IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
GARY LEE ROLLINS

Petitioner

Vs.

Civil Action No. 15-C-29
James J. Rowe, Judge

DAVID BALLARD, WARDEN
MOUNT OLIVE CORRECTIONAL CENTER,

Respondent

ORDER

On the 27th day of December, 2019, came the respondent, David Ballard, Warden by Jeffery T. Mauzy, Prosecuting Attorney, and the petitioner, Gary L. Rollins, appearing in person and by counsel, M. Tyler Mason, for the purpose of a hearing upon the Petition for Habeas Corpus heretofore filed by the petitioner.

Whereupon, the Court proceeded to announce the following FINDINGS on the record regarding the basis for the Court's decision in this matter:

1. Regarding whether or not there was a deal for the prosecutor to not prosecute the witness, April Bailes, at the time of her testimony, there was no meeting of the minds between the witness and the Nicholas County Prosecuting Attorney sufficient to establish terms of a contract, an essential element for an enforceable agreement.

2. With respect to the testimony of April Bailes, defense counsel's cross examination of Ms. Bailes mounted a strong attack of her truthfulness andconstituted powerful evidence as to why her credibility should be questioned.

3. Defense counsel's evidence as to the number of prior consistent statements she had given law enforcement and their evidence as to the circumstances and timing of her change of story constituted further strong impeachment evidence against April Bailes.

4. Even if there had been a bargain and the jury so advised, it would have been cumulative only and would not have had any material effect because of the other evidence presented.

5. Based on all the evidence presented at trial, there is no reasonable probability that the result of the proceeding would have been different for the overwhelming evidence left no reasonable doubt about the guilt of the Petitioner.

6. Regarding the juror who was April Bailes' great uncle, clearly he did not know who she was at the time of trial, and she did not know who he was.

7. Defense counsel's performance at trial met and even exceeded the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law.

8. Regarding the possibility of perjured testimony by April Bailes as to her denial of a bargain, her testimony was consistent with the pretrial statements made by the Prosecuting Attorney, and there is no evidence otherwise that the prosecutor had any knowledge she was testifying falsely.

9. The West Virginia Supreme Court of Appeals already addressed the prosecutor's closing statements in the Petitioner's appeal.

The Court then directed counsel for the Respondent to draft the written order from this hearing adopting the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. Petitioner Gary Lee Rollins was convicted of first-degree murder following a trial that concluded on August 21, 2012.
2. The petitioner filed an appeal on May 15, 2013, and the West Virginia Supreme Court of Appeals affirmed the conviction on June 17, 2014.
3. The petitioner filed an original Petition in this matter that was entered on March 23, 2015.
4. Following the appointment of counsel, an Amended Petition for Writ of *Habeas Corpus* was filed on November 13, 2017.
5. In an Order entered by this Court on October 12, 2018, the Court dismissed grounds one, two and five raised in the Amended Petition.
6. This Court conducted an omnibus hearing in this matter on January 17, 2019, and January 30, 2019. Testimony was taken from witnesses on both dates.
7. The following witnesses testified during the omnibus hearing: Regina Lucente, Maria Bailey, Joanne McNemar, Sgt. Ron Lilly, Wayne Van Bibber, Tim C. Carrico, Herbert Gardner, James R. Milam, II, Johnathan Craig Sweeney, Judge Brad Dorsey, Cynthia Stanton, April Bailes, Cynthia Kesterson, Mabel Catherine Bailes, Nelson Paul Bailes, and the petitioner, Gary Lee Rollins.
8. The petitioner testified at the omnibus hearing regarding his understanding of this proceeding, his rights, and the grounds he has raised in this proceeding.
9. Based on the petitioner's testimony, he has clearly, knowledgably and with the assistance of competent counsel, waived any other grounds for *habeas corpus* relief not raised in his

Amended Petition.

10. Based on the Court's October Order, the remaining grounds raised in the Amended Petition to be addressed are as follows:

3. Petitioner was denied a fair trial by an impartial jury as secured by the Sixth Amendment to the United States Constitution.

4. Juror Misconduct

6. Petitioner was denied due process of law when the elected prosecuting attorney of Nicholas County used improper methods calculated to produce a wrongful conviction.

7. Ineffective assistance of counsel.

8. Prosecutor misconduct.

9. Knowing use of perjured testimony and bolstering witness.

10. Cumulative error doctrine.

11. Ineffective assistance of counsel on appeal.

Juror Issues

11. Addressing these in order, the first two grounds above relate to the fact that Nelson Paul Bailes was a juror in the underlying trial of the petitioner.

12. Nelson Paul Bailes is a paternal great uncle of April Bailes a/k/a April O'Brien.

13. April Bailes was a witness in the trial of the petitioner at which Nelson Paul Bailes served as a juror.

14. Nelson Paul Bailes did not inform the Court or the parties of this relationship during the trial.

15. Nelson Paul Bailes was unaware that the witness, April Bailes a/k/a April O'Brien, was related to him at any point during the trial.

16. April Bailes was identified at trial as April O'Brien, and Nelson Paul Bailes did not hear her referred to as April Bailes during the trial.

17. April Bailes testified that she had never met Nelson Paul Bailes prior to the October 2018 hearing in this *habeas* proceeding.

18. Nelson Paul Bailes testified that he had never met April Bailes prior to the October 2018 hearing in this proceeding.

19. Based on the testimony of Nelson Paul Bailes, April Bailes and Cynthia Kesterson, it is clear that the witness, April Bailes, and the juror, Nelson Paul Bailes, had no knowledge of each other as of the time of the trial in the underlying criminal matter.

20. It is also evident that even if Nelson Paul Bailes was aware that one of the witnesses was his great niece at the time of the trial, it would have had no impact on his assessment of the testimony of the witness.

21. Based on the circumstances at the time of trial, it was reasonable for Nelson Paul Bailes not to notify the Court that he was related to the witness April Bailes, who was identified as April O'Brien.

22. There is no indication that Nelson Paul Bailes intentionally misled the Court or parties regarding his qualifications to serve as a juror or his relationship to any of the witnesses.

23. In fact, there is no reason to believe that any person intentionally deceived the Court or the parties about the familial relationship between Juror Nelson Paul Bailes and Witness April Bailes.

24. In the Amended Petition it is also alleged that the petitioner was denied a fair jury, because there was a juror who was not disqualified who had been a victim of domestic violence, and

there was a juror who was a former client of the prosecuting attorney.

25. However, there was no evidence presented regarding these two points.

26. Therefore, the petitioner has failed to meet his burden in demonstrating that his jury trial was constitutionally infirm because of these issues.

27. Though it is not addressed in the Amended Petition, there was testimony taken regarding Nelson Paul Bailes being related to a state trooper.

28. It appears that Nelson Paul Bailes did not hear the Court when it asked potential jurors if they were related to law enforcement.

29. However, it does not appear that Mr. Bailes had any improper purpose in not notifying the Court of his relationship to a state trooper. Further, it appears that said relationship had no bearing on the juror's assessment of the testimony of witnesses at trial.

30. With respect to all of the issues related to the juror, Nelson Paul Bailes, the Court FINDS that there was no error committed by the trial Court and no willfully improper conduct on the part of the juror or any other person related to these issues.

31. The Court further FINDS that, if there had been any error committed that resulted in Nelson Paul Bailes serving on the jury, it would be harmless error, as there is no evidence the juror reached his conclusions based on anything other than a proper consideration of the relevant and admissible evidence presented at trial.

Ineffective Assistance Issues

A. Trial Counsel

32. The Amended Petition claims ineffective assistance of both trial counsel and appellate counsel.

33. The bases for the ineffective assistance claim against trial counsel are summarized as follows: 1) failed to conduct adequate and meaningful voir dire; 2) failed to object to the witness, April Bailes, being called due to an inconsistency in her name as called versus as stated during voir dire; 3) no voir dire questions about recommendation of mercy; 4) failure to seek a change of venue; 5) failure to elicit certain testimony from medical expert witnesses; 6) failure to request Court instructions regarding lesser included offenses.
34. Though testimony was taken from both trial attorneys for the petitioner at the omnibus hearing, no significant evidence was developed on any of the points outlined above.
35. It was established that trial counsel was not aware of the familial ties of one of the jurors to one of the State's witnesses.
36. However, there is no evidence that this information could likely have been discovered through reasonable, non-extraordinary efforts by trial counsel, nor is there any evidence that such information would have played a meaningful role if it had been known.
37. Further, it does not appear that the petitioner was prejudiced by the inclusion of Nelson Bailes on the jury, as discussed above.
38. The lack of evidence regarding the ineffective assistance claims leads to the conclusion that none of the bases listed caused sufficient prejudice to the petitioner to justify *habeas* relief.
39. Nonetheless, regarding the other claims made against trial counsel, first, the failure to object to the witness who was called by a different name likely had no impact on the trial as the Court most likely would have allowed the witness to testify over the objection, because the identity of the witness was previously known to the defense.
40. Next, though counsel did not pose their own questions regarding a recommendation of mercy

during *voir dire*, it appears that the Court did address it. As such, the defendant's rights were not infringed upon.

41. Failure to seek a change of venue and to move for certain jury instructions are matters of trial strategy subject to the broad discretion of the trial attorneys, and it is not clear that these decisions were flawed or wrong in any event.

42. The failure to elicit certain testimony from medical expert witnesses would require further evidence to possibly be developed into an objectionable ground of ineffective assistance. No evidence has been presented to establish that the conduct of trial counsel was deficient in this regard.

43. In fact, the evidence presented in hearing did establish that the petitioner was represented at trial by two highly experienced, extremely competent defense attorneys.

44. Though there was testimony regarding the so-called "invited error" by defense counsel at trial that the West Virginia Supreme Court of Appeals discussed in ruling on the appeal of the underlying criminal matter, such evidence is not sufficient to establish ineffective assistance of counsel in this case.

45. The "invited error" regarded a comment by the prosecutor to the jury that the appellate counsel argued was improper and influenced the jury's verdict. *State v. Rollins*, 233 W. Va. 715, 728, 760 S.E.2d 529, 542 (2014).

46. First, the "invited error" would only be error at all if it is determined that the prosecutor's comment was, in fact, improper.

47. As will be discussed more fully in the section below, that conclusion cannot be reached in this case.

48. Additionally, as the Supreme Court pointed out in the appeal below, "[a] conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." *Syl. pt. 5, State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

49. Unless trial counsel's failure to object to the prosecutor's statement to the jury or inviting the error by statements made in the defense's own closing was either clear prejudice to the defendant or manifest injustice, the error on the part of counsel is harmless.

50. Further, with respect to ineffective assistance of counsel, it must be established that "(1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Miller*, 194 W.Va. 3, 15, 459 S.E.2d 114, 126 (1995).

51. So, even assuming, *arguendo*, that counsel's performance was deficient, it still must be established that the outcome probably would have been different.

52. The evidence is certainly insufficient to establish that the petitioner was clearly prejudiced, that a manifest injustice occurred because of the statement or that there is a reasonable probability that the jury would not have found the petitioner guilty, if only counsel had objected to the statement or not invited error.

B. Appellate Counsel

53. Regarding appellate counsel, the only specific deficiency mentioned in the Amended Petition is that of failing to discover that one of the jurors was related to a witness.

54. As previously discussed, the inclusion of the juror in question did not cause injury to the

petitioner's constitutional rights.

55. Consequently, any error committed by counsel in failing to discover this fact was harmless.

56. However, failure to discover such an obscure and unusual fact on appeal, when counsel would normally be focused on more common and cognizable errors, does not constitute error in this case.

57. Based on the foregoing, there is no basis established to overturn the verdict below on grounds of ineffective assistance of counsel.

Prosecutorial Misconduct Issues

58. The Amended Petition raises multiple issues with respect to purported misconduct by the prosecuting attorney at trial.

A. Closing Argument

59. The easiest of these to deal with in this proceeding is that of the prosecutor's statement to the jury that he intended to indict April Bailes.

60. As discussed above, the evidence is insufficient to establish that said statement was, in fact, false but there was evidence that the prosecuting attorney at the time, did intend to seek an indictment.

61. That being the case, the issue of the alleged improper remark to the jury during closing argument was previously dealt with on direct appeal.

62. Therefore, that ground of the *habeas* petition is deemed to have already been decided.

B. Perjured Testimony

63. Next is that of knowing use of perjured testimony.

64. The allegedly false testimony is apparently the testimony of April Bailes at trial that she was

not promised anything by the State in return for her testimony.

65. Though April Bailes testified in the omnibus hearing that she was promised that she would not be prosecuted in exchange for her testimony, she could not remember testifying to the contrary at trial. Omnibus Hearing Transcript, 1/30/19, at 75, 88-89 (hereinafter "Day 2").

66. She also testified that her memory of the facts surrounding the case would have been better at the time of trial than at the omnibus hearing or at her deposition in October, 2018. *Id.*, at 112-113.

67. Ms. Bailes also seemed unclear on her recollection of who conveyed to her that she would not be prosecuted. *Id.*, at 73, 93-94.

68. Even if it could be shown that Ms. Bailes testified falsely on this point at trial, which is not established to any degree, there is no evidence that the prosecutor knew she was going to do so or asked her to do so.

69. April Bailes did state that neither the prosecutor nor anyone else asked her to withhold the information that she allegedly had a plea agreement with the State. *Id.*, at 95.

70. It therefore cannot be established that the prosecuting attorney knowingly sought or used perjured testimony.

C. Plea Agreement

71. The primary unresolved questions, then, involve whether or not there was a plea agreement between the State and April Bailes, and whether the prosecutor withheld that information from the defense.

72. First, on the issue of whether a deal existed, the evidence is mixed.

73. While the witness, April Bailes, ultimately testified that she believed she had a deal that she

would not be prosecuted, she testified to the contrary at trial.

74. She also denied being told by anyone not to reveal a deal between her and the State.

75. That raises questions as to why she would testify that there was no deal if in fact there was one.

76. Ms. Bailes also initially testified when asked if Mr. Milam ever agreed not to prosecute her if she testified against Mr. Rollins, "I don't think so. I don't remember how all that came about." *Id.*, at 73.

77. She also testified that she did not remember who promised her anything for her testimony. *Id.*

78. She then acknowledged that she had stated in her deposition that Mr. Milam had promised not to prosecute her if she testified, but qualified her deposition testimony by commenting that her father had passed away not long before that day and that she was "in a mess" at the time. *Id.*, at 75 and 77.

79. Based on the extensive questioning of April Bailes in the omnibus hearing on various questions involving her recall of events, it appears the most accurate assessment is that what she said at trial was fresh in her mind and was the most accurate statement of events, compared to any later statements she made to the contrary either in a deposition or in the omnibus hearing itself.

80. April Bailes' attorney at the time of the trial was Public Defender Cynthia Stanton.

81. Ms. Stanton testified that she absolutely had a deal in place for her client in exchange for the client's testimony. *Id.*, at 30-32.

82. She believed this agreement was reached at a preliminary hearing in magistrate court in October, 2011. *Id.*

83. She based this belief, at least in part, on a note that this hearing was continued "for further investigation." *Id.*

84. From the testimony of at least three witnesses, such notation often means that there was either plea negotiations ongoing, a plea offer had been made, or a defendant was going to "work" for the State, particularly as a confidential informant in drug cases.

85. However, it is undisputed that the terms of any plea agreement in this case were never reduced to writing.

86. Ms. Stanton also testified that her understanding was that either her client would not be prosecuted, or she would be allowed to plead guilty to a misdemeanor. *Id.*, at 258 30

87. The ambiguity of Ms. Stanton's description of the supposed plea agreement lends itself to the conclusion that no agreement with clear, specific terms was in place.

88. It is also of note that Ms. Stanton never responded to a letter from the petitioner's defense counsel asking if a plea agreement existed for her client. *Id.*, at 35-38.

89. According to Ms. Stanton, this was due to her disdain for the defense attorney. *Id.*, at 36-37.

90. She admitted that her lack of response was not requested by the prosecutor, who was copied on the request letter, nor was she ever asked by him to keep the deal a secret from anyone. *Id.*, at 38.

91. Based on all the evidence and testimony, it seems unusual that such an agreement would not have been in writing if it existed.

92. The prosecuting attorney at the trial, P.K. Milam, testified that there was never a plea agreement in place for April Bailes in the underlying matters. Omnibus Hearing Transcript, 1/17/19, at 157, 176 (hereinafter "Day 1").

93. He also testified that he had fully intended to indict her following the trial but decided, on looking at the issue of accessory after the fact, that he could not do so because of an exception under the law for the master-servant relationship. *Id.* at 149-156

94. He further stated that he did not believe it would be proper to prosecute her for actions taken after she made the 9-1-1 call, because he believed she was acting under duress due to threats made by the petitioner that he would harm her and her child if she betrayed his confidence. *Id.* at 155.

95. Mr. Milam acknowledged that his memory was poor as to a number of details regarding the proceedings underlying this case, but he seemed to clearly recall his rationale behind not indicting April Bailes, as well as the fact that no plea agreement ever existed.

96. Whether or not the prosecutor's assessment of the existence of a proper master-servant relationship at the time was accurate is irrelevant; the relevant considerations are what he believed to be true and his actions as a result of that belief.

97. Mr. Milam believed that he could not indict April Bailes for the 9-1-1 call, because he believed she qualified for an exception due to a master-servant relationship.

98. He also believed that her actions after the 9-1-1 call should not be prosecuted, because she was acting under duress after threats by the petitioner.

99. Mr. Milam and Ms. Stanton both testified regarding a conversation that allegedly took place with Judge Johnson shortly after the trial.

100. According to P.K. Milam, Cynthia Stanton had gone to the judge with her complaints that Mr. Milam contended there was no plea agreement when she believed that there was. Day 1, at 183-186.

101. According to Ms. Stanton, she went to the judge after the trial, because she believed Mr. Milam had lied to the jury about his intent to prosecute April Bailes based on the existence of a plea agreement. Day 2, at 42-43.

102. One certain fact is that April Bailes was never prosecuted in circuit court nor did she plead guilty to a misdemeanor for any role in the case.

103. Her bound-over felony case was ultimately dismissed by the Court for inaction.

104. This result is consistent with both Mr. Milam's and Ms. Stanton's version of events.

105. Notably, both Mr. Milam and Ms. Stanton agree that Mr. Milam's position at the time they spoke to the judge following the trial was that there was no agreement.

106. This State's Supreme Court of Appeals has stated regarding oral plea agreements, "While we do not require that a plea bargain agreement be written, although that is the far better course, we do require substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion." *State v. Wayne*, 162 W. Va. 41, 42-43, 245 S.E.2d 838, 840 (1978), *overruled on other grounds*, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983).

107. Ultimately, the Court finds this to be the decisive factor in determining whether there was a "secret" plea bargain of some kind struck in this case.

108. The most substantial evidence of an agreement in this case is the testimony of Cynthia Stanton and April Bailes.

109. Even Ms. Stanton, however, failed to establish that there was a consummated agreement rather than a general discussion.

110. Her testimony was that the outcome for April Bailes would depend on the veracity of

her testimony.

111. The agreement lacked certainty.

112. Further, the evidence showed that the matter was rescheduled a number of times in magistrate court, and at one point, a note indicated the matter should be scheduled after the September grand jury met following the August trial.

113. Finally, the preliminary hearing for April Bailes' charges was not actually waived until October of 2012, after the trial in August and after the grand jury convened in September.

114. If there were an agreement in place as of October, 2011, the customary practice in Nicholas County would have been for April Bailes to waive her preliminary hearing at that time.

115. The evidence is that it was more likely a conversation took place in October, 2011, about a *possible* plea deal that defense counsel later attempted to convert to a formal agreement.

116. April Bailes' own testimony on the alleged deal was that she was promised she would not be "charged" if she testified for the State.

117. Despite the special prosecutor trying to explain to her that she had already been charged by the time she testified, Ms. Bailes never seemed to understand the difference when testifying at the omnibus hearing.

118. She could not remember ever discussing the matter with her attorney.

119. The felony charges against April Bailes that were bound over in October, 2012, were dismissed by the Court due to inaction, rather than on the motion of the State.

120. The fact that she was not required to plead guilty to a misdemeanor, as was one promised possible outcome of Ms. Stanton's arrangement with the State, lends itself to Mr. Milam's claim that he determined he could not prosecute her due to the master-servant exception.

121. This case differs from the situation in *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 510 S.E.2d 790 (1998).

122. In that case, the Court noted, "In cases such as this, where there is doubt over the existence of an agreement between the State and a defendant, but substantial evidence, although circumstantial, is present which suggest that an agreement existed, this Court will resolve the benefit of the doubt in the defendant's favor." *Id.*, 203 W. Va. at 722, 510 S.E.2d, at 796.

123. Emphasizing, the Court followed that statement with a citation to *State v. Wayne,* "We do require substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion." *State v. Wayne*, 162 W. Va. 41, 42-43, 245 S.E.2d 838, 840 (1978), *overruled on other grounds*, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983).

124. Therein lies a distinction between *State ex rel. Yeager v. Trent* and this case.

125. In the prior case, both the prosecutor and the defense attorney admitted to the existence of an agreement at some point, though both later recanted.

126. In the present case, the prosecuting attorney has never acknowledged any agreement, and the agreement alleged to have existed by counsel for the defendant was not one with definiteness and performance.

127. Based on the totality of the evidence, the Court FINDS that there was no plea

agreement or immunity agreement between the State and April Bailes when she testified at the trial of the petitioner.

128. Still, the Court will address the issue of whether the existence of such an agreement would require the Court to order a new trial in this matter if there had been such an agreement.

129. For the sake of analysis of the argument only, the Court considers the legal relevance under the assumption that there was an agreement of some kind between the State and Ms. Bailes and that the existence of such deal was concealed from the defendant by the State.

130. The most important aspect of this analysis involves the failure to provide the information to the defense, which would presumably constitute a violation of the requirements of *Brady v. Maryland. See State ex rel. Yeager v. Trent*, 203 W. Va. 716, 510 S.E.2d 790 (1998).

131. The analysis of a Brady violation in West Virginia begins as stated in *Syl. Pt. 2, State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007):

> There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

132. The issue of a plea or immunity agreement between the State and a witness would potentially be favorable to the defendant only as impeachment evidence in this matter.

133. Therefore, the key factor is whether the evidence was material.

134. "Evidence is deemed material "if there is a reasonable probability that, had the

evidence been disclosed to the defense the result of the proceeding would have been different." *State v. Morris*, 227 W.Va. 76, 85, 705 S.E.2d 583, 592 (2010) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))." *Buffey v. Ballard*, 236 W. Va. 509, 516-517, 782 S.E.2d 204, 211-212 (2015).

135. Undoubtedly, if the evidence was disclosed to the defense, counsel for the defendant at trial would have used the existence of the plea deal to impeach the testimony of the witness and in closing arguments.

136. In this case, though, the record shows that counsel for the defense was able to argue that there was a deal with the witness, albeit one the witness denied.

137. The transcript of April Bailes' testimony from the trial was certainly a point of interest in the omnibus hearing of this matter.

138. A review of the cross-examination of Ms. Bailes by Mr. Van Bibber, counsel for the then-defendant Mr. Rollins, shows that defense counsel portrayed the witness's testimony as inconsistent with numerous prior statements she gave police; that she only provided the important detail that Mr. Rollins confessed to her after the two were no longer in a relationship, after she was seeing someone else, after she was arrested for accessory after the fact to murder, and with the understanding from the police officer that he would help her if she cooperated with the State against Mr. Rollins. Trial Transcript, Volume 3, at 216-261.

139. Based on all the questions raised as to her credibility, it is likely that the jury viewed her testimony with skepticism, regardless of whether she was promised leniency.

140. With respect to the prosecutor's statement to the jury regarding his intent to indict her, first, the jury is instructed that the statements of counsel in closing argument are not

evidence.

141. Instructions notwithstanding, even if the jury believed the prosecutor's statement, it seems unlikely that single comment would sway a juror from disbelief to belief of the witness's testimony in this particular case.

142. Additionally, it is even more unlikely that there is a reasonable probability that this one factor would have resulted in a different result to the proceeding had it occured as assumed for this analysis.

143. There was a overwhelming evidence presented in the trial that led to the conviction of this petitioner aside from the testimony of April Bailes.

144. Therefore, the Court concludes that there is no reasonable probability that disclosure of a plea deal between the State and April Bailes would have likely led to a different result at trial.

Based on all the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, the petition for habeas corpus is hereby DENIED.

The Clerk of this Court is directed to forward attested copies of this Order to Jeffery T. Mauzy, Prosecuting Attorney, 108 East Maple Avenue, Fayetteville, West Virginia 25840; Kevin Hughart, PO Box 13365, Sissonville, West Virginia, 25360.

ENTER this 16th day of January, 2020.

JAMES J. ROWE, JUDGE

copy, certified this
22 day of Jan 20 20

Debbie Tiernan

CB