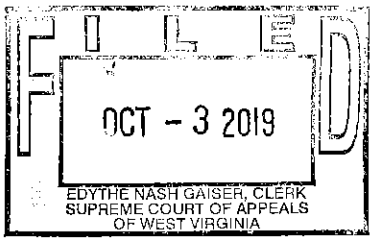

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

DOCKET NUMBER 19-0612

CLAYTON E. ROGERS,

Petitioner,

v.

DONNIE AMES, SUPERINTENDENT
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

PETITION FOR APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

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I.

ASSIGNMENT OF ERROR

1. The trial court erred in improperly instructing the jury on the element of "malice;"
2. The trial court erred in improperly instructing the jury on "voluntary manslaughter;"
3. The Petitioner was prejudiced by the plain error of the trial court allowing the jury venire to overhear confidential bench questioning of individual jurors;
4. The Petitioner received ineffective assistance of counsel due to the failure of counsel to object to improper jury instructions; the failure to challenge the array or to request a curative instruction or a mistrial following the overheard jury bench conferences; the failure to object, challenge for cause, or to strike peremptorily, a seated juror whose husband had been murdered and who was unhappy with the sentence the killer received; the failure to properly cross-examine a witness, Robert Wilcox; the failure to cross-examine a witness, Keith Hubbard, on impeachable felonies; the withdrawal of the request for a trial bifurcated into the guilt-innocence phase and mercy-no-mercy phase, all depriving the Petitioner of numerous Constitutional safeguards and protections;
5. The Petitioner received constitutionally ineffective assistance of appellate counsel due counsel's failure to raise and argue improper jury instructions and failure to argue the trial court's plain error of infecting the jury venire with the overheard bench conferences;
6. The trial court erred in denying the Petitioner's motion to suppress;
7. The trial court erred in denying the trial counsel's motion to withdraw;

8. The trial court erred in denying a new trial based upon the improper comments by the Prosecutor;
9. There was insufficient evidence to convict the Petitioner of First-Degree Murder;
10. The cumulative effect of all individual errors deprived the Petitioner of his Due Process right to a fair trial.

II.

STATEMENT OF THE CASE

In September 2010, the Petitioner, Clayton Rogers (hereinafter, "the Petitioner") was indicted for the alleged murder of Laura Amos ("Amos") by a Kanawha County Grand Jury. Appendix Record (hereinafter, "AR") 287. Following the unitary trial, on February 25, 2011, the Petitioner was found guilty of First-Degree Murder with no recommendation of mercy. AR 1797-1798. He was sentenced accordingly and, upon appeal, this Court affirmed the Petitioner's conviction and sentence. AR 1956. His Petition for a Writ of Habeas Corpus followed.

In the post-conviction Petition in the court below the Petitioner assigned several habeas corpus grounds. They are now the grounds which are the subject of this appeal. The Petitioner claimed ineffective assistance of his trial and appellate counsel, instructional errors at trial in the form of improper instructions on "malice" and "voluntary manslaughter," constitutional error in denying the Petitioner's suppression motion and the trial counsel's motion to withdraw, insufficiency of evidence, improper comments by the prosecutor, and ultimately, cumulative error. AR 92. The Circuit

Court, in its opinion of June 10, 2019, rejected the Petitioner's arguments *seriatim* and denied the issuance of the Great Writ. AR 203.

Factually, the evidence adduced in the court below revealed that on August 28, 2010, the Petitioner, his girlfriend Amos and Keith Hubbard ("Hubbard") were all drinking under a bridge in St. Albans, West Virginia. AR 1381. The Petitioner and Amos got into an argument because another man, one Greg Lacy ("Lacy"), declared love for Amos and proposed marriage to her. The next day, starting at noon, the Petitioner, Hubbard and one Larry Means ("Means") were drinking together in an abandoned St. Albans house. Amos joined them there, drinking in celebration of the Petitioner's birthday. Lacy came by to deny making any advances towards Amos. AR 1388-1391.

Soon thereafter, the Petitioner and Amos walked around the corner of the abandoned house and Hubbard and Means soon heard Amos yell Hubbard's name three times. When one Rusty Martin ("Martin") came by the house looking for a place to rent, Hubbard suggested checking out the abandoned house. When Hubbard and Martin entered the home, they saw Amos lying dead on the floor in a pool of blood. Amos had been stabbed twice in the neck. AR 1392.

The Petitioner was arrested the next day. While being transported to the Kanawha County Sheriff's Office, the Petitioner was advised of the Miranda (v. Arizona, 384 U.S. 436 (1966)) rights by Captain Scurlock. At the police station the Petitioner signed his Miranda warning waiver of rights before he was presented to a Kanawha County Magistrate and agreed to make a statement to law enforcement officers. The Petitioner admitted to cutting Amos' throat and explained where he discarded the knives. Only then was the Petitioner advised of his prompt presentment rights. However, the Petitioner was

first taken to the place where he claimed to have discarded the knives. The latter were never found, and only then was the Petitioner taken before a Magistrate who came on duty at 8:00 p.m., AR 911-926, 936-945, even though the Petitioner's interview concluded at approximately 4:50 p.m. AR 940, 948.

Subsequently, the Petitioner was indicted by a Kanawha County grand jury for murder. AR 287. His counsel withdrew the original request for a bifurcated trial. The Petitioner also moved to suppress his statement. This motion was denied. The Petitioner's counsel moved to withdraw citing a conflict of interest. This motion was also denied.

The Petitioner's unitary trial commenced on February 22, 2011, and ended on February 25, 2011. The jury convicted the Petitioner of First-Degree Murder and did not recommend mercy. AR 1797-1798. The Circuit Court sentenced the Petitioner accordingly, AR 258, 1803-1825, and this Court affirmed the Petitioner's conviction in State v. Rogers, 231 W.Va. 205, 744 S.E.2d 315 (2013). AR 1956-1986. The Petitioner's post-conviction Petition for Writ of Habeas Corpus was denied and he is now seeking review of that denial.

III.

SUMMARY OF ARGUMENT

The Petitioner contends that the trial court erred in improperly instructing the jury on the element of "malice" in the First-Degree Murder as well as the definition of "voluntary manslaughter." The Petitioner further argues that an error of constitutional dimensions ensued when the jury venire overheard exchanges between the trial court and the selected

jurors during the individual voir dire, said exchanges being unduly prejudicial to the Petitioner's cause. The latter received ineffective assistance of trial and appellate counsel at various stages of the pre-trial, trial, and appellate proceedings, ranging from erroneous withdrawal of the motion for a bifurcated trial to the failure to object to the jury composition, to the ineffective cross-examination of witnesses, and to the failure of the appellate counsel to address the trial errors. It is also the Petitioner's contention that the trial court's denial of the motion to suppress and motion of the trial counsel to withdraw constituted reversible errors. The Petitioner argues that Prosecutor's improper comments, aimed at inflaming the jury's collective passion against the Petitioner, deprived the latter of his Due Process rights to a fair trial. Finally, the Petitioner contends that there was insufficient evidence to convict him of First-Degree Murder and the cumulative effect of all individual errors deprived him of his constitutionally-guaranteed Due Process rights to a fair trial.

IV.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner believes that an oral argument is necessary under Rule 19 of the West Virginia Rules of Appellate Procedure to address the issues of ineffective assistance of counsel, especially the dichotomy of the unitary trial versus bifurcated murder trial, denial of the motion to suppress upon prompt presentment grounds, and the cumulative error ensuing from the compilation of individual pre-trial, trial, and appellate errors.

V.

ARGUMENT

(1)

"Malice" is one of the essential elements of First-Degree Murder. State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999). Here, the trial court omitted the word "only" from the instruction meaningfully altering the entire instruction in the process. While "ill will" as a predicate for "malice" must not only be directed at the victim, but must also "denote an action flowing from any wicked and corrupt motive," the instruction offered in the present case absolved the prosecution from directing the "ill will" at the victim. The Petitioner argues that such a definition of "malice," as given, to be plainly erroneous, and it cannot be said beyond a reasonable doubt that the unconstitutional instruction in this case could not have contributed to the Petitioner's conviction.

