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IN THE  
SUPREME COURT OF APPEALS  
WEST VIRGINIA

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34713

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STATE OF WEST VIRGINIA, EX REL. MAX PAUL KITCHEN,

Plaintiff/Petitioner,

v.

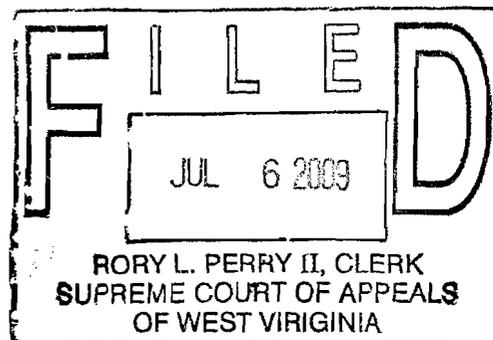
HOWARD PAINTER, WARDEN, MT. OLIVE CORRECTIONAL COMPLEX,

Defendants/Respondents.

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PETITIONER'S LEGAL BRIEF IN SUPPORT OF PETITION FOR APPEAL

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## ASSIGNMENT OF ERRORS

- I. THE LOWER COURT ERRED BY CONCLUDING THAT KITCHEN'S COUNSEL WAS NOT INEFFECTIVE DESPITE ITS FINDING THAT COUNSEL'S *DEFICIENT* TRIAL PERFORMANCE RESULTED FROM HER FAILURE TO REQUEST A BIFURCATED TRIAL, INTRODUCE MITIGATING EVIDENCE OR TO PLEA FOR MERCY ON BEHALF OF A CLIENT WHO WAS SENTENCED TO LIFE IN PRISON AFTER A JURY CONVICTED HIM OF FIRST DEGREE MURDER WITHOUT A RECOMMENDATION OF MERCY
  
- II. THE LOWER COURT ERRED IN DENYING KITCHEN'S HABEAS CLAIM THAT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY RULING THAT THE TRIAL COURT ACTED PROPERLY WHEN IT ALLOWED THE INTRODUCTION OF THE CO-DEFENDANT'S GUILTY PLEA AND OTHER RULE 404(B) EVIDENCE OF PRIOR UNCHARGED MISCONDUCT AGAINST KITCHEN AND BY FINDING THAT THE TRIAL COURT PROPERLY CONDUCTED AN *IN CAMERA* HEARING PRIOR TO ITS ADMISSION AND GAVE APPROPRIATE LIMITING INSTRUCTIONS
  
- III. THE LOWER COURT ERRED BY FAILING TO MAKE FINDINGS REGARDING THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON MISLEADING AND PREJUDICIAL REMARKS MADE BY THE PROSECUTOR IN CLOSING ARGUMENT AND BY RULING THAT THOSE REMARKS WERE NOT IMPROPER.
  
- IV. THE LOWER COURT ERRED BY RULING THAT THE TRIAL COURT'S REFUSAL TO DISQUALIFY TWO JURORS WITH STRONG TIES TO THE PROSECUTOR WAS PROPER AND CONSTITUTIONALLY PERMISSIBLE.
  
- V. THE LOWER COURT ERRED IN DENYING KITCHEN'S CLAIM THAT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAD BEEN VIOLATED BY RULING THAT ANY CUMULATIVE EFFECT OF FAILURES COMMITTED DURING HIS TRIAL DID NOT RESULT IN INEFFECTIVE ASSISTANCE OF COUNSEL OR PREJUDICE TO HIM.

**PETITIONER'S LEGAL BRIEF IN SUPPORT OF PETITION FOR APPEAL  
OF DENIAL OF HABEAS CORPUS PETITION**

Comes now Max Paul Kitchen ("Kitchen," "petitioner," or "defendant") by counsel, Carrie Webster, and Bucci, Bailey and Javins, LLC, and offers the following legal brief in support of his underlying petition, which this Court has unanimously agreed to review.

**PROCEEDING AND RULINGS BELOW**

This Petition seeks reversal of a final order entered by the Circuit Court of Kanawha County on August 22, 2007, denying his request for habeas relief and reversal of his conviction of first degree murder. See Final Order Denying Habeas Relief.

This case's lengthy procedural history is significant. In September, 2006, a Logan County jury convicted Max Paul Kitchen of first degree murder and conspiracy to commit malicious assault.<sup>1</sup> The jury did not recommend mercy. Judge Eric O'Briant, the presiding trial judge, sentenced Kitchen to life in prison without the possibility of parole.

After unsuccessfully appealing his conviction to the West Virginia Supreme Court of Appeals, Kitchen filed a pro se Petition for Writ of Habeas Corpus in Logan County Circuit Court on August 24, 1998. Matthew Clark, Kitchen's initial habeas counsel, subsequently filed an amended petition, asserting multiple assignments of error on behalf of the petitioner. See Petitioner's Supplemental Petition. On January 2, 2003, the Honorable Judge Roger L. Perry,

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<sup>1</sup> The jury acquitted Kitchen on the actual charge of malicious assault.

who presided over the first habeas petition, denied Kitchen's petition for habeas relief.<sup>2</sup> See *(First) Final Order Denying Habeas Relief*.

On August 20, 2003, Kitchen filed his Petition for Appeal of the habeas court's denial of his writ. The Court also granted petitioner's motion to supplement the official record with documents that had not been introduced at his jury trial or in his habeas proceeding below. It also, *sua sponte*, remanded the entire proceeding back to the lower habeas court with instructions to reopen the case to consider evidence that petitioner sought to incorporate in his Petition from these exhibits.<sup>3</sup>

On November 16, 2004, this Court granted Judge Perry's request for recusal from the underlying habeas proceeding, and appointed the Honorable Irene Berger, Thirteenth Judicial Circuit in Kanawha County, as Special Judge in this matter. On August 24, 2005, Judge Berger presided over a second omnibus evidentiary hearing.<sup>4</sup> Thereafter, on December 6, 2005, Kitchen

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<sup>2</sup> Judge Perry subsequently relieved Mr. Clark of further legal representation in this matter and appointed the undersigned to represent the petitioner in his habeas appeal.

<sup>3</sup> In granting such motion, this Court authorized the inclusion of the following exhibits in the habeas record: (1) West Virginia State Police Investigation Report; (2) The May 31, 1996 hearing transcript of the plea agreement by co-defendant, Hank Mosley; (3) Letter from Nell Kitchen, Kitchen's mother, to presiding trial court judge, Eric O'Briant, dated July 8, 1996, and filed by the circuit clerk on July 15, 1996; (4a) Letter from Matthew L. Clark, Esquire, dated November 15, 2001, to Judge Perry, requesting his consideration of additional evidence and law; (4b) Letter from Judge Perry, dated November 20, 2001, to Matthew Clark, Esquire, requesting that he file any necessary motions with the clerk to avoid ex parte communication; (4c) letter from special prosecuting attorney, Ron Rumora, to Judge Perry, opposing Clark's request; and (5) Kitchen's direct petition for appeal, previously filed by his trial counsel and denied by this Court.

<sup>4</sup> Witnesses at this hearing included the petitioner, his mother and trial counsel. Greg Campbell, a Charleston attorney and the petitioner's court appointed expert, also appeared, offering testimonial evidence in support of Kitchen's claim of ineffective assistance of counsel claim and other constitutional errors entitling him to a new trial.

again amended his habeas petition, asserting and incorporating evidence established in the second evidentiary hearing in support of his habeas claims. *See Petitioner's Second Supplemental Petition.*<sup>5</sup>

In her final Order, Judge Berger found that sufficient evidence was established to find that trial counsel's performance was deficient. *See [Second] Final Order Denying Writ of Habeas Corpus, entered August 22, 2007.* However, the habeas judge denied the writ because she further found that the petitioner did not establish that "... there is a reasonable probability ... that the results of the trial would have been different ... in the absence of these failures [of trial counsel]...." *Id., at 3.* The habeas court also rejected and denied other errors asserted by the petitioner in his habeas writ. Thus, the petitioner herein timely files and seeks habeas relief from this Court based on errors the habeas court committed and which deprived him of his constitutional right to a fair trial.

