IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

**CLAYTON E. ROGERS,**
***Petitioner,***

**v.**

**Case No. 14-P-243**
**Criminal Case No. 10-F-847**
**Judge Carrie Webster**

**DAVID BALLARD, WARDEN,**
**Mount Olive Correctional Complex,**
***Respondent.***

## FINAL ORDER DENYING PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Pending before this Court is the amended petition for writ of habeas corpus filed by Clayton Rogers, by and through his counsel, Matthew Victor, Esquire and the law firm of Helgoe and Victor. After careful review and consideration of the parties' respective pleadings and legal briefs, the record of Petitioner's trial and current habeas case, as well as pertinent legal authority, the Court is of the opinion that Petitioner's petition for writ of habeas corpus should be DENIED. In support thereof, the Court makes the following findings of fact and conclusions of law.

## PROCEDURAL HISTORY AND RELEVANT BACKGROUND

1. The Court takes judicial notice of all proceedings and the record in the underlying cases, to wit: 10-F-847 and 14-P-243.
2. The Circuit Court of Kanawha County, West Virginia, has proper jurisdiction in this matter pursuant to W.Va. Code § 53-4A-1-13 et seq.
3. On August 30, 2010, the Kanawha County Sheriff's Department arrested and charged Clayton E. "Gino" Rogers with the felony offense of first-degree murder of Laura S. Amos, whose body was found the day prior "lying on the floor in a puddle of blood in the living room" of an abandoned

house located in St. Albans, West Virginia. It was subsequently determined that she bled to death after sustaining multiple stab wounds to her neck.

4. A Kanawha County Grand Jury indicted the Petitioner on First Degree Murder of Laura Amos in the September 2010 Term of Court. The Petitioner was arraigned on the charge at a hearing on October 7, 2010, and his trial was set on December 13, 2010.

5. On November 10, 2019, the Court entered an Order granting petitioner's motion for a criminal competency and criminal responsibility examination, and granted a motion by petitioner's trial counsel to continue his trial to January 31, 2011.

6. Prior to trial, the Court heard and ruled upon various pretrial motions, including a motion to withdraw filed by petitioner's trial counsel. The motion was ultimately denied, but the Court did grant a brief trial continuance to February 22, 2011. A hearing on the other pretrial motions was held on February 18, 2011.

7. The jury trial in the underlying criminal case commenced on February 22, 2011. On February 25, 2011, a Kanawha County criminal jury found Rogers guilty of First Degree Murder of Laura Amos (hereinafter "Amos" and/or "Victim"), who was his girlfriend at that time. The jury also recommended a life sentence without mercy, and the circuit court subsequently entered an order sentencing him to life in prison without the possibility of parole.

8. Following entry of a court order sentencing him to life in prison without possibility of parole, the petitioner filed a Notice of Petition for Appeal with the Supreme Court on April 6, 2011. In that appeal the following issues were raised: error in the circuit court's denial of the petitioner's motion to suppress based on violation of prompt presentment; error in the court's denial of the motion to disqualify petitioner's trial counsel; and improper remarks by the prosecuting attorney in argument. On July 5, 2013, the West Virginia Supreme Court of Appeals unanimously affirmed the petitioner's conviction. *State v. Clayton Eugene Rogers,* 231 W. Va. 205, 744 S.E.2d 315 (2013.)

9. On April 5, 2014, the petitioner filed his initial habeas petition and motion for the appointment of counsel, which was granted. On March 23, 2015, the petitioner, by and through counsel, filed his

amended petition for habeas corpus. On February 23, 2016, the State of West Virginia, by and through Assistant Prosecuting Attorney of Kanawha County, Laura Young, filed its Answer and memorandum in law in opposition to the amended habeas petition.

10. Following submission of legal briefs from the petitioner and the respondent, an omnibus evidentiary hearing was held on April 25, 2018. The petitioner was present, in person, and by counsel. The petitioner informed the Court that he did not wish to testify, and instead wished to waive his right to the hearing and the presentation of any evidence thereof. The petitioner, in person and by and through his legal counsel, stated affirmatively that he did not want to testify, present witnesses, exhibits, or any further evidence. The petitioner was personally questioned and affirmed that petitioner's waiver of the hearing was knowingly, intelligent and voluntary, which the Court so found. (See Court Order entered May 1, 2018.)

**STANDARD OF REVIEW AND APPLICABLE LAW**

The Court will address first, the standards regarding habeas corpus, generally. The Court will then address the specific standard regarding ineffective assistance of counsel. The Court will then address the specific issues raised in the amended petition for writ of habeas corpus addressing both the facts and law, and will denote whether a specific assertion implicates a state constitutional right, a federal constitutional right, or both.

1. Jurisdiction and venue are appropriately in the Circuit Court of Kanawha County, pursuant to Rule 3 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia.

2. West Virginia Code §53-4A-1 provides for post-conviction habeas relief for "[a]ny person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State or both. . ."

3. The contentions and the grounds in fact or law must "have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding

or proceedings in a prior petition or petitions under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence." West Virginia Code §53-4A-1.

4. West Virginia's post-conviction habeas corpus statute "clearly contemplates that [a] person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding." Syl. Pt. 1, *Markley v. Coleman*, 215 W.Va. 729, 601 S.E. 2d 49 (2004) (citations omitted). Such proceeding gives the Petitioner an opportunity to "raise any collateral issues which have not previously been fully and fairly litigated." *Coleman* at 732, 601 S.E.2d at 52. The initial habeas corpus hearing is *res judicata* as to all matters raised and to all matters known or which, with reasonable diligence, could have been known. Syl. Pt. 2, *Coleman, supra.*

5. The habeas corpus statute "contemplates the exercise of discretion by the court." *Perdue v. Coiner,* 156 W. Va. 467, 194 S.E.2d 657 (1973).

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

7. "Habeas corpus proceedings are civil proceedings. The post-conviction habeas corpus procedure provided for by Chapter 85, Acts of the Legislature, Regular Session, 1967, is expressly stated therein to be 'civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case.'" *State ex rel. Harrison v. Coiner*, 154 W. Va. 467, 476, 176 S.E.2d677, 682 (1970). The burden is on the petitioner to prove his claims by a preponderance of the evidence.

8. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, State *ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). Moreover, "[t]he sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by due process of law." Syl. Pt. 1, *State ex rel. Tune v. Thompson,* 151 W. Va. 282, 151 S.E.2d 732 (1966).

9. A circuit court having jurisdiction over habeas corpus proceedings has broad discretion in dealing with habeas corpus allegations. *Markley, supra* at 733, 601 S.E.2d at 53. It may deny the petition without a hearing and without appointing counsel if the petition, exhibits, affidavits and other documentary evidence show to the circuit court's satisfaction that the Petitioner is not entitled to relief. Syl. Pt. 3, *Markley, supra.* A circuit court may also find that the habeas corpus allegation has been previously waived or adjudicated and if so, the court "shall by order entered of record refuse to grant a writ and such refusal shall constitute a final judgment." *Markley, supra,* at 733, 601 S.E. 2d at 53 (2004) (citations omitted). (citing W.Va. Code section 53-4A-3(a)).

10. When determining whether to grant or deny relief, a circuit court is statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner and to state the grounds upon which each matter was determined. Syl. Pt. 4, *Markley, supra. See also* W.Va. Code §53-4A-3(a).

11. The petitioner has knowingly, voluntarily, and understandingly raised certain issues as enumerated above, and knowingly, voluntarily, and understandingly waived all other issues.

12. Claims of ineffective assistance begin and in large measure end with the standards set forth in *Strickland/Miller.*

13. West Virginia evaluates an ineffective assistance of counsel claim under the two-prong standard set forth by the Supreme Court of the United States in *Strickland v. Washington.* Syl. Pt. 5, *State v. Miller,* 194 W. Va. 3, 459 S.E. 2d 114 (1995) (citing *Strickland v. Washington,* 466 U.S. 668 (1984)). To succeed on such a claim, a petitioner must establish that: 1) his 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. Virginia Penitentiary,* 207 W. Va. 11, 528 S.E. 2d 207 (1999).

14. The *Strickland* standard is not easily satisfied. *See Miller,* 194 W. Va. at 16 ("[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"), *see also*, *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005)("Petitioners claiming ineffective assistance of counsel under *Strickland* have a heavy burden of proof.").

15. In *Miller*, the court outlined the challenge faced by a petitioner claiming ineffective assistance, noting that judicial review of a defense counsel's performance "must be highly deferential" and explaining that there is a strong presumption that "counsel's performance was reasonable and adequate." *Miller*, 194 W.Va. at 16, 459 S.E.2d at 127. Moreover, the *Miller* court held that there is a "wide range" of performance which qualifies as constitutionally-adequate assistance of counsel, stating:

> A defendant seeking to rebut th[e] strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a 'wide range.' The 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

*Id.*, *see also Vernatter*, 207 W. Va. at 17, 528 S.E.2d at 213 ("[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .'") (quoting *Strickland*, 466 U.S. at 689).

16. 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." *See Miller*, 194 W. Va. at 17, 459 S.E.2d at 128, *State ex rel. Myers v. Painter*, 213 W. Va. 32, 35, 576 S.E.2d 277, 280 (2002)("The first prong of [the *Strickland*] test requires that a petitioner identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment)(internal quotation marks omitted).

17. 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.

18. Strategic choices and tactical decisions, with very limited exception, fall outside the scope of this inquiry and cannot be the basis of an ineffective assistance claim. *Legursky*, 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), *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.").

19. Identifying a mere mistake by defense counsel is not enough. *See Edwards v. United States*, 256 F.2d 707, 708 (D.C. Cir. 1958) ("Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not . . . amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice.'"). 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, the court continued, "perfection is not the standard for ineffective assistance of counsel." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

20. Even if defense counsel's conduct is deemed objectively unreasonable, and therefore satisfies the first *Strickland* prong, that conduct does not constitute ineffective assistance unless the petitioner can also establish that the deficient conduct had such a significant impact that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *Miller, supra*. 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 *Strickland's* "prejudice prong" requires a showing that counsel's deficient performance was serious and impactful enough to "'deprive the defendant of a fair trial, a trial whose result is reliable.'" *State ex rel. Strogen v. Trent*, 196 W. Va. 148 at n. 4, 469 S.E.2d 7, 12 (1996) (quoting *Strickland*, 466 U.S. at 687), *see also Myers*, 213 W. Va. at 36, 576 S.E.2d at 281 (2002) ("The second or "prejudice" requirement of the *Strickland / Miller* test looks to whether counsel's deficient performance adversely affected the outcome in a given case.").

21. There is no precise formula, applicable in all cases, that can be applied to determine if the constitutionally-inadequate conduct in question so significantly degraded the reliability of the trial such that the prejudice prong is satisfied. *See Legursky*, 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."). But there is no question that the burden of demonstrating prejudice lies with the petitioner. *Strickland*, 466 U.S. at 693, *Legursky*, 195 W. Va. at 319, 465 S.E.2d at 421.

## RELEVANT FACTS

1. An arrest warrant was issued on August 29, 2010, petitioner was arrested and gave a statement the next day. (*Id.* at 48-49.)

3. In a voluntary statement that was admitted as evidence by the trial court following a pretrial "voluntariness" hearing, and affirmed on appeal, the petitioner admitted that he stabbed Amos, and threw away the knives he used to kill her. (*Pretrial Hearing transcript, January 24, 2011 at 21.*)

4. The criminal trial commenced on February 22, 2011, with jury selection.

5. After general *voir dire* questions were posed to the panel, several jurors were questioned individually at the bench by the judge and attorneys for the State and the Defendant. The colloquy with these jurors were conducted in a discreet manner with "white noise" used to mute the conversation it could not be heard by jurors or anyone else in the courtroom.

6. One juror had worked with the petitioner's brother. (*Id.* at 65.)

7. Another juror knew someone whose mother was murdered, and felt compassion for that person. The same juror had been involved in an abusive relationship. (*Id.* at 71).

