IN THE SUPREME COURT OF APPEALS OF THE STATE OF

WEST VIRGINIA

Gary Lee Rollins,
Petitioner Below, Petitioner,

v. **No. 20-0149**

Donnie Ames, Superintendent,
Mount Olive Correctional Complex,
Respondent Below, Respondent.

Appeal from a final order of the
Circuit Court of Nicholas County, West Virginia
Case No.: 15-C-29

PETITIONER'S APPEAL BRIEF

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ASSIGNMENT OF ERROR

ERROR #1: The circuit court committed reversible error when it failed to grant the relief requested in the Petitioner's Amended Petition for Writ of Habeas Corpus based on the errors raised concerning the State's use of perjured testimony, prosecutorial misconduct, and prejudicial, false statements made to the jury with respect to an undisclosed immunity/plea deal between the state and its star witness in the Petitioner's original trial.

Error #2: The circuit court erred when it denied the Petitioner relief based on newly discovered evidence that one of the jurors on the case was the great uncle of the State's star witness, April Bailes.

Error #3: The circuit court erred in finding that the Petitioner did not receive ineffective assistance of trial or appellate counsel.

KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE CIRCUIT COURT

This is an appeal from the Circuit Court of Nicholas County, Judge James Rowe presiding. The Petitioner filed his Petition for Habeas Corpus in the Circuit Court of Nicholas County, Case Number 15-C-29. The circuit court denied the Petitioner relief via order entered January 21, 2020.

The Petitioner seeks relief in the form of a reversal of the final Order of the Circuit Court of Nicholas County. Said Order denied any and all relief prayed for in the Petition for Habeas Corpus.

STATEMENT OF THE CASE

I. CRIMINAL CASE AND APPEAL.

This case originates from Nicholas County Case Number 11-F-81. In that case, the Petitioner was convicted by a jury of First-Degree Murder, and sentenced to life in prison without the possibility of parole. *Appendix Record*

(hereafter R.) at 2303. This Honorable Court has dealt with the underlying facts of the criminal case on the Petitioner's direct appeal. See *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014), Per Curium. Since that time the Petitioner has uncovered newly discovered evidence which attacks the credibility of the underlying trial.

Because this Honorable Court has already appraised the underlying criminal investigation and multiple summaries of the facts are littered throughout the appendix, the Petitioner will greatly abridge them here, with emphasis on the errors before the Court.

The Petitioner, Gary Rollins, and his wife, Terassa Rollins, operated a small vegetable farm in Nettie West Virginia. *Rollins* at 722. They worked the farm with a small crew of workers. *Id.* On October 5, 2009, Mr. Rollins spent the morning working the vegetable field with three hired workers: Tanya Wagner, April Bailes, and Kay Rudd. *Id.*[1] Just after Mr. Rollins and the workers had broken for lunch, Mr. Rollins went looking for his wife, whom he had not seen since early that morning, when she had told Mr. Rollins that she was going out to put up Halloween decorations. *Id.* After a short look around, Mr. Rollins found the body of his wife in a small pond on their property pinned beneath a large, fallen tree. *Id.* Apparently, the tree had fallen on Mrs. Rollins while she was out walking that morning. *Id.*

[1] At different times in the record, April Bailes is also referred to as April O'Brien and April Bailes O'Brien, as her name changed with her marital status over the years. For the sake of simplicity, this brief will refer to her as April Bailes, unless an adequate description of the facts necessitates otherwise.

Not yet sure if his wife was dead, he rushed to the pond to try and free her from beneath the tree. *Id.* When it would not budge, he ran back to the lunch area where three workers were still eating lunch, and he shouted for someone to call an ambulance. *Id.* Ms. Bailes retrieved her cell phone from her car to call an ambulance. *Id.* Meanwhile Mr. Rollins jumped into his tractor, which he was able to use to push the tree off her body. *Id.* He and Ms. Wagner pulled Ms. Rollins' dead body from the pond, and Ms. Wagner unsuccessfully performed CPR. *Id.*

Emergency personnel arrived and pronounced Ms. Rollins dead at the scene. *Id.* at 722-723. Nicholas County Sherriff's Deputy, David Sales also arrived and took statements from witnesses. *Id.*

Early in the investigation, Deputy Sales was informed that Mr. Rollins had been having an affair with his employee, April Bailes. *Id.* Two days after his wife's death, Mr. Rollins voluntarily came into the Sherriff's office and gave a recorded interview, where he denied any wrongdoing in his wife's death and stated he believed it to be an accident, where the tree likely fell on her when she was by the pond feeding the fish or squirrels. *Id.* at 723-724

Thereafter:

> Following the investigation by Deputy Sales, the doctor who performed the autopsy on Ms. Rollins, Dr. Sabet, concluded that Ms. Rollins's death was an accident and the result of "drowning complicated compression asphyxia." The Chief Medical Examiner, Dr. James Kaplan, upon reviewing Dr. Sabet's findings, agreed with this conclusion. An amended death certificate was issued on October 20, 2009, reflecting the manner of death—"accident"—and cause of death—"drowning complicated compression asphyxia." The State Medical Examiner's Office issued an autopsy report containing the same findings as the amended death certificate on January 10, 2010.

State v. Rollins, 233 W. Va. 715, 724, 760 S.E.2d 529, 538 (2014).

Even though the investigation had been closed and the death had been ruled an accident, Mrs. Rollins's family was unsatisfied. The family contacted then-Governor Joe Manchin, a demanded that he order the investigation be reopened. *Id.* at 724. Governor Manchin obliged, and then contacted the West Virginia State Police and instructed them to conduct their own investigation.

The State Police picked through the Sherriff Department's investigation and found some incongruities in the reports from the frantic scene where Mrs. Rollins's body was found. When the State Police conducted later interviews with witnesses, they did not recall Mr. Rollins as being wet above his knees when he came back from discovering his wife's body to get his employees to call 911, despite the fact he told the police he had jumped in the water to lifter the tree. *Id.* at 724-725. Ms. Bailes had told the 911 operator that Ms. Bailes was trapped under a tree and not breathing, but the State Troopers did not believe she could have gotten a clear view of the pond from where she was standing when she called. *Id.* There was also evidence Mr. Rollins had taken out some life insurance on his wife a few months before she died. *Id.*

The State Police then met with Dr. Sabet and Dr. Kaplan on January 14, 2010, with their own interpretations of the facts in an effort to sway the examiners opinions. *Id.* at 725. Drs. Sabet and Kaplan apparently bought the State Troopers' spiel. Despite receiving no new scientific or medical information, they decided to alter their findings and change Mrs. Rollins' death

certificate to say that her cause of death was "asphyxia due to probable strangulation" and the manner of death was "undetermined" and filed it on January 19, 2010, with an amended autopsy report filed on July 19, 2010. *Id.*

In September 2011, the Petitioner was arrested First Degree Murder or Terrassa Rollins and indicted that month. *Id.*[2] April Bailes was arrested the next month, based on the theory that she helped cover up the crime by knowing about the crime before making the 911 call the day the body was found. *Id.*

In May 2012, nearly two years after her death, Ms. Rollins's corpse was exhumed. *Id.* at 725-726. Her family had hired celebrity forensic pathologist and noted JFK conspiracy theorist, Cyril Wecht, to give Mrs. Rollins's long-decomposing corpse another autopsy.[3] *Id.* He concluded that her spine had not suffered the damage that would be expected from a large tree falling on her. The Defense was able to get its own pathologist, Dr. Cohen, who examined the body and concluded that found the injuries consistent with being pinned under a falling tree and drowning. *Id.*

At a pretrial hearing on July 24, 2012, the following exchange was had concerning the State's key witness, April Bailes:

> MR. VANBIBBER: Okay. This – For some housekeeping issues, your Honor. Mr. Milam, I believe, has agreed that it will be

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[2] Though the Petitioner was not arrested for murder until September 2011, he was incarcerated from July 2010, through the present day. This incarceration stemmed from a probation revocation out of Clay County, where the Petitioner was originally convicted on an "attempt" relating to some alleged marijuana cultivation. *R.* at 2399-2403.

[3] See *ShapingOpinion.com*, "Dr. Cyril Wecht, Was the JFK Assassination a Conspiracy?" https://shapingopinion.com/dr-cyril-wecht-was-the-jfk-assassination-a-conspiracy-episode/

disclosed to the jury that he does not intend to prosecute April O'Brien.

MR. MILAM: The more we talked about it, your Honor -- She's charged as accessory after the fact in this for basically her actions calling it into 911, and what I told Mr. VanBibber is at this point -- if what she says is true, I don't believe she committed a crime because I don't believe she willfully did it. I think she was under duress as a result, and that's why she did it, and I have not offered her a plea agreement until this case -- all the evidence comes out in this case, because if there's evidence to the contrary, then I don't believe her def- -- then maybe it is willful on her part, is -- Basically, what I'm trying to say, if she testifies as to what she's told us and all the evidence comes out as what she has told us previously, then I do not believe she's committed a crime, and I'll put that in writing to her -- to him as – as being the State's position on that; that there's not a plea agreement at this time, but that is our position as to how we're going to treat her.

R. at 117-118 (*Pre-Tr. Hrg.* 7/24/12 at 16-17).

The Petitioner's five day trial was held between August 14, 2012, and August 18, 2012. At trial, the State put on three experts in forensic pathology- Drs. Sabet, Kaplan, and Wecht- all of whom testified that Mrs. Rollins's injuries were inconsistent with the theory that she was drowned when the tree fell on top of her. *Rollins* at 726. Defense witness, Dr. Cohen, testified that her injuries were consistent with the theory that she was drowned when the tree fell on top of her. *Id.*

The State's star witness was April Bailes. Despite the fact she had a pending felony charge for accessory after the fact to murder, she took the stand.[4]

She testified that she had been having an affair with Mr. Rollins at the time of Mrs. Rollins death. R. at 42 (*Trial Tr., Day* 3, *8/16/2012* at 207). She stated that on the morning Mrs. Rollins body was found, before the body was discovered by the Petitioner, the Petitioner pulled her aside and told her that he had killed Terrassa. She testified the Petitioner told her that:

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

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

The prosecutor asked her if, during the police investigation, she told "numerous police officers," on "at least three to four occasions," had she lied about what she knew about Mrs. Rollins's death, to which she admitted "yes."[5] R. at 1049 (*Trial Tr., Day 3, 8/16/2012* at 215). She further testified that she had been promised nothing in return for her testimony, despite the fact that

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[4] Even the trial court judge seemed a bit startled upon finding out that Ms. Bailes was about to take the stand while she was still facing a pending felony. R. at 1037-1038 (*Trial Tr., Day 3, 8/16/2012*, 203.8-204.24).

