**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**Docket No. 20-0169**

**KEVIN GOODMAN, JR.,**

***Petitioner,***

**v.**

**TOM HARLAN, INTERIM SUPERINTENDENT, HUTTONSVILLE CORRECTIONAL CENTER,**

***Respondent.***



# RESPONDENT'S BRIEF

Appeal from the Circuit Court of Fayette County,
Case No. 17-C-237

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## ASSIGNMENTS OF ERROR

Kevin Goodman, Jr. ("Petitioner"), by counsel, advances two assignments of error, alleging that (1) his trial counsel was ineffective for failing to (A) introduce into evidence an allegedly exculpatory evidence of a tollbooth video and (B) offer two cautionary instructions on how to consider testimony of the alleged accomplices who pled guilty; and (2) the trial court committed reversible error when it ruled Petitioner's rights "were not violated when the State presented false testimony from a witness, who lied at trial and identified Petitioner as one of the perpetrators, told the jury that it could believe the perjured testimony, and the State failed to take appropriate action to correct the admission of this perjured testimony." (Pet'r's Br. at i).

## STATEMENT OF THE CASE

### 1. Indictment and Case Overview.

Petitioner was indicted on May 12, 2015, by a Fayette County grand jury along with four co-defendants, Antwyn Gibbs ("Gibbs"), Radee Hill ("Hill"), Kentrell Goodman ("Kentrell"), and Rashod Wicker ("Wicker"), for first degree robbery, entry of a dwelling, grand larceny, and conspiracy to commit these felonies. *State v. Gibbs*, 238 W. Va. 646, 649–50, 797 S.E.2d 623, 626–27 (2017) (footnotes omitted).[1] Before trial, Kentrell and Wicker pled guilty to first degree robbery and, in exchange, the remaining charges were dismissed. *Id.* (footnotes omitted).

Petitioner, Gibbs, and Hill were jointly tried. *Gibbs*, 238 W. Va. at 650, 797 S.E.2d at 627. Trial lasted three days, and "[t]he State's evidence included the testimony of eleven witnesses and numerous exhibits, including physical evidence of the crimes. Each of the defendants testified in

[1] Petitioner became a suspect in these crimes because Petitioner's mother contacted the police and informed them that she believed her son, Petitioner, was involved in them. (A.R. at 609). Petitioner's mother was worried that Petitioner would eventually end up dead if he continued engaging in criminal activity. (*See* A.R. at 202).

his own defense, denying any culpability in the crimes, and [Petitioner] also presented the testimony of an alibi witness [Courtney Curry]." *Id.* at 650, 797 S.E.2d at 627. Petitioner was convicted of all counts. *Id.* at 646, 797 S.E.2d at 626.

**2. Relevant Trial Testimony.**

**A. The State's Case.**

As this Court previously observed, at trial the State established that:

> between midnight and 1:00 a.m. on January 9, 2015, Hill, Wicker, Kentrell G., [Petitioner and Gibbs] departed South Carolina, traveling to Oak Hill, West Virginia, for the purpose of robbing Andrew Gunn. Kentrell G., who grew up in Oak Hill, was close friends with Gunn and knew that Gunn kept a safe containing approximately $10,000 in his bedroom in the home of his grandparents, Linda and Edward Knight. Kentrell G. conveyed this information to his brother, petitioner Goodman, who responded, 'Let's go get money.' The men traveled to Oak Hill in a car belonging to Kentrell G.'s girlfriend, Lindsey Hess. Wicker, who was the sole person in the group with a valid driver's license, was the driver.

*Gibbs*, 238 W. Va. at 650, 797 S.E.2d at 627 (footnote omitted).[2] Once in Oak Hill, Petitioner, Kentrall, Gibbs and Hill entered the home through an open door. *Id.* at 650, 797 S.E.2d at 627. Linda Knight was in the residence, "sitting on the couch getting ready to do her granddaughter's hair for school," when she saw four men enter her home. *Id.* Two armed men entered her home followed by two more. (A.R. at 228, 233). While Ms. Knight was unable to identify these perpetrators, Gunn, who was present during the robbery, positively identified Petitioner as one of those four individuals. (A.R. at 298; *see also* A.R. at 304, 310).

Consistent with this evidence, Lindsey Hess, Kentrell's girlfriend, testified at trial that she was living with Kentrell in January of 2015, and that Petitioner stayed with them frequently. (A.R. at 328-29). During one of Petitioner's visits, Hess heard Petitioner discussing the robbery plans

[2] To clarify, both Petitioner and Gibbs pursued a direct appeal following their convictions. Those appeals were consolidated. The "*Gibbs*" opinion includes Petitioner's appeal. *State v. Gibbs*, 238 W. Va. 646, 797 S.E.2d 623 (2017).

with Kentrell. (A.R. at 332). Petitioner said, among other things, "I can get guns, I can get people." (A.R. at 353, 356).

During the evening of January 8, 2015, Hess noticed her vehicle, a 2003 Acura, was missing. (A.R. at 343-44). Petitioner and Kentrell were also missing. (A.R. at 335). Around 1:00 a.m. on January 9, 2015, Hess received a text message from Courtney Curry, Petitioner's girlfriend, asking where Petitioner was. (A.R. at 337-38). Given her understanding of what they were up to, Hess informed Curry that Petitioner was in West Virginia. (A.R. at 336-39). Hess saw Petitioner, Kentrell, and her car later that morning, perhaps around noon, along with Wicker, in South Carolina. (A.R. at 340-41).

Kentrell's testimony was entirely consistent with Hess' testimony. Kentrell testified that he believed Gunn kept a large amount of cash in a safe at his home. (A.R. at 618-19). Kentrell told his brother, Petitioner, about it. (A.R. at 619). This conversation occurred a few days before January 9, 2015, (A.R. at 619-20), and they hashed out plans to travel to West Virginia to rob Gunn, and then they carried out that plan. (A.R. at 624-37). Kentrell told the jury that around midnight or one in the morning, Petitioner told Kentrell, "Come on. Let's go. We've got to ride." (A.R. at 624). Because neither of the brothers had a license, Wicker was asked to drive. (A.R. at 624). Gibbs and Hill went because they were staying at the same house as the Goodmans. (A.R. at 624-25). They took Hess's car. (A.R. at 625). With respect to the seating arrangements for the ride from South Carolina to West Virginia, Kentrell's testimony was equivocal:

> I was sitting in the driver's seat—no. I was sitting in the passenger's seat. Rashod was driving, and the other three was in the back, I guess. Well, Kevin had to be behind Rashod, and the other two was just in there.