8. Another juror, Ms. McKinnon-Brown, disclosed that her husband had been killed. (*Id.* at 73.)

The person who killed him was caught and previously served five years in prison. She had been friends with her husband's killer and his family. She stated unequivocally that she would have an open mind, that her personal experience would not affect her judgment, and that she would listen to the evidence. She also stated that she didn't care that the criminal case involving her husband "didn't turn out the way" she wanted.

(*Id.* at 75-77). She additionally stated that she had no positive or negative feelings toward the prosecution. (*Id.* at 77.) Ms. McKinnon-Brown twice more stated that her personal experience would not affect her ability to weigh the evidence or influence the way she viewed the case. (*Id.* at 79.)

15. As to the selection of the jury, and why Ms. McKinnon Brown was not stricken from the venire, there is no evidence of record that she was anything but completely fair and impartial to both the petitioner and the state. As to why she was not stricken by use of a peremptory challenge, the Court will note that which jurors to strike peremptorily is a strategic decision and that other jurors would appear, from the transcript, to be far more problematic than Ms. McKinnon Brown.

16. Some of the jurors (at least 7) indicated that they were in favor of the death penalty, even though West Virginia has abolished that penalty. (*Id.* at 44-45.)

17. At least two jurors (besides Ms. McKinnon Brown) were connected to friends and relatives who had been murdered. (*Id.* at 58-59.)

18. One of the jurors had worked with the prosecutor's father. (*Id.* at 80.)

19. One of the jurors "thought" she could recommend mercy. (*Id.* at 86.)

20. From the onset, trial counsel acknowledged that the case was not a "who done it", that there was no dispute that the petitioner killed Laura Amos. The dispute would be whether the petitioner had the requisite state of mind to commit murder. (*Id.* at 130.)

21. Captain Scurlock observed that the victim was lying on the floor with a large pool of blood around her head and partly covered with a blanket. (*Id.* at 136.) She had no wounds on her arms. (*Id.* at 138.) It appeared as if the blanket had been placed over her after she was stabbed. (*Id.* at 143.) She had no blood on her tennis shoes, either the top or bottom.

22. Captain Scurlock, having been qualified as an expert in blood stain analysis opined that the victim was seated or lying down when she was bleeding. (*Id.* at 146; 158) He also opined that based upon the cast-off stains of blood in the room the person who stabbed Laura was behind her. (*Id.* at 149.)

23. Sean Snuffer was involved in trying to locate the petitioner. Laura died on Sunday, August 29; the petitioner was not located that day. (*Id.* at 167.) The petitioner was arrested on August 30. (*Id.* at 170.)

24. The petitioner's voluntary statements to the police were played for the jury. The petitioner had been sitting on the porch of an abandoned house drinking with Keith Hubbard and Larry Means. (Excerpt, Trial Transcript, February 23, 2011 at 8-9.) Laura was at the house, too. (*Id.* at 13.) Laura had been the petitioner's on and off girlfriend for about five years. (*Id.* at 17.)

25. The two got along fine until "drinking." (*Id.*) The petitioner's choice was beer, but he had been drinking vodka the day he killed Laura. (*Id.* at 18.)

26. The petitioner stated "It had to happen. Something happened to her. . . She got killed." (*Id.* at 21.)

27. The petitioner, Hubbard and Means waited until one o'clock on Sunday and bought beer. (*Id.* at 32.) Laura joined them and they sat on the porch. (*Id.* at 33.) After drinking the beer, the group started drinking vodka. (*Id.* at 34.) He and Laura had arguments in the past. (*Id.* at 35.) The arguments were mostly about drinking and her behavior with other men. (*Id.*) They had a "discussion" about another man having proposed to Laura. (*Id.* at 36.)

28. The petitioner remembered being in the house and Laura bleeding from the neck. (*Id.* at 37.) She was sitting on the floor while bleeding. He saw no one else in the house. (*Id.* at 38.) 29. The petitioner acknowledged he had to have killed her. (*Id.* at 39.) The petitioner had told another person ". . . I said I killed her. I had to do it. ... I said I had to cut her throat. Slashed her." (*Id.* at 40.)

30. Rogers had two knives on him that day. (*Id.*) He threw the knives away in the woods while he was running. (*Id.* at 41.) He "probably" used both knives in killing Laura. (*Id.* at 43.) He "thought" he cut both sides of her neck. (*Id.* at 52.) She was sitting down when he stabbed her. (*Id.* at 56.)

31. The petitioner knew he had done wrong, knew he'd killed her, and knew he had no reason to do it. (*Id.* at 60.) After he stabbed her, she sat on the floor, not moving, trying to hold the blood in, but there was too much blood, coming out from both sides of her neck. (*Id.* at 63.)

32. He didn't remember her screaming, and normally she did scream when he got aggressive with her. (*Id.* at 66.) The petitioner's knives were folding knives, so he had to unfold them to use them. (*Id.* at 67.) After he killed her, he folded the knives back up and put them in his pocket. (*Id.* at 68.)

33. Keith Hubbard was incarcerated at the time of trial. (Trial Transcript, February 23, 2011 at 19.)

34. On direct examination, the state elicited the information that Hubbard was serving a sentence for the felony offense of possession of a stolen vehicle. He had previous felony convictions including credit card fraud, possession of stolen vehicle and burglary. (*Id.* at 20.)

35. He saw Laura and the petitioner on August 28. The three were sitting on a log, drinking. Laura and the petitioner argued over the "proposal" from another man. Hubbard heard the petitioner say to Laura "I'll kill you." (*Id.* at 21-22.)

36. Hubbard saw the petitioner on August 29. Hubbard Means and the petitioner bought beer and sat on the porch of "that" house and drank. (*Id.* at 24-25.) About three o'clock in the afternoon, Greg Lacy, of whom petitioner was ostensibly jealous because of a "marriage proposal" walked by. There was a little argument between Lacy and the petitioner. The petitioner was punching the sidewalk. Hubbard told Lacy to leave before there was a fight. (*Id.* at 27-28.)