[5] The record refers to statements Ms. Bailes gave to law enforcement where she supports Mr. Rollins innocence on October 5, 2009, October 7, 2009, and January 15, 2010. R. at 1050-1053, 1058-1060 (*Trial Tr., Day 3, 8/16/2012*, 216-219, 224-226.) She further admitted to giving multiple statements to the defense's private investigators, all inculpating Mr. Rollins in his wife's death. *Id.*at 1071-1072 (237-238).

she had been charged as an accessory after the fact to murder. *Id.* at 1049-1051.

On cross examination, Ms. Bailes admitted that she had an ongoing relationship with Mr. Rollins for a significant period of time while he was in jail, awaiting trial and even traveled from Nettie all the way to the Central Regional Jail in Flatwoods to him there forty-three times. R. at 1080-1081 (*Trial Tr., Day 3, 8/16/2012* at 246-247). She testified that she often traveled to the jail with Mr. Rollins's mother. *Id.* at 1082 (248). She even admitted, after having to be refreshed with the jail visitation logs, that she brought her three-year-old daughter along with her to participate in her visits with Mr. Rollins in April 2010, May 2010, and August 2010. *Id.* at 1083-1085 (249-251). She continued her romantic involvement with Mr. Rollins until December of 2010. *Id.* at 1087-1089 (253-254). She accepted phone calls from him four of five times a day, and sent him letters with photographs of her and her baby. *Id.*

The trial court gave the jury an instruction stating specifically that April Bailes was facing a charge for accessory after the fact, which carried a penalty of five years in prison. R. at 1464 (*Trial Tr., Day 5*, 8/18/2012, 116.10-116.13).

During closing arguments at trial, defense counsel raised the issue that April Bailes was providing favorable testimony in the State's case, so that she would avoid being prosecuted as an accessory after the fact for the murder of Teressa Rollins. R. at 1555-1556 (*Trial Tr., Day 5*, 8/21/2012, 207-208). Defense counsel noted to the jury that April Bailes had given five statements to the police during the pendency of the trial, and that she had never indicated

that to law enforcement that the Petitioner had confessed to her that the Petitioner had killed the victim until the State arrested and charged her as an accessory after the fact in October 2011. *Id.* Defense counsel argued to the jury that April Bailes visited the Petitioner no less that forty three times in jail, which rebutted the State's concocted theory that April Bailes lied on the Petitioner's behalf because she feared the Petitioner would harm her or her child if she were to testify against the Petitioner. *Id.*

Defense counsel finally argued to the jury that:

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

R. at 1551-1552 (Trial Tr., Day 5, 8/21/2012, 183-184).

Mr. Milam immediately objected to Defense counsel's statement, saying, "[o]bjection. There's no evidence of that in this case, your Honor." The objection was overruled, as the Court stated that the jury would "remember the evidence." *Id.*

During Rebuttal closing arguments, Mr. Milam stated the following to the jury:

> Mr. VanBibber wants you to believe that she's getting out of trouble for telling us the truth. Tpr. White, when he interviewed her, told her -- said you can either tell us the truth now or we'll arrest you later, and he made good on that promise, because we knew from the very beginning, from that 911 call, that she could not have had that information. That's what broke this case wide open. Reviewing that tape shows that she could not have that information from the get-go, and we interviewed her again and again and again and gave her every opportunity in the world to help herself, and she didn't, and she got arrested for it, and she's charged with accessory after the fact.

> Now, he wants you to believe that she's getting some kind of consideration out of that. **You can bet your behind that I'm going to indict her next month.**
>
> If she'd told us this from the beginning, two years ago, three years ago now, this case would have been totally different, but she held that information in -- in her pocket for two years, and she didn't [tell] anyone until she was in trouble, and she tried to save her own behind.
>
> Well, it's too late at that point. **She's being prosecuted as accessory after the fact in this case.**

R. at 155-1556 (Trial Tr., Day 5, 8/21/2012, 207-208) (emphasis added).

The Petitioner was convicted of First-Degree Murder and sentenced to life in prison without mercy, on August 21, 2012. *Rollins* at 726.

Thereafter, attorney Brad Dorsey filed an appeal with the West Virginia Supreme Court of Appeals. *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014). Said appeal was heard by the West Virginia Supreme Court, and the conviction from the Circuit Court of Nicholas County was affirmed by decision entered June 17, 2014.

In his criminal appeal, the Petitioner raised the ground that the prosecutor made improper comments to the jury (i.e. the statement that he would prosecute April Bailes), which prejudiced the Petitioner with the jury. *Rollins*, 728. This Honorable Court did not find that argument convincing, and found the issue was invited error on behalf of the defense counsel Wayne VanBibber at trial, as no objection was made by defense counsel contemporaneously with the prosecutor's statement. *Id.* ***Since this decision was issued, new evidence of a deal between the State and April Bailes has come to light.***

II. HABEAS CORPUS.

A. The Petition

The Petitioner went on to file a pro se Petition for Writ of Habeas Corpus in the Circuit Court of Nicholas County on March 20, 2015. R. at 2252-2268.

The Circuit Court of Nicholas County then appointed Kevin W. Hughart, Esq., to represent the Petitioner in these Proceedings on March 27, 2015. R. at 1.

The Petitioner, through counsel filed an Amended Petition for Writ of Habeas Corpus on November 7, 2017. R. at 2269-2300

The Errors Raised in the Petitioner's Amended Petition for Writ of Habeas Corpus are as follows:

> Ground one: court failed to remove jurors who should have been stricken for cause.
> Ground two: forced to use preemptory challenges to remove jurors who should have been stricken for cause.
> Ground three: petitioner was denied a fair trial by an impartial jury as secured by the Sixth Amendment to the United States Constitution.
> Ground four: juror misconduct.
> Ground five: the circuit court committed error by permitting 404(b) evidence, allowing the state to present cumulative evidence, and gave improper jury instructions.
> Ground six: petitioner was denied due process of law as secured by the U.S. Constitution and Article III and XX to the West Virginia Constitution when the elected prosecuting attorney of Nicholas County used improper methods. Calculated to produce a wrongful conviction.
> Ground seven: ineffective assistance of counsel.
> Ground eight: prosecutor misconduct.
> Ground nine: knowing used of perjured testimony and bolstering of witness.
> Ground ten: cumulative error doctrine.

R. at 2325.

While this matter was pending before the circuit court, the Petitioner hired a private investigator to search for undiscovered evidence about the trial. During his investigation, he met with Nelson Paul Bailes, who served on the petit jury that convicted and sentenced the Petitioner. R. at 2275-2299. The investigator discovered, through interviews and a public records search, that Nelson Paul Bailes was the great uncle of April Bailes, the State's star witness at trial. R. at 2287-2289.

After an extensive investigation and numerous delays, the Circuit Court held an omnibus hearing lasting two full days on January 17, 2019, and January 30, 2019.[6]

B. Omnibus Habeas Hearing January 17, 2019.

1. Defense Trial Counsel, Wayne VanBibber and Tim Carrico

During the Omnibus Hearing on January 17, 2019, trial counsel for the Petitioner, Wayne VanBibber testified that he was extremely suspicious that the State had struck a deal with April Bailes, wherein Ms. Bailes would receive favorable treatment if she were to provide useful testimony on the State's behalf. R. at 62-65 (Omnibus Hearing 1640-1643). Mr. VanBibber cited that Ms. Bailes had given statements which did not implicate the Petitioner as having committed any wrongdoing before October 2011; then she was arrested in October 2011 as an "Accessory After the Fact," at which point she changed

[6] A number of members of April Bailes's family, as well as the Investigator Herbert Gardner,

her story to say that the Petitioner had secretly confessed to her that he had murdered Tarrasa Rollins. *Id.* at 1652-1653 (73.16-74.12).

Mr. VanBibber further testified that he asked Mr. Milam directly whether there had any sort of an agreement entered into between Ms. Bailes and the State, to which Mr. Milam stated there had not been any deal. *Id.* at 1653 (74.7-74.13). Mr. VanBibber stated that Mr. Milam had always represented to him that Mr. Milam intended to prosecute April Bailes. The following exchange was had between Mr. VanBibber and Mr. Hughart regarding Ms. Bailes's changing statements and his preparation for the Petitioner's trial:

> Q To your knowledge, did April Bailes -- Was her testimony consistent with the last statement that she gave law enforcement?
> A I don't recall exactly what the -- what the two statements said.
> Q Well, you agree that she gave four or five statements in this case; correct?
> A I believe she gave numerous different statements in this case, but I don't recall the number of statements.
> Q All her prior statements except the last statement said that she didn't know anything about the death of Teresa Rollins; isn't that correct?
> A That's correct.
> Q And, in her last statement, she testified that Mr. Rollins -- (indicated) -- told her he killed his wife; isn't that correct?
> A That's correct.
> Q And her trial testimony -- At trial, she testified according to her last statement; isn't that correct?
> A I believe that's correct....
> Q And isn't it true, sir, that it actually -- There was a jury instruction given in regard to the crimes against April Bailes; is that correct?
> A (Referred to Petitioner's Exhibit Number 9 [jury instruction on charges pending against April Bailes].) That's correct.
> Q So the jury was informed that she was, in fact, facing five years; is that correct?
> A That's correct.

Q But, if she had a plea agreement with the State, she would not which -- and, pursuant to a plea agreement, she would not be charged, she would not be facing that five years.
Q Would you agree with that?
A I would agree with that.
Q Now, do you recall if you requested this instruction or whether or not the State requested that instruction?
A I -- I don't recall.
Q Now, if there was a plea agreement in this case, which you were told there -- you -- there was not -- Is that that correct?
A Correct.
Q If there was, in fact, a plea agreement in this State -- in this case, it would be a Brady violation. Would you agree with that?
A I would.
Q The prosecutor is required to provide you the information if there -- a plea agreement exists; is that correct?

R. at 1656-1659 (77.18-80.21. 33). When Mr. VanBibber was shown Mr. Milam's statement from the July 24, 2012, Pre-Trial Transcript, wherein Mr. Milam stated that he did not believe April Bailes committed a crime, Mr. VanBibber testified that "[i]t appears that Mr. Mi(am switched his position on that to suit whatever mood he was in on that particular day." *Id.* at 1672, 117-118 (93.2-3; *Pre-Trial Tr., 7/24/2012*, 16-17).

Mr. VanBibber testified that if he had known of a deal between the State and Ms. Bailes regarding her testimony, then Mr. VanBibber would have objected at trial during Mr. Milam's closing rebuttal, when Mr. Milam told the jury to "bet your behind that I'm going to indict her next month." R. at 1164 (85.5-86.3).

Mr. VanBibber further testified that if he had known about this deal between April Bailes and the State at the time of trial, he would not have

committed "invited error," as described in the Supreme Court's decision in *State v. Rollins*, because he would have had a known ground to object to Mr. Milam's statement to the jury. R. at 1679 (100.1-100.24).

On cross examination, Mr. VanBibber further testified that, if there was an undisclosed deal between the State and Ms. Bailes, "I don't believe that I was able to effectively prepare for the case based on his [Milam's] misrepresentation, and I believe that I could have cross-examined her successfully if I had had the truth about the deal. You can't cross-examine someone if you don't know the truth." R. at 1671 (92.17-92.24).

Tim Carricio, who served as co-counsel for the Petitioner at trial, testified at the Omnibus Hearing on January 17, 2019. He testified that if a plea existed and defense counsel was made aware of it, it would have been extremely helpful at trial. Further, if the State failed to disclose such an agreement, it would constitute prosecutorial misconduct. R. at 1696 (*Omnibus Tr.* 1/17/2019, at 117.3-117.5).

2. Trial Prosecutor, James "P.K." Milam

The Petitioner's final witness on January 17, 2019, was former Nicholas County Prosecutor James "P.K." Milam. R. at 1708 (*Omnibus Tr.* 1/17/2019 at 129). Mr. Milam was the Nicholas County Prosecutor during the entirety of the underlying criminal matter at issue in this case. *Id.*

Mr. Milam testified that it was his *modus operandi* to reduce all felony pleas to writing. R. at 1719 (140.20-140.21). However, if he were entering into a plea agreement with a defendant on a felony that had not been indicted, and

the parties were agreeing to reduce the charge to a misdemeanor in magistrate court, that would not typically be in writing. *Id.*

Mr. Milam testified that it was typical for an oral plea deal to be struck in magistrate court before a felony preliminary hearing, and the parties would agree to write "pending further investigation" on the magistrate court form. R. 1720 (141). This would give the defendant time to provide some useful service to the state in exchange for a dismissal of a felony or reduction of a felony to a misdemeanor. R. at 1720-1721 (141-142).

Mr. Milam was initially unable to recall from memory whether April Bailes was ever charged with accessory after the fact or any other crime in relation to the death of Terrassa Rollins. R. at 1724 (145).

Mr. Milam testified that the State did not enter into a plea agreement with April Bailes in exchange for her testimony against the Petitioner. R. at 1736 (157.20-157.22).

Mr. Milam testified that from the time Ms. Bailes changed her story to say that the Petitioner had confessed killing his wife her, it was always Mr. Milam's intent to prosecute Ms. Bailes for her dishonesty with the police. R. at 1728 (149).[7]

[7] It is important to remember that shortly after her arrest, on October 13, 2011, is when Ms. Bailes finally changed her story and told the police that Mr. Rollins had taken her aside on the morning of October 5, 2009, and confessed to her that he had killed his wife. *State v. Rollins*, 233 W. Va. 715 at 725. However, at Mr. Rollins's pretrial hearing on July 24, 2012, Mr. Milam told the court that there was not a plea deal between the State and Ms. Bailes because he did not believe that Ms. Bailes had committed a crime because she was under duress each time she lied to law enforcement. R. at 117-118 (*Tr. Pre-Trial Conf.*, 7-24-12, 16-17).

Mr. Milam testified about why he was so intent on prosecuting Ms. Bailes as follows:

> If April O'Brien or Bailes, whatever you want --whatever name she goes by, had given us this information early in the case, it could have saved thousands of man hours and tens of thousands of dollars for us; so I tried to indict her -- wanted to indict her for accessory after the fact because we knew all along -- well, not all along, but very shortly into the investigation that her -- that she knew more than she was letting on, and that was simply because, when she made the call to 911, where she was at, she couldn't possibly see Teresa's body; so we knew she had more information, because she got -- she gave an accurate description as to what happened without being able to see it, so we knew she had this information, but she continually denied that she had any information about what was going on before or after the fact. It wasn't until we had spent all this money, all this time on this case that she finally told us what we knew she knew, which was that Gary had told her that he'd killed Teresa; so I personally was upset with her. The state police are also upset with her because of all this time of ours that she wasted really could have changed this, you know, this case early about how we performed it. You know, we wouldn't have had to spend all this time if we knew he'd already told somebody. We wouldn't have to spend all this extra money and time; so my plan was to indict her. She wasn't getting any breaks from me.

R. at 1727-1728 (148.3-149.1).

However, Mr. Milam stated that he researched the applicable code section (W. Va. Code, § 61-11-6) before presenting the indictment to the grand jury that was to take place immediately following the Petitioner's trial, and, in doing so, he found an exception in the law, wherein an employee could not prosecuted for acting as an accessory after the fact for an employer.[8] R. at

[8] The relevant code language reads "any person who knowingly harbors, conceals, maintains or assists the principal felon after the commission of the underlying offense violating the felony provisions of sections one, four, or nine of article two of this chapter, or gives such offender aid knowing that he or she has committed such felony, with the intent that the offender avoid or escape detention, arrest, trial or punishment, shall be considered an accessory after the fact and, upon conviction, be guilty of a felony and confined in a state correctional facility for a period not

1733-1734 (154-155). Mr. Milam stated that, because he believed Ms. Bailes was employed by the Petitioner at the time she made a misleading 911 call, Ms. Bailes would be immune from prosecution as an accessory after the fact. *Id.*

Mr. Milam acknowledged Ms. Bailes's employment for Mr. Rollins ended after Mr. Rollins was arrested. R. at 1732 (53). He also acknowledged that, *even after her employment terminated*, Ms. Bailes continued to give statements to law enforcement stating that she had no knowledge of the Petitioner killing his wife. *Id.* So, at that point she would not be protected by the "servant" exception to the accessory after the fact statute.

Mr. Milam further testified that, although Ms. Bailes employment at the Rollins's farm ended shortly after the date Mrs. Rollins's body was discovered, Ms. Bailes was not prosecuted because Ms. Bailes was under duress during the next two years while the case was awaiting trial. R. at 1733 (154.20-155.11). Mr. Milam testified that this duress was the result of the Petitioner making threats toward Ms. Bailes that she or her child would be harmed if Ms. Bailes were to testify against the Petitioner. *Id.*

Mr. Milam then testified that he intended to prosecute Ms. Bailes from the time that she changed her statement to implicate the Petitioner as having murdered his wife, all the way up through the Petitioner's trial, and up until he learned of the master/servant defense to "accessory after the fact" when he was

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to exceed five years, or a period of not more than one half of the maximum penalty for the underlying felony offense, whichever is the lesser maximum term of confinement. But **no person** who is a person in the relation of husband and wife, parent, grandparent, child, grandchild, brother or sister, whether by consanguinity or affinity, **or servant to the offender shall be considered an accessory after the fact.** W. Va. Code Ann. § 61-11-6(b) (West) (emphasis added).

preparing for indictments for the September 2012, grand jury. R. at 1735 (156.7-156.23).

Mr. Milam stated that Ms. Stanton allowed her client to testify without a plea agreement, and this was "idiotic." R. at 1737 (158.18-159.1).

Counsel for the Petitioner presented Mr. Milam with the transcript of the July 24, 2012, Pretrial Conference transcript and had him read the portion where he [Mr. Milam] stated that he did not intend to prosecute Ms. Bailes because he "[did] not believe she had committed a crime." See Footnote 8, Supra. Mr. Milam then conceded his prior testimony that he intended to prosecute Ms. Bailes all the way through the trial was not truthful. R. at 1749-1750 (170.17-171.5).

In contrast, when Mr. Milam was asked why he told the jury to "bet your behind," that he would indict Ms. Bailes at the next grand jury, despite the fact that he claimed Ms. Bailes had not committed a crime at the pretrial hearing on July 24, 2012, Mr. Milam responded with the following:

> You know, the ebb and flows of the trial. I don't know. Frustration. Hard to tell. I wanted to express the point to the jury that there was no plea agreement; that was the reason.

R. at 1754 (175.17-175.20).

Mr. Milan further agreed that if a prosecutor were to fail to disclose a plea deal which was granted to a witness in exchange for testimony that would constitute a *Brady* violation rising to the level of prosecutorial misconduct. R. at 1751-1752 (171.22-172.9).

When Mr. Milam was asked what changed to account for the contrasting statements he made to the Court on July 24, 2012, that he did not believe Ms. Bailes had committed a crime versus telling the jury that he was going to indict her, Mr. Milam cornered by his own fleeting logic and inconsistencies, responded, "*I don't know, to be honest.*" R. at 1753 (174.21).

Mr. Milam was further unable to recall whether he had co-counsel during the trial or who that co-counsel would have been. R. at 1760 (181). He also had no recollection

Finally, Mr. Hughart then presented Mr. Milam with April Bailes Magistrate Preliminary Timeframe Waiver form on which the words "pending for further investigation" had been handwritten on it. R. at 1773 (194); See R. at 2031 (*Petitioner's Exhibit 3*).