### **STATEMENT OF FACTS**

On October 1, 1995, an apparent altercation occurred near Rum Creek, Logan County, West Virginia, resulting in serious injuries to Carl Starkey ("Starkey") and fatal injuries to Andrew Caldwell ("Caldwell"). Based on his initial witness statement, Starkey and Caldwell, who were in an ATV, were approaching [a gate] when "about five guys jumping out of the weeds . . . and started hitting us with ballbats." *See WV State Police Report of Investigation in State v. Kitchen* [internal citations omitted]. Although he did not recognize the other men, Starkey identified co-defendants, Kitchen and Mosley, whom Starkey said had accused both me [Starkey

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and Mosley] of stealing their pot.” *Id.* Both men were subsequently arrested and charged with committing multiple felonious crimes. The other men who were undisputably present at the scene and purportedly involved in the altercation, were not charged with any crime.<sup>6</sup>

After a five day trial, the jury returned a guilty verdict against Kitchen for murder in the first degree and another related felony offense. Multiple errors committed by the trial court and Kitchen’s trial counsel prejudiced the petitioner and deprived him of his constitutional right to a fair trial.

During jury selection and voir dire, the parties learned that one prospective juror, Carol Melton, was a neighbor and personal friends with Jerry White, the state’s prosecutor. White also served as her son’s ball coach, and even provided counsel to Melton in a personal legal matter. Another prospective juror, Annie Hall, was related to Benny Adkins, the prosecutor’s investigator, by marriage. Benny Adkins assisted Prosecutor White with the investigation of *State v. Kitchen* and was physically seated at the State’s table throughout the trial. The defendant was forced to utilize two pre-emptory strikes to remove two jurors from the panel after the trial judge refused to disqualify them for cause..

The trial court improperly allowed the State to introduce evidence of the alleged theft of marijuana by the alleged victims and cultivation of marijuana by a co-defendant. Specifically, the trial court failed to hold a mandatory *in camera* hearing, pursuant to W.V.R.E. 404(b) and *State v. McGinnis, supra*, to determine by a preponderance of evidence whether or not the collateral

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<sup>6</sup> At least two of the men, Thomas Miller and Rod Nelson, admittedly lied to state police investigators in their initial statements and later changed their story. *Id.* at pp. 30-46. Every individual [other than co-defendants] present on the night of the incident later became a key witness for the State in its trial against Kitchen.

crime actually occurred and whether Kitchen committed the alleged act. The State did not offer evidence or otherwise establish the actual existence of a marijuana field or that Kitchen (or Mosley for that matter) committed this unlawful act. The trial court compounded this prejudicial error by admitting into evidence co-defendant Mosley's plea to a cultivation of marijuana charge although Kitchen had never been charged with this same alleged misconduct. (Trial Tr. 4, Day 3, p. 58). The State used this uncharged conduct and the co-defendant's guilty plea to establish petitioner's 'motive' and to unfairly implicate him during the trial and specifically during closing argument, where he made improper and prejudicial remarks. (Trial Tr. Day 4, p. 34).

Trial counsel's ineffectiveness at critical stages in her legal representation of the petitioner, resulted in multiple constitutional errors and deprived Kitchen of a fair trial. While the underlying petition sets forth multiple grounds in support of his IAC claim, discussed *supra*, particularly egregious among them was trial counsel's duty and failure to move for bifurcation of the guilt and sentencing phases, and failure to conduct a reasonable investigative inquiry to identify "mercy evidence" which she could have developed and introduced as mitigating evidence at the trial's penalty phase.<sup>7</sup>

These and other alleged errors which form the basis of this petition and resulting appeal are addressed more fully in the habeas court's final order denying petitioner's requested relief, which is set forth and discussed below.

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<sup>7</sup> Trial counsel also never gave an opening statement, failed to conduct a preliminary hearing or advise client why she waived rights that should have only been waived with permission from petitioner. Counsel also failed to develop a credible theory of defense or trial strategy, or effectively cross exam State witnesses. Petitioner also asserts that trial counsel failed to explain implications for him if he rejected a plea offer by the State that would recommend mercy if he plead guilty to first degree murder.

## DISCUSSION OF LAW

**I. THE LOWER COURT ERRED BY CONCLUDING THAT KITCHEN'S COUNSEL WAS NOT INEFFECTIVE DESPITE ITS FINDING THAT COUNSEL'S DEFICIENT TRIAL PERFORMANCE RESULTED FROM HER FAILURE TO REQUEST A BIFURCATED TRIAL, INTRODUCE MITIGATING EVIDENCE OR TO PLEA FOR MERCY ON BEHALF OF A CLIENT WHO WAS SENTENCED TO LIFE IN PRISON AFTER A JURY CONVICTED HIM OF FIRST DEGREE MURDER WITHOUT A RECOMMENDATION OF MERCY**

At trial, Kitchen, a middle-aged man with no criminal record, faced life in prison if he was convicted of first degree murder. He placed his trust and literally his 'life' in the hands of his legal counsel. Yet, it is undisputed that his counsel failed develop or address the "mercy" issue at any stage of the trial. Judge Berger, who presided over this matter after it was reassigned, agreed. In analyzing Kitchen's claim of ineffective counsel under the two pronged test set forth in State ex. Rel. Daniel v. Legursky, 465 SE.2d 416 (1995), the Court concluded that Kitchen established that his trial counsel's performance was deficient:

The Court finds that the petitioner met the first prong of the analysis. The Court finds defense counsel's performance in failing to make a motion to bifurcate guilty and mercy stages of trial, failing to call character witnesses in mitigation, failing to argue for mercy, and failing to object to state's argument for no mercy was deficient under an objective standard of reasonableness since no reasonable explanation for the failures were tendered during the habeas proceedings.

*See Final Order Denying Habeas Relief* (finding Kitchen met the first prong of the legal test set forth in *Strickland v. Washington, supra* (measuring whether counsel's performance was deficient under an objective standard of reasonableness)).<sup>8</sup> *Id.*

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<sup>8</sup> Judge Berger's findings will be set forth more fully in another section of this Petition.

Despite finding that counsel's deficient performance centered on her failure to mitigate her client's sentence in a capital murder case, the Court still denied Kitchen's Petition for Writ of Habeas Corpus because she concluded that he could not demonstrate that "...there is a reasonable probability ... that the results of the trial would have been different ... in the absence of these failures..." *Id.*, at 3. It is the habeas court's conclusion, based on the facts she relied upon, and others she did not reference or apparently consider, which is flawed and in violation of Kitchen's constitutional rights.

Importantly, the facts in this case are analogous to this Court's recent per curiam opinion in State ex rel. Shelton v. Painter, 655 S.E.2d 794 (W.Va. 2007). In Shelton, this Court found that defense counsel violated his duty of loyalty to his client during closing argument and failed to introduce any evidence in support of mercy or to make any meaningful plea for mercy. Although it found trial counsel's performance deficient, it declined to remand the case for a new trial on the issue of guilt, and instead required a limited new trial only on the penalty issue of whether the defendant should or should not receive mercy.

This Court has considered several cases, discussed *supra*, where counsel has failed to argue mercy or meaningfully develop it, and it has consistently emphasized that counsel has a duty to present evidence to help mitigate the defendant's sentence in capital crimes. In the instant case, trial counsel represented a client [Kitchen] who was facing a life sentence. She either knew or should have known that it was possible that he could be convicted of murder. Therefore, to some extent, trial counsel's strategic focus should have been on mitigation and mercy. At the very least, counsel should have prepared for this possibility, particularly when she had (and presented to jurors) two conflicting theories in her case. She had a duty to do so and she violated this duty.

Kitchen had no criminal record, a little girl and had maintained steady employment. It is therefore error for the lower court to have concluded that he would have received life without mercy when the jury never heard any evidence at all in mitigation of his sentence. Nor did counsel make inquiry about the existence of mitigating evidence that could be introduced on Kitchen's behalf.

In order to fully discuss and assess petitioner's contention that his trial counsel failed to introduce available evidence to mitigate his sentence and/or develop the issue of mercy, it is important to provide the court with a review and discussion of trial counsel's acts and omissions which ultimately demonstrate a undisputable pattern of legal unpreparedness and strategic uncertainty, resulting in the petitioner's failure to get a fair trial guaranteed by the state and federal constitutions.

The West Virginia Supreme Court of Appeals has made clear that "(f)ailure to meet the burden of proof imposed by *either* part of the Strickland/Miller test is fatal to a habeas petitioner's claim." State ex rel. Daniel v. Legursky, 195 W.Va. 314, 321, 465 S.E.2d 416, 423 (1995)(emphasis added). Thus, below is a discussion and analysis of these multiple trial performance deficiencies which resulted in constitutional violations that adversely impacted the petitioner's right to a fair trial and its outcome.

1. Trial Counsel Failed To Introduce Evidence To Mitigate The Petitioner's Life Sentence For His First Degree Murder Conviction Without Mercy.

