IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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WILLIAM BALLENGER,
Petitioner Below, Petitioner

v. **Case No.: 23-107**

ROBIN MILLER, Superintendent,
Huttonsville Correctional Center
Respondent Below, Respondent

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. A jury found Petitioner was a habitual offender based on a prior felony conviction from the state of Kentucky for possession of cocaine. Unlike West Virginia, Kentucky classifies possession of cocaine as a felony. Trial counsel did not challenge the Kentucky conviction even though it is classified as a misdemeanor in West Virginia. The circuit court abused its discretion in finding trial counsel acted reasonably. It also erred as a matter of law by holding that facts in criminal complaints, not the elements of the crime of conviction, govern classification of out of state felonies in recidivist actions.

2. The State violated double jeopardy by indicting Petitioner on two counts of robbery as both charges involved the same incident, the same victim, and the same unit of prosecution. The circuit court erred in finding trial counsel provided effective assistance despite failing to argue that the two counts of robbery violated double jeopardy.

3. The circuit court abused its discretion by rejecting Petitioner's cumulative error claim and holding that the alleged errors were the result of strategic decisions and "well within the broad range of professionally competent assistance."[1]

STATEMENT OF THE CASE[2]

Around 3 a.m. in April of 2014, the victim and two witnesses were outside waiting for a ride home.[3] Petitioner approached them, threatened the victim, and demanded money from the victim.[4] The victim threw $20 onto the street and Petitioner responded that he was going to beat

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[1] A.R. 222.
[2] The statement of the case focuses on facts relevant to the appeal. For a complete recitation of the underlying facts from the criminal case, please refer to Petitioner's Amended Petition for Writ of Habeas Corpus. A.R. 32-36. The State's response to the Amended Petition can be found at A.R.198-210.
[3] A.R. 567-70.
[4] A.R. 219; A.R. 573; A.R. 575; A.R. 746; A.R. 1560; A.R. 1562.

the victim because he only had $20.[5] Petitioner then assaulted the victim, took his cell phone, and fled.[6] The police recovered the cell phone at the scene.[7]

1. Procedural history.

In a superseding indictment, a Cabell County grand jury charged Petitioner with first degree robbery, second degree robbery, malicious wounding, and obstruction.[8] Trial commenced in April of 2016, and a jury acquitted Petitioner of first degree robbery. However, the same jury also convicted him of second degree robbery, battery as a lesser included offense of malicious wounding, and obstruction.[9] Following a recidivist trial, predicated on a prior conviction in the state of Kentucky, the court enhanced Petitioner's second degree robbery sentence by five years.[10]

On appeal, Petitioner's counsel argued a single issue: "that the circuit court erred in denying his motion to dismiss the indictment for failure to provide him with a speedy trial."[11] This Court affirmed Petitioner's convictions.[12]

Several years and attorneys later, Petitioner filed an amended petition for writ of habeas corpus, a supplemental petition, and a motion for summary judgment.[13] A hearing was held on the motion for summary judgment, and an evidential hearing was held on the petitions.[14] During these hearings, counsel moved the entire record of the criminal case into evidence in the habeas case.[15] Proposed orders, arguing the parties respective positions, were submitted after each hearing.[16]

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[5] A.R. 747; A.R. 1059.
[6] A.R. 219; A.R. 577; A.R. 1059.
[7] A.R. 1059-60, 890.
[8] A.R. 1426-27.
[9] A.R. 1489-94.
[10] A.R. 1496-1498.
[11] *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Nov. 22, 2017).
[12] *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Nov. 22, 2017).
[13] A.R. 32-134; A.R. 141-52; A.R. 153-72.
[14] A.R. 243-78; A.R. 279-441.
[15] A.R. 245; A.R. 281-82; A.R. 360.
[16] A.R. 10-31 (proposed order following evidentiary hearing); A.R. 190-97 (proposed order following summary judgment hearing).

In January of 2023, the court issued a final order denying all claims.[17] Petitioner appeals three erroneous holdings made by the lower court: (1) West Virginia classifies out of state felony convictions by looking at facts in a criminal complaint as opposed to the statutory elements of the crime of conviction; (2) charging first and second degree robbery for a single incident involving the same victim does not violate double jeopardy; and (3) there was no cumulative error.

2. Petitioner's recidivist conviction was based on a predicate out of state conviction properly classified as a misdemeanor in West Virginia.[18]

After the jury convicted Petitioner of second degree robbery, the State filed a recidivist information alleging Petitioner had a prior Kentucky conviction for possession of cocaine.[19] Kentucky classifies possession of cocaine as a felony.[20] Trial counsel did not challenge the State's use of his predicate felony for recidivist purposes[21] and a recidivist jury found Petitioner was a habitual offender. Thereafter, the court increased his sentence by five years.[22]

Petitioner's Amended Petition for Writ of Habeas Corpus, and his subsequent motion for summary judgment, argued that the Kentucky conviction for possession of cocaine is not a qualifying predicate offense, as the elements of the offense constitute a misdemeanor in West Virginia.[23] During the habeas hearing, trial counsel appeared unfamiliar with the law relating to classification of out of state felonies for recidivist purposes.[24] When asked why he did not

[17] A.R. 211-26.
[18] This issue was argued in Petitioner's amended petition for habeas corpus (A.R. 37-39), his motion for summary judgment (A.R. 153-72), in two proposed orders (A.R. 16-20, 190-197), and during a hearing on the motion for summary judgment (A.R. 243-78).
[19] A.R. 1503-59.
[20] KRS § 218A.1415.
[21] A.R. 1260-1425 (transcripts related to the recidivist proceedings).
[22] A.R. 1496-99.
[23] A.R. 37-39; 153-72.
[24] A.R. 364-68.

challenge the predicate conviction, he stated "I don't recall why or if I in fact did. I know I didn't file a written motion, but I don't know why, to answer your question."[25]

Ultimately, the court rejected Petitioner's argument that the Kentucky conviction, by virtue of its elements, is classified as a misdemeanor in West Virginia. In reaching this decision, the court held that instead of analyzing the statutory elements of the offense of conviction, classification occurs by looking to the facts set forth in the underlying criminal complaint.[26]

3. The State charged Petitioner with first degree robbery and second degree robbery based on a single incident involving one victim.[27]

The State initially indicted Petitioner for one count of first degree robbery.[28] A superseding indictment charged Petitioner with first degree robbery for taking the victim's phone and second degree robbery for taking the same victim's money.[29] At no point did trial counsel argue that the two robbery charges violated double jeopardy, or request a jury instruction clarifying that only one robbery conviction could be returned. Ultimately, the jury acquitted Petitioner of first degree robbery but convicted him of second degree robbery.[30]

During the habeas hearing, trial counsel agreed that there was only one victim of the robberies and that second degree robbery is a lesser included of first degree robbery.[31] When asked why he did not argue that the two charges of robbery violated double jeopardy, he testified that he could not remember why.[32] He also testified that "a lot of the way I practice law is strategy, there was a reason behind it, or maybe there wasn't a reason behind it. Maybe I didn't know the first

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[25] A.R. 368.
[26] A.R. 213-18.
[27] This issue was argued in Petitioner's amended petition for habeas corpus (A.R. 39-43), in Petitioner's proposed order (A.R. 16-20), and during the omnibus hearing (A.R. 291-93, 297-303, 382).
[28] A.R. 1500.
[29] A.R. 1501-02.
[30] A.R. 1489-94.
[31] A.R. 297.
[32] A.R. 297-98.

indictment existed. I am not sure."[33] Despite this testimony, he did not articulate a particular strategy for not challenging the two counts of robbery. Finally, he testified that failing to argue double jeopardy was not ineffective because the jury found Petitioner not guilty of the first degree robbery charge. According to trial counsel, "the ends justify the means."[34]

The circuit court rejected Petitioner's double jeopardy claim. Specifically, the court held that when enacting the robbery statute, "the State Legislature intended to create two distinct statutory provisions under which an individual can be charged, and thus, intended to criminalize two distinct acts."[35] Accordingly, because Petitioner received money from the victim via threats, and then obtained the victim's phone via violence, double jeopardy was not violated.[36]

4. Trial counsel failed to make multiple objections during trial.[37]

Once trial began, the State committed multiple errors that trial counsel failed to object to. The errors began with opening statements where the State testified that she would visit Huntington as a child and "[n]ever at any time did I feel a sense of fear or felt that we had to avoid any areas of Huntington. And unfortunately, I can't say the same for my children, that they will have the same safe memories of walking down the streets of Huntington. I don't have to tell you about the drug-fueled situation that the Huntington area is facing right now, it is everywhere . . .[38] Ladies and gentlemen, we must be able to walk the streets of Huntington again without fear of violence."[39]

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[33] A.R. 298.
[34] A.R. 299.
[35] A.R. 219.
[36] A.R. 219-20.
[37] This issue was argued in Petitioner's amended petition for habeas corpus (A.R. 45-49), in Petitioner's proposed order (A.R. 16-20), and during the omnibus hearing (A.R. 570-589).
[38] A.R. 551 (trial transcript); A.R. 1675 (omnibus exhibit 15, page 30); A.R. 90 (Amended Petition exhibit, page 39).
[39] A.R. 559 (trial transcript); A.R. 1683 (omnibus hearing exhibit 15, page 38); A.R. 92 (Amended Petition exhibit, page 41).

Two days later, the State's closing picked up where the opening left off. "I told you in my opening that fear for what could happen on the streets of Huntington is something that is not fair. It is not fair that the people have to walk around Huntington fearing things[40] . . . I, as a prosecutor, told you, my job is to try to keep this area safe by holding people accountable for their actions."[41]

In between the State's opening and closing, it introduced hand written statements from two witnesses,[42] police reports that officers read from during their testimony,[43] and a Huntington Police Department Prosecution Report, prepared by the police for the State, and outlining the State's case.[44] The State also published photos prior to their admission.[45] Officer Bentley, a State witness, testified to what the victim said in a recorded statement even though the recording was never played or admitted into evidence.[46] A CAD[47] report was introduced through a witness who did not create it.[48] Doctors were asked to simply read from the medical records.[49] The State elicited expert testimony from an undisclosed expert in emergency medicine.[50] The State used leading questions to the point of testifying.[51] The State also testified during Petitioner's cross examination when she

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[40] A.R. 1173 (trial transcript); A.R. 1694 (omnibus hearing exhibit 15, page 49); A.R. 93 (Amended Petition exhibit, page 42).
[41] A.R. 1209 (trial transcript); A.R. 1730 (omnibus exhibit 15, page 85); A.R. 94 (Amended Petition exhibit, page 43).
[42] A.R. 1560; A.R. 1562; A.R. 1646-47 (omnibus exhibit 15, page 1-2); A.R. 671 (witness reading their statement); A.R. 877-79 (reading through leading questions), 95-99 (transcripts attached as exhibit to Petitioner's amended petition for writ of habeas corpus).
[43] A.R. 1568-76 (trial exhibits); A.R. 1583-84 (trial exhibits); A.R. 1586-87 (trial exhibits); A.R. 925; A.R 1064 (trial transcript); A.R. 929-30 (trial transcript); A.R. 1623-26 (omnibus exhibit 12).
[44] A.R. 1577-1580 (trial exhibit); 1623-26 (omnibus exhibit 12).
[45] A.R. 898-99.
[46] A.R. 1059.
[47] CAD stands for computer aided dispatch and the report contains information relayed from 911 call centers to officers in the field.
[48] A.R. 858-59; 1563-66; A.R. 1584; A.R. 1590; A.R. 1619 (omnibus exhibit 11).
[49] A.R. 631, 633, 634.
[50] A.R. 821-22.
[51] A.R. 877-79.

stated that she was the same height as the victim and ordered Petitioner to stand next to her to show the height discrepancies between the victim and Petitioner.[52]

During the habeas hearing, trial counsel testified that he does not object if he thinks the court will overrule him.[53] Conversely, he also testified that he cannot read the court's mind.[54] Ultimately, the court held that trial counsel's decisions to not object were strategic and "well within the broad range of professionally competent assistance."[55]

SUMMARY OF ARGUMENT

Pride comes before the fall. Here, trial counsel boasted that he tried 65 cases, 55 of which were criminal cases.[56] He also boasted that he is "one of the most experienced trial lawyers that has ever been before [the court]."[57] Despite his vast experience, his performance in this case demonstrated a lack of knowledge regarding fundamental principles of law. The court's final order vindicating trial counsel's performance, exhibited an equal misunderstanding of the law.

Trial counsel's ineffectiveness culminated during the recidivist trial when he failed to challenging the predicate Kentucky felony for possession of cocaine. His actions were not strategic, but rather rooted in a lack of familiarity with basic legal principles surrounding recidivist prosecutions that have existed since 1942.[58] No reasonable attorney would fail to argue that Petitioner's Kentucky conviction for possession of cocaine is not a qualifying offense as the statutory elements of the crime of conviction constitute misdemeanor simple possession in West Virginia.[59] The circuit court compounded trial counsel's error by incorrectly holding foreign

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[52] A.R. 1125.
[53] A.R. 307, 308, 310, 314.
[54] A.R. 314.
[55] A.R. 222.
[56] A.R. 308, 311.
[57] A.R. 295.
[58] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942).
[59] Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986).

convictions are classified by reviewing facts alleged in a criminal complaint as opposed to the statutory elements of the crime of conviction.

Counsel's error during the recidivist trial could have been foreclosed before trial even began had he argued double jeopardy prohibited the State from charging Petitioner with first and second degree robbery. Specifically, as both charges resulted from a single incident, involving one victim, and shared the same unit of prosecution. Petitioner was prejudiced as trial on greater and lesser included offenses have the potential to "induce" the jury to simply convict on one of the two charges as opposed to "continu[ing] to debate [a defendant's] innocence" on both charges.[60]

Finally, counsel's trial "strategy" was to not object if there was a chance the court would overrule him. This "strategy" resulted in the impermissible and prejudicial introduction of police reports, expert testimony, a prosecution report, testimony by the prosecuting attorney, and an opening statement and closing argument by the State that was designed to inflame the jury and enlist them in a quest to make the streets of Huntington safe again.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 19 oral argument and a memorandum decision as the case involves claims "involving assignments of error in the application of settled law" and "unsustainable exercise of discretion [and] the law governing that discretion is settled."[61]

ARGUMENT

Petitioner's counsel provided ineffective assistance at every stage of the proceedings. He failed to challenge the recidivist information that used a Kentucky conviction classified as a misdemeanor in this state. He failed to argue double jeopardy prohibited the State from charging

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[60] *Price v. Georgia*, 398 U.S. 323, 331–32 (1970).
[61] Rule 19(a), Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia.

two counts of robbery when there was only one event and one victim, and finally, his failure to object during trial resulted in cumulative error.[62]

These errors were "so serious that [trial counsel] was not functioning as the 'counsel' guaranteed [to Petitioner] by the Sixth Amendment."[63] Counsel's errors prejudiced Petitioner and "deprive[d] [him] of a fair trial."[64] Absent these errors, "the result of the proceedings would have been different."[65]

As always, a three prong standard of review applies when appealing the denial of a petition for writ of habeas corpus. The Court "review[s] 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."[66]

1. Petitioner was convicted as a habitual offender based on a Kentucky conviction that West Virginia classifies as a misdemeanor.

Petitioner was convicted in Kentucky of possession of cocaine. While Kentucky classifies Petitioner's conviction as a felony, under West Virginia law, the statutory elements of Petitioner's crime of conviction only establish misdemeanor simple possession. Accordingly, West Virginia classifies Petitioner's Kentucky conviction as a misdemeanor.[67]

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[62] Syl. Pt. 7, *State v. Tyler G.*, 236 W.Va. 152, 778 S.E.2d 601 (2015).
[63] *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).
[64] *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).
[65] Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).
[66] *Dement v. Pszczolkowski*, 245 W. Va. 564, 574, 859 S.E.2d 732, 742 (2021) citing Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).
[67] This issue was argued in Petitioner's amended petition for habeas corpus (A.R. 37-39), his motion for summary judgment (A.R. 153-72), in two proposed orders (A.R. 16-20, 190-197), during a hearing on the motion for summary judgment (A.R. 243-78), and during the omnibus hearing (A.R. 361-368, 380-82).

Since at least 1942, this Court has held that foreign felony convictions may only be used for recidivist purposes if West Virginia classifies the conviction as a felony.[68] Despite this longstanding law, trial counsel failed to challenge the State's use of the Kentucky conviction as the basis for the recidivist action. Consequently, the court enhanced Petitioner's sentence by five years.[69] Trial counsel's ineffectiveness was compounded by the circuit court during habeas proceedings when it held that (1) Petitioner failed to establish that trial counsel acted unreasonably by not challenging the use of the Kentucky conviction;[70] and (2) the Kentucky conviction is a qualifying predicate as courts classify out of state convictions by looking at facts in a criminal complaint instead of the elements of the conviction.[71]

a. Trial counsel's failure to argue settled law added five years to Petitioner's sentence.

This Court has consistently held that out of state felony convictions that are not classified as felonies in West Virginia may not "be the basis for application of the West Virginia Habitual Criminal Statute."[72] "Whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute . . . depends upon the classification of that crime in this State."[73] Furthermore, this Court has recognized that "[i]t is conceivable that there may be crimes which are punishable by confinement in a penitentiary in other jurisdictions and that the same crimes would be classed as misdemeanors under our laws. In such event, it would

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[68] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942); see also Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986).
[69] *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).
[70] A.R. 215.
[71] A.R. 215-16.
[72] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942); Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986); *State v. Ward*, 245 W. Va. 157; 858 S.E.2d 207 (2021) (affirming *Justice v. Hedrick* but finding it inapplicable to the prohibited person statute).
[73] Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986) (emphasis added); see also *State v. Norwood*, 242 W. Va. 149, 153–59, 832 S.E.2d 75, 79–85 (2019) fn. 9.

seem proper that the laws of this State should be considered in determining the grade of the crimes for which there have been former convictions."[74]

West Virginia classifies possession of any drug, including cocaine, as a misdemeanor: "[i]t is unlawful for any person knowingly or intentionally to possess a controlled substance . . . Any person who violates this subsection is guilty of a misdemeanor. . ."[75] Possession of cocaine is classified as a felony only if the additional elements of "manufacture, deliver, or possess with intent to manufacture or deliver" are present.[76] Therefore, if another state classifies mere possession of cocaine as a felony—*i.e.* possession *without* intent to manufacture or deliver—that felony conviction cannot be used in West Virginia for recidivist purposes.[77] Kentucky is such a state.

Unlike West Virginia, Kentucky does not always classify mere possession of a drug as a misdemeanor. One exception is cocaine, a Schedule II narcotic.[78] Here, Petitioner's Kentucky conviction was for "Possession of a controlled substance in the first degree;" specifically, cocaine.[79] Pursuant to the Kentucky statute,

> (1) A person is guilty of possession of a controlled substance in the first degree when he or she knowingly and unlawfully possesses: (a) A controlled substance that is classified in Schedules I or II and is a narcotic drug . . .
> (2) Possession of a controlled substance in the first degree is a Class D felony . . . [80]

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[74] *Id.* at 56, citing *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942).
[75] W. Va. Code § 60A-4-401(c) (2011).
[76] W. Va. Code §§ 60A-1-101(r)(4) (2011) (cocaine is defined as a narcotic drug), 60A-2-206(4) (2014) (cocaine is a schedule II drug), 60A-4-401(a)(i) (2011).
[77] Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986).
[78] Ky. Rev. Stat. Ann. § 218A.1415, *Com. v. Shivley*, 814 S.W.2d 572, 573 (Ky. 1991), *Finn v. Com.*, 313 S.W.3d 89, 92 (Ky. 2010).
[79] KRS § 218A.1415; A.R. 1503-59.
[80] KRS § 218A.1415.

Under this statute, possession of even a miniscule amount of cocaine that is invisible to the human eye is considered a felony.[81] Furthermore, Kentucky's corollary to West Virginia's possession with intent to deliver cocaine is found in a different code section: KRS § 218A.1412(1)(a), "Trafficking in controlled substances in the first degree."[82]

Petitioner's Kentucky conviction was for possession of cocaine.[83] He was neither charged with, nor convicted of violating the Kentucky trafficking statute. Based on the elements of possession of cocaine in Kentucky, which are nearly identical to West Virginia's elements for misdemeanor simple possession, West Virginia classifies Petitioner's Kentucky conviction not as a felony, but as a misdemeanor. Therefore, the Kentucky conviction cannot be used for enhancement purposes under West Virginia's Habitual Offender Act.[84]

A competent attorney would have moved to dismiss the recidivist information. During the omnibus hearing, trial counsel could not articulate a reason or strategy to justify his inaction.[85] As such, he was ineffective for not arguing settled law[86] and not challenging the State's use of the Kentucky conviction. Petitioner was prejudiced by a 5 year increase in his sentence[87] and both prongs of *Strickland* and *Miller* have been met.[88]

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[81] *Finn v. Com.*, 313 S.W.3d 89, 95 (Ky. 2010).
[82] First offense trafficking in "four (4) grams or more of cocaine" is a Class C felony while trafficking in less than four grams of cocaine is a Class D felony.
[83] A.R. 1503, 1530-32, 1534-35, 1543.
[84] Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986), see also *State v. Norwood*, 242 W. Va. 149, 153–59, 832 S.E.2d 75, 79–85 (2019) fn. 9.
[85] A.R. 368.
[86] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942); Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986).
[87] A.R. 1496-99.
[88] *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

b. The circuit court abused its discretion and erred as a matter of law when it held that Petitioner failed to prove both prongs of *Strickland* and *Miller*.

Despite the evidence of ineffective assistance of counsel, the court incorrectly held that Petitioner did not establish both prongs of *Strickland* and *Miller*.[89] First, the court held that because trial counsel "could not recall whether he challenged the State's use of Petitioner's Kentucky conviction or what his reasoning might have been," Petitioner failed to prove trial counsel was ineffective.[90] Second, the court found that Petitioner's Kentucky conviction was a proper predicate felony. To justify this finding, the court held that the facts alleged in the Kentucky criminal complaint, not the elements of the crime of conviction, are examined for classification purposes.[91]

c. The circuit court abused its discretion by finding trial counsel acted reasonably when he failed to argue settled law.

The court found that trial counsel "testified that he could not recall whether he challenged the State's use of Petitioner's Kentucky conviction or what his reasoning might have been."[92] The court further held that "Petitioner has shown nothing more than the fact that he was found guilty of a felony in West Virginia, the State subsequently filed a recidivist information based on his Kentucky felony, a jury found Petitioner to be the same individual who committed the Kentucky felony, and a judge applied the recidivist statute accordingly. Consequently, this Court 'hesitate[s] to label as ineffective an attorney's actions when the reasons for those actions are not clear,' see *State v. Bess*, 185 W. Va. 290, 293 406 S.E.2d 721 724 (1991), and finds that Petitioner has failed to satisfy the first prong of the *Strickland* inquiry."[93]

[89] A.R. 215-16.
[90] A.R. 214-15.
[91] A.R. 215-18.
[92] A.R. 214-15.
[93] A.R. 215.

The circuit court's "hesitation" amounts to an abuse of discretion premised on a misreading of *State v. Bess*. In *Bess*, this Court reiterated that it generally does not hear claims of ineffective assistance of counsel on *direct appeal* as a record must first be developed in a habeas corpus action.[94] In those situations, *i.e.* on direct appeal, this Court will "hesitate to label as ineffective an attorney's actions when the reasons for those actions are not clear."[95]

Unlike in *Bess*, a thorough record of Petitioner's ineffective assistance claim exists. The transcripts of the recidivist trial show that counsel never challenged the Kentucky conviction.[96] Petitioner raised the issue in his petition for habeas corpus[97] and in a separate motion for summary judgment.[98] The issue was argued during a hearing on the motion for summary judgment,[99] and renewed during the omnibus hearing.[100] Trial counsel was questioned on the issue during the omnibus hearing,[101] and Petitioner filed two separate proposed orders arguing to vacate the recidivist conviction.[102] Finally, during the omnibus hearing, Petitioner asked trial counsel why he did not challenge the Kentucky conviction. Trial counsel testified that "I don't recall why or if I in fact did. I know I didn't file a written motion, but I don't know why, to answer your question."[103]

Despite the court's reliance on *Bess*, trial counsel's inability to remember why he failed to argue settle law does not absolve him. Instead, trial counsel's lack of memory, coupled with the rest of his testimony revealed at least one reason for not making a basic argument in Petitioner's recidivist case: trial counsel was unfamiliar with the law regarding classification of out of state

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[94] *State v. Bess,* 185 W. Va. 290, 293, 406 S.E.2d 721, 724 (1991).
[95] *State v. Bess*, 185 W. Va. 290, 293, 406 S.E.2d 721, 724 (1991).
[96] A.R. 1259-1425.
[97] A.R. 37-39.
[98] A.R. 153-172.
[99] A.R. 243-78.
[100] A.R. 282.
[101] A.R. 361-68.
[102] A.R. 13-16, 190-97.
[103] A.R. 368.

convictions.[104] More importantly, trial counsel was unable to articulate a strategy underlying his failure to challenge the Kentucky felony.[105] Undoubtedly, because none exists. No reasonable attorney would fail to argue law that would prevent their client from serving an additional five years in prison.

Accordingly, trial counsel's failure to argue settled law amounted to a "performance [that] was deficient under an objective standard of reasonableness."[106] The circuit court's order finding otherwise amounts to an abuse of discretion premised on a misinterpretation of *Bess*.

d. The circuit court erred as a matter of law in finding that classification of out of state felony convictions is conducted by looking at facts in a criminal complaint.

Petitioner's Kentucky conviction is not a qualifying conviction for recidivist purposes as the elements of the crime of conviction constitute a misdemeanor in West Virginia. The circuit court's holding to the contrary[107] is premised on an incorrect conclusion of law: classification of foreign felony convictions requires analysis of the facts listed in the criminal complaint rather than the elements of the crime of conviction.[108]

The constitutions of the United States,[109] West Virginia,[110] and Kentucky[111] require the State to charge felonies by indictments or informations, not by criminal complaints. Further, this Court requires indictments and informations to provide "notice of the charge against which [a person] must defend," and "a plain, concise and definite written statement of the essential facts

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[104] A.R. 364-68.
[105] See A.R. 279-441.
[106] Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).
[107] A.R. 215-18.
[108] A.R. 215-18.
[109] U.S. Constitution, Amendment V.
[110] Art III, Sec 4 W. Va. Constitution; see also W. Va. R. Crim. Pro., Rule 7(a) and (b).
[111] Kentucky Constitution, Section 12; see also Ky. R. Cr 6.02 (1); *Malone v. Com.*, 30 S.W.3d 180, 182 (Ky. 2000).

constituting the offense charged."[112] Similarly, the Supreme Court of Kentucky explicitly states that the purpose of an indictment is to "inform an accused individual of the essential facts of the charge against him so he will be able to prepare a defense."[113] Neither jurisdiction allows the initial criminal complaint to serve as a formal felony charge or notice of the factual foundation. Finally, it is axiomatic that "[i]n a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged."[114]

It follows that when classifying an out of state conviction for recidivist purposes, the statutory elements of the crime of conviction are examined under the lens of West Virginia law. These elements are found in the indictment or information, and in the corresponding statute. They are not found in the facts alleged in the criminal complaint. Here, analysis of the elements in Kentucky's possession of cocaine statute demonstrates that West Virginia classifies Petitioner's predicate conviction as a misdemeanor.

The circuit court's final order cites *Justice v. Hedrick,* and *State v. Ward's* interpretation of *Justice v. Hedrick* to support its holding that facts in a criminal complaint are used to classify foreign convictions.[115] The circuit court appears to hold that the word "conduct," as used in these cases, is synonymous with factual allegations in a criminal complaint:[116] "the nature of the criminal conduct should be considered, not the classification affixed to the offense by another jurisdiction" and "*unlike a recidivist conviction, which enhances punishment based on the earlier conduct*."[117]

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[112] Syl. Pt. 6, *State v. Wallace*, 205 W. Va. 155, 156, 517 S.E.2d 20, 21 (1999); W. Va. R. Crim. Pro., Rule 7(c)(1).
[113] *Malone v. Com.*, 30 S.W.3d 180, 182 (Ky. 2000).
[114] Syl. Pt. 7 in part, *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994) (emphasis added); see also *McDaniel v. Com.*, 415 S.W.3d 643, 658 (Ky. 2013); *In re Winship,* 397 U.S. 358, 364 (1970).
[115] *Justice v. Hedrick*, 177 W. Va. 53, 56, 350 S.E.2d 565, 568 (1986); *State v. Ward*, 245 W. Va. 157; 858 S.E.2d 207 (2021).
[116] A.R. 217.
[117] A.R. 217 (original in bold, italics in the original).

However, the "conduct" Petitioner was convicted of in Kentucky is found in the elements of the statute he pleaded guilty to violating—not in the criminal complaint. Moreover, in *Justice v. Hedrick*, this Court did not look to the criminal complaint when classifying a Michigan conviction for attempted breaking and entering. Instead, this Court looked at the conviction.[118]

State v. Lawson[119] further illustrates that elements and not criminal complaints are used to classify out of state felony convictions. In *Lawson*, this Court held that

> It is conceivable that there may be crimes which are punishable by confinement in a penitentiary in other jurisdictions and that the same crimes would be classed as misdemeanors under our laws. In such event, it would seem proper that the laws of this State should be considered in determining the grade of the crimes for which there have been former convictions.[120]

Notably, criminal complaints are not mentioned in *Lawson*. Instead, this Court spoke of "crimes" and "former convictions." A comparison of crimes and convictions requires a review of their respective elements. The facts listed in a criminal complaint are not part of the analysis.

Finally, by relying on the facts alleged in the Kentucky criminal complaint, the circuit court added additional conduct and elements not included in the information or in the statute Petitioner pleaded guilty to violating. Specifically, the intent to deliver cocaine. However, if the State cannot add additional conduct and elements to an indictment prior to trial,[121] then by analogy, the court cannot engage in the same conduct after conviction. Petitioner pleaded guilty to knowingly and unlawfully possessing cocaine.[122] Under West Virginia law, this constitutes a misdemeanor and

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[118] *Justice v. Hedrick*, 177 W. Va. 53, 56, 350 S.E.2d 565, 568 (1986).
[119] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643 (1942).
[120] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942).
[121] Syl. Pts. 1-3, *State v. Adams*, 193 W. Va. 277, 456 S.E.2d 4, (1995).
[122] KRS § 218A.1415.

the circuit court cannot add uncharged facts and elements in an effort to elevate the conviction to a felony.[123]

When classifying out of state convictions for recidivist purposes, the statutory elements of the crime of conviction are examined to determine classification in West Virginia. The circuit court was wrong as a matter of law when it held that facts alleged in a criminal complaint are used to classify foreign convictions. Accordingly, the recidivist conviction must be vacated.

2. The indictment charging Petitioner with first and second degree robbery violated double jeopardy as both counts shared the same unit of prosecution.

The superseding indictment against Petitioner violated double jeopardy as the first and second degree robbery charges shared the same unit of prosecution.[124] During a single robbery of a single victim, the State alleged that the Petitioner took a cell phone and money. However, the indictment charged the single incident of robbery as two separate crimes.[125] Second degree robbery for taking money by threat, and first degree robbery for taking money by force. Trial counsel should have moved to dismiss the indictment, moved the court to require the State to choose which count to strike from the indictment, or requested a jury instruction that only one robbery conviction may be returned. Such a motion was necessary as the State charged Petitioner with two counts of robbery when only a single act of robbery occurred. Petitioner was prejudiced as trial on two counts of robbery can "induce" a jury to simply convict on one of the two charges as opposed to "continu[ing] to debate his innocence" on both charges.[126] The circuit court's final order holding

[123] W. Va. Code § 60A-4-401(c) (2011).
[124] A.R. 1426-27.
[125] A.R. 1501-1502.
[126] This issue was argued in Petitioner's amended petition for habeas corpus (A.R. 39-43), in Petitioner's proposed order (A.R. 16-20), and during the omnibus hearing (A.R. 291-93, 297-303, 382). *Price v. Georgia*, 398 U.S. 323, 331–32 (1970).

trial counsel committed no error was premised on an erroneous interpretation of the robbery statute and thus, a *de novo* standard of review applies.

a. Double jeopardy applies to multiplicitous indictments.

Jeopardy attaches after a "jury has been impaneled and sworn."[127] "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution . . . protects against multiple punishments for the same offense."[128] This protection extends to multiplicitous indictments: "the charging of a single offense in more than one count."[129] "The analysis of whether a criminal defendant may be separately convicted and punished for multiple violations of a single statutory provision turns upon the legislatively-intended unit of prosecution."[130] At issue here is the unit of prosecution for robbery and whether the first and second degree robbery charges in the indictment allege separate offenses—they do not.[131]

b. The robbery counts in the indictment share the same unit of prosecution.

The Supreme Court of Appeals of West Virginia recognized that the legislature did not define robbery when it enacted W. Va. Code § 61-2-12.[132] Instead, "the elements of robbery,

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[127] *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 663, 383 S.E.2d 844, 845 (1989) citing *Brooks v. Boles,* 151 W.Va. 576, 153 S.E.2d 526, 530 (1967).
[128] Syl. Pt. 1, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992). Syl. Pt. 6, *State v. Myers*, 229 W. Va. 238, 728 S.E.2d 122 (2012).
[129] 41 Am. Jur. 2d Indictments and Informations § 196; see also 9 Tenn. Prac. Crim. Prac. & Procedure § 16:15.
[130] Syl. Pt. 4, *State v. Goins*, 231 W.Va. 617, 748 S.E.2d 813 (2013).
[131] Unit of prosecution analysis is appropriate here as the different degrees of robbery merely reflect classification for punishment purposes. *State v. Harless*, 168 W. Va. 707, 710, 285 S.E.2d 461, 464 (1981). Moreover, second degree robbery is a lesser included of first degree. *State v. Massey*, 178 W.Va. 427, 432, 359 S.E.2d 865, 870 (1987); *State v. Phillips,* 199 W. Va. 507, 511, 485 S.E.2d 676, 680 (1997). If two different statutes were at issue, the analysis would be controlled by *Blockburger*. *State v. Green*, 207 W. Va. 530, 536, 534 S.E.2d 395, 401 (2000).
[132] *State v. Henson*, 239 W. Va. 898, 906, 806 S.E.2d 822, 830 (2017).

unaffected by the statute, are derived from the common law[:]"

> (1) the unlawful taking and carrying away,
> (2) of money or goods,
> (3) from the person of another or in his presence,
> (4) by force or putting him in fear,
> (5) with intent to steal the money or goods.[133]

A plain reading of the elements demonstrates that the unit of prosecution is a singular person (or business): "the person," "his presence," "putting him in fear."[134] Further evidence that the unit of prosecution is a singular person is found in case law. For example, attempting to rob a convenience store with multiple clerks present constitutes only one count of attempted robbery against a business.[135] Conversely, taking property from three separate individuals at the same time constitutes three offenses of robbery.[136] Taking multiple items from one person is one offense of robbery.[137] Finally, in 2017, this Court held in *Henson* that assaulting multiple people during a home invasion, but only taking property belonging to one person, constitutes one offense of robbery.[138] The *Henson* Court further held that charging robbery offenses for all individuals present during the home invasion violated double jeopardy: "in order for multiple punishments to be imposed for multiple counts of robbery, the State must show that the property taken belongs to different victims."[139] Importantly, the defendant in *Henson* took property from the victim's pocket as well as from his room but only one count of robbery was charged.

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[133] *State v. Henson*, 239 W. Va. 898, 906, 806 S.E.2d 822, 830 (2017) citing Syl. Pt. 3, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982).
[134] *State v. Henson*, 239 W. Va. 898, 906, 806 S.E.2d 822, 830 (2017) citing Syl. Pt. 3, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982).
[135] Syl. Pt. 2, *State v. Collins*, 174 W. Va. 767, 329 S.E.2d 839 (1984).
[136] See *State v. Pannell*, 225 W. Va. 743, 748, 696 S.E.2d 45, 50 (2010) (robbing three persons at the same time constitutes three separate acts of robbery even when property only obtained from two of the three persons).
[137] *State v. Harless*, 168 W. Va. 707, 708, 285 S.E.2d 461, 463 (1981).
[138] *State v. Henson*, 239 W. Va. 898, 908, 806 S.E.2d 822, 832 (2017).
[139] *State v. Henson*, 239 W. Va. 898, 908, 806 S.E.2d 822, 832 (2017).

Counsel is unaware of a case that deals with the specific issue at hand: can both first and second degree robbery be committed against one person during the same transaction. However, the unit of prosecution for robbery—a singular individual—evidences that the superseding indictment charging Petitioner with first and second degree robbery violated double jeopardy. Because the victim was the only person whose property was demanded and taken, there can be only one charge of robbery.

The fact that multiple items were taken from the victim does not permit the State to charge multiple counts of robbery. Robbery's elements underscore this point.[140] If taking multiple items from a single person during the same transaction constituted separate acts of robbery, "money or goods" would be singular. The use of the plural indicates the taking of multiple items during one event equates to a single robbery.[141]

Further evidence that two robberies cannot be committed against one person at the same time is found in the fact that robbery, at its core, is a larceny.[142] "With regard to larceny, we have held that the taking of two separate items of property from the same owner at the same time is but one larceny . . . This appears to be the general rule."[143] That this rule applies to robbery is established in robbery's elements: the unlawful taking of "money or goods,"[144] and in the fact that larceny is a lesser included offense of robbery.[145]

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[140] *State v. Harless*, 168 W. Va. 707, 708, 285 S.E.2d 461, 463 (1981); *State v. Henson*, 239 W. Va. 898, 908, 806 S.E.2d 822, 832 (2017).
[141] See *State v. Green*, 207 W. Va. 530, 537–38, 534 S.E.2d 395, 402–03 (2000) (The Legislature's use of singular or plural terms is determinative of the unit of prosecution.).
[142] *State v. Henson*, 239 W. Va. 898, 906, 806 S.E.2d 822, 830 (2017) (Thus, under the common law, the elements of the robbery included the elements of larceny . . .).
[143] *State v. Collins*, 174 W. Va. 767, 770, 329 S.E.2d 839, 842 (1984) citing *State v. Mullenax*, 124 W.Va. 243, 252, 20 S.E.2d 901, 905 (1942), overruled on other grounds, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977) and 50 Am.Jur.2d Larceny § 3 (1970); 52A C.J.S. Larceny § 53 (1968).
[144] *State v. Henson*, 239 W. Va. 898, 906, 806 S.E.2d 822, 830 (2017) citing Syl. Pt. 3, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982).
[145] Syl. Pt. 5, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982).

c. Trial counsel's failure to assert a double jeopardy argument prejudiced Petitioner.

The two counts of robbery were duplicative charges and the State violated double jeopardy by charging and prosecuting Petitioner twice for a single incident of robbery.[146] The prejudice inherent in this multiplicitous indictment is significant. First, the State should not be allowed to stack the deck in their favor and increase their odds of securing a conviction by charging a single crime multiple times in an indictment. Second, the State denied Petitioner the opportunity to decide whether to request instruction on the lesser included offense of second degree robbery. Given the allegation of the first degree robbery charge (taking of a cell phone[147]), and the evidence at trial (the cell phone was found at the scene of the crime[148]), not requesting a lesser included charge would be a valid strategy. Had the State not denied petitioner the opportunity to employ this strategy, there is a substantial likelihood that Petitioner would not have requested a lesser included offense and he would not have been convicted of a felony as the jury acquitted him of first degree robbery.[149]

Third, the effect on the jury of being faced with debating separate first and second degree robbery charges cannot be downplayed. As explained in *Price v. Georgia,* trial on greater and lesser included offenses have the potential to "induce" the jury to simply convict on one of the two charges as opposed to "continu[ing] to debate [a defendant's] innocence" on both charges.[150] Here, the inducement to convict is even greater as the issue involves separate charges for the same offense as opposed to lesser included offenses.

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[146] *State v. Henson*, 239 W. Va. 898, 903, 806 S.E.2d 822, 827 (2017). (two of three robbery convictions reversed on double jeopardy grounds because "Petitioners should have been indicted, tried and convicted on only a single count of first degree robbery.").
[147] A.R. 1500 (original indictment); A.R. 1501-02 (superseding indictment).
[148] A.R. 1059-60; A.R. 890.
[149] A.R. 1493.
[150] *Price v. Georgia*, 398 U.S. 323, 331–32 (1970).

Finally, defending against two robbery charges is inherently more difficult than defending against one robbery charge. Accordingly, trial counsel committed constitutional error that prejudiced Petitioner and this Court should reverse the second degree robbery charge.

d. Under the facts of this case, the circuit court's holding that two separate counts of robbery are permissible constitutes error as a matter of law.

The court's order holding that a defendant can be charged with first and second degree robbery for taking multiple items from a single individual, during a single transaction, is wrong as a matter of law.[151] As an initial matter, the circuit court appears to engage in a *Blockburger* analysis of the robbery statute's elements.[152] This Court has explicitly held that *Blockburger* is inapplicable when analyzing a single statute and that in such instances unit of prosecution analysis should be employed.[153] As demonstrated above, the unit of prosecution for robbery has always been a single individual. This applies to common law robbery,[154] the aggravated/non aggravated robbery statute,[155] and the current robbery statute.[156] The different degrees of robbery do not constitute different crimes as the circuit court held.[157] Instead, they reflect classification of robbery for punishment purposes.[158] The unit of prosecution remains the same.

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[151] A.R. 218-20.
[152] A.R. 218-20; *Blockburger v. United States*, 284 U.S. 299 (1932).
[153] *State v. Green*, 207 W. Va. 530, 535–37, 534 S.E.2d 395, 400–02 (2000) ("[I]f the prosecutions are under the same statute, a pure *Blockburger* test, focused on the statutory elements, is not helpful.")
[154] *State v. Henson*, 239 W. Va. 898, 906, 806 S.E.2d 822, 830 (2017) citing Syl. Pt. 3, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982).
[155] W. Va. Code § 61-2-12 (1961); see also *State v. Adams*, 211 W. Va. 231, 234, fn. 7, 565 S.E.2d 353, 356, fn. 7 (2002).
[156] W. Va. Code § 61-2-12 (2000).
[157] A.R. 219.
[158] State v. Harless, 168 W. Va. 707, 710, 285 S.E.2d 461, 464 (1981).

Finally, the court's holding that a single robbery can result in two charges of robbery is essentially a finding that second degree robbery is not a lesser included of first degree robbery. This is contrary to prior holdings by this Court.[159]

Trial counsel was ineffective for not moving to dismiss the superseding indictment, forcing the State to elect one of the robbery counts to proceed on, or ensuring the court instructed the jury that it could only return a guilty verdict on one of the robbery charges. Trial counsel's error allowed the State to charge and prosecute Petitioner twice for a single incident of robbery.[160] Accordingly, this Court should vacate the robbery conviction.

3. The cumulative effect of multiple errors violated Petitioner's right to a fair trial.

In addition to the errors already argued in this brief, trial counsel ignored the Rules of Evidence and allowed the State to act with impunity. Beginning with the State's opening statement, continuing throughout the trial, and culminating with the State's closing argument, Petitioner was prejudiced by numerous and consequential errors. The cumulative effect of these errors requires reversal of Petitioner's convictions and the trial court's final order holding otherwise amounts to an abuse of discretion.[161]

"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."[162] "This

[159] State v. Massey, 178 W.Va. 427, 432, 359 S.E.2d 865, 870 (1987); State v. Phillips, 199 W. Va. 507, 511, 485 S.E.2d 676, 680 (1997).

[160] *State v. Henson*, 239 W. Va. 898, 903, 806 S.E.2d 822, 827 (2017) (two of three robbery convictions reversed on double jeopardy grounds because "Petitioners should have been indicted, tried and convicted on only a single count of first degree robbery.").

[161] This issue was argued in Petitioner's amended petition for habeas corpus (A.R. 45-49), in Petitioner's proposed order (A.R. 16-20), and during the omnibus hearing (A.R. 570-589).

[162] Syl. Pt. 7, *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601 (2015) citing Syl. Pt. 5, *State v. Smith,* 156 W.Va. 385, 193 S.E.2d 550 (1972). See also *Robert R. v. Terry*, No. 16-1121, 2018 WL 317313, (W. Va. Jan. 8, 2018).

doctrine is applicable only when 'numerous' errors have been found."[163] "Even where the errors are numerous, if they are insignificant or inconsequential, the case should not be reversed under the doctrine."[164]

During Petitioner's trial, the prejudicial errors began accumulating when counsel failed to object during the State's opening statement.[165] Instead of informing the jury what the evidence would show, the State impermissibly attempted to enlist the jury in a quest to cure the societal ills plaguing Huntington. The statements prejudiced the Petitioner, were extensive, and "were deliberately placed before the jury to divert attention to extraneous matters."[166] The opening also included facts not in evidence and "statements calculated to inflame, prejudice or mislead the jury . . ."[167] For example, the State began its opening with a personal anecdote of childhood visits to Huntington when the city was still safe.[168] The State then attempted to inflame the jury: "unfortunately, I can't say the same for my children, that they will have the same safe memories of walking down the streets of Huntington."[169] Thereafter, the State informed the jury that it "[tries] to take the voice of the residents of this area in criminal matters against individuals charged with crimes. As a prosecutor, it is my job to try and keep this area safe by holding the people accountable for their actions."[170] Finally, the State concluded its opening with more attempts to inflame and

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[163] *Robert R. v. Terry*, No. 16-1121, 2018 WL 317313, at *3 (W. Va. Jan. 8, 2018) (internal citations and quotations omitted.).
[164] *Id.*
[165] Syl. Pt. 5 and 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).
[166] Syl. Pt. 5 and 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).
[167] Syl. Pt. 2, *State v. Kennedy*, 162 W. Va. 244, 244, 249 S.E.2d 188, 189 (1978).
[168] A.R. 551 (trial transcript); A.R. 1675 (omnibus exhibit 15, page 30); A.R. 90 (Amended Petition exhibit, page 39).
[169] A.R. 551 (trial transcript); A.R. 1675 (omnibus hearing exhibit 15, page 30); A.R. 90 (Amended Petition exhibit, page 39).
[170] A.R. 552 (trial transcript); A.R. 1676 (omnibus hearing, exhibit 15, page 31); A.R. 91 (Amended Petition exhibit, page 40).

rally the jury against Petitioner: "Ladies and Gentlemen, we must be able to walk the streets of Huntington again without fear of violence."[171]

Two days later, the State's closing argument picked up where its opening ended: "I told you in my opening that fear for what could happen on the streets of Huntington is something that is not fair. It is not fair that the people have to walk around Huntington fearing things[172] . . . I, as a prosecutor, told you, my job is to try to keep this area safe by holding people accountable for their actions"[173]

In addition to not objecting to the State's inflammatory opening and closing, counsel also failed to make basic hearsay[174] and witness bolstering[175] objections. For example, counsel allowed the State to introduce the handwritten statements that the two witnesses gave to the police shortly after the incident.[176] These statements were not used to refresh their recollections. Instead, they were introduced as substantive evidence and read to the jury.[177]

Similarly, counsel did not object when the State introduced police reports into evidence and had officers read portions of their reports to the jury.[178] Incredibly, there was no objection to the introduction of Officer Bentley's "Huntington Police Department Prosecution Report"[179] which was replete with hearsay statements, violated Rule 803(8)(ii) of the West Virginia Rules of

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[171] A.R. 559 (trial transcript); A.R. 1683 (omnibus hearing exhibit 15, page 38); A.R. 92 (Amended Petition exhibit, page 41).
[172] A.R. 1173 (trial transcript); A.R. 1694 (omnibus hearing exhibit 15, page 49); A.R. 93 (Amended Petition exhibit, page 42).
[173] A.R. 1209 (trial transcript), A.R. 1730 (omnibus exhibit 15, page 85); A.R. 94 (Amended Petition exhibit, page 43).
[174] Rule 802 of the West Virginia Rules of Evidence.
[175] "Bolstering occurs when a party seeks to enhance a witness's credibility before it has been attacked. Bolstering is generally disallowed. *State v. Wood*, 194 W. Va. 525, 531, 460 S.E.2d 771, 777 (1995) (citations omitted).
[176] A.R. 1560, 1562.
[177] A.R. 671, 877-79; A.R. 95-100 (Amended Petition exhibit, pages 44-48).
[178] A.R. 1568-76 (trial exhibits); A.R. 925 (trial transcript); 1064 (trial transcript), A.R. 929-30 (trial transcript); A.R. 1623-26 (omnibus exhibit 12).
[179] A.R. 1577-1580 (trial exhibit), A.R. 1623-26 (omnibus exhibit 12).

Evidence, provided a biased outline of the State's case for the jury to use during their deliberations, and impermissibly bolstered the State's case.[180] Nor was there a hearsay or confrontation clause objection when Officer Bentley testified to the contents of the victim's recorded statement—a statement that was not played for the jury.[181] The defense further failed to object to the introduction of a CAD[182] report through a witness who did not create it[183] and at the start of Officer Quinn's testimony, the State gave him the CAD report to refer to if necessary as opposed to waiting to see if his recollection needed refreshed.[184]

Additionally, the State asked several physicians[185] to read from their reports: "[t]urning your attention to page 2 of Exhibit 7 where it says history of present illness, could you read that paragraph, and I am going to actually stop you at certain points for you to clarify in regards to how [the victim] presented on this particular day."[186] The defense also did not object to testimony from an undisclosed expert in emergency medicine.[187]

The defense did not object when the State used leading questions to essentially testify.[188] Similarly, trial counsel did not object when the prosecutor testified during her cross examination of Petitioner. Specifically, the prosecutor said that she was the same height as the victim and

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[180] "Bolstering occurs when a party seeks to enhance a witness's credibility before it has been attacked. Bolstering is generally disallowed." *State v. Wood*, 194 W. Va. 525, 531, 460 S.E.2d 771, 777 (1995) citations omitted.
[181] A.R. 1059.
[182] CAD stands for computer aided dispatch and the report contains information relayed from 911 call centers to officers in the field.
[183] A.R. 858-59 (trial transcript); 1563-66 (trial exhibit); A.R. 1619-22 (omnibus exhibit 11); A.R. 63-66 (Amended Petition exhibit 12-15).
[184] A.R. 884.
[185] A.R. 631, 633, 634.
[186] A.R. 631.
[187] A.R. 821-22.
[188] A.R. 877-79; *State v. Fairchild*, 171 W. Va. 137, 150, 298 S.E.2d 110, 124 (1982) ("As a general rule, the use of leading questions is not permitted on direct examination.").

ordered Petitioner to stand next to her to show the height discrepancies between the victim and Petitioner.[189]

Finally, the State published photos to the jury prior to their admission,[190] and, despite trial counsel's testimony to the contrary,[191] Petitioner's constitutional right to be present at all critical stages was violated when he was absent for three conferences between the Court, the State, and trial counsel to discuss jury instructions.[192]

Trial counsel was ineffective for failing to make necessary objections to multiple evidentiary violations committed by the State. As justification for not objecting, he testified that he does not object if he thinks the court will overrule him.[193] Conversely, he also testified that he cannot read the court's mind.[194]

Isolated decisions to not object can be strategic. Here, however, there was a complete capitulation by trial counsel and a breakdown of the adversarial process that left Petitioner effectively without counsel. Trial counsel allowed the State to violate double jeopardy, impermissibly inflame the jury, introduce whatever evidence it wanted, and charge Petitioner as a recidivist without challenging the prior conviction. Petitioner was prejudiced by having his case decided upon by an inflamed jury which had a biased outline of the State's case to review during their deliberations. While any error in isolation may be harmless, the cumulative effect requires reversal. The court's order finding otherwise amounts to an abuse of discretion.[195]

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[189] A.R. 1125, A.R. 116 (Amended Petition exhibit, page 65).
[190] A.R. 898-99, A.R. 117-18 (Amended Petition exhibit, page 66-67).
[191] A.R. 322.
[192] A.R. 1130 (trial transcript); A.R. 119 (Amended Petition exhibit, page 68); Exhibit p. 68; *State v. Coleman*, No. 18-0731, 2020 WL 919301 (W. Va. Feb. 26, 2020) citing Syl. Pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977); Article III, Section 14 of the West Virginia Constitution; A.R. 322 (trial counsel denied jury instructions were discussed outside of Petitioner's presence).
[193] A.R. 307, 308, 310, 314.
[194] A.R. 314.
[195] A.R. 221-24.

CONCLUSION

Petitioner moves the Court to vacate the recidivist conviction, vacate the second degree robbery conviction, and remand for a new trial on the remaining counts.

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