Mr. Milam acknowledged that, based on the document, he and Ms. Stanton were in magistrate court together on October 26, 2011, at Ms. Bailes's preliminary hearing, and the document was served upon him. R. at 1773-1774 (194-195).

Mr. Milam then testified as to his recollection of that day in court as follows:

> Q And do you remember being there with Ms. Stanton, discussing this case with her, now that you've had an opportunity to review that document?
> A No. (Shook head.) I mean, that doesn't tell me anything.
> Q And –
> A It tells me that, yeah, I was probably there, but don't -- That doesn't help me remember anything from that, no.
> Q And this document is consistent of your prior practice of continuing a case for further investigation to allow a

defendant to perform some type of act for the State; isn't that true, sir?

A That' s correct , and I -- (nodded) -- and I would believe that's probably what happened here on this day, that it was -- we put that on there, for further investigation, until we could determine what we were going to do.

Q With all the things that you don't remember seven and eight years ago --

A Um-hm.

R. at 1173-1774 (196.2-196.20).

On cross examination, Mr. Milam was adamant there was no plea deal. *Id.* at 202.3-202.6.

C. Omnibus Habeas Hearing January 30, 2019.

1. Public Defender, Cynthia Stanton

Cynthia Stanton has been the Public Defender for Nicholas County, West Virginia, since October 1985. R. at 1834 *(Habeas Corpus Omnibus Hearing* (hereafter *Omnibus*) *Tr., Day 2, 1/30/2019,* 29). Ms. Stanton was the Public Defender in Nicholas County at all times throughout the underlying criminal proceedings in the Petitioner's case, as well as the related case concerning April Bailes.

Cynthia Stanton represented April Bailes when she was charged by the State of West Virginia, by Nicholas County Prosecutor James Milam, with Accessory After the Fact of the Murder of April Bailes. R. at 1836 (30).

At the Omnibus hearing on January 30, 2019, Ms. Stanton testified that there was a deal entered into between April Bailes, through Ms. Stanton, and the State of West Virginia, through James Milam. R. at 1837 (31).

Ms. Stanton testified that the terms of the deal between the state of West Virginia and April Bailes were such that, if April Bailes gave veracious testimony at the trial of the Petitioner to the effect that the Petitioner had confessed to April Bailes that he murdered Teresa Rollins, then the State would agree not to prosecute April Bailes for Accessory After the Fact to the Murder of Teresa Rollins; specifically, "'That, depending on the veracity of her statement, that she would either have her charges dismissed or she would plead to a misdemeanor with no jail time. Of her testimony, not statement, I guess." R. at 1837-1838 (32, 10-13).

Ms. Stanton testified that the terms of the deal were not specifically in writing. Rather, the deal was struck orally, in October 2011, at April Bailes's preliminary hearing for "Accessory After the Fact" to the Murder of Teresa Rollins. R. at 1837-1838 (32.17-33.17).

Ms. Stanton testified that it was the modus operandi in Nicholas County Magistrate Court to write the words "further investigation" on the back of a Magistrate Court Waiver of Timeframe for Preliminary Hearing form when there had been a plea agreement reached with the State, wherein a Defendant would cooperate with law enforcement or the Prosecutor in exchange for the Prosecutor agreeing to drop the criminal charges against the Defendant. *Id.*; See Petitioner's Exhibit #3.

Ms. Stanton testified as to a handwritten note on the back of the document, which read, "'Don't reset this again until after September 1st. Grand jury is 9/11, after that also?' Response, 'Yes.'" R. at 1839 (34.5-6); R. at 2041

(*Petitioner's Exhibit 3*). Ms. Stanton testified "[t]hat notes [sic] means that there was a plea agreement and not to reset it until afterwards to see if she performed on her part of the plea agreement." R. at 1839 (34.8-10).

Ms. Stanton testified that the timeframe for April Bailes's preliminary hearing was waived multiple times thereafter, up through the Petitioner's trial in August 2012. R. at 1839 (34.8-20).

Ms. Stanton testified that Mr. Vanbibber sent her a letter dated August 6, 2012, asking Ms. Stanton to confirm or deny that that a plea deal had been entered into between Ms. Bailes and the State in exchange for her testimony against the Petitioner, but did not respond to the letter because she did not care for Mr. VanBibber. R. at 1840-1842 (35.19-37.18.

Ms. Stanton testified that she was later informed of Mr. Milam's promise to the jury during his closing rebuttal that he was going to indict April Bailes the next month. R. at 1846 (41.13-41.20). She stated that she responded to this information that Mr. Milam had committed an ethics violation by researching her own responsibilities as an officer of the court, and she found that she "could file an ethics complaint against Mr. Milam or I could go to the circuit judge as an officer of the court and tell them what happened." R. at 1847-1848 (42-43).

She testified that she went to the Circuit Judge, Gary Johnson, with her complaint, after which the judge convened a meeting in chambers between himself, Mr. Milam, and Ms. Stanton on August 27, 2012. R. at 148 (43.3-43.16). Ms. Stanton testified that at the meeting:

> Judge Johnson called over P.K., and I told them, as an officer of the court, that I had an ethical duty to disclose that what Mr. Milam said in the closing argument was not true. I was asked what does he mean [verbatim]. I said that there was an agreement that she would not be indicted, and that I felt ethically compelled that I needed to put that -- tell the judge that.

Id. at 43.10-43.16.

At said meeting, Judge Johnson stated that because the grand jury had not yet met, "it was not an issue." *Id.* at 43.7-19. Ms. Stanton testified that "I did tell Judge Johnson that -- that he knew, under no circumstances, would I put anyone to trial on a murder case without a plea agreement." *Id.* at 44.7-44.10.

Ms. Stanton further testified that Ms. Bailes was not indicted at the next grand jury, nor any time after, and after three terms of court, Judge Johnson dismissed Ms. Bailes charges. *Id.* at 44.20-45.10.

2. Current Nichols County Prosecutor, Johnathan Sweeney.

At the Omnibus hearing on January 30, 2019, counsel for the Petitioner called Johnathan Craig Sweeney. Mr. Sweeney is the current Nicholas County Prosecutor, and he was the Assistant Prosecutor for Nicholas County in 2012. *Omnibus Tr., Pt. 2*, January 30, 2019, at 1811-1812 (5-6).

Mr. Sweeney examined the Waiver of Timeframe for Preliminary Hearing that was entered in Nicholas County Magistrate Court in October 2012. R. at 1814 (8); See *Pet. Ex. 3.*

Mr. Sweeney testified that he was aware of the common practice in Nicholas County Magistrate Court, wherein he and defense attorneys would

enter into some sort of a cooperation deal, and the attorneys would write on Waiver of Timeframe for Preliminary Hearing Document "for further investigation." R. at 1814-1815 (8.9-9.7).

Mr. Sweeney further identified notes in the prosecutor's file, which he interpreted as being shorthand in the style adopted by attorneys in Nicholas County Magistrate Court as meaning that "[t]hey were going to hold this in abeyance until after grand jury so they could keep the pressure on the witness to testify." R. at 1816 (10.18-10.20).

On cross examination, Mr. Sweeney testified that he spoke to Ms. Bailes once in his tenure as the Nicholas County Prosecuting Attorney. He stated that during that meeting he asked Ms. Bailes if she had a deal with the state, to which she replied, "yes." R. at 1817 (11.12-11.21).

3. April Bailes

April Bailes testified at the Omnibus hearing on January 30, 2019. She testified that she had been an employee of Rollins Farm on the date Mrs. Rollins's body was found, but she was no longer an employee of Rollins farm as of November 2009. R. at 1872-1873 (*Omnibus Tr., Pt. 2, January 30, 2019,* 66-67).

She admitted that on January 15, 2010, she gave a statement to a West Virginia State Trooper, in which she denied any knowledge of Mr. Rollins killing his wife. R. at.1876 (*Omni. Tr., Pt. 2, January 30, 2019,* 70-71).

At this hearing, she admitted that it was her understanding that Ms. Stanton had entered into a plea agreement on her behalf, wherein if Ms. Bailes

provided testimony against the Petitioner at trial, she would not be prosecuted as an accessory after the fact. R. at 1882 (76.10-76.24).

The following exchange was had between Ms. Bailes and counsel for the Petitioner:

Q (Referred to transcript.) Okay. Now, in -- When you gave your deposition, you were asked how do you know Mr. Milam, and you answered he was the prosecutor; correct?
A (Nodded.) Yes.
Q (Referred to transcript.) And then you were asked, "And did he is he the one who agreed not to prosecute you if you gave your testimony?" and your answer was yes; isn't that correct?
A Yes.
Q (Referred to transcript.) Then you were asked, "And do you recall what he told you about that?"
And your answer was, "Just that if I testified I would not I wouldn't be charged."
Q Is that correct?
A (Nodded.) Yes.
Q (Referred to transcript.) And the next question is, "Is that what Mr. Milam told you?" and your answer was yes; isn't that correct?
A. Yes.
Q. And then you were asked, "And this was prior to the trial?" and your answer was yes; isn't that correct?
...
Q (Referred to transcript.) Now, in that, I asked you the question, "Okay. Now Ms. Stanton testified that Mr. Milam prepared you for your testimony, would you agree with that?
And your answer was, "We talked beforehand. Is that correct?
A (Nodded.) Yes.
Q (Referred to transcript.) And the next question was, "And did you meet Mr. Milam in his office?" and your answer was
yes; isn't that correct?
A Yes.
Q (Referred to transcript.) So was it your understanding that you had a plea agreement with the State and you would provide testimony against Mr. Rollins and you would not be prosecuted for accessory after the fact?
A Yes.

R. at 1880-1882 (*Omnibus Tr., Pt. 2, January 30, 2019*, at 74.20-76.24).[9]

Ms. Bailes further testified as follows:

Q	So what the private investigator wrote down there accurate; would you agree with that?
A	Yes.
Q	(Referred to document.) So did you, in fact, have a with the State, ma'am?
A	(Nodded.) Yes.
Q	And did you perform -- Well, strike that. What were you required to do in regard to that plea?
A	Testify.
Q	And did you do that?
A	Yes.
Q	So you -- would you agree with me that you upheld your end of the bargain?
A	Yes.
Q	And were you required to testify in the same manner as in the last statement that you gave to law enforcement?
A	I don't understand.
Q	Well, the last statement you gave to law enforcement, you stated that Gary Rollins told you he'd killed his wife; is that correct?
A	Yes.
Q	And was that the testimony that the State was wanting
A	Yes.
Q	And was that what you were required to testify to in exchange for not being prosecuted?
A	Yes.
Q	And you did that?
A	Yes.
Q	So you were promised not to be prosecuted in exchange for that testimony; is that correct?
A	Yes.

R. at 1889-1891 (83.18-85.4).

[9] The Petitioner conducted depositions with a number of witness before the omnibus hearing, but the transcripts of the deposition were not entered into the record.

D. Final Hearing December 27, 2019.

Thereafter, the matter remained dormant on the circuit court's docket for some time. R. at 2386. On December 27, 2019, the court reconvened for dispositional hearing to allow counsel to make final arguments. *Id.*

Counsel for the Petitioner noted the evidence from multiple witnesses, including the current prosecutor that there was a deal between Ms. Bailes and the State before the Petitioner's trial. R. at 2387-2388. Counsel also noted Mr. Milam's inconsistent statements to the trial court wherein he stated that Ms. Bailes that he did not believe Ms. Bailes had committed a crime at the July 24, 2012 pretrial hearing, to his statement to the jury that they could "bet their sweet behind" he was going to indict her as accessory after the fact for murder, but then he never did indict her. *Id.* Counsel explained that Ms. Bailes held herself out to the jury as martyring herself with no promises of leniency when she testified to lying to the police, when in reality she was doing it for her own personal gain, to avoid prosecution. R. at 2388.[10]

The State argued that Mr. Milam was telling the truth that there was no deal, and this case differed from the controlling precedent because in the on-point case, the prosecutor at some point admitted there was a deal between the witness and the State. R. at 2389.[11]

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[10] The transcript says that counsel stated Ms. Bailes was "murdering" herself, but counsel remembers clearly stating that he used the word "martyring."

[11] The transcript at different points misnames the speakers, at one point listing the counsel for the respondent as Mr. Sweeney, despite the fact Jeff Mauzy represented the Respondent. R. at 2301.

The circuit court found that there was some evidence of a deal and perjured testimony, but that evidence was immaterial. R. at 2390-2392. The court found Mr. Milam's argument that he did not prosecute Ms. Bailes because she was under duress for fear of the Petitioner incredible, as countered by the fact that Ms. Bailes visited the Petitioner at the jail some forty three times after he was arrested. R. at 2392. The court acknowledged that multiple witnesses testified to the practice of continuing a case "for further investigation" in magistrate court to connote plea negotiations.

The court stated that:

> But it all boils down to whether or not – even if you assume for a minute that the prosecution improperly withheld evidence of a deal -- whether or not that was material. And it appears to me that even without Ms. Bailes' testimony as to what he told her, the case that the prosecution made was so overwhelming that it was immaterial.
>
> The defense counsel, as I say, had ample ammunition and used that against her with respect to impeachment questions, and I don't believe that there's any likelihood or any reason to suspect if the jury had been told straight up, "Yeah, she was not going to be prosecuted if she testified this way," that would've made any difference at all. It simply is immaterial because of the strength of the prosecution's case.
>
> -- even if you assume that there was error as alleged by the Petitioner here with respect to prosecutorial misconduct or juror selection or use of perjured testimony of both of the witnesses, it's all of no consequence.

R. at 2392-2393.

The court used this logic to deny the Petitioner relief and dismiss the case from the docket. The circuit court entered its final order from the hearing on January 28, 2020. R. at 2301-2321. On this issue of the deal between the

State and Ms. Bailes, the court found that "[t]he 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." R. at 2318.

The order explained away the trial court's the instruction to the jury that Ms. Bailes was charged with felony accessory after the fact, as well as the prosecutor's statement that they could bet their "sweet behind" that he would indict her the next month with the following:

> 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.
>
> 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 occurred as assumed for this analysis.

R. at 2320. Because the circuit court did not believe the additionally testimony would have swayed the mind of juror, the court determined the new evidence was immaterial.

The Petitioner was denied relief. It is from this order the Petitioner appeals.

SUMMARY OF ARGUMENT

The circuit court committed clear error in finding that the newly discovered evidence was immaterial and abused its discretion when these findings to dismiss the Petition without granting any relief to the Petitioner.

First, the circuit court erred in finding that no secret plea or immunity agreement existed between April Bailes and the State. Both Ms. Bailes and her attorney testified at the omnibus hearing that such a deal existed, and this was the reason that she waived her Fifth Amendment right against self-inclination and testified against the Petitioner at trial. April Bailes clearly committed perjury at trial when she said she had been promised nothing in return for her testimony.

The prosecutor made extremely prejudicial, false statements to the jury when he promised that he was going to indict Ms. Bailes for felony accessory after the fact to murder the next month, even though less than a month earlier he had proffered to the court that he did not believe that Ms. Bailes had committed a crime. Every aspect of the secret deal with Ms. Bailes and the prosecutor's statements to the jury was materially prejudicial to the Petitioner at trial.

Second, the circuit court erred in finding that the Petitioner was not materially prejudiced at trial when it was discovered that Nelson Paul Bailes, who served on the petit jury that convicted the Petitioner, was the great uncle of April Bailes.

Third, the circuit court erred when it failed to find that the cumulative error doctrine was applicable to this case. The trial court allowed multiple errors to occur throughout the underlying criminal proceeding, such that their cumulative effect was to create a fundamentally unfair trial for the Petitioner, which would be remedied by a reversal of his conviction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner contends this matter involves issues of fundamental public importance regarding the very nature of due process, which makes it appropriate for oral argument under W. Va. R. App. P. 20.

If this Honorable Court is not inclined to grant argument under Rule 20, then, because this case involves (1) assignments of error in the application of settled law; (2) an unsustainable exercise of discretion where the law governing that discretion is settled; (3) insufficient evidence or a result against the weight of the evidence, and/or; (4) narrow issues of law, oral argument, under W. Va. R. App. P. 19 may be necessary.

ARGUMENT

STANDARD OF REVIEW

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong[ed] standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006); Syl, Pt. 1, *Christopher H. v. Martin*, 241 W. Va. 706, 828 S.E.2d 94 (2019)

ASSIGNMENT OF ERROR

ERROR #1: The circuit court committed reversible error when it failed to grant the relief requested in the Petitioner's Amended Petition for Writ of Habeas Corpus based on the grounds raised concerning the State's use of perjured testimony, prosecutorial misconduct, and prejudicial, false statements made to the jury with respect to an undisclosed immunity/plea deal between the state and its star witness in the Petitioner's original trial.

A. Issue.

In the Petitioner's Amended Petition for Writ of Habeas Corpus, Ground Eight (12(H)), clearly lays out the prosecutor's multiple contradictory representations as to how he intended to proceed with Ms. Bailes's charge of "Accessory After the Fact." The Amended petition states that the "[p]rosecutor made representations to jury that he was going to indict April Bailes. Upon information and belief, these representations were made for purposes of bolstering April Bailes credibility before the jury. At the time the Prosecutor made these statements to the jury he knew he was not going to indict April Bails." The Amended Petition further states "[d]uring rebuttal argument, the prosecuting attorney, James K. Milam, made material misrepresentations to the jury when he expressed his intention to indict the state's key witness, April Bailes, whose misrepresentation resulted in substantial prejudice and manifest injustice to the appellant."

B. Rule.

"A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt

violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982); accord *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

"The prosecution must disclose any and all inducements given to its witnesses in exchange for their testimony at the defendant's trial." Syl. Pt. 2, *State v. James*, 186 W.Va. 173, 411 S.E.2d 692 (1991); Syl. Pt. 1, *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 717, 510 S.E.2d 790, 791 (1998).

The West Virginia Supreme Court elaborated on the materiality standard in *State v. Fortner* as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

182 W.Va. at 354, 387 S.E.2d at 820 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

The *Fortner* Court further found that "evidence reflecting on the credibility of a key prosecution witness may be so material to the issue of guilt as to qualify as exculpatory matter which the prosecution is constitutionally required to disclose." *State v. Fortner*, 182 W.Va. at 354, 387 S.E.2d at 821;

quoted in *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 722–23, 510 S.E.2d 790, 796–97 (1998).

"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." Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 22, 650 S.E.2d 119, 121 (2007).

C. Analysis.

There is overwhelming evidence that a deal was entered into between the State of West Virginia and April Bailes, wherein April Bailes would testify against the Petitioner, Gary Lee Rollins, at his murder trial in Nicholas County Case, 11-F-81, and, in return, the State of West Virginia would cause the felony "Accessory After the Fact" charge against Ms. Bailes to be dropped or allow her to plead to a misdemeanor. Despite Mr. Milam's claims that there was no such deal, the contradictory testimony of Public Defender, Cynthia Stanton, April Bailes, and Johnathan Sweeney makes it apparent that there was a plea/immunity deal in place.

At the Omnibus Hearing, April Bailes provided credible testimony that she was party to a deal wherein she would testify against the Petitioner at trial,

in accordance with her final statement to the police, that the Petitioner had confessed to Ms. Bailes that he murdered his wife. R. at 1880-1882. In return Ms. Bailes was never indicted as an "accessory after the fact" for her alleged involvement covering up the murder.

Ms. Bailes testified at trial that no promises were made to her by the State in exchange for her testimony. *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529, Footnote 5, (2014); R. at 1049-1051 (*Trial Tr., Day 3, 8/16/2012,* 216.3). By admitting to the existence of this deal during the Petitioner's habeas proceeding, Ms. Bailes implicated herself in having committed perjury at the Petitioner's trial. She had no incentive to testify to this existence of the deal.

The trial court instructed the jury that Ms. Bailes was facing up to five years in prison for her charge of "Accessory After the Fact." R. at 1464. In fact, pursuant to her cooperation agreement with the State, Ms. Bailes was not facing five years in prison. In light of the evidence presented during these proceedings, this instruction was obviously in error.

Cynthia Stanton provided credible testimony that she and James Milam entered into a deal on Ms. Bailes's behalf wherein Ms. Bailes would provide testimony that the Petitioner had admitted to Ms. Bailes that he had murdered his wife, and Ms. Bailes's felony "Accessory After the Fact" charge would be dismissed or pled to a misdemeanor without jail time. R. at 1837-1842.

Ms. Stanton further provided credible testimony that, upon learning that Mr. Milam told the jury that he intended to indict Ms. Bailes the next month,

Ms. Stanton reported the issue to the Circuit Court Judge Gary Johnson. She gave detailed testimony about how Judge Johnson held a conference with Ms. Stanton and Mr. Milam shortly thereafter, and the judge declined to act on the matter because the Grand Jury had not yet convened. R. at 1847-1848.

Mr. Milam had stated he had no clear recollection of the meeting and stated that Ms. Stanton was wrong in believing she had a deal in place. R. at 1762-1763. It is inconceivable that Mr. Milam does not recall being summoned to a meeting in the judge's chambers after being accused of lying to the jury.

There is ample evidence that the deal made between the State of West Virginia and April Bailes was never disclosed to the Petitioner or his lawyers.

April Bailes's testimony at the Petitioner's trial was the only evidence whatsoever that the Petitioner confessed to having killed his wife. There were no eyewitnesses who could place the Petitioner in the vicinity of Ms. Rollins at or near the time of her death. April Bailes was the State's key witness. All other evidence was forensic and circumstantial evidence.

The plea/immunity deal between The State of West Virginia and April Bailes was material evidence.

Mr. Milam's statement at trial to the jury during closing rebuttal, which included that, "You can bet your behind that I'm going to indict her next month[,]" was false and materially prejudicial to the jury.

Mr. Milam's testimony at the omnibus hearing was replete with inaccuracies and memory lapses. He was unable to remember whether he even had a co-counsel at the Petitioner's trial. R. at 1760. He could not remember

whether he had charged Ms. Bailes as an accessory at any point. His testimony as to whether or not a deal existed between the State of West Virginia and April Bailes is not credible. See R. at 1706-1800 (*Transcript of PK Milam's Omnibus Testimony*).

The fact that Mr. Milam had stated to the Court at a Pre-trial Conference, less than a month before trial, that he did not believe April Bailes had committed a crime makes his comments to the jury blatanly phony, especially coupled with the fact that April Bailes was never indicted, and her case was dismissed for failure to indict. *See* R. at 117-118.

Even if, as Mr. Milam testified, he did not indict April Bailes based on his belief that she had a master/servant relationship with the Petitioner, this does not change the effect his statements had on the jury. The jury was led to believe that Ms. Bailes testified without any sort of inducement given in exchange for her story. The jury was led to believe Ms. Bailes had effectively made a moral decision to testify against the Petitioner, despite the fact that her testimony would inevitably lead to her being indicted and presumably convicted of a felony carrying a substantial prison sentence.[12]

Further, Mr. Milam's claims during the omnibus hearing that Ms. Bailes was supposedly under duress when she gave her three exculpatory statements about the Petitioner to law enforcement are entirely baseless. The threat the

[12] The master/servant defense is a complete red herring in this case. Ms. Bailes was only in a master/servant relationship with the Petitioner when she made the 911 call to the police the day the body was discovered and again two days later. It is undisputed that she gave multiple incongruous statements to police and investigators after her employment with the Petitioner terminated, which the State could have prosecuted as "accessory after the fact."

Petitioner allegedly made to Ms. Bailes she and her daughter "wouldn't be here" was on the day the body was discovered. *State v. Rollins*, 233 W. Va. 715, 725, 760 S.E.2d 529, 539 (2014). He was arrested shortly thereafter, and in the intervening months, she visited Mr. Rollins at the jail forty-three times. *She even brought her three-year-old daughter along to the jail to visit with Mr. Rollins on multiple occasions. Trial Tr., Day 3, 8/16/2012* at 249-251. She continued to "date" Mr. Rollins until December of 2010. She accepted phone calls from him four of five times a day, and sent him letter with photographs of her and her baby. *Id.* at 253-254. This is not the behavior of a woman fearing for her own life and the life of her daughter. She had no defense of duress.

In the original appeal, the Petitioner raised the ground that the prosecutor made improper comments to the jury (i.e. the statement that he would prosecute April Bailes), which prejudiced the Petitioner with the jury. *State v. Rollins*, 233 W. Va. 715, 728, 760 S.E.2d 529, 542 (2014). This Honorable Court found the issue was invited error on behalf of the defense counsel Wayne VanBibber at trial, as no objection was made by defense counsel contemporaneously with the prosecutor's statement. *Id.*

This revelation of the undisclosed plea/immunity deal between the State and April Bailes changes the posture of that issue, as defense counsel was unable to object at the time due to his lack of knowledge that a plea deal existed.

This case is strikingly similar to *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 510 S.E.2d 790 (1998). In *Yeager*, it appeared that State's key witness

was induced by a plea deal to testify that his friend murdered the victim, and this deal was never disclosed by the State. In that case, the nature of the plea deal was somewhat vaguely recorded in magistrate court, and it consisted mostly of oral promises and continuing the preliminary hearing of the witness, so the witness could testify against the defendant at trial. If the witness gave convincing testimony at trial, the charges would simply be dropped. *Id.* at 794-796. The witness gave convincing testimony, and the charges were eventually dropped. *Id.*

The Supreme Court reversed the conviction in that case, and made the finding that

> 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 suggests that an agreement existed, this Court will resolve the benefit of the doubt in the defendant's favor. See *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) ("[W]e do require substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion.")

State ex rel. Yeager v. Trent, 203 W. Va. 716, 722, 510 S.E.2d 790, 796 (1998).

In the instant case, there is clear and convincing direct evidence from multiple witnesses (many of whom were parties to the deal) that such a deal existed between the State and its key witness. Ms. Bailes accepted a deal wherein she would testify (in accordance with her last statement given to the police (after she was arrested)) that the Petitioner had confessed to her that he had murdered his wife. In return, depending on the veracity of her testimony

she would either have her charges dismissed or she would plead to a misdemeanor with no jail time.

Per *Trent,* the test is satisfied requiring "substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion." *Id.* While the State had some leeway with its end of the bargain to dismiss the charges or allow her to plead to a misdemeanor with no jail time, this consideration is far from illusory. R. at 1837-1838 (*Omnibus Tr., Pt. 2, January 30, 2019,* 32.10-32.14) (testimony of C. Stanton). In either event, if Ms. Bailes cooperated, she would walk free. If she failed to uphold her end of the bargain, the State intended to indict her on a felony for which she would face up to five years in prison.

In its dispositional order, the circuit court attempted to waive off the deal as lacking a "meeting of the minds" because Ms. Stanton was stated that "depending on the veracity of her testimony" Ms. Bailes would have her charges dismissed or be permitted to plead to a misdemeanor. This does not mean that there were no clear terms of the deal. April Bailes was guaranteed *at least* the benefit of pleading to a misdemeanor in return for her testimony to convict the Petitioner. If her testimony was especially good, she stood to earn the added bonus of a dismissal. In either case, she was testifying for the concrete guarantee that she would not be convicted of a felony.[13]

[13] A proper analogy would be if A promised B that A would pay B $50 to paint A's fence. If A found that B did an exceptional job of painting the fence then A promised B a bonus of an additional $25. The terms of the contract are enforceable in so much as B is guaranteed at least $50. B is not guaranteed the potential full $75 of the contract, and the $25 bonus would be,

The circuit court further attempts to find this deal immaterial by relying on the fact that the jury was able to hear counsel impeach and cross examine Ms. Bailes about any potential inducements or guarantees that defense counsel suspected she had received. While it is true that defense counsel was allowed to cross-examine Ms. Bailes on these issues, she never buckled and held firm to her story that she was not promised anything for her testimony. Further, any question of a deal was solidly wiped from the jurors' minds when the prosecutor exclaimed they could "bet your sweet behind" he would indict her at the next term of court. Finally, the circuit judge gave an explicit instruction to the jury that Ms. Bailes was under a felony charge for "accessory after the fact," so the non-biased circuit judge piled on to Ms. Bailes credibility.

Finally, the court's dispositional order tries to claim that, even if there was a secret deal, the "overwhelming" evidence against the Petitioner outside of Ms. Bailes's testimony made his conviction a sure thing anyway, so the false statements by the prosecutor, the perjury by Ms. Bailes, and the concealment of the secret deal are still immaterial. This is patently absurd. The evidence in this case involved an initial investigation by the Nicholas County Sherriff's Office that ruled Terrassa Rollins's death an innocent accident. *Rollins* at 723-724. The initial reports by three medical examiners all concluded that her death was an accident. *Id.*

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most-likely, unenforceable. However, there is no doubt that if B paints the fence, B is owed $50 from A.

The governor, at the direct behest of Terrassa Rollins's family, ordered the State police to reopen the case after a full investigation had already closed the matter with no fault found. *Id.* at 724. After finding some inconclusive evidence about some insurance and what must have been blocking Ms. Bailes's view from where she made the 911 call, the State Police decided to call Mrs. Rollins's death a murder. *Id.* The State Police then took this *non-medical* information (almost certainly along with their order from the governor) to the State's medical examiners, and suddenly the autopsy report and death certificate were altered to say that a murder had occurred. *Id.* Without Ms. Bailes's testimony, the State's case was based wholly on flimsy, circumstantial evidence. This explains why it took the State nearly two years to indict the Petitioner. Even the prosecutor, Mr. Milam, alluded to this fact on the stand at the omnibus hearing. *Id.* at 148.3-149.1.

All elements of the *Brady/Hatfield* test are met. (1) The evidence at issue- the deal between the State and April Bailes- would have been favorable to the defendant as exculpatory or impeachment evidence; (2) The existence of the deal made between the State and Ms. Bailes was suppressed by the State, either willfully or inadvertently; and (3) The existence of this deal was material, i.e., it prejudiced the defense at trial.

D. Conclusion.

Based on the clear evidence that an agreement was entered into between the State and its key witness to testify at the Petitioner's trial in return for

leniency and/or immunity, the clear evidence that the agreement was never disclosed to defense counsel, the clear evidence that the prosecutor made inappropriate, prejudicial statements to the jury, and the clear evidence that the trial court gave a faulty instruction based on this misrepresentation, it is apparent that the Petitioner's right to Due Process was materially prejudiced at trial, in violation of Article III, Section 14 of the West Virginia Constitution and Amendment V of the United States Constitution. It was clearly erroneous for the circuit court to find that no deal existed and no prejudicial statements were made to the jury. It was an abuse of discretion for the circuit court to deny the Petitioner relief on these grounds. Accordingly, circuit court's order should be reversed, and the Petitioner's conviction must be vacated.

ERROR #2: The circuit court erred when it denied the Petitioner relief based on newly discovered evidence that one of the jurors on the case was the great uncle of the State's star witness, April Bailes, along with other clear errors concerning voir dire and ineffective assistance of trial counsel relating to jury selection.

A. Issue.

The Petitioner contends that the circuit court was clearly erroneous in finding that it was immaterial that the great uncle of the State's star witness was permitted to sit on the jury that convicted the Petitioner. The circuit court was further clearly erroneous in failing to find that defense counsel was not ineffective in conducting voir dire at trial which would have shown that April Bailes and Nelson Paul Bailes were related.

B. Background.

The issues concerning juror selection and misconduct at issue before the Court stem from the familial relationship between State Witness, April Bailes, and juror, Nelson Paul Bailes, as well as trial counsel's failure to notice that familial relationship and/or take action on the knowledge thereof.[14]

Nelson Paul Bailes was selected for the jury pool in the Petitioner's underlying criminal case. Nelson Paul Bailes is the paternal great uncle of April Bailes. He is the brother of her paternal grandfather. *Omnibus Hr. Pt. 1, 1/17/19,* at 124. See R. at 2017-2030, Petitioner's Exhibit No. 1.

On the State's witness list at trial, April Bailes appeared by her married name April O'Brien. During voir dire, the jurors were asked whether they knew "April O'Brien." None of the jurors stated they knew her. She was not identified as "April Bailes" during voir dire. R. at 1643. This went unnoticed by defense counsel Tim Carrico and Wayne VanBibber. R. at 1642-1650.

Nelson Paul Bailes sat on the Petit Jury at the Petitioner's trial.

When April Bailes went on to testify on day three of the Petitioner's trial, she stated her name on the record as "April Bailes." R. at 1037-1038.

At the omnibus hearing on January 17, 2019, the Petitioner called Private Investigator Herbert Gardner to testify concerning the blood relationship between the State's witness at trial, April Bailes, and the juror at trial Nelson Paul Bailes.

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[14] At the omnibus hearing, the Petitioner conceded that the other juror issues raised in Grounds 1, 2, and 3 were *res judicata.*

Mr. Gardner testified that he had researched the birth certificates and conducted personal interviews with the Bailes family members in question, and he had determined juror Nelson Paul Bailes to be the great uncle of April Bailes. R. at 1703 (*Omnibus Tr., Pt. 1, January 17, 2019*, at 124.1-124.8).

During Mr. Gardner's testimony, an affidavit was admitted without objection, which established the line of consanguinity between Nelson Paul Bailes and April Bailes. Said affidavit read as follows:

> I, Herbert Gardner, do attest that the following statement is both true and factual, and that it is given freely and in good conscious, this day, Friday, May 26th 2017.
>
> On the date of April, 14th 2017 at 3:00 pm EST, at the residence of Garry Bailes and April Bailes O'Brien, located on McMillion Road, Nettie WV,the following events occurred;
>
> I arrived at residence (McMillion Road, Nettie WV) at 3:00 pm with my Associate, Steve Deakins. I observed Garry Bailes near a pickup truck parked next to his trailer. I approached Mr. Bailes identified myself, and stated my purpose for seeing him. I stated I needed to have him view Birth and Marriage Records to establish familial connections between himself, his daughter (April Bailes O'Brien) and his father (Charles Bailes) to their uncle (Nelson Bailes). Mr. Bailes was reluctant to talk, however, his daughter April Bailes O'Brien overhead us speaking and asked about the records. I approached Ms. Bailes-O' Brien on the porch and explained the purpose of my visit and began opening documents from my brief case. Initially both father and daughter were defensive and reluctant to admit a family relation to Nelson Bailes. After I showed them both the Records they did admit family relationship to Nelson Bailes, but, down played their closeness to him, stating they were rarely in communication.

R. at 2017 (*Pet. Exhibit No. 1)*; *Omnibus Tr., Pt. 1*, January 17, 2019, at 124.

Mr. Gardner echoed the affidavit with his testimony about his process of interviewing Gary Bailes and April Bailes:

Q And did you have contact with a Gary Bailes and April Bailes What -- What's dated on -- That date, sir? (Referred to Petitioner's Exhibit Number 1.)
A This was April the 14th, 2017, 3:00 in the afternoon.
Q Okay. So did you go to Gary Bailes and April Bailes' home?
A Yes. It's
Q Did --
A -- a mobile home.
Q Did you speak -- Did you speak to them about their relationship with Nelson Paul Bailes?
A I did.
Q And what information did you acquire?
A After some questioning and then showing them the documents, they did admit the family relationship.
Q Did they say that they knew each other?
A They said that there wasn't a lot of contact between them but they did know who he was.
Q (Referred to document.) They state they were rarely in communication?
A Yes.
Q Okay, but, according to their statement, did you infer that they did, in fact, communicate, it was just rarely?
A Yes.

R. at 1703-1704 (124-125).

The family connection between April Bailes and Nelson Paul Bailes was established in detail by the collection of birth and marriage certificates collected by Mr. Gardner. These were admitted to the recorded, along with a letter by Mr. Gardner which explained the significance of each official document, both individually and connected. It read as follows:

> Enclosed are copies of Marriage and Birth Certificates obtained from Nicholas County Courthouse and the WV State Department of Health,Division of Vital Statistic. These records demonstrate a direct familial link between a juror (Nelson Bailes) and the Prosecution's star witness (April Dawn Bailes/O'Brien) in our client Gary Rollins original trial. The genealogical link is as follows:
>
> 1. Birth Certificate #001950 assigns a live birth of April Dawn Bailes to Cynthia Louise Kesterson and Gary Lee Bailes.

2. Application for Marriage license #002281 reinforces relationship of parents named in (1.).
3. Birth Certificate #004028 assigns a live birth of Gary Lee Bailes (father of April Bailes) to Charles William Bailes and wife Mavis Emogen McKinney.
4. Birth Certificate #34107 assigns a live birth of Charles William Bailes (father of Gary Lee Bailes) to James E. Bailes and wife Vida Virginia Foster.
5. Birth Certificate issued from the office of Audra Deitz, Clerk of the County of Nicholas, Birth Record No. 5 / Page 10 establishes a live birth of Nelson Paul Bailes to James E. Bailes and wife Vida Foster.
6. The brother/brother relationship of Charles William Bailes (grandfather of April Bailes) to Nelson Paul Bailes (Great Uncle to April Bailes) is thusly established. WV State Statute requires nine degrees of separation for family members in such matters as trial. Further, Marriage Certificate issued from the office of Audra Deitz, Clerk of the County of Nicholas, records the marriage of Nelson Paul Bailes to Mable Katherine Rudd on 19 th December 1964. This same Mable Katherine Rudd was known to this Investigator as 'Kay' Rudd during the original investigation of this case. At NO time did she offer or acknowledge a relationship to the juror (who was as yet not selected for the jury) before or after jury selection. During interviews with Investigators, Ms. Rudd acknowledged a 'Motherly' role to Ms. Bailes, whose children were living with Ms. Rudd during her involvement in the original trial. This alone indicates knowledge and familiarity between the parties of April Bailes and Nelson Bailes. Database searches also indicate that both parties at one time lived on the same road. At NO time during trial did April Bailes acknowledge knowing Nelson Bailes, nor did he acknowledge knowing April Bailes.

See R. at 2237-2251 (*Pet. Exhibit No. 11*); *Omnibus Tr., Pt. 1, January 17, 2019,* at 124.1-124.16.

During April Bailes testimony on January 30, 2019, counsel for the Petitioner asked Ms. Bailes about her relationship to juror Nelson Paul Bailes, which she described during the following exchange:

Q And do you know Nelson Paul Bailes?
A Yes.
Q And how do you know Nelson Paul Bailes?
A When -- I -- I met him when we first came to court this hearing, this part of the hearing.
Q He's your great uncle; correct?

A (Nodded.) Yes.
Q He's your grandfather's brother --
A (Nodded.) Yes.
Q -- correct?
A (Nodded.) Yes.
Q And your dad knew Nelson Paul Bailes --
A Yes.
Q -- isn't that correct?
A (Nodded.) Yes.
Q And Nelson Paul Bailes would come down to the farm sometimes to visit with your grandpa, wouldn't he?
A (Shook head.) No, not 'til -- I don't know maybe a few months before my grandpa passed away, and that was just to help him do his wood.
Q So he didn't visit prior to then ever?
A (Shook head.) Not that I ever know of.
Q Now, do you know whether or not Nelson Paul Bailes used to own an interest in the farm that -- that you lived on and your grandpa lived on?
A (Shook head.) No.
Q No. You don't know that?
A (Shook head.) No.
Q You don't know that?
A (Shook head.) No.
Q Okay. Do you know how Nelson Paul Bailes would -- would have known that your married name was April O'Brien?
A (Shook head.) No.
Q Did Nelson Paul Bailes attend your grandfather's funeral?
A Yes.
Q Did you all talk at the funeral? (Shook head.) No.
Q Did he attend your father's funeral?
A (Nodded.) I believe so.
...