(A.R. at 625). Once in West Virginia, Petitioner entered the victims' home, helped retrieve the safe, and carried the safe to their car. (*See* A.R. at 635-36).

For the ride back to South Carolina, Kentrell testified that "I got back in the passenger seat, Rashod was still in the driver's seat, ***and I didn't turn around and see how they were sitting in the back seat.***" (A.R. at 637) (emphasis added). He testified that there were "five [people] in this car, but I just don't remember where everybody was sitting at. But there was three in the back seat" (Petitioner, Hill, and Gibbs). (A.R. at 637). Kentrell also testified during trial that Gibbs drove part of the way. (A.R. at 676).

Wicker, Petitioner's cousin, testified similarly at trial. (A.R. at 714-15). He testified that he was not sure where Petitioner was sitting but that Kentrell was sitting in the front passenger seat. (A.R. at 718). Wicker drove. (A.R. at 718-19). When asked again where everyone was seated for the drive from South Carolina to West Virginia, Wicker testified "I can't tell you exactly, but I know Kentrell was in the passenger's seat. And if I'm correct, because [Petitioner] is tall, he sat behind Kentrell—I mean, sat behind me, and the other two defendants was on the right side of him." (A.R. at 720).[3] Both Wicker and Kentrell implicated Petitioner in the robbery. (*See, e.g.*, A.R. at 636, 728).

As discussed *infra*, the defense focused heavily on attacking Kentrell's and Wicker's testimony and frequently highlighted the fact that each man pled guilty under very favorable terms in exchange for their trial testimony implicating Petitioner, Gibbs, and Hill.

**B. The Defense Case.**

After the State rested, Petitioner called Courtney Curry, his girlfriend or former girlfriend, to testify. (A.R. at 789). Curry testified that she and Petitioner were hanging out at a friend's

[3] The copy of the transcript supplied by Petitioner to the Respondent and the Court contains handwritten notations, *see, e.g.*, A.R. at 721, 727, 729, 723, 752, 756, 766, 812. Some of these notations are argumentative or draw conclusions based upon inferences from witness testimony. (A.R. at 721, 735). These are improper, they are not part of the actual trial transcript, it was improper for Petitioner to include this annotated copy of the transcript, and it is something the State certainly did *not* agree to include.

house on the night in question, and, around 12:30 a.m. or 1:00 a.m., Curry left, but Petitioner stayed. (A.R. at 792). When Curry awoke the next morning, Petitioner was not there, so she texted Hess and asked if Hess had seen Petitioner. (A.R. at 793). Hess responded by saying that Petitioner went to West Virginia. (A.R. at 793). Curry went to Chapin, South Carolina, the next morning and saw Petitioner there, so she assumed Hess was lying about Petitioner going to West Virginia. (A.R. at 793). Curry was not sure what time that morning she saw Petitioner in the Chapin area, (A.R. at 793), and she admitted on cross-examination that she told the police that she was not sure whether she and Petitioner were together on the evening in question. (A.R. at 804).

Petitioner also testified at trial. (A.R. at 815). He denied being involved in the robbery. (A.R. at 820). He denied traveling to West Virginia. (A.R. at 821). Instead, Petitioner testified that on January 8, 2015, he was partying at a friend's house with Curry, Kentrell, Rashod, and others. (A.R. at 816). Curry left around 1:00 in the morning while he stayed. (A.R. at 816). Petitioner was "plastered" so he laid down on a couch at the home and slept until the early morning. (A.R. at 817).

**3. Conviction and Sentence.**

Petitioner was convicted of all counts. (*See* A.R. at 1059). He was sentenced to an indeterminate term of not less than one nor more than five years for his conviction of conspiracy to commit a felony; not less than one nor more than 10 years for his conviction of unlawful entry of a dwelling; and a determinate term of 50 years for his conviction of first degree robbery. (A.R. at 1059-60).

**4. Direct Appeal.**

Petitioner pursued a direct appeal, challenging the trial court's ruling on a motion to sever and the length of the sentences imposed. *Gibbs*, 238 W. Va. at 649, 797 S.E.2d at 626. This Court rejected those claims and affirmed Petitioner's convictions and sentences. *Id.*

**5. Habeas Corpus Proceedings.**

Following the denial of his direct appeal, Petitioner instituted habeas corpus proceedings. (*See* A.R. at 1063). He was appointed counsel and claimed his trial counsel was ineffective for failing to introduce a video into evidence and failing to request a "*Bolling*" and "*Flack*" instruction. (*See* A.R. at 1081). Petitioner also alleged that his conviction was based upon perjured testimony and, therefore, was unconstitutional. (*See* A.R. at 1080). Following additional briefing by the parties, the circuit court held an omnibus hearing. (A.R. at 1104-1172). The following is an overview of testimony relevant to the claims presented in this appeal:

**A. Ineffective assistance of counsel.**

Trial counsel testified that he was "absolutely" prepared for trial, that he had ample resources, and that he spent a significant amount of time preparing for trial. (A.R. at 1157-58). He also testified that he visited Petitioner regularly prior to trial and that he sufficiently conferred with Petitioner. (A.R. at 1158). He was asked:

> Q: As part of the discovery in this case, did you receive a copy of some videos of the vehicle which was reported to be carrying the men responsible for this first degree robbery at the Gunn residence?
>
> A: I did . . . I received four CDs that were tollbooth video, two of them as the vehicle was coming north and two of them as the vehicle was going south.

(A.R. at 1130).

Trial counsel testified that he spoke with Petitioner about the CDs before trial. (A.R. at 1132). Trial counsel did not view the CDs as particularly important pieces of evidence. (A.R. at 1132). He reviewed the video evidence and testified regarding the tollbooth videos that:

> it really only shows the car going through. And when – when I looked at that, you know, the windows were kind of glazed you couldn't see into the vehicle. So to me, and how I believe I explained it to Kevin, although I don't recall the exact words, was the only thing the videos do is confirm the times in which the vehicle did go through the tollbooth which did nothing, but corroborate the codefendants['] story.

(A.R. at 1132-33).

During examination by Petitioner's habeas counsel, trial counsel was provided a single frame photograph pulled from one of the tollbooth videos. (A.R. at 1134-35). Upon first seeing the photograph, trial counsel testified that he believed it showed an empty back seat in the car. (A.R. at 1134-35). The photograph that was the subject of this discussion was timestamped 9:17 a.m., meaning this photograph would reflect the way occupants were seated on the way back from the robbery. (A.R. 1154-56). In looking at the photograph, trial counsel testified that it was impossible to see the tags on the vehicle, meaning it was impossible to determine whether the vehicle was a South Carolina-registered vehicle or some other vehicle. (A.R. at 1161).

Trial counsel agreed during the omnibus hearing that this photograph had evidentiary value, inasmuch as it appeared to show an empty back seat, and he would have moved to introduce it at trial to suggest that his client was not involved in the robbery because he was not in the car. (A.R. at 1135). Counsel testified, on cross-examination, that the photograph showed someone in the middle of the back seat or on the back passenger side. (A.R. 1151). He also conceded it might have shown someone sitting on the right hand side, but speculated that it was perhaps a reflection. (A.R. at 1151-52, 1158). Counsel testified that "the other windows [other than the driver's window] are so tinted you can't see in the back seat." (A.R. at 1162).

With respect to trial counsel's alleged ineffectiveness for failing to ask for a cautionary or limiting instruction on the weight to give a co-defendant's testimony, during the habeas corpus hearing, Petitioner's counsel was asked, and answered, the following questions:

> Q: [D]id you ask at the end of the jury charge for such an instruction to be given?
>
> A: No.
>
> Q: Okay. Did either of your co-defendant—co-counsel ask for cautionary instruction regarding State v. Flack or State v. Bolling, point of law with respect to guilty pleas and accomplice testimony?
>
> A: No.
>
> Q: Okay. So the best of your knowledge, none was given by the Court either at the time of their testimony or at the final change?
>
> A: To the specific two cases you cite, no. The Court's general charge has some warnings concerning that in it. And – but not to those specific cases, no.

(A.R. at 1139-40).

Trial counsel also testified that he was aware of the law, (A.R. at 1139), that the defense attorneys met and discussed what instructions should be given before trial ended, and that none of the defendants requested such an instruction. (A.R. at 1159).

**B. Gunn's allegedly perjured testimony.**

Petitioner did not develop or introduce any evidence relating to his contention that Gunn perjured himself at trial. (*See* A.R. at 1223) ("The Court **FINDS** that beyond the existing record in this matter, the Petitioner did not present any evidence to support this claim at the [omnibus evidentiary] hearing."). Petitioner did not call Gunn or the prosecutor who tried the case (or any prosecutor involved in the case or anyone associated with the case) to testify on this issue, and did not attempt to call anyone else to offer any testimony to attack the integrity of Gunn's trial testimony. (*See id.*).

## 6. Habeas court's order denying relief.

The circuit court denied the petition via an incredibly detailed and well-reasoned 42-page order entered on February 13, 2020. (A.R. at 1211-1252).

### A. The circuit court's denial of Petitioner's claim of ineffective assistance of counsel.

With respect to Petitioner's claim that his counsel was ineffective for failing to introduce the photograph (or video) at trial showing an empty back seat in the car, the circuit court found as follows:

> The Court has thoroughly reviewed the subject turnpike toll booth videos that serve as the basis for Petitioner's [ineffective assistance of counsel] claim.
>
> First, while the Petitioner asserts that the video affirmatively shows that he did not participate in the crime he was convicted of and directly contradicts the trial testimony of Rashod Wicker and Kentrell Goodman, the Court **FINDS** that the Petitioner places far more weight and exculpatory value on the video tape than it actually warrants. The Court **FINDS** the video segment that Petitioner specifically draws attention to does not show what the Petitioner would have this Court believe. Having meticulously reviewed each and every segment of the collection of video tapes, the Court **FINDS**, at best, the videos are inconclusive as to the occupancy of the subject vehicle and are of no significant exculpatory value.
>
> Applying the foregoing to the analysis of Petitioner's counsel's effectiveness under the first prong of *Strickland/Miller*, the Court **FINDS** and **CONCLUDES** the Petitioner is unable to establish that his counsel provided constitutionally deficient service by not entering the turnpike tollbooth videos into evidence or further bringing them to the attention of the jury.
>
> Even if the Petitioner could overcome the hurdle presented by the first prong of *Strickland/Miller*, considering the nature and value of the video evidence as observed by this Court, the Court **FINDS** and **CONCLUDES** the Petitioner is unable to establish that had counsel entered the videos into evidence or utilized them to attempt to impeach and discredit the testimony of Rashod Wicker and Kentrell Goodman, there is a reasonable probability that the jury would not have convicted the Petitioner based upon the presentation of this video evidence.

(A.R. at 1241-42) (footnotes omitted). The habeas court explained further:

> The Court very carefully viewed ***every segment of all of the videos, including the segment that the Petitioner asserts is exculpatory evidence directly contradicting co-defendant testimony***. The Petitioner, put quite simply, is seeing what he wants

> to see, or what he would have this Court see, rather than what the video actually depicts.

(A.R. at 1241 n.47) (emphasis in original). The circuit court recognized that the "[t]rial testimony of Rashod Wicker and Kentrell Goodman placed the Petitioner seated in the subject vehicle behind the driver's seat at the time the Petitioner and the co-defendants left South Carolina en route to West Virginia." (A.R. at 1241 n.48) (citing trial transcript). And that:

> Trial testimony and evidence further established: 1) with the exception of one defendant, the remaining were wearing darker colored clothing; 2) the placement of the perpetrators in the vehicle, with the exception of Rashod Wicker, was not affirmatively established at any point following their departure from South Carolina; 3) some or all of the perpetrators exited and reentered the vehicle at least three times during the round trip from South Carolina to West Virginia and back to South Carolina; and 4) the videos of the subject vehicle during the perpetrators' trips from South Carolina to West Virginia were taken during night time hours and during inclement weather. Even with a meticulous, repetitive review of all of the subject videos, the Court, in only two instances, was able to catch vague glimpses of red in the rear of the vehicle, even though, according to trial testimony of Linda Knight and Rashod Wicker, one subject was wearing a red jacket or hoodie.

(A.R. at 1241, n.48) (citing trial transcript). With respect to the tollbooth videos, the court astutely observed that:

> The cameras are clearly positioned for the purpose of capturing images of the driver of a vehicle, and the vehicle itself, rather than the occupants of a vehicle. The difficulty in viewing the occupants of the rear of the vehicle with clarity was due to the camera positioning, window tinting, glare, and other less than optimal viewing conditions. Further, it is clear that dark clothing, posture and positioning of the perpetrators, and the ambient conditions, all further contributed to the video being inconclusive as to the number and identity of the perpetrators occupying the subject vehicle, with the exception of the driver, Rashod Wicker.

(A.R. at 1241, n.48). And:

> Petitioner's habeas counsel painted a convincing picture when questioning Petitioner's trial counsel at the OHC hearing. In the heat of the moment, under direct examination, and with habeas counsel describing what ***he and the Petitioner viewed the still picture marked Petitioner's Exhibit 3 to show***,[4] trial counsel conceded that he should have entered the videos into evidence. The Court, having meticulously reviewed ***all*** of the segments of the videos, both in still frame and at

[4] A single frame shot pulled from the video itself.

> normal speed, including Petitioner's Exhibit 3 and those frames preceding and following it, was not as easily influenced or convinced as trial counsel, and does not agree that the videos were of such exculpatory value that any reasonably proficient counsel would have entered the videos into evidence or that counsel's performance was deficient because trial counsel did not. Moreover, the videos were of evidentiary value to the prosecution as the same was inculpatory evidence that showed co-defendant, Rashod Wicker, operating the subject vehicle and further corroborated the trial testimony of Rashod Wicker, Kentrell Goodman, and Lindsey Hess.

(A.R. at 1242 n.49) (emphasis in original).

As to trial counsel's alleged failure to request a cautionary or limiting instruction on the use of accomplice testimony where the accomplice has entered a guilty plea, the court determined:

> Petitioner asserts that his trial counsel was ineffective because trial counsel did not request a cautionary instruction to be given to the jury when Petitioner co-defendants, Rashod Wicker and Kentrell Goodman, provided uncorroborated testimony against the Petitioner in his underlying criminal trial. Petitioner's claim against his trial counsel is, however, without merit.
>
> This Court found, *supra*,[5] the accomplice/co-defendant testimony of Rashod Wicker and Kentrell Goodman ***was corroborated*** during the underlying trial and therefore no cautionary instruction was warranted. As the underlying alleged constitutional error was determined not to be error at all, the Court **FINDS** and **CONCLUDES** Petitioner cannot now establish that his counsel was constitutionally ineffective under either prong of *Strickland/Miller* for failing to request an instruction that was not warranted.

(A.R. at 1243).

Regarding Petitioner's claim that his counsel was ineffective for failing to request a *Flack* limiting instruction, the habeas court rejected the notion that trial counsel's conduct was deficient, but, for the sake of analysis, also resolved the claim by determining that Petitioner could not satisfy the second prong of the *Strickland/Miller* test. (A.R. at 1246). First and foremost, the court observed that the jury was well aware and fully informed of the fact that Wicker and Goodman

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[5] During his habeas corpus proceedings, Petitioner raised, as a standalone claim, a challenge to the trial court's alleged failure to offer this instruction. (*See* A.R. at 1236). The habeas court denied that claim on the basis that Petitioner's convictions were not based upon the uncorroborated testimony of an accomplice. (A.R. at 1236-38).

entered guilty pleas, as this information was highlighted both by the State and the Defense at trial. (A.R. at 1246). In fact,

> [t]he pleas themselves, and the benefits and incentives for Rashod Wicker and Kentrell Goodman to testify, became the center point of counsels' theory that Rashod Wicker and Kentrell Goodman: 1) were the first to be interviewed and arrested; 2) initially attempted to avoid implicating each other and downplayed their individual involvement; and 3) initially lied to law enforcement about who else was involved.

(A.R. at 1246-47). The court elaborated:

> Based upon trial counsels' opening and closing arguments, trial counsels' cross examination of Rashod Wicker, Kentrell Goodman, Lindsey Hess and Andrew Gunn, as well as trial counsels' direct examination of the Petitioner and co-defendants Antwyn Gibbs, Radee Hill, and Petitioner's alibi witness, Courtney Curry, it is clear to this Court that trial counsel propounded this idea and theory consistently and fervently throughout Petitioner's trial.

(A.R. at 1247). The court similarly observed that "Petitioner's trial counsel essentially laid out this exact theory throughout the course of the trial and at the heart of this theory was the entry of pleas by Rashod Wicker and Kentrell Goodman." (A.R. at 1247 n.57) (citing trial transcript at Vol. I. 121, 122, 230, 234; Vol. II at 119, 122, 212, 213, 268, 270, 274, 276, 277, 278, 282, 284, 285, 286, 287; Vol. III at 38, 41, 42, 44, 45, 107, 108, 111, 113, 115, 116; Vol. III at 243-46). The habeas court also found that:

> Trial counsel propounded a theme of dissention, tenuous/distant relationships, and jealousy among the parties throughout trial . . . Trial counsel further emphasized Rashod Wicker's and Kentrell Goodman's initial implications upon arrest and the benefits being gained from the entry of the pleas, to further develop a motive to support trial counsels' theory that Rashod Wicker and Kentrell Goodman were falsely implicating the Petitioner, Gibbs, and Hill as a means to protect the true perpetrators.

(A.R. at 1247 n.59) (citing multiple portions of the trial transcript). Consistent with this theme, the habeas court observed that:

> [T]he jury heard the testimony of Petitioner and co-defendants, Antwyn Gibbs and Radee Hill, as they took the stand to testify on their own behalf and were

> subject to cross examination. Each defendant attempted to discredit the testimony of Rashod Wicker and Kentrell Goodman. The jury was given the opportunity to compare the testimony of the Petitioner and co-defendants . . . to assess that testimony to evaluate the credibility of these witnesses and to determine the weight to be given to their individual testimony, irrespective of the disclosure of the plea agreement.
>
> Further, the plea agreements, and the benefit grained thereby, was at the heart of defense counsels' argument, and based upon defense counsels' theory of the case and the argument presented to the jury, the Court finds it highly unlikely that there was any confusion by the jury regarding whether Rashod Wicker's and Kentrell Goodman's pleas could be taken as proof of the guilt of the Petitioner, Gibbs, or Hill.
>
> Moreover, the Court's instruction . . . did offer various cautionary warnings that instructed the jury to individually weigh the evidence against each defendant and further directed the jury not to collectively apply the guilt or innocence of any one defendant to all of the defendants.

(A.R. at 1248) (footnotes omitted).

Given these considerations, the court determined Petitioner could not satisfy the second prong of the *Strickland/Miller* test:

> When the Court considers the testimony and evidence presented at Petitioner's trial consistent with trial counsels' theory of the case, and then considers the same in conjunction with the charge and instructions that were given to the jury by the Court, the Court **FINDS** that the Petitioner is unable to show that there was any confusion on the part of the jury as to whether Rashod Wicker's and Kentrell Goodman's plea agreements were to be taken as evidence of the guilt of the Petitioner . . . . Therefore, this Court **FINDS** and **CONCLUDES** that, under the second prong of the *Strickland/Miller* test, the Petitioner has failed to make the requisite showing of prejudice to establish that his trial counsel provided ineffective assistance by not requesting that the Court give a limiting instruction to the jury.

(A.R. at 39).

### B. The circuit court's ruling with respect to Petitioner's claim that his conviction was based upon perjured testimony.

The circuit court found that Petitioner failed to establish Gunn's trial testimony was perjured. (A.R. at 1225). The court observed that Gunn's testimony was "inconsistent and questionable," but further that Gunn testified at trial that he was "untruthful when he initially dealt with the investigating officers." (A.R. at 1225). Relying upon this Court's well-established body

of law, the court ruled that which statement to believe—what Gunn told the police during his interview with them as opposed to Gunn's trial testimony—was a question of credibility for the jury to weigh and consider. (A.R. at 1225) (citing *Flack*, 239 W. Va. at 581, 803 S.E.2d at 551).[6] In the alterative, assuming the testimony was false, the court still rejected Petitioner's claim on the basis that such testimony did not have a material effect on the jury's verdict. (A.R. at 1226).

This appeal followed.

## SUMMARY OF THE ARGUMENT

Petitioner's contention that his trial counsel was ineffective is meritless. Counsel was not deficient for failing to introduce video evidence of an empty backseat because there is no such evidence. Even assuming Petitioner is correct, the evidence does not possess the exculpatory value Petitioner contends it does. For these reasons, Petitioner cannot establish either prong of the *Strickland/Miller* standard. Petitioner's claim that his counsel was ineffective for failing to request two jury instructions is similarly without merit. Petitioner was not entitled to a *Bolling* instruction (meaning counsel was not deficient for failing to ask that one be given and Petitioner was not prejudiced because the instruction would have been refused) and the *Flack* instruction was both unnecessary and immaterial (meaning counsel was not deficient and Petitioner suffered no prejudice).

Petitioner's final assignment of error—that his conviction is based upon perjured testimony—is equally unavailing. Witnesses commonly offer inconsistent or even contradictory statements. Andrew Gunn certainly did. But which statement to believe and how much weight to

[6] *See also id.* at 1225 ("Based upon the foregoing, the Court **FINDS** that the Petitioner has failed to make the requisite showing that Mr. Gunn's trial testimony was false. As such, this Court **FINDS** and **CONCLUDES** that the Petitioner is unable to establish either that the prosecutor presented false testimony or that the prosecutor knew or should have known the testimony was false.").

give Gunn's testimony is a core function for the jury, and Petitioner did not even attempt to develop evidence during the habeas proceeding below to prop up his claim that Gunn committed perjury. For these reasons, Petitioner's claims fail.

## 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 right to the effective assistance of counsel was not violated.

Petitioner's first assignment of error challenges two aspects of his trial counsel's performance. First, he contends that his trial counsel was ineffective for "fail[ing] to introduce into evidence the exculpatory video showing that Petitioner was not in the vehicle used in the crime, which video corroborated the testimony of Petitioner and his alibi witness and contradicted the State's main witness." (Pet'r's Br. at 22). Second, Petitioner alleges his counsel was ineffective for failing to request that the trial court give two instructions to the jury regarding how to consider the testimony of his accomplices. (Pet'r's Br. at 22). Each claim is meritless and will be addressed in turn.

### A. Petitioner's claim regarding the video evidence fails.

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

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

> A [criminal] defendant seeking to rebut th[e] strong presumption of [counsel's] effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a 'wide range.' The test of ineffectiveness has little or nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

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

A petitioner claiming ineffective assistance must identify the specific "acts or omissions" of his counsel believed to be "outside the broad range of professionally competent assistance." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128; *see also State ex rel. Myers v. Painter*, 213 W. Va. 32, 35, 576 S.E.2d 277, 280 (2002) ("The first prong of [the *Strickland*] test requires that a petitioner identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment") (internal quotation marks omitted). The reviewing court is then tasked with determining, "in light of all the circumstances" but without "engaging in hindsight," if that conduct was so objectively unreasonable as to be constitutionally inadequate. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128. Strategic choices and tactical decisions, with very limited exception, fall outside the scope of this inquiry and cannot form the basis of an ineffective assistance claim. *SER Daniel*, 195 W. Va. at 328, 465 S.E.2d at 430.

Identifying a mere mistake by defense counsel is not enough. *See, e.g., Edwards v. United States*, 256 F.2d 707, 708 (D.C. Cir. 1958) ("Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not . . . amount to ineffective assistance of counsel, unless taken as a whole the trial was a mockery of justice."). As the *Miller* court noted, "with [the] luxury of time and the opportunity to focus resources on specific facts of a made record, [habeas counsel] inevitably will identify shortcomings in the performance of prior counsel;" however, merely identifying some mundane mistake does not establish ineffectiveness because "perfection is not the standard for ineffective assistance of counsel." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128. Only if an identified error is "so serious that [the defense attorney] was not functioning as the

'counsel' guaranteed by the Sixth Amendment" has the first prong of the *Strickland/Miller* test been satisfied. *Strickland*, 466 U.S. at 687.

Assuming that defense counsel's conduct is deemed to have been objectively unreasonable (thereby satisfying the first prong of *Strickland/Miller*), such conduct does not constitute ineffective assistance unless it can also be established that the conduct was so impactful that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. As the Supreme Court explained in *Strickland*, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Thus, satisfying the "prejudice prong" of *Strickland/Miller* requires a showing that counsel's deficient performance was so serious and detrimental that it "adversely [a]ffected the outcome in a given case[.]" *SER Myers*, 213 W. Va. at 36, 576 S.E.2d at 281. There is no precise formula that can be used to determine if a given instance of constitutionally-inadequate conduct so significantly degraded the reliability of the trial (or other proceeding) such that the prejudice prong is satisfied. *See SER Daniel*, 195 W. Va. at 325, 465 S.E.2d at 427 ("Assessments of prejudice are necessarily fact-intensive determinations peculiar to the circumstances of each case."). There is no question, however, that the burden of demonstrating prejudice lies with the petitioner claiming ineffective assistance. *State v. Hatfield*, 169 W. Va. 191, 209, 286 S.E.2d 402, 413 (1982) ("[T]he burden is on the defendant to prove ineffective assistance"); *see also Strickland*, 466 U.S. at 693; *SER Daniel*, 195 W. Va. at 319, 465 S.E.2d at 421.

