
NO. 33900

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

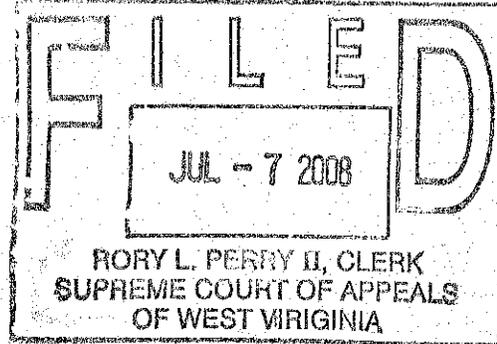
MARK DAMRON,

Appellant,

v.

WILLIAM HAINES, Warden,
Huttonsville Correctional Complex,

Appellee.



BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Mark Damron (hereinafter "Appellant") from the June 8, 2007, final order of the Circuit Court of Cabell County (O'Hanlon, J.), denying him habeas corpus relief on his various claims of constitutional violations.

II.

PROCEDURAL HISTORY

On March 1, 2005, Appellant was convicted by a jury in the Cabell County Circuit Court of one count of first degree arson in violation of West Virginia Code § 61-3-1, and one count of second degree arson in violation of West Virginia Code § 61-3-2. (Tr. 326-27; R. at 144-51.) On May 26, 2005, the judge sentenced Appellant to a term of twenty years imprisonment in the State penitentiary

for the conviction of first degree arson, and a term of ten years imprisonment in the State penitentiary for his conviction of second degree arson, the terms to be served consecutively. (Sentencing Hr'g, 12, May 26, 2005; R. at 158-69.) This Court denied Appellant's petition for appeal on January 19, 2006. (See Order, Jan. 19, 2006.)

Appellant filed a petition for habeas corpus relief on November 6, 2006. (Habeas R. at 21.) After conducting an omnibus hearing on May 21, 2007, the circuit court entered a final order on May 23, 2007, denying Appellant any habeas corpus relief. (*Id.* at 112-28.) Appellant now appeals that order.

III.

STATEMENT OF FACTS

The events of this case arose out of fires set to a building located at 2421 Third Street in Huntington, West Virginia, in the early morning of August 6, 2003. Steve Ellis, Deputy Fire Marshal for the Fire Prevention Bureau of the Huntington Fire Department, was called to this address by a 911 dispatch at approximately 3:00 a.m. and immediately went to the scene of the fire. (Tr. 119.) The building located at this address that was on fire was a commercial building which contained a shoe repair shop and a nightclub on the bottom floor and apartments above them. (*Id.* at 60.) One of the upstairs apartments was occupied by an elderly man named William Brewer. (*Id.* at 61, 107.)

During the time in question, Corporal Jeff Sexton of the Huntington Police Department was on patrol in the area and observed a fully engulfed structure fire at this building. (*Id.* at 77-79.) Upon seeing this fire, he called the dispatcher in order to notify the fire department. The dispatcher told him that the fire department had already been notified and was responding. (*Id.* at 79.)

In his capacity as Deputy Fire Marshal, Mr. Ellis conducts origin and cause investigations. (*Id.* at 112.) When Mr. Ellis arrived, firefighters had extinguished a majority of the fire. (*Id.* at 121.) He was assisted by Assistant State Fire Marshal Devin Palmer. (*Id.* at 124.) Upon entering the building, they discovered that the fire originated at the front of the shoe repair shop. (*Id.* at 127.) Everything in the public area of the shoe repair shop was virtually consumed by the fire—the counter was severely burnt, and there was substantial heat and fire damage done to the ceiling joints and floor rafters of the second floor. (*Id.* at 128.)

At this point Steve Ellis saw a man leaving a stairwell area. Mr. Ellis, yelled, “Hey you.” But the person kept on walking. (*Id.* at 151.) When Mr. Ellis went to the stairwell, he observed twisted pieces of newspaper on the floor in flames. (*Id.*) The person who was spotted in the stairwell was Appellant. The Huntington Deputy Fire Marshal then pursued Appellant and yelled, “Fire Marshal. Stop. Freeze.” (*Id.* at 152.) Appellant then started to go down an alley, and Mr. Ellis pursued him. (*Id.*) Steve Ellis again yelled to Appellant, “Fire Marshal. Stop.” (*Id.*) Appellant finally complied. Mr. Ellis then told Appellant to keep his hands in the air because he was a bit scared. (*Id.*) He then told Appellant to get on the ground to which the latter obeyed. (*Id.* at 153.) During the pursuit, Devin Palmer was a couple steps behind Steve Ellis. At this point, Mr. Ellis asked, “Man, what was you [sic] doing in that building?” (*Id.*) His reasoning for asking this question was because people tended to go into areas like this out of curiosity. However, Appellant responded to this question by stating that the firefighters put out the fire too quickly the first time, and he was back to finish the job. (*Id.* at 153.) Mr. Ellis then asked Appellant, “What were you thinking, man? We were in that building working the scene,” to which the latter replied, ““Yeah, I know.” (*Id.* at

166.) While Deputy Fire Marshal Ellis was chasing Appellant, he used his radio to call a dispatch for the fire department and the police. (*Id.* at 171.)

