IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

KEVIN GOODMAN, JR., **Petitioner,**

v. **Civil Action No.: 17-C-342**
Judge Paul M. Blake, Jr.

CHARLES WILLIAMS, Superintendent,
Huttonsville Correctional Center, **Respondent.**

ORDER
DENYING AND DISMISSING PETITION

This matter is before the Court on an *Amended Petition For Writ Of Habeas Corpus* (hereinafter, the "*Petition*") filed by the Petitioner, Kevin Goodman, Jr., by and through counsel, J. Timothy DiPiero, Esq. and Lonnie C. Simmons, Esq., on February 11, 2019.

On August 27, 2019, the above styled matter came on for an omnibus habeas corpus hearing (hereinafter "OHC hearing"). The Petitioner appeared in person, and by his counsel, J. Timothy DiPiero, Esq., and Lonnie C. Simmons, Esq. (referred to hereinafter as "habeas counsel"). The Respondent, Charles Williams, Superintendent, appeared by his counsel, Assistant Prosecuting Attorney Jeffery T. Mauzy.

The Court initially heard the argument of habeas counsel regarding the *Petitioner's Objection To The Court's Order Requiring Him To Fill Out A Losh List.*

The Court **FINDS** and **CONCLUDES** that it is well established law in West Virginia that a Petitioner must raise all grounds known, or with reasonable diligence could be known, in a

post-conviction habeas corpus proceeding.[1] Further, the Court **FINDS** and **CONCLUDES** that a Petitioner seeking post-conviction habeas corpus relief must confirm, for benefit of the record, those grounds the Petitioner intends to assert and those grounds the Petitioner waives in the proceeding and the Petitioner and habeas counsel can be expected to review those grounds and complete a list to be incorporated and attached to the final order ruling in the matter.[2]

Based thereon, *Petitioner's Objection To The Court's Order Requiring Him To Fill Out A Losh List* should be, and hereby is, **DENIED.**

Next, the Court took up *Petitioner's Motion To Have Expert Witness Paid By Public Defender Services And To Schedule A Future Hearing* (hereinafter "*Motion For Expert Witness*"). The Petitioner seeks to have an expert witness present testimony, at a future, undetermined hearing, regarding Petitioner's claim of ineffective assistance of counsel and, as the Petitioner is indigent, to have Public Defender Services pay for the services rendered by such expert witness.

First, the Court notes that this matter has been scheduled for hearing for a considerable time, and yet, the *Motion For Expert Witness* was only filed of late.

Second, the Court **FINDS** that it is well equipped and familiar with the standard established in West Virginia to analyze claims of ineffective assistance of counsel and, as this matter is being heard by the Court without a jury, the Court further **FINDS** that an expert in the area of ineffective assistance of counsel could offer no testimony or evidence that would assist, or otherwise alter, the Court's analysis of the Petitioner's ineffective assistance of counsel claims under the standard established in Strickland v. Washington, 466 U.S.668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its West Virginia progeny, Syl. Pt. 5, State v. Miller, 194 W. Va. 3, 6,

[1] *See* Losh v. McKenzie, 277 S.E.2d 606, 610–11, 166 W.Va. 762, 768 (W.Va., 1981).
[2] *See* Losh, 277 S.E.2d at 612, 166 W.Va. at 770.

459 S.E.2d 114, 117 (1995). Accordingly, Petitioner's *Motion For Expert Witness* is hereby **DENIED**.

The Court then had habeas counsel and the Petitioner specifically confirm, on the record, those grounds asserted and waived for purposes of this proceeding.

The Court **FINDS** that the Petitioner, raises and asserts the following grounds in this habeas proceeding: 1) Suppression of helpful evidence by prosecutor; 2) State's knowing use of perjured testimony; 3) Excessive sentence; 4) Prejudicial joinder of defendants; 5) Constitutional errors in evidentiary rulings; 6) Claims of prejudicial statements by prosecutor; 7) Sufficiency of evidence; 8) Instructions to jury; 9) Ineffective assistance of counsel. Further, the Court **FINDS** and **CONCLUDES** that the Petitioner, with the assistance of competent counsel, has knowingly and intelligently waived all other grounds for habeas corpus relief not raised in this proceeding, with the narrow exception of those grounds specifically exempted by established law.[3]

The parties then proceeded to put forth testimony and evidence regarding those grounds raised by the Petitioner.

The Court has carefully reviewed the relevant legal authority, the record in this matter and all associated matters[4], and fully considered the parties' arguments and the evidence presented at the OHC hearing. Based upon the following findings of fact and conclusions of law, the Court is of the opinion that the *Petition* should be **DENIED** and **DISMISSED**.

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[3] *See* Losh v. McKenzie, 277 S.E.2d 606, 611, 166 W.Va. 762, 768 (W.Va., 1981) (providing that future habeas corpus petitions will be summarily denied unless addressing one of the narrow exceptions).

[4] The Petitioner and his co-defendants have individually appealed their convictions and have each filed prior habeas corpus petitions that were summarily denied. The Petitioner filed a notice of appeal regarding this Court's summary denial of the Petitioner's prior petition for writ of habeas corpus, but subsequently withdrew the appeal.

Accordingly, the Court enters this comprehensive *Order Denying And Dismissing Petition* pursuant to § 53-4A-7(c) of the West Virginia Code and Rule 9(c) of the *West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings*.

I. STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND[5]

On May 12, 2015, a Fayette County grand jury returned an indictment jointly charging Kevin Goodman, Jr. (referred to hereinafter as "Petitioner"), Kentrell Goodman (referred to hereinafter by name or as "Kentrell G."), Antwyn Gibbs (referred to hereinafter by name or as "Gibbs"), Radee Hill (referred to hereinafter by name or as "Hill"), and Rashod Wicker (referred to hereinafter by name or as "Wicker") with the felony offenses of first degree robbery, entry of a dwelling, grand larceny , and conspiracy to commit these felonies. Kentrell G. and Wicker entered into plea agreements with the State pursuant to which each pled guilty to first degree robbery with all remaining charges being dismissed.

Prior to trial, the Petitioner, Gibbs, and Hill each filed a motion under Rule 14(b) of the *West Virginia Rules of Criminal Procedure* seeking to sever his trial from that of his co-defendants. Following hearings on these motions, and through its order entered on August 31, 2015, the trial court denied all motions to sever.

The three-day joint trial of the Petitioner, Gibbs, and Hill began on September 9, 2015. The State's evidence included the testimony of eleven witnesses and numerous exhibits, including physical evidence of the crimes. Each of the defendants testified in his own defense, denying any culpability in the crimes, and the Petitioner also presented the testimony of an alibi witness.

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[5] After a thorough review of the record, transcripts, and appellate opinion, the Court has to a great extent incorporated the "Facts and Procedural Background" outlined in the appellate opinion into this order. *See* State v. Gibbs, 238 W. Va. 646, 797 S.E.2d 623, 626–30 (2017).

The evidence at trial revealed that between midnight and 1:00 a.m. on January 9, 2015, Hill, Wicker, Kentrell G., Gibbs, and the Petitioner departed South Carolina, traveling to Oak Hill, West Virginia, for the purpose of robbing Andrew Gunn. Kentrell G., who grew up in Oak Hill, was close friends with Gunn and knew that Gunn kept a safe containing approximately $10,000 in his bedroom in the home of his grandparents, Linda and Edward Knight. Kentrell G. conveyed this information to his brother, the Petitioner,[6] who responded, "Let's go get money." The men traveled to Oak Hill in a car belonging to Kentrell G.'s girlfriend, Lindsey Hess. Wicker, who was the sole person in the group with a valid driver's license, was the driver.

Upon their arrival in Oak Hill around 7:30 or 8:00 a.m. on January 9, 2015, Wicker parked the car near a wooded area fifty to sixty feet from the Knights' residence. Wicker, who has cerebral palsy, remained with the car. Mrs. Knight testified that she had let her dogs outside earlier that morning but had not fully closed the door to her home when she brought them back inside. Then, as she was sitting on the couch getting ready to do her granddaughter's hair for school[7], she happened to look over and saw a rifle or shotgun easing into her home through the door. Thereafter, four men, who had the majority of their faces covered but who appeared to be black,[8] entered her home. According to Mrs. Knight, in addition to one man having a "long gun," another man had a pistol. During his trial testimony, Andrew Gunn described these weapons as a .38 special and a 12-gauge shotgun.

Although Mrs. Knight was "really scared" for herself and her grandchildren, she refused to get on her knees as one of the men told her to do and, instead, remained seated on the couch.[9] Her eighteen-year-old disabled grandson got on his knees and laid his head in her lap as he cried,

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[6] When necessary, the Court will refer to Kentrell G. and the Petitioner collectively as the "Goodmans".
[7] The start time for school had been delayed on this particular morning due to inclement weather.
[8] Petitioner and the other four co-defendants are black.
[9] Mrs. Knight testified she was unable to get on her knees due to arthritis and a sciatic nerve problem.

while her five-year-old granddaughter was "squashed down" behind her on the couch hiding in fear. When Mrs. Knight asked the men if she could get a heart pill because she was having chest pain, the man with the long gun told her "no." [10]

Trial testimony revealed that two of the four men went immediately to Gunn's bedroom, while the two armed men remained in the front of the home. Gunn made an in-court identification of the Petitioner as one of the men in the front of the house. Gunn further described that from his seated position in the living room, he looked down the hallway to his bedroom, where he observed two men throw his crossbow, two pairs of his athletic shoes, and his safe containing approximately $10,000 out of his bedroom window to Kentrell G. After being in the Knights' home approximately fifteen minutes, the perpetrators fled. Mrs. Knight immediately telephoned the Oak Hill police and reported the crime.

Oak Hill police officers responded to the scene and interviewed those present. Soon thereafter, the officers received a tip that the Goodmans were possibly involved in the robbery and that they lived in or near Newberry, South Carolina. Two Oak Hill police officers then traveled to South Carolina where search warrants were obtained through the assistance of local law enforcement officers. In executing the warrants, the officers searched the residence of Benita Wicker, who is co-defendant Wicker's mother and the Goodmans' paternal aunt. At that time, Kentrell G. and his girlfriend, Lindsey Hess, were residing in Ms. Wicker's home; the Petitioner frequently stayed there, sleeping on the living room couch; and Wicker also lived there. The officers recovered Gunn's crossbow and athletic shoes from inside Ms. Wicker's home, and his safe was found in Ms. Wicker's yard. These items were admitted into evidence at

[10] Mr. Knight testified similarly regarding the morning in question. As he came out of his bedroom to get a cup of coffee, he saw a shotgun and a handgun pointed at him by men with "cowboy masks" covering their faces. He stated that when the men told him to get on the floor, he felt like his heart stopped, but replied that he only got on the floor for the Lord. He then returned to his bedroom where he heard men going through Gunn's adjacent bedroom.

trial through the testimony of Garrett Lominack, Lieutenant of Investigations for the Newberry County Sheriff's Office in Newberry, South Carolina, and were identified by other witnesses, including Mrs. Knight and Gunn, as the items that had been stolen. The State also presented the testimony of other law enforcement officers concerning the results of their criminal investigation in this matter, including the statements given by Kentrell G. and Wicker in which they implicated themselves, Hill, Gibbs, and the Petitioner in the robbery.[11]

During Kentrell G.'s trial testimony, he described the manner in which the decision was made to travel to West Virginia to steal the money in Gunn's safe; how he and his brother, the Petitioner, decided to use Ms. Hess's vehicle for that purpose; how the other men became involved; and how they went about executing the robbery. He testified that Gibbs was carrying the shotgun as the men approached the Knights' residence; that Gibbs and Hill were the first to enter the Knights' residence; and that he remained outside the residence, pointing the other men to the window of Gunn's bedroom where the safe was located. He identified the safe, crossbow, and athletic shoes as the items that were stolen from the Knights' residence and stated that he carried the crossbow and athletic shoes to the car where Wicker was waiting, while the Petitioner and Gibbs carried the safe. Kentrell G. further testified that after the stolen items and the weapons were placed into the trunk of the car, he and the other men got into the car, and they returned to South Carolina that same day.

Kentrell G.'s girlfriend, Ms. Hess, testified that while she, Kentrell G., and the Petitioner were all in Benita Wicker's house during the evening of January 8, 2015, she overheard the Goodmans planning to rob Andrew Gunn and heard the Petitioner tell Kentrell G. that he could get guns and knew people who could help. Later, during the early hours of January 9, 2015, Ms.

[11] Other incriminating evidence at trial included cell phones, cell phone communication records, guns, and spent and unspent ammunition.

Hess realized her car was gone from the Wicker residence. Ms. Hess also confirmed the text messages she exchanged with the Petitioner's girlfriend, Courtney Curry, around 1:00 a.m. on January 9, 2015. Ms. Curry texted, inquiring as to the Petitioner's whereabouts. Ms. Hess texted a reply that the Petitioner was in West Virginia. Sometime around midday on January 9, 2015, Ms. Hess saw that her car, Kentrell G., the Petitioner, Wicker, and Gunn's safe were all at Ms. Wicker's house. Ms. Hess testified that a day or two later, the Petitioner purchased a car seat for Kentrell G.,[12] and a television and gaming system were purchased for the bedroom she shared with Kentrell G. in Ms. Wicker's home.

Wicker's testimony was consistent with that given by other State's witnesses. He testified that Kentrell G. told him that because he had a driver's license, they needed him to drive them to West Virginia to get some money and that they would be using Ms. Hess's car. He described how he, Kentrell G., Hill, Gibbs, and the Petitioner traveled to Oak Hill and where he parked the car in relation to the Knights' residence. He further described seeing Gibbs retrieve a long gun from the trunk of the car, after which the Petitioner, Gibbs, Kentrell G., and Hill headed into the woods towards the Knights' residence. Approximately fifteen minutes later, Wicker saw all four men running back towards the car, with the Petitioner carrying the safe and Kentrell G. carrying the crossbow and athletic shoes, all of which were thrown into the trunk.

Evidence at trial demonstrated that upon their return to South Carolina that same day, Wicker was dropped off at the home of his mother, Ms. Wicker. Kentrell G. testified that he and the other men then drove to the Gibbs' residence where the safe was opened in the backyard by the Petitioner firing a shotgun at the lock.[13] The men divided the cash taken from the safe[14] and

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[12] Ms. Hess was pregnant at the time with Kentrell G.'s baby.

[13] An expert for the State testified at trial that pieces of plastic recovered by law enforcement from the yard of the Gibb's residence were matched to the safe recovered at Ms. Wicker's residence.

then placed the safe back into the trunk of Ms. Hess's vehicle, which the Goodmans drove to Ms. Wicker's home.

The Petitioner, Gibbs, and Hill each testified in their own defense, denying any involvement in the crimes. The Petitioner also presented the testimony of an alibi witness, Courtney Curry, who stated that the Petitioner was with her in South Carolina, as early as 8:30 a.m. on January 9, 2015.

At the conclusion of all of the evidence, the jury returned its verdict finding Petitioner, Gibbs, and Hill guilty of first degree robbery, entry of a dwelling, and conspiracy. All three co-defendants were sentenced to terms of incarceration of one to five years for conspiracy, which was enhanced to two to five years for Gibbs in light of his recidivist conviction; one to ten years for the entry of a dwelling; and fifty years for first degree robbery. The sentences were ordered to be served consecutively.

On December 14, 2015, the Petitioner, by and through trial counsel, Brandon S. Steele, Esq., filed a *Notice Of Appeal*, regarding his conviction and sentence, to the West Virginia Supreme Court of Appeals. On June 9, 2016, due to the development of an impermissible conflict of interest, trial counsel filed a *Motion To Withdraw As Court Appointed Counsel*. On June 10, 2016, the Court entered an *Order Substituting Counsel* wherein the Court granted trial counsel's *Motion To Withdraw As Court Appointed Counsel* and appointed David White, Esq., as appellate counsel for the Petitioner.

On March 9, 2017, the West Virginia Supreme Court of Appeals filed a written opinion[15]

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[14] Wicker testified that although he was not present when the cash was divided at Gibbs' residence, Kentrell G. later gave him $2000, half of which he then gave to his mother.

[15] The West Virginia Supreme Court of Appeals consolidated the review of Petitioner's appeal with that of Gibbs. *See* State v. Gibbs, 238 W. Va. 646, 797 S.E.2d 623 (2017). As grounds for the appeal, Gibbs argued that the evidence was insufficient to convict him of first degree robbery and, along with the Petitioner, maintained that the

wherein the West Virginia Supreme Court of Appeals upheld Petitioner's and Gibbs' conviction and sentencing.[16]

On July 5, 2017, pursuant to W.Va. Code § 53-4A-1, the Petitioner, *pro se*, filed a *Petition For Writ Of Habeas Corpus* in the Circuit Court of Fayette County, West Virginia. On September 6, 2017, this Court summarily denied the petition by entry of its *Order Denying And Dismissing Petition*. On October 4, 2017, the Petitioner filed a notice of appeal regarding this Court's decision and the same was docketed and a *Scheduling Order* entered in *Kevin Goodman, Jr. v. Ralph Terry, Acting Warden, Mt. Olive Correctional Complex*, No. 17-0894. On December 5, 2019, prior to perfecting the appeal, the Petitioner filed a *Petition For A Post-Conviction Writ Of Habeas Corpus West Virginia Code § 53-4A-1 et seq.* in this Court and then on December 7, 2017, the Petitioner filed a motion to voluntarily withdraw the appeal and the same was granted by the West Virginia Supreme Court of Appeals' entry of its *Order* on December 8, 2017.

On June 26, 2018, this Court entered an *Order Relieving Currently Appointed Habeas Counsel And Appointing Substitute Habeas Counsel*[17] wherein Petitioner's current habeas counsel was appointed and directed to timely file an amended petition and *Losh List*. On February 11, 2019, the Petitioner, by and through counsel, J. Timothy DiPiero, Esq. and Lonnie

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trial court abused its discretion in denying their respective motions to sever their trials without addressing the issue that they did not want the six preemptory jury challenges to which each would be entitled if tried separately to be reduced through sharing those challenges in a joint trial. Id. The Petitioner challenged the proportionality of his sentencing and the trial court's denial of his motion to sever his trial, which he asserts resulted in the admission of irrelevant prejudicial evidence. Id.

