *Id.* Because the Circuit Court concluded Petitioner failed to demonstrate any error, it likewise was correct conclusion that the cumulative error doctrine did not apply. Accordingly, Petitioner’s second assignment of error is meritless.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court of Monroe County’s April 30, 2018, Order Denying and Dismissing Petition for Writ of Habeas Corpus.

Respectfully submitted,

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