IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0149

GARY LEE ROLLINS,

Petitioner,

v.

DONNIE AMES, Superintendent,
Mount Olive Correctional Complex,

Respondent.

On Appeal from the Circuit Court of Webster County (Case No. 15-C-29)

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Gary Lee Rollins ("Petitioner"), by counsel, advances three assignments of error, contending that the circuit court erred when it did not grant him habeas corpus relief due to (1) "errors raised concerning the State's use of perjured testimony, prosecutorial misconduct, and prejudicial, false statements made to the jury;" (2) a juror's relationship to a State witness; and (3) ineffective assistance of trial and appellate counsel. (Pet'r's Br. at ii).

STATEMENT OF THE CASE

1. Investigation into Teresa Rollins's death and Petitioner's trial.

A. Preliminary investigation.

Until October 5, 2009, Petitioner and his wife, Teresa Rollins, owned property in Nettie, West Virginia, where they made their living farming vegetables. *State v. Rollins*, 233 W. Va. 715, 722, 760 S.E.2d 529, 536 (2014) (per curiam). They employed a number of individuals, including April O'Brien, who was also known as April Bailes,[1] to help them tend their crops. *Id.* at 722, 760 S.E.2d at 536. On October 5, 2009, Petitioner's wife was found dead on their property, "pinned underwater in a pond by a fallen tree." *Id.* at 722, 760 S.E.2d at 536. April O'Brien-Bailes called 9-1-1, and reported that Ms. Rollins "was trapped in the pond and not breathing." *Id.* at 722, 760 S.E.2d at 536. Ms. Rollins's body was recovered from the pond sometime thereafter. *Id.* at 722, 760 S.E.2d at 536.

An autopsy was performed on Ms. Rollins's body the following day. *Rollins*, 233 W. Va at 715, 760 S.E.2d at 537. Dr. Zia Sabet, who performed the autopsy, observed scratches on Ms.

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[1] April Bailes was known as April O'Brien around the time of Ms. Rollins's murder, and during the pretrial and trial proceedings. (*See, e.g.*, A.R. at 6, 17, 249, 1039). She was identified to the jury as "April O'Brien," but also referred to herself as "April Bailes." (*See* A.R. at, 249, 1039). In other court records, she is identified as "April O'Brien-Bailes." (A.R. at 16). For clarity's sake, the State shall refer to her as April O'Brien-Bailes.

Rollins's face and bruising on her back; he prepared a death certificate and noted that the status of the cause and manner of death were "pending [further] investigation." *Id.* at 723, 760 S.E.2d at 537.

The subsequent investigation revealed that Petitioner was having an affair with Ms, O'Brien-Bailes. *Rollins*, 233 W. Va. at 722-23, 760 S.E.2d at 536-37. On October 13, 2009, Deputy Kenneth Sales of the Nicholas County Sheriff's Department and lead investigator at the time, interviewed Petitioner, informing him that "[f]rom the circumstances of this case [the affair], we have changed it to a murder investigation, so right now, you're being questioned about a murder." *Id.* at 722-23, 760 S.E.2d at 536-37. During this interview, Mr. Rollins admitted that any jury would look at him as a defendant and think "Oh boy, he had to have done it," given that he had been involved in a year-long affair with Ms. O'Brien-Bailes. *Id.* at 723, 760 S.E.2d 529, 537.

After this investigation was concluded, Dr. Sabet issued an autopsy report, indicating that Ms. Rollins's death was accidental and caused by "drowning complicated compression asphyxia." *Rollins*, 233 W. Va. at 724, 760 S.E.2d at 538. An amended death certificate reflecting this determination was issued on January 10, 2010. *Id.* at 724, 760 S.E.2d at 538.

B. State police investigation.

At the behest of the victim's family, and at the direction of then-Governor Joe Manchin, the State Police initiated a second investigation into Ms. Rollins's death. *Rollins*, 233 W. Va. at 724, 760 S.E.2d at 538. Based on their independent investigation, the State Police determined that Ms. Rollins's death was *not* accidental and for the following reasons:

Shortly before her death, Petitioner took out multiple life insurance policies that would cover his wife in the event of her death. *Rollins*, 233 W. Va. at 724, 760 S.E.2d at 538. Petitioner

also purchased an expensive vehicle (over $44,000), initially financing effectively the entire amount and then telling the dealership that he would be "paying it off pretty soon." *Id.* at 724, 760 S.E.2d at 538. He then purchased life insurance to cover the purchase price of the truck for both him and his wife. *Id.* at 724, 760 S.E.2d at 538.

One month before Ms. Rollins died, Petitioner attempted to increase Ms. Rollins's life insurance coverage for both "natural and accidental death causes." *Rollins*, 233 W. Va. at 724, 760 S.E.2d at 538.

> [Petitioner] was informed by the agent that to cover natural death, Ms. Rollins would need a new physical because of her previously disclosed cholesterol issues. Mr. Rollins ultimately decided to forego the health portion of the insurance, stating, 'Yeah, because all I'm looking for is just the accidental,' and, 'We're not trying to increase life when neither one of us is planning—planning a natural death for at least another 30 to 40 years.' Mr. Rollins stated that the reason he wanted to purchase additional insurance was 'because we were under the assumption that our mortgage was insured also . . . so basically what we're covered in now will just barely pay off our mortgage.'

Rollins, 233 W. Va. at 724–25, 760 S.E.2d at 538–39. "The total coverage for each spouse with the respective $300,000 increases was $500,000." *Id.* at 725, 760 S.E.2d at 539.

In addition, the State police determined that Ms. O'Brien-Bailes's call to the 9-1-1 operator on the day Ms. Rollins's body was discovered "highly suspicious:"

> According to the statements of all witnesses present at the Rollinses' farm, upon discovering Ms. Rollins's body, Mr. Rollins ran up the hill shouting for someone to call an ambulance. At that time, Mr. Rollins did not explain why they should call an ambulance. Ms. Bailes made the 911 call after retrieving her phone from her vehicle. The point from which she made the call was approximately eighty-five yards from where Ms. Rollins lay in the pond, yet she told the 911 operator that Ms. Rollins was trapped under a tree in the pond and that Ms. Rollins was not breathing. The State Police theorized that because Ms. Bailes could not see the scene at the pond with the detail she described to the 911 operator, she must have known that Ms. Rollins was dead in the pond prior to placing the call.

Rollins, 233 W. Va. at 725, 760 S.E.2d at 539 (footnote omitted). The State police also found Petitioner's statements to be suspicious:

> Mr. Rollins's claim that he jumped into the pond in an attempt to save his wife did not match the testimony of witnesses on the scene. Those witnesses described Mr. Rollins as being either completely dry or wet only up to his knees shortly after Ms. Rollins's body was removed from the pond. Based on these statements, the State Police did not believe that Mr. Rollins was wet enough to support his claim that he had jumped into the pond and attempted to pull his wife's body free from beneath the tree.

Rollins, 233 W. Va. at 725, 760 S.E.2d at 539.

The State police provided this information to the Medical Examiner's office. *Id.* Based upon this information, the Medical Examiner's Office amended the death certificate on January 19, 2010, to "asphyxia due to probable strangulation" and the manner of death was "undetermined." *Id.*

Mr. Rollins was indicted for his wife's murder; shortly thereafter, Ms. O'Brien-Bailes was arrested as an accomplice and admitted to the police that Mr. Rollins "told her that he had killed his wife." *Rollins*, 233 W. Va. at 725, 760 S.E.2d at 539. She testified:

> We unloaded the stakes, and he had took me by the arm to the other side of the tractor, and he just looked at me like—with this look like he was looking through me, and he just said, 'I—I killed Teresa.'
>
> And I just looked at him, you know, like 'What?'
>
> And he said it again. He said, 'I killed Teresa,' and he said that I'd be the one to call 911 and tell them about her under the tree, and that if I didn't go along with it, that me and my daughter wouldn't be here.

Rollins, 233 W. Va. 715, 725, 760 S.E.2d 529, 539 (2014)

C. Trial, conviction, and sentence.

Petitioner was tried beginning on August 14, 2012. In addition to evidence described above (i.e., Ms. O'Brien-Bailes's testimony that Petitioner told her that he killed his wife; the insurance coverages, Petitioner's spending spree, and the suspicious initial statements provided by Petitioner and Ms. O'Brien-Bailes), the State presented testimony from three experts: "Drs. Sabet and Kaplan of the State Medical Examiner's Office, and Dr. Wecht. All three experts testified that they did

not believe the injuries to Ms. Rollins's body were extensive enough to have been caused by a falling tree." *Rollins*, 223 W. Va. at 726, 760 S.E.2d at 540. "The State also presented the testimony of a friend of Ms. Rollins who claimed that Mr. Rollins had physically abused his wife in the months preceding her death." *Id.* at 726, 760 S.E.2d at 540

Petitioner advanced a defense that "Ms. Rollins's death was an accident and that the former governor's influence had caused the police and medical examiners to wrongfully accuse Mr. Rollins of murder. The defense presented the testimony of Dr. Cohen who stated that he believed a falling tree could have caused Ms. Rollins's death." *Rollins*, 233 W. Va. at 726, 760 S.E.2d at 540.

As this Court previously observed:

> All four of the medical expert witnesses at trial—the State's three witnesses and the defense's one witness—agreed that Ms. Rollins's body did not present with any large hemorrhages or broken bones. They also agreed that based on her wounds, the tree could not have knocked her unconscious and that she was conscious when she was submerged in the water. The witnesses disagreed primarily on the amount of bruising on Ms. Rollins's back and in their ultimate conclusions.

233 W. Va. 715, 726, 760 S.E.2d 529, 540.

> During closing, the Defense argued that Ms. O'Brien-Bailes was lying, claiming:
>
> She's joined their team. She's gotten on the—the governor's freight train express. We're all going to railroad Gary Rollins, so now what does she get out of it. She's not in jail. She's not been indicted. You heard that she was arrested. She was taken before a magistrate, but she's not been indicted. You can't get convicted if you're not indicted.[2]
>
> Who hands out the indictments? That man right there. (Indicated.) P.K. Milam [the prosecutor]. Is he going to indict his star witness, do you think? Is that what's really going to happen here? After all is said and done, he gets his conviction thanks to her lie, he's going to repay that by indicting her? Do you think they thought that?

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[2] This is not an accurate statement of the law. Of course an individual may be convicted of a felony without first being indicted. Syl. Pt. 7, *Montgomery v. Ames*, 241 W. Va. 615, 827 S.E.2d 403 (2019).

. . . .

> And she knew what they wanted her to say because they'd been trying to get her to say it for two years, and they couldn't do it until they put the cuffs on her. She knew what they wanted. In the end, she gave it to them for her freedom.

233 W. Va. 715, 727, 760 S.E.2d 529, 541. In rebuttal, the State argued that:

> Mr. Vanbibber [defense counsel] wants you to believe that [Ms. O'Brien-Bailes is] getting out of trouble for telling us the truth. Trp. White [of the State Police], when he interviewed her, told her—said you can either tell us the truth now or we'll arrest you later, and he made good on that promise, because we knew from the very beginning, from that 911 call, that she could not have had that information. That's what broke this case wide open. Reviewing that tape shows that she could not have that information from the get-go, and we interviewed her again and again and again and gave her every opportunity in the world to help herself, and she didn't, and she got arrested for it, and she's charged with accessory after the fact.
>
> Now, he wants you to believe that she's getting some kind of consideration out of that. *You can bet your behind that I'm going to indict her next month.*
>
> If she'd told us this from the beginning, two years ago, three years ago now, this case would have been totally different, but she held that information in—in her pocket for two years, and she didn't anyone [sic] until she was in trouble, and she tried to save her own behind. Well, it's too late at that point. She's being prosecuted as an accessory after the fact in this case.

Rollins, 233 W. Va. at 727, 760 S.E.2d 529, 541 (emphasis in original).

The jury found Petitioner guilty of first-degree murder and did not recommend mercy. *Id.* "The circuit court entered a Trial Order on December 18, 2012, finding Mr. Rollins guilty of the first degree murder of his wife. Following a sentencing hearing on September 26, 2012, Mr. Rollins was sentenced to life imprisonment without mercy." *Id.* at 726, 760 S.E.2d at 540.

2. Direct Appeal.

Following his conviction and sentence, Petitioner pursued a direct appeal, raising seven assignments of error:

1) He was prejudiced by a remark made by the prosecutor during closing arguments;
2) The circuit court erred by refusing to strike a juror during voir dire;

3) The circuit court erred by failing to strike a biased juror upon discovering a previous relationship between that juror and the prosecutor;
4) The circuit court erroneously permitted the presentation of evidence of domestic violence;
5) The State's presentation of three medical expert witnesses was cumulative and prejudicial;
6) He was subjected to unfair surprise when one of the State's medical expert witnesses, Dr. Kaplan, testified in a manner inconsistent with his report; and
7) The cumulative effect of the errors in the case warrants reversal of his conviction.

Rollins, 233 W. Va. at 726, 760 S.E.2d at 540. In relevant part to this proceeding, Petitioner alleged on appeal that:

> the prosecutor's assertion that he would indict Ms. Bailes improperly bolstered Ms. Bailes's credibility. Despite Ms. Bailes's testimony that she had not been promised anything by the State with regard to her trial testimony, Mr. Rollins contends in this appeal that Ms. Bailes was the State's 'star witness' at trial and that the prosecutor's statement regarding Ms. Bailes's credibility prejudiced his case.

Id. at 727, 760 S.E.2d at 541.

This Court rejected the claim on the basis that the error was either waived or invited. *Rollins*, 233 W. Va. at 728, 760 S.E.2d at 542 ("[W]e find that . . . Mr. Rollins waived the right to challenge the State's rebuttal argument on appeal . . . . Additionally, in making accusations against the prosecutor in its closing argument, the defense invited the prosecutor's comment."). The Court also declined to review Petitioner's claim under the "plain error" doctrine given that the prosecutor's remarks "were in direct response to closing arguments made by the petitioner[.]" *Id.* at 728, 760 S.E.2d at 542.

3. Habeas Corpus Proceedings.

On March 23, 2015, Petitioner instituted habeas corpus proceedings. (*See* A.R. at 2303). He was appointed counsel and filed an amended petition. (*See id.*). In relevant part to this appeal, Petitioner claimed that the prosecutor engaged in misconduct for telling the jury that he was going to indict Ms. O'Brien-Bailes and that she did not have a plea agreement with the State; that Ms.

O'Brien-Bailes perjured herself when she testified that she did not have a plea agreement with the State; the jury was biased against him because one of the jurors was related to a State's witness; and his trial and appellate counsel were ineffective. (A.R. at 2269-2300). On December 27, 2019, the circuit court held an omnibus hearing and both sides called multiple witnesses (discussed in more detail, *infra*). (*See* A.R. at 2301).

On January 16, 2020, the circuit court entered a thorough twenty-page order denying relief. (A.R. at 2300-20). The court determined that: (1) there was no plea or immunity agreement between Ms. O'Brien-Bailes and the State, (A.R. at 2317-18); (2) the prosecutor's statement during his closing argument that he intended to indict Ms. O'Brien-Bailes was accurate at the time it was made, (A.R. at 2310); and (3) at the time of trial, Nelson Bailes had no idea that he was related to Ms. O'Brien-Bailes, and Ms. O'Brien-Bailes had no idea that she was related to Nelson Bailes. (A.R. at 2302). The court also found Petitioner's trial counsel's performance "met and even exceeded the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable in the criminal law," (A.R. at 2302), and Petitioner's complaints about his appellate counsel were meritless. (A.R. at 2309). Given this, the court concluded that Petitioner was not entitled to habeas corpus relief. (A.R. at 2320).

4. This Appeal.

In this appeal, Petitioner contends that the circuit court erred when it failed to grant him habeas corpus relief on the following grounds:

1. The State's "use of perjured testimony, prosecutorial misconduct, and prejudicial, false statements made to the jury with respect to an undisclosed immunity/plea deal between the [S]tate and its star witness;"
2. Newly discovered evidence "that one of the jurors on the case was the great uncle to the State's star witness, April Bailes;"
3. Ineffective assistance of trial and appellate counsel.

(Pet'r's Br. at ii).

SUMMARY OF THE ARGUMENT

Petitioner's first assignment of error—which involves claims of prosecutorial misconduct, including the existence of an undisclosed plea agreement with a State witness—is without merit. There was no plea agreement and the habeas court's determination on that issue is fully supported by the record. Moreover, the prosecutor did not engage in misconduct when he told the jury that Ms. O'Brien-Bailes would be indicted because, at the time the statement was made, the prosecutor had every intention of indicting Ms. O'Brien-Bailes. Even though the indictment was not ultimately pursued, the prosecutor's statement at the time it was made was honest and accurate. Finally, even assuming the comment does constitute misconduct, it does not rise to the level of misconduct warranting a reversal of Petitioner's conviction.

Petitioner's second assignment of error is equally unavailing. He contends that a juror—Nelson Paul Bailes ("Nelson Bailes")—violated his right to an unbiased jury because Nelson Bailes is April O'Brien-Bailes's great uncle. The problem with this claim is that neither Ms. O'Brien-Bailes nor Nelson Bailes were aware that they were related. Consequently, it is not possible that Nelson Bailes's unknown (and distant) familial relationship to a State's witness violated Petitioner's right to an unbiased jury.

Petitioner's third assignment of error is similarly without merit. Petitioner's assigned error is "ineffective assistance of trial or appellate counsel," but Petitioner has failed to offer even a single supporting argument. Instead, he alleges that he is entitled to habeas corpus relief on the basis of "cumulative error." Even assuming this Court addresses a "cumulative error" claim, the claim should be rejected because neither of the two other alleged errors identified by Petitioner are errors in the first instance.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this matter is unnecessary as the case involves issues of settled law and Petitioner's claims are meritless. A memorandum decision affirming Petitioner's conviction and sentence is appropriate. W. Va. R. App. P. 21.

STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of a circuit court in a habeas corpus proceeding, this Court applies a three-prong standard of review: the final order and disposition is reviewed under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are reviewed *de novo*. Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

ARGUMENT

1. Petitioner's first assignment of error is without merit.

Petitioner's first assignment of error centers on the prosecutor's statement at trial that Ms. O'Brien-Bailes was going to be indicted for accessory to murder. (Pet'r's Br. at 33). He contends that the prosecutor had a plea agreement with Ms. O'Brien-Bailes which granted her immunity from prosecution in exchange for her favorable trial testimony, and that Ms. O'Brien-Bailes perjured herself when she testified that she did not have such an agreement with the State. (Pet'r's Br. at 35-36). Building upon this assertion, Petitioner argues that the prosecutor engaged in misconduct when he told the jury during closing arguments that Ms. O'Brien-Bailes was going to be indicted for accessory to murder and broke that promise when he did not subsequently indict her. (Pet'r's Br. at 38). Each claim fails.

A. The circuit court's factual determination that no plea or immunity agreement existed between Ms. O'Brien-Bailes and the State is supported by the record and should not be disturbed on appeal.

A circuit court's factual findings in a habeas corpus proceeding is reviewed under a "clearly erroneous" standard. Syl. Pt. 1, *Mathena*, 219 W. Va. 417, 633 S.E.2d 771. This standard of review is deferential—factual findings will be set aside only where they are "clearly wrong." *Id.* at 421, 633 S.E.2d at 775 (citing *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975)); *see also Phillips v. Fox*, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995) (explaining that a circuit court's factual determinations are afforded deference on appeal); *see generally Warner v. Sirstins*, 838 P.2d 666, 669 (Utah Ct. App. 1992) ("Findings of fact are not disturbed unless they are clearly erroneous, and due regard is given to the opportunity of the trial court to judge the credibility of the witnesses . . . . Factual findings are clearly erroneous if they are without adequate evidentiary support or induced by an erroneous view of the law.") (citations omitted). Here, the circuit court's factual determination that no plea or immunity agreement existed between Ms. O'Brien-Bailes and the State is fully supported by the record. Because that factual determination is not "clearly wrong" and because it dispositively resolves Petitioner's claims, Petitioner is not entitled to relief.

Below, the circuit court unequivocally found that there was *no* agreement between the State and Ms. O'Brien-Bailes. (A.R. at 2317-18) ("Based on the totality of the evidence, the Court FINDS that there was no plea agreement or immunity agreement between the State and April Bailes when she testified at the trial of Petitioner."). In reaching that determination, the circuit court engaged in an extensive evaluation of the evidence adduced during the habeas proceedings; it recognized that the evidence on this issue was "mixed," and it proceeded to weigh that evidence

in order to guide it towards its conclusion. (A.R. at 2311). It ultimately concluded that no agreement was ever offered by the State to Ms. O'Brien-Bailes based upon the following evidence:

At trial, Ms. O'Brien-Bailes testified that she was not promised anything by the State in exchange for her testimony. (*See* A.R. at 2311-12). Years later, however, she testified at the omnibus hearing that she believed she was promised she would not be prosecuted in exchange for her trial testimony. (*See* A.R.at 2311). And she also testified that she could not remember testifying to the contrary at trial. (A.R. at 2312). As the circuit court recognized, Ms. O'Brien-Bailes's omnibus hearing testimony—that she received a promise from the State to testify at trial—was vague and undermined by her failure to provide any specific information about that agreement—Ms. O'Brien-Bailes was "unclear on her recollection of who conveyed to her that she would not be prosecuted." (A.R. at 2311).

