

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

FILED

March 16, 2021

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**Keith M. Molineaux,
Petitioner Below, Petitioner**

vs) No. 18-0898 (McDowell County 04-C-221-M)

**Donnie Ames, Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent**

MEMORANDUM DECISION

Petitioner Keith M. Molineaux, by counsel Michael E. Froble, appeals the September 28, 2018, order of the Circuit Court of McDowell County denying his instant petition for a writ of habeas corpus. Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel Shannon Kiser, filed a response in support of the circuit court's order. Petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On April 9, 2001, John and Kimmie Stepp were murdered in their home in Skygusty, West Virginia. The following day, Thomas King entered the North Fork Police Department to confess to his involvement in these murders. Mr. King informed officers that he, Brandon Britto, James Jones, and petitioner drove to the Stepp household to purchase marijuana. Mr. King recounted that petitioner was dissatisfied with the quality of Mr. Stepp's marijuana, so Mr. Stepp offered to obtain better marijuana. Upon hearing this offer, petitioner asked Mr. Stepp if he had money for better marijuana. Mr. King stated that the situation escalated, and, ultimately, petitioner placed a gun to Mr. Stepp's head, demanded Mr. Stepp give him money, and, when Mr. Stepp denied having money, ordered Mr. and Mrs. Stepp to the rear of their home.

Petitioner directed Mr. Britto to come with him to the rear of the home, and he instructed Mr. King and Mr. Jones to search the home. Mr. King stated that once petitioner, Mr. Britto, and the Stepps were in the rear of the home, Mr. King, who was toward the front of the home, heard a gunshot. Hearing the gunshot prompted Mr. King to flee from the Stepp residence. As Mr. King ran to the car, he heard a second gunshot. Mr. King entered the car in which the four men arrived, and, shortly thereafter, the three other men joined him. The four men then left the scene. According to Mr. King, while in the car, petitioner admitted to shooting and killing both Stepps.

Petitioner was subsequently indicted for the first-degree murder of John Stepp, the first-degree murder of Kimmie Stepp, first-degree robbery, burglary, conspiracy to commit robbery, conspiracy to commit murder, and conspiracy to commit burglary. Petitioner's trial on these charges began on April 22, 2002. On April 25, 2002, the jury found petitioner guilty of each first-degree murder charge, robbery, conspiracy to commit robbery, burglary, and conspiracy to commit burglary. Petitioner was acquitted of conspiracy to commit murder.

On May 16, 2002, petitioner was sentenced in the Circuit Court of McDowell County to life without mercy for each of his first-degree murder convictions. The life sentences were to run consecutively. The circuit court noted that these convictions were obtained under the felony murder rule; accordingly, pursuant to *State v. Williams*, 172 W. Va. 295, 305 S.E.2d 251 (1983), petitioner was not sentenced for the underlying robbery or burglary convictions. Petitioner appealed his conviction to the West Virginia Supreme Court of Appeals, but that appeal was refused by order entered on January 27, 2004. Petitioner thereafter appealed to the Supreme Court of the United States, but the writ of certiorari was denied on June 14, 2004.

Petitioner initially filed a petition for habeas corpus relief in the circuit court in 2004. The circuit court denied the petition without the appointment of counsel or an evidentiary hearing. On December 28, 2005, petitioner appealed the denial of his habeas petition to this Court. Pursuant to this Court's prior order in Case No. 33157, petitioner's petition for a writ of habeas corpus was granted returnable below for appointment of counsel and the holding of an evidentiary hearing.

Petitioner thereafter filed multiple original jurisdiction petitions for mandamus and habeas relief with this Court, all of which were denied. Eventually, petitioner filed the instant petition for a writ of habeas corpus in the circuit court in which he asserted twenty-seven grounds for relief.¹ The circuit court set the matter for an omnibus hearing split over three days:

¹Petitioner's twenty-seven grounds for habeas relief are: (1) ineffective assistance of counsel based upon counsel's failure to call witnesses during the suppression hearing; (2) ineffective assistance of counsel based upon counsel's failure to provide a time notice to co-defendants to organize a "show up" in front of the jury; (3) ineffective assistance of counsel based upon counsel's failure to investigate and/or interview additional defense witnesses; (4) ineffective assistance of counsel based upon counsel's failure to call the victims' minor daughter as a witness during trial; (5) ineffective assistance of counsel based upon counsel's failure to

(continued . . .)

March 26, 2018; April 3, 2018; and June 18, 2018. Over the three days set aside for the omnibus evidentiary hearing, petitioner called numerous witnesses in an attempt to prove his case.

Petitioner now appeals the circuit court's September 28, 2018, order denying the instant habeas petition. This Court reviews a circuit court order denying a habeas petition under the following standards:

“In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and

object to leading questions asked by the prosecutor during co-defendant King's direct examination during the State's case-in-chief; (6) ineffective assistance of counsel based upon counsel's failure to move for a change of venue; (7) ineffective assistance of counsel based upon counsel's failure to object to statements obtained in violation of Petitioner's Fifth Amendment rights; (8) ineffective assistance of counsel based upon counsel's failure to object to the trial court's robbery instruction to the jury; (9) ineffective assistance of counsel based upon counsel's failure to object to the trial court's failure to instruct the jury that the arguments of counsel are not to be considered evidence; (10) ineffective assistance of counsel based upon appellate counsel's failure to challenge the trial court's failure to instruct the jury that the arguments of counsel are not to be considered evidence; (11) ineffective assistance of counsel based upon appellate counsel's failure to challenge the trial court's failure to instruct the jury that the arguments of counsel are not to be considered evidence; (12) ineffective assistance of counsel based upon counsel's failure to seek a psychological evaluation of Petitioner to determine competency and criminal responsibility; (13) ineffective assistance of counsel based upon counsel's failure to question potential jurors regarding prejudice and bias; (14) ineffective assistance of counsel based upon counsel's failure to object to the hearsay testimony of Officer Jones; (15) ineffective assistance of counsel based upon counsel's failure to investigate forensic evidence; (16) ineffective assistance of counsel based upon counsel's failure to call Sergeant J. R. Pauley as a witness during the suppression hearing; (17) ineffective assistance of counsel based upon counsel's failure to rebut evidence of Petitioner's confession; (18) ineffective assistance of counsel based upon counsel's failure to develop mitigating evidence; (19) ineffective assistance of counsel based upon counsel's failure to object to hearsay; (20) plain error by virtue of the trial court's incorrect jury instruction on robbery; (21) prosecutorial misconduct based upon the prosecutor's failure to establish chain of custody information relating to the murder weapon, clothes, bandanas and other evidence collected during the investigation; (22) insufficiency of the indictment based upon the State's failure to include the item taken; (23) actual innocence; (24) a due process violation based upon differing case numbers being used during petitioner's criminal proceedings; (25) a violation of the prompt presentment rule; (26) a violation of petitioner's Fifth Amendment right against self-incrimination; and (27) a violation of the Confrontation Clause predicated upon the witnesses that trial counsel should have sought to include as witnesses at trial.

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).

“A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court’s satisfaction that the petitioner is entitled to no relief.’ Syllabus Point 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).” Syl. Pt. 2, *White v. Haines*, 215 W.Va. 698, 601 S.E.2d 18 (2004).