According to Petitioner, his trial counsel was ineffective for failing to move for the admission of video evidence showing that the driver's side backseat of the "vehicle used in the

crime" was empty. (Pet'r's Br. at 22). Petitioner believes this evidence would have established he was not in the car, meaning he did not participate in the crimes. (*See id.*). But Petitioner's argument is predicated upon two facts that he has not established: *first*, the video does not show an empty backseat behind the driver; and, *second*, even if it did show an empty backseat behind the driver, it does not prove what Petitioner claims it proves. Moreover, Petitioner has failed to demonstrate that the circuit court abused its discretion when it engaged in its fact-finding process and determined that the video evidence did not show what Petitioner claims it showed.

*First*, contrary to Petitioner's claims, the tollbooth video does not clearly show an empty back seat. If nothing else, this is demonstrated by the sheer fact that no one at the omnibus hearing could agree on whether or not the still frame in question (or the video, for that matter) showed an empty back seat. (A.R. at 1151-52, 1158, 1162; *see also* A.R. at 1241 n.47). As trial counsel explained during the habeas hearing, the windows of the car were heavily tinted. (A.R. at 1162). And it is not even clear whether the vehicle in question is even the same Acura as that allegedly driven by Wicker on the day in question. (A.R. at 1161).

Given this dispute, the circuit court meticulously reviewed the subject evidence—it viewed the video frame-by-frame and in normal speed—and, given its own review coupled with the testimony adduced at the omnibus hearing, determined that the video failed to show an empty driver's-side backseat. (A.R. at 1241-42). The court ruled that "the video segment that Petitioner specifically draws attention to does not show what the Petitioner would have this Court believe," and, "[a]t best, the videos are inconclusive as to the occupancy of the subject vehicle." (A.R. at 1241-42). Because of this, the court ruled the video was not exculpatory and, therefore, trial counsel was not deficient for failing to seek its admission at trial. (A.R. at 1241-42). While

Petitioner continues to insist otherwise, he has failed to establish any error in the circuit court's ruling and his claim fails on that basis alone.

Indeed, as this Court has observed on many occasions, 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 the video failed to establish that Petitioner was *not* in the car is fully supported by the record. (*See* A.R. at 1241-42). Because that factual determination is not "clearly wrong" and because it dispositively resolves Petitioner's claims, Petitioner is not entitled to relief.

*Second*, even if the video showed an empty seat behind the driver, Petitioner still has not carried his burden of proving the circuit court's finding was clearly erroneous. While Petitioner admits in the testimony that "one person can be seen seated in the back of this Acura," (Pet'r's Br. at 27), he nonetheless claims it could not have been Petitioner because he allegedly sat behind the driver's seat. (Pet'r's Br. at 27). That claim misrepresents the record. In fact, specifically regarding the return ride from West Virginia to South Carolina, Kentrell testified that "I got back in the passenger seat, Rashod was still in the driver's seat, ***and I didn't turn around and see how***

***they were sitting in the back seat.***" (A.R. at 637) (emphasis added). Kentrell testified further that there were "five [people] in this car, but I just don't remember where everybody was sitting at. But there was three in the back seat" (Petitioner, Hill and Gibbs). (A.R. at 637). Wicker similarly testified that he did not know who was sitting where. (A.R. at 720). The same is true with respect to the drive from South Carolina to West Virginia, both Kentrell and Wicker offered equivocal testimony at trial of who was sitting where. (A.R. at 634, 718).

Thus, Petitioner's representation that the evidence established that Petitioner was definitively sitting behind the driver's seat is disingenuous, at best, and constitutes a gross, if not blatant, mischaracterization of the evidence adduced at trial. The circuit court similarly rejected Petitioner's claim that the trial testimony established he was sitting behind the driver's seat. (A.R. at 1241 & n.47, n.48)—a finding that Petitioner does not even seem to contest in his Brief.[7]

Given that the video is not exculpatory, trial counsel's performance in not attempting to admit the video into evidence was not deficient, meaning Petitioner cannot satisfy even the first prong of the conjunctive *Strickland/Miller* test. His claims otherwise fail.

### B. Counsel's alleged failure to request two instructions did not violate Petitioner's right to the effective assistance of counsel.

Petitioner contends that his counsel was ineffective for failing to request the trial court give two instructions, the first of which is based upon the following point of law:

> Conviction for a crime may be had upon the uncorroborated testimony of an accomplice; but in such case the testimony must be received with caution and the jury should, upon request, be so instructed.

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[7] Moreover, Petitioner's contention that he "was not in the vehicle used in the crime" misstates the law: not a single one of the crimes for which Petitioner was convicted requires the use of a car. ***No*** car was used in the crime. (*Contra* Pet'r's Br. at 22) ("Petitioner was not in the vehicle used in the crime").

Syl. Pt. 2, *State v. Bolling*, 162 W. Va. 103, 246 S.E.2d 631 (1978) (quoting Syl. Pt. 1, in part, *State v. Humphreys*, 128 W.Va. 370, 36 S.E.2d 469 (1945)).

Petitioner argues that the trial court "would have been required to give" this instruction had counsel requested it be given. (Pet'r's Br. at 31). Syllabus Point 2 of *Bolling* quite plainly provides that a trial court must give this instruction upon request of the defendant where the State's case is based on the "***uncorroborated*** testimony of an accomplice." Syl. Pt. 2, *Bolling*, 162 W. Va. 103, 246 S.E.2d 631. Petitioner's argument is legally flawed because the State's case against Petitioner was not based upon the uncorroborated testimony of an accomplice. In fact, it was based upon the ***corroborated*** statements of multiple accomplices, one of the victims, and a substantial amount of circumstantial evidence. (*See* A.R. at 1236-38, 1243). Accordingly, trial counsel could not have been objectively deficient because Petitioner was not entitled to have this instruction given. Syl. Pt. 2, *State v. Bolling*, 162 W. Va. 103, 246 S.E.2d 631; *see also* Syl. Pt. 3, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980) ("Where the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction. This rule applies even though the corroborative evidence falls short of constituting independent evidence which supports the alleged ultimate fact that the accused committed the offense charged."). Below, the circuit court rejected Petitioner's claim on this very basis and this Court should, too. (A.R. at 1243).

For the same reasons, Petitioner suffered no prejudice. He was not entitled to the instruction. Therefore, there is no probability that the outcome would have been different because the instruction would not have been given.

Next, Petitioner argues that his counsel was ineffective for failing to request an instruction, derived from the following point of law:

> An accomplice who has entered a plea of guilty to the same crime charged against the defendant may testify as a witness on behalf of the State. However, if the jury learns of the accomplice's guilty plea, then upon the motion of the defendant, the trial court must instruct the jury that the accomplice's plea of guilty cannot be considered as proving the guilt of the defendant, and may only be considered for proper evidentiary purposes such as to impeach trial testimony or to reflect on a witness's credibility. The failure of the trial court, upon request, to give such a limiting jury instruction is reversible error. To the extent that Syllabus Point 3 of *State v. Caudill,* 170 W. Va. 74, 289 S.E.2d 748 (1982) is inconsistent, it is hereby modified.

Syl., *State v. Flack*, 232 W. Va. 708, 753 S.E.2d 761, 763 (2013).

The circuit court rejected Petitioner's argument on the basis that counsel's performance (not requesting this instruction) was reasonable and that the lack of this instruction did not prejudice Petitioner's case. (A.R. at 1246, 1249). This Court should affirm for either or both of these reasons.

*First*, counsel's performance was not deficient. Counsel, along with two veteran and highly experienced defense attorneys who represented the other two defendants, tried this case. (A.R. at 1246). They met in advance and discussed which instructions they wanted the trial court to give to the jury. (A.R. at 1159). Trial counsel testified that he was aware of the subject instruction, but that he did not request it be given. (A.R. at 1139). Neither did either of the other veteran defense attorneys. (*See* A.R. at 1246). Counsel also testified that he did not want the jury to be over-saturated with instructions and was aware that the jury was instructed on their ability to assess the credibility of each witness. (*See* A.R. at 1246 n.54). Given this confluence of factors, the circuit court rejected the notion that counsel's performance was objectively deficient. (A.R. at 1246).

That was a reasonable decision in light of the testimony from trial counsel and a review of the trial record, and this Court should affirm the court's ruling on that basis. Because *Strickland/Miller* is a conjunctive, two-pronged test, Petitioner's failure to satisfy the first prong is fatal to his claim. Syl. Pt. 5, *State ex rel. Daniel*, 195 W. Va. 314, 465 S.E.2d 416 ("In deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland* . . . and *Miller* . . . , but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test.").

*Second*, even assuming counsel's performance was objectively deficient, there was no resulting prejudice. The purpose of the *Flack* instruction is to inform the jury that they should assess the witnesses' credibility and that the accomplice's guilt cannot be considered for purposes of proving the defendant's guilt. Syl, *Flack*, 232 W. Va. 708, 753 S.E.2d 761. In fact, the jury was instructed on assessing witness credibility, and the very heart of Petitioner's defense at trial was that Kentrell and Wicker got sweetheart plea deals and were falsely implicating Petitioner in the crime. (*See* A.R. at 1246-49). This theory was advanced by trial counsel during opening, throughout the cross-examination of the witnesses, during Petitioner's own testimony, and was the primary, if not sole, focus of closing arguments. (*See id.*). The jury was expressly informed during trial that Kentrell and Wicker pled guilty, the jury was informed of the terms of those plea agreements, and their credibility was called heavily into question (especially given that they gave multiple conflicting statements to law enforcement). Thus, the jury had this evidence before it and was instructed on its ability to weigh and assess credibility. For these reasons, Petitioner was not prejudiced by counsel's failure to request the *Flack* instruction.

Moreover, in *Flack*, this Court rejected Brandon Flack's claim on appeal that the trial court's failure to give such an instruction was reversible error. *Flack*, 232 W. Va. at 714, 753

S.E.2d at 767. There, Flack's accomplice, Jasman Montgomery, pled guilty and testified at Flack's trial, implicating Flack in a murder. On direct appeal, this Court refused to apply the plain error doctrine to review whether the trial court's failure to give such an instruction constituted reversible error (much like here, Flack's counsel did not request such an instruction). Notably, in finding no plain error, this Court observed

> We also cannot say that plain error doctrine has been triggered. There was no evidence that the prosecutor sought to infer the defendant's guilt by virtue of Montgomery's guilty plea, nor was there evidence of any aggravating circumstances surrounding Montgomery's testimony.

*Id.* at 714, 753 S.E.2d at 767. In the case at hand, there is nothing in the record to support any notion that the prosecutor sought to infer Petitioner's guilt by virtue of Kentrell's or Wicker's guilty pleas, nor any evidence of "aggravating circumstances" surrounding the testimony of these two individuals. To the contrary, both individuals were cross-examined extensively regarding their guilty pleas and inconsistent statements in order to undermine each man's testimony implicating Petitioner in the crimes. (*See* A.R. at 1247 n.59; 1249).

Finally, at trial, Petitioner advanced an alibi defense. His defense at trial was *not* that he was less culpable than his co-defendants or accomplices, but that he was not an accomplice in the first instance. This narrative, coupled with trial counsel's aggressive advocacy throughout trial advancing the alibi defense and calling into question Kentrell's and Wicker's credibility at every turn, means there could not have been any confusion that the jury would have believed Petitioner was guilty simply because Kentrell and Wicker pled guilty—which is a key purpose of the *Flack* instruction. For these reasons, Petitioner cannot establish that "but/for" counsel's failure to request this instruction be given, the jury would not have convicted him. The jury was expressly informed of each and every aspect of this instruction throughout the course of trial. Petitioner's claims otherwise fail.

## 2. Petitioner's conviction is not based upon perjured testimony.

Petitioner contends that the State obtained his conviction through the use of false (perjured) testimony given by Andrew Gunn. (Pet'r's Br. at 31). To establish that a petitioner's conviction rests upon perjured testimony suborned by the State, a petitioner must establish that "(1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 376, 701 S.E.2d 97, 98 (2009); *see also* Syl. Pt. 2, *Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 190 W. Va. 321, 322, 438 S.E.2d 501, 502 (1993) ("Although it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict."). Petitioner's claim fails because he cannot establish either the first or second prong of the test, much less all three.

"Under the first prong of the *McBride* test, the Petitioner must show that the prosecutor actually presented false and perjured testimony." *Christopher J. v. Ames*, 241 W. Va. 822, 833, 828 S.E.2d 884, 895 (2019). Petitioner has not met that burden. He recognizes that Gunn's testimony was inconsistent compared to previous statements he gave to the police, but uses that fact to leap to the conclusion that Gunn committed perjury. (Pet'r's Br. at 32). The habeas court rejected the notion that any conflict in Gunn's testimony amounted to perjury; instead, the court found that the value or weight to give Gunn's inconsistent statements was ultimate a credibility issue for the jury, and there was no evidence to support a claim that Gunn perjured himself during trial.[8] (A.R. at 1225). The court observed that Gunn's testimony was "inconsistent and

[8] Indeed, when questioned by Petitioner's trial counsel about his conflicting statements, Gunn insisted that his trial testimony was truthful and that his pre-trial statement to the police was not accurate. (A.R. at 1225).

questionable," but further that Gunn testified at trial that he was "untruthful when he initially dealt with the investigating officers," and that his trial testimony was truthful. (A.R. at 1225). Relying upon this Court's well-established body of law, the circuit court ruled that which statement to believe—what Gunn told the police during his interview with them as opposed to Gunn's trial testimony—was a question of credibility for the jury to weigh and consider. (A.R. at 1225) (citing *Flack*, 239 W. Va. at 581, 803 S.E.2d at 551).[9] In the alterative, assuming the testimony was false, the court still rejected Petitioner's claim on the basis that such testimony did not have a material effect on the jury's verdict. (A.R. at 1226). This finding was correct—any conflict between Gunn's pretrial statements and his trial statements go to the credibility or relative weight of his testimony. Simply because the statements are conflicting does not mean Gunn engaged in perjury when he testified at trial. Because petitioner has failed to satisfy even the first prong of the *McBride* test, his claim fails. *Christopher*, 241 W. Va. at 834, 828 S.E.2d at 896 ("[W]e need not address the remaining two prongs of the *McBride* test.").

For the same reasons, the existence of these conflicting statements does not establish that the State knowingly used false evidence during its case. As this Court has observed on a number of occasions, "[i]nconsistencies between a witness's trial testimony and their previous statements, or between the testimonies of multiple witnesses, do not necessarily demonstrate falsity." *Flack v. Ballard*, 239 W. Va. 566, 581–82, 803 S.E.2d 536, 551–52 (2017). *Accord United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987) ("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony."); *see also McMahon*

[9] *See also id.* at 1225 ("Based upon the foregoing, the Court **FINDS** that the Petitioner has failed to make the requisite showing that Mr. Gunn's trial testimony was false. As such, this Court **FINDS** and **CONCLUDES** that the Petitioner is unable to establish either that the prosecutor presented false testimony or that the prosecutor knew or should have known the testimony was false.").

*v. City of Middletown*, 2015 WL 1427916, at *5 (Conn. Super. Ct. Mar. 5, 2015) ("We must bear in mind that inconsistencies and contradictions within a witness's testimony or between that testimony and other evidence do not necessarily mean that the witness is lying. Failures of memory may be the reason for some inconsistencies and contradictions; also, it is not uncommon for two honest people to witness the same event, yet perceive or recall things differently."). Instead, "[i]t is 'the role of the jury to weigh the evidence and make credibility assessments after it observed the witnesses and heard their testimony." *Id.* at 581-82, 803 S.E.2d at 551-52 (quoting *State ex rel. Franklin*, 226 W. Va. at 379, 701 S.E.2d at 101 (further explaining that "'[t]he jury made its determination, and this Court will not second guess it simply because we may have assessed the credibility of the witnesses differently.'")); *see also State v. Rivera*, 109 P.3d 83, 88 (Ariz. 2005) ("Absent a showing that the prosecution was aware of any false testimony, the credibility of witnesses is for the jury to determine."); Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) ("Credibility determinations are for a jury and not an appellate court."). For these reasons, Petitioner has also failed to satisfy the second prong of the *McBride* test.

Finally, inasmuch as the Petitioner complains that the prosecutor's closing argument regarding Gunn's testimony was improper, that claim easily fails.[10] The prosecutor told the jury it could accept or reject Gunn's trial testimony, and as the habeas court below recognized, this statement was proper and fully in line with West Virginia law (law which is set forth above). (A.R. at 1225). Petitioner's contention that the prosecutor needed to "do more" is predicated upon his continued, unestablished assertion that Gunn perjured himself at trial. As outlined above, that simply is not the case.

[10] Petitioner did not raise below, nor has he advanced a claim in this proceeding, that the prosecutor engaged in misconduct. *See* Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

All told, Petitioner's accusations fail to establish that Gunn committed perjury, much less that the State knew or should have known the testimony was false.[11] Gunn's conflicting testimony was a matter for the jury's assessment of his credibility, but it does not support a claim that Petitioner's conviction is based upon false testimony. *See State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) ("Credibility determinations are for a jury and not an appellate court.") (quoting Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163). Simply put, Petitioner has failed to establish that any of this challenged testimony was false or that the State knew or should have known that it was false or that the verdict is based upon false evidence. Consequently, his claims fail. *See generally Flack*, 239 W. Va. at 582, 803 S.E.2d at 552 (rejecting a claim, in part, on the basis that "there [is] no evidence in the record which supports the claims that the prosecutor knew or should have known that evidence was false.").

## CONCLUSION

The Circuit Court of Fayette County's February 13, 2020 Order should be affirmed and Petitioner's requested relief denied in full.

Respectfully Submitted,

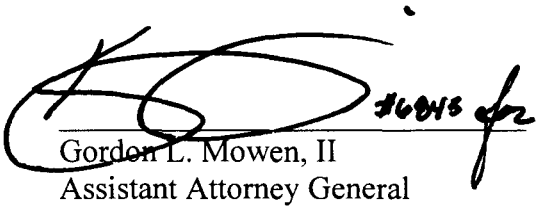
TOM HARLAN, Interim Superintendent,
HUTTONSVILLE CORRECTIONAL
CENTER

RESPONDENT

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

[11] In fact, Petitioner made no attempt to develop this claim during his post-conviction proceeding. (A.R. at 1223). He called no witnesses and introduced no evidence. (*Id.*).



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 20-0169**

**KEVIN GOODMAN, JR.,**

***Petitioner,***

**v.**

**TOM HARLAN, INTERIM SUPERINTENDENT, HUTTONSVILLE CORRECTIONAL CENTER,**

***Respondent.***

## CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, counsel for the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, July 27, 2020, addressed as follows:

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