Steve Compton, a police officer with the Huntington Police Department, was dispatched to the scene. He was just a few blocks away, and arrived quickly. (*Id.* at 214.) Upon arriving, he observed Appellant and Deputy Fire Marshal Ellis at the scene. (*Id.*) Officer Compton radioed in to Corporal Sexton for a description of the suspect since the latter was given a description earlier by a witness. (*Id.* at 82, 214-15.) Based on this description, Officer Compton believed he had probable cause and arrested Appellant. (*Id.* at 215.) At this time, Appellant kept making statements and admissions to Officer Compton. Officer Compton told him to stop and informed him that he had the right to remain silent and that anything he said could be used against him in court. Then Officer Compton immediately took out his *Miranda* card and read Appellant his rights. (*Id.*) The admissions Appellant made to the officer were that this was payback and that he came back to finish the job. (*Id.*) When the officer searched Appellant incidental to the arrest, he found a Bic cigarette lighter on the latter's person. (*Id.*)

According to Officer Compton, Appellant made several admissions to him throughout the course of that morning and continued to do so at the police headquarters after he was Mirandized. (*Id.* at 217.) When Appellant was taken to the police headquarters, Corporal Sexton heard him make numerous spontaneous statements admitting to the crime. (*Id.* at 88-89.) None of these statements were made in response to questions by Officer Compton or Corporal Sexton. Specifically, Corporal Sexton heard Appellant say that he went back to finish the work that was started regarding the fire. (*Id.* at 88.) Additionally, Appellant stated that the owner of the building was an "SOB," and he owed the latter money due to a gambling debt. (*Id.*) At this point, Corporal Sexton gave Appellant a

Miranda waiver form and told him that if he wanted to make a statement, he should read the warning on the form and provide a written statement. (*Id.* at 94.) Appellant refused to do this. (*Id.*)

Mr. Frowde Lockhart was the owner of the building and the nightclub on the ground floor, The Brass Room. (*Id.* at 60-51.) Mr. Lockhart knew Appellant. He testified that Appellant lived behind his building and worked for him until approximately 1981 or 1982 when he was let go. (*Id.* at 64-65.) Frowde Lockhart stated that he won money through gambling from Appellant around the time the latter stopped working for him. (*Id.* at 65.) He also testified that after Appellant was let go from working at the bar, he was no longer allowed to be in his building. (*Id.*)

William Brewer, the tenant in one of the upstairs apartments was inside when the fire occurred. He testified that he was up late that night into the early morning because he could not sleep. At one point, he heard a loud crash or bang, and he went out on his balcony and saw smoke coming out of the building. (*Id.* at 108.) He then got dressed and went downstairs and saw that the front window of the building had been shattered with smoke emitting out of it. (*Id.*) Mr. Brewer then left and went to a Super America nearby to have them call 911. (*Id.* at 109.) He testified that when he went outside, the entire interior of the shoe repair shop was ablaze. (*Id.* at 110.)

Apart from a fire being started while Mr. Brewer was inside, there was enormous economic damage caused by these acts. Mr. Brewer testified that he lost just about everything in his apartment due to smoke damage. (*Id.*) Mr. Lockhart stated that although he was able to salvage some of the equipment and furnishings, the insurance company totaled the building and it had to be demolished. (*Id.* at 68.) Bert Hanlin, the owner of Lewis Brothers Shoe Repair located on the bottom floor, testified that he did not have insurance and lost everything in the fire, totaling over \$100,000. (*Id.* at 72.)

As previously stated, the jury convicted Appellant of one count of first degree arson and one count of second degree arson. (Tr. 326-27; R. at 144-51.)

IV.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

- A. The lower court erroneously denied Mr. Damron's Habeas Corpus relief due to improperly allowing Mr. Damron's statements to Fire Marshal Steve Ellis into evidence which violated the Defendant's Fifth Amendment Rights under the United States and West Virginia Constitution.

The State's Response:

Using a "reasonable person" standard, Appellant should not have considered his encounter with Steve Ellis to be an arrest and the questioning to be a custodial interrogation. Therefore, his Fifth Amendment rights were not violated.

- B. The Court at Mr. Damron's Habeas Hearing erroneously concluded the statement included in Officer Sexton's report and given to Officer Compton was not testimonial in nature and therefore not subject to the strictures of *Crawford* due to the statements being taken in the course of interrogation and not in an on-going emergency.

The State's Response:

The introduction of Mike Smith's testimony where he was unavailable to appear during the trial proceedings was not a violation of the Confrontation Clause because the interrogation by Corporal Sexton was nontestimonial.

- C. The Court at Mr. Damron's Habeas Hearing erroneously ruled that Mr. Damron's conviction for First and Second Degree Arson and sentences of 20 years and 10 years, consecutively, violate the Double Jeopardy Clause of the 5th Amendment to the United States Constitution and Article III, Section V of the West Virginia Constitution by subjecting Mr. Damron to multiple punishments for the same offense.

The States's Response:

Appellant's convictions do not violate the prohibition against Double Jeopardy. He was punished twice for convictions for two distinct offenses.

- D. The Court at Mr. Damron's Habeas Hearing erroneously ruled Mr. Damron was denied effective assistance of trial counsel [*sic*].

The State's Response:

Appellant was not given ineffective assistance by his trial counsel. He has failed to establish by a preponderance of the evidence that his counsel's performance was deficient using an objective standard of reasonableness, and that, but for the alleged errors, the result of the trial would have been different.

- E. Mr. Damron is entitled to reversal of his habeas denial due to the fact that Mr. Damron was provided with ineffective assistance of habeas counsel by his habeas corpus counsel, Steve Bragg.

The State's Response:

Appellant has failed to establish that he was provided ineffective assistance of counsel at the habeas stage, and he more than likely has selected the wrong forum to raise this claim.

V.

ARGUMENT

- A. **APPELLANT WAS NOT UNDER ARREST AND THERE WAS NO CUSTODIAL INTERROGATION WHEN HE ADMITTED TO HUNTINGTON DEPUTY FIRE MARSHAL STEVE ELLIS THAT HE SET FIRE TO THE BUILDING. THUS, THERE WAS NO FIFTH AMENDMENT VIOLATION.**

1. **The Standard of Review.**

In *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989), *overruled on other grounds by State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999), this Court stated,

and we now hold, that a trial court's determination of whether a custodial interrogation environment exists for purposes of giving *Miranda* warnings to a suspect is based upon "whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." 181 W.Va. at 641-642, 383 S.E.2d at 823.

State v. Middleton, 220 W. Va. 89, 95, 640 S.E.2d 152, 158 (2006).

2. **Using a "Reasonable Person" Standard, Appellant Should Not Have Considered His Encounter with Steve Ellis to Be an Arrest and the Questioning to Be a Custodial Interrogation. Therefore, His Fifth Amendment Rights Were Not Violated.**

As was previously discussed, Huntington Deputy Fire Marshal Steve Ellis did pursue Appellant down an alley when he saw him in a stairwell of the burning building. (Tr. 152-53.) During this chase, it is true that Mr. Ellis yelled out to Appellant, "Fire Marshal, Stop. Freeze." and said to get on the ground, to which the latter eventually complied. (*Id.* at 152-53, 203.) Steve Ellis then asked Appellant what he was doing in the building. (*Id.* at 153.) However, according to Deputy Fire Marshal Ellis, this was done because, it has been his observation in inspecting fire scenes, that people tend to go inside of burning and fire-damaged buildings to see what is happening. (Motion Hr'g, 13, Jan. 21, 2005; Tr. 153.) Mr. Ellis stated that his main purpose was to find out what was going on. (Tr. 172.) Steve Ellis testified that in his capacity as the Huntington Deputy Fire Marshal, he has no power or authority to arrest and did not arrest Appellant that morning. (Motion Hr'g, 13, Jan. 21, 2005; Tr. 173.) As Appellant correctly points out, West Virginia Code § 29-3-12(h) gives the authority to arrest to state fire marshals. Yet, that statutory authority would apply to Assistant State Fire Marshal Devin Palmer rather than Steve Ellis. However, Mr. Ellis testified that Devin Palmer did not arrest Appellant either. (Tr. 173.) According to Mr. Ellis, he never carries handcuffs. (*Id.*) Although Devin Palmer is issued handcuffs in his capacity, it is unclear whether he had them

that morning. (*Id.*) Appellant contends that Steve Ellis “subjectively intended” to keep him detained while Assistant State Fire Marshal Devin Palmer went to obtain his handcuffs, according to Mr. Ellis’ testimony in the preliminary hearing. (*See* Appellant’s Brief at 12.) Yet there is no record of this testimony in the transcripts of the motion hearings. While Steve Ellis was chasing Appellant, he radioed a dispatcher for fire and police assistance. (Tr. 169, 171.) As mentioned above, Mr. Ellis did tell Appellant to keep his hands up during the pursuit, but the Deputy Fire Marshal testified that he did so because he was scared. Once Appellant stopped and Huntington Deputy Fire Marshal Ellis asked him what he was doing in the building, Appellant replied that the fire department put the first fire out too quickly, and he was finishing the job. (*Id.* at 153.) Appellant characterizes this inquiry as Steve Ellis trying to determine the latter’s intentions. (*See* Appellant’s Brief at 13.) Yet a better characterization would be that he was trying to determine why he was in a burning building as he stated that he has done with other witnesses he classifies as “looky-losers”; “nosey” people at a fire scene. (Tr. 153.) When Steve Ellis had Appellant on the ground, no search was conducted. (Motion Hr’g, 35, Aug. 14, 2003.) Within seconds after this occurred, Huntington Police arrived and arrested Appellant. (Tr. 172-73.) While it is true that Steve Ellis had a weapon on his person, he did not use it and testified that he doubted that Appellant saw it from where it was located. (Tr. 205.) In light of all this and despite Mr. Ellis yelling for Appellant to stop while a chase occurred, it seems doubtful that this could be considered a custodial interrogation using the reasonable person standard as established in *Middleton, supra*.

Appellant cites *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682 (1980), to strengthen his argument that his *Miranda* rights were violated. Yet regarding *Miranda* safeguards, in that case the United States Supreme Court held, “A practice that the police should know is reasonably likely

to evoke an incriminating response from a suspect thus amounts to interrogation.” 446 U.S. at 301, 100 S. Ct. at 1690. The facts surrounding Appellant’s statement to Steve Ellis did not involve the police, but rather a firefighter without the authority to arrest asking a question of a person seen in a burning building to find out what was going on. This was merely a firefighter trying to figure out why Appellant was in a burning building rather than a practice by the police that should reasonably be known to evoke an incriminating response. Additionally, the United States Supreme Court held the following regarding determining whether an interrogation is custodial:

“Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”

Yarborough v. Alvarado, 541 U.S. 652, 663, 124 S. Ct. 2140, 2149 (2004) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 465 (1995)). Again, when the facts are examined using an objective test, this is a situation where a man was seen in a burning building, was chased by a firefighter with no authority to arrest, who said no words indicating an arrest was being made and who did not use a firearm to stop the person fleeing. While it is true that Steve Ellis yelled, “freeze” and “get on the ground,” no weapon was used to confine Appellant at this point. There is no doubt that Mr. Ellis used fairly forceful words when pursuing Appellant. Yet these same words could have been used by Mr. Lockhart, Mr. Brewer, any other firefighter or any witness who saw Appellant in this building and wanted to know what had happened.

In fact, the United States Supreme Court has held that where there is a pursuit of someone by the mere slight showing of authority, there is no seizure for Fourth Amendment purposes at the

point of fugivity where there is no use of physical force to restrain. *California v. Hodari D.*, 499 U.S. 621, 625-26, 111 S. Ct. 1547, 1550 (1991). The Court further held, "It ["seizure" for Fourth Amendment purposes] does not remotely apply, however, to a prospect of a policeman yelling, 'Stop, in the name of the law.' to a fleeing form that continues to flee." *Id.* at 626, 111 S. Ct. at 1550. This is no different than Mr. Ellis chasing Appellant and yelling for him to stop. The fact that Steve Ellis was a Deputy Fire Marshal for the city of Huntington who had no arrest authority makes Appellant's argument even weaker with respect to this ruling.

Appellant also cites various factors outlined in *Middleton, supra*, in determining if a custodial interrogation occurred. In *Middleton*, this Court held the following:

The factors to be considered by the trial court in making [a determination of whether a custodial interrogation environment exists], while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.

220 W. Va. at 96, 640 S.E.2d at 159 (quoting *State v. Preece*, 181 W. Va. 633, 641-42, 383 S.E.2d 815, 823-24, *overruled on other grounds by State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 82 (1999)). Yet again, when all of these factors are considered, there was no custodial interrogation of Appellant. This was an inquiry to determine why Appellant was in a burning building by a firefighter without the use of force. There was no police officers present when Steve Ellis questioned Appellant and the latter responded. Shortly after this, a lawful arrest by Huntington police occurred.

This Court in *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), held "[a]n arrest is the taking, seizing or detaining of the person of another (1) by touching or putting hands on him; (2) by

any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.” *Id.*, Syl. Pt. 2. Again, using these factors, there was no arrest or custodial interrogation. There was no physical detention. Although Steve Ellis used words to get Appellant to stop running from him, there were no verbal indications that he planned on taking him into custody. Although Appellant blurted out an admission, he did not consent to any placement of custody.

The state habeas court found that Mr. Ellis had no authority to arrest, did not use force and questioned Appellant consistent with an ordinary citizen concerned for his own safety inquiring about the intentions of a person seen running out of a burning building when it denied Appellant’s claim using the reasonable person standard. (Habeas R. at 118.)

Appellant also argues that his habeas petition should be reinstated due to numerous errors committed by the lower court which had a cumulative effect, despite one of such errors alone being harmless. He cites this Court’s opinion in *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), that held,

“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. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972).

Guthrie at 686, 461 S.E.2d at 192 (quoting Syl. Pt. 5, *State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1982)). Yet as was set forth above, the State has established that no error occurred, cumulative or otherwise. In light of this, Appellant was not denied a fair habeas hearing.

Therefore, Appellant’s claim fails on this ground.

B. THE TESTIMONY OF MIKE SMITH PRESENTED AT TRIAL THROUGH CORPORAL JEFF SEXTON DID NOT VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE III, SECTION XIV OF THE WEST VIRGINIA CONSTITUTION.

1. The Standard of Review.

Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 69, 124 S. Ct. 1354, 1374 (2004).

[S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 814, 126 S. Ct. 2266, 2268-69 (2006) (consolidated with *Hammon v. Indiana* (June 19, 2006)).

2. The Introduction of Mike Smith's Testimony Where He Was Unavailable to Appear During the Trial Proceedings Was Not a Violation of the Confrontation Clause Because the Interrogation by Corporal Sexton Was Nontestimonial.

Appellant wrongly asserts that the testimony of Mike Smith that was brought in through the testimony of Corporal Sexton regarding his police statement was a violation of the Confrontation Clause. As stated above, Corporal Jeff Sexton was patrolling the area on the morning in question when he observed this building in a fully engulfed fire. (Tr. 77-79.) After calling in a dispatch to the fire department, he found a witness at the scene named Mike Smith. He got out of his cruiser and asked the person questions to determine if he had information on the cause of the fire, and whether he knew if anyone was still in the building. (*Id.* at 80-81.) When asked, the witness told

Corporal Sexton that he saw someone kick in a door to the building and enter it. (*Id.* at 82.) The prosecutor attempted to introduce identification testimony Corporal Sexton obtained from Mike Smith, but, as Appellant notes in his brief, the trial judge sustained an objection. (*Id.* at 81-92.) Oddly, when the prosecutor spoke to Mr. Smith's identification statement during his closing argument, Appellant did not object. (*Id.* at 312.)

It is true that Mike Smith was unavailable at trial and there was no prior opportunity to cross-examine him. However, the habeas court found that the State attempted to have him appear at trial. A subpoena was issued for him, but after a year and six months from the time of the fires, the witness could not be found. (Habeas R. at 121.)

Yet Mr. Smith's statement was nontestimonial in nature; and thus, its admission was no violation of the Confrontation Clause according to *Davis, supra*. There is no doubt that this questioning of a witness at the scene of a fire was to enable police assistance to meet an ongoing emergency, when examining it objectively.

The events surrounding Corporal Sexton's interrogation of Mr. Smith were indeed an emergency. When describing the fire upon first observing it, Corporal Sexton said it was a fully engulfed one where it would be dangerous for anyone to be close to it. (Tr. 79.) After calling a dispatch, Corporal Sexton used his cruiser to block off Third Avenue so that no one else could travel in that direction. (*Id.*) He parked the cruiser with the emergency lights activated. (*Id.* at 80.) The corporal testified that he was seeking out witnesses to ask questions to determine if there was anyone still in the building. (*Id.* at 80-81.) In light of this testimony, it is puzzling how Appellant can characterize this situation where Corporal Sexton was gathering information to be anything but an

emergency. Thus, the interrogation can easily be classified as nontestimonial and not a violation of the Confrontational Clause.

In *Davis, supra*, the United States Supreme Court distinguished a statement in the form of a 911 call in upholding its admission and ruled it to be nontestimonial rather than a violation of the Confrontation Clause with the scenario in *Crawford, supra*, where the latter involved an interrogation that occurred hours after the incident at a police station where the witness calmly answered questions. *Davis* at 814, 126 S. Ct. at 2269. The Court ruled the 911 statement to be an emergency, whereas the *Crawford* interrogation in which the introduction was held to violate the Confrontation Clause, was characterized as directed to solve a past crime. *Id.* The emergency interrogation of Mr. Smith is closer to the 911 call introduced in *Davis, supra*, than the testimonial statement made in *Crawford, supra*.

In ruling in favor of the State on this issue, the habeas court stated the following:

The court agrees with the Respondent's contention that it was obvious from the facts of this case that the statement taken from Mr. Smith was taken by Officer Sexton during his initial arrival at the fire scene and in his attempt to determine what had happened.

It was an extremely dangerous situation as the entire building was engulfed in flames and the officer was certainly faced with an on-going emergency.

(Habeas R. at 120.) In light of all of this, Appellant's claim fails on this ground.

C. APPELLANT'S CONVICTION FOR ONE COUNT OF FIRST DEGREE ARSON AND ONE COUNT OF SECOND DEGREE ARSON DID NOT CONSTITUTE A DOUBLE JEOPARDY VIOLATION. IF ANYTHING, HIS INDICTMENT FOR TWO COUNTS EACH OF FIRST AND SECOND DEGREE ARSON AND SUBSEQUENT CONVICTION OF ONE COUNT OF EACH OFFENSE AMOUNTED TO AN ERROR THAT WAS CURED.

1. The Standard of Review.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. Syl. Pt. 1, State v. Gill, 187 W. Va. 136, 416 S.E.2d 263 (1992).

2. Appellant's Convictions Do Not Violate the Prohibition Against Double Jeopardy. He Was Convicted on Two Counts for Two Separate Offenses.

Appellant challenges his convictions on the ground that it is a violation of the prohibition against the Double Jeopardy Clauses of the United States and West Virginia Constitutions. However, his convictions for first and second degree arson do not amount to double jeopardy.

He initially challenges the convictions on the basis of *Blockburger v. United States*, 294 U.S. 299, 52 S. Ct. 180 (1932). However, that case is not applicable here. According to *Blockburger*, "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 303, 52 S. Ct. at 182. Appellant is correct that second degree arson contains no elements distinct from first degree

arson; thus, one cannot be convicted of both offenses for the same act using the *Blockburger* standard. According to West Virginia Code § 61-3-1(a), first degree arson is defined as follows:

Any person who willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another, shall be guilty of arson in the first degree and, upon conviction thereof, be sentenced to the penitentiary for a definite term of imprisonment which is not less than two nor more than twenty years. A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of two years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.

West Virginia Code § 61-3-2 defines second degree arson as follows:

Any person who willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any building or structure of any class or character, whether the property of himself or herself or of another, not included or prescribed in the preceding section, shall be guilty of arson in the second degree and, upon conviction thereof, be sentenced to the penitentiary for a definite term of imprisonment which is not less than one nor more than ten years. A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of one year of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.

The commission of one act does not constitute the violation of two distinct statutory provisions. However, Appellant was convicted of committing two separate crimes. The jury convicted Appellant of two distinct offenses arising from two separate acts rather than one act that contained offenses of two distinct statutory provisions.

As stated previously, Corporal Sexton was patrolling the area that morning when he saw the structure fire and dispatched 911 emergency. (Tr. 78-79.) He then found a witness who said that he saw a person kick in the door of the building and enter it. (*Id.* at 81-82.) Steve Ellis and Devin Palmer were dispatched to the first fire at the building and discovered that the shoe repair shop was

severely damaged. (*Id.* at 121.) Steve Ellis testified that by the time he had arrived on the scene the fire department had extinguished the majority of the fire. (*Id.*)

Steve Ellis witnessed Appellant in a stairwell in the building and chased him. When Mr. Ellis arrived at the stairwell, there were rolled up newspapers burning. (*Id.* at 151-52.) Deputy Fire Marshal Ellis then chased Appellant down an alley. When Appellant stopped, Mr. Ellis asked him, "Man what was you [sic]doing in that building?" In response, Appellant answered that the fire department put out the fire too quickly the first time, and he was back to finish the job. (*Id.* at 163.) Appellant then said, "You guys put the fire out too quick, I wanted the place to burn to the ground because I hate that guy [Mr. Lockhart], and I was just finishing the job." (*Id.* at 155.) Steve Ellis testified that it took a fire truck to put the second fire out. (*Id.* at 154.) According to Mr. Ellis, Appellant was wearing a black hoodie. (*Id.* at 163.)

Mr. Ellis dispatched the Huntington Police and Officer Stephan Compton arrived minutes later and arrested Appellant. (*Id.* at 215.) Before the officer had a chance to read Appellant his *Miranda* rights, Appellant made similar admissions of the offenses. Officer Compton immediately told him he had the right to remain silent and that anything he said could be used against him in court and then immediately formally Mirandized him. (*Id.*) When Officer Compton took Appellant to the police station, the latter made numerous admissions in front of Corporal Sexton. (*Id.* at 88-89.)

As outlined above, there was significant evidence to convict Appellant of two counts of arson. In actuality, Appellant could have been convicted of two counts of first degree arson since he willfully and maliciously set fire twice to a building that contained a dwelling. Appellant makes the argument that he should have been charged with attempted arson, at the most. However, there was clearly enough evidence to convict him of two separate acts of arson. Appellant also makes the

dubious argument that he should not have been convicted of first degree arson because the second burning occurred when the dwelling was destroyed after the first fire, and thus uninhabitable for dwelling purposes. Despite the problematic nature of this argument, it seems it is moot in light of the jury convicting him of one count of first degree arson and one count of second degree arson.

Appellant also attacks these convictions due to their being on the basis of circumstantial evidence. Despite this argument being suspect, this Court held in *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979), "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." *Id.*, Syl. Pt. 4. Thus, this argument need not be substantively addressed.

The problem lies in the fact that Appellant was indicted on two counts each of first and second degree arson. (R. at 25-27.) The four counts did constitute error; however, the jury seems to have corrected this when it convicted him of one count of first degree arson and one count of second degree arson. This was a cured error. Regarding indictments, the Fourth circuit held the following:

Likewise, any defect in the grand jury proceedings are rendered harmless following a conviction by jury. See *U.S. v. Mechanik*, 475 U.S. 66 (1986) ("the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation." *Id.* at 73.)) Unless the alleged errors deprived a criminal defendant of the fundamental concepts of a fair trial, due process is not violated.

United States v. Morsley, 64 F.3d 907, 913 (4th Cir. 1991). Similarly, this conviction rendered the indictment a cured error. Appellant should have challenged the indictment, yet there is nothing in the record that indicates that he did so. Regardless, Appellant was correctly convicted for two

offenses arising out of two separate acts, and a double jeopardy violation as established in *Gill* did not occur. Thus, his claim fails.

D. APPELLANT WAS NOT GIVEN INEFFECTIVE ASSISTANCE BY HIS TRIAL COUNSEL. HE HAS FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT USING AN OBJECTIVE STANDARD OF REASONABLENESS, AND THAT BUT FOR THE ALLEGED ERRORS, THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

1. The Standard of Review.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 64 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1985).

2. Appellant's Trial Counsel Did Not Provide Ineffective Assistance by His Not Investigating Television News Coverage Tapes or Criminal Booking Photographs.

Appellant asserts that his trial attorney's failure to investigate and obtain video coverage and photographs of his arrest amounted to ineffective assistance of counsel. His reasoning is that the

State established that he was wearing a black hooded sweatshirt on the morning in question, and such materials would show that he was not; thus, damaging the State's case against him. However, the standard to establish ineffective assistance of counsel in investigative matters in a trial are extremely high, and Appellant does not meet it. In *Rose v. Johnson*, 141 F. Supp. 2d 661 (S.D. Texas 2001), the following was held regarding this issue:

In order to establish that counsel was ineffective due to a failure to investigate the case or to discover and present evidence, the petitioner must do more than merely allege a failure to investigate--he must state with specificity what the investigation would have revealed, what specific evidence would have been disclosed, and how the evidence would have altered the outcome of the trial. See *Anderson v. Collins*, 18 F.3d 1208, 1221 (5th Cir.1994); *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir.1993); *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.1989); *Lockhart v. McCotter*, 782 F.2d 1275, 1282-83 (5th Cir.1986), cert. denied, 479 U.S. 1030, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987); *Alexander v. McCotter*, 775 F.2d 595, 603 (5th Cir.1985); *Schwander [v. Blackburn]*, 750 F.2d [494] at 500-01 [(5th Cir., 1985)]. Moreover, when trial counsel's decision not to pursue further investigation into a potential defense or into an area of potentially mitigating evidence is based on consultation with the defendant, which leads the attorney to believe that further investigation would be fruitless, that decision may not be challenged as unreasonable. See *Boyle [v. Johnson]*, 93 F.3d [189] at 187-88 [(5th Cir., 1996)]; *West [v. Johnson]*, 92 F.3d [1385] at 1406-09 [(5th Cir., 1996)]; *Andrews [v. Collins]*, 21 F.3d [612] at 623 [(5th Cir., 1994)]. Hence, the extent of counsel's investigation must be viewed in the context of the defendant's cooperation with his attorney in facilitating the investigation. See *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir.), cert. denied, 515 U.S. 1108, 115 S.Ct. 2259, 132 L.Ed.2d 265 (1995).

141 F. Supp. 2d at 691. With respect to counsel's duty to investigate, the Supreme Court has observed:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland at 690-91, 104 S. Ct. at 2066.

At Appellant's habeas hearing, his trial counsel, John Laishley, testified that he hired an investigator and conducted a thorough investigation of the facts and circumstances surrounding the case. (Habeas Hr'g at 5.) This included visiting and investigating the area of the fire, interviewing police officers and fire marshals and engaging in a thorough discovery process with the State. (*Id.* at 5-6.) Mr. Laishley stated that he did not remember the existence of any such videotape of news coverage of Appellant being arrested. (*Id.* at 8.) It was also established that Appellant's habeas counsel, Steve Bragg, called the television station and was informed that there was no such tape. ® at 126.) The habeas court also found that the parties were unable to verify that there were any booking photographs taken of Appellant. It further found that even if such photographs were found where Appellant was not wearing a black hooded sweatshirt, the value would be minimal since he may have not been wearing it at the jail that night or the police may have taken it off of him for the picture. (*Id.* at 126-127.)

This Court held in *State ex. rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (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.

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.

Id., Syl. Pts. 3 and 4. Based on this, the habeas court denied Appellant relief on this ground. It is apparent that Appellant is asking this Court to engage in hindsight with this matter in order to find his counsel ineffective. The record is clear that Appellant's trial counsel conducted a thorough investigation. Further, it is doubtful, at best, that any videotape from news coverage even existed. As the state habeas court found, a potential booking picture with Appellant wearing something other than a black hooded sweatshirt is of very limited value. As previously outlined, there was overwhelming evidence to convict Appellant for these offenses, including an eyewitness account by Assistant Marshal Ellis, his own admissions and testimony of motivation by Mr. Lockhart. Appellant did not meet the standard to show his counsel's performance was deficient nor did he establish that it prejudiced him in accordance with *Strickland, supra*. There is no way that Appellant has established that, but for his counsel's performance, the result of his trial would be different. Thus, Appellant has failed to establish ineffective assistance on this ground.

3. **Trial Counsel's Not Requesting a New Suppression Hearing or a Reconsideration Hearing Due to the Absence of Assistant State Fire Marshal Palmer and His Statement Allegedly Being Illegible Did Not Amount to Ineffective Assistance of Counsel.**

Appellant erroneously asserts that his trial counsel provided him ineffective assistance of counsel by not requesting a new suppression hearing or a reconsideration hearing due to Assistant State Fire Marshal Palmer not being present and Mr. Palmer's statement allegedly being illegible. However, this could all be considered trial strategy on his counsel's part that is to be afforded great deference. The United States Supreme Court held the following in *Strickland, supra*:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Additionally, *Strickland* held the following regarding acts and omissions of counsel:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982).

Strickland. As stated previously, this Court in *Legursky, supra*, discouraged the practice of hindsight and second-guessing with respect to evaluating counsel's representation using the ineffective assistance of counsel standard.

Appellant's counsel, Mr. Laishley, actually subpoenaed Mr. Palmer and made many efforts to get him to the suppression hearing, yet he was out of the state at the time. (Habeas Hr'g at 11-12.) Regarding the Palmer statement and having him present at the hearing, Mr. Laishley testified that he questioned whether it would have made any difference at the suppression hearing at all. (*Id.* at 11, 19.) The habeas court cited this in its Final Order denying Appellant relief on this ground. ®. at 127.) Additionally, the habeas court found that Mr. Palmer's testimony at the suppression hearing would have only bolstered the testimony given by Mr. Ellis at the hearing. (*Id.*) In light of these findings, this amounts to sound trial strategy on Mr. Laishley's part that should not be second-guessed or looked at with hindsight in determining whether or not his assistance was effective.

Appellant fails to meet the deferential standard. As with the investigation conducted by Appellant's trial counsel, this aspect of the representation cannot be characterized as deficient nor that it prejudiced him. Appellant gives speculation as to why Mr. Palmer's testimony would have benefitted him at the suppression hearing, yet he does not overcome the deferential standard applied to trial strategy. Therefore, this claim fails.

E. APPELLANT HAS FAILED TO ESTABLISH THAT HIS HABEAS ATTORNEY'S REPRESENTATION AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, AND IT IS DOUBTFUL THAT HE HAS CHOSEN THE CORRECT FORUM FOR SUCH A CHALLENGE.

1. The Standard of Review.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2064.

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 64 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, *supra*.

2. **Appellant Fails to Establish That He Was Provided Ineffective Assistance of Counsel at the State Habeas Stage.**

Appellant cites three grounds for the claim that his habeas counsel provided ineffective assistance to him at his State habeas hearing: improper investigation and follow-up on the issue of television news footage of his arrest, failure to properly include all of the ineffective assistance claims against Mr. Laishley and a failure to properly notify him in advance of his hearing, causing him to be unprepared and “physically unkempt.” None of these grounds meet the standard set in *Strickland, supra* and *Miller, supra*, to establish ineffective assistance of Appellant’s habeas counsel.

With respect to the video footage of Appellant’s arrest, it is worth noting that his habeas counsel, Mr. Steve Bragg did investigate by contacting Channels 3 and 13, yet he was not able to obtain such videotapes. (Habeas Hr’g at 36.) Appellant even admits the same in his brief. (*See* Appellant’s Petition at 34.) Mr. Bragg questioned Mr. Laishley extensively with respect to the latter’s investigation, including whether his trial counsel attempted to obtain any videotapes from news coverage. (Habeas Hr’g at 5-9.) Yet according to Appellant, somehow Mr. Bragg’s inquiry was not good enough and amounted to ineffective assistance of counsel. The habeas court rejected this ground for ineffective assistance with respect to Appellant’s trial counsel. (®. at 126.) Appellant further makes the rather puzzling argument that Mr. Bragg could have contacted his ex-wife and former neighbors to determine if such video footage existed in order to give him “peace of mind.” In light of all of this, there is no way that Mr. Bragg’s performance was deficient or that, but for such performance, the result would have been different.

Appellant also asserts that Mr. Bragg only addressed three of seventeen claims of ineffective assistance of counsel regarding his trial attorney in the habeas proceedings. Yet, he neither details what these additional claims were nor does he outline how such omissions amounted to deficiencies that prejudiced him.

Further, Appellant contends that Mr. Bragg failed to properly notify him of his habeas hearing causing him to be unprepared and physically unkempt. Appellant characterizes his unkempt status as having shown up for the hearing not being properly shaved and admits that this falls short of reversible error. (See Appellant's Petition at 35.) In making this claim, he fails to state when Mr. Bragg informed him of his hearing causing him to be unprepared or what the manifestations of this lack of preparedness constituted other than a subjective feeling. In *State ex. rel. Hatcher v. McBride*, 221 W. Va. 760, 656 S.E.2d 789 (2007), this Court was presented with the issue where the Appellant claimed ineffective assistance of his habeas counsel where the only allegation discussed with specificity was that his trial counsel should have objected more strenuously to the circuit judge at the sentencing hearing, and his habeas counsel should have pursued the issue more strenuously during the habeas hearing. This was all presented in general terms without any specificity. This Court held that he failed to meet the *Strickland* standard and denied his claim. *Id.* at ____, 656 S.E.2d at 794-95. Similarly, Appellant has failed to show how the representation he received in his habeas hearing was deficient, or how, but for his habeas counsel's performance, the outcome would have been different regarding his counsel's notification.

3. **This Court May Not Be the Proper Forum for this Claim.**

Raising an ineffective assistance of habeas counsel for the first time at the appellate stage may be an inappropriate procedure and forum for seeking such relief. It seems that another habeas

hearing may be the proper forum for this claim. Regarding habeas proceedings and ineffective assistance at that stage, this Court has held the following:

A prior omnibus habeas corpus hearing is res judicata as to all matter raised and as to all matters known or with reasonable diligence would have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Syl. Pt. 4, *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981); Syl. Pt. 2, *Markley v. Coleman*, 215 W. Va. 729, 601 S.E.2d 49 (2004). Although it dealt with a direct appeal to this Court as opposed to a habeas appeal, this Court held the following:

“It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.” Syl. Pt. 10 of *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992).

Syl. Pt. 10, *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004). In light of these holdings, it could be argued that Appellant needs to file another habeas claim to have a hearing on this issue before this Court can make a ruling regarding the performance of his habeas counsel.

It is worth noting that Appellant stated in his habeas hearing that he was satisfied with the representation he received from Mr. Bragg. At the hearing, the following discourse occurred:

| | |
|-------------------------------|---|
| Ms. Husted [State’s counsel]: | And so you’re satisfied with your attorney and his representation in this habeas? |
| Appellant: | That’s the big question for me today? |
| The Court: | Do you want him to represent you? |
| Appellant: | Absolutely if he wants to represent me. |

(Habeas Hr'g at 59-60.) Regardless of this apparent satisfaction with his counsel, Appellant has not met the standards established in *Strickland, supra*, and *Miller, supra*, for an ineffective assistance claim. Additionally, he has probably chosen the wrong forum for it. Thus, his the claim fails.

Although the State has fully addressed the claims, Appellant's fourth and fifth assignments of error were addressed in his Petition for Appeal yet omitted in his Appellant Brief. Although the State addresses them, these grounds are to be deemed waived by Appellant. This Court held in *State v. LaRock*. 196 W. Va. 294, 470 S.E.2d 613 (1996),

Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal. *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995) ("casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal"). We deem these errors abandoned because these errors were not fully briefed.

Id. at 302, 470 S.E.2d at 621. In light of Appellant's omission, Assignments of Error Four and Five raised in his Petition for Appeal should be deemed waived.

VI.

CONCLUSION

For the foregoing reasons, the Final Order of the Circuit Court of Cabell County denying Appellant habeas relief should be affirmed by this Honorable Court.

Respectfully submitted,

WILLIAM HAINES, Warden,
Huttonsville Correctional Center,
Appellee,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

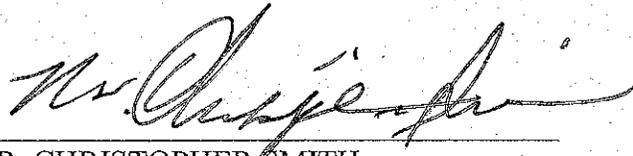


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 7th day of July, 2008, addressed as follows:

Douglas V. Reynolds, Esq.
703 Fifth Avenue
Huntington, West Virginia 25701

A handwritten signature in cursive script, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH