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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0612

CLAYTON E. ROGERS,
Petitioner Below, Petitioner,

v.

DONNIE AMES, SUPERINTENDENT,
Mt. Olive Correctional Complex,
Respondent below, Respondent

RESPONSE BRIEF

Appeal from a June 10, 2019, Order
Circuit Court of Kanawha County, West Virginia
Case No. 14-P-243

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RESPONSE BRIEF

Donnie Ames, Superintendent ("Respondent"), by counsel, Holly M. Flanigan, Assistant Attorney General, respectfully submits this Response to the Brief filed by Petitioner. Because Petitioner fails to demonstrate the existence of reversible error, this Court should affirm the Circuit Court of Kanawha County's June 10, 2019, Order denying the petition for habeas corpus relief.

I. ASSIGNMENTS OF ERROR

Clayton E. Rogers ("Petitioner") asserts eleven assignments of error. In accordance with Rule 10(d) of the Revised Rules of Appellate Procedure, these assignments are not restated, although each will be addressed in turn below.

II. STATEMENT OF THE CASE

This instant matter arises from Petitioner's 2011 conviction by jury of first degree murder without a recommendation of mercy. Petitioner was sentenced to life in prison without the possibility of parole, and appealed. The factual and procedural history, as set forth by the West Virginia Supreme Court of Appeals ("WVSCA") in *State v. Rogers*, 231 W.Va. 205, 744 S.E.2d 315 (2013), is as follows:

> Keith Hubbard testified that on August 28, 2010, he, the victim, Laura Amos, and the Petitioner were all drinking under a bridge in St. Albans, West Virginia. The Petitioner and Ms. Amos had been in a relationship off and on for years. Mr.

Hubbard stated that the Petitioner and Ms. Amos got into an argument with one another due to another man, Greg Lacy, supposedly proposing marriage to her. The Petitioner was angered by this proposal and told Ms. Amos that he would kill her. Mr. Hubbard and Ms. Amos left the area under the bridge and went to Mr. Lacy's home that was also located in St. Albans. The two spent the night at Mr. Lacy's home.

The next day, August 29, 2010, the Petitioner, Mr. Hubbard and another man, Larry Means, were hanging out at an abandoned house on West Main Street in St. Albans and had been drinking beer and vodka together throughout the day. Mr. Hubbard testified that the Petitioner was still angry about the proposal made to the victim. Ms. Amos joined them at the abandoned house. Everyone was sitting on the front porch of the house, drinking alcohol in celebration of the Petitioner's birthday. Mr. Lacy came by the abandoned home and walked up to the porch. Mr. Lacy and the Petitioner argued about Mr. Lacy's proposal to Ms. Amos. Mr. Lacy left the house.

Mr. Hubbard testified that about five minutes later, the Petitioner and Ms. Amos got up and walked around the corner of the abandoned house. Mr. Hubbard and Mr. Means remained on the porch of the abandoned house. Mr. Hubbard stated that about ten or fifteen minutes later, he heard Ms. Amos scream his name three times. Mr. Hubbard ran around to the side of the house to see what was happening, but he did not see anybody. He stated that he did not know where the Petitioner and Ms. Amos had gone, so he went back to the front porch.

Mr. Hubbard testified that he and Mr. Means sat on the front porch for a while until Rusty Martin came by the house and informed Mr. Hubbard that he was looking for a house to rent. Mr. Hubbard told him that he should check out the house where they had been sitting. When Mr. Hubbard and Mr. Martin started to enter the home, they saw Ms. Amos lying on the floor in a pool of blood. She had been stabbed twice in the neck.[3]

The police were called to the home. Upon their investigation at the scene, including talking to Mr. Means, Mr. Martin and Mr. Hubbard, the police obtained an arrest warrant for the Petitioner, who had fled the scene. The police searched for the Petitioner, but did not find him until the next day.

On August 30, 2010, pursuant to an arrest warrant, Captain Donald Scurlock of the Nitro Police Department and Detective Sean Snuffer of the Kanawha County Sheriff's Office arrested the Petitioner around 3:15 p.m. near the home of the Petitioner's friend, Timothy Ward, in St. Albans. At approximately 3:18 p.m., while the Petitioner was being transported to the Kanawha County Sheriff's Office, he was advised of his *Miranda* rights by Captain Scurlock.

Upon arriving at the Sheriff's department, at approximately 3:55 p.m., the Petitioner was again read his *Miranda* rights by Detective Snuffer. The Petitioner signed a waiver of rights form on which he circled and initialed on the form that he was willing to make a statement to the law enforcement officers. The Petitioner was

> interviewed by Captain Scurlock and Detective Snuffer. During the interview, the Petitioner admitted to slicing/cutting the victim's throat. He stated that he fled out the side door of the house and into a wooded area behind the house. The Petitioner explained to the officers where he discarded the knives. The interview concluded at approximately at 4:50 p.m.
>
> At the conclusion of the interview, Captain Scurlock and Detective Snuffer indicated that they were going to begin processing the Petitioner by fingerprinting him, photographing him and doing paperwork. At this time, Detective Snuffer advised the Petitioner that he had the right to be promptly presented to a magistrate because he was under arrest. The Petitioner, however, agreed to waive his right to prompt presentment and to take the officers to where he had discarded the knives he used to murder the victim. The officers, even after the Petitioner indicated he would waive his right to prompt presentment, told the Petitioner that if at any time he changed his mind and wanted to be taken to the magistrate, all he had to do was to let them know that and they would immediately bring him to the magistrate. The Petitioner was allowed to speak to his daughter who came to the sheriff's office. He then was transported by the officers to the area where he stated he had discarded the knives. The knives, however, were not found.
>
> The law enforcement officers returned to the sheriff's office with the Petitioner around 7:00 to 8:00 p.m. The undisputed evidence was that there was no magistrate on duty in Kanawha County between 6:00 and 8:00 p.m. on this day. Detective Snuffer testified that the Petitioner was taken to the magistrate at 8:00 p.m., when the magistrate came back on duty.

The Direct Appeal.