37. Hubbard did not state that Laura and the petitioner had an argument. After Lacy left, Laura and the petitioner walked around the corner of the house. Some minutes later, he heard Laura yell his name, three times. (*Id.* at 30-31.) Hubbard ran around the side of the house, but saw no one.

38. Sometime after that, a couple looking for a place to rent walked by. "Rusty" opened the door of the abandoned house; Hubbard could see Laura lying in a pool of blood. (*Id.* at 32.) They went across the street to have someone call the police. (*Id.* at 33.)

39. On cross examination, Hubbard admitted that he had problems with drugs and alcohol and that at times, he couldn't remember. (*Id.* at 34.) Hubbard admitted having a "buzz" when he was sitting on the log with Laura and the petitioner. (*Id.* at 37.)

40. Hubbard admitted that he cared for Laura like a sister and felt bad for not doing anything. (*Id.* at 41.) He admitted wanting to do anything to help, including telling the police he'd heard the petitioner whisper to Laura he'd kill her. (*Id.* at 42.)

41. Larry Means also described meeting up with the petitioner and drinking at the abandoned house. (*Id.* at 53.) Laura came later and started drinking with them. When Means walked away, he heard them arguing, but thought nothing of it because they "fuss and argue" all the time. (*Id.* at 61.) Means acknowledged drinking both beer and vodka that day. (*Id.* at 65.)

42. Greg Lacy passed the abandoned house on August 29 as he was walking home from work. (*Id.* at 72.) He joined the group on the porch. Shortly thereafter, the petitioner started banging his fist on the steps saying that he wanted the truth. The petitioner said nothing more to him. Lacy had never proposed marriage to Laura. (*Id.* at 73-74.)

43. Lisa Mobray saw the petitioner and Laura sitting on the porch, drinking and arguing a little bit. She saw the petitioner hit Laura, kiss her, and then the two of them went into the abandoned house. (*Id.* at 83.)

44. Dr. Mahmoud performed the autopsy on the victim. She was markedly intoxicated when she died. (*Id.* at 110.) She died from fatal bleeding from sharp force injuries to her neck. (*Id.* at 111.) She had no defensive wounds. (*Id.* at 112.) She was stabbed in both sides of her neck, and it appeared that at least one of the wounds had evidence that the knife had been twisted. (*Id.* at 116.) The neck contains huge arteries, and severing them can cause death within a few seconds. (*Id.* at 119.)

## PETITIONER'S ASSIGNMENT OF ERRORS

In support of his amended habeas petition, the Petitioner asserts the following grounds for relief: That the trial court committed error, to wit: (1) the trial court gave an improper jury instruction regarding malice; (2) the trial court gave an improper instruction as to voluntary manslaughter; (3) the venire overheard confidential bench conferences which were prejudicial; (4) that trial court erred in denying petitioner's motion to suppress, motion for new trial based on improper comments by the prosecutor; denial of counsel's motion to withdraw; (5) the petitioner received ineffective assistance of trial counsel with sub-grounds of

failing to object to the improper instructions; failing to address the issue of overheard bench conferences; failure to remove a crime victim from the jury; failure to properly cross-examine two witnesses, Keith Hubbard and Robert Wilcox; and withdrawing the request for a bifurcated trial on the guilt/innocence phase and mercy/no mercy phase; and (6) ineffective assistance of appellate counsel; and cumulative error.

The petitioner additionally asserts that this Court should overturn the decision issued by the West Virginia Supreme Court of Appeals upon appellate review of his criminal case, asserting that the Supreme Court "got it wrong" when it determined that the petitioner's voluntary statement should not be suppressed, that his attorney did not have a conflict of interest, and that the prosecuting attorney did not make inappropriate comments. Further, the petitioner contends that the evidence to convict the petitioner was insufficient.

### A. Alleged Trial Court/Jury Related Errors

#### 1. Jury Instruction on "Malice"

As the petitioner asserts error in the Court's instructions as to malice and voluntary manslaughter, the Court has reviewed, in detail, the instructions as given and the arguments of trial counsel regarding the instructions.

The State was requesting instructions as to first and second degree murder only. The Defense was requesting instructions as to voluntary intoxication, voluntary manslaughter and involuntary manslaughter. (Trial Transcript February 2, 2011 at 29.)

Defense counsel specifically requested an instruction on voluntary manslaughter because "there's, you know, evidence that this could have been in the heat of passion." (*Id.* at 31.) Defense counsel also noted that if one acts without malice and kills someone, the offense was voluntary manslaughter. (*Id.* at 33.) The State objected to the giving of a voluntary manslaughter instruction. (*Id.* at 36.)

Defense counsel proposed the voluntary manslaughter instruction, including the language including sudden heat of passion. (*Id.* at 52.) Defense counsel did not object to the definition of malice. (*Id.*)

Defense counsel did request an instruction which would direct the jury that it must find that malice existed toward the deceased. (*Id.* at 57.) However, the state pointed out that the definition of malice was "not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from any wicked or corrupt motive." (Id. at 58.)

As to the definition of malice, the Court instructed the jury that:

> Malice is defined as that condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from the acts committed or the words spoken. Malice is not confined to ill will to any one or more particular person but is intended to denote an action flowing from any wicked or corrupt motive, done with an evil purpose and wrongful intention where the act has been attended with circumstances showing such a reckless disregard for human life as to necessarily include a formed design against the life of another. Therefore, malice may be inferred from any willful, deliberate and cruel act against another. (*Id.* at 114.)

The petitioner relies on Syllabus Point 4 of *State v. Jenkins*, "An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous". *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (W.Va., 1994). The instruction disapproved in *Jenkins* was one that specifically instructed the jury that "to convict one of murder, it is not necessary that malice should exist in the heart of the defendant ... against the deceased."