[16] Gibbs, 797 S.E.2d at 638. Co-defendant, Radee Hill, also appealed his conviction and sentence resulting from the joint trial referenced in the above styled matter, arguing therein that the sentence he received was disproportionate. *See* State v. Hill, No. 16-0138, 2016 WL 6678997 (W. Va. Nov. 14, 2016) (unreported memorandum opinion). The West Virginia Supreme Court of Appeals likewise affirmed this Court's decision in Mr. Hill's criminal matter. *See* id. at *3; *see also* Gibbs, 797 S.E.2d at 638.

[17] The Court originally appointed a different attorney on April 20, 2018, to represent the Petitioner and prosecute his habeas petition but due to the Petitioner's and Court's inability to have meaningful communication with appointed counsel, this Court *sua sponte* removed said counsel and appointed Petitioner's current counsel as substitute counsel to represent the Petitioner in this matter.

C. Simmons, Esq., filed an *Amended Petition For Writ Of Habeas Corpus, Petitioner's Objection To The Court's Order Requiring Him To Fill Out A Losh List,* and a list of asserted and waived grounds incorporated therein (hereinafter the "*Losh List*") [18] that are the subject of this proceeding.

II. HABEAS SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

The right to petition the Court for a post-conviction writ of habeas corpus is guaranteed by the West Virginia Constitution, Article III, Section Four. Post-conviction habeas corpus proceedings are governed by the *West Virginia Rules Governing Post Conviction Habeas Corpus Proceedings in West Virginia*, (referred to hereinafter as "Rule" or "Rules"), and West Virginia Code § 53-4A-1, et seq.

In the matter before this Court, the Petitioner was convicted and sentenced in this Court and subsequently filed the instant *Petition* seeking habeas corpus relief from said conviction and sentencing. Accordingly, the Court **FINDS** and **CONCLUDES** that this Court has jurisdiction over the subject matter of this proceeding and venue is proper in this Court.

With regard to habeas corpus matters in general, "[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. pt. 4, State ex rel. Mcmannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979), cert. denied, 464 U.S. 831 (1983). Further, only those constitutional claims that have not

[18] Petitioner's original *Losh List* indicated the Petitioner intended to raise seven (7) grounds for relief in this habeas matter. Immediately preceding the OHC hearing, however, the Petitioner and his counsel indicated that they wished to add two (2) additional grounds to the *Losh List*: Suppression of helpful evidence by the prosecutor and Instructions to the jury.

previously been waived or adjudicated on the merits in a prior proceeding are subject to substantive review by the Circuit Court.[19]

Once the Court has completed its review for constitutional error, whether denying or granting the relief sought, the Court "is statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by Petitioner, and to state [the] grounds upon which [the] matter was determined." Syl. pt. 4, Markley v. Coleman, 215 W. Va. 729, 731, 601 S.E.2d 49, 51 (2004); *See also* Syl. pt. 1, State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997); Syl. pt. 8, State ex rel. Vernatter v. Warden, West Virginia Penitentiary, 207 W.Va. 11, 14, 528 S.E.2d 207, 210 (1999).

Accordingly, the Court will now proceed to address each of the Petitioner's claims put forth in the *Petition*.

III. ANALYSIS OF PETITIONER'S INDIVIDUAL HABEAS CLAIMS

A. Suppression of helpful evidence by prosecutor

In his *Losh List*, the Petitioner asserted that it was his intention to allege that the prosecutor suppressed helpful evidence.

A "petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. Pt. 1, in part, State ex rel. Scott v. Boles, 147 S.E.2d 486, 150 W.Va. 453 (W.Va. 1966); *see also* Syl. Pt. 7, State ex rel. Hatcher v. McBride, 656 S.E.2d 789, 791, 221 W.Va. 760, 762 (W.Va. 2007). "[A] [mere] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim." State ex rel. Hatcher v. McBride, 221 W. Va. 760, 766, 656 S.E.2d 789, 795 (2007)

[19] *See* W. Va. Code § 53-4A-1; *see also* Losh v. McKenzie, 277 S.E.2d at 609-11, 166 W.Va. at 764-68; Ford v. Coiner, 196 S.E.2d 91, 92, 156 W.Va. 362, 362 (W.Va. 1972).

(*quoting* State Dept. Of Health v. Robert Morris N., 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995).

The Court **FINDS** that beyond the mere assertion of constitutional error, the Petitioner has provided this Court with nothing to support this claim. The Court gleaned from what testimony and evidence was presented at the OHC hearing that the Petitioner had initially intended to allege that in some way the prosecutor had suppressed the turnpike toll booth videos, but, as testimony and the record show, these videos were timely disclosed and provided to Petitioner's counsel.

Accordingly, under state law, the Court **CONCLUDES** the Petitioner is entitled to no habeas relief upon this claim because the Petitioner has failed to present any evidence to meet his burden of proof.

B. State's knowing use of perjured testimony

The Petitioner contends that habeas relief is warranted based upon his allegation that the prosecutor knowingly elicited false identification testimony from Andrew Gunn regarding the Petitioner and then used the same to secure a conviction against the Petitioner in his underlying criminal trial.

The Court **FINDS** that beyond the existing record in this matter, the Petitioner did not present any evidence to support this claim at the OHC hearing.

The Court's review of the trial transcript does reveal that during Andrew Gunn's testimony he identified the Petitioner as being one of the individuals that entered his

grandparent's residence and robbed him on the morning of January 9, 2015.[20] This testimony directly conflicted with prior statements Mr. Gunn had given to police shortly after the robbery.[21]

It is a basic constitutional tenet that a criminal conviction cannot be secured by a prosecutor's knowing presentation and use of false evidence.[22] To prevail on such a claim, a habeas petitioner "must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." Syl. Pt. 8, Flack v. Ballard, 239 W. Va. 566, 803 S.E.2d 536, 540 (2017); Syl. Pt. 2, State ex rel. Franklin v. McBride, 226 W. Va. 375, 376, 701 S.E.2d 97, 98 (2009).

While the Petitioner asserts that his claim warrants relief because all three prongs of the *Franklin* test[23] have been met, the Court is unconvinced.

First, it was apparent that the prosecutor did not set out to specifically elicit the alleged false testimony as it was volunteered by Mr. Gunn in response to a different question.[24] Based upon the prosecutor's follow-up questioning, it was also apparent that the prosecutor was surprised by this testimonial revelation because the prosecutor delved further into this line of questioning in what this Court perceives as an attempt to rectify an assumed misunderstanding or

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[20] *See* Trial Transcript, *State of West Virginia v. Antwyn D. Gibbs, Kevin Goodman, Jr., and Radee M. Hill*, Fayette County Indictment Nos. 15-F-64, 15-F-66, 15-F-67, Vol. I, pp. 210, 216. Hereinafter, for ease of reference, the Court will refer to the aforementioned transcript simply as the "Trial Transcript" and specific citations noted by volume and page number.

[21] *See* Trial Transcript, Vol. I, pp. 223-34.

[22] *See* State ex rel. Franklin v. McBride, 226 W. Va. 375, 379, 701 S.E.2d 97, 101 (2009) (quoting State v. Wilkerson, 363 N.C. 382, 683 S.E.2d 174, 187 (2009) and People v. Diaz, 297 Ill.App.3d 362, 231 Ill.Dec. 523, 696 N.E.2d 819, 827 (1998)).

[23] Franklin v. McBride, 226 W. Va. at 376, 701 S.E.2d at 98.

[24] *See* Trial Transcript, Vol. I, p. 209-210.

miscommunication.[25] Further, during the latter part of Mr. Gunn's direct examination, the prosecutor specifically called into question the truthfulness of Mr. Gunn's trial testimony.[26] Based upon Mr. Gunn's testimony both on direct examination and on cross examination, there is little doubt that Mr. Gunn's credibility was put into question before the jury.

Next, while the Petitioner alleges that Mr. Gunn perjured himself before the jury based upon Mr. Gunn's earlier statements and identifications made to law enforcement, it is unclear whether Mr. Gunn was being untruthful during the investigation, during his trial testimony, or both. "Inconsistencies between a witness's trial testimony and their previous statements, or between the testimonies of multiple witnesses, do not necessarily demonstrate falsity." Flack v. Ballard, 239 W. Va. at 581, 803 S.E.2d at 551. The inconsistent testimony of Mr. Gunn placed his credibility at issue and, as such, Petitioner's counsel diligently, and with substantial success, attacked Mr. Gunn's overall credibility to the jury.[27]

Based upon the foregoing, the Court **FINDS** that the Petitioner has failed to make the requisite showing that Mr. Gunn's trial testimony was false. As such, this Court **FINDS** and **CONCLUDES** that the Petitioner is unable to establish either that the prosecutor presented false testimony or that the prosecutor knew or should have known the testimony was false.