In evaluating the sum-total of Ms. O'Brien-Bailes's testimony, the circuit court determined, "[b]ased on the extensive questioning of April Bailes in the omnibus hearing on various questions involving her recall of events, it appears ***the most accurate assessment is that what she said at trial was fresh in her mind and was the most accurate statement of events, compared to any later statements she made to the contrary either in a deposition or in the omnibus hearing itself.***" (A.R. at 2312) (emphasis added).[3] Thus, the habeas court took Ms.

[3] Petitioner contends that Ms. O'Brien-Bailes's testimony at the omnibus hearing was credible. (Pet'r's Br. at 35). But simply saying Ms. O'Brien-Bailes's testimony is credible does not make it so. In fact, Petitioner omits that Ms. O'Brien-Bailes's testimony from the omnibus hearing was entirely at-odds with her trial testimony, *and* that Ms. O'Brien-Bailes was unable to provide any details about her alleged plea agreement. (A.R. at 2312). This is not a credible witness, and the circuit court recognized as much. (A.R. at 2312). Moreover, this Court does not engage in making credibility determinations on appeal, but defers to the fact-finder below. *See Plumley v. Dodson*, 2016 WL 1412247, at *3 (W. Va. Apr. 7, 2016) (memorandum decision) ("We note that the habeas court judge was Mr. Dodson's trial court judge. Had the judge made credibility determinations, this Court would have afforded him great deference because he had the opportunity to view the witnesses.").

O'Brien-Bailes's conflicting testimony and made an eminently reasonable determination: Ms. O'Brien-Bailes's trial testimony was more credible than her vague testimony from later proceedings. (A.R. at 2312). Because this factual determination was reasonable and based upon the evidence placed before it, the circuit court's finding is not "clearly erroneous."

The circuit court engaged in a number of other reasonable factual determinations in reaching its ultimate determination that there was no plea deal. The prosecutor, P.K. Milam, testified at the omnibus hearing "that there was never a plea agreement in place for April Bailes[.]" (A.R. at 2313). The prosecutor's testimony finds further support in the record given that, immediately after trial, the prosecutor took the position that Ms. O'Brien-Bailes did not have any sort of plea deal. (A.R. at 2315).

Given this, the habeas court's factual determination that there was no plea agreement was reasonable and supported by the record. (A.R. at 2317-18) ("Based on the totality of the evidence, the Court FINDS that there was no plea agreement or immunity agreement between the State and April Bailes when she testified at the trial of Petitioner.").[4] This necessarily means that the court's factual findings underpinning this determination are not "clearly wrong." It also means that Petitioner's claims on appeal fail. Because there was no plea agreement between Ms. O'Brien-Bailes and the State, Ms. O'Brien-Bailes did not perjure herself at trial; the State did not suborn perjury; and the prosecutor did not engage in misconduct when he told the jury there was no such plea agreement.

[4] Petitioner claims that "[t]here is overwhelming evidence" that the State entered into an immunity or plea agreement with Ms. O'Brien-Bailes in exchange for her trial testimony. (Pet'r's Br. at 35). Such a claim is disingenuous. As outlined above, the State denied the existence of a plea agreement, no such plea agreement has ever been adduced, and Ms. O'Brien-Bailes herself testified at trial that there was no plea agreement. No reasonable definition of "overwhelming evidence" could ever be used to describe this scenario.

B. The prosecutor's comment during closing argument that he intended to indict Ms. O'Brien-Bailes was accurate at the time it was made and Petitioner's claims otherwise are meritless.

Petitioner contends that his conviction should be set aside because the prosecutor engaged in misconduct when telling the jury during Petitioner's trial that Ms. O'Brien-Bailes would soon be under indictment when, in fact, Ms. April O'Brien-Bailes was not subsequently indicted. (Pet'r's Br. at 1). This claim fails for either of two reasons. *First*, the prosecutor's comment does not constitute prosecutorial misconduct at all and, therefore, cannot form the basis for habeas corpus relief. Second, assuming the comment does constitute prosecutorial misconduct, it does not rise to the level of misconduct warranting a reversal of Petitioner's conviction.

i. No misconduct.

During closing arguments, Petitioner's counsel tried to paint Ms. O'Brien-Bailes as an agent for the State and accused her of lying when she testified that Petitioner confessed to her that he murdered his wife:

> She's joined their team. She's gotten on the—the governor's freight train express. We're all going to railroad Gary Rollins, so now what does she get out of it. She's not in jail. She's not been indicted. You heard that she was arrested. She was taken before a magistrate, but she's not been indicted. You can't get convicted if you're not indicted.
>
> Who hands out the indictments? That man right there. (Indicated.) P.K. Milam [the prosecutor]. Is he going to indict his star witness, do you think? Is that what's really going to happen here? After all is said and done, he gets his conviction thanks to her lie, he's going to repay that by indicting her? Do you think they thought that?

Rollins, 233 W. Va. at 727, 760 S.E.2d at 541. In response, the Prosecutor argued during rebuttal that Ms. O'Brien-Bailes was not an agent of the State because she had not received any form of deal with the State, and that the State would soon be indicting her as an accessory to murder after-the-fact. *Id.* at 727, 760 S.E.2d at 541.

It is undeniably true that Ms. O'Brien-Bailes was not indicted for any crime relating to the murder of Teresa Rollins. (A.R. at 2315). But, as the lower court recognized, that is not the relevant inquiry upon which to address this claim. Instead, the question is whether the prosecutor intended to indict Ms. O'Brien-Bailes at the time when he told the jury he planned to indict her. (*See* A.R. at 2310). The answer to the question is plainly "yes."

While a prosecutor occupies a quasi-judicial role, he or she still has a duty to be an advocate on behalf of the State. *State v. Hamrick*, 216 W. Va. 477, 481, 607 S.E.2d 806, 810 (2004) (citing *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977) (noting that a prosecutor must "vigorously pursue his case")). It should hardly be surprising, then, that effective prosecutors frequently make impassioned closing arguments to the jury. And a prosecutor's closing argument is intended to be—and should be—a persuasive narrative based upon the evidence designed to highlight why the evidence supports a conviction; closing arguments, by design, are intended to point to the evidence and sway the jury towards a certain outcome. *See generally State v. Johnson*, 187 W. Va. 360, 364 n.7, 419 S.E.2d 300, 304 n.7 (1992). It is also proper for a prosecutor to respond to the closing arguments made by the Defense. *Rollins*, 233 W. Va. at 744, 760 S.E.2d at 558 (citing *State v. Mullins,* 171 W.Va. 542, 301 S.E.2d 173 (1982) for the proposition that a "prosecutor's remark to be in direct response to comment made by defense counsel in closing argument . . . was not error")).

Here, the prosecutor's statement that he intended to indict Ms. O'Brien-Bailes for her involvement in Ms. Rollins's murder was made to rebut Petitioner's claim that Ms. O'Brien-Bailes was a turncoat, seduced by the State through some form of leniency agreement to lie and claim that Petitioner killed his wife. This was an appropriate argument to make considering this was a heavily contested issue—this Court recognized as much in Petitioner's direct appeal. *Rollins*, 233 W. Va. at 744, 760 S.E.2d at 558 (declining to invoke plain error and observing that "the

prosecutor's remarks were directly and appropriately responsive to defense counsel's closing argument"). Moreover, P.K. Milam, the assistant prosecutor who tried the case, testified at the omnibus hearing that "he had fully intended to indict her following trial but decided, on looking at the issue of accessory after that fact, that he could not do so because of an exception under the law for the master-servant relationship." (A.R. at 2315).

Given these considerations, the habeas court determined that, at the time the statement was made, the State "did intend to seek an indictment." (A.R. at 2310). Consequently, the prosecutor's persuasive closing argument relating to Ms. O'Brien-Bailes's status and his intention to indict her were made in good-faith and accurate at the time they were made. There was no prosecutorial misconduct and Petitioner's claim fails.

ii. Assuming the comment does constitute misconduct, such misconduct still does not warrant granting habeas corpus relief.

As discussed, above, the prosecutor's discussion of his intention to indict Ms. O'Brien-Bailes was not improper. Assuming, purely for the sake of argument, however, that it was, it still does not constitute reversible error. "A judgment of conviction will not be set aside because of improper remarks made by the prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). In order to evaluate whether an improper prosecutorial comment is so damaging as to require reversal, this Court articulated a four factor test in *Sugg*. These factors gauge:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. at Syl. Pt. 6, 456 S.E.2d 474.

Applying this four factor test to the case at hand, there is little question that the prosecutor's comment does *not* cross the threshold into reversible error. First, it was not misleading. The prosecutor testified, under oath, at Petitioner's omnibus hearing that he had every intention of indicting Ms. O'Brien-Bailes at the time he made the comment. (A.R. at 2315). Moreover, the prosecutor's argument at trial was offered in direct response to Petitioner's counsel's closing argument in which Petitioner insisted Ms. O'Brien-Bailes was acting as a State agent, lying about Petitioner's involvement in his wife's death, and was receiving some sort of benefit from the State in exchange for her testimony. *Rollins*, 233 W. Va. at 744, 760 S.E.2d at 558 ("[T]he prosecutor's remarks were directly and ***appropriately*** responsive to defense counsel's closing argument") (emphasis added). As outlined in the previous section, the notion that Ms. O'Brien-Bailes had a plea agreement and was acting as an agent for the State because of some sort of favorable arrangement is inaccurate, and the prosecutor's comment that Ms. O'Brien-Bailes would soon be indicted was directly responsive to that accusation. Thus, this factor weighs heavily in favor of the State.

Second, it cannot be disputed that this remark was isolated. It occurred once. (A.R. at 1556). This factor weighs also weighs in favor of finding that the alleged prosecutorial misconduct does not warrant reversal. Third, as outlined above and in this Court's *Rollins* opinion, the evidence at trial implicating Petitioner in his wife's death was substantial, thereby mitigating against any concern that the prosecutor's comment had any tendency to improperly sway the jury to convict. Finally, there is no evidence suggesting that the Prosecutor's comments were "deliberately placed before the jury to divert attention to extraneous matters." In fact, the Prosecutor's single comment was directly responsive to a key issue created by the defense—Ms. O'Brien-Bailes's credibility and bias.

For these reasons, Petitioner cannot establish an entitlement to relief under *Sugg* and his claim fails in substance. *See generally Adkins*, 209 W. Va. at 216, 544 S.E.2d at 918 (holding that a prosecutor's "isolated comment" clearly did not mislead the jury or prejudice the accused.).

Finally, the conclusion that the Prosecutor's isolated remark is insufficient to warrant reversal is also confirmed by this Court's discussion of the same issue in Petitioner's direct appeal. There, the Court refused to invoke the plain error doctrine to address that claim, explaining that the prosecutor's remarks "were in direct response to closing arguments made by the petitioner[.]" *Id.* at 728, 760 S.E.2d at 542.

2. Petitioner's right to an unbiased jury was not violated.

Petitioner contends that the circuit court should have granted him habeas corpus relief on the basis that Ms. April O'Brien-Bailes's great uncle, Nelson Bailes, was empaneled on the jury, and, therefore, his right to an impartial jury was violated. (Pet'r's Br. at 44).[5] This claim fails

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[5] Petitioner spends a portion of his argument in support of this assignment of error alleging that his trial counsel was ineffective. (Pet'r's Br. at 53-54). A claim that counsel's performance fell below the threshold which the Constitution demands is a patently different claim than Petitioner's assignment of error that a biased juror violated his right to a fair trial. The State shall address the former given that Rule 10 requires a Petitioner to identify his assignment of error and then argue, in a heading below that assignment of error, the reasons why he believes he is entitled to relief upon that claim. W. Va. Rev. R. App. P. 10(c)(7). In other words, Petitioner's interspersed argument that his counsel was ineffective is not the same claim as that presented in the assignment of error.

Even if this Court were to consider the claim couched within such framework, it easily fails. A claim of ineffective assistance of counsel is reviewed to determine whether trial counsel's performance was objectively unreasonable and, if so, whether, in the absence of such error, the result of the underlying proceedings would have been different. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (adopting *Strickland v. Washington*, 466 U.S. 668 (1984)). Both April O'Brien-Bailes (the witness) and Nelson Bailes (the juror) testified that they had no idea they were related to one another. (A.R. at 2303). While Petitioner claims that his trial counsel "could have" uncovered this relationship by "notic[ing] the two had the same last name, which "*should have* led to a line of inquiry where the consaguineal connection between [the two] *could have* been uncovered," that claim fails because there is no line of inquiry which would have uncovered this—neither individual knew they were related to one another. (A.R. at 2302). Thus, counsel's performance was not objectively unreasonable (no line of questioning would have uncovered this relationship because Nelson Bailes did not know about it in the first instance) and

because Nelson Bailes had no idea that he had any relation to April O'Brien-Bailes, and April O'Brien-Bailes had no idea that she had any relation to Nelson Bailes. (A.R. at 2305). Indeed, it is undisputed that "Nelson Paul Bailes was unaware that the witness, April Bailes a/k/a April O'Brien, was related to him at any point during trial." (A.R. at 2304). The same is also true for April O'Brien-Bailes: "April Bailes testified that she had never met Nelson Paul Bailes prior to the October 2018 hearing in this *habeas* proceeding." (A.R. at 2305). In fact, "**[b]ased on the testimony of Nelson Paul Bailes, April Bailes and Cynthia Kesterson,[6] it is clear that the witness, April Bailes, and the juror, Nelson Paul Bailes, had no knowledge of each other as of the time of the trial in the underlying criminal matter**." (A.R. at 2305) (emphasis added). Accordingly, there can be no concern that Mr. Bailes was prejudiced against Petitioner or in favor of Ms. Bailes due to a familial relationship (and no concern that Ms. Bailes's testimony was somehow impacted due to the presence of Nelson Bailes on the petit jury). (A.R. at 2302) ("Regarding the juror who was April Bailes' great uncle, clearly he did not know who she was at the time of trial, and she did not know who he was.").

Both the federal and state constitutions guarantee a criminal defendant the right to a fair trial. U.S. Const. Amend. 14; W. Va. Const. Sec. 14, Art III. Implicit in these constitutional provisions is the right to an unbiased jury. *See State v. Sutherland*, 231 W. Va. 410, 416, 745 S.E.2d 448, 454 (2013). The *voir dire* process safeguards these rights—jury selection is designed "to secure jurors who are not only free from prejudice, but who are also free from the suspicion of prejudice." *State v. Beck*, 167 W. Va. 830, 838–39, 286 S.E.2d 234, 240 (1981) (citation omitted). A juror who cannot act as a fair or impartial fact-finder must be excused from service, *see* Syl. Pt.

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there was no resulting prejudice (Juror Bailes was not a biased juror because he was unaware of his alleged (and distant) familial relationship with the witness).

[6] Cynthia Kesterson testified at the omnibus hearing, in part, that she was April O'Brien-Bailes's mother and that she did not know Nelson Bailes. (A.R. at 1921).

1, *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009), and any doubts on whether a juror can be fair and impartial should be resolved "in favor of excusing the juror." Syl. Pt. 2, in part, *State v. Cowley*, 223 W. Va. 183, 672 S.E.2d 319 (2008).

"In determining whether a juror should be excused, our concern is whether the juror holds a particular belief or opinion that prevents or substantially impairs the performance of his or her duties as a juror in accordance with the instructions of the trial court and the jurors' oath." *State v. Miller*, 197 W. Va. 588, 605, 476 S.E.2d 535, 552 (1996) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). "A juror is impartial if he or she can lay aside any previously formed impression or opinion of the parties or the merits of the case and can render a verdict based on the evidence presented at trial." *Id.* at 605, 476 S.E.2d at 552 (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

Of course, a juror who has actual bias must be excused from service. *State v. Miller*, 197 W. Va. 588, 605, 476 S.E.2d 535, 552 (1996). "Actual bias can be shown either by a juror's own admission or by proof of specific facts which show the juror has such a prejudice or connection with the parties at trial that bias is presumed." *Miller*, 197 W. Va. at 605, 476 S.E.2d at 552. Ordinarily, "[w]hen a prospective juror is closely related by consanguinity to a prosecuting witness or to a witness for the prosecution, who has taken an active part in the prosecution or is particularly interested in the result, he should be excluded upon the motion of the adverse party." Syl. Pt. 2, *State v. Beckett*, 172 W. Va. 817, 819, 310 S.E.2d 883, 885 (1983) (quoting Syl. Pt. 2, *State v. Kilpatrick*, 158 W. Va. 289, 210 S.E.2d 480 (1974)).

West Virginia law plainly prohibits a prospective juror who has a close familial relationship with a State witness from sitting on the petit jury upon motion by the adverse party. *See, e.g.*, Syl. Pt. 2, *State v. Beckett*, 172 W. Va. 817, 819, 310 S.E.2d 883, 885 (1983). Implicit in that rule, however, is that the prospective juror is aware of that relationship. This is because the entire

purpose of this rule—as Petitioner recognizes—is to prevent that juror from being biased in favor of a family member's testimony. (Pet'r's Br. at 51-52).

Here, Nelson Bailes had no idea that he had any relation to April O'Brien-Bailes. At the omnibus hearing, when asked whether he was related to April O'Brien-Bailes, Nelson Bailes testified:

> A: That's what they tell me. Like I told you, I've never met the girl. I did not know she was kin to me or nothing else like that.

(A.R. at 1944). Indeed, Nelson Bailes clearly and unequivocally testified that he did not know that he had any relation to April O'Brien-Bailes at the time of the trial. (A.R. at 1946) ("Q: If someone would have told you, 'Nelson, this is April Bailes. She's your great niece,' would you have known that? A: No, sir.").

For these reasons, there is no concern that Nelson Bailes was a biased juror. In the same vein, April O'Brien-Bailes had no idea she had any relation to Nelson Bailes—she did not know him—and, therefore, there can be no concern that April O'Brien-Bailes's testimony was somehow impacted by Nelson Bailes's presence on the petit jury. Petitioner's claims otherwise fail, which is exactly what the circuit court determined below and precisely why this Court should affirm its ruling here.

3. The circuit court correctly concluded that Petitioner's trial and appellate counsel were not ineffective.

Petitioner's third assignment of error is a claim that his trial and appellate counsel were ineffective. (Pet'r's Br. at 56). Despite this, Petitioner argues in his Brief under that heading that the cumulative error of his trial proceedings warrant granting him habeas corpus relief. (Pet'r's Br. at 56). He makes no actual argument in this section that his trial counsel was ineffective and fails to even mention what aspect of appellate counsel's performance he believes was deficient or

prejudiced him in his direct appeal. (*See* Pet'r's Br. at 55-56). Because Petitioner has failed to advance an argument supporting this assignment of error, his assignment of error fails.

This Court has explained on many, many occasions that a Petitioner cannot simply earmark an assignment of error to preserve it for review; instead, to articulate a claim sufficient to merit review on appeal, a Petitioner must articulate his claim and explain why that claim warrants relief. *State, Dep't of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("'[A] skeletal "argument," really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs.'") (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *see also State v. LaRock,* 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."); *State v. Sites*, 241 W. Va. 430, 449, 825 S.E.2d 758, 777 (2019), *cert. denied sub nom. Sites v. W. Virginia*, No. 19-6068, 2019 WL 6257479 (U.S. Nov. 25, 2019) ("We decline to address this inadequately briefed issue on the merits."); *State v. Benny W.*, No. 18-0349, 2019 WL 5301942, at *13 n. 23 (W. Va. Oct. 18, 2019) (Memorandum Decision) (recognizing the same); *State v. Back*, 241 W. Va. 209, 213 n.4, 820 S.E.2d 916, 920 n.4 (2018). Here, Petitioner has failed—entirely—to explain how or why he believes his constitutional right to the effective assistance of trial or appellate counsel was violated. For these reasons, Petitioner's third assignment of error is meritless.

As to his claim of "cumulative error," because none of the errors identified by Petitioner are errors in the first instance, there necessarily cannot be any form of "cumulative" error. *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996) (explaining that where there is no error, "the cumulative error doctrine has no application.").

CONCLUSION

Donnie Ames, the Superintendent of Mount Olive Correctional Complex, requests this Court affirm the Circuit Court of Nicholas County's Order denying Gary Lee Rollins's petition for habeas corpus relief.

Respectfully Submitted,

DONNIE AMES, SUPERINTENDENT,
MOUNT OLIVE CORRECTIONAL
COMPLEX,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0149

GARY LEE ROLLINS,

Petitioner,

v.

On Appeal from the Circuit Court of Webster County (Case No. 15-C-29)

DONNIE AMES, Superintendent, Mount Olive Correctional Complex,

Respondent.

CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing "Response Brief" upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this day, June 30, 2020, addressed as follows:

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