On appeal, Petitioner argued the trial court erred in (1) determining his statement was not taken in violation of the prompt presentment statute; (2) in denying his due process rights when it denied counsel's motion to withdraw based on an actual conflict of interest; and (3) in denying his due process right to a fair trial based upon the prosecutor's improper, prejudicial closing arguments. . *Rogers*, 231 W.Va. 205, 744 S.E.2d 315. The WVSCA affirmed Petitioner's conviction and sentence. It concluded the trial court did not err in determining that Petitioner's statement to law enforcement should not be suppressed because the prompt presentment statue had not been violated. *Id.* It likewise found no error in the trial court's denial of trial counsel's motion to withdraw. *Id.* Lastly, the WVSCA applied the factors set forth in *State v. Sugg*, 193 W.Va. 388, 456 S.E. 2d 469 (1995), and concluded the trial court did not err in denying the motion for a new

trial as the prosecutor's remarks neither clearly prejudiced the accused, nor resulted in manifest injustice. *Rogers*, 231 W.Va. 205, 744 S.E.2d 315.

The Amended Petition for Writ of Habeas Corpus.

Petitioner's amended habeas petition asserted the following grounds for relief: (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 during *voir dire* which prejudiced Petitioner; (4) the trial court erred in denying Petitioner's motion to suppress, motion for new trial based on improper comments by the prosecutor, and counsel's motion to withdraw; (5) 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 during individual *voir dire*; failing to remove a crime victim from the jury; failing 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; (6) Petitioner received ineffective assistance of appellate counsel; and, (7) cumulative error. Appendix Record "AR" 92-134[1]; AR 214-215.

Petitioner additionally asserted *Rogers*, 231 W.Va. 205, 744 S.E.2d 315 should be overturned because this Court "got it wrong" when it determined that 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. *Id.*; AR 214-215. Further, Petitioner contends that the evidence to convict the petitioner was insufficient. *Id.*; AR 214-215.

Upon "a thorough and complete review of the complete contents of the criminal case file in this matter, and considering the arguments of counsel...in written submissions," AR 230, the Circuit Court of Kanawha County denied relief in an extensive, comprehensive order addressing each assignment of error. AR 203-230. This appeal followed.

[1] "Appendix Record" refers to the record Petitioner filed in this matter pursuant to W.Va. Rev. R. App. Pro. 7. It will hereinafter be cited as "AR" followed by the page(s) being referenced.

Appeal of the final order denying the petition for writ of habeas corpus.

Petitioner raises the following issues on appeal:

(1) the trial court gave an improper jury instruction regarding malice; (2) the trial court gave an improper instruction as to voluntary manslaughter; (3) Petitioner was prejudiced by the plain error of the trial court allowing the venire to overhear confidential bench questioning of individuals; (4) 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 during individual *voir dire*; failing to remove a crime victim from the jury; failing 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; (5) Petitioner received ineffective assistance of appellate counsel; (6) the trial court erred in denying Petitioner's motion to suppress, (7) the trial court erred in denying the trial counsel's motion to withdraw; (8) the trial court erred in denying a new trial based on improper comments by the prosecutor; (9) insufficient evidence to convict Petitioner of first degree murder; and, (10) cumulative error. Pet'r Br. 1-2.

III. SUMMARY OF THE ARGUMENT

A. Petitioner asserts in separate, but related, arguments that trial counsel was ineffective for failing to object to the omission of the word "only" from the jury instruction on first degree murder, and the inclusion of "sudden excitement" and "heat of passion" in the voluntary manslaughter instruction. The habeas court concluded the "malice" instruction was "virtually identical" to the instruction this Court approved in *State v. Mullins*, 193 W. Va. 315, 322, 456 S.E.2d 42, 49 (1995). As to voluntary manslaughter, the habeas court concluded the jury was clearly instructed that the element of malice distinguished murder and manslaughter, and that to convict Petitioner of voluntary manslaughter, the jury had to find an absence of malice. Petitioner has not shown error with the habeas court's decision.

B. Petitioner next avers the trial court committed "plain error" by leaving the bench microphone on during individual *voir dire* conducted at the bench, thus "infecting" the entire venire.[2] Concluding Petitioner failed to establish a factual predicate for this claim, the habeas court denied relief. Petitioner's contention on appeal likewise rests on allegations unsupported by fact or law, and this claim thus fails.

C. Petitioner asserts numerous ways in which trial counsel provided constitutionally deficient representation. The habeas court found each claim to be meritless under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

i. The habeas court duly concluded that neither trial counsel nor appellate counsel were ineffective regarding the jury instructions on malice and voluntary manslaughter. Specifically, because there was no error in the instructions, trial counsel was not ineffective for failing to object to the instructions and appellate counsel was not ineffective for raising the issue on appeal. Petitioner fails to allege, much less demonstrate, how the habeas court's findings of fact and conclusions of law were erroneous or an abuse of discretion.

ii. The habeas court correctly found the claim of a poisoned venire to be baseless, and thus correctly concluded that neither trial counsel nor appellate counsel were ineffective by failing to address it. Here, Petitioner conclusorily suggests that "but for this error, the outcome of the proceedings" at trial and on appeal, would have been different. But Petitioner points to no fact or law indicating error in the habeas court's ruling, and Petitioner makes no argument whatsoever. As a result, Petitioner has not satisfied the burden imposed by either part of the *Strickland/Miller* test, and this claim fails.

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[2] Although Petitioner indicates this was "plain error" by the trial court, Pet'r Br. 1, he does not identify or discuss any aspect of the plain error doctrine.

iii. Next, the habeas court rejected Petitioner's claim of ineffective assistance of counsel by trial counsel failing to remove a seat juror, Ms. McKinnon-Brown, from the jury pool. Pet'r Br. 11. According to the habeas court, the juror, though the victim of a violent crime, stated under oath she could be fair in assessing the evidence, which satisfies the test to be applied with regard to qualifications: whether a juror can return a verdict based solely on the evidence and the court's instructions. Petitioner fails to demonstrate any error or abuse of discretion by the court below.

iv. The habeas court found no merit to Petitioner's contention that trial counsel's assistance was constitutionally defective in regard to cross-examining two witnesses–Mr. Wilcox and Mr. Hubbard. The habeas court noted that the scope and content of cross-examination constitute strategic decisions that rarely will be second-guessed by a reviewing court. It also directly found that the critical information Petitioner claims should have been elicited on cross-examination was, in fact, already in front of the jury. Finding neither prong of *Strickland/Miller* satisfied, the habeas court denied relief. Petitioner has not shown error or abuse of discretion by the court below.

v. The habeas court denied relief on Petitioner's last claim of ineffective assistance of counsel, first finding that well-established law defeated the contention that the jury should have been instructed on factors to consider in determining whether to grant mercy. The habeas court also denied relief on Petitioner's claim that the unitary trial deprived him of the opportunity to present mitigating evidence, allocute, participate in a presentence investigation report, and present witnesses, because Petitioner pointed to no evidence at all, much less evidence that would have convinced the jury that Petitioner's brutal, senseless murder of his unarmed girlfriend deserved a recommendation of mercy. Petitioner has not shown error or abuse of discretion by the court below.