The instruction defining malice actually given by the Court in the instant case was substantially similar to the instruction given in *State v. Mullins,* 193 W. Va. 351, 456 S.E.2d 42 (1995.). *Mullins* asked the West Virginia Supreme Court to reverse a murder conviction on the basis that the malice instruction ran afoul of *Jenkins.*

The instruction approved in *Mullins*:

> The word "malice," as used in these instructions, is used in a technical sense. It may either be express or implied, and it includes not only anger, hatred and revenge, but other unjustifiable motives. It may be inferred or implied from you from all of the evidence in this case, if you find such inference is reasonable from the facts and circumstances in this case which have been proven to your satisfaction beyond a reasonable doubt.
>
> It may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden. Malice is not confined to ill will toward any one or more particular persons, but malice is every evil design in general, and by that is meant that the fact has been attended by such circumstances as are

> ordinary symptoms of a wicked, depraved and malignant spirit and carry with them the plain indications of a heart, regardless of social duty and fatally bent upon mischief.

The *Mullins* decision continued with the following analysis: The *Jenkins* Court stated that this initial sentence was wrong, and then explained that "the rule that malice must be shown against the victim is consistent with our earlier cases, as illustrated by Syllabus Point 5 of State v. Panetta, 85 W.Va. 212, 101 S.E. 360 (1919)":

> Malice is an essential element of murder either in the first or second degree, and where an intentional homicide by the use of a deadly weapon is admitted, the jury may infer malice, willfulness and deliberation from the act; and by legal malice is meant not only such as may exist against the deceased, but it includes such disposition of the accused as shows a heart regardless of duty and fatally bent on mischief. *Jenkins*, 443 S.E.2d at 249.

The above language from *Panetta*, cited with approval in *Jenkins*, is similar to the language contained in the malice instruction given in this case, wherein the trial court explained that:

> Malice is not confined to ill will toward any one or more particular persons, but malice is every evil design in general, and by that is meant that the fact has been attended by such circumstances as are ordinary symptoms of a wicked, depraved and malignant spirit and carry with them the plain indications of a heart, regardless of social duty and fatally bent upon mischief.

The *Mullins* Court concludes by finding no error in the lower court's definition of malice.

This Court therefore FINDS that the jury instruction given in the trial below was substantially similar to, in fact, virtually identical with the instruction in *Mullins*. Therefore, the Court concludes that the instruction was a correct statement of the law.

The Court does note that a careful reading of the conference on instructions reveals that trial counsel did ask for an instruction on malice containing the language from *Jenkins* which petitioner cites in his brief. However, the Court gave a correct definition of malice, and trial counsel was not ineffective by requesting the *Jenkins* language, which the Court chose not to give.

The Court also finds that the issue of the definition of malice being incorrect was waived by not being presented on direct appeal. However, this Court finds that appellate counsel was not ineffective in failing to raise this issue. The Court's definition of malice was correct, and appellate counsel cannot have

been objectively deficient for failing to assert that as error on appeal. However, the result of the appeal would not have differed had the issue been raised. As the instruction was correct, the West Virginia Supreme Court would not have reversed petitioner's conviction.

2. Jury Instruction on "Voluntary Manslaughter"

The petitioner alleges that the trial court erred by improperly instructing the jury on "voluntary manslaughter" The Court notes that petitioner's trial counsel requested an instruction on voluntary manslaughter, which the State objected to. Trial counsel argued that the jury could infer that the petitioner acted under heat of passion when he murdered Ms. Amos.

The Court instructed the jury that:

> The essential elements of voluntary manslaughter are that Clayton Rogers, a/k/a Geno. . . did intentionally and unlawfully, without malice deliberation or premeditation but under sudden excitement and heat of passion killed Laura Amos. It is the element of malice which forms the critical distinction between murder and voluntary manslaughter. (Trial Transcript, 2/24/11 at 115,)

The petitioner cites no case law demonstrating that the instruction the Court gave the jury regarding voluntary manslaughter was erroneous. The jury was instructed more than once that the burden fell upon the state to prove the petitioner's guilt of each and every element of each and every offense beyond a reasonable doubt. The jury was clearly instructed that it was the element of malice which distinguished murder and manslaughter. Instructions are not to be dissected piecemeal.

"Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed

for an abuse of discretion." Syl. Pt. 15, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995) *State v. McGuire*, 200 W.Va. 823, 490 S.E.2d 912 (W.Va., 1997).

To convict the petitioner of voluntary manslaughter, the state would not have had to prove that he acted in the heat of passion, but rather that he acted intentionally, but without malice. That is the instruction that the jury received.

The jury was instructed again and again that the burden of proof rested on the State, and that the petitioner had to prove nothing. The jury was instructed, repeatedly, that the burden of proof was beyond a reasonable doubt. The jury found that the petitioner acted with malice, thereby rendering it impossible to convict the petitioner of only voluntary manslaughter no matter the provocation. By adding the words "heat of passion," the Court did not commit error.

When viewed as a whole, this Court finds that the instructions were a legally correct statement of the law. The jury was instructed as to the elements of each offense, and clearly instructed that in order to convict the petitioner of voluntary manslaughter; it had to find an absence of malice. Trial counsel was not ineffective for failing to object to the instruction (in fact, they requested it) and appellate counsel was not ineffective for failing to raise the instruction upon appeal.

Assuming, however, that it was objectively deficient performance for counsel to fail to object to the manslaughter instruction (which the petitioner requested), and objectively deficient performance for the appellate counsel to fail to raise the issue on appeal, petitioner fails to demonstrate that the instruction affected the results of the proceeding. That is, he fails to demonstrate that had the Court omitted the words "heat of passion" and "sudden excitement" the petitioner would have been acquitted of both first and second degree murder and convicted of voluntary manslaughter. Further, he fails to demonstrate that had appellate counsel raised the issue as plain error, the Supreme Court would have reversed his conviction.

A careful review of the record shows that the instruction used was one submitted by the petitioner, and that the only change made was the addition of an eighth element stating "upon gross provocation and in the heat of passion." Petitioner argues that the change created error; however, the introduction to the same jury instruction states "[t]his crime is consistently defined as a sudden, intentional killing upon gross

provocation and in the heat of passion." Thus, the circuit court did not change the jury instruction, but merely reiterated the statement already submitted in the instruction by the petitioner. No objection was made to this jury instruction, and thus this Court must review this assignment of error under the plain error doctrine. This Court finds no plain error in this instruction. State v. *Mayle* (W.Va., 2012, Memorandum decision Case No. 11-0562).

3. Prejudicial Error Due to Venire Overhearing Confidential Bench Questioning of Individual Jurors

Petitioner asserts that the "white noise" was not turned on while potential jurors were questioned at the bench but that is not supported by the record. The sole reference to the "white noise" (an issue raised by the petitioner) is a statement by the Court, that "I forgot I had this sound up and on" (*Id.* at 82). Specifically, that comment arose immediately after individual jurors had been questioned at the bench. The Court then addressed a question to the entire panel about (presumably) lunch plans. By clear inference, the Judge's apology about the "sound up and on" would be an apology that the white noise was still on, making it difficult to communicate with the entire panel.

The petitioner has advanced no facts that demonstrate the white noise was not turned on during the bench conferences with prospective jurors. To the contrary, in considering the context of the comment made by the Court, it is apparent that the white noise was *on* during the bench conferences and that the Court noted that the white noise had inadvertently not been turned off after the bench conferences were concluded, and attorneys returned to question the entire jury panel.

However, even assuming that the white noise was off during the bench questions of the proposed jurors, there is nothing in the entire record that indicates the rest of the venire heard *any* of the questions or answers, and that the venire was thereby tainted. Moreover, the petitioner has not produced any evidence of any sort that demonstrates any prospective juror heard anything from the bench conferences of the other jurors. The burden of proof to establish prejudice rests upon the petitioner in this civil case, and he fails. The petitioner has not established the factual predicate for this claim. Therefore, there was nothing for trial counsel to object to, and nothing for appellate counsel to raise on appeal.

4. Error in Denial of Pretrial Motions

In the amended petition, this Court is asked to readdress the issues of the petitioner's motion to suppress; the motion to disqualify trial counsel; and the remarks of the prosecuting attorney in closing argument. That is, the petitioner essentially is requesting this Court overrule the West Virginia Supreme Court (and its own rulings at trial). This is something the Court cannot and will not do.

Syllabus Point 6 of *Hatfield v. Painter,* 232 W. Va. 622, 671 S.E.2d 453, (2008) notes:

> "The general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it are regarded as the law of the case." Syllabus point 1, *Mullins v. Green,* 145 W. Va. 469, 115 S.E. 2d 320 (1960).

*Hatfield* notes that the law of the case doctrine prohibits reconsideration of issues which have been decided in a prior appeal in the same case provided there have been no material changes in facts. The rule is one of policy related to the stability of the decision-making process, predictability of results, proper working relationships between trial and appellate courts and judicial economy. Moreover, the law of the case rule applies to rulings made by appellate courts in criminal cases. 232 W. Va. at 632, 671 S.E.2d at 463. (Internal citations omitted.)

There have been no material changes in facts in this matter since the Supreme Court rendered its opinion in the direct appeal. Therefore, the decision is conclusive upon the parties and this Court. The law of *this* case is that the Court's rulings on suppression and disqualification were correct. Moreover, the comments of the prosecuting attorney did not require reversal of the conviction. The petitioner may not raise these grounds in habeas, and these grounds afford the petitioner no relief.

5. Insufficient Evidence

The Court finds that the evidence was sufficient to convict the petitioner. However, this issue was not raised on direct appeal, and therefore has been waived. Under the provisions of Chapter 53, Article 4A, Code of West Virginia, 1931, as amended, commonly known as 'Post-Conviction Habeas Corpus, 'there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in

fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance.

In a habeas corpus proceeding under Chapter 53, Article 4A, Code of West Virginia, 1931, as amended, the burden of proof rests on petitioner to rebut the presumption that he intelligently and knowingly waived any contention or ground for relief which theretofore he could have advanced on direct appeal. Syllabus Points 1 & 2, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972).

However, notwithstanding the above, the Court finds the evidence in this case was voluminous. "Moreover, without the remarks, the evidence introduced at trial to establish the Petitioner's guilt, including the Petitioner's confession to committing the murder was overwhelming." *Rogers, supra*. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Syl. Pt. 1, *State v. Puntillo*, 227 W.Va. 492, 711 S.E.2d 562 (2011).

"A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011).

Without reciting in detail the facts adduced at trial reflected in findings of fact, the evidence against the petitioner was, indeed, overwhelming.

The petitioner and Laura Amos had a long-term relationship. The petitioner was angry and jealous over the "proposal" that Laura might have received. Laura and the petitioner met on the day of her murder. They drank, amicably. At some point, the petitioner and Laura left the relative safety of the front porch and went inside. Once inside, while Laura was sitting or lying defenseless on the floor--as shown by the lack of defensive wounds on her hands--the petitioner took not one, but two folding knives out of his pockets. He opened the blades and stabbed the victim on each side of her neck. He folded the knives back up, fled the scene, throwing away the incriminating evidence. The petitioner confessed to killing Laura, and stated that she had done nothing to deserve to die.

The contention of insufficient evidence was waived by not being presented on direct appeal. However, presentation of the issue would have been futile in the face of the overwhelming evidence against him. Moreover, appellate counsel was not ineffective in failing to urge this issue on appeal. Again, under *Strickland/Miller,* counsel is ineffective only if his 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. Virginia Penitentiary*, 207 W. Va. 11, 528 S.E. 2d 207 (1999).

6. Ineffective Assistance of Habeas and Appellate Counsel

In addition to other claims addressed above, appellate counsel's performance was not deficient by failing to raise this issue on appeal. Had the issue of sufficiency of the evidence been raised, the Supreme Court would have affirmed the conviction. Indeed, "Moreover, without the remarks, the evidence introduced at trial to establish the Petitioner's guilt, including the Petitioner's confession to committing the murder was overwhelming." *Rogers, supra*. The issue of sufficiency of the evidence, the waiver of that

ground by not raising it on appeal, and the issue of effective representation by appellate counsel as to this issue is decided on state and federal constitutional grounds.