Syl. Pts. 1 & 3, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016). Petitioner contends that he was denied effective assistance of counsel because his counsel failed to call any witnesses in his defense, did not allow the petitioner to testify in his own defense, and failed to investigate forensic evidence. Petitioner argues that some of the most critical evidence in the trial came from the testimony of co-defendant Thomas King, who placed the sole responsibility of the murders of John and Kimmie Stepp on him. The petitioner asserts that Mr. King’s statement required effective counsel to persuade the jury that the allegations were false. Instead, petitioner was persuaded not to testify at trial, and he was not given the opportunity to deny his involvement in the shooting or a chance to explain the history between himself, the co-defendants, and the victims.

Petitioner also argues that his trial court counsel failed to call his father, Kiko Molineaux, and his girlfriend during his suppression hearing to testify that petitioner asked for an attorney on two separate occasions while being questioned by the investigating officers. Petitioner argues that his trial counsel failed to call these witnesses because his father wore his hair in dreadlocks. Thus, petitioner contends that the decision to forego calling his father resulted not from strategy, but racial stereotyping. Petitioner also contends that trial counsel erred in failing to offer his own testimony. Petitioner argues that these failures prejudiced him because he was not given the opportunity to deny or explain his involvement in the shooting and that any additional evidence to refute Mr. King’s account was critical for the jury to evaluate his credibility.² Petitioner further argues that the trial court did not have all of the evidence because his counsel chose not to

²The circuit court noted that petitioner’s first-degree murder convictions were predicated on the felony murder rule. Therefore, evidence concerning which co-defendant exited the Stepp home last, and then, inferentially, which pulled the trigger, is immaterial. The deaths occurred during the commission of an enumerated felony, irrespective of who pulled the trigger, is sufficient to sustain a felony murder first-degree murder conviction. *See* W. Va. Code § 61-2-1. (“Murder . . . in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance. . . is murder of the first degree.”).

question the one person who could testify that petitioner did not actually kill the Stepps, the couple's six-year-old daughter who witnessed the murders.

Petitioner asserts that his trial counsel was ineffective when he failed to investigate and require the forensic testing of the petitioner's clothing that was recovered by the investigating officers. Petitioner contends that because the shooting was done at close range, there would have been blood on his clothing if he were the shooter. By not securing the evidence and demanding testing of the same, his trial counsel removed the opportunity to contradict the claim that petitioner was indeed the shooter. Petitioner believes that the jury would have heard testimony from the West Virginia State Crime Lab that the Petitioner had no blood or gunshot residue on his clothing worn on the night of the shooting.

In West Virginia, claims of ineffective assistance of counsel are governed by the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 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. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Id. at Syl. Pt. 6.

"When assessing whether counsel's performance was deficient, we 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" *Id.* at 15, 459 S.E.2d at 126 (citation omitted). Further, to demonstrate prejudice, "a defendant must prove there is a 'reasonable probability' that, absent the errors, the jury would have reached a different result." *Id.*

As a result, petitioner "bears a difficult burden because constitutionally accepted performance is not defined narrowly and encompasses a 'wide range'" *Id.* Indeed,

[t]he test of ineffectiveness has little or nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

Id. Consequently, "the cases in which a defendant may prevail on the ground of ineffective

assistance of counsel are few and far between one another.” *Id.*

Finally,

[i]n deciding ineffective assistance of counsel claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington* . . . and *State v. Miller*, . . . but may dispose of such a claim based solely on a petitioner’s failure to meet either prong of the test.

Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

The circuit court concluded that the evidence adduced at the omnibus hearing does not support petitioner’s asserted ground for relief for ineffective assistance of counsel. It was found that petitioner’s father did not testify that he heard his son ask for an attorney prior to or during petitioner’s questioning by the police, and no testimony from the girlfriend was adduced. The officers present during petitioner’s arrest and subsequent questioning testified that petitioner did not ask for an attorney.³ In fact, petitioner completed a form waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The circuit court found that petitioner’s trial counsel did not render deficient representation given that there is no evidence that petitioner’s father or girlfriend heard petitioner invoke his right to counsel prior to or at the time of police questioning. The circuit court also held that petitioner has failed to demonstrate that counsel’s failure to force a small child to testify regarding her parents’ brutal murders amounts to deficient representation rather than sound trial strategy.

Petitioner listed an ineffective assistance of counsel claim predicated on counsel’s failure to object to the robbery jury instruction given. He seeks review of the instruction under the plain error doctrine given counsel’s failure to object to the instruction. Petitioner acknowledges that the trial court’s robbery instruction was taken directly from West Virginia Code § 61-2-12, but he argues that the statute only states the means and manner by which a robbery is committed, differentiates between the two classes of robbery, and prescribes a penalty for each class. The specific elements of robbery are outlined in case law. The trial court’s instruction did not instruct the jury that robbery included the unlawful taking of goods or money from the person, and the intent to permanently deprive the owner of their property. Thus, petitioner asserts that the jury was not instructed on the essential elements of robbery or attempted robbery.

Under the plain error doctrine, a court may, “in the interest of justice, notice plain error in

³At the time of petitioner’s arrest, he was given his *Miranda* warnings. Following his arrest, he was transported to the Bluefield Police Department and again given his *Miranda* warnings. In fact, petitioner initialed and signed a waiver of rights form, which memorialized these warnings, his understanding of them, and his waiver. During his interview with Trooper Crowder, the petitioner made certain admissions. Petitioner now contends that Trooper Crowder did not specifically inform him of his rights under *Miranda*.

the giving or refusal to give any instruction, whether or not it has been made the subject of objection.” W. Va. R. Crim. P. 30; *see also* “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). But the plain error doctrine “is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.” Syl. Pt. 2, in part, *State v. Rogers*, 215 W. Va. 499, 600 S.E.2d 211 (2004). Also, plain error is not typically recognized in the giving of an erroneous instruction, “even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial court.” *State v. Hutchinson*, 176 W. Va. 172, 342 S.E. 2d 138 (1986).

The circuit court found that the truth-finding function of the trial court was not impaired as it relates to petitioner’s robbery conviction because it does not rise to the level of plain error. The circuit court noted that petitioner was also convicted of burglary, which is also a predicate for felony murder. Petitioner does not challenge the instruction given on burglary. Also, at petitioner’s sentencing, the trial court recounted that the jury convicted him of both robbery and burglary and stated that, because petitioner’s felony murder convictions could be predicated on either his burglary or robbery convictions, it did not sentence him for either burglary or robbery. The circuit court determined that even if this Court were to assume error with respect to the robbery instruction, it would still stand as a result of petitioner’s burglary conviction. The circuit court found that any such error is harmless error because Petitioner cannot show that he is imprisoned under a void sentence.⁴ *See* W. Va. Code § 53-4A-1.

Secondly, in support of his petition for writ of habeas corpus, petitioner contends that the State committed prosecutorial misconduct because it did not provide chain of custody information relating to the murder weapon, clothes, bandanas, and all other evidence collected during the investigation, despite being ordered to provide such evidence. The circuit court found that the petitioner fails to articulate how chain of custody information would be exculpatory or useable as impeachment evidence. Petitioner also fails to substantiate that any evidence was suppressed by the State. The circuit court found that petitioner fails to explain how any alleged failures prejudiced him at trial, particularly given that petitioner admits to being at the scene of the murders.

In further support of his prosecutorial misconduct claim, petitioner asserts that the prosecutor presented false testimony regarding his confession to Trooper Crowder. On the final day of the omnibus hearing, petitioner called Trooper Crowder who testified that he was positive that petitioner confessed to the murders. He stated that petitioner knew and understood his rights at the time of his interview and that he never invoked his right to remain silent. Trooper Crowder

⁴ “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syl. Pt. 5, *State v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975).

also noted that petitioner never requested an attorney. Petitioner contends that the fact that other officers stated that petitioner did not confess renders Trooper Crowder's claims concerning a confession not credible. Petitioner also highlights the length of time that passed before Trooper Crowder's notes of the confession were ultimately provided by the State.

In order to obtain a new trial on a claim that a prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony; (2) the prosecutor knew or should have known the testimony was false; and (3) the false testimony had a material effect on the jury verdict."

Syl. Pt. 2, *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009). The circuit court found that petitioner has not satisfied his burden under *Franklin*. The fact that Petitioner did not confess to all investigating officers does little to discredit Trooper Crowder's testimony concerning a confession. Likewise, the length of time that passed before the notes were produced fails to establish that the testimony concerning the confession is false. The circuit court also found that petitioner presented no evidence showing that the prosecutor knew or should have known any such testimony was false. The circuit court found that petitioner's statement to Trooper Crowder was not obtained in violation of the Fifth Amendment. Moreover, counsel was not ineffective in this regard as the issue was addressed at a suppression hearing. Accordingly, the circuit court held that the petitioner has failed to establish that the prosecutor committed misconduct in eliciting testimony regarding his confession and that petitioner failed to satisfy either prong of *Strickland*.

As the circuit court's order includes detailed and well-reasoned findings and conclusions as to the specific assignments of error now raised by petitioner on appeal and because we find no clear error or abuse of discretion in the circuit court's order or the record before us, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignments of error raised on appeal and direct the Clerk to attach a copy of the circuit court's September 28, 2018, "Final Order" to this memorandum decision.

For the foregoing reasons, we affirm the circuit court's September 28, 2018, denial of petitioner's petition for a writ of habeas corpus.

Affirmed.

ISSUED: March 16, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA ex rel.
KEITH MARTIN MOLINEAUX,**

Petitioner,

v.

Case No. 04-221-M

**THOMAS MCBRIDE,
Warden, Mt. Olive Correctional Complex,**

Respondent.

**ORDER DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS
CORPUS AND PETITIONER'S MOTION FOR PREPARATION OF
TRANSCRIPTS**

This matter comes before the Court following petitioner's Petition for a Writ of Habeas Corpus.¹ The parties appeared for an omnibus evidentiary hearing on March 26, 2018, April 23, 2018, and June 18, 2018. The Court has fully considered petitioner's petition, all amended and supplemental filings, respondent's responses, and the evidence and testimony adduced during the omnibus hearing; accordingly, the Court finds and orders as follows:

FACTS

On April 9, 2001, John and Kimmie Stepp were murdered in their home in Skygusty, West Virginia. The following day, Thomas King entered the North Fork Police Department to confess to his involvement in these murders. Mr. King informed officers that he, Brandon Britto, James Jones, and petitioner drove to the Stepp household to

¹Petitioner has also filed amended and supplemental petitions in support of his request for habeas relief.

purchase marijuana. Mr. King recounted that petitioner was dissatisfied with the quality of Mr. Stepp's marijuana, so Mr. Stepp offered to obtain better marijuana. Upon hearing this offer, petitioner asked Mr. Stepp if he had money for better marijuana. Mr. King stated that the situation escalated, and, ultimately, petitioner placed a gun to Mr. Stepp's head, demanded Mr. Stepp give him money, and, when Mr. Stepp denied having money, ordered Mr. and Mrs. Stepp to the rear of their home.

Petitioner directed Mr. Britto to come with him to the rear of the home, and he instructed Mr. King and Mr. Jones to search the home. Mr. King stated that, once petitioner, Mr. Britto, and the Stepps were in the rear of the home, Mr. King, who was toward the front of the home, heard a gunshot. Hearing the gunshot prompted Mr. King to flee from the Stepp residence. As Mr. King ran to the car, he heard a second gunshot.

Mr. King entered the car in which the four men arrived, and, shortly thereafter, the three other men joined him. The four men then left the scene. According to Mr. King, while in the car, petitioner admitted to shooting and killing both Stepps.

Petitioner was subsequently indicted for the first-degree murder of John Stepp, the first-degree murder of Kimmie Stepp, first-degree robbery, burglary, conspiracy to commit robbery, conspiracy to commit murder, and conspiracy to commit burglary. Petitioner's trial on these charges began on April 22, 2002. On April 25, 2002, the jury found petitioner guilty of each first-degree murder charge, robbery, conspiracy to commit robbery, burglary, and conspiracy to commit burglary. Petitioner was acquitted of conspiracy to commit murder.

On May 16, 2002, petitioner was sentenced. The trial court sentenced petitioner to life without mercy for each first-degree murder conviction. The circuit court noted that

these convictions were obtained under the felony murder rule; accordingly, pursuant to *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983), petitioner was not sentenced for the underlying robbery or burglary convictions.² Further finding that there was only one agreement, the circuit court found that *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988), precluded sentencing petitioner for the two separate conspiracy convictions.³ Finally, the circuit court ordered that petitioner's two life sentences run consecutively.

Petitioner thereafter initiated the instant petition for a writ of habeas corpus, in which he asserts numerous grounds for relief.⁴ Each of petitioner's asserted grounds, as well as a more detailed recitation of relevant facts, is addressed in turn.

INEFFECTIVE ASSISTANCE OF COUNSEL

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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.

Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

²"Double jeopardy prohibits an accused charged with felony-murder, as defined by W.Va. Code § 61-2-1 . . . from being separately tried or punished for both murder and the underlying enumerated felony." *Williams*, 172 W.Va. at 299, 305 S.E.2d at 255, Syl. Pt. 8.

³"The double jeopardy clause of the Fifth Amendment prohibits the prosecution of a single conspiracy as two or more conspiracies under a general conspiracy statute merely because two separate substantive crimes have been committed." *Johnson*, 179 W.Va. at 622, 371 S.E.2d at 343, Syl. Pt. 7.

⁴Petitioner filed a direct appeal with the Supreme Court of Appeals of West Virginia prior to initiating his habeas proceeding. His appeal was refused, however.

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Id. at Syl. Pt. 6.

"When assessing whether counsel's performance was deficient, we 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" *Id.* at 15, 459 S.E.2d at 126 (citation omitted). Further, to demonstrate prejudice, "a defendant must prove there is a 'reasonable probability' that, absent the errors, the jury would have reached a different result." *Id.* (citation omitted).

As a result, petitioner "bears a difficult burden because constitutionally accepted performance is not defined narrowly and encompasses a 'wide range.'" *Id.* Indeed,

[t]he test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

Id. Consequently, "the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another." *Id.*

Finally,

[i]n deciding ineffective assistance of counsel claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington* . . . and *State v. Miller*, . . . but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test.

Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

It is against this backdrop that this Court examines each of petitioner's claims of ineffective assistance of counsel.

Failure to Call Witnesses During Suppression Hearing

Petitioner argues that his trial counsel failed to call petitioner's father, Kiko Molineaux, and girlfriend during his suppression hearing to testify that petitioner asked for an attorney on two separate occasions while being questioned by the investigating officers. Petitioner argues that trial counsel failed to call these witnesses because petitioner's father wore his hair in dreadlocks. Thus, petitioner contends that trial counsel's decision to forgo calling his father resulted not from strategy, but was due to racial stereotyping and the belief that the court would not judge his father credibly on account of his dreadlocks.

Petitioner also contends that trial counsel erred in failing to offer his own testimony on the issue of the number of times he asked for an attorney and invoked his right to remain silent.

Petitioner argues that these failures prejudiced him because the trial court did not have all of the evidence concerning his requests for an attorney at the suppression hearing.

The evidence adduced at petitioner's omnibus evidentiary hearing does not support this asserted ground for relief. Petitioner's father did not testify that he heard his son ask for an attorney prior to or during petitioner's questioning by the police, and no testimony from the girlfriend was adduced. The officers present during petitioner's arrest and subsequent questioning, on the other hand, testified unequivocally that petitioner did not ask for an attorney. Indeed, prior to questioning by the investigating officers,

petitioner completed a form waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).⁵ Accordingly, we find that petitioner's trial counsel did not render deficient representation given that there is no evidence that petitioner's father or girlfriend heard petitioner invoke his right to counsel prior to or at the time of police questioning.⁶

⁵*Miranda* held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

⁶This Court also notes that petitioner's claim that his father overheard him request an attorney was first brought to his trial counsel's attention on the day of trial. At sentencing, trial counsel Stephen Paesani informed the Court:

On the day of trial, I was approached by my client's father, Kiko Molineaux, and was advised that he had been present and overheard comments made by [petitioner] at the time of his arrest, comments to the effect, statements that I need a lawyer. That – I also learned on the day of trial that those same statements were overheard by his – by his companion, Stacy Gaparity (phonetically). And, unfortunately, I only became aware of those statements on the day of trial.

The trial court stated,

Okay. Well, we had a suppression hearing and your client could have testified at the suppression hearing and he chose not to testify. . . He would have known – I'm talking about [petitioner], the defendant – whether he asked for an attorney at that time or not, and he could have testified at that time, but he chose not to, for whatever reason, and that was his right to do so.

....

Secondly, his father was present at the suppression hearing. . . Mr. Molineaux, Sr. [Kiko], could have told you about that information during the suppression hearing and he chose not to.

These and other factors led the trial court to conclude that its ruling at the suppression hearing would not have changed. Thus, this evidence compels the conclusion that trial counsel's representation was not ineffective for failing to call these witnesses at

(continued . . .)

Failure to Provide Timely Notice to Codefendants' Counsel of "Show Up"

Petitioner argues that his trial counsel failed to give timely notice to his codefendants' counsel that he wanted them to "show up" in front of the jury to demonstrate that petitioner was tallest among them. Petitioner argues that his codefendants' appearance and height was relevant because one witness described the last figure seen running from the crime scene as short and thin and wearing a gray hooded sweatshirt. Petitioner asserts that he is the tallest of the codefendants, however. Thus, had counsel provided timely notice, the jury would have been shown that the short, thin man identified by witnesses as the last one running to the car was likely codefendant Mr. Britto.⁷

This claim fails due to petitioner's failure to demonstrate that the outcome of his trial would have been different. Importantly, the jury heard evidence regarding the relative height of the four codefendants. Mr. King testified that petitioner was the tallest

the suppression hearing because the trial court's ruling would have remained the same and because trial counsel was unaware of these alleged claims. *See Legursky*, 195 W.Va. at 327, 465 S.E.2d at 429 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.") (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

⁷Petitioner also argues that the failure to present the "show up" violated his Sixth Amendment right to confront his accusers.

"In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him." Syl. Pt. 1, in part, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *overruled on other grounds by State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). Simply put, the Confrontation Clause is not implicated as no testimonial statement was admitted against petitioner.

of the four men, while Mr. Britto was the shortest. Thus, we find no error in counsels' failure to attempt to introduce cumulative evidence. Petitioner's trial counsel acknowledged as much at trial when he withdrew his request for a show up indicating that, "we just changed our mind about the demonstration. We don't think it's necessary[.]"⁸

Failure to Investigate

Petitioner states that trial counsel failed to investigate the story petitioner told them concerning how the case developed the day before the murders. Specifically, counsel failed to interview petitioner's stepmother, Mr. King's grandmother, Mr. King's sisters, and Mr. King's Uncle Kelly. Petitioner contends that, had these individuals been interviewed, "[p]etitioner's story would've been corroborated of what really happened in the underlying case." Petitioner also states that Sean Coles and the Stepp family were not interviewed.

Petitioner, however, fails to demonstrate what such investigation would have yielded. Petitioner does not outline the evidence these individuals allegedly possess, and at his omnibus hearing, he admitted that he could not remember whether he asked trial counsel to interview Mr. Coles. Accordingly, petitioner has failed to demonstrate either

⁸This Court also notes that petitioner's first-degree murder convictions were predicated on the felony murder rule. Therefore, evidence concerning which codefendant exited the Stepp home last, and then, inferentially, which pulled the trigger, is immaterial. That deaths occurred during the commission of an enumerated felony, irrespective of who pulled the trigger, is sufficient to sustain a felony murder first-degree murder conviction. *See* W.Va. Code § 61-2-1 ("Murder . . . in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree.").

that counsel was deficient or that the outcome of his trial would have been different had these individuals been interviewed.

Failure to Call Witness

Petitioner argues that his trial counsel was ineffective in failing to call the murdered victims' six-year-old daughter to testify at trial. Petitioner claims that, in her statement to police, the young girl stated that the shooter had "twisties" in his hair. According to petitioner, this described Mr. Britto's hairstyle and was, therefore, exculpatory. Petitioner also states that, even if trial counsel did not want to call her as a witness, they could have requested a deposition from her.

Petitioner has failed to demonstrate that counsel's failure to force a small child to testify regarding her parents' brutal murders amounts to deficient representation rather than sound trial strategy. Petitioner was not prevented from arguing at trial that Mr. Britto was the shooter. Indeed, the trial record reflects that this assertion was made known to the jury. Accordingly, petitioner has failed to establish that the failure to call the young girl amounted to deficient representation or that the outcome of his trial would have been different had her testimony been elicited.⁹

Failure to Object to Leading Questions

Petitioner contends that trial counsel failed to object to the prosecutor's leading questions during Mr. King's direct examination. Petitioner, though, fails to identify a deprivation of any constitutional right in asserting this ground. It has long been held that

⁹Petitioner's assertion in this regard also ignores the fact that he was convicted of felony murder. As explained above, petitioner's first-degree murder convictions stand under the felony murder rule even if he did not pull the trigger.