D. Petitioner submits that appellate counsel was ineffective by failing to appeal the jury instructions on malice and voluntary manslaughter, and by failing to appeal the venire being

"infected" by purportedly overhearing the bench conferences. These claims are identical to those Petitioner raised in conjunction with the ineffective assistance of trial counsel claims, which Respondent addressed, *supra* at Section C(i)-(ii), and will not readdress here.

E. The assignments of error Petitioner sets forth in his Brief as grounds 6, 7, and 8 were previously and directly addressed and rejected by the WVSCA in Petitioner's direct appeal, *State v. Rogers*, 231 W.Va. 205, 744 S.E.2d 315 (2013). The habeas court correctly concluded that the *Rogers* decision is "the law of the case" and refused to reconsider them. Petitioner fails to identify or explain how the habeas court's findings and conclusions were erroneous.

F. The habeas court correctly denied relief on Petitioner's challenge to the sufficiency of the evidence underlying his conviction, finding this issue to be waived by Petitioner's failure to raise it on direct appeal. Also, even though Petitioner did not challenge the sufficiency of the evidence on direct appeal, the WVSCA nonetheless expressed that the evidence at trial, including Petitioner's confession, provided "overwhelming" evidence of guilt. Relying thereon, in part, the habeas court likewise found the evidence of Petitioner's guilt to be "voluminous." Petitioner fails to show error in the habeas court's decision.

G. Lastly, the habeas court correctly denied relief on the claim of cumulative error, because the cumulative error doctrine evaluates only the effect of matters determined to be error, not the cumulative effect of non-errors.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not required in this case, as it involves the application of settled legal principles to relatively uncomplicated facts. This matter is appropriate for resolution by memorandum decision.

V. STANDARD OF REVIEW

Review of a circuit court's denial of a petition for habeas corpus relief is three-pronged: "the final order and the ultimate disposition [are reviewed] under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *State ex rel. Thompson v. Ballard*, 229 W. Va. 263, 728 S.E.2d 147 (2012) (quoting Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006)).

Petitioner also claims ineffective assistance of counsel, which this Court has found presents a mixed question of law and fact; it reviews the circuit court's findings of historical fact for clear error and its legal conclusions *de novo*. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 320, 465 S.E.2d 416, 422 (1995).

VI. ARGUMENT

A. The habeas court correctly concluded the trial court's instructions on first degree murder and voluntary manslaughter were correct statements of the law.

Petitioner asserts in separate, but related, arguments that the jury instructions on first degree murder and voluntary manslaughter were erroneous. Pet'r Br. 6-7, 8-9.[3] Specifically, Petitioner contends the omission of the word "only" from the definition of "malice" in the first degree murder instruction unconstitutionally altered its meaning, and the inclusion of "sudden excitement" and "heat of passion" in the voluntary manslaughter instruction effectively added two elements to the crime of manslaughter without which the jury "may have found an absence of malice alone sufficient for the acquittal of Petitioner.[4] *Id.* The habeas court noted that because

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[3] Section A combines Petitioner's Assignments of Error 1 and 2.

[4] Petitioner mentions "plain error" at the conclusion of each discussion on the jury instructions. Pet'r Br. 7, 8. However, aside from referencing "plain error," Petitioner does not in any fashion set forth, address, or apply the plain error doctrine. *See id.*; *see State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (this court has no power to reverse for plain error unless all four of the following requirements are met: (1) there was error; (2) it was plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of

Petitioner could have challenged the jury instructions on direct appeal, but did not, there now exists a rebuttable presumption that the contentions have been waived. AR 217. On appeal, Petitioner has not addressed the presumption of waiver much less overcome it. *See* Pet'r Br. 6-9. This alone should preclude appellate review.

But even if this Court undertakes review, Petitioner's claims fail because Petitioner has not shown error with the habeas court's conclusion that both instructions at issue are correct statements of the law. When reviewing a trial court's instructions to the jury, this Court has consistently applied the following principles:

> The court's instructions to the jury must be a correct statement of the law and supported by the evidence. 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 the charge accurately reflects the law. Deference is given to the [trial] court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

State v. Guthrie, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995) citing *State v. Bradshaw,* 193 W.Va. 519, 543, 457 S.E.2d 456, 480 (1995).

First, regarding the definition of "malice," the trial 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.

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the judicial proceedings. Under plain error, appellate courts will notice unpreserved errors only in the most egregious circumstances.). Respondent, therefore, will not address it either.

AR at 215.[5] It is not entirely clear what Petitioner believes would be a correct instruction on malice; just that Petitioner believes the word "only" should be included in the instruction to denote that the accused's "ill will" is directed toward the victim. *See* Pet'r. Br. 7. Petitioner bases this argument on *State v. Jenkins*, where the WVSCA struck down a jury instruction which stated "to convict one of murder, it is not necessary that malice should exist in the heart of the defendant ... against the deceased." *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994). According to *Jenkins*, "[a]n 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." *Id.* at Syl. Pt. 4. Notably, the instruction in the present case does not in any fashion parallel the erroneous *Jenkins* instruction. Instead, as the habeas court expressed, the trial court's instruction is "substantially similar to, in fact, virtually identical with the instruction [approved] in *Mullins*." AR 216.

In *State v. Mullins*, 193 W. Va. 315, 322, 456 S.E.2d 42, 49 (1995), this Court was again faced with a challenge to a jury instruction on "malice." The instruction at issue provided:

> 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.

Id. The WVSCA, finding the instruction similar to the instruction from *State v. Panetta*, 85 W.Va. 212, 101 S.E. 360 (1919) which *Jenkins* cited with approval, affirmed this instruction on malice. *Mullins*, 193 W. Va. at 322, 456 S.E.2d at 49. In the present matter, the habeas court compared the trial court's malice instruction with the instruction approved in *Mullins*, and found them "virtually

[5] The habeas court noted that a careful reading of the transcript revealed that trial counsel asked for an instruction on malice containing the incorrect language from *Jenkins*-the same instruction Petitioner cites in his brief. AR 217. The trial court, however, gave a correct definition of malice. The habeas court concluded trial counsel was not ineffective by requesting the *Jenkins* language, which the trial court chose not to give.

identical." AR 216. Petitioner has not demonstrated error with this finding. Nor has Petitioner demonstrated the habeas court abused its discretion.

> Next, regarding voluntary manslaughter, the trial 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)

Petitioner contends that the inclusion of "sudden excitement" and "heat of passion" in this instruction added two elements to the crime of manslaughter without which the jury "may have found an absence of malice alone sufficient for the acquittal of Petitioner." Pet'r Br. 8-9. The habeas court disagreed.

Finding this contention meritless, the habeas court explained that to convict 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[,]" and that "[t]hat is the instruction that the jury received." AR 218-219. The habeas court iterated that "the jury was clearly instructed that it was the element of malice which distinguished murder and manslaughter," and that "to convict the petitioner of voluntary manslaughter; it had to find an absence of malice," *Id.* at 218-219. The habeas court stated the jury obviously "found that Petitioner had acted with malice, thereby rendering it impossible to convict Petitioner of only voluntary manslaughter no matter the provocation." AR 219. Consequently, and with Petitioner pointing to no legal authority indicating otherwise, the habeas court held that adding the words "heat of passion" did not constitute error. AR 219. On appeal, Petitioner has not demonstrated, explained, or offered legal support for his

contention that the instruction on voluntary manslaughter was erroneous much less that it "constitutes plain error." *See* Pet'r Br. 8-9.[6]

It is worth noting the habeas court also found that:

> 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).

AR 219-220. Regardless of whether trial counsel advocated for the instruction given, Petitioner simply has not shown that the instruction on voluntary manslaughter was erroneous. Therefore, this claim fails.

Lastly, in response to Petitioner's single-sentence contentions that both trial counsel and appellate counsel provided constitutionally deficient representation by failing to pursue these issues, the habeas court duly concluded that because neither of these claims of error were actually error, no corresponding claims of ineffective assistance of counsel claims could survive. AR 217, 219. Petitioner has not sufficiently pled much less demonstrated error with this ruling.

B. The habeas court correctly found meritless Petitioner's claim that the venire was tainted by overhearing individual *voir dire* conducted at the bench.

Petitioner's third assignment of error avers the trial court committed "plain error" by leaving the bench microphone on during individual *voir dire* conducted at the bench, thus

[6] Although Petitioner indicates this was "plain error," he does not set forth or discuss any aspect of a plain error or apply a plain error analysis. Therefore, Respondent will not, either.

"infecting" the entire venire with "stories of murder and domestic violence." Pet'r Br. 9-10.[7] Just as the habeas court found in the Order on appeal, the record does not support such a contention.

Specifically, the habeas court found the following fact:

> 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."

Order 8; AR 210. Petitioner points to nothing contradicting this finding of fact. Nor does Petitioner demonstrate error in the habeas court's finding 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 concluded[.]" *Id.* The habeas court further found the "entire record" devoid of any indication that the venire heard any of the questions or answers, or that the venire was thereby tainted. *Id.* Concluding Petitioner failed to establish a factual predicate for this claim, the habeas court denied relief. It correspondingly concluded there was nothing for trial counsel to object to and nothing for appellate counsel to raise on appeal. *Id.*

Petitioner fairs no better on appeal. He points to no facts indicating any member of the venire overheard the individual *voir dire*, much less that the entire venire overheard it and was tainted thereby. Nor does he allege or explain how the habeas court's findings and conclusions were erroneous. Petitioner's contention here rests on allegations unsupported by fact or law, and this claim thus fails.

[7] Although Petitioner indicates this was "plain error" by the trial court, he does not set forth or discuss any aspect of a plain error or apply a plain error analysis.

C. The habeas court properly found Petitioner's ineffective assistance of counsel claims meritless.

Petitioner asserts that trial counsel was ineffective by failing to object to the improper jury instructions; failing to address the issue of overheard bench conferences during *voir dire*; failing to remove a crime victim from the jury; failing 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. Pet'r Br. 10. Petitioner correspondingly asserts that appellate counsel was ineffective by failing to appeal the purportedly improper jury instructions and failing to argue under plain error analysis that the jury was infected by overhearing the bench conferences. Pet'r Br. 11, 16. To succeed on such claims, Petitioner must satisfy the high standards adopted by this Court in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In West Virginia,

> 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, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. The *Strickland/Miller* test is conjunctive so that "[i]n deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington,* 466 U.S. 668, and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), 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). In other words, "[f]ailure 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*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999). Therefore, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often

be so, that course should be followed." *Strickland*, 466 U.S. at 697. The Petitioner has a heavy and demanding burden in satisfying both *Strickland/Miller* prongs and it is a burden that he has failed to carry in the instant matter.

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "The language and tenor of *Strickland* makes it clear that petitioner here bears a very heavy burden of presentation and proof in making out a claim for ineffectiveness." *Roller v. McKellar*, 711 F. Supp. 272, 283 (D.S.C. 1989). As recognized by this Court, "[a] defendant bears a 'highly demanding' burden when seeking to establish an ineffective assistance of counsel claim. *Lloyd v. Terry*, No. 16-1166, 2018 WL 1319187, at *5 (W. Va. Mar. 14, 2018) (memorandum decision) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)). As to the performance prong, "[p]etitioner's burden in proving ineffective assistance of counsel is heavy as there is strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Harold B. v. Ballard*, No. 16-0029, 2016 WL 5210852, at *4 (W. Va. Sept. 19, 2016) (memorandum decision). *See also Miller*, 194 W. Va. at 16, 459 S.E.2d at 12 ("we always should presume strongly that counsel's performance was reasonable and adequate."). "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). In other words, "[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." *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127. Additionally,

> the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another. This result is no accident, but instead flows from deliberate policy decisions this Court and the United States Supreme Court have made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential" and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance[.]" *Strickland*, 466 U.S. at 689–90[]. In other words, we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a "wide range." . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

Miller, 194 W. Va. at 16, 459 S.E.2d at 127.

Moreover, as to the prejudice prong, the burden is also heavy for "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011). "Under these rules and presumptions, the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another." *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127. Petitioner fails to meet the high bar of the *Strickland/Miller* standard.

Applying *Strickland/Miller* to the Petitioner's claims that trial counsel provided constitutionally deficient representation, the habeas court concluded each claim was meritless. On appeal, "the burden is on the defendant to prove ineffective assistance by a preponderance of the evidence." *State v. Hatfield*, 169 W. Va. 191, 209, 286 S.E.2d 402, 413 (1982). Here, Petitioner cannot.

i. The habeas court correctly found no merit to Petitioner's contention that trial counsel was constitutionally deficient by failing to object to improper jury instructions.

