NO. 21-0536

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

MARK SOWARDS,
Petitioner Below, Petitioner

v.

(Circuit Court of Cabell County)
(Case No.: 18-C-325)

DONNIE AMES, SUPERINTENDENT,
MT. OLIVE CORRECTIONAL COMPLEX
Respondent Below, Respondent

PETITIONER'S BRIEF

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II. STATEMENT OF THE CASE

This appeal stems from the denial, in part, of the Petitioner's Petition for Writ of Habeas Corpus filed in Civil Action Number 18-C-325 in the Circuit Court of Cabell County, West Virginia. [pp. 105-111]. In his underlying Habeas petition, the Petitioner asserted several grounds for relief, most of which were denied. [pp. 57-90]. The Circuit Court did grant the Petitioner's underlying petition on the ground that he should have been given credit for time served while on post-conviction home confinement [p. 111]. However, the remaining grounds for relief requested in the underlying petition were denied, and this appeal follows.

As to the events of the underlying criminal action, after a birthday dinner with his wife on the evening of August 11, 2008, the Petitioner, Mr. Sowards, went to the Blackhawk Grille to join in a game of Texas Hold'em poker. [p. 757]. Mr. Sowards arrived at approximately 8:00pm and paid three hundred dollars ($300.00) to "buy-in" to the game. [pp. 757-758]. After playing for

several hours a person who was unknown to Mr. Sowards arrived at Blackhawk Grille to play poker as well. [p. 759]. This person, later identified to Petitioner as Tim Rosinsky, sat down to the immediate right of Mr. Sowards. [p. 760]. During the evening, Mr. Sowards and Mr. Rosinsky had a verbal confrontation regarding Mr. Sowards' earring and his sexual orientation. [pp. 762-763]. Another attendee, Craig Brumfield, disrupted the confrontation and sat between Mr. Sowards and Mr. Rosinsky for a while during the evening [p. 763]. Eventually, Mr. Sowards and Mr. Rosinsky reconciled and continued to play for the rest of the night.

It was a common consensus among the witnesses that Mr. Rosinsky was the big winner of the night; however, at one point, Mr. Rosinsky had to "buy-in" again. [p. 470]. Mr. Rosinsky testified that when he bought back in, he spent three hundred dollars ($300.00) which left him ten dollars ($10.00) in his wallet. [pp. 470-472]. At one point during the evening, one hand won by Mr. Rosinsky took all of Mr. Sowards' money, requiring Mr. Sowards to "re-buy" again. Mr. Sowards had no money so the "house" allowed him two hundred dollars ($200.00) credit to continue playing. [pp. 761-762].

In the early morning hours of August 12, 2008, the game wound down and the players began to cash out. Mr. Sowards cashed out prior to Mr. Rosinsky and momentarily forgot that he had been playing "on the house" so at the end of the night he owed the house approximately seven dollars ($7.00). [p. 765]. Mr. Rosinsky cashed out prior to Mr. Sowards and according to the witnesses won approximately three thousand dollars ($3,000.00). [p. 658]. However, the house was only able to give Mr. Rosinsky approximately twelve to fifteen hundred dollars ($1,200.00 - $1,500.00) in cash that night. [p. 671].

When Mr. Sowards left Blackhawk Grille, he walked across the street outside to his vehicle and decided he needed to relieve himself beside the building. [p 767]. Mr. Sowards asserted that

after he finished relieving himself, he heard a commotion in the parking lot at the Blackhawk Grille. [p. 767]. Mr. Sowards testified that he saw two people fighting on the ground and walked over to break up what he thought was a fight between two people from the poker game. [p. 768]. Mr. Sowards testified that he was punched and attacked so he ran back to his car and left. [p. 768-769]. Mr. Sowards then left the parking lot and headed down Main Street while trying to call 911 on his cellphone. [p. 769]. Mr. Sowards then struck another vehicle from behind as he was trying to dial 911. [pp. 770-771]. Police arrived at Blackhawk Grille and the accident scene to investigate. Mr. Sowards was taken to the hospital by ambulance where he was questioned by Sergeant D'Allessio and his clothing was taken by the officer. [pp. 772-773].

During the September 2008 term of the Grand Jury, Mr. Sowards was indicted on one count of First-Degree Robbery and one count of Malicious Wounding in Cabell County Case Number 08-F-334. [p. 12]. At this point, the Petitioner began going through a whirlwind of attorneys, prosecutors, and judges which resulted in multiple delays in this process. Most, if not all, of these changes in the lawyers, prosecutors, and judges were not at the request of the Petitioner but rather due to the alleged victim, Timothy Rosinsky, being a practicing attorney in Cabell County, West Virginia. In Case Numbers 08-F-334 and 10-F-351, the Petitioner was appointed with six different attorneys. [pp. 128-141]. Furthermore, the Cabell County Prosecuting Attorney's Office was recused from the case by order entered September 1, 2010, and the Putnam County Prosecuting Attorney's Office was appointed as special prosecutor by order entered September 29, 2010 [pp. 158-159].

During the October 2010 term of the Grand Jury, Mr. Sowards was re-indicted on one count of First-Degree Robbery and one count of Malicious Assault [p. 13-14]. The initial 2010 indictment stated the alleged acts occurred in Putnam County, but the State later changed the

indictment to state that the acts occurred in Cabell County. [pp. 13-16]. At this time, Adrian Hoosier was on the case as the Petitioner's appointed counsel. Mr. Hoosier filed a Motion to Suppress evidence, which was held in circuit court on April 8, 2011. [pp. 161-222]. This motion was denied, and evidence regarding a wallet allegedly taken by Mr. Sowards as well as Mr. Sowards' statement(s) were permitted to be introduced at trial. [pp. 223-224]. Mr. Hoosier subsequently filed a Motion to Disqualify the presiding judge, Alfred Ferguson, based on his relationship with the alleged victim, Mr. Rosinsky. [pp. 225-227]. This motion was also denied. [pp. 231-233]. Throughout this time, from the initial indictment up through Mr. Hoosier's representation of Mr. Sowards, there were multiple continuances of the trial date, due in large part to the juggling of attorneys, judges, and prosecutors.

On November 7, 2011, John Laishley was appointed as the Petitioner's counsel, which was his sixth court-appointed attorney since the original indictment in September 2008. [p. 240]. Mr. Laishley filed two retroactive demands for a jury trial, a motion to dismiss for failure to prosecute based on the length of the delay in the Petitioner going to trial, and . [pp. 243-253]. Hearings were held on these motions on February 8, 2012 and February 15, 2012. [pp. 254-307, pp. 311-376]. The circuit court denied the motions. [pp. 377-379]. Mr. Laishley had also filed a second Motion to Dismiss on February 15, 2012, which was denied. [pp. 308-310].

The Petitioner finally went to trial, approximately three-and-a-half years after the original indictment in September 2008, on February 23, 2012. [pp. 380-901]. On February 24, 2012, the Petitioner was convicted by a jury of First-Degree Robbery and Malicious Assault. [p. 923]. Mr. Sowards was sentenced to forty (40) years for Count I for First-Degree Robbery, and not less than two (2) nor more than ten (10) years for Count II for Malicious Assault (identified as Malicious

Wounding in the Commitment Order) to run consecutively with the sentence for Count I, and he was granted bond with home confinement restrictions during the appeal process.

On May 16, 2012, the Petitioner filed an appeal with the West Virginia Supreme Court of Appeals raising the issue of plain error regarding the Amended Indictment of 2010 in that the State exceeded its authority to amend said indictment, and the amendment made was a matter of substance. Furthermore, the Petitioner argued that his sentence violated the proportionality principle contained in West Virginia Constitution, Article II, Section 5. On April 16, 2013, the West Virginia Supreme Court of Appeals issued a Memorandum Decision affirming the jury conviction and sentencing.

The Petitioner then went through several additional attorneys for a potential Habeas action before the undersigned counsel was appointed by the Circuit Court of Cabell County. A hearing on the Petitioner's Habeas petition was held on May 12, 2021, and the order, which granted in part and denied in part the Petitioner's requested relief, was entered on June 11, 2021. [pp. 105-111]. This appeal follows.

III. STANDARD OF REVIEW

The standard of review in habeas corpus proceedings in West Virginia is set forth in syllabus point one of *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006), which provides as follows:

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong 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.

Therefore, factual findings are reviewed under a clearly erroneous standard, but questions of law are reviewed *de novo*. The ultimate disposition is reviewed for abuse of discretion.

IV. SUMMARY OF ARGUMENT

The Petitioner believes that the circuit court committed reversible error when it denied the Petitioner's relief on the grounds listed below. As more fully detailed in this brief, the Petitioner was prejudiced by multiple continuances of his trial after he was appointed with six different attorneys, three different judges, and two different prosecuting attorneys' offices. These multiple delays were a violation of Mr. Sowards' right to a speedy trial. Second, there was evidence at trial that could have, and would have, supported a conviction for a lesser included offense of misdemeanor battery; however, the trial court impermissibly denied counsel's request for said instruction, and the lower court's failure to reverse the Petitioner's conviction on this is reversible error.

Third, the trial court's erroneous evidentiary rulings with regard to the speedy trial violations, the decision not to change venue, and allowing illegally obtained evidence to be presented at trial, should have been reversed by the lower court. Fourth, Mr. Sowards suffered from ineffective assistance of counsel at trial. His counsel's performance was deficient under an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. The lower court should have found that Mr. Sowards' constitutional rights were violated under *Strickland*. Lastly, due to the cumulative effect of all of these errors, Mr. Sowards' convictions should have been overturned. All of these errors, even if taken on their own, merit the granting of this appeal. When taken together, however, it is clear that the relief requested in this appeal should be granted.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary under Rule 19(a) of the West Virginia Rules of Appellate Procedure because this appeal assigns errors in the application of settled law and unsustainable exercise of discretion in applying the law to the facts of this case.

VI. ARGUMENT

I. The Circuit Court Erred in Denying Relief Upon "Ground 1" of the Petition for Writ of Habeas Corpus, Inordinate Delay of Trial.

Article III, Section 14 of the West Virginia Constitution provides that a criminal defendant shall have a trial "without unreasonable delay." The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

West Virginia Code §62-3-21 provides an accused a remedy of discharge from prosecution for a criminal offense if three regular terms of court after the accused is charged have passed, subject to certain exceptions. In *Good v. Handlan*, the West Virginia Supreme Court of Appeals held that "[i]t is the three-term rule, W.Va. Code 62-3-21, which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 1, *Good v. Handlan*, 342 S.E.2d 111, 176 W.Va. 145 (W.Va., 1986). The Court has also held that "[i]t is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right." Syl. Pt. 1, *State v. Carrico*, 427 S.E.2d 474, 189 W.Va. 40 (W.Va., 1993), citing *State ex rel. Leonard v. Hey*, 269 S.E.2d 394, 398 (W.Va., 1980).

The Court in *Carrico* discussed the factors in considering the effects of an unreasonable delay on the accused's due process rights. The Court stated, "A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of a delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant." *Carrico* at p. 478, citing Syl. Pt. 2, *State v. Foddrell*, 297 S.E.2d 829, 171 W.Va. 54 (W.Va., 1982).

In this case, it is clear that the Petitioner suffered from an inordinate delay in going to trial. It is undisputed that he was originally indicted in September 2008; that he was reindicted in October 2010; and then he was subsequently reindicted in October 2010 due to the jurisdictional error in the first reindictment filed in October 2010. During that time, the Petitioner had been represented by seven (7) different attorneys. The Petitioner's first attorney was Mike Ransom in Charleston, who was retained. [p. 118]. He was then appointed six (6) different attorneys from shortly after the original indictment until his trial in February 2012. [pp. 118-119]. The Petitioner also went through two (2) different prosecuting attorney's offices [p. 158], and he also had three separate judges on his criminal case – Judge O'Hanlon, Judge Cummings, and Judge Ferguson. [p. 160].

The Petitioner testified at the omnibus hearing that he was never advised of his right to a speedy trial. [p. 119]. He further indicated that "he was aware of a few" of the continuances ... one being his counsel's surgery, his own surgery, and when the Putnam County Prosecuting Attorney's office was appointed as special prosecutor. [pp. 119-120]. Despite many of the continuances orders which are labeled as Agreed Orders [see Appendix generally from pp. 128-242], the Petitioner testified that he did not agree to orders other than the ones for his counsel's surgery, his own surgery, and when the Putnam County Prosecuting Attorney's office was

appointed as special prosecutor. [p. 120]. He further indicated that he never filed anything with the lower criminal court asserting his right to a speedy trial because he did not know of his right to a speedy trial. [p. 120]. The record in 18-C-325 further reflects an affidavit signed by the Petitioner that he was never told about his constitutional right to a speedy trial; that he would continuously ask his lawyers to "hurry up because I wanted to 'get it over and go to trial'"; and that his previous lawyers would continue his trial without his knowledge and/or approval. [p. 924]. None of this evidence was contradicted at the omnibus hearing.

It is clear that the Petitioner was denied a trial without unreasonably delay under the guidelines of *Foddrell*. More specifically, the length of the delay was approximately three-and-a-half years. This is an unreasonable and excessive delay. The reasons for the delay, admittedly, were agreed upon by the Petitioner. He testified that he agreed to three (3) continuances -- his counsel's surgery, his own surgery, and when the Putnam County Prosecuting Attorney's office was appointed as special prosecutor. However, other than those continuances, there were over ten (10) continuances that took place without the Petitioner's knowledge or consent. With regard to his assertion of his rights, the Petitioner did not assert his rights to have a speedy trial because he was not advised of his rights to a speedy trial. The Petitioner cannot assert a right if he does not know he has a right. Lastly, the Petitioner was clearly prejudiced by the unreasonable delay. He testified that his workers compensation benefits were stopped due to his pending criminal charges. [pp. 120-121], and he had this pending action hanging over his head for several years.

Based on the factors outlined in *Foddrell*, the Petitioner suffered by being denied a trial for an unreasonable amount of time. The Petitioner's due process rights were violated; his convictions cannot stand, and the lower court should have overturned his conviction. It is reversible error and should now be overturned by this Court.

II. The Circuit Court Erred in Denying Relief Upon "Ground 2" of the Petition for Writ of Habeas Corpus, Failure to Instruct the Jury on a Lesser Included Offense.

As a general rule, the refusal to give a requested jury instruction is reviewed under an abuse of discretion standard. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*. Syl. Pt. 1, *State v. Hinkle*, 489 S.E.2d 257, 200 W.Va. 280 (W.Va., 1996). The first determination to consider is whether battery is a lesser included offense of malicious assault. The Court has explained the analysis of the lesser included offense of malicious assault stating "[u]pon review, we find it is unnecessary to adopt an expanded definition of a lesser included offense because this Court long ago determined under the common law that a misdemeanor assault conviction is sustainable under an indictment for malicious assault." *State v. Henning*, 793 S.E.2d 843, 238 W.Va. 189 (W.Va., 2016). "One of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law." Syl. Pt. 2, *Smith v. W.Va. St. Bd. Of Educ.*, 295 S.E.2d 680, 170 W.Va. 593 (W.Va., 1982). There is no indication in West Virginia Code §61-2-9 of legislative intent to alter the common law rule set for in syllabus point one of *Craft* and syllabus point three of *King*. To the contrary, by placing the offenses of assault and battery within the framework of West Virginia Code §61-2-9, it is clear that the legislature intended to import the common law pertaining to the offenses of assault and battery into the statute. Accordingly, we now clarify and hold that the crime of assault as defined by West Virginia Code §61-2-9(b) is a lesser included offense of malicious assault as set forth in West Virginia Code §61-2-9(a)." *Henning* at p. 850.

The next determination is whether or not Mr. Sowards is entitled to a jury instruction of a lesser included offense. The Court has held that "[t]he question of whether a defendant is entitled to an instruction on a lesser included offense involved a two-part inquiry. The first inquiry is a

legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense." *State v. Neider*, 295 S.E.2d 902, 170 W.Va. 662(W.Va., 1982).

The Court determined the legal elements and lesser included offenses of malicious assault in *State v. Henning, supra*, satisfying the first prong of the *Neider* analysis. Turning to the second prong of the analysis, Battery is committed as defined in West Virginia Code §61-2-2(c) when "any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature to the person of another or unlawfully and intentionally causes physical harm to another person is guilty of a misdemeanor."

The alleged victim of the crime, Tim Rosinsky, of malicious assault testified at the underlying criminal trial, and he testified to evidence that could have merited a conviction for misdemeanor battery if the jury would have been given that chance. More specifically, the testimony of Mr. Rosinsky was as follows:

> Rosinsky: So I turned to see what he was trying to say to me and there was a punch that was in mid-throw. I mean, it was coming at my face.
>
> State: And did it land on your face?
>
> Rosinsky: It sure did.
>
> State: And he hit you?
>
> Rosinsky: He hit me so many times that – in the fact that I don't – I can't tell you exactly what punch hit where. I think the first punch was a right that he had thrown and I think it hit the right side of my face. I am not a hundred percent sure. I just know that it not only got my attention it buckled me. And when I buckled because I was hurt at this point I was not in a position to even defend myself. Hell, I had had my hand in my pocket, my right hand in my pocket, which is my dominant hand. . . . And then he started playing a game of kick ball with my head and he started kicking me with his feet when I was laying on the ground. [pp. 489-490].

The Petitioner's attorney sought to have the jury instructed on the elements of battery as a lesser-included offense of malicious assault. [pp. 816-817]. The lower court stated that it did not believe "there is any evidence to support a Battery change in this case." [p. 817]. Mr. Rosinsky's own testimony regarding the night of the alleged crime clearly contradicts the lower court's statement. As such, the jury should have been instructed on the crime of battery, and the lower court in this matter refused to reverse the Petitioner's conviction on this ground. This is reversible error and must be overturned now on appeal.

III. ***The Circuit Court Erred in Denying Relief Upon "Ground 3" of the Petition for Writ of Habeas Corpus, Reversible Evidentiary Rulings***

A. Three-Term Rule – Failure to Prosecute

The arguments for Ground III(A) are the same as the arguments as laid out in Ground I of this Petitioner's Brief.

B. Change of Venue

The Court has addressed the issue of change of venue in West Virginia. *State v. Sette*, 242 S.E.2d 2d 464, 161 W.Va. 384 (W.Va., 1978). The Court held, "[t]o warrant a change of venue in a criminal case, there must be a showing of good cause therefore, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and it's ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Syl. Pt. 1, *Sette*, citing Syl. Pt. 2, *State v. Woolridge*, 40 S.E.2d 899, 129 W.Va. 448 (W.Va., 1946).

In this case, the Petitioner, by counsel, filed a Motion for a Change of Venue on or about March 3, 2010. [pp. 144-145]. The motion was denied by the underlying criminal court by order

entered on or about May 14, 2010 [pp. 146-147]. The denial order, with regard to the motion to change venue, simply stated that, "[A]s to the defendant's motion for change of venue, the Court denies the defendant's motion." [p. 146]. At the omnibus hearing in this matter, the Petitioner testified that his top, if not his main concern, with the trial was the victim's relationship with the court system, as he was a practicing attorney in Cabell County. More specifically, the Petitioner testified, "Well, clearly, I mean you've got an individual that works in this county and works in the same courthouse that I'm being tried at. ... Tim Rosinsky. And his first wife was Judge O'Hanlon's secretary; so, you know, I just – I felt uneasy about that right off the bat, especially already being accused of this." [p. 121]. The Petitioner further stated that he had made these concerns to all of his attorneys during their course of representation of the Petitioner. [p. 121].

The Petitioner submits that the Circuit Court's failure to properly consider the relationship of Mr. Rosinsky, a practicing attorney in Cabell County, with members of the court system, including Judge Ferguson, the presiding judge in the underlying court case, and to overturn the Petitioner's convictions is an abuse of discretion. There was certainly good cause to transfer this case out of Cabell County where Mr. Rosinsky was actively practicing law at the time of the alleged underlying events as well as the underlying criminal trial.

IV. The Circuit Court Erred in Denying Relief Upon "Ground 4" of the Petition for Writ of Habeas Corpus, Ineffective Assistance of Counsel

The United States Supreme Court set forth the two-prong test, which had been adopted by the State of West Virginia, for ineffective assistance of counsel claims. This test was initially set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and under *Strickland*, a claim for ineffective assistance of counsel is successful when a court determines "(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." *See Syl. Pt. 5, State v. Miller*, 194 W.Va. 3 (1995). The Sixth Amendment of the United States Constitution requires that a criminal defendant receive effective assistance of counsel. *U.S. Const.* amend. VI.

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 [prior] 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*, 459 S.E.2d 114 (W.Va. 1995).

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation." Syl. Pt. 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995). *State ex rel. Strogen v. Trent*, 469 S.E.2d 7, 196 W.Va. 148 (W. Va. 1996).

In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices. Syl. Pt. 4, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (W. Va. 1995).

In deciding ineffective of assistance 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. Syl. Pt. 5. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (W. Va. 1995).

A defendant can only obtain reversal on ineffective assistance of counsel grounds if the error complained of occurred at a critical stage in the adversary proceedings. This is true because Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United States Constitution guarantee the right to counsel only at critical stages. Syl. Pt. 6. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (W. Va. 1995).

In this case, the record shows that there was ineffective assistance of counsel during the Petitioner's trial. The Petitioner was charged with one count of first-degree robbery and one count of malicious assault. [pp. 15-16]. This Court has held that robbery is a specific-intent crime. *State v. Wilkerson*, 230 W.Va. 366, 738 S.E.2d 32 (W.Va. 2013). Furthermore, this Court has previously stated:

> We have, heretofore, allowed evidence of voluntary intoxication to show that a defendant was incapable of forming the required mental state for first degree murder. In *State v. Keeton*, 166 W.Va. 77, 82-83, 272 S.E.2d 817, 820 (W.Va.1980), this Court observed that "[w]hile it is true that voluntary drunkenness does not ordinarily excuse a crime, ... it may reduce the degree of the crime or negative a specific intent." (Citation omitted). The Court also commented that it had generally held that "the level of intoxication must be `such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation.'" Id. at 83, 272 S.E.2d at 821 (quoting syllabus point 1, State v. Davis, 52 W.Va. 224, 43 S.E. 99 (1902)). See also State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979) (finding that level of intoxication so incapacitated defendant that giving of first-degree and second-degree murder instructions was erroneous, but cautioning that case presented unique factual circumstances not likely to arise again).

State v. Joseph, 214 W.Va. 525, 590 S.E.2d 718 (W. Va. 2003).

Thus, this Court has made it clear that evidence of voluntary intoxication is a possible defense to a specific intent crime, such as robbery and malicious assault. Mr. Laishley admitted at the omnibus hearing that it was his thought that "voluntarily intoxication is not a defense, but whatever." [p. 116]. As such, Mr. Laishley admitted under oath that he did not pursue a possible defense for his client, even though there was evidence presented at trial as well as gathered on the night of the alleged events that the Petitioner was intoxicated. Mr. Laishley failed to investigate the possible defense of diminished capacity and present it to the Court and jury, creating prejudice against the Petitioner by precluding a stronger argument for the inclusion of the lesser included offenses. Mr. Laishley failed to consult with an expert about the possibility of this defense and as such, no expert testimony was presented on behalf of the Petitioner at trial. The Petitioner asserts that had Mr. Laishley presented a diminished capacity defense and the jury was allowed to consider the lesser included offenses, there is a reasonable likelihood that the outcome of the trial would have been different. The Circuit Court's failure to reverse the Petitioner's convictions based on this ground is irreversible error.

V. The Circuit Court Erred in Denying Relief Upon "Ground 6" of the Petition for Writ of Habeas Corpus, Cumulative Effect of Multiple Trial Errors.

"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." Syl. Pt. 12, *State v. Guthrie*, 461 S.E.2d 163, 194 W.Va. 657 (W.Va., 1995), citing Syl. Pt. 5, *State v. Smith*, 193 S.E.2d 550, 156 W.Va. 385 (W.Va., 1972). "In order to invoke the cumulative error doctrine, there must be more than harmless error." *State v. McKinley*, 764 S.E.2d 303, 327, 234 W.Va. 143, 167 (W.Va., 2014).

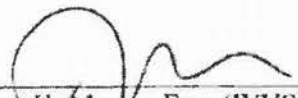
The record in the lower tribunal is clear that the Petitioner suffered from several multiple errors. These multiple errors are adequately presented in the preceding sections. Even if this Court finds that these errors, when taken separately, are harmless, the Court has the authority to find that the cumulative effect of them, taken together, prevented the Petitioner from receiving a fair trial. The cumulative effect of these errors shows that the Petitioner has been prejudiced in the underlying criminal trial, and therefore, his convictions should be overturned.

VII. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons set forth above, the Petitioner prays that this Honorable Court reverse the lower court's decision; to remand this matter back to the lower court for proceedings consistent with that decision; and to grant any and all further relief that it deems necessary.

MARK SOWARDS

BY COUNSEL



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CERTIFICATE OF SERVICE

I, Juston H. Moore, Esq., hereby certify that on the 29th day of November, 2021, I served a true and correct copy of the Petitioner's Appeal Brief and Appendix on the following:

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