In the current matter, the deficiency of trial counsel's performance is apparent from a close analysis of not only the trial transcript but also from testimony taken at two separate evidentiary hearings. First, trial counsel willingly assumed the responsibility as lead counsel in the petitioner's

first degree murder trial, and consequently knew her client faced a potential life prison sentence without the possibility of parole. Therefore, she had a duty, under the law, to mitigate his potential sentence with available evidence. See State v. LeRock, 196 W.Va. 294, 309, 470 S.E.2d 613, 628 (1996)(recognizing that under West Virginia case law, counsel's performance is deficient if she fails to make a reasonable investigation for possible exculpatory or mitigating evidence in a first-degree murder trial).

Second, the petitioner declined to testify in his own defense upon counsel's repeated advice not to do so. (1<sup>st</sup> Omn. Hrg. Tr., p. 42; 2<sup>nd</sup> Omn. Hrg. Tr., pp. 28, 88). Therefore, because counsel did not put her client on the stand, she should have and could have introduced other available evidence in order to provide the jury with a favorable impression of the petitioner as a son, father and friend or at least "reduce the jury's view of the severity of his alleged acts." *Accord Schofield, supra*. Instead, counsel waived her opening statement, refused to call a single character witness and failed to develop or articulate a cogent theory of defense. Consequently, the jury did not recommend mercy nor a lesser offense.

It is well-settled that a criminal defense attorney has a duty to introduce mitigation evidence in a criminal case and particularly in a capital murder case. In Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991), the Court found that defendant's counsel was ineffective for failure to introduce available mitigation evidence in a first degree murder trial. In reversing the defendant's first degree murder conviction, it relied upon Leach v. Hamilton, supra, which implied that "... a lawyer should make sure that any available mitigation evidence is presented to the jury in a murder case." *Id.*, at 203, 406 S.E.2d at 429. The Court further quoted Leach by stating:

We cannot envision a murder defense, however, that would not require introduction of all possible evidence toward reduction of a jury's view of the severity of defendant's acts. Even when alibi is a defense, good character evidence would be appropriate... And so we cannot conceive of any fact that defendant could introduce to convince a jury that he deserves mercy at a separate sentencing stage that should not be introduced by him at the main trial....

Id., at 203, 406 S.E.2d at 425 (quoting Leach, — W.Va. —, 280 S.E.2d 62)). Although the Schofield Court held that a circuit judge had “exceeded his legitimate powers in modifying the appellee’s conviction from one for first-degree murder without a recommendation of mercy to first-degree murder with a recommendation of mercy...” Id., at 204, 406 S.E.2d at 430, it did not dispute the trial court’s reasoning in finding counsel ineffective:

With respect solely to the question of effectiveness of representation addressing the issue of the potential recommendation of mercy: *the lack of witnesses, the lack of argument*, the lack of a complete and explicit mercy instruction, taken together, clearly and convincingly combined to create a condition that cause the defendant not to receive effective assistance relative to the question of mercy in this case...(t)herefore, this Court is of the opinion that Kathy Schofield did not receive a constitutionally fair trial on the question of the degree and potential duration of her sentence....

Id., at 203, 406 S.E.2d at 429(emphasis added).

Similarly, in our current case, the lack of a consistent defense or trial strategy, the lack of an opening argument, the failure to present witnesses who could have bolstered the petitioner’s character or consider trial bifurcation, and the overall lack of effective legal representation at critical levels of the trial proceedings deeply prejudiced his right to a fair trial and quite likely resulted in his sentence to life without mercy.

Importantly, based on these acts and omissions by the petitioner’s trial counsel, Gregory

Campbell, a prominent and experienced criminal attorney who was qualified as an expert in this matter, testified at the August, 2005 evidentiary hearing and concluded that these multiple errors committed by trial counsel likely impacted the outcome.

[Webster]: Did you see any effort to offer mitigating evidence through character witnesses, through an effort to bifurcate the trial, through an opening or any type of other mechanisms that trial counsel had available in this case?

[Campbell]: ... I don't think she knew where she was going from the get-go... I think he [Kitchen] could have gotten a different result had there been just a regular trial: an opening statement, a theory of defense, and some mitigating evidence.

[Webster]: ... what is your conclusion with respect to trial counsel's performance in this case?

[Campbell]: Well, I think she fell below the standard. I don't think – and I don't like to say that, but I think she did. I don't think any reasonable, reasonably competent criminal defense attorney would have done it this way, and I truly believe the outcome – that there is a good probability that the outcome would have been different had the issue - - had mitigating evidence been put to the jury.... I think he would have had a good shot at mercy; and I think you could have developed a second degree case, to tell you the truth.

(2<sup>nd</sup> Omn. Hrg. Tr., pp. 128-29)

- a. Counsel failed to call crucial character witnesses that would have helped mitigate the petitioner's sentence.

Our Court has recognized that the failure to call and present witnesses and critical evidence could be a basis for a successful ineffective assistance claim. *Id.* at 430-431 (citing generally *State v. Spence*, 388 S. E. 2d 498 (W. Va. 1989)); *State v. Hatfield*, 286 S. E. 2d 402 (W. Va. 1982). In this case, trial counsel's failure to call many of the witnesses who had been subpoenaed effectively eliminated the petitioner's right to testify in his own defense. Trial counsel

also blatantly failed to offer character witnesses to mitigate the petitioner's sentence, despite the availability of both family members and friends who could have provided favorable testimony about the petitioner. Trial counsel compounded this error by failing to investigate or even discuss the petitioner's personal background with close family members. Under West Virginia law, this conduct can result in ineffective assistance of counsel. *See Syllabus 3, Daniel*, 195 W.Va. at 320, 465 S.E.2d at 422

("Courts applying the *Strickland* standard have found no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation, nor demonstrated a strategic reason for failing to do so.").

First, after challenging evidence from the State and waiving the petitioner's opening statement, trial counsel called only two quick rebuttal witnesses, Chris Browning and Shawn Carter, in presenting the petitioner's "defense." These witnesses briefly testified to conversations they had with State witness, Jake White, in an effort to challenge White's credibility. (Trial Tr. Day 4, pp. 96-108). In fact, at his second evidentiary hearing, Nell Brown, the petitioner's mother, testified that her son's trial counsel was unaware of and did not even plan to call Shawn Carter until family members literally approached her at trial and advised that he might have some information that may be helpful to the petitioner. *2<sup>nd</sup> Omn. Hrg. Tr.*, pp. 52, 55-56, 71. If the petitioner's family had not approached Kitchen's counsel, Chris Browning would have been the only witness called on the petitioner's behalf.

Second, trial counsel initially subpoenaed sixteen or seventeen possible witnesses, including the petitioner's grandmother. *1<sup>st</sup> Omn. Hrg. Tr.*, p. 35. Even though the petitioner did not have any prior criminal record, had support from friends and family and was raising a little

girl as a single parent, defense counsel failed to call any of these character witnesses or explain to her client why she chose not to do so. *2<sup>nd</sup> Omn. Hrg. Tr., p. 71; Omn. Hrg. Tr., p. 54.*

At the petitioner's second evidentiary hearing, his mother testified that she was not even subpoenaed as a witness nor did trial counsel or her investigator ever talk to her or other family members about the petitioner's family background and their relationship with them.

*2<sup>nd</sup> Omn. Hrg. Tr. pp. 45-46, 51-52.* Mrs. Brown testified she was so frustrated that she sent a personal letter to the sentencing judge after her son's conviction:<sup>9</sup>

**[Webster]:** . . . what is the purpose of this letter?

*[Nell Brown]:* Well, to let him [the judge] know something about my son, you know. In the trial, nobody was called, nobody - - they didn't know anything about him. Even one of the jurors told us later that they didn't know him from Adam. All they knew was the prosecutor was calling him a murderer, and that's all they knew. They said had they known anything about him, it might have been different.

**[Webster]:** And in the contents of the letter what are some things that you told the judge about your son that you wanted him to know?

**[Brown]:** Well, I told him about him [her son] having a five-year old daughter . . . that he was a single father. The mother deserted her. She didn't - she don't want her. And it - it's affected Jess- -- its affected her ever since.

*2<sup>nd</sup> Omn. Hrg. Tr. pp. 46-48.* Mrs. Brown's compelling testimony evidenced the existence of provided examples of the kind and decent person that her son's friends and family knew him to be, but also and family. that her son had a good, solid work record and had never been fired.

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<sup>9</sup> This letter was one of the documents that the Supreme Court agreed to supplement as part of the record.

that she told the judge her son did not have any criminal history and had never been in trouble with the law. She provided examples of the kind of person he really was. (*Id.* at 48-50)

However, despite her testimony about these compelling character traits of her son, trial counsel never apparently investigated or inquired about the petitioner's family background, and she certainly did not introduce such testimony at trial to mitigate his guilt or sentence.