“[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt. 4, *State ex rel. Farmer v. McBride*, 224 W.Va. 469, 686 S.E.2d 609 (2009) (citation omitted).

Failure to Move for Change of Venue

Petitioner argues that his trial counsel was ineffective for failing to move for a change of venue. Petitioner contends this was a “high profile case in a small community.”

At petitioner’s pretrial conference held on April 12, 2002, petitioner’s trial counsel explained to the trial court that

we have discussed the defense of this case and the issue of change of venue not once or twice, Judge, but three or four times. And, for example, on the change of venue, he would bring that up and we’d explain to him how we felt like we were fine here in McDowell County. . . And he would be agreeable with that. And we’ve discussed it again today. And he appeared to me to, again, be agreeable to that.

Petitioner, nonetheless, maintained that he wished to move for change of venue.

The trial court informed the parties,

As far as the change of venue is concerned, and I have thought about this myself, I have been in high profile cases, as you have yourself. . .

During the jury selection, if it becomes apparent that we cannot select a jury out of the panel that we have, which is about 50 jurors that we have, and I think Judge Stephens has probably an equal amount of jurors, then I probably would raise the issue as to whether or not I thought that we could not get a fair and impartial jury.

. . . .

So, as far as the change of venue is concerned, we will know during the voir dire whether or not there can be a jury selected.

. . . .

. . . So as far as the change in venue is concerned, I’m very, very sensitive to this defendant receiving a fair trial and that is an option that I have kept open.

The trial court, therefore, indicated that it would entertain a motion for change of venue if an impartial jury could not be empaneled. Once trial began, prospective jurors were questioned regarding their knowledge of the parties and the facts of this case. There was no difficulty empaneling an impartial jury.

The foregoing establishes that counsel was not deficient in representing petitioner as they discussed this issue with petitioner multiple times. The trial court also was cognizant of the issue and informed the parties that it would consider, and likely grant, a motion for change of venue if they were unable to empanel an impartial jury. Such motion was unnecessary, however. Accordingly, petitioner also fails to demonstrate that the result of his trial would have been different had counsel moved for a change of venue.

Failure to Object to Use of Statements Obtained in Violation of Fifth Amendment

At the time of petitioner's arrest, he was given his *Miranda* warnings. Following his arrest, he was transported to the Bluefield Police Department and again given his *Miranda* warnings. In fact, petitioner initialed and signed a waiver of rights form, which memorialized these warnings, his understanding of them, and his waiver.

During an interview with Trooper Michael Crowder of the West Virginia State Police, petitioner made certain admissions. Petitioner now contends that Trooper Crowder did not specifically inform him of his rights under *Miranda* and that he shoved his forearm on petitioner's throat.

Petitioner also argues that Officer William T. Jones, of the Bluefield Police Department, enlisted petitioner's father to assist with eliciting a confession. Petitioner contends that, when alone with his father, his father instructed him not to say anything without an attorney. Petitioner maintains that he followed his father's advice and that his

father heard petitioner request an attorney. Counsel, however, failed to call petitioner's father at the suppression hearing.

The trial court held a suppression hearing on March 6, 2002, and Trooper Crowder testified about his interview of petitioner. The State specifically asked Trooper Crowder, "Did you, or anyone in your presence, make any threats toward him, physical threats or other threats?" Trooper Crowder responded, "Absolutely not." Petitioner did not object to this testimony or contradict it in any way at that time.

Trooper Crowder also testified at the suppression hearing that petitioner never asked to stop the interview or for an attorney. Likewise, Trooper Crowder testified at petitioner's omnibus evidentiary hearing that petitioner never invoked his right to remain silent or to an attorney.

At the suppression hearing, Officer Jones testified that, after being interviewed by Trooper Crowder, petitioner requested to speak with him. In other words, petitioner initiated the interview with Officer Jones. During the interview with Officer Jones, which was recorded, petitioner never asked for any attorney. At a point during the interview, petitioner did indicate that he no longer wished to proceed, and the interview was stopped.

As detailed above, petitioner offered no credible evidence that he requested an attorney prior to or during police questioning. As a result, we find that his statement to Trooper Crowder was not obtained in violation of the Fifth Amendment. Moreover, counsel was not ineffective in this regard as the issue was addressed at a suppression hearing. At the pretrial hearing, the trial court even found that its ruling would not have

changed had evidence been admitted by petitioner's father that petitioner requested an attorney. Thus, petitioner has failed to satisfy either prong of *Strickland*.

Failure to Object to Robbery Jury Instruction

Petitioner asserts that trial counsel's failure to object to the robbery jury instruction amounts to ineffective assistance of counsel because it failed to contain all of the elements of the offense. During its deliberations, the jury requested an explanation of the robbery count. Petitioner, therefore, argues that this should have alerted counsel to the fact that jury had difficulty understanding the instruction given.

At trial, the jury was instructed that

[r]obbery of the first-degree is committed when any person who commits or attempts to commit robbery by committing violence to the person, including but not limited to, partial strangulation or suffocation, or by striking or beating. Or, two, uses the threat of deadly force by the presenting of a firearm or other deadly weapon.

This instruction is based on West Virginia Code § 61-2-12, which sets forth that

[a]ny person who commits or attempts to commit robbery by:

(1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree[.]

Petitioner submits that the jury should have been instructed on the common law definition of robbery, which is "(1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods." Syl. Pt. 1, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981). Petitioner's counsel did not request this definition or object to the one given at trial; rather, trial counsel agreed to the robbery instruction given.

“The general rule in West Virginia is that ‘[a]n instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it.’” *State v. Stacy*, 181 W.Va. 736, 384 S.E.2d 347 (1989) (citation omitted).

Even assuming error in counsels’ failure to request the common law definition of robbery, we find that petitioner has not demonstrated that the outcome of his trial would have been different had the jury been instructed on the common law definition of robbery because petitioner has failed to identify any element of this definition for which the State failed to present evidence.

At trial, Mr. King testified that petitioner picked him up and, along with the two other codefendants, drove to Mr. Stepp’s home to purchase marijuana. After the men entered the Stepp residence to negotiate the drug buy, petitioner complained about the quality of the marijuana presented. According to Mr. King, Mr. Stepp informed them that he knew where to get better marijuana, and petitioner asked Mr. Stepp whether he had the money to purchase better marijuana. Mr. King testified that the dialogue between petitioner and Mr. Stepp continued as Mr. King turned to look in the living room at Ms. Stepp watching TV. Mr. King said,

when I turned back into the kitchen, I [saw petitioner] with a gun up to John Stepp’s head. . . . He was telling him, asking him to give him the money. . . . he just had the gun to his head and was asking him where is the money. I know you got some money in the house, where’s the money.

Mr. King testified that petitioner told Mr. Stepp he would kill him if he did not give him the money.

When Mr. Stepp denied having money, petitioner directed Mr. Britto to assist him with moving the Stepps to the rear of the home and instructed Mr. King and Mr. Jones to search the home for money. Mr. King further testified that, after hearing the gunshots and

entering the car in which they came, his codefendants joined him in the car and they drove away.¹⁰ The four men proceeded to Mr. Britto's home.

Mr. King testified that, after arriving at Mr. Britto's home, Mr. Britto and petitioner proceeded to one room separately while he and Mr. Jones remained in a different room. Mr. Britto and petitioner were in the room for approximately five minutes, and then petitioner came out and left Mr. Britto's home with Mr. King and Mr. Jones.¹¹

Officer Jones investigated the Stepp murders after Mr. King confessed to his involvement. During the course of his investigation, he searched Mr. Britto's apartment with other officers. One of the officers recovered \$4,550 in Mr. Britto's apartment, and another recovered a gun. Ammunition was also recovered from Mr. Britto's bedroom.¹²

Accordingly, there was sufficient evidence adduced to meet the elements of common law robbery, and petitioner cannot demonstrate that the result of his trial would have been different had the jury been instructed on this common law definition.

¹⁰Notably, Mr. King also testified that petitioner was the last individual to exit the Stepp home.

¹¹Mr. King testified that he asked petitioner what he did with the gun. Petitioner responded to Mr. King that it was not his gun; rather, it belonged to Mr. Britto.

¹²This Court notes that the attempt to commit robbery is also defined as first-degree robbery where violence is committed to the person or the threat of deadly force is used. W.Va. Code § 61-2-12. Accordingly, that money was ultimately recovered is not critical to the analysis.

Failure to Object to Trial Court's Failure to Instruct Jury That Counsels' Arguments Are Not to be Considered Evidence

Petitioner contends that it is "well settled . . . that the court's instructions are not to be considered evidence" and it is "long settled law that argument made by [c]ounsel is not to be considered evidence in this case." Petitioner asserts that counsels' failure to object to the trial court's failure to offer instructions on these points of law amounted to ineffective assistance of counsel and a violation of his due process and Sixth Amendment rights.

Petitioner fails to highlight any particular argument offered by counsel that would have altered the outcome of his trial. Moreover, petitioner fails to offer any law obligating a trial court to offer these instructions or demonstrating that such failure amounts to a deprivation of his constitutional rights. Accordingly, there is no merit to this contention.

Failure of Appellate Counsel to Highlight Erroneous Jury Instructions

Petitioner filed a direct appeal of his convictions, and he was appointed new counsel to prosecute this appeal. Petitioner argues that his appellate counsel failed to properly prepare his appeal by failing to challenge the jury instruction on robbery.

As set forth above, petitioner cannot demonstrate that the result of his trial would have been different had this instruction been given. Accordingly, petitioner is not entitled to relief on this ground.

Failure of Appellate Counsel to Raise as Error the Trial Court's Instructions

Petitioner asserts that the trial court instructed the jury that its instructions and counsels' arguments are considered as evidence. Petitioner contends that appellate

counsel should have known that this is a misstatement of the law and alleged such instruction as error.

This assertion is unsupported by the trial transcript: no such instruction was given. Accordingly, petitioner is not entitled to relief on this ground. Moreover, even if the jury had been so instructed, petitioner has failed to demonstrate that the result of his trial would have been different in light of the evidence properly adduced.

Failure to Seek Psychological Evaluation

Petitioner asserts that trial counsel was defective in failing to seek a psychological evaluation to determine competency to stand trial and criminal responsibility where there was evidence that he suffered from psychological disorders. Petitioner claims that he informed trial counsel that he suffered from severe mental disorders during grade school and had been seen by several school psychologists. Although petitioner contends that he was diagnosed with several psychological disorders, he fails to identify any other than to say “it is the belie[f] of the [p]etitioner that he was diagnosed in the past with ‘paranoid schizophrenia disorder.’”

In further support of this ground, petitioner argues that his failure to offer testimony on his own behalf at the suppression hearing and at trial could be explained by a mental disorder. Petitioner explains that, because testimony at the suppression hearing could not be used against him, he had nothing to lose in testifying. Finally, incriminating evidence was offered against petitioner at his trial. Petitioner says his only chance of defending against this evidence was to testify. Because petitioner refrained from testifying, he contends that a psychological evaluation could have determined whether a mental disorder prevented him from testifying.

Petitioner's self-serving statements notwithstanding, petitioner offers no evidence to substantiate any claim of a mental disorder that would have provided a viable defense at trial. Also, at petitioner's omnibus evidentiary hearing, trial counsel McGinnis E. Hatfield Jr. testified that he does not recall petitioner discussing competency issues or requesting a psychological exam.

An attorney's trial decisions

may be based on information given to him or her by the petitioner: 'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Legursky, 195 W.Va. at 326-27, 465 S.E.2d at 428-29 (citation omitted). Thus, petitioner's after-the-fact assertions that he suffered from a mental disorder years prior to the commission of the crimes of which he was convicted, and that such mental disorder "could" explain certain decisions he made, lack credibility and fail to demonstrate entitlement to habeas corpus relief.

Failure to Question Potential Jurors Regarding Bias and Prejudice

One of petitioner's trial attorneys, Mr. Hatfield, was a municipal judge for the City of Bluefield, West Virginia. Petitioner asserts that Mr. Hatfield failed to ask on the juror questionnaire whether any potential juror had appeared before him. Petitioner contends that this failure amounts to deficient representation because, if a juror or one of the juror's close friends or family members had received an adverse decision from Mr. Hatfield, it could have affected the deliberations in his case.

A review of the trial transcript in this matter reveals that prospective jurors were asked specifically whether any knew Mr. Hatfield:

With the defendant, Mr. Molineaux, are his attorneys, McGinnis E. Hatfield, Jr., better known as Mackie Hatfield, and Steven Paesani, they're both representing Mr. Molineaux in this case. Have any of you or members of your family ever been represented by either Mr. Hatfield or Mr. Paesani?

(No Response)

Are any of you acquainted with either of those gentlemen personally, on a personal basis?

(No Response)

Accordingly, we find no merit to this assertion.

Failure to Object to Hearsay

Following the murders, officers searched Brandon Britto's apartment. They found a 9 mm handgun, which proved to be the murder weapon. At trial, Officer Jones testified as follows:

Q: What happened when those men indicated that you could look into the apartment?

A: Britto . . . made the implication about Mr. Molineaux – after Sergeant Pauley had found the gun, that Mr. Molineaux had brought the gun back up to the apartment building.

Petitioner argues that this testimony was inadmissible hearsay and violative of his rights under the Confrontation Clause. Counsel, however, failed to object or request a limiting instruction.

Additionally, counsel purportedly rendered ineffective assistance in failing to object to Trooper Crowder's testimony and to the admission of his codefendants' statements, the latter admissions violating the Confrontation Clause.¹³

Assuming, without deciding, that counsel erred in failing to object to this testimony, we nonetheless find that petitioner's ineffective assistance of counsel claim concerning the failure to object is meritless. Petitioner cannot demonstrate that the result of his trial would have been different had objections to this testimony been lodged given Mr. King's testimony, recounted above.

Failure to Investigate Forensic Evidence

Petitioner states that "[i]t is believed that the State has withheld physical evidence" from him. Specifically, petitioner asserts that chain of custody information for "all items of evidence" has been improperly and prejudicially denied to him.

Petitioner's "beliefs" about the State's actions are insufficient to entitle him to habeas relief. Rather, petitioner bears the burden of proving this allegation by a preponderance of the evidence. Syl. Pt. 1, *State ex rel. Scott v. Boles*, 150 W.Va. 453, 147 S.E.2d 486 (1966). Accordingly, petitioner has failed to demonstrate that he is entitled to relief on this ground.

Failure to Call Certain Witnesses

Petitioner contends that trial counsel erred in failing to call Sergeant J. R. Pauley to testify during his suppression hearing. Petitioner asserts that other officers offered

¹³ Petitioner's reference to the admission of his codefendants' statements is supported only by citation to Officer Jones's testimony quoted above. Nonetheless, petitioner's challenges under the Confrontation Clause are addressed *infra*.

testimony during the suppression hearing that was inconsistent with and contradictory to Sergeant Pauley's testimony before the grand jury. Specifically, petitioner asserts that Sergeant Pauley testified before the grand jury that petitioner denied any knowledge of the murders, but Trooper Crowder testified at the suppression hearing to having obtained a confession from petitioner.

Petitioner also claims that trial counsels' failure to call Lieutenant Helton to testify during trial amounted to ineffective assistance. Lieutenant Helton purportedly testified at an earlier proceeding that petitioner denied involvement with the subject murders.¹⁴

Again, given Mr. King's testimony at trial, petitioner has failed to establish that the result of his trial would have been different had these individuals been called either at the suppression hearing or at trial.

Failure to Rebut Evidence of Confession

Petitioner claims that counsel failed to introduce evidence that he did not confess to the murders to Trooper Crowder. Petitioner asserts that it is his "belief that each one of the [the police officers involved in the investigation of the murders and in interviewing him] knew that the five[-]page 'confession' [obtained by Trooper Crowder] was not true."

Petitioner also points to the fact that at a November 26, 2001, hearing, the State was unaware of a statement petitioner had provided as the State did not have the police

¹⁴Petitioner also states that Lieutenant Helton "would've testified that on April 11, 2001 he was present during the entire time [p]etitioner was interviewed by Trooper Crowder and that the [p]etitioner never made any incriminating statements." Lieutenant Helton testified at petitioner's omnibus hearing and made no such assertion.

report. Petitioner asserts that this is because he never gave an incriminating statement on April 11, 2001, the day he was interviewed by the police.

Petitioner also maintains that trial counsel was ineffective for failing to object to holding a suppression hearing without Sergeant Pauley, the lead investigating officer. Petitioner claims that his statement to Trooper Crowder would have been suppressed had counsel objected "because it would've been clear th[at] Trooper Crowder was not telling the truth relating to his notes and the 'confession.'"

Petitioner maintains that trial counsel was ineffective in failing to highlight these inconsistencies with the State's witnesses. Petitioner further claims that the failure to object to Trooper Crowder's testimony and secure Sergeant Pauley amounted to allowing perjured testimony.

Sergeant Pauley testified before the Grand Jury that petitioner "gave part of a statement, he would start talking and then quit and start again. So we do have a partial statement from him, but he, basically denied any knowledge of it . . . this incident." Because the statement purportedly given to Trooper Crowder would have been obtained prior to Sergeant Pauley's grand jury testimony, petitioner claims that this suggests that Trooper Crowder lied about obtaining a statement from petitioner.

As with petitioner's prior claim, he has failed to establish that the outcome of his trial would have been different given Mr. King's testimony. Further, petitioner's assertion that Trooper Crowder lied about obtaining this statement lacks credibility. Petitioner examined Trooper Crowder at the suppression hearing and never once challenged Trooper Crowder's assertion that he obtained this statement. Additionally, Trooper Crowder's testimony at the suppression hearing was detailed as to his involvement in

petitioner's arrest and the subsequent taking of petitioner's statement. Petitioner has failed to provide any evidence to substantiate his attack on Trooper Crowder's credibility.

Failure to Develop Mitigating Evidence

Petitioner argues that his trial counsel provided "no defense at all" and that counsel's closing statement was meandering and "tantamount to arguing nothing." Petitioner, however, fails to identify the existence of any mitigating evidence, thereby failing to sustain his burden of proving this allegation.

Failure to Object to Hearsay

At trial, Trooper Crowder testified regarding his elicitation of an oral statement from petitioner. Trooper Crowder took notes of petitioner's statement, which were introduced as evidence at trial. Trooper Crowder explained the organization of his notes to the jury and stated, "[petitioner] asked about the child, to see the picture. He was talking about the child at the scene. When he found [out] about the child there and that the child had been struck by a bullet." Petitioner argues that his trial counsel failed to object to this hearsay. Petitioner also states that he was not provided with any medical evidence documenting the child's injury or describing petitioner.

Petitioner, again, fails to demonstrate that the result of his trial would have been different even had objections been raised in these instances. Petitioner was not charged with any crime relative to the child, and this testimony explained the organization of and offered context to Trooper Crowder's notes. Accordingly, this claim fails.

TRIAL COURT ERROR – JURY INSTRUCTION ON ROBBERY

In addition to petitioner's ineffective assistance of counsel claim predicated on counsels' failure to object to the robbery jury instruction given, petitioner also seeks

review of the instruction under the plain error doctrine given counsels' failure to object to the instruction.

Petitioner acknowledges that the trial court's robbery instruction was taken directly from West Virginia Code § 61-2-12, but he argues that the statute only states the means and manner by which a robbery is committed, differentiates between the two classes of robbery, and prescribes a penalty for each class. The specific elements of robbery are outlined in case law. The trial court's instruction did not instruct the jury that robbery included the unlawful taking of goods or money from the person, and the intent to permanently deprive the owner of their property. Thus, petitioner asserts that the jury was not instructed on the essential elements of robbery or attempted robbery.

Under the plain error doctrine, a court may, "in the interest of justice, notice plain error in the giving or refusal to give any instruction, whether or not it has been made the subject of objection." W.Va. R. Crim. P. 30; *see also id.* at R. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

But the plain error doctrine "is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syl. Pt. 2, in part, *State v. Rogers*, 215 W.Va. 499, 600 S.E.2d 211 (2004). Also, plain error is not typically recognized in the giving of an erroneous instruction, "even of constitutional

magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial.” *State v. Hutchinson*, 176 W.Va. 172, 342 S.E.2d 138 (1986).

As set forth above, the truth-finding function of the trial was not impaired as it relates to petitioner’s robbery conviction. Accordingly, assuming any error with the robbery instruction, it does not rise to the level of plain error.

This Court also highlights that petitioner was also convicted of burglary, which is also a predicate offense for felony murder. Petitioner does not challenge the instruction given on burglary. At petitioner’s sentencing, the trial court recounted that the jury convicted petitioner of both robbery and burglary and stated that, because petitioner’s felony murder convictions could be predicated on either his burglary or robbery convictions, it did not sentence him for either burglary or robbery. Therefore, even if this Court were to assume error with respect to the robbery instruction, petitioner’s felony murder convictions – the only convictions on which he was sentenced – still stand as a result of his burglary conviction. Accordingly, any such error is harmless error because petitioner cannot show that he is imprisoned under a void sentence.¹⁵ See W.Va. Code § 53-4A-1.

PROSECUTORIAL MISCONDUCT

Petitioner contends that the State has not provided chain of custody information relating to the murder weapon, clothes, bandanas, and all other evidence collected during

¹⁵“Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syl. Pt. 5, *State v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

the investigation, despite being ordered to provide such evidence. Petitioner argues that this amounts to a *Brady* violation.¹⁶

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 3, *Buffey v. Ballard*, 236 W.Va. 509, 782 S.E.2d 204 (2015) (citation omitted).

Petitioner fails to articulate how chain of custody information would be exculpatory or useable as impeachment evidence. He also fails to substantiate that any evidence was suppressed by the State. Critically, petitioner fails to explain how any alleged failures prejudiced him at trial, particularly given that petitioner admits to being at the scene of the murders.

In further support of his prosecutorial misconduct claim, petitioner asserts that the prosecutor presented false testimony regarding his confession to Trooper Crowder. Petitioner contends that the fact that other officers stated that petitioner did not confess renders Trooper Crowder's claims concerning a confession incredible. Petitioner also highlights the length of time that passed before Trooper Crowder's notes of the confession were ultimately provided to the State.

In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict.

¹⁶*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1982).

Syl. Pt. 2, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

Petitioner has not satisfied his burden under *Franklin*. That petitioner did not confess to all investigating officers does little to discredit Trooper Crowder's testimony concerning a confession. Likewise, the length of time that passed before the notes were produced fails to establish that the testimony concerning the confession was false. As noted above, petitioner did not dispute the authenticity of the confession at his suppression hearing. Petitioner's after-the-fact assertion that he did not confess fails to demonstrate that Trooper Crowder's testimony was false.

Petitioner also has presented no evidence showing that the prosecutor knew or should have known any such testimony was false. Accordingly, petitioner has failed to establish that the prosecutor committed misconduct in eliciting testimony regarding petitioner's confession.

SUFFICIENCY OF THE INDICTMENT

Petitioner contends that an integral element of a robbery charge is a description of the property taken. Petitioner's robbery and conspiracy to commit robbery charges in the indictment failed to include "what was stolen or permanently deprived."

Petitioner cites no authority to support his assertion that this information must be included within the indictment. To the contrary, "[a]n indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. Pt. 3, in part, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999) (citation omitted). An indictment is sufficient "if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or

conviction in order to prevent being placed twice in jeopardy.” *Id.* at Syl. Pt. 6. Further, “[a]n indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.” Syl. Pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Additionally,

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

Syl. Pt. 5, *State v. Johnson*, 219 W.Va. 697, 639 S.E.2d 789 (2006) (citation omitted).

Petitioner failed to challenge the indictment prior to trial; accordingly, his assertion regarding the indictment is insufficient to warrant habeas relief.

ACTUAL INNOCENCE

Petitioner contends that he is innocent and that the evidence withheld in violation of *Brady* will prove his actual innocence. Petitioner fails to outline any such withheld evidence or how it establishes his innocence. Importantly, petitioner was convicted of felony murder. He does not dispute being present at the scene of the crime; accordingly, his assertion that he did not pull the trigger, which was contradicted at trial in any event, affords him no relief.

DIFFERENT CASE NUMBERS

Petitioner asserts that different case numbers were used in his underlying criminal case, and he “has not been able to find any legitimate reason for the separate case numbers[.]” Petitioner fails to explain the import of this, let alone establish that the usage of different case numbers amounts to a violation of his constitutional rights. Accordingly, he is not entitled to relief on this ground.

VIOLATION OF PROMPT PRESENTMENT

Aside from incorporating arguments previously made, petitioner fails to substantiate this claim. Nonetheless, even if this Court were to accept petitioner’s claims as true and assume he wishes to assert this ground to support exclusion of his confession, it has been held that “[o]rdinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.” Syl. Pt. 14, *State v. Newcomb*, 223 W.Va. 843, 679 S.E.2d 675 (2009) (citations and internal quotations omitted).

VIOLATION OF RIGHT AGAINST SELF-INCRIMINATION

Petitioner contends his right against self-incrimination was violated when the officers failed to re-advise him of his *Miranda* rights. The argument previously presented is incorporated within this stand-alone claim.

There is no merit to this claim. At petitioner’s omnibus evidentiary hearing, testimony was adduced that petitioner was advised of his *Miranda* rights on several occasions, and he completed a *Miranda* rights waiver form.

CONFRONTATION CLAUSE VIOLATIONS

As addressed above, petitioner raised challenges to certain testimony under his ineffective assistance of counsel claim. Petitioner incorporates by references arguments previously made in asserting a standalone claim. To the extent not addressed above, this Court makes the following findings and conclusions

“The Confrontation Clause contained in the Sixth Amendment to the United States Constitution provides: ‘In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him.’ This clause was made applicable to the states through the Fourteenth Amendment to the United States Constitution.” Syl. Pt. 1, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *overruled on other grounds by State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

In support of petitioner’s Confrontation Clause claims, petitioner cites to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). West Virginia adopted the *Crawford* standard in *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). The Supreme Court of Appeals of West Virginia made clear however, that “*Crawford/Mechling* [is to] be given prospective application only inasmuch as it is a new principle of law, [and] retroactive application of which would retard its operations and produce inequitable results.” *State v. Kennedy*, 229 W.Va. 756, 776, 735 S.E.2d 905, 925 (2012). Accordingly, petitioner’s reliance on *Crawford*, which was decided after his trial took place, is misplaced, and his analysis under *Crawford* affords him no relief here.

As a result of the foregoing rulings, petitioner’s Amended and Supplemental Petition for a Writ of Habeas Corpus is hereby **DENIED** and **DISMISSED**.

PETITIONER'S MOTION FOR PREPARATION OF TRANSCRIPTS

Petitioner requests that this Court order production of transcripts from the omnibus evidentiary hearing prior to issuing its ruling on petitioner's habeas petition.

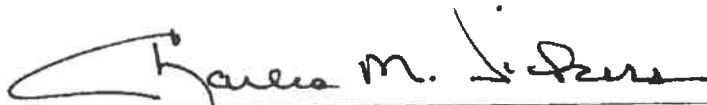
Although petitioner "feels" that such preparation will "aid the court in its determination" of his habeas, this Court finds that the issues have been adequately presented and that reliance on the transcripts is unnecessary for resolution of petitioner's claims. Accordingly, "Petitioner's Motion for Preparation of Transcripts for Court-Purposes Prior to Ruling on Petitioner's Requests for Habeas Corpus Relief" is hereby **DENIED.**¹⁷

The Court directs the Circuit Clerk to distribute attested copies of this Order to the following counsel of record:

Dennie S. Morgan Jr.
Morgan Law
P.O. Box 476
Welch, WV 24801

Emily K. Miller
Assistant Prosecuting Attorney
93 Wyoming Street, Suite 207
Welch, WV 24801

ENTER: Sept 28, 2018



CHARLES M. VICKERS, JUDGE

¹⁷Petitioner, by separate motion, also alerts this Court to a typographical error concerning the age of the Stepps' daughter. Petitioner's "motion" is hereby acknowledged.