In the present case, in charging the jury regarding "malice," the trial court stated as follows: "... Malice is not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from any wicked and corrupt motive, done with an evil purpose and wrongful intention where the act has been attended with circumstances showing such a reckless disregard for human life as to necessarily include a formed design against the life of another...." AR 1752.

As this Court emphasized, "(a)n instruction in a first degree case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous." Syllabus Point, State v. Jenkins, 191 W. Va. 87, 443 S.E.2d 244 (1994). And in State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978), this Court stressed that "the source of said malice is not only confined to a particular ill will to the deceased...."

Id., 161 W.Va. at 524, 244 S.E.2d at 223-224 (emphasis supplied). Therefore, it appears that in West Virginia, "ill will," as a precursor to "malice," must be directed at the potential victim, rather than exist in the vacuum.

It is possible that the trial court unintentionally omitted the word "only" from the instruction offered to the jury. Nevertheless, the entire instruction was meaningfully altered. While, in reality, "ill will," as a predicate for "malice" must not only be directed at the victim, but also must "denote an action flowing from any wicked and corrupt motive," the instruction offered in the present case absolved the prosecution from directing the "ill will" (again as a predicate for "malice") at the victim. For that matter, under the trial court's phraseology, "malice" may be directed at anyone and/or may comprise a variety of shades of human feelings, since it is not "confined to ill will." Such a definition of "malice" is plainly erroneous as a matter of law and requires a reversal of the Petitioner's conviction. It is particularly true since it cannot be said beyond a reasonable doubt that the unconstitutional instruction in this case could not have contributed to the verdict of First-Degree Murder without a recommendation of mercy. This plain error which seriously affected the Petitioner's right to a trial by jury that was properly instructed on the elements of the offense. It also violated his right to due process to have the jury consider the correct elements of the offense. United States v. Olano, 507 U.S. 725 (1993).

(2)

The Petitioner presses that the Voluntary Manslaughter instruction was erroneous. By adding the "sudden excitement" and the presence of "heat of passion" the trial court

compelled the jury to believe it must find these two additional elements to render a verdict of voluntary manslaughter. Had the jury been properly instructed, the jury may have found an absence of malice alone sufficient for the acquittal of the Petitioner.

In Syllabus Point 3, State v. McGuire, 200 W.Va. 823, 490 S.E.2d 912 (1997), this Court noted: "Gross provocation and heat of passion are not essential elements of voluntary manslaughter, and, therefore, they need not be proven be evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter." Id., 200 W.Va. at 825, 490 S.E.2d at 914. However, in the case at bar, the trial court instructed that jury that "(t)he essential elements of "voluntary manslaughter" are that Clayton Rogers, a/k/a Geno, in Kanawha County, West Virginia, on or about the 29th day of August, 2010, did intentionally and unlawfully, without malice, deliberation or premeditation but under sudden excitement and heat of passion killed Laura Amos. It is the element of malice which forms the critical distinction between murder and voluntary manslaughter." AR 1753.

By so instructing the jury, the Circuit Court added two elements to voluntary manslaughter: the presence of "sudden excitement" and the presence of "heat of passion." The instructed compelled the jury to believe that it must find these two additional elements to arrive at a verdict of voluntary manslaughter. This placed an additional and improper burden upon the jury which should have been instructed that it is only intent without malice that is the defining element of voluntary manslaughter. Had the jury been properly instructed, the jury may have found an absence of malice alone, and acquitted the Petitioner of First-Degree Murder or Second-Degree murder. Such an improper definition of voluntary manslaughter constitutes plain error which vitiated the Petitioner's

rights to due process and prevented the jury from considering the proper and essential elements of the offense. As such, this error requires a reversal of the Petitioner's conviction.

(3)

During the individual questioning of the jury members at the Bench, the microphone was not turned off. Juror Taylor addressed the contacts with the Petitioner's brother and the discussions concerning the use of a knife, as well as her own domestic violence experience. Juror Carpenter discussed her life experience involving murder of a family friend, and the domestic violence victimization. Juror McKinnon-Brown noted her husband had been murdered, and Juror Boggs noted he had worked with the Prosecuting Attorney's father at Union Carbide. Juror Mullins, in discussing the murder of her seven-year old nephew and four-year old niece, expressed amazement at how one of the suspects "got off." AR 1242-1260. All of these revelations were not kept confidential from the jury.

No objection was made by counsel, no mistrial was requested, no challenge to the array was offered and no curative instruction was requested or given. The entire point of sidebar conferences is to prevent the venire from hearing the trial court's and counsel's discussions with individual jurors. In this case, the sound was "up and on" during Bench conferences with several prospective jurors.

Under the plain error analysis of United States v. Olano, supra, a venire infected with stories of murder and domestic violence cannot fairly adjudicate a case involving an alleged domestic abuser and a murderer. The integrity of the process due the Petitioner

was seriously and irreversibly affected by this failure, and for that reason alone, his conviction must now be reversed.

(4)

The West Virginia Supreme Court of Appeals has adopted the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984), for evaluating claims of ineffective assistance of counsel. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). The Strickland test requires that the defendant prove: (1) counsel's performance was deficient under the objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Miller, supra, 194 W.Va. at 3, 459 S.E.2d at 114.

It is the Petitioner's contention that he received ineffective assistance of trial counsel for a variety of reasons: failure to object to improper jury instructions; failure to object, ask for curative instruction, or challenge the array, or request a mistrial following the overheard venire bench conferences; failure to object to, or challenge for cause, or to strike peremptorily, a seated juror whose husband had been murdered and who was unhappy with the sentence the killer received; failure to properly cross-examine a witness, Robert Wilcox, on the presence of a bloody wound on the Petitioner's hand; failure to cross-examine a witness, Keith Hubbard, on impeachable felonies; withdrawing the request for a trial bifurcated into the guilt/innocence phase and mercy/no mercy phase which decision deprived the Petitioner of numerous constitutional safeguards and protections.

The trial counsel's failure to object to both malice and/or voluntary manslaughter instructions as stated, supra, constitutes prejudicial ineffectiveness of counsel. Had the jury been properly instructed following counsel's objection, the jury may well have returned a verdict of voluntary manslaughter or Second-Degree Murder. The result of the trial would have been different, necessitating, now, an award of a new trial. Moreover, as this error can be discerned on the record, appellate counsel was prejudicially ineffective in failing to raise these errors as both cognizable trial counsel ineffectiveness claims or plain error.

Following the venire's overhearing the bench conferences, it was constitutionally ineffective for the Petitioner's counsel not to object, ask for curative instruction, challenge the array, or request a mistrial following this error. The Petitioner presses that but for this error, the outcome of the proceedings at the trial level would have been different. Again, as this error can be discerned on the record, AR 1242-1260, appellate counsel was prejudicially ineffective in failing to raise these errors as both cognizable trial counsel ineffectiveness claim or plain error.

Counsel failed to move to strike for cause, and failed to peremptorily strike a seated juror, Ms. Kinnon-Brown. The letter noted during the voir dire that her husband had been murdered and the killer received a sentence of five years, and further, that the juror was dissatisfied with the killer's sentence. AR 1220-1221, 1253-1257. While the juror noted that she could be fair in assessing the evidence, the decision to keep such a juror on the murder trial panel defies belief as to any justification, cannot be explained in terms of any trial strategy, and substantiates the Petitioner's claim that he received prejudicially ineffective assistance of counsel.

Furthermore, in reviewing the case trial counsel should have noted the witness Robert Wilcox had previously stated that the Petitioner was seen by Wilcox immediately after the incident with a small bloody wound to his hand. This important detail, not elicited on cross-examination of the witness, would have accomplished several important defense objectives. In this case, the trial strategy appeared to have been an attempt to secure a lesser verdict than First-Degree Murder without mercy. Yet by not addressing the potential for the Petitioner's intoxication (i.e. self-inflicted cut, a knife injury), the Petitioner's counsel abandoned an argument which had the potential of lowering the Degree of Murder to that of the Second Degree. In the absence of any attempt by the defense counsel to argue self-inflicted intoxication caused injury, the jury was told by the prosecution that the killing was premeditated and deliberate. The prosecution asked for that inference because he argued that the Petitioner was sober enough not to cut himself. "He said that after he stabbed her, he folded the knives up. He didn't cut himself with those knives. No evidence of any injuries on the defendant's hands.... He was ... sober enough to shut those knives down, unfold each of them.... (i)f he was that drunk and that wasted, that he doesn't know what he is doing and can't plan ahead, that wouldn't be possible, he wouldn't have done that." AR 1780-1781.

Yet, the Petitioner had cut himself. He had wounds and the existence of those wounds, had it been brought out on cross-examination from the State's witness, would have negated the central argument of the State's case. The cuts would have enabled the Petitioner to show that the Petitioner's intoxication was so advanced that he injured himself as well, that he was, in fact not only not sober enough, but he was so drunk that apparently did not even know of (or feel) his self-inflicted injuries. Being so drunk, he

could not have premeditated or deliberated, resulting in, at a maximum, a verdict of Second-Degree Murder.

Trial counsel also failed to cross-examine another State's witness, Keith Hubbard, on impeachable felonies, specifically credit card fraud, possession of a stolen vehicle (two convictions) and burglary. Impeaching the credibility of witnesses is a fundamental duty of criminal defense counsel. In this case, counsel's failure to impeach Keith Hubbard on a slew of felonies, is inexplicable and unduly prejudicial to the Petitioner's cause.

The issue of the withdrawal of a request for bifurcation of the trial into two phases is multi-faceted and presents several constitutional problems, all of which substantiate the Petitioner's claim that he received prejudicially ineffective assistance of counsel.

Under both the Eight Amendment to the United States Constitution and the West Virginia Constitution, Article III, §5, cruel and unusual punishment must be prohibited. The result of the withdrawal of the bifurcated trial request was just what the Federal and State Constitutions prohibit.

It is not well established that any sentencing schemes in capital cases are the province of the jury. Ring v. Arizona, 536 U.S. 584 (2002). The jury must be presented with all possible information to determine what sentence to impose in its collective exercise of sentencing authority. By denying bifurcation of the trial in this case the trial court deprived the Petitioner of a reasonable chance for mercy from the jury.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), the United States Supreme Court proclaimed that counsel's inadequate investigation of all mitigating circumstances did not meet the minimum standards of the legal profession and, in prejudicing the criminal defendant's due process rights to a fair trial, constituted ineffective assistance of counsel.

Under Wiggins and Ring, supra, presentation of mitigating circumstances to the sentencing authority is mandatory, otherwise ineffective assistance of counsel ensues. In any capital case, the jury must be appraised of all mitigating factors the trial court wished for the jury to consider in arriving at its sentence.

In the case at bar, while informing the jury of a "mercy" sentencing option, the trial court failed to provide the jury with any instructions specifically delineating the role of any mitigating factors to be considered in reaching the sentencing decision. Nor did the trial court direct the jury to consider any relevant aspects of the character, background, and record of the Petitioner in mitigation of punishment, in direct violation of Summer v. Shuman, 483 U.S. 66 (1987), leaving the jury to speculate and guess as to what legal factors to consider therein. The discussion of the parole considerations is not the same as delineating mitigation factors.

The lack of bifurcation in the present case left the jury guessing whether it could consider the Petitioner's character evidence as relevant only to the issue of guilt or innocence, or as relevant to the sentencing determination as well as during the sentencing phase. Due to the absence of the bifurcation herein, the jury could have easily concluded that the Petitioner's character, background, and record were of no sentencing significance.

Not that the jury had at its disposal all available information, another by-product of the trial court's denial of bifurcation following the withdrawal of the bifurcation request. Under Lockett v. Ohio, 438 U.S. 586 (1978) the sentencing authority must not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

basis for a sentence less than death." Id. at 604. But in failing to provide a bifurcated trial in the case at bar, counsel precluded the petitioner from presenting to the jury, not only any and all mitigating evidence, but also the evidence of his future dangerousness under Shafer v. South Carolina, 532 U.S. 32 (2001).

Since here was no separate proceeding available to the Petitioner to assemble and present (complete) mitigating evidence to the sentencing authority, the Petitioner was deprived of a forum wherein he could present the same. Trial counsel's belief that a unitary trial would replace a bifurcated proceedings in arriving at, perhaps, anything less-than-a-life-without parole sentence was as unrealistic as it was erroneous. In the unitary trial some mitigating evidence was simply inadmissible, and the Petitioner's the right to an allocution, participation in the preparation of a pre-sentence report along with the Petitioner's objections, corrections, and comments, presentation of mitigation witnesses, comments by the defense counsel all were taken away from the Petitioner in violation of his Constitutionally–guaranteed Due Process of Law.

And the Petitioner stood to lose a lot by insisting on a unitary trial. The Petitioner's background involved successful employment, good relations with others, and an apparent dose of remorsefulness, factors which could have persuaded the jurors to offer the Petitioner mercy, should said factors been presented to the jury in the sentencing phase of the proceedings.

The absence of the bifurcation in the present case ran afoul of the principle of an individualized sentencing, Zant v. Stephens, 462 U.S. 862 (1982), and the individual and consideration of all mitigating factors required by the Constitution. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the High Court struck down a sentencing scheme in

which the court limited what evidence could be considered as mitigating factors. Here, by virtue of the lack of bifurcation, the trial court de facto limited the evidence which the Petitioner could present to the jury in his quest for a sentence of less than life-without mercy. The jury herein was deprived of accurate and complete information concerning the Petitioner's background, education, family responsibilities, work record, etc., while arriving at the Petitioner's punishment. As this Court held in Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991): "(t)he determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by full presentation of all relevant circumstances without regard to strategy during trial on the merits." 185 W.Va. at 207, 406 S.E.2d at 433.

(5)

The ineffectiveness of counsel spilled into the appellate process. The Petitioner received constitutionally ineffective assistance of appellate counsel due to the failure of appellate counsel to argue or raise on appeal improper jury instructions and failure to argue or raise on appeal the trial court's plain error of infecting the jury venire with overheard bench conferences.

(6)

The police officers failed to promptly present the Petitioner to a Magistrate as required by the prompt presentment rule. It is the Petitioner's contention that the police purposely delayed taking the Petitioner to a Magistrate in order to encourage the

Petitioner to make a statement. Within a few seconds of his arrest the Petitioner was advised by Detective Snuffer: "We need to talk to you about what happened," AR 1493. And further: "When we get down here, Geno, we want to talk to you about what happened, AR 1500, "here" meaning the police station. Within a few minutes and on the way to the police station, rather than the Magistrate Court, Detective Scurlock renewed the police entreaties: "We'd like to talk to you about what – you know, what happened. AR 1496. "You just need to make things right .... There is still a lot of good you could do in the world." AR 1502.

The Petitioner was never advised he had a right to be promptly presented to the neutral and detached Magistrate. His appearance before the Magistrate happened only an hour or so later, after the Petitioner had confessed, and the Magistrate Court was just across the street from the police station where the confession took place. Just because the Petitioner was read the Miranda rights the prompt presentment rule was not nullified. State v. DeWeese, 213 W.Va. 339, 582 S.E.2d 786 (2003). And the "booking process" delay presented by the State of West Virginia in the court below swallows the prompt presentment rule. The real reason for the delay was not the booking necessity – the police officers purposely pressured and entreated the Petitioner to obtain a confession, all while delaying taking him to a Magistrate. To believe otherwise would be an exercise in self-deception. State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984). The Petitioner's statement should have been suppressed for the violation of the prompt presentment rule. The presentation to the jury of the Petitioner's statement violated his right to a fair trial and Due Process of Law.

(7)

The Petitioner now reasserts his claim that he was denied his Constitutional right to counsel because he was saddled with a lawyer who had a conflict of interest. The Kanawha County Public Defender had previously represented a witness who was called to testify against the Petitioner. Since an attorney owes a duty of loyalty to his client, the Petitioner's trial counsel could not reasonably be expected to exercise that duty by both representing the Petitioner and also cross-examining a client who had been previously represented by the same Office. The Petitioner preserves his argument understanding that this Court found no "actual (trial) conflict" in its appellate opinion. State v. Rogers, 231 W.Va. 205, 215, 744 S.E.2d 315, 325 (2013). Notwithstanding this Court's prior ruling the Petitioner respectfully argues that a trial error ensued and that he is entitled to a new trial with competent counsel free from conflict.

(8)

The Prosecutor's comments during his closing arguments were prejudicial to the Petitioner and inflamed the jury against the Petitioner, especially the inappropriate comments such as "plunging the knives in her neck, he stood there and the blood from that knife dripped on that floor," and the Petitioner's "enjoy(ment) of three meals a day," when "... Amos won't get to enjoy that." AR 1789.

The Prosecutor seemed to have reveled in the graphic description of Amos' murder. "He hit right where he was aiming .... (H)e severed both carotid arteries." AR 1786. "... (A)fter he plunged the knives in her neck, he stood there and the blood from that knife dripped on that floor." AR 1784. "... (A)fter he stabbed her, he reached out and cleaned

his knife off on her shirt." AR 1787. Finally, the Prosecutor appealed to the collective conscience of the jury: "Ladies and gentlemen, he'll get to enjoy three meals a day. Laura Amos won't get to enjoy that." AR 1789.

The Petitioner again understands that this Court ruled to the contrary in its direct appeal opinion involving the Petitioner. The latter contends, however, that the Prosecutor's remarks clearly prejudiced the Petitioner and resulted in manifest injustice, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), requiring the reversal of his conviction.

(9)

The Petitioner contends that evidence presented at trial did not rise to the level of sufficiency necessary to convict the Petitioner of First-Degree Murder. The Petitioner so contends being fully aware of the "heavy burden" standard imposed by this Court upon criminal-case appellants alleging insufficiency of the evidence at trial. State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The evidence adduced at trial demonstrated the Petitioner and Amos had an on and off again relationship. The State of West Virginia conceded that the Petitioner had been drinking heavily, in the middle of the day, and he was in the company of alcoholic friends who were also consuming alcohol. The Petitioner himself got drunk on vodka, after he had already been intoxicated on beer. AR 1394-1395. "The alcohol influenced it. That's the only way it had to happen. The alcohol influenced it." AR 1395. There was no eye witness to the death of Amos. However, there was evidence of the Petitioner's intoxication. He himself was so drunk he did not even remember the details of his

encounter with Amos. "I had to have killed her. I was there. Wasn't nobody else there." In consideration of the Petitioner's heavy inebriation, the elements of premeditation and deliberation were not sufficiently proven to rise to the level of First-Degree Murder. In other words, there was insufficient evidence to prove each and every element of the crime of First-Degree Murder, and the Petitioner's conviction must be reversed.

(10)

Finally, it appears that the cumulative effect of numerous errors cited herein rises to the level requiring reversal of the Petitioner's conviction. As the West Virginia Supreme Court of Appeals held on several occasions, "where the record of a criminal trial shows that the cumulative effect of numerous error committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992), cited in State v. Shermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (W.Va. 2002). See also, State v. Guthrie, supra, where this Court's resolve to reverse the defendant's conviction based upon cumulative error was "fortified," 173 W.Va. at 686, 461 S.E.2d at 192, after the Court's review of the trial court record.

The cumulative effect of all errors upon the Petitioner's rights to the Constitutionally-guaranteed procedural and substantive due process. Grave doubt lingers as to how significantly the Petitioner's procedural and substantive due process rights have been affected by the errors complained of herein. Kotteakos v. United States, 328 U.S. 750 (1946). And, as the United States Supreme Court held not long ago, when a judicial reviewer is in grave doubt whether trial error of constitutional dimension and "substantial

and injurious effect or influence in determining the jury's verdict (occurred, then) that error is not harmless. And the Petitioner must win." O'Neal v. McAnnich, 513 U.S. 432, 436 (1995).

A grave doubt lingers in this case not only as to the correctness of the ultimate jury verdict based upon the sufficiency of the evidence but also as to all other errors of constitutional dimensions mentioned herein. This Court is asked now to find that the cumulative error that pervades the record in the present case was far from harmless. The Constitutional mandates of Due Process require that much from this Court.

VI.

CONCLUSION

For the foregoing reasons, and for the reasons apparent to the Court from the record, the Petitioner prays that this Court reverse the denial of the Writ of Habeas Corpus and reverse the Petitioner's underlying criminal conviction outright. In the alternative, the Petitioner prays that he be granted a new trial and any further relief this Court may deem fair, just, and appropriate.

Respectfully submitted,
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