The Court notes that the petitioner raises only the failure to include a challenge to the instructions regarding malice and voluntary manslaughter, and the failure to raise the overheard bench conferences as ineffective assistance of appellate counsel. Those issues lacked merit, and appellate counsel was not objectively deficient for failing to raise those issues on appeal. Moreover, the failure to raise those issues did not affect the result of the proceeding; that is, including those issues would not have resulted in a decision from the Court reversing this conviction. The contention that appellate counsel was ineffective affords the petitioner no relief.

Trial counsel was not ineffective in any of the other particulars cited by respondent. The Court will not repeat its discussion regarding the issue of the effectiveness of trial counsel dealing with the instructions and the overheard bench conferences.

It was not ineffective assistance of counsel to leave Ms. McKinnon-Brown on the jury.

Ms. McKinnon-Brown, under oath, did not simply state she could be fair. She stated she had been friends with the killer, and his family. She stated unequivocally that she had an open mind, her personal experience would not cloud her judgment, and that she would listen to the evidence. She did not harbor ill feeling—in fact, she said she didn't care—that the criminal case turned out the way it did. She had no positive or negative feelings toward the prosecution. Two more times, she stated that her personal experience would not affect her ability to weigh the evidence or the way she viewed the case.

There is nothing in the record to contradict her unequivocal statement that she would weigh the evidence impartially and reach a fair verdict. Eye contact, body language, tone of voice, facial expression, demeanor all weigh heavily on the experienced trial lawyer's decision on exercising peremptory strikes.

Objectively, the *voir dire* reveals that trial counsel had reason to be concerned about prospective jurors other than Ms. McKinnon-Brown. Seven prospective jurors favored the death penalty which would lead to concern about their ability to recommend mercy. One juror "thought" she could recommend mercy.

One other juror had a close connection to a murder case and had been in an abusive relationship. Another had worked for years with the prosecutor's father and remembered the prosecutor from football.

The decision of which juror to keep or strike is a strategic decision, which generally falls outside the scope of an ineffective assistance of counsel claim. The presumption is that the attorney's performance was reasonable and adequate. There must be clear record evidence that the strategy was unreasonable. Reviewing courts must refrain from hindsight and second guessing.

The petitioner has not shown—in fact does not even claim—prejudice from leaving Ms. McKinnon-Brown on the jury. The decision to leave her on the jury was not objectively deficient performance. Moreover, if one examines the "but for" prong of *Strickland/Miller*, the petitioner cannot show that leaving her on the jury affected the result. This allegation of ineffective assistance affords the petitioner no relief.

Counsel was not ineffective in his cross-examination of Robert Wilcox.

Petitioner's brief states that trial counsel was ineffective for not cross-examining Mr. Wilcox about an alleged cut on petitioner's hand. Mr. Wilcox would have had no idea of how the petitioner injured his hand. In fact, the jury heard that the petitioner was angry and punching the concrete just before he killed Laura.

Presumably, habeas counsel believed that testimony about the cut would bolster the contention that petitioner was drunk. Sobriety or lack thereof is not demonstrated by a cut on the hand. Drunk people, sober people, and people whose state of mind is somewhere in between cut themselves all the time. An accidentally inflicted injury—a cut—is not limited to those who have been drinking.

The jury heard that the petitioner had been drinking, heavily, the day he killed Laura and heard from his statement that he had been drinking heavily and that, essentially, he acted in a blackout and that alcohol was responsible for his actions. The observation of a witness, who saw the petitioner fleeing the crime scene—thereby negating the inference that he was so intoxicated he didn't know what he was doing—that there was a random cut on his hand, would not have convinced the jury of the petitioner's voluntary intoxication.

It was a reasonable strategic decision to refrain from eliciting the information that the petitioner had a cut on his hand. The jury had already heard that the petitioner was hitting the concrete. The existence (if it existed because there is no information about the cut in the trial record) of the cut does not make his voluntary intoxication defense more believable. Again, an accidentally inflicted injury is not reserved to the sober.

Mr. Wilcox told the jury that the petitioner "had a buzz, he was lit. . ." (Trial transcript, February 23, 2011 at 88). He repeated that the petitioner had a buzz and wanted a beer. (*Id.* at 90-91) Mr. Wilcox had told the police that the petitioner was acting "weird", that he was taking pills or drinking. (*Id.* at 92) Therefore, the jury was informed that Mr. Wilcox's observation was that the petitioner was acting weird, drinking or taking pills. The critical information—that petitioner was intoxicated—was before the jury.

Again, the presumption is that counsel's decisions were reasonable. And as noted above, "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." *Miller, supra,* 194 W. Va. 15 16, 459 S.E. 2d at 127.

It was an objectively reasonable decision not to ask Mr. Wilcox about the petitioner's hand. And, because the decision was objectively reasonable, there is no need to address the second prong of *Strickland/Miller*.

However, it is patently clear that the failure to ask about the cut did not affect the result. The jury heard that the petitioner had an alcohol problem and had been drinking for hours, even days, before he killed Laura. The jury heard from Mr. Wilcox that as the petitioner was fleeing, he was buzzed or lit—but not so buzzed he slurred his words or failed to ask for another beer. Therefore, the jury heard, and rejected the intoxication defense and the failure to ask about the cut did not contribute to the verdict.

The petitioner satisfies neither prong of the analysis, either the objective or subjective analysis. Therefore, this contention affords the petitioner no relief.

Counsel was not ineffective in cross-examination of Keith Hubbard.

Petitioner assails trial counsel for not impeaching Hubbard based upon his criminal convictions. However, the information about those convictions was before the jury and any additional questions would have been merely cumulative.

Rule 609 of the West Virginia Rules of Evidence provides that a witness may be impeached by evidence that the witness has been convicted of a crime which may be punished by a sentence in excess of a year, or by any offense involving dishonesty or false statement.

Hubbard was incarcerated at the time of trial serving a felony sentence for possession of a stolen car and had previous felony convictions including credit card fraud, possession of a stolen vehicle and burglary. There was no need to "impeach" Hubbard by cross-examining him on his convictions; the jury already knew about them.

Moreover, although Hubbard did testify about a threat the petitioner made to the victim, his testimony was also helpful to the petitioner in that he testified he did not see the petitioner and Laura argue before her death. Moreover, not only did the jury know that Hubbard was apparently a four-time loser when it came to criminal convictions, the jury knew that he (Hubbard) had problems with drugs and alcohol, that Hubbard had a "buzz" when he purportedly overheard the threat, that he loved Laura like a sister, and admitted he wanted to do anything to help, including telling the police he'd heard the petitioner whisper the threat.

The information about the criminal convictions was before the jury. Hubbard also was effectively impeached by revealing his alcohol issues and bias toward the victim. Petitioner's brief does not suggest how the failure to ask any additional questions of Hubbard prejudiced the petitioner.

Again, counsel is presumed competent, and the decision about what questions to ask on cross-examination is the essence of a strategic decision which may not be assailed through the prism of hindsight.

The decision not to rehash the criminal convictions by further cross-examination was not objectively deficient performance. Moreover, the petitioner does not even suggest how the failure to cross-examine Hubbard in greater detail affected the result of the proceedings.

The petitioner fails to satisfy either prong of *Strickland/Miller* as to this issue. This issue affords the petitioner no relief.

Counsel was not ineffective for withdrawing the motion to bifurcate.

Petitioner's brief spends a substantial amount of paper assailing the decision to withdraw the bifurcation motion without ever stating in particularity how in this case, *not in general*, the petitioner was harmed.

Petitioner's brief suggests that withdrawing the motion to bifurcate left the jury with an incomplete picture of the petitioner and that there was significant information helpful to the jury which should have been presented to the jury. However, the petitioner's brief does not state what that evidence might be.

Bifurcation goes two ways. There *might* exist evidence that the petitioner would have wanted the jury to hear that was not admissible during the guilt phase. Petitioner, however, does not state what the positive evidence might be.

The State, however, definitely would have had evidence that it could have presented in a mercy phase, including, but not necessarily limited to information obtained from the criminal records in Kanawha County that the petitioner had at least two previous criminal convictions demonstrated by his two previous petitions for writ of habeas corpus filed in 1989 and 1993; a 2003 arrest for forgery; an arrest for malicious wounding; two instances of violating a domestic violence protective order and a conviction for aggravated robbery.

This Court believes that the jury made its decision about mercy based upon the brutal and senseless murder of a defenseless, intoxicated victim who had her throat cut by not one but two knives. Not bifurcating the trial had no impact upon the jury's decision regarding mercy. In fact, the state had negative information about the petitioner that the jury did not hear, and would have heard in a bifurcated trial. Had the trial been bifurcated, the result would have been the same, a recommendation of no mercy.

The petitioner also states that the jury, in this unitary trial, should have been instructed regarding mitigating factors. "An instruction outlining factors which a jury should consider in determining whether

to grant mercy in a first degree murder case should not be given." Syl. Pt. 1, *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (W.Va. 1987).

"While our reading of W.Va. Code, 62-3-15, is that unitary trials are permitted, there is nothing in the statutory language that forbids bifurcation. It may well be true that unitary trials are adequate and appropriate in most cases. . ." *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (W.Va., 1996).

The decision of whether or not to pursue bifurcation is again, a strategic decision that may not be assailed in hindsight. The petitioner presents nothing to demonstrate that he had evidence which was admissible as to the issue of punishment, but not in the guilt phase. The petitioner does not demonstrate that the result would have differed had the motion for bifurcation been pursued, granted, and this have been a two-phase trial. It was not an objectively unreasonable decision to withdraw the request for bifurcation. The petitioner does not posit in his brief that there actually were positive factors to present to the jury; at any rate he cites none. There was substantial admissible evidence—the criminal history alone—which would have ensured the jury's withholding of mercy.

Counsel had strategic reasons for withdrawing the request. Although the unitary trial did result in a verdict which withheld mercy, to judge the decision to withhold mercy based upon the result is the epitome of second guessing, which a reviewing court may not engage in.

It was an objectively reasonable decision to withdraw the request for bifurcation. Further, had this been a bifurcated trial, the result would not have changed. Therefore, the petitioner again fails to satisfy either prong of *Strickland/Miller*, and this contention affords the petitioner no relief.

The petitioner has failed to carry his burden to demonstrate that the trial court committed any error of constitutional dimension, and additionally failed to carry his burden to demonstrate that either his trial or appellate counsel committed any act or omission which resulted in ineffective assistance.

The petitioner asserts that the cumulative effect of trial counsel's errors and omissions resulted in ineffective assistance of counsel. The doctrine of cumulative errors does not apply. Where the record a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the

defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. Syl. Pt. 14, *State v. Foster*, 221 W.Va. 629, 656 S.E.2d 74 (2007).

The cumulative error doctrine is not applicable without legal and/or factual basis which support the individual assignments of error. *See State v. Glaspell*, 2013 WL 3184918 (W.Va. June 24, 2013). The cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors. *State v. Knuckles*, 196 W.Va. 416, 426; 473 S.E.2d 131, 141 (1996). Because Petitioner fails to meet his burden of establishing counsels' errors in defending his case, the doctrine of cumulative errors does not apply.

**RULING**

WHEREFORE, based upon a thorough and complete review of the complete contents of the criminal case file in this matter, and considering the arguments of counsel for the petitioner and the warden in written submissions, it is ORDERED that the petition seeking a writ of habeas corpus be and the same is hereby DENIED. It is further ORDERED that said civil action be and the same is hereby DISMISSED. The Court notes the exceptions and objections of the petitioner.

It is ORDERED that the Office of the Circuit Clerk of Kanawha County send a certified copy of this ORDER to counsel of record and to the petitioner. The petitioner is informed that he has 30 days after the entry of this ORDER to file a notice of appeal. If petitioner wishes to appeal, and wishes the assistance of counsel for the purpose of appeal, the petitioner must request the appointment of counsel. Counsel will not automatically be appointed for the purpose of appeal.

ENTERED: 6/10/19

The Honorable Carrie Webster
Judge, Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT. GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13 DAY OF June 2019
Cathy S. Gatson
CIRCUIT CLERK OF KANAWHA COUNTY, WEST VIRGINIA