As discussed in Section A, *supra*, the habeas court concluded the jury instructions on both malice and voluntary manslaughter were legally correct statements of the law. AR 219. As a result of there being no error in the instructions, the habeas court correspondingly concluded that trial counsel was not ineffective for failing to object to the instructions and appellate counsel was not

ineffective for raising the issue on appeal. AR 219, 224; *see* Pet'r Br. at 11, 16. Even with finding no violation of the objective prong of *Strickland/Miller*, the habeas court nonetheless considered whether Petitioner satisfied the prejudice prong. *Id.* Ultimately, the habeas court found that even if trial counsel was objectively deficient in failing to object (to instruction he submitted), Petitioner failed to demonstrate that the instruction affected the results of the proceeding. *Id.* According to the habeas court, Petitioner failed to demonstrate that had the trial court omitted the words "heat of passion" and "sudden excitement" in the voluntary manslaughter instruction or included the word "only" in its definition of "malice," Petitioner would have been acquitted. *Id.* The habeas court also found that appellate counsel's failure to raise those issues on appeal did not affect the result of the proceeding; that is, appealing those issues would not have resulted in a decision from the WVSCA reversing Petitioner's conviction. AR 224.

On appeal, Petitioner briefly addresses this assignment of error, cursorily alleging that "had the jury been properly instructed following counsel's objection, the jury may well have returned a verdict of voluntary manslaughter or Second-Degree murder." Pet'r Br. 11. But Petitioner points to nothing in the record to support this conclusory allegation, and he fails to cite any legal authority advancing his position. Petitioner also fails to allege, much less demonstrate, how the habeas court's findings of fact and conclusions of law were erroneous or an abuse of discretion. Pet'r Br. 11. As a result, Petitioner has not shown error, and Petitioner's ineffective assistance of counsel claims fail.

ii. The habeas court correctly found no merit to Petitioner's contention that counsel provided constitutionally deficient representation in regard to the bench conferences during *voir dire*;

Petitioner contends trial counsel was constitutional ineffective for failing to object, ask for a curative instruction, challenge the array, or request a mistrial following the venire overhearing the bench conferences during individual *voir dire*, and that appellate counsel was ineffective in

failing to raise these errors on appeal. Pet'r Br. 11, 16. However, as discussed above in Section B, the habeas court found this claim to be baseless because the record was devoid of any indication that any prospective juror overheard the bench conferences. AR 220. The habeas court additionally found that viewing in context the trial court's comment about the sound being "up and on" made clear the trial court was apologizing that the white noise it utilized during the bench conferences remained on, making it difficult to communicate with the entire jury panel. AR 220. Finding no factual predicate for Petitioner's claim, the habeas court duly concluded there was nothing for trial counsel to object to, and nothing for appellate counsel to raise on appeal. *Id.*

In the instant appeal, Petitioner conclusorily suggests that "but for this error, the outcome of the proceedings" at trial and on appeal, would have been different. Pet'r Br. 11; *See also* Pet'r Br. 16. However, Petitioner points to no fact or law indicating error in the habeas court's ruling, and Petitioner makes no argument whatsoever. Pet'r Br. 11. As a result, Petitioner has not satisfied the burden imposed by either part of the *Strickland/Miller* test, and this claim fails.

iii. The habeas court correctly found no merit to Petitioner's contention that trial counsel was constitutionally deficient by failing to remove a crime victim from the jury.

Petitioner next alleges trial counsel provided ineffective assistance by failing to move to strike for cause and by failing to peremptorily strike a seated juror, Ms. Kinnon-Brown. Pet'r Br. 11. The entirety of Petitioner's 3-sentence claim is that this juror noted during *voir dire* that her husband had been killed and that she was unhappy that the killer received a sentence of 5 years. *Id.* Petitioner goes on to recognize that, despite this history, the juror nonetheless stated under oath that she could be fair in assessing the evidence. *Id.* Yet without including any legal authority or analysis to support this claim of error, Petitioner concludes keeping such a person on the jury panel "defies belief." *Id.* Such a claim is unsustainable, as the decision of which juror to keep or strike

is a strategic decision that generally falls outside the scope of an ineffective assistance of counsel claim, and Petitioner fails to demonstrate error by the court below.

A criminal defendant is not entitled to a jury comprised of individuals who have never been impacted by crime; he is entitled to a jury that is free from bias or partiality. *State v. Harshbarger*, 170 W.Va. 401, 294 S.E.2d 254, 256 (1982)("The purpose of voir dire is to obtain a panel of jurors free from bias or prejudice.") To accomplish this, "the true test to be applied with regard to qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had." Syl. Pt. 1, *Harshbarger, supra, quoting State v. Chariot*, 157 W.Va. 994, 206 S.E.2d 908 (1974).

The habeas court delved into the record of the *voir dire* to address this claim. What the record revealed was that this juror was questioned at length, and she unequivocally stated she would be able to listen impartially to the evidence and decide the case without regard to her past experience:

> 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.

AR 224. As a result of the juror's ability to return a verdict based on the evidence and the trial court's instructions and disregard any prior opinions she may have had, the habeas court concluded trial counsel was not ineffective in deciding to leave Ms. McKinnon-Brown on the jury. *Id.*

The habeas court further noted that in direct contrast to this juror's unequivocal statement that she would weigh the evidence impartially and reach a fair verdict, objectively viewing the record of *voir dire* showed that trial counsel had reason to be more concerned about prospective

jurors other than Ms. McKinnon-Brown. *Id.* Specifically, seven prospective jurors favored the death penalty and one prospective juror "thought" she could recommend mercy, which would lead to valid concern about their ability to recommend mercy. *Id.* Another juror had a close connection to a murder case and had been in an abusive relationship; and another had worked for years with the prosecutor's father and remembered the prosecutor from football. *Id.* Recognizing that eye contact, body language, tone of voice, facial expression, demeanor all weigh heavily on the experienced trial lawyer's decision on exercising peremptory strikes, *id.*, the habeas court stated 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. *Id.* Therefore, given the presumption that an attorney's performance was reasonable and adequate and the lack of evidence in the record indicating trial counsel's exercise of peremptory strikes was unreasonable, the habeas court found no basis for relief. It further found that because Petitioner neither alleged nor showed prejudice from leaving Ms. McKinnon-Brown on the jury Petitioner failed to satisfy the *Strickland/Miller* factors. *Id.* Petitioner has not set forth fact or law demonstrating any error in the habeas court's decision. Accordingly, Petitioner cannot satisfy either prong of *Strickland/Miller*, and this contention affords Petitioner no relief.

iv. The habeas court correctly found no merit to Petitioner's contention that trial counsel was constitutionally deficient failing to properly cross-examine two witnesses, Keith Hubbard and Robert Wilcox;

Petitioner next contends trial counsel's cross-examination of two witnesses for the State—Robert Wilcox and Keith Hubbard—was constitutionally deficient. Specifically, Petitioner asserts that had trial counsel cross-examined Mr. Wilcox about a small cut Mr. Wilcox saw on Petitioner's hand immediately after Petitioner stabbed Laura, the testimony would have proven that Petitioner was so intoxicated he injured himself and did not realize it, Pet'r Br. 12; *see* AR 225, thereby bolstering his efforts to negate the element of premeditation or deliberation. *See* AR 114.

The habeas court deemed it reasonable for counsel to refrain from eliciting information about the cut on Petitioner's hand, found this claim meritless and denied relief. AR 224-225. As the habeas court explained, the cut (if it existed at all, because there was no information about the cut in the trial record), AR 226, did not make Petitioner's voluntary intoxication defense more believable. *Id.* "Sobriety or lack thereof is not demonstrated by a cut on the hand[,]" as "[a]n accidentally inflicted injury—a cut—is not limited to those who have been drinking." AR 225. It further found that the critical information—that petitioner was intoxicated—was already before the jury. *Id.* Mr. Wilcox told the jury that Petitioner "had a buzz, he was lit. . ." *Id.* Mr. Wilcox repeated that Petitioner had a buzz and wanted a beer. *Id.* And Mr. Wilcox had told the police that Petitioner was acting "weird," and that he was taking pills or drinking. *Id.* Based on this testimony, the habeas court concluded that the substantive impact of testimony about a cut on Petitioner's hand was negligible; it would not have convinced the jury of Petitioner's voluntary intoxication or made his voluntary intoxication defense more believable. *Id.* at 224, 225.

The habeas court also deemed it a reasonable strategic decision for trial counsel to refrain from drawing attention to the cut on Petitioner's hand, because the jury had heard that Petitioner was angry and punching concrete shortly before he killed Laura. AR 209, 225-226. As this Court has long recognized, the scope and content of cross-examination constitute strategic decisions that rarely will be second-guessed by a reviewing court, as the method and scope of cross-examination "is a paradigm of the type of tactical decision that [ordinarily] cannot be challenged as evidence of ineffective assistance of counsel[,]" *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995) (internal citation omitted). AR 225; AR 1387; 1435. On appeal, Petitioner reiterates arguments presented below. He does not offer any legal authority of factual support that trial counsel's decision was objectively unreasonable or that he was prejudiced, and he offers no legal

authority or argument to suggest the habeas court's ruling was erroneous. This contention affords Petitioner no relief.

Petitioner also challenges trial counsel's lack of cross-examination of Keith Hubbard on Mr. Hubbard's convictions for credit card fraud, possession of a stolen vehicle, and burglary. Pet'r Br. 13. While Petitioner asserts that impeaching the credibility of witnesses is a fundamental duty of criminal defense counsel and that trial counsel's failure to do so using Mr. Hubbard's felony convictions was unduly prejudicial, those two points are the entirety of his argument. Petitioner does not suggest how the decision to forego such questioning was unreasonable or unduly prejudiced Petitioner. Nor does Petitioner identify much less demonstrate any error in the habeas court's finding that trial counsel effectively impeached Mr. Hubbard by revealing his alcohol issues and bias toward the victim and that "the information about those convictions was before the jury and any additional questions would have been merely cumulative." AR 227.

Petitioner has not overcome the strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance, and this claim fails.

v. The habeas court correctly found no merit to Petitioner's contention that trial counsel was constitutionally deficient by withdrawing the request for a bifurcated trial on the guilt/innocence phase and mercy/no mercy phase.

Petitioner's last claim of ineffective assistance of counsel is twofold. First, Petitioner contends the trial court erred by failing to give the jury an "instruction delineating the role of any mitigating factors to be considered in reaching the sentencing decision." Pet'r Br. 14. Second, Petitioner claims by withdrawing the motion for bifurcated trial, counsel deprived him of the opportunity to present mitigating evidence and evidence of his future dangerousness, the right to allocution, the right to participate in a presentence investigation report, and the right to present witnesses and other mitigating evidence required by due process. Pet'r Br. 14-16. Petitioner at no point explains how in this case, *not in general*, he was prejudiced.

To begin, Petitioner's contention that the trial court's failure to direct the jury to consider mitigating factors, such as aspects of Petitioner's character, background, and record, left the jury to speculate as to what legal factors to consider in direct violation of *Summer v. Shuman*, 483 U.S. 66 (1987) fails. Pet'r Br. 14. It fails not only because Petitioner attributes this purported deficiency to the trial court, *not* trial counsel, and therefore falls outside the purview of *Strickland/Miller*, but it also fails because this Court has expressly prohibited the giving of such an instruction.

Assuming, *arguendo*, Petitioner attributed to trial counsel the lack of an instruction on factors to be considered by the jury regarding mercy/no mercy, this Court has expressly disapproved the giving of such an instruction, because "the recommendation of mercy in a first degree murder case lies solely in the discretion of the jury." *State v. Triplett*, 187 W.Va. 760, 769, 421 S.E.2d 511, 520 (1992). Contrary to the argument advanced by Petitioner, the WVSCA has consistently and adamantly refused to permit a trial court to suggest to the jury what it should consider. For example, in *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987), the WVSCA emphasized that a jury has unfettered discretion to determine the question of mercy based solely on their impression of the defendant and the circumstances of the case. *Id.* The *Miller* court explicitly stated that an instruction outlining factors for a jury to consider in determining whether to grant mercy *should not be given* because such an instruction leaves the jury "in the posture of not having the unfettered discretion of making the determination of mercy based solely on their impression of the defendant and the circumstances of the case." *Id.* This Court's decision in *Billotti v. Dodrill*, 183 W. Va. 48, 57, 394 S.E.2d 32, 41 (1990), underscored this principle:

> In the case now before us, the defendant argues that W.Va. Code § 62–3–15 provides no guidelines for the jury and appropriate factors for jury consideration were not listed in the instruction given by the trial court. However, in *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987), we addressed a situation in which the factors for jury consideration discussed in *Leach* had been delineated in an instruction that the defendant objected to upon appeal as having been "erroneous," "misleading and confusing." *Id.* 178 W.Va. at 620, 363 S.E.2d at 506. We stated

> that "[n]owhere in the opinion [Leach] did we suggest, much less direct, that a jury should be instructed on factors in determining whether to recommend mercy." *Id.* 178 W.Va. at 621, 363 S.E.2d at 507. Even more significantly, we noted that "[i]n jurisdictions where the decision to recommend mercy is left entirely within the discretion of the jury and is made binding on the trial court, it is uniformly held that an instruction which enumerates instances or suggests when a mercy recommendation might be appropriate is reversible error." *Id.* 178 W.Va. at 622, 363 S.E.2d at 508 (citations omitted). Thus, contrary to the argument now advanced by the defendant, we concluded in *Miller* that "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." *Id.* 178 W.Va. at 623, 363 S.E.2d at 509.

Billotti, 183 W. Va. at 57, 394 S.E.2d at 41. The *Billotti* Court, like the *Miller* Court, thus held that no instruction should be given outlining factors which a jury should consider in determining whether to grant mercy in first degree murder case. *Id.*

Without even giving a nod to this Court's rejection of the very argument he advances herein, Petitioner relies on (without explanation or application to the matter at bar) *Summer v. Shuman*, 483 U.S. 66 (1987). Such reliance is misplaced, as the *Shuman* decision addressed a Nevada statute imposing automatic, mandatory capital punishment for an inmate that is convicted of a murder committed while in prison, where that same inmate had been convicted of a prior criminal offense yielding a sentence of life imprisonment without possibility of parole. *Id.* The *Shuman* Court held that the 8th and 14th Amendments to the United States Constitution were violated by the Nevada statute's automatic and mandatory imposition of the death penalty. The *Shuman* principles do not apply to the present matter, as Petitioner was not sentenced to death, and his sentence to life in prison without the possibility for parole was not automatic upon his conviction for murder. Instead, Petitioner's eligibility or ineligibility for parole was a separate and independent question for the jury to deliberate and decide. The habeas court correctly found no merit to this contention.

Secondly, Petitioner suggests that withdrawing the motion to bifurcate left the jury with an incomplete picture of Petitioner and that there was significant information helpful to the jury which

should have been presented to the jury. However, Petitioner does not state what that evidence might be; instead, he vaguely references "successful employment, good relations with others, and an apparent dose of remorsefulness[.]" Pet'r Br. 15. As the habeas court noted, "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." AR 228. In assessing trial counsel's decision to proceed with a unitary trial, the habeas court found it to be sound strategy:

> Bifurcation goes two ways. While there *might* exist evidence that the petitioner would have wanted the jury to hear that was not admissible during the guilt phase, Petitioner, did not identify what the positive or mitigating evidence might be.

AR 228-229. In contrast, 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 . . . 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."

Id. Correspondingly, the habeas court found that trial counsel's decision to withdraw the motion for bifurcated trial was reasonable, as Petitioner presented "nothing to demonstrate that he had evidence which was admissible on the issue of punishment, but not the guilt phase." *Id.*

The habeas court likewise concluded Petitioner failed to demonstrate he was prejudiced by the unitary trial. *Id.* Reiterating Petitioner's "brutal and senseless murder of a defenseless, intoxicated victim" by cutting Laura's throat with not one but two knives, as well as recognizing Petitioner had multiple prior arrests and convictions for violent crimes and domestic abuse, led the habeas court to conclude the unitary trial had no impact upon the jury's decision regarding mercy. For these same reasons, Petitioner cannot and has not demonstrated on appeal that trial counsel's performance was objectively unreasonable.

What is more, even assuming *arguendo* that the legal authorities Petitioner cites (and very briefly mentions) in his brief—*Zant v. Stephens*, 462 U.S. 862 (1982) and *Shoefield v. W.Va. Virginia Dept. of Corrections*, 185 W.Va. 199, 406 S.E.2d 425 (1991)—demonstrate trial counsel acted objectively unreasonable in withdrawing the motion to bifurcate, Petitioner fails to demonstrate that prejudice resulted therefrom. By withdrawing the motion for a bifurcated trial, counsel not only ensured Petitioner's damning criminal history was eliminated from the jury's consideration in the mercy phase, but it also ensured the jury did not hear the emotional, heart-breaking statements from Laura's family as to how his vicious murder of Laura fundamentally affected the lives of so many innocent people. *See* AR 1805-1809. Trial counsel's decision to withdraw the motion for bifurcation was a shrewd decision calculated to offer Petitioner the best chance at receiving mercy. Petitioner fails to suggest what evidence exists that would have convinced the jury that Petitioner's brutal, senseless murder of his unarmed girlfriend deserved a recommendation of mercy. Giving lip service to claims that unspecified evidence of Petitioner's "background, education, family responsibilities, work record, etc.," could have been presented in a bifurcated trial falls far short of meeting the heavy burden imposed by *Strickland/Miller*. Simply put, Petitioner has not demonstrated clear error or an abuse of discretion by the habeas court, and its decision should be affirmed.

D. Petitioner's claim of ineffective assistance of appellate counsel is duplicative and meritless.

Here, Petitioner cursorily submits that appellate counsel was ineffective by failing to appeal the jury instructions on malice and voluntary manslaughter, and by failing to appeal the venire being "infected" by purportedly overhearing the bench conferences. Pet'r Br. 16. These claims are identical to those Petitioner raised in conjunction with the ineffective assistance of trial counsel claims, Pet'r Br. 11, which Respondent addressed, *supra* at Section C(i)-(ii). For the reasons

previously stated as well as the nonexistent factual and legal analysis here as to how the *Strickland/Miller* test is satisfied and how the habeas court's ruling constitutes reversible error defeat this claim, this assignment of error is meritless and cannot survive appellate scrutiny.

E. The habeas court correctly concluded that the law of the case doctrine precluded it from readdressing the issues of Petitioner's motion to suppress, motion to disqualify trial counsel, and motion for new trial based on the prosecuting attorney's remarks in closing argument.

The assignments of error Petitioner sets forth in his Brief as grounds 6, 7, and 8, Pet'r Br. 16-19, were directly addressed and rejected by the WVSCA in Petitioner's direct appeal, *State v. Rogers*, 231 W.Va. 205, 744 S.E.2d 315 (2013). Specifically, Petitioner's Ground 6 alleges "[t]he trial court erred in denying the Petitioner's motion to suppress." Pet'r Br. 1, 16-17. Ground 7 alleges "[t]he trial court erred in denying the trial counsel's motion to withdraw." *Id.* at 1, 18. Ground 8 alleges "[t]he trial court erred in denying a new trial based upon the improper comments by the Prosecutor." *Id.* at 2, 19. The *Rogers* Court expressly ruled on each of these issues. It held that:

(1) Law enforcement's delay in taking Petitioner before a magistrate following his arrest resulting from taking him to the sheriff's station before taking him before a magistrate did not violate the prompt presentment to magistrate rule and, therefore, the circuit court did not err in denying the motion to suppress Petitioner's statement to police;

(2) Because trial counsel had no actual conflict of interest, disqualifying him would have been inappropriate; therefore, the circuit court did not err in denying Petitioner's counsel's motion to withdraw;

(3) The prosecutor's remarks during closing argument, while not in absolutely keeping with the evidence and law, neither clearly prejudiced defendant, nor resulted in manifest injustice. Consequently, this Court found no error in the denial of Petitioner's motion for a new trial.

Rogers, 231 W.Va. 205, 744 S.E.2d 315. The habeas court, recognizing that Petitioner was essentially requesting that it overrule the West Virginia Supreme Court (and its own rulings at

trial), aptly refused to re-address these three issues pursuant to the law of the case doctrine. AR at 220-221. Petitioner has not and cannot demonstrate that this was error.

This Court has long held that "'[t]he 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 is regarded as the law of the case.' Syl. Pt. 1, *Mullins v. Green,* 145 W. Va. 469, 115 S.E. 2d 320 (1960)." Syl. Pt. 6, *Hatfield v. Painter,* 232 W. Va. 622, 671 S.E.2d 453 (2008). *Hatfield* further explains 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. *Id.* at 632, 671 S.E.2d at 463. "Such issues may not be re-litigated in the trial court or re-examined in a second appeal." *Id.*

In considering these issues, the habeas court found that there were no material changes in facts in this matter since the *Rogers* decision; that the *Rogers* decision is conclusive upon the parties and this Court; and that "the law of *this* case is that the Court's rulings on suppression and disqualification were correct[,]" and "the comments of the prosecuting attorney did not require reversal of the conviction." AR at 221-222. It lastly concluded these claims were not cognizable in habeas corpus. On appeal, Petitioner fails to express or explain how the habeas court's findings and conclusions were erroneous. As a result, he has not satisfied his burden of showing error, and these three contentions afford him no relief.

F. The habeas court correctly concluded Petitioner waived the challenge to the sufficiency of the evidence by failing to raise it on direct appeal. Despite the waiver, the habeas court nonetheless assessed the evidence and found "voluminous" evidence of Petitioner's guilt.

Petitioner next challenges the sufficiency of the evidence underlying his conviction. He contends his inebriation when he twice stabbed Laura in the neck negated his ability to premeditate or deliberate, as required for a conviction of first degree murder. Pet'r Br. 19-20. This contention fails for multiple reasons.

To begin, the habeas court was correct in concluding Petitioner waived the issue by failing to raise it on direct appeal. AR 221-222. As explained by the habeas court, in a habeas corpus proceeding under W.Va. Code §53-4A-1 –11 there is a rebuttable presumption that a 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. *Id.*; AR 221-222. It is the petitioner who bears the burden of rebutting the presumption of waiver. *Id.* citing Syl. Pts. 1 & 2, *Ford v. Coiner,* 156 W. Va. 362, 196 S.E.2d 91 (1972). Here, it is indisputable that Petitioner did not challenge the sufficiency of the evidence on direct appeal. *See Rogers*, 231 W.Va. 205, 744 S.E.2d 315. It is likewise indisputable that Petitioner fails to address or rebut the presumption of waiver in the two paragraphs he devotes to this issue. *See* Pet'r 19-20. Further, "[e]xcept in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of the evidence." *Cannellas v. McKenzie,* 160 W.Va. 431, 436, 236 S.E.2d 327, 331 (1977). Petitioner's cursory attention to the sufficiency of the evidence claim lacks a showing of any extraordinary circumstances justifying examination of this issue on habeas review. Pet'r Br. 19-20. For this reason alone, the sufficiency challenge is unsustainable.

Further, despite the clear waiver, the habeas court nonetheless assessed the sufficiency of the evidence and, relying in part on *Rogers, supra,* found voluminous evidence supporting the conviction of first degree murder. Specifically, even though the *Rogers* Court was not directly tasked with addressing a challenge to the sufficiency of the evidence because Petitioner failed to raise it, the Court included an assessment thereof as part of its discussion on the challenge to the prosecutor's remarks in closing argument. The Court succinctly stated, "the evidence introduced at trial to establish the Petitioner's guilt, including the Petitioner's confession to committing the murder, was overwhelming." *Rogers*, 231 W.Va. at 217, 744 S.E.2d at 327. Then, without reciting

in detail the evidence adduced at trial, the habeas court set forth some of this "overwhelming" evidence:

> 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.

AR 222-223. With such evidence against Petitioner, the habeas court easily concluded that any rational trier of fact would find the elements of first degree murder satisfied beyond reasonable doubt. *See id.*; AR 222-223. Petitioner fails to demonstrate any error or abuse of discretion with this conclusion.

Lastly, whether the State proved the requisite premeditation or deliberation is a question of fact for the trier, not for a reviewing court. It is a well-established legal principle in this State that ""[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses." Syl. Pt. 2, *State v. Bailey,* 151 W.Va. 796, 155 S.E.2d 850 (1967)." *State v. Martin*, 224 W. Va. 577, 582, 687 S.E.2d 360, 365 (2009). Here, the trier clearly rejected Petitioner's attempt to mitigate his culpability and convicted him of first degree murder.

For all these reasons, this claim fails.

G. Cumulative error

Petitioner lastly asserts he is entitled to the reversal of his conviction because of cumulative error. Pet'r Br. 20-21. The cumulative error doctrine "evaluate[s] only the effect of matters determined to be error, not the cumulative effect of non-errors." AR 229-230 citing *State v.*

Knuckles, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996). As found by the habeas court, the cumulative error doctrine does not apply here because Petitioner failed to meet his burden of establishing error. AR 229-230. As Petitioner fails to demonstrate error in any claim advanced, the cumulative error doctrine does not apply. Accordingly, Petitioner's last assignment of error fails.

VII. CONCLUSION

For these reasons, this Court should affirm the Circuit Court of Kanawha County's June 10, 2019, Final Order.

Respectfully submitted,

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