Q Now, Herbert Gardner was the private investigator that came and spoke to you. Did he introduce himself to you?
A I'm sure he did.
Q Okay, and how long did you -- did you talk with Mr. Gardner?
A I don't recall how long it was.
Q So -- But you had conversation with him; correct?
A Yes.
Q Do you remember talking to a private -- private investigator and him showing you some birth records?
A Yes.
Q Some -- Some birth certificates and some marriage certificates?
A (Nodded.) Yes.
Q And you remember admitting the family relationship with Nelson Paul Bailes but stating that you all were in --rarely in communication?
A Yes.

R. at 1886-1869 (*Omnibus Tr., Pt. 2, January 30, 2019*), at 80-83.

The Petitioner called Mabel Bailes, the wife of juror Nelson Paul Bailes to testify at the Omnibus Hearing on January 30, 2019. R. at 124 (118). She testified to knowing that her husband, Nelson, was the brother of Charles Bailes, and that Charles was the father of Gary Bailes. *Id.* at 119-120. On cross, she stated that she is now familiar with April Bailes, but she would not have known her name or who she was in 2012. *Id.*

The Petitioner called juror Nelson Paul Bailes to testify at the Omnibus Hearing on January 30, 2019. R. at 1934 (128). He testified that he is the brother of the late Charles Bailes. R. at 1933 (127.3-5). Before his brother died, he would visit him from time to time on their family farm in Nettie, West Virginia. Charles Bailes is the father of Gary Bailes. Gary Bailes is the father of April Bailes. Nelson Paul Bailes stated that he knew his nephew Gary, and saw him in passing, most often when he driving to Charlie's house. R. at 1935 (129.17-130.13).

Gary Bailes's home was right down the road Paul Bailes's home, and he had to drive past Gary's home to get to Charles's home. R. at 1934-1935 (128-129). He testified that he did not know he was supposed to disclose to the court that he was the uncle of a State Trooper. R. at 1943 (137).

The following exchange was had as to Mr. Bailes knowledge of his familial relationship with April Bailes:

Q So you would agree that you are April Bailes' great uncle?
A Would you agree with that?

A That ' s what they tell me. Like I told you, I've never met the girl. I did not know she was kin to me or nothing else like that. I've never met or talked to the girl until -- in this -- after trial was over.
Q How did you learn that you were -- were – were related to April Bailes?
A That I don't remember.
Q (Referred to transcript.)I'll turn your attention to page 11 of your transcript, sir. It says -- (Displayed transcript.)I asked you a question, "So you've seen his daughter -- You mean April Bailes?" And your answer was, "That one and the other one other one he's got. I don't even know what her name is." Do you remember that --
A No sir
Q -in your deposition?
A (Shook head.) No, sir.
Q (Referred to document.) Do you recall in your deposition me taking you through your birth certificate and marriage certificates? You and Charles are brothers --
A (Nodded.) Um-hm.
Q -- correct? You need to answer out loud, sir.
A (Nodded.) Yes. Yes, sir.
Q And Charles' son was Gary --
A (Nodded.) Yeah.
Q -- correct?
A (Nodded.) Right.
Q And Gary's daughter was April Bailes; correct?
A As far as I know.
Q So that would make you April's great uncle.
A As far as I know.

R. at 1943-1944 (137-138).

On cross examination, Mr. Bailes testified to the following:

Q Okay. Now, let's get down to it. If -- If someone would have told you --And I'm -- I'm asking you about 2012, when the trial was going on --
A (Nodded.) Yeah. okay?
Q If someone would have told you, "Nelson, this is April Bailes. She's your great niece," would you have known that?
A (Shook head.) No, sir.
Q Would you have given her -- And, just because you're related to her, would you have given her testimony any more credibility, any more weight?
A (Shook head.) No.

R. at 1946 (141).

C. Rule.

"The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right." Syl Pt. 4, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981).

"A potential juror closely related by blood or marriage to either the prosecuting or defense attorneys involved in the case or to any member of their respective staffs or firms should automatically be disqualified." *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983).

"When a prospective juror is closely related by consanguinity to a prosecuting witness or to a witness for the prosecution, who has taken an active part in the prosecution or is particularly interested in the result, he should be excluded upon the motion of the adverse party." Syllabus point 2, *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E.2d 480 (1974); Syl. Pt. 3, *State v. Christian*, 206 W. Va. 579, 526 S.E.2d 810 (1999).

The West Virginia Supreme Court has further ruled that:

> ... "Blood is thicker than water;" and it is utterly impossible for any person to determine how far the judgment or action of a person affected by it may be swayed or controlled. It operates upon the mind and heart of the individual secretly and silently. Its operation is not disclosed by any outward manifestation other than the result. It is utterly impossible to look into a man's mind and see its operation. Its effect is not general, like many

> other disqualifications. It is purely personal, operating between the related parties and to the prejudice of all others.... [O]ne who has an interest in the subject-matter of the litigation or is related to one of the parties, is palpably and wholly unfit for service as a juror.

State v. Christian, 206 W. Va. 579, 582, 526 S.E.2d 810, 813 (1999) quoting *State v. Harris*, 69 W.Va. at 245-246, 71 S.E. at 609.

In order to receive a new trial, a party challenging a verdict based on the presence of a juror disqualified under W.Va. Code § 52–1–8(b)(6) must show that a timely objection was made to the disqualification or that ordinary diligence was exercised to ascertain the disqualification. Syl. Pt. 4, *Proudfoot v. Dan's Marine Serv.*, Inc., 210 W. Va. 498, 500, 558

"In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syllabus point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

"In deciding ineffective ... assistance [of counsel] claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Syllabus point 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

"In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syllabus point 6, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995); *Coleman v. Binion*, 829 S.E.2d 1 (W. Va. 2019) S.E.2d 298, 300 (2001).

D. Argument.

In the instant case, it is clear that juror, Nelson Paul Bailes, is the Uncle of April Bailes. Though the original witness call sheet, which was read to the jury during voir dire to ensure no connections between jurors and witnesses, stated that April Bailes name as "April O'Brien," when Ms. Bailes was called to testify, she was identified as "April Bailes."

Nelson Bailes knew or should have known the familial connection between himself and Ms. Bailes. After hearing April Bailes identify herself as "April Bailes" during her testimony, he should have alerted the Court to the potential conflict.

Nicholas County- and the town of Nettie in particular- are not so large in population that the average person would not notice a connection between two people from Nettie with the name Bailes.[15]

Counsel for the Petitioner at trial should have noticed that Nelson Paul Bailes had the same last name as the State's star witness. Any reasonable attorney acting under the circumstances would have so noticed. This should have led to a line of inquiry where the consanguineal connection between Juror Bailes and Witness Bailes could have been uncovered, and Mr. Bailes would have been removed from the jury.

Because Nelson Paul Bailes had a close consanguineal relationship to the state's star witness, he should have been automatically removed from the jury.

Counsel's failure to notice that Nelson Paul Bailes had the same surname as the State's key witness and act upon the same was objectively deficient. Had trial counsel acted on this obvious connection, there is a high likelihood the outcome of the proceedings would have been different.

It was clearly erroneous to for the circuit court to find that the Petitioner was not materially prejudiced by Nelson Paul Bailes sitting on the jury. The circuit court was further clearly erroneous in not finding material prejudice caused by the Petitioner's trial counsel in failing to notice this fundamentally unfair situation unfolding. It was an abuse of discretion for the circuit court not to reverse the Petitioner's conviction on these grounds.

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[15] Censusreporter.org tallies the population of Nettie at 609 people. https://censusreporter.org/profiles/16000US5458180-nettie-wv/; retrieved 5/18/2020.

Error #3: The circuit court erred in finding that the Petitioner did not receive ineffective assistance of trial or appellate counsel.

The Petitioner's tenth ground in his Amended Habeas Petition invoked the cumulative error doctrine. It was clearly erroneous for the circuit court to find all of the combined trial errors to be immaterial, and it was an abuse of discretion for the circuit court to dismiss the Petition based on this finding of immateriality.

"Where the record of a criminal trial shows that the cumulative effect of numerous errors 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." Syllabus point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972); Syl. Pt. 7, *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601, 604 (2015).

In the instant case, the following errors are all apparent

1. The State failed to disclose a deal made with its star witness wherein she would avoid incarceration by testifying against the Petitioner.
2. The State's star witness committed perjury when she testified at trial that she was not promised anything for her testimony.
3. The State allowed said perjured testimony and did not alert the Court.
4. The prosecutor told the jury that he intended to indict his star witness as an "Accessory After the Fact," but he did not.
5. The Court improperly instructed the jury that Ms. Bailes was facing a felony charge for "Accessory After the Fact," when the that charge was being dismissed based on Ms. Bailes's agreement with the State.
6. The great uncle of April Bailes, Nelson Paul Bailes, sat on the jury which convicted the Petitioner. Mr. Bailes should have been automatically disqualified.

Even if this Honorable Court does not find blatant, reversible error based on the individual issues detailed above, it is clear that the overall effect of these errors at trial accumulated to produce an entirely unfair proceeding. Based on the foregoing, the Petitioner is entitled to relief based upon the cumulative error doctrine. The circuit court's failure to realize this was a clear abuse of discretion. His conviction must be vacated, and he is entitled to a new trial.

CONCLUSION

For the reasons detailed above the, circuit court committed reversible error in denying the Petitioner relief as prayed for in his Amended Petitioner for Writ of Habeas Corpus. This Honorable Court should reverse and remand this matter back to the circuit court of Jackson County

Respectfully Submitted,
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IN THE SUPREME COURT OF APPEALS OF THE STATE OF

WEST VIRGINIA

Gary Lee Rollins,
Petitioner Below, Petitioner,

v. **No. 20-0149**

Donnie Ames, Superintendent,
Mount Olive Correctional Complex,
Respondent Below, Respondent.

Appeal from a final order of the
Circuit Court of Nicholas County, West Virginia
Case No.: 15-C-29

Certificate of Service

I, M. Tyler Mason, Hughart Law Office, attorney for the Petitioner, do hereby state that true and accurate copies of this **Appellate Brief** and corresponding **Appendix** have been served on the following parties, by First Class U.S. mail, this 21st day of May 2020:

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