Even if it were assumed, *arguendo*, that Mr. Gunn's trial testimony was indeed false, rather than inconsistent and questionable, and that the prosecutor presented this same testimony

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[25] *See* Trial Transcript, Vol. I, p. 210, at lines 8-18.
[26] *See* Trial Transcript, Vol. I, p. 215, at lines 1-11.
[27] *See* Trial Transcript, Vol. I, pp. 223-35. The vast majority of Petitioner's counsel's cross examination was an attack on Mr. Gunn's credibility on the basis that Mr. Gunn's trial testimony conflicted with earlier statements and identifications Mr. Gunn had given to the law enforcement initially investigating the robbery. On four different occasion, Petitioner's counsel asked Mr. Gunn if he was lying then or lying now. *See* id., p. 225 at line 21; p. 229 at line 8; p. 229 at line 17; and p. 229 at line 19. Mr. Gunn finally conceded that he was being untruthful when he initially dealt with the investigating officers and further admitted, "I don't even want to be -- want to be here. . . . I just want my stuff back." *See* Id., p. 229, at 17 thru p. 230, at line 7.

knowing it was false, Petitioner's claim still fails as he simply cannot establish that the testimony had a material effect on the jury's verdict.[28]

At the end of the prosecutor's direct examination of Mr. Gunn, the prosecutor questioned the truthfulness of Mr. Gunn's trial testimony.[29] More importantly, during the state's closing argument, the prosecutor specifically advised the jury as follows:

> I am telling you something I have never told a jury in all my fifteen years as a prosecutor. [Andrew Gunn] picked out Kevin Goodman, Jr., as being in that house. I am asking you to disregard that testimony. I don't believe that. I don't believe it. I don't want you folks to believe a lie. Is it convenient? Sure. But I'm not going to sit here and tell you to believe something I don't believe. I don't believe it.
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> Did he see Kevin Goodman? Yea, probably did. Did he see Kentrell Goodman? Yeah, probably did. But you can't take – you can't take that identification as being the truth. So I urge you not to. You can. I just wouldn't do it.

Trial Transcript, Vol. III, pp. 221-22.

The prosecutor explicitly told the jury that Mr. Gunn's identification testimony was a lie and the jury should disregard it. Further, while the Petitioner takes issue with the prosecutor telling the jury that they could take the testimony as the truth, it is clear that the prosecutor recognized, just like this Court, that determinations of witness credibility and the weight to be given to a witness's testimony is a matter wholly within the province of the jury.[30]

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[28] Franklin v. McBride, 226 W. Va. at 376, 701 S.E.2d at 98.

[29] *See* Trial Transcript, Vol. I, p. 215, at lines 1-7. Kentrell Goodman was a close acquaintance of Mr. Gunn and the prosecutor questioned the truthfulness of Mr. Gunn's trial testimony because of this relationship.

[30] Syl. Pt. 2, State v. Smith, 225 W. Va. 706, 707, 696 S.E.2d 8, 9 (2010) (quoting Syllabus Point 1, State v. Harlow, 137 W.Va. 251, 71 S.E.2d 330 (1952)); Syl. Pt. 2, State v. Juntilla, 227 W. Va. 492, 494, 711 S.E.2d 562, 564 (2011) (quoting State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)); *see also* Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 S.E. 242, 242–43 (1908) ("while it is for the court to determine the competency of the witnesses to testify, the value of the testimony given by such witnesses is a question for the jury").

Based upon the foregoing, and the whole of the record related to the subject witness and testimony at issue here, this Court **FINDS** the Petitioner is unable to show that the testimony had a material effect on the jury's verdict.

Accordingly, the Court **CONCLUDES**, under state law, the Petitioner is not entitled to any habeas relief upon this claim.

C. Excessive sentence

In his *Losh List*, the Petitioner asserted that it was his intention to allege that his sentence was excessive as a ground for relief in this proceeding.

The Court **FINDS** that the Petitioner put forth no evidence or argument in support of this claim for habeas relief.

Further, the Court **FINDS** the Petitioner previously challenged the proportionality of his sentence on appeal to the West Virginia Supreme Court of Appeals, to no avail. In its opinion, the West Virginia Supreme Court of Appeals stated that Petitioner's claim would be analyzed "'under a deferential abuse of discretion standard, ***unless*** the order violates statutory or constitutional commands.' Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)." State v. Gibbs, 797 S.E.2d 623, 636, 238 W.Va. 646, 659 (W.Va., 2017) (***emphasis added***).

Had the Petitioner's sentence violated statutory or constitutional commands, the Supreme Court's analysis of Petitioner's proportionality claim would have ended there and that Court would have accordingly found merit to Petitioner's claim. However, based upon the Supreme Court of Appeals' analysis and determination that the Petitioner's sentence was constitutionally proportionate under a deferential abuse of discretion standard, this Court **FINDS** the Petitioner's

sentence naturally had to comply with statutory or constitutional commands and, hence, could not have been excessive.

Based upon the foregoing and deciding the same under state law, the Court **CONCLUDES** there is no merit to Petitioner's excessive sentence claim.

D. Prejudicial joinder of defendants

In his *Losh List*, the Petitioner asserted that it was his intention to allege and raise prejudicial joinder of the defendants as a ground for relief in this habeas proceeding.

West Virginia Code § 53-4A-1 is very clear that in a habeas corpus matter,

> a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

W. Va. Code Ann. § 53-4A-1 (West).[31]

Even though the Petitioner provided no additional evidence or argument regarding this claim, the Court **FINDS** that it is all too familiar with the Petitioner's claim of prejudicial joinder as this issue was raised and adjudicated prior to trial, on appeal, and in Petitioner's earlier filed

[31] *See generally* Bowman v. Leverette, 169 W. Va. 589, 594, 289 S.E.2d 435, 438 (1982) (disposing of habeas petitioner's claims based on prior adjudication on appeal); *see also* Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (stating "[b]y its terms [the federal habeas statute] bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2).").

habeas matter.[32] As such, the Court **FINDS** that the issue has already been fully and finally adjudicated on the merits. Accordingly, pursuant to state law, the Court **CONCLUDES** that the Petitioner is not entitled to habeas relief upon this claim as it is barred on the basis of res judicata.

E. Constitutional errors in evidentiary rulings

In his *Losh List*, the Petitioner alleges that there were constitutional errors in evidentiary rulings.

Beyond making this random claim, the Court **FINDS** the Petitioner has provided no additional evidence in support thereof.[33]

"'There is a presumption of regularity of court proceedings in courts of competent jurisdiction that remains until the contrary appears, and the burden of proving any irregularity in such court proceedings rests upon the person who alleges such irregularity to show it affirmatively. In a collateral attack on a judgment of a court of competent jurisdiction the burden does not shift to the defendant upon the filing of a petition and affidavit to prove that the judgment is proper in all respects and that the court performed all of its duties required by law.' Syllabus Point 2, *State ex rel. Scott v. Boles, Warden,* 150 W.Va. 453, 147 S.E.2d 486 (1966)." Syl. Pt. 3, Coleman v. Brown, 229 W. Va. 227, 229, 728 S.E.2d 111, 113 (2012).

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[32] The Petitioner raised the issue both on appeal and, with slightly different nuances, in Petitioner's last habeas matter before this Court. The Supreme Court of Appeals found no error and the issues were disposed of in the habeas matter both on the basis of res judicata and upon the merits. *See* Kevin Goodman, Jr., v. David Ballard, Fayette County Civil Action No. 17-C-237, *Order Denying And Dismissing Petition* at 11-12, 16-19, 30-31 (September 6, 2017); *see also* Gibbs, 238 W. Va. 646, 797 S.E.2d 623, 626 (2017).

[33] The Petitioner does allege the Court committed constitutional error in its instructions to the jury, but that claim is addressed herein under the appropriate related heading regarding jury instructions. Aside from that issue, the Petitioner does not cite to or present any evidence regarding a particular instance where the Court allegedly erred in its evidentiary rulings.

As the Petitioner fails to cite to any particular instance where the Court allegedly erred in its evidentiary rulings, much less committed error of a constitutional magnitude, and as the Petitioner has failed to present any evidence to overcome the presumption that the Court conducted the proceedings properly, this Court **FINDS** the Petitioner has failed to prove by a preponderance of the evidence that the Court committed any constitutional error in making its evidentiary rulings. As such, the Court **CONCLUDES** that, under state law, the Petitioner is not entitled to any habeas relief upon this claim.

F. Claims of prejudicial statements by prosecutor

The Petitioner listed "[c]laims of prejudicial statements by prosecutor" in his *Losh List* as a ground for relief that he intended to raise in this habeas matter.

Beyond listing this as a ground for relief, the Court **FINDS** the Petitioner provided no additional evidence at the OHC hearing to support this claim.

Based upon the record and the OHC hearing testimony, the Court can only assume that the Petitioner raises this ground regarding the same issue addressed *supra* under Petitioner's claim regarding the state's use of allegedly perjured testimony to secure Petitioner's conviction.[34] As the Court discussed in its analysis of that claim, the mere fact that the Prosecutor told the jury that it *could* believe Mr. Gunn's testimony regarding the identification of the Petitioner[35] is not prejudicial error or inconsistent with established law, as it is wholly for the

[34] *See* supra at p. 13.
[35] *See* Trial Transcript, Vol. III, p. 222 at lines 1-4.

jury, and the jury alone, to assess witness credibility and determine what weight is to be given to witness testimony.[36]

Accordingly, under state law, the Court **CONCLUDES** that Petitioner is not entitled to any habeas relief upon his claim that the prosecutor made prejudicial statements during the Petitioner's underlying criminal trial.

G. Sufficiency of evidence

The Petitioner raises the issue of the sufficiency of the evidence upon which his conviction was obtained. Further, Petitioner asserts that he is actually innocent of the crimes of which he was convicted.

In West Virginia, it is indeed a rare occasion when relief is warranted based upon a sufficiency of the evidence claim.

> "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, State v. Foster, 221 W. Va. 629, 632, 656 S.E.2d 74, 77 (2007); *see also* State v. Ladd, 210 W. Va. 413, 419, 557 S.E.2d 820, 826 (2001). "Thus, the relevant inquiry is whether, after

[36] Syl. Pt. 2, State v. Smith, 225 W. Va. 706, 696 S.E.2d 8 (2010); Syl. Pt. 2, State v. Juntilla, 227 W. Va. 492, 711 S.E.2d 562 (2011).

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 2, in part, State v. Foster, 221 W. Va. at 632, 656 S.E.2d at 77 (quoting Syl. Pt. 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)).

The vast weight of Petitioner's sufficiency of the evidence claim rests upon Petitioner's contention regarding the conflicting testimony of Andrew Gunn and Petitioner's contention that the turnpike toll booth video was strong exculpatory evidence and affirmative proof that the Petitioner was not involved in the crime as alleged by his co-defendants and other witnesses. Petitioner asserts that had this affirmative video evidence been presented to the jury, and the perjured testimony of Mr. Gunn excluded, the remaining evidence would have been insufficient to sustain his conviction.

As this Court discussed *supra*, although Andrew Gunn's testimony did conflict with earlier statements given to the police, this inconsistent testimony did not constitute perjured testimony, but instead went toward the jury's assessment of the witness's credibility and the weight to be given to such testimony.[37] The jury was free to give Mr. Gunn's testimony that weight it deemed proper and it apparently did so. This Court will not now delve into the province of the jury by questioning its weight and credibility determinations.

Secondly, the Petitioner places far more weight on the tollbooth video tape than it warrants. As discussed *infra*, the video does not show what the Petitioner and habeas counsel would have this Court believe.[38] This Court **FINDS**, at very best, the video is inconclusive as

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[37] *See* discussion, supra, at pp. 13-17.

[38] *See* discussion and footnotes, infra, at pp. 31-32. The Petitioner asserts that the video shows an empty back seat behind the driver which he alleges is in direct contradiction to the testimony presented by his co-defendants, Rashod

to the rear occupancy of the subject vehicle and is of no significant exculpatory evidentiary value.

Having determined that the video was of no significant exculpatory value and that the prosecutor did not elicit perjured testimony from Mr. Gunn, the Court is left to analyze the evidence presented at the trial of this matter consistent with the commands outlined in Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163, to determine whether relief is warranted upon Petitioner's sufficiency of the evidence claim..

In addressing Petitioner's claim that prejudicial evidence was imputed upon the Petitioner as a result of the Court's failure to sever the Defendants' trial on appeal, the West Virginia Supreme Court of Appeals found that "even if the State's physical evidence were excluded in a separate trial, the testimony of Gunn, Hess, the Knights, and, in particular, that of co-defendants Kentrell G. and Wicker, would be sufficient to convict petitioner Goodman." State v. Gibbs, 238 W. Va. at 656, 797 S.E.2d at 633.

Likewise, having reviewed the evidence presented at Petitioner's trial in the light most favorable to the prosecution, this Court **FINDS** that there was more than sufficient evidence presented by which the jury could have found the Petitioner guilty beyond a reasonable doubt.

Therefore, this Court **CONCLUDES**, under state law, the Petitioner is entitled to no habeas relief upon this claim.

Wicker and Kentrell Goodman. Further, Petitioner asserts that the video shows that the rear seat is only occupied by one occupant, rather than three. As discussed *infra*, the Court very carefully viewed ***every segment of all of the videos, including the segment that the Petitioner asserts is exculpatory evidence directly contradicting co-defendant testimony.*** The Petitioner, put quite simply, is seeing what he wants to see or what he would have this Court see, but the video, at very best, is inconclusive as to the rear occupancy of the subject vehicle. Moreover, based upon the trial testimony provided by co-defendants Rashod wicker and Kentrell Goodman, the Petitioner was only alleged to have been in the rear seat behind the driver at the time the Petitioner and the co-defendants left South Carolina en route to West Virginia. *See* Trial Transcript, Vol. II, at pp. 230, 242; Trial Transcript, Vol. III, at p. 11.

H. Instructions to jury

As grounds for habeas relief herein, the Petitioner makes two separate claims regarding the Court's alleged failure to give appropriate instructions to the jury.

First, the Petitioner claims that it was constitutional error for the Court not to provide a *Caudill* instruction[39] regarding testimony by two co-defendants relating to entry of their guilty pleas prior to testifying at Petitioner's criminal trial and second, the Petitioner asserts that it was constitutional error for the Court not to provide a cautionary instruction to the jury regarding the prosecutor eliciting uncorroborated accomplice testimony during the Petitioner's criminal trial.[40]

Although the Court will address the substantive merit of each claim, the Court initially recognizes that both claims fail under the plain language of West Virginia's habeas statute. West Virginia Code § 53-4A-1(c) provides, in relevant part, "a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal) . . .." W. Va. Code Ann. § 53-4A-1 (West).

The Court **FINDS** the Petitioner could have raised the alleged instructional errors on appeal to the West Virginia Supreme Court of Appeals, but failed to do so. Accordingly, the Court **CONCLUDES** that Petitioner has waived these contentions.

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[39] Syl. Pt. 3, State v. Caudill, 170 W. Va. 74, 289 S.E.2d 748 (1982), *holding modified by* State v. Flack, 232 W. Va. 708, 753 S.E.2d 761 (2013).

[40] The Petitioner raises these same two claims in the context of ineffective assistance of trial counsel for failing to request said instructions. Although intertwined, the Court will address the substantive merit of the independent claims and then address those related claims under the section regarding claims of ineffective assistance of counsel as the basis for rejecting the independent claims necessarily lends to the claims of ineffective assistance of counsel.

Although the Court has concluded that the instructional errors now raised by the Petitioner in this habeas proceeding have previously been waived, these alleged errors are also entwined with Petitioner's ineffective assistance of counsel claims. As such, the Court opts to also address the substantive merit of the individual claims.

a. *Caudill limiting instruction regarding disclosure of co-defendants' entry of guilty plea*

The prosecutor elicited testimony from two of the Petitioner's co-defendants, Rashod Wicker and Kentrell Goodman, during which it was disclosed to the jury that each had independently entered a plea of guilty to robbery, arising from the same incident, prior to providing testimony against the Petitioner.

In the case of *State v. Caudill*, 170 W. Va. 74, 289 S.E.2d 748 (1982), the West Virginia Supreme Court of Appeals established,

> In a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

Syl. Pt. 3, State v. Caudill, 170 W. Va. at 75, 289 S.E.2d at 749. Under the holding of *Caudill*, if the given circumstances presented, the court was ***required*** to give the limiting instruction, *sua sponte*. However, recognizing that under certain circumstances, as a tactical matter, trial counsel may not want the instruction to be given, the West Virginia Supreme Court of Appeals revisited the issue in *State v. Flack* and established the following:

> [a]n accomplice who has entered a plea of guilty to the same crime charged against the defendant may testify as a witness on behalf of

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

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

The record of Petitioner's underlying criminal matter reveals, and the Court accordingly **FINDS**, Petitioner's trial counsel did not request that the Court give a *Caudill* instruction.

Therefore, the Court **CONCLUDES**, under state law, the Petitioner is not entitled to any habeas relief upon this claim.

b. *Cautionary instruction regarding uncorroborated accomplice testimony*

Petitioner's second instructional claim is that the Court committed constitutional error when it failed to give a cautionary instruction to the jury upon the presentation of the allegedly uncorroborated accomplice testimony of Petitioner's co-defendants, Rashod Wicker and Kentrell Goodman.

Petitioner's co-defendants, Rashod Wicker and Kentrell Goodman, did testify at length regarding how the robbery of Andrew Gunn came to fruition, the trip to West Virginia from South Carolina, the actual commission of the crimes, and the return to South Carolina with the robbery proceeds.

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

upon request, be so instructed." Syl. Pt. 1, in part, State v. Humphreys, 128 W. Va. 370, 36 S.E.2d 469 (1945) (disapproving case citations omitted); Syl. Pts. 1 and 2, State v. Vance, 164 W. Va. 216, 216, 262 S.E.2d 423, 424 (1980).[41]

Once again, the record of Petitioner's underlying criminal matter reveals, and the Court accordingly **FINDS**, Petitioner's trial counsel did not request the cautionary instruction.

Further, even if the Court assumed *arguendo* that the instruction had been requested by trial counsel and the same denied by the Court, Petitioner's argument would still be unavailing.

> Where the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction. This rule applies even though the corroborative evidence falls short of constituting independent evidence which supports the alleged ultimate fact that the accused committed the offense charged.

Syl. Pt. 3, State v. Vance, 164 W. Va. at 216, 262 S.E.2d at 424.

The trial testimony of Rashod Wicker corroborated the trial testimony of Kentrell Goodman, and vice versa. Moreover, the testimony of both Rashod Wicker and Kentrell Goodman was corroborated by the trial testimony of Lindsey Hess, Linda Knight, and Andrew Gunn, as well as the physical and technical evidence that was presented at trial. As such, the Court **FINDS** the testimony of Petitioner's accomplice/co-defendants was sufficiently corroborated in material fact to permit the jury to assess the truthfulness of the accomplice/co-defendant testimony.

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[41] *See also* Syl. Pt. 2, State v. Bolling, 162 W. Va. 103, 103, 246 S.E.2d 631, 632 (1978) (*quoting* Syl. Pt. 1, State v. Humphreys, 128 W.Va. 370, 36 S.E.2d 469 (1945); Syl. Pt. 2, State v. Messinger, 163 W. Va. 447, 447, 256 S.E.2d 587, 588 (1979) (*quoting* Syl. Pt. 3, State v. Spadafore, W.Va., 220 S.E.2d 655 (1975) (per curiam opinion).

Further, as the accomplice/co-defendant testimony ***was corroborated*** during the underlying trial, the Court **FINDS** and **CONCLUDES** the circumstances did not warrant giving the jury an accomplice testimony cautionary instruction.

Accordingly, under state law, the Court **CONCLUDES** the Petitioner is not entitled to any habeas relief upon this claim.

I. Ineffective assistance of counsel

Petitioner raises as a ground for relief in the *Petition* that his trial counsel failed to provide him with competent and effective assistance of counsel as contemplated by both the West Virginia Constitution and the United States Constitution.

The Supreme Court of Appeals has stated, "[o]ur law is clear in recognizing that the Sixth Amendment of the federal constitution and Article III, § 14 of the state constitution guarantee not only the assistance of counsel in a criminal proceeding but that a defendant has the right to effective assistance of counsel." Ballard v. Ferguson, 232 W. Va. 196, 751 S.E.2d 716, 720 (2013) (citing Cole v. White, 180 W. Va. 393, 395, 376 S.E.2d 599, 601 (1988)). "A charge of ineffective assistance of counsel is not one to be made lightly. It is a serious charge which calls into question the integrity, ability and competence of a member of the bar." State ex rel. Daniel v. Legursky, 195 W. Va. 314, 319, 465 S.E.2d 416, 421 (1995). "Unless claims of ineffective assistance of counsel have substantial merit, [the] Court, historically, has taken a negative view toward the assertion of frivolous claims." State ex rel. Daniel v. Legursky, 195 W. Va. at 319, 465 S.E.2d at 421.

It is well established that"[i]n 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." Syl. Pt. 5, State v. Miller, 194 W. Va. 3, 6, 459 S.E.2d 114, 117 (1995).[42]

"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 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." Syl. Pt. 6, State v. Miller, 194 W. Va. at 6-7, 459 S.E.2d at 117-118. Likewise, in evaluating whether counsel's conduct was professionally acceptable, this Court will assess counsel's actions according to what was known and reasonable at the time, rather than using hindsight to second guess counsel's decisions and potentially "elevate a possible mistake into a deficiency of constitutional proportion". Syl. Pt. 4, State ex rel. Daniel v. Legursky, 195 W. Va. at 317, 465 S.E.2d at 419.[43] "Only if an identified error is 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment' is the first prong of the *Strickland* test satisfied. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052." Flack v. Ballard, 239 W. Va. at 576, 803 S.E.2d at 546 (2017) (internal emphasis omitted).

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[42] As the West Virginia Supreme Court of Appeals explicitly adopted the federal standard for analyzing ineffective assistance of counsel claims in State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995), hereinafter, the Court will simply refer to the controlling state and federal test collectively as *Strickland/Miller*.

[43] *See also* State ex rel. Edgell v. Painter, 206 W. Va. 168, 172, 522 S.E.2d 636, 640 (1999).

Even if a habeas petitioner successfully navigates the first hurdle of his ineffective assistance of counsel claim, the habeas petitioner must also establish by a preponderance of the evidence "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. 668, 104 S.Ct. 2052.[44] This second prong is essentially a determination of whether the petitioner has been unfairly prejudiced by counsel's deficient performance.[45]

Pursuant to the guidance offered in *Legursky*, the Court may deem it unnecessary to address the Petitioner's contentions under both prongs of the *Strickland/Miller* test; the Court may choose to conduct analysis only under the prong that the contention fails to meet. Legursky, 195 W. Va. at 321, 465 S.E.2d at 423.

With the foregoing guidance in mind, this Court will now proceed to address Petitioner's ineffective assistance of counsel claims.

a. Failure of trial counsel to introduce turnpike toll booth videos into evidence

The Petitioner alleges that trial counsel provided constitutionally deficient service warranting habeas relief by failing to introduce turnpike toll booth videos into evidence at Petitioner's trial when these videos allegedly contained images which were of great exculpatory value and essentially exonerated the Petitioner.

The Court has thoroughly reviewed the subject turnpike toll booth videos that serve as the basis for Petitioner's claim.

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[44] *See also* State v. Miller, 194 W. Va. at 6, 459 S.E.2d at 117.

[45] *See* Coleman v. Painter, 215 W. Va. 592, 596, 600 S.E.2d 304, 308 (2004); *see also* Syl. Pt. 9, State v. England, 180 W. Va. 342, 345, 376 S.E.2d 548, 551 (1988) citing Syl. Pt. 19, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974) (noting "that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.").

First, while the Petitioner asserts that the video affirmatively shows that he did not participate in the crime he was convicted of and directly contradicts the trial testimony of Rashod Wicker and Kentrell Goodman, the Court **FINDS** that the Petitioner places far more weight and exculpatory value on the video tape than it actually warrants. The Court **FINDS** the video segment the Petitioner specifically draws attention to[46] does not show what the Petitioner would have this Court believe.[47] Having meticulously reviewed each and every segment of the collection of video tapes, the Court **FINDS**, at best, the videos are inconclusive as to the occupancy of the subject vehicle and are of no significant exculpatory value.[48]

Applying the foregoing to an analysis of Petitioner's counsel's effectiveness under the first prong of *Strickland/Miller*, the Court **FINDS** and **CONCLUDES** the Petitioner is unable to

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[46] Petitioner entered a still shot of the video into evidence in this habeas matter as Petitioner's Exhibit No. 3.

[47] The Petitioner asserts that the video shows an empty back seat behind the driver which he alleges is in direct contradiction to the testimony presented by his co-defendants, Rashod Wicker and Kentrell Goodman. Further, Petitioner asserts that the video shows that the rear seat is only occupied by one occupant, rather than three. The Court very carefully viewed ***every segment of all of the videos, including the segment that the Petitioner asserts is exculpatory evidence directly contradicting co-defendant testimony***. The Petitioner, put quite simply, is seeing what he wants to see, or what he would have this Court see, rather than what the video actually depicts.

[48] Trial testimony of Rashod Wicker and Kentrell Goodman placed the Petitioner seated in the subject vehicle behind the driver's seat at the time the Petitioner and the co-defendants left South Carolina en route to West Virginia. *See* Trial Transcript, Vol. II, at pp. 230, 242; Trial Transcript, Vol. III, at p. 11. Trial testimony and evidence further established: 1) with the exception of one defendant, the remaining were wearing darker colored clothing; 2) the placement of the perpetrators in the vehicle, with the exception of Rashod Wicker, was not affirmatively established at any point following their departure from South Carolina; 3) some or all of the perpetrators exited and reentered the vehicle at least three times during the round trip from South Carolina to West Virginia and back to South Carolina; and 4) the videos of the subject vehicle during the perpetrators trip from South Carolina to West Virginia were taken during night time hours and during inclement weather. Even with a meticulous, repetitive review of all of the subject videos, the Court, in only two instances, was able to catch vague glimpses of red in the rear of the vehicle, even though, according to the trial testimony of Linda Knight and Rashod Wicker, one subject was wearing a red jacket or hoodie. *See* Trial Transcript, Vol. I, at p. 140; *see also* Trial Transcript, Vol. III, p. 31. The cameras are clearly positioned for the purpose of capturing images of the driver of a vehicle, and the vehicle itself, rather than the other occupants of a vehicle. The difficulty in viewing the occupants of the rear of the vehicle with clarity was due to camera positioning, window tinting, glare, and other less than optimal viewing conditions. Further, it is clear that dark clothing, posture and positioning of the perpetrators, and the ambient conditions, all further contributed to the video being inconclusive as to the number and identity of the perpetrators occupying the subject vehicle, with the exception of the driver, Rashod Wicker.

establish that his counsel provided constitutionally deficient service by not entering the turnpike tollbooth videos into evidence or further bringing them to the attention of the jury.[49]

Even if the Petitioner could overcome the hurdle presented by the first prong of *Strickland/Miller*, considering the nature and value of the video evidence as observed by this Court, the Court **FINDS** and **CONCLUDES** the Petitioner is unable to establish that had counsel entered the videos into evidence or utilized them to attempt to impeach and discredit the testimony of Rashod Wicker and Kentrell Goodman, there is a reasonable probability that the jury would not have convicted the Petitioner based upon the presentation of this video evidence.

Based upon the foregoing, the Court **CONCLUDES**, under state and federal law, the Petitioner is not entitled to habeas relief upon this claim of ineffective assistance of counsel.

b. Failure of trial counsel to request cautionary/limiting instructions regarding accomplice/co-defendant testimony and entry of guilty plea

Finally, the Petitioner alleges that his trial counsel provided constitutionally deficient service because 1) trial counsel did not request an accomplice/co-defendant cautionary instruction when accomplices/co-defendants, Rashod Wicker and Kentrell Goodman, allegedly provided uncorroborated trial testimony against the Petitioner; and 2) trial counsel did not request a *Caudill* limiting instruction regarding the disclosure to the jury that Petitioner's co-defendants, Rashod Wicker and Kentrell Goodman, prior to providing trial testimony in the

[49] Petitioner's habeas counsel painted a convincing picture when questioning Petitioner's trial counsel at the OHC hearing. In the heat of the moment, under direct examination, and with habeas counsel describing what ***he and the Petitioner viewed the still picture marked Petitioner's Exhibit 3 to show***, trial counsel conceded that he should have entered the videos into evidence. The Court, having meticulously reviewed ***all*** of the segments of the videos, both in still frame and at normal speed, including Petitioner's Exhibit 3 and those frames preceding and following it, was not as easily influenced or convinced as trial counsel, and does not agree that the videos were of such exculpatory value that any reasonably proficient counsel would have entered the videos into evidence or that counsel's performance was deficient because trial counsel did not. Moreover, the videos were of evidentiary value to the prosecution as the same was inculpatory evidence that showed co-defendant, Rashod Wicker, operating the subject vehicle and further corroborated the trial testimony of Rashod Wicker, Kentrell Goodman, and Lindsey Hess.

matter, had entered pleas of guilty to charges stemming from the same conduct of which the Petitioner was standing trial. The Court will address each claim, in turn.

i. Uncorroborated Accomplice/Co-Defendant Testimony

Petitioner asserts that his trial counsel was ineffective because trial counsel did not request a cautionary instruction to be given to the jury when Petitioner's co-defendants, Rashod Wicker and Kentrell Goodman, provided uncorroborated testimony against the Petitioner in his underlying criminal trial. Petitioner's claim against his trial counsel is, however, without merit.

This Court found *supra*, the accomplice/co-defendant testimony of Rashod Wicker and Kentrell Goodman ***was corroborated*** during the underlying trial and therefore no cautionary instruction was warranted.[50] As the underlying alleged constitutional error was determined not to be error at all, the Court **FINDS** and **CONCLUDES** Petitioner cannot now establish that his counsel was constitutionally ineffective under either prong of *Strickland/Miller* for failing to request an instruction that was not warranted.

As such, the Court **CONCLUDES,** under state and federal law, the Petitioner is not entitled to any habeas relief based upon this portion of Petitioner's ineffectiveness claim.

ii. Disclosure To Jury That Co-Defendant/Accomplice Entered Plea

As discussed *supra*, *State v. Flack* established that

> [a]n accomplice who has entered a plea of guilty to the same crime charged against the defendant may testify as a witness on behalf of the State. However, if the jury learns of the accomplice's guilty plea, then upon the motion of the defendant, the trial court must instruct the jury that the accomplice's plea of guilty cannot be considered as proving the guilt of the defendant, and may only be considered for proper evidentiary purposes such as to impeach trial testimony or to reflect on a witness' credibility. The failure of the

[50] *See* Instructions to jury, supra at pp. 26-28.

> trial court, upon request, to give such a limiting jury instruction is reversible error. To the extent that Syllabus Point 3 of *State v. Caudill,* 170 W.Va. 74, 289 S.E.2d 748 (1982) is inconsistent, it is hereby modified.

Syllabus, State v. Flack, 232 W. Va. 708, 753 S.E.2d 761 (2013). Moreover, this Court found no constitutional error upon Petitioner's substantive claim because Petitioner's trial counsel did not request such an instruction.[51] The Petitioner now asserts that his trial counsel provided ineffective assistance because no such *Caudill* limiting instruction was requested.

During habeas counsel's direct examination of Petitioner's trial counsel at the OHC hearing, Petitioner's trial counsel testified that 1) the Petitioner's underlying criminal trial was counsel's first felony criminal jury trial; 2) Petitioner's counsel did not request a *Caudill* limiting instruction; 3) Petitioner's counsel was familiar with the *Flack* case;[52] 4) Petitioner's counsel believed that the Court's charge contained some relevant, related warnings; and 5) Petitioner's counsel was unaware of any strategic reason for not asking for the subject cautionary instructions.

On cross-examination, Petitioner's trial counsel testified that: 1) although it was counsel's first criminal jury trial, Petitioner's trial counsel was working with an experienced attorney in his firm and had him as a resource; 2) the other two co-defendants that went to trial along with the Petitioner were represented by two seasoned, experienced criminal defense attorneys, one of which was a former prosecutor; 3) the Petitioner's co-defendants' counsel were available as a resource for Petitioner's trial counsel preceding, and during the course of,

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[51] *See* Instructions to jury, supra at p. 26.
[52] State v. Flack, 232 W. Va. 708, 753 S.E.2d 761 (2013).

Petitioner's jury trial; and 4) co-defendants' counsel coordinated with Petitioner's trial counsel and conferred with him regularly during the course of the joint jury trial.

On re-direct examination, Petitioner's trial counsel also testified that all defense counsel[53] met the evening before instructions were given to the jury to discuss possible instructions to present to the Court the following day and neither he, nor co-defendants' counsel, requested a *Caudill* limiting instruction at any time during the trial.

Although, at first blush Petitioner's trial counsel's concession during the OHC hearing would appear to confess error under the deficiency prong of *Strickland/Miller*, the Court is uncertain that this confession, when compared to the trial transcript and proof presented at the OHC hearing and considered in conjunction with the fact that two other veteran criminal trial attorneys also did not request the limiting instruction, is alone sufficient to find that Petitioner's trial counsel's service was indeed deficient in this regard.

"'Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, ***unless no reasonably qualified defense attorney*** would have so acted in the defense of an accused.' Syllabus Point 21, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syl. Pt. 3, State ex rel. Kitchen v. Painter, 226 W. Va. 278, 700 S.E.2d 489 (2010) (***emphasis added***).

As the Supreme Court of Appeals explained in *State v. Miller*,

> [i]n other words, we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally

[53] Hereinafter, the Court, where applicable, will refer to Petitioner's trial counsel and co-defendants' trial counsel, collectively, simply as counsel or trial counsel.

> acceptable performance is not defined narrowly and encompasses a "wide range." The test of ineffectiveness has little or nothing to do with what the ***best*** lawyers would have done. Nor is the test even what most ***good*** lawyers would have done. We only ask whether a ***reasonable*** lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

State v. Miller, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995) (citation omitted) (***emphasis added***).

The Court finds it rather telling that two other veteran attorneys involved in the joint trial also did not request the limiting instruction.[54] Be that as it may, rather than belaboring the issue, this Court will assume deficiency without deciding the issue as, based upon a detailed reading of the trial transcript in this matter, and pursuant to *Legursky*,[55] the Court **FINDS** Petitioner's claim may be fully disposed of under the prejudice prong of the *Strickland/Miller* test.

First, in addressing the prejudice prong of the *Strickland/Miller* test, the Court notes that Petitioner's trial counsel and Petitioner's co-defendants' counsel, highlighted the entry of pleas by co-defendant's Rashod Wicker and Kentrell Goodman during the course of presenting their theory of the case.[56] The pleas themselves, and the benefits and incentives for Rashod Wicker and Kentrell Goodman to testify, became a center point of counsels' theory that Rashod Wicker

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[54] Moreover, when discussing instructions, Petitioner's trial counsel specifically informed the Court that he felt that it was to his client's benefit not to burden the jury with overwhelming instructions. *See* Trial Transcript, Vol. III, p. 172.

[55] State ex rel. Daniel v. Legursky, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995) (stating a court "need not address both prongs . . . but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test.").

[56] *See* Trial Transcript, Vol. I, pp. 118, 119, 122, 125 (counsel's opening statements); *see also* Trial Transcript, Vol. II, pp. 256, 260, 268, 293 (cross examination of Kentrell Goodman); Trial Transcript, Vol. III, pp. 35, 47 (cross examination of Rashod Wicker); Trial Transcript, Vol. III, 254, 255, 256 (closing argument). Moreover, the plea agreements were entered into evidence without objection from counsel and it was clear all defense counsel sought to highlight Rashod Wicker's and Kentrell Goodman's incentive to testify. *See* Trial Transcript, Vol. III, p. 58, 187; *see also* Trial Transcript, Vol. I, pp. 126-28 (Court discusses out of presence of jury that defense counsel clearly wants the jury to know that the plea agreements have been entered into and the incentives to testify); Trial Transcript, Vol. III, p. 65 (motion for judgment of acquittal based on incentives and inconsistent testimony).

and Kentrell Goodman: 1) were the first to be interviewed and arrested; 2) initially attempted to avoid implicating each other and downplayed their individual involvement; and 3) initially lied to law enforcement about who else was involved.[57] Counsel concentrated on the plea bargain itself, and the incentives for Rashod Wicker and Kentrell Goodman to testify, to further challenge the credibility of each witness and promote counsels' theory that Petitioner, Antwyn Gibbs, and Radee Hill were in no way involved in the commission of the crime and Rashod Wicker and Kentrell Goodman were only attempting to gain the best plea deal they could while, at the same time, protecting the actual perpetrators of the crime.[58]

Based upon trial counsels' opening and closing arguments, trial counsels' cross examination of Rashod Wicker, Kentrell Goodman, Lindsey Hess and Andrew Gunn, as well as trial counsels' direct examination of the Petitioner and co-defendants, Antwyn Gibbs, Radee Hill, and Petitioner's alibi witness, Courtney Curry, it is clear to this Court that trial counsel propounded this idea and theory consistently and fervently throughout Petitioner's trial.[59]

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[57] Petitioner's trial counsel essentially laid out this exact theory throughout the course of the trial and at the heart of this theory was the entry of pleas by Rashod Wicker and Kentrell Goodman. *See* Trial Transcript, Vol. I, pp. 121, 122, 230, 234; *see also* Trial Transcript, Vol. II, pp. 119, 122, 212, 213, 268, 270, 274, 276, 277, 278, 282, 284, 285, 286, 287; Trial Transcript, Vol. III, pp. 38, 41, 42, 44, 45, 107, 108, 111, 113, 115, 116; and Trial Transcript, Vol. III, pp. 243-46 (trial counsel's closing argument).

[58] This theory was consistent among all defense counsel. *See* Trial Transcript, Vol. I, pp. 118, 125, 126-28; *see also* Trial Transcript, Vol. II, pp. 252, 256, 260-61, 293-95, 301, 304; Trial Transcript, Vol. III, pp. 23-26, 32, 33, 35-36, 47-48, 54, 56-57, 64-65, 126-27, 147, 241, 254-61.

[59] Trial counsel propounded a theme of dissention, tenuous/distant relationships, and jealousy among the parties throughout trial. Trial counsel further highlighted the relationship between Rashod Wicker, Kentrell Goodman, and Lindsey Hess and their relationship with Kevin Goodman, Sr., who was initially identified as a suspect in the crime. Trial counsel further emphasized Rashod Wicker's and Kentrell Goodman's initial implications upon arrest and the benefits being gained from the entry of the pleas, to further develop a motive to support trial counsels' theory that Rashod Wicker and Kentrell Goodman were falsely implicating the Petitioner, Gibbs, and Hill as a means to protect the true perpetrators. *E.g.*, Trial Transcript, Vol. III, pp. 41-44 (Petitioner's trial counsel's cross examination of Rashod Wicker); *see also* Trial Transcript, Vol. III, pp. 110-16 (Petitioner's trial counsel's direct examination of the Petitioner); Trial Transcript, Vol. III, pp. 32, 33-35 (Antwyn Gibb's trial counsel's cross examination of Rashod Wicker); and Trial Transcript, Vol. III, pp. 254-61 (Radee Hill's trial counsel's closing argument).

Consistent with counsels' theory, the jury heard the testimony of Petitioner and co-defendants, Antwyn Gibbs and Radee Hill, as they took the stand to testify on their own behalf and were subject to cross examination. Each defendant attempted to discredit the testimony of Rashod Wicker and Kentrell Goodman. The jury was given the opportunity to compare the testimony of the Petitioner and co-defendants, Antywn Gibbs and Radee Hill, to that of Rashod Wicker and Kentrell Goodman, and assess that testimony to evaluate the credibility of these witnesses and to determine the weight to be given to their individual testimony, irrespective of the disclosure of the plea agreements.

Further, as the plea agreements, and the benefit gained thereby, was at the heart of defense counsels' argument, and based upon defense counsels' theory of the case and the argument presented to the jury, the Court finds it highly unlikely that there was any confusion by the jury regarding whether Rashod Wicker's and Kentrell Goodman's pleas could be taken as proof of the guilt of the Petitioner, Gibbs, or Hill.

Moreover, the Court's instructions, although not directly addressing the issues presented in *Flack*, did offer various cautionary warnings that instructed the jury to individually weigh the evidence against each defendant and further directed the jury not to collectively apply the guilt or innocence of any one defendant to all of the defendants.[60]

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[60] *See* Trial Transcript, Vol. I, pp. 99-100 (Court cautioned jury not to think of defendants as a group or assume because one defendant may be guilty another defendant must be guilty); *see also* Trial Transcript, Vol. III, p. 197 (Court cautioned that jury must individually consider the credibility of the witnesses); Trial Transcript, Vol. III, pp. 204-05 (Court cautioned the jury that they must give evidence separate consideration as to each defendant and not consider defendants as a group or assume because one defendant may be guilty of a particular charge another must also be guilty); Trial Transcript, Vol. III, pp. 212-13 (Court informed jury that burden is on the State to prove each individual defendant was present and that each individual defendant committed the offenses charged). Also, during voir dire, trial counsel inquired of the prospective jurors whether there was any juror that would not consider the guilt or innocence of each defendant separately to which no prospective juror answered in the affirmative. *See* Trial Transcript, Vol. I, p. 78.

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

Accordingly, consistent with state and federal law, the Court **CONCLUDES** Petitioner is not entitled to any habeas relief upon this portion of Petitioner's ineffective assistance of counsel claim.

ULTIMATE CONCLUSION

Based upon the findings of fact and conclusions of law set forth in the foregoing order, this Court **CONCLUDES** that the Petitioner is not entitled to any habeas relief on the claims put forth in the *Petition*.

IV. ASSESSMENT OF FEES AND COSTS FOR THIS PROCEEDING PURSUANT TO W.VA. CODE § 53-4A-4(b)

The Petitioner proceeded *in forma pauperis* in the prosecution of this habeas matter.

Pursuant to West Virginia Code, a petitioner who alleges sufficient facts to show to the satisfaction of the Court that he or she is unable to pay the costs of the proceeding or to employ counsel, may be permitted to proceed *in forma pauperis* in the prosecution of a petition under W.Va. Code § 53-4A-1 for a writ of habeas corpus.[61]

West Virginia code also provides that

> all necessary costs and expenses incident to [habeas] proceedings hereunder, originally, or on appeal pursuant to section nine of this article, or both, including, but not limited to, all court costs, and the cost of furnishing transcripts, shall, upon certification by the court to the state auditor, be paid out of the treasury of the State from the appropriation for criminal charges.

W. Va. Code § 53-4A-4(b) (West).

At the conclusion of the habeas matter, the Court shall grant that relief, if any, which is warranted under the circumstances and shall "adjudge the costs of the proceedings, including the charge for transporting the prisoner, to be paid as shall seem right." W. Va. Code Ann. § 53-4-7 (West). The West Virginia Code governing habeas corpus proceedings also provides that at the conclusion of the habeas matter, "[i]n the event a petitioner who is proceeding *in forma pauperis* ***does not substantially prevail, all such costs, expenses and fees shall be and constitute a judgment of the court against the petitioner to be recovered as any other judgment for costs.***" W. Va. Code Ann. § 53-4A-4(b) (West) (***emphasis added***).

The Court has carefully considered Petitioner's claims for relief and has given Petitioner the benefit of every reasonable doubt in considering those grounds. Be that as it may, the Court has still concluded that habeas relief is not warranted as the Petitioner's claims are without merit.

Accordingly, the Court **FINDS** that the Petitioner has failed to substantially prevail on any of his alleged claims for relief. The Court also **FINDS** and **CONCLUDES** that it is both

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[61] W. Va. Code Ann. § 53-4A-4(a) (West).

appropriate and warranted for the Petitioner to be assessed all related court costs, expenses and fees associated with the prosecution of this habeas proceeding in Fayette County Circuit Court civil case number 17-C-342.

V. FINAL RULING AND JUDGMENT

NOW, THEREFORE, in consideration of all of the above, the Court is of the opinion to, and hereby does, **DENY** the relief sought by the Petitioner in the *Petition* and **DISMISSES** this matter from the Court's active docket.

As the Petitioner ***did not substantially prevail*** in this matter, the Court further **ORDERS** that ***the Petitioner shall be assessed all costs, expenses and fees associated with the prosecution of this matter*** [62] and that all such costs, expenses and fees "shall constitute a **JUDGMENT OF THE COURT** against the Petitioner to be recovered as any other judgment for costs." W.Va. Code § 53-4A-4(b) (**EMPHASIS ADDED**).

This *Order Denying And Dismissing Petition* is a **FINAL ORDER.** The Clerk of this Court is directed to remove this matter from the Court's active docket.

The Clerk of this Court is also directed to forward an attest copy of this *Order Denying And Dismissing Petition* to the institution where the Petitioner is currently housed for recovery of the Judgment consistent with the institutional rules and statutes governing the same.

The Clerk shall also send an attest copy of this *Order Denying And Dismissing Petition* to: **J. Timothy DiPiero, Esq.**, *Dipiero Simmons McGinley & Bastress, PLLC*, P.O. Box 1631, Charleston, WV 25326-1631; **Kevin Goodman, Jr., Inmate #3535949**, Huttonsville Correctional Center, P.O. Box 1, Huttonsville, WV 26273; **Charles Williams, Superintendent**,

[62] Appointed attorney fees are **not** to be included in the calculation of the total costs, expenses, and fees due, as this Court has not made the requisite findings herein that would permit the same to be included.

Huttonsville Correctional Center, P.O. Box 1, Huttonsville, WV 26273; and **Assistant Prosecuting Attorney Jeffery Mauzy,** 108 East Maple Avenue, Fayetteville, WV 25840.

ENTERED this 13th day of February 2020.

PAUL M. BLAKE, JR.
JUDGE

Paul M. Blake, Jr., Chief Judge

A TRUE COPY of an order entered
Teste:
Circuit Clerk Fayette County, WV