During his direct examination, Greg Campbell testified that “. . . you need to put on mitigation evidence.” *Id.* at 107. He offered the following example of mitigation he believed a defense attorney could use in hypothetical case similar to the instant one:

[Campbell]: . . . Mr. Kitchen would offer me as a defense lawyer something that a lot of your clients don't offer you. You have got a guy with no prior record, you had a guy with some steady work history with real jobs, not a backyard mechanic or anything like that, and you had a single parent . . . Women aren't the only single parents . . . you had a guy who was a single parent raising a child. That's something in my opinion that a jury would have to appear – you want him to look like somebody different than a guy with a baseball bat waiting for somebody to roll off a hill.

[Webster]: . . . Do you agree or disagree, based on a review of the case and the testimony you have heard today, whether or not there would – that some of that character witness through his parents and other available good character evidence could have or should have come in even in light of the marijuana issue?

[Campbell]: If I were trying this case before Judge Berger, I would have tried to convince Judge Berger that I'm not throwing his character wide open into evidence; that I would like to show traits or characteristics of this defendant, specifically limited to the fact that he works, he has no prior record, and he was raising a child. If she said “yes, I'm going to do that,” I would have been fine. If she said “No; if you've put it in, it's opened up,” I would put it in.

*Id.* at 107-09. Mr. Campbell also opined that regardless of the “marijuana issue,” because this was a unitary trial . . . you only had

one shot to get in mitigation evidence, and you had to get it in to save him....” *Id.* at 109 (emphasis added).

This Court has noted that “the failure to present critical evidence could be the basis for a successful ineffective assistance of counsel claim.” *Daniel*, 195 W.Va. at 328, 465 S.E.2d at 430. Examples of a valid claim may be where counsel “... failed to present advantageous evidence that could affect a jury’s verdict.” *Id.* *See also State ex. rel Leach v. Hamilton*, W.Va., 280 S.E.2d 62 (1980).

That is exactly what transpired in the instant case. Clearly, in this particular case, it became imperative for counsel to call character witnesses, namely the petitioner’s mother and grandmother and possibly others to help mitigate his sentence. However, at the first evidentiary hearing, trial counsel testified that she made a strategic decision not to put his character in issue, but when questioned by habeas counsel she could only refer to the “marijuana issue” that had already been introduced into trial, as a reason to not call any character witnesses. Trial counsel could not provide an explanation why she did not call the petitioner’s mother or grandmother or other witnesses that may not have even known about “the marijuana situation” but could have certainly provided testimony about his good character – the fact that he had no prior criminal record, was raising a little girl as a single parent, and other testimony that may very well have positively impacted the jury’s verdict, particularly on the issue of mercy.

[Clark - Habeas Counsel]: Do you remember what specific facts those witnesses would have testified to that would have called his character into ill repute?

[Codispoti]: Well, we had the marijuana issue that the Court had allowed in and there were several of his friends that we were calling that I guess could not now testify, according to Max, that he was a law abiding citizen because some of these individuals would have

smoked marijuana with him, known something about the marijuana situation.

(1<sup>st</sup> Omn. Hrg. Tr., pp. 35-38). Obviously, trial counsel's own testimony demonstrates that she could have called witnesses such as his grandmother or his young child's babysitter but chose not to for unexplained and unacceptable reasons. At the close of the State's evidence, it would have been obvious to any reasonable and knowledgeable criminal defense attorney that the testimony of the men with the petitioner on the night in question could result in his conviction for first degree murder, unless trial counsel could present evidence to support her theory that 'he didn't do it' or that he acted in self-defense. Yet, other than two quick rebuttal witness, counsel offered no evidence at all to support her theory. Infact, these witness did nothing to support her theory; rather they merely suggested that others may have been involved in the incident by suggesting they intended to "pin it on Max."

Thus, at this point, trial counsel or any other reasonable and prudent criminal defense attorney should have realized that it was crucial that character witnesses be called to help mitigate the petitioner's sentence in the event he was convicted of either crime. Thus, it was totally unreasonable for her to not call character witnesses, because the "marijuana issue" had already been introduced. In fact, Greg Campbell agreed that due to the Rule 404(b) evidence that had already come in about marijuana, there already existed an inference that the petitioner was growing and/or smoking it. (1<sup>st</sup> Omn. Hrg. Tr., p. 108).

Therefore, testimony from any of these character witnesses concerning potential marijuana use by the petitioner would have resulted in minimal prejudice; however, having a jury hear that the petitioner had never been in trouble, and was a good father and son would have been

immensely helpful to his defense.

b. Trial counsel waived the petitioner's opening without telling him.

One of the most glaring and utterly inexcusable errors in the petitioner's trial was his counsel's waiver of his opening statement. This was a man who was charged with first degree murder. He was literally fighting for his life during that trial.

Defense counsel initially deferred the opening until the close of the State's evidence (Trial Tr. 3, Day 2, p. 20). The Court advised the jury that trial counsel had exercised her option to give her opening after the State had presented its evidence, (Trial Tr. 3, Day 2, pg. 38-39). Of course, based on the court's representation, the jury believed and anticipated that the petitioner's trial counsel would give an opening statement.

Conversely, the State delivered a lengthy opening statement and gave the jury a preview of its evidence against the petitioner, essentially branding him a cold-blooded murderer. Despite significant eyewitnesses offered by the State during its case-in-chief, the petitioner's trial counsel advised the Court that she was not going to give an opening and instead would simply put on some brief evidence. (Trial Tr. 4, Day 3, p. 94).

[Ms. Codispodi]: We'll elect to proceed your Honor. I don't intend to make an opening statement. I just have a couple of witnesses. They will be short witnesses and I don't think that they require an explanation.

(Trial Tr. Day 3, p. 95.) The Court, apparently unaware that it had already advised the jury that trial counsel had merely deferred her opening, expressed concern that trial counsel's decision not prejudice her client.

[Court][out of jury's presence]: *If you and your client make that decision [to not deliver an opening], and, of course, whether you would want to make an opening statement is also up to you. You've certainly reserved your right*

and you may do so.

[Ms. Codispoti]: Thank you, Your Honor.

[The Court]: In that regard, the Court will bring the jury in at one o'clock. I would request counsel and the defendant to approach the bench rather than bringing in the jury and going through some academic exercise. *I don't want to tell them that you're going to make an opening statement and you get up and say you're not going to make one, Ms. Codispoti.*

Id., at 94-95(emphasis added). After the parties reconvened and trial counsel again informed the Court that she did not intend to deliver an opening and instead planned to call a couple "of short witnesses" that did not require an explanation, the Court instructed her to "(c)over that specifically on the record before you close your evidence..." Id., at 95. Yet, when the trial resumed, nothing was specifically put on the record and trial counsel merely proceeded to call her first of two brief witnesses. Id., at 96. Thus, the inherent prejudice in her failure to not deliver an opening was exacerbated by the trial court, albeit inadvertently, when it informed the jury that trial counsel merely was deferring her opening and then trial counsel never gave one.

Furthermore, trial counsel's own client apparently did not know that she had not planned to give one, even though it was clear from the Court's remarks that it was a decision the client was entitled to make. (1st Hrg. Tr., pp. 94-95). At both evidentiary hearings, the petitioner denied that trial counsel had ever discussed the waiver of her opening with him.

[Clark]: ... Did she talk that over [waiving the opening] with you before she did it?

[Kitchen]: No. I didn't even know she did it [waive the opening]. That's how much I knew about the law. I didn't even know she waived it.

[Clark]: She never gave you a reason for waiving that opening statement?

[Kitchen]: No.

(1<sup>st</sup> Omn. Hrg. Tr., p. 57). It is also clear from both evidentiary hearing transcripts, that trial counsel could not provide a good reason for waiving the opening and acknowledged it was an unusual decision to not give one. Importantly, upon a review of both evidentiary hearing transcripts, it appears that trial counsel gave conflicting reasons why she deferred and later waived her client's opening statement.

First, during her testimony in the initial evidentiary hearing, counsel offered the following reason why she deferred/waived her client's opening statement.

[Codispoti]: ... the reason that I did it [not give an opening] was because that I think the State wasn't aware that its evidence was contradicting the medical evidence and I didn't want to touch upon that. We only had a few defense witnesses and my strategy was to not give the prosecution the opportunity to realize that and present some type of rebuttal.

[Clark]: The State had closed its case, had it not?

[Codispoti]: I'm talking about rebuttal.

[Clark]: The witnesses you called in your defense case had nothing to say about the medical evidence; is that correct?

[Codispoti]: That's correct.

[Clark]: How can the State rebut that with evidence? They could only rebut what you call in your defense case in chief, correct?

[Codispoti]: That would have been correct.

[Clark]: So I'm having trouble understanding why you were having concern of rebuttal. Can you explain that to me a little more?

[Codispoti][frustrated]: Well, because Mr. White [the prosecutor] would have been the one, I guess. I don't know. I mean, at this point in time I can't tell you what I was thinking back five years

ago.  
*1st Omn. Hrg. Tr., pp. 39-41.*

Later, trial counsel acknowledged that she could have given an Opening without “tipping your hand... to the prosecutor...”

[Clark]: ...Could you have given an opening statement and explained to the jury the presumption of innocence, the burden of proof, the standard of proof beyond a reasonable doubt without tipping your hand or without disclosing to the prosecutor what your theory and evidence would be.

[Codispoti]: Yes, I could have.

Id., at 50. Then, during her testimony at the second evidentiary hearing, counsel contradicted her previous testimony and admitted that the individual she had consulted with regarding the medical evidence [which she earlier claimed contradicted the State’s evidence] “would not have supported the alleged contradiction... and instead “would have agreed with the medical examiner’s presentation of the evidence.” (2<sup>nd</sup> Omn. Hrg. Tr., p. 25-26). Further, counsel agreed that she was aware, prior to trial, that she did not have expert evidence to support her theory regarding the medical evidence.” Id. It was therefore disingenuous for counsel to use this alleged ‘contradictory medical evidence’ as her reason for deferring and eventually waiving the petitioner’s opening when she knew *prior to trial* that this particular theory could not be sustained.

During his testimony, Greg Campbell said that waiver of an opening statement is absolutely one factor to consider in whether counsel was ineffective, and as a cumulative factor can result in deficient performance of counsel.

[Webster]: In your opinion, based on a review, did the waiver of that opening fall below the minimum standards expected of a criminal lawyer, given the circumstances in this particular case?

[Campbell]: In my opinion, given the circumstances of this case and what you knew before you started, knowing that there was going to be people putting Max Kitchen with a bat in his hand near that victim, I would have wanted to say something to the jury as quickly as I could to try to slow down the train that the prosecutor was running. I wouldn't have waived. I don't know – no one comes to mind that wouldn't (sic) have waived, Ms. Webster. It's – you can, you can defer your opening statement. I wouldn't have done it. And I think it, it was a mistake not to give it here. *2<sup>nd</sup> Omn. Hrg.*

*Tr., p. 105-106*

Thus, the fact that trial counsel failed to give an opening and then only presented two brief rebuttal witnesses was highly prejudicial to the petitioner. Absent a cogent theory of defense or effective cross-examination and rebuttal testimony, a powerful opening statement was potentially trial counsel's most powerful tool. Had she given an opening, she could have informed the jury that the petitioner had never been in trouble and attempted to paint a favorable picture of him that would have introduced the petitioner to the jury and allowed them to learn about him as a son, father, friend, hard worker and community member. Instead, the jury heard nothing about this man other than he allegedly used a baseball bat to kill another human being. Trial counsel's inexcusable failure to give an opening statement demonstrated her lack of command and confidence in this case and ultimately did her client a huge disservice, likely resulting in a harsher sentence than he would have received had she done a competent job.

c. Counsel failed to conduct effective cross examinations of the state's witnesses.

Counsel also failed to effectively cross exam the State's witnesses to elicit evidence helpful to her theory. First, she failed to elicit any medical evidence through either Dr. Sabet or Dr. Lopez to support either of her "purported" theories. In fact, it has become evident, from the

second evidentiary hearing testimony, that no medical evidence existed to support any such theory that the injury to the victim's head (or explanation as to how they occurred) was different than where the medical examiner said it was.

Second, although only one eyewitness, Rod Nelson, testified to purportedly seeing the petitioner strike the victim, Andrew Caldwell in the head, counsel seemingly failed to bring that out through her collective cross examinations or convey that to the jury in her closing argument - facts that could have arguably bolstered her theory of defense that Max did not kill Caldwell.( See Supreme Court Supp. Exhibit 1).<sup>10</sup> Another witness, Rod Nelson, also admittedly lied to the State Police and gave a false statement denying his presence at the scene where the altercation occurred, so his credibility was questionable at best.

Counsel also failed to effectively elicit and/or convey to the jury that Carl Starkey, one of the other victims, provided an initial statement to the state police that placed most or all of the other men [Nelson, Lambert, Miller and White] at the scene with the petitioner and co-defendant Mosley when the attack occurred - a disclosure that was entirely inconsistent with the trial testimony of these four men and with the state's closing argument. (Id., pp. 20-26, 30-46) Apparently, trial counsel failed to have the State Police investigation or the statements of Starkey or these other witnesses introduced during the trial, and consequently failed to draw out critical inconsistencies in each of their initial statements to the state police and subsequent testimony at trial. Id. Had she been more thorough, her cross examinations of these witnesses could have considerably bolstered her theory that "Max didn't do it."

Furthermore, three witnesses also testified that they believed Caldwell and Starkey or

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<sup>10</sup> The Supreme Court ordered that the West Virginia State Police Investigative Report be made part of the record.

someone had a gun. (Trial Tr. 3, Day 2, p. 55, Starkey 100-101; p. 136; Tr. 4, Day 3, p. 68).

However, none of this evidence was used to bolster her purported self-defense theory in closing argument, likely because counsel had failed to effectively develop either theory during the trial.

Counsel also failed to establish, through the statements given to the state police, that the petitioner had actually pulled the co-defendant off the other victim because he was concerned he may drown or that the petitioner actually left before the altercation had concluded. (See Supreme Court Supp. Exhibit 3). There was also testimony that there was no intent to kill anybody. Greg Campbell testified during the evidentiary hearing, that these facts, if properly raised in cross examination, could have helped develop a second degree murder case. (Id. at 130).

- d. Counsel failed to discuss bifurcation of trial with the petitioner nor did she even consider it as a vehicle to introduce mitigation evidence on petitioner's behalf.

In 1996, the West Virginia Supreme Court of Appeals for the first time recognized that “(a) trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.” Syl. Pt. 4, State v. LeRock, 196 W.Va., 294, 470 S.E.2d 613. The LeRock Court provides a number of factors a court may consider when determining whether bifurcation is appropriate, including “whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes.” See Id. at Syl. Pt. 6.

In the instant case, trial counsel testified that she did not offer character evidence because she was concerned about the “marijuana issue.”<sup>11</sup> However, she likewise acknowledged that she

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<sup>11</sup> Her testimony about her vague recollection about a previous ball bat altercation involving the petitioner is highly unreliable and highly disputed and inconsistent with her testimony during her first evidentiary hearing. (2<sup>nd</sup> Omn. Hrg. Tr., pp. 16, 67-68)

did not move to bifurcate and did not consider it prior to trial because she did not believe it was necessary. (2<sup>nd</sup> Omn. Hrg. Tr., p.20). She suggests that had she known what she learned before the plea of co-defendant Mosley (information which she does not even recall), she would have considered doing so; however, even if she HAD actually learned something damaging about the petitioner, she would have had ample time, prior to trial, to move to bifurcate the sentencing phase. In fact, given her testimony, she was obligated to do so and failed. (Id.)

Upon examination, Greg Campbell testified that, in his opinion, in a capital case, you need to ask the court to bifurcate and separate the guilt phase from the sentencing stage. (Id. at 110). He also testified that a lawyer has a duty to explain bifurcation to his client. (Id. at 111). It is undisputed in this case that trial counsel for the petitioner did not consider nor discuss bifurcation with him. (Id. at 20; 63.) Mr. Campbell also agreed that under these circumstances, a bifurcated trial was the best way to get in mitigating evidence and that trial counsel “knew everything that she needed to know at the beginning, in my opinion.”

[Campbell]: . . . given her mind set (Codispoti), she should have made a motion to bifurcate the trial so she could have bypassed the problems that she thought she had with marijuana. That would have been a clean way for her to do it, just to make a motion to bifurcate, explain to the Court, you know, you’ve got – “We’re going to open up the door if we offer mitigating evidence. What we would like to do is just not present it in the guilt phase and present it in the sentencing phase,” because – just because you make a motion for a bifurcated trial doesn’t mean you get it. I mean, you have got to convince the Court there’s a real need for it.

(Id. at 114-115).

In a recent trial court opinion, State v. Rodoussakis, a circuit judge granted a habeas petition for ineffective assistance of counsel because trial counsel did not consider or even explain bifurcation to his client. (See Rodoussakis opinion, attached as Exhibit 2 in the August 24, 2005

Omnibus Hearing Transcript). Judge Jolliffe opined that a defendant cannot waive his right to request a bifurcated trial unless he had been told about the option and knowingly waive his right to request one. Thus, had trial counsel for the petitioner considered alternative evidentiary maneuvers to introduce his good character traits and discussed it with him, bifurcation could have been a viable option to introduce available mitigation evidence. Instead, trial counsel not only failed to pursue that option; she failed to even discuss it with the petitioner, effectively waiving his right to pursue it.

- e. Trial counsel failed to raise the issue of mercy in her closing or to object to the State's improper discussion of it in its rebuttal.

Although counsel's performance at the beginning of the petitioner's trial was deficient by waiving her client's opening statement, it was equally or perhaps more deficient in her closing. During this time, counsel for petitioner never mentions mercy. Then, although the prosecutor never mentioned mercy in his initial closing, he turns around in his rebuttal and argues for no mercy. (Trial Tr. 5, Day 6, p. 66-67) Yet, defense counsel never objected to this rule violation. The petitioner's initial Habeas counsel alleged that improper closing argument by the prosecutor was error in his Supplemental Petition. This additional evidence further illustrates its inappropriateness and rule violation. According to Mr. Campbell, this created real difficulties for the petitioner.

[Mr. Campbell]: Then I think what made it all just go to heck in the handbasket for Mr. Kitchen is – and it was an improper closing, it goes against the rule, but there was no objection by anybody - - but then the prosecutor stands up in rebuttal and argues for no mercy. Well, she (Codispoti) never asked for mercy, she never mentioned mercy, there's no mitigation evidence, and the State says "Don't give him any mercy" and then sits down. And that's exactly what

he got: no mercy.

(2<sup>nd</sup> Omn. Hrg. Tr., p. 113)(emphasis added). A review of all trial and post-trial pleadings show that not only did trial counsel for petitioner fail to object during the closing, she also failed to raise it in her Appeal. The petitioner's initial habeas counsel likewise failed to raise this issue. The lack of any opening on the petitioner's behalf, combined with a closing that has a prosecutor arguing for no mercy while the petitioner's own trial counsel sits idly by and fails to raise the issue of mercy or even object to the prosecutor's remarks in rebuttal demonstrate deficient performance that clearly had an impact on the outcome of this trial.

2. Counsel Failed to Develop a Cogent and Consistent Theory of Defense

It is apparent upon a review of the trial and evidentiary hearing transcripts that the petitioner's trial counsel set forth an inconsistent theory of defense, which predictably led to a fragmented trial strategy. This Court has held that "(a) decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be 'so ill chosen that it permeates the entire trial with obvious unfairness.'" Daniel, 195 W.Va. at 328, 465 S.E.2d at 430 (quoting Teague v. Scott, 60 F.3d 1167, 1172 (5<sup>th</sup> Cir. 1995)(quoting Garland v. Maggio, 717 F.2d 199, 206 (5<sup>th</sup> Cir. 1983)). However, in this case, the trial tactics employed by counsel resulted in a trial that was fraught with prejudice and confusion, ultimately resulting in an unfair trial and adversely impacting its outcome.

a. Trial counsel's first theory of defense was inconsistent with her 'self-defense' theory.

First, the petitioner's counsel utilized two inconsistent theories of defense: one theory was

apparently that the petitioner was not the individual who committed murder (1<sup>st</sup> Omn. Hrg Tr., p. 38); another was a theory of self-defense, evidenced through trial counsel's cross-examination of the State's witnesses, pretrial discussions with the Court and the State (about witnesses that counsel had subpoenaed but then never called) and a jury instruction that the Court gave on self-defense at the conclusion of the trial. (Trial Tr., 2, Day 1, pp. 5-6; Tr. 3, Day 2, pp. 55, 100, 136, 147, 185; Tr. 4, Day 3, p. 5. 68; Tr. 5, Day 4, pp. 28-29).

For example, when asked what her theory of defense was during the first evidentiary hearing, trial counsel testified that "... our defense strategy was Max was not the individual that committed the murder ... and our trial strategy ... was ... to try to discredit the State's evidence." (1<sup>st</sup> Omn. Hrg Tr., p. 38). She purportedly attempted to show that the State's evidence contradicted and was contrary to the medical evidence through cross-examination and other evidence. Id., pp. 38-39.

However, counsel failed to develop her theory of defense or trial strategy with respect to the medical evidence presented by the State, even though counsel stated that she found it to be contradictory. (1<sup>st</sup> Omn. Hrg. Tr., p. 40). She acknowledged that she consulted with a [medical] expert [during her pretrial investigation] to determine if the petitioner's version was consistent with the medical examiner's report. Id., at p. 30. Yet, she never called any witnesses during her case in chief regarding the medical evidence, nor effectively questioned Dr. Sabet, the assistant medical examiner who performed Caldwell's autopsy, about these potential inconsistencies. (Trial Tr. 3, Day 2, pp. 119-21). Trial counsel also did not question Dr. Lopez, one of Caldwell's treating physicians, about his injuries. Id., at 125. Furthermore, trial counsel failed to explain her trial strategy to the petitioner or that disproving the State's medical evidence was part of her

theory of defense. (1<sup>st</sup> Omn. Hrg. Tr., pp. 56-7).

[Clark]: ... Did she explain to you what her strategy was going to be in this trial?

[Kitchen]: No. Not that I can remember, no.

[Clark]: Did she explain to you she hoped to disproved (sic) the State's case by medical evidence?

[Kitchen]: No.

[Clark]: Did she ever discuss with you calling an expert witness on your behalf to dispute that medical evidence that she spoke of?

[Kitchen]: No.

Given trial counsel's testimony at the habeas evidentiary hearing and her closing remarks at trial, it is apparent that she planned to rely on the medical evidence to support her theory that the petitioner did not kill Caldwell. Yet, she consulted with an expert but then did not call one and failed to even consult with her client about the meeting or her theory.

Perhaps the most troubling aspect of trial counsel's theory, particular since she opted to defer her opening statement until she heard the State's evidence, was that the testimony of several State's witnesses [who testified that they either saw the petitioner hit Caldwell in the head or saw him with a baseball bat near Caldwell], made it clear early on that it was crucial for her to rebut this evidence if she wanted to convince the jury that "Max was not the individual who committed murder." (1<sup>st</sup> Omn. Hrg. Tr., p. 38). This damaging testimony also required counsel to evaluate the likely outcome if she were unable to rebut it, and should have prompted her to consider as part of her trial strategy ways to mitigate his sentence if he were convicted for murder. Yet, she failed to produce any witnesses or independent evidence to support her theory and did not appear to even

credibly rebut State's witnesses on cross-examination even with helpful facts she had in her possession.

Greg Campbell testified at the second evidentiary hearing that because the petitioner's trial counsel did not give an opening, it was almost impossible to know where she was going nor did he think trial counsel knew where she was going with her theory of defense. (2<sup>nd</sup> Omn. Hrg. Tr., p.100). As a result, he does not think the jury knew where she was going. Id. He also opined that her theories of defense were inconsistent.

[Campbell]: You know, in her case she started off with he didn't – I think that "he didn't do it" is inconsistent with self-defense. Now it would be different if you say, "Well, he's not guilty of murder because of self-defense." There you're not saying that he didn't to (sic) it. You're saying that it was a justifiable act. But that wasn't her theory, as I saw it. That wasn't the evidence either.

Id. at 100-101. Mr. Campbell also testified that the witness statements give someone a pretty good idea of what the State was going to do and infact that was what it did do, and that made 'he didn't do it' a little harder." Id. at 102. Further, despite these alleged "theories," trial counsel never referred or referenced either of them in her closing. (Id. at 125).

Therefore, it is entirely unclear from the record how trial counsel planned to 'effectively' develop this particular theory of defense without more evidence to bolster it. Furthermore, even after she had heard the State's evidence, she failed, as part of her defense strategy, to mitigate the petitioner's potential sentence to life in prison and did not develop or otherwise put on any evidence to support a recommendation of mercy. Thus, this theory of defense was prejudicial to the petitioner because his counsel never gave the jury a clear picture of where she was headed.

b. Trial counsel's 'self-defense' theory was never developed or

explained to the jury.

Although trial counsel testified that her theory of defense was that Kitchen wasn't the individual who killed Caldwell, she also offered a self-defense theory which resulted in a jury instruction on self defense at the close of trial. (Trial Tr. 5, Day 4, pp. 28-29; see also Omnibus Hrg. Tr., p. 38). Also, during a pretrial discussion with the Court, she indicated, over the State's objection, that she may offer character witnesses on both Starkey and Caldwell's propensity to carry guns and to use them as well as theft or theft of guns, depending on the State's case. (Trial Tr. 2, Day 1, pp. 5-6). However, she never called any of these witnesses during the trial, even though at least three of the State's witnesses testified that they heard someone yell there was a gun and/or they were scared that someone had one. (Trial Tr. 3, Day 2, pp. 55, 100-101, 136, 147; Tr. 4, Day 3, p. 68). Furthermore, other than vague references to these witnesses during her closing, trial counsel never presented this theory of self defense as a viable option for the jury to consider in its deliberations. This theory was also entirely inconsistent with trial counsel's theory that Max was not the individual that killed Caldwell. Thus, offering the jury two inconsistent and undeveloped theories undermined both. Consequently, both theories were ineffective as a result of trial counsel's poorly developed trial strategy and was highly prejudicial to the petitioner.

3. Trial Counsel Failed to Effectively Represent The Petitioner At The Appellate Level and Other Critical Stages.

From this Second Supplemental Petition, it is clear that the petitioner's trial counsel essentially failed at all critical stages to effectively represent him. Each deficiency, by itself, may or may not reach the level our courts find unacceptable. However, cumulatively and collectively,

trial counsel's repeated deficiencies in her trial performance not only compromised the petitioner's right to a fair trial but also ultimately and adversely impacted the outcome.

First, the petitioner's right to effective counsel attaches at all critical stages. In addition to pretrial and trial, trial counsel's performance at the appellate stage was deficient in that she failed to present any substantive factual or legal analysis to support the issues raised in her Petition for Appeal before the West Virginia Supreme Court of Appeals. For example, trial counsel failed to identify or present a discussion of the McGinnis decision to bolster her evidentiary objection to the admissibility of the uncharged misconduct against the petitioner.<sup>12</sup> In fact, at the first evidentiary hearing, counsel testified that she did not recall uncovering the McGinnis decision in her research and does not know why she did not bring the case up at the trial level. (1<sup>st</sup> Omn. Hrg. Tr., pp. 44-45). She also acknowledged her failure to rely upon or even cite McGinnis, *supra*, in her Petition for Appeal, even though improper admission of Rule 404(b) evidence was one of her main assignments of error. Counsel remained unfamiliar with McGinnis even at the evidentiary hearing. *Id.*

When questioned about her strategy or tactic in not requesting oral argument in her Petition, she replied, "I guess my strategy was that the brief spoke for itself, the petition spoke for itself ... and that she "guess(ed) she didn't..." believe there was anything to be gained by making an oral presentation. (1<sup>st</sup> Omn. Hrg. Tr., p. 45). The petitioner testified that his trial counsel did not advise or otherwise why she waived his oral argument presentation to the Supreme Court. *Id.*, at 56-57. The petitioner also testified that trial counsel did not advise or explain the implications

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<sup>12</sup> McGinnis requires a trial court to make specific findings that the alleged prior bad act occurred and that the individual against whom the evidence will be used actually committed the prior act pursuant to Rule 404(b). *Syl. pt. 2, McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

of a plea offer by the State to plead guilty to first degree murder with a recommendation of mercy. (1<sup>st</sup> Omn. Hrg, Tr., pp. 54-55).<sup>13</sup>

At a critical pretrial stage, trial counsel failed to conduct a preliminary hearing for purposes of discovery. Petitioner testified that trial counsel advised him to waive the preliminary hearing because he "... stood a chance of losing my bond if I went ahead with the hearing." Id., at 56. Interestingly, counsel had already secured bond for the petitioner prior to the preliminary hearing and he had already been released from jail. Id. The hearing would have also likely given her an opportunity to cross-examine some or all of the witnesses who later admitted they had lied to the State Police in their initial statements.

This lengthy trail of errors demonstrate an unwavering pattern of legal and strategic uncertainties, which most certainly poisoned and prejudiced the petitioner's chances of getting a fair trial and a just outcome, and effectively denied him his constitutional right to a fair trial.

4. Counsel Failed To Make Rule Specific Objections To Introduction of Evidence or Uncharged Conduct and Lacked Knowledge of Applicable Case Law.

Because the prejudicial introduction and use of uncharged conduct (cultivation of marijuana) was unsuccessfully challenged by counsel and discussed at the pretrial one week before trial, and so potentially damaging to the defense's case, trial counsel should have been fully prepared and armed with applicable case law which required the Court to conduct an in camera

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<sup>13</sup> Petitioner testified at his subsequent evidentiary hearing that although he does recall counsel advising him of the plea offer, but does not believe she explained it in relation to the evidence in the case. (2<sup>nd</sup> Omn. Hrg. Tr. p. 61).

hearing and determine, by a preponderance of evidence, that the bad act occurred and that it was committed by the petitioner. Despite this legal mandate, this did not occur. Instead, trial counsel merely made an objection. She never directed the trial court State v. McGinnis, a landmark case which spells out what must occur before 404(b) evidence can come in. As a criminal defense attorney in a first degree murder case, trial counsel should have but obviously lacked knowledge or command of a case that required proof that the bad act had occurred and that the petitioner had committed it. This did not occur and the evidence - the alleged cultivation of a marijuana field - came in as Kitchen's motive and was repeatedly and improperly used by the State throughout the trial and closing argument.

When Hank Mosley, the co-defendant, entered a plea to cultivation of marijuana, the State did not offer any evidence to establish the actual existence of a marijuana field or the location where it was cultivated. Yet, the trial court improperly allowed the plea to come in as evidence in Kitchen's trial. At the second evidentiary hearing, Greg Campbell testified that introduction of the 404(b) evidence and the plea improperly polluted and messed up the trial. (2<sup>nd</sup> Omn. Hrg. Tr., p. 103-104).

While Mr. Campbell did not specifically opine that trial counsel's failure to make a rule specific objection was deficient, he did unequivocally agree that its admissibility was extremely damaging to the petitioner. Thus, if trial counsel been more knowledgeable and confidence about this evidentiary rule, she could have been potentially been more persuasive in objecting to challenging the trial court's ruling and preserving a stronger record for appellate review.

5. Cumulative Errors Committed by Trial Counsel Substantially Prejudiced Kitchen and Likely Impacted the Outcome.

Even if this Court does not find that any individualized error is sufficient to grant the

petitioner relief, it should be soundly convinced that the “cumulative effect of trial counsel’s performance denied him a fair trial.” *Accord Daniel*, 195 W.Va. at 322, 465 S.E.2d at 424. The *Daniel* Court recognized that a “showing of prejudice” can be made by “... demonstrat(ing) that the cumulative effect of counsel’s individual acts or omissions was substantial enough to meet *Strickland*’s test.” *Daniel*, at note 7 (quoting *Williams v. Washington*, 59 F.3d 673, 682 (7<sup>th</sup> Cir. 1995)).

From the outset of this case, trial counsel failed to effectively represent the petitioner at critical stages of the proceedings. She waived his preliminary hearing, which is designed to protect and promote a defendant’s rights; failed to confer with petitioner and explain certain decisions that he was entitled to make. It is also clear that counsel did not set forth a credible or consistent defense or trial strategy, instead offering two entirely inconsistent theories of defense. She did not give an opening statement, which she originally just deferred, and likewise apparently failed to: consider or discuss bifurcation with the petitioner; effectively cross-examine the State’s witnesses, discuss issue of mercy with petitioner nor raise it during the trial or object to the State’s rebuttal reference to it; and call any character witnesses that could have, at a minimum, helped mitigate his sentence at the penalty phase either on the issue of mercy; or a lesser charge.

These legal deficiencies stripped petitioner of a fair trial. In conjunction with other evidence in the record below, Greg Campbell testified that based on his review of the trial record, a competent defense attorney should have been able to develop and have a decent shot at a second degree murder conviction. Thus, this Court should be able to confidently examine and distinguish this instant case from *Shelton* [citations omitted] to conclude that “there was a reasonable probability that but for counsel’s alleged errors the outcome of the petitioner’s challenge...” would

have been different. Accord Daniel, at 326, 465 S.E.2d at 428.

**II. THE LOWER COURT ERRED IN DENYING KITCHEN'S HABEAS CLAIM THAT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY RULING THAT THE TRIAL COURT ACTED PROPERLY WHEN IT ALLOWED THE INTRODUCTION OF THE CO-DEFENDANT'S GUILTY PLEA AND OTHER RULE 404(B) EVIDENCE OF PRIOR UNCHARGED MISCONDUCT AGAINST KITCHEN AND BY FINDING THAT THE TRIAL COURT PROPERLY CONDUCTED AN *IN CAMERA* HEARING PRIOR TO ITS ADMISSION AND GAVE APPROPRIATE LIMITING INSTRUCTIONS**

The Habeas Court erroneous found that “(t)he trial court did not err in allowing evidence regarding Petitioner’s alleged possession and/or cultivation of marijuana” and that “(t)he hearing held by Judge O’Briant on May 26, 1998, adequately addressed the presentation and use of evidence related to cultivation of marijuana.” The habeas court found that “(t)he probative value, particularly with regard to motive, was substantial, while the prejudice was low, given the nature of the total case.” (Final Habeas Order, p. 2, ¶ 4, p. 11, ¶ 11). It ignored in its findings and conclusions the important fact that trial court did not make findings to determine that the alleged act occurred or that it was committed by Kitchen, in direct contravention of State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516. The habeas court also improperly found that the “trial court substantially complied with the dictates of Rule 404(b)...at the pretrial hearing held on May 28, 1996.” (Id.,at ¶ 4), p. 4, ¶ 8).

First, it is undisputed that the trial court did not make the requisite findings to support the admissibility of the alleged uncharged misconduct of Kitchen, which the State exclusively relied upon as Kitchen’s “motive” for the crime of first degree murder. Specifically, the trial court improperly allowed the State to introduce evidence of the theft of marijuana by the alleged victims, Starkey and Caldwell, from the accused prior to the alleged crime, to show Kitchen’s motive in the commission of the crime against Caldwell. (See 6/3/96 Court Order). Despite defense counsel’s objection that the evidence should not be admitted due to its prejudicial effect,

the Court allowed the introduction of such evidence through the testimony of Starkey, Mosley and White, and found the evidence was material on the issues of motive, intent, deliberation, elements of the crime of first degree murder and that the probative value outweighed the prejudicial effect. (Pretrial hrg. Tr., 5-28-96, at pp. 5-19). However, the Trial court failed to hold the mandatory in camera hearing to determine by a preponderance of evidence whether or not the collateral crime, i.e. cultivation of marijuana, actually occurred or that Kitchen committed such act pursuant to W.V.R.E. 404(b) and pursuant to State v. McGinnis, supra. At no time did the State offer extrinsic evidence or otherwise establish the actual existence of a marijuana field or that Kitchen committed this unlawful act. In fact, the pretrial hearing transcript speaks for itself and demonstrates that the trial court failed to undertake the required finding by a preponderance of evidence that the other acts occurred.

Consequently, the State exclusively relied upon this alleged collateral and uncharged crime of the accused to establish "motive" in its case against Kitchen, alleviating its need to prove premeditation or deliberation - essential elements of first degree murder. The State referred to the cultivation and alleged theft of marijuana in its opening statement, throughout its case in chief and most significantly in its closing argument when it made improper usage of the uncharged misconduct by referring to the cultivation of marijuana as a "felony" and specifically to Kitchen's guilt with respect to this crime. (Trial Tr. 3, Day 2, pgs. 33, 36; Tr. 5, Day 4, pg. 34).

The West Virginia Supreme Court of Appeals, influenced by Huddleston v. United States, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed. 2d 771 (1988), has held:

Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v. Dolin, supra. After hearing the evidence and argument of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred

and that the Defendant committed the acts. *If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or the Defendant was the actor, the evidence should be excluded under Rule 404(b).* If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 and conduct the balancing required under Rule 403. If the trial court is then satisfied that Rule 404(b) evidence is then admissible, it should instruct the jury on the limited purpose for which such evidence should be submitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence. *Syl. pt. 2, State v. McGinnis*, 193 W.Va. at 147, 455 S.E.2d at 527-28 (emphasis added).

Likewise, in *State v. Larock*, 196 W.Va. at \_\_\_, 70 S.E.2d 629-30 (W.Va. 1996), the court stated:

A standard of review for the trial court's admission of evidence pursuant to Rule 404(b) involves a three step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review whether the trial court found the evidence was admissible for a legitimate purpose. Third, we review for error the trial court's conclusions that the other acts evidence is more probative than prejudicial under Rule 403. (emphasis added).

Thus, these case make clear that the Court must make these requisite findings or error is committed. If the court fails to complete the first part of the analysis, then the inquiry should end and the evidence should be excluded. Accord McGinnis, Syl. pt. 2. The McGinnis court stressed that without these factual findings by a court, the accused is at unfair risk of prejudice:

To expose the jury to Rule 404(b) evidence before the trial court has determined by a preponderance of the evidence that the acts were committed and that the defendant committed them would in our view subject the defendant to an unfair risk of conviction regardless of the jury's ultimate determination of these facts.

McGinnis, 193 W.Va. at 158, 455 S.E.2d at 527. Further, in holding "that the admissibility of Rule 404(b) evidence must be determined as a preliminary matter under Rule 104(a) rather than

Rule 104(b),” it relied upon and adopted the reasoning set forth in People v. Garner, 806 P.2d at 372, n.4, stating, “[g]iven the clearly recognized potential for prejudice inherent in other-crime evidence, its (sic) seems more reasonable to us ... to require the trial court to be satisfied by a preponderance of the evidence of the conditionally relevant facts before permitting” the jury to hear them.” Id., (quoting Garner, 866 P.2d 366 (Colo. 1991)). The McGinnis Court further held that unless these preliminary findings are made, there is no need “to further consider whether the proffered evidence is logically relevant and whether the probative value of other-crime evidence is outweighed by the danger of unfair prejudice.” Id. (quoting Garner, 806 P.2d at 372, n.4)). Thus, under McGinnis, “(i)f the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b).” Id. at 159, 455 S.E.2d at 516.

In McGinnis, the State requested admission of collateral crime evidence against Lyle McGinnis, who was accused with the murder of his wife, arguing that it “would show motive...” Id., at 160, 455 S.E.2d at 529. In reversing and remanding McGinnis’s first degree murder conviction due to improper admission by the trial court of 404(b) evidence, this Court noted “... the [prosecutor’s] extensive use of collateral evidence...” against McGinnis. It also reasoned that “(t)he excessive zeal of the Prosecutor in introducing evidence of collateral crimes can and has affected the accused’s right to a fair trial.” Id. at 164, 455 S.E.2d at 533 (quoting State v. Thomas, 157 W.Va. 640, at 656, 203 S.E.2d at 456)).

Similarly, in the instant case, the State relied extensively upon hearsay statements from a co-defendant and two other men who were present at the scene and gave false statements to law enforcement, to bolster its theory – that Kitchen conspired to assault Starkey and kill Caldwell

because they were stealing his pot. Specifically, the State was permitted to admit the following statement from Starkey, one of the alleged victims.

[State]: During the time of these incidents, was anything said in your presence by either Mr. Mosley or Kitchen with regard to why they were hitting you and Mr. Caldwell?

[Starkey]: They said we just stole their pot.

.....

[State]: How many times was that stated, Mr. Starkey, in your presence?

[Starkey]: I'd say three times.

[State]: And for the record, did you steal any kind of marijuana up there?

[Starkey]: No, sir.

(Trial Tr. 3, Day 2, pp. 87-88). The State also elicited testimony from White, who stated that Kitchen and Mosley “grew dope up the hollow.... and said it was the best they ever did....” (Trial Tr. 4, Day 3, pp. 8-9). Mosley then testified that “he [Kitchen] was talking about whipping their ass [Starkey and Caldwell] for stealing our weed.” *Id.* at pp. 43-44. Mosley also testified that he plead guilty to cultivation of marijuana. *Id.*, at 58.

Even though the State never provided any extrinsic evidence to support these allegations or demonstrated that the enterprise [marijuana field existed], it was permitted to poison the jury with constant references to it during its opening statement, direct examination of its witnesses and in its closing. Specifically, in the very beginning of its opening statement, the State used this evidence to improperly influence the jury:

[State]: What was their motive for this? The state's evidence will show that their motive as their idea that Carl Starkey and Andrew Caldwell were stealing marijuana that belonged to them. The State will show to you that this is the motive for why Mr. Kitchen clubbed Andrew Caldwell to death.

(Trial Tr. 3, Day 2, p. 33). The State also referred to the statements that Jake White and Carl

Starkey later testified to about the marijuana. Id. at 36.

During the State's closing argument to the jury and despite the court's previous limiting instructions, the prosecutor repeatedly referred to and made improper prejudicial use of the uncharged misconduct of Kitchen to inflame the jury, referring to Kitchen as "guilty of the crime of cultivation of marijuana.... and calling the act a *felony*."

PROSECUTOR WHITE [closing argument]: There was some mention made with regard to calling the police with regard to someone stealing pot [referring to testimony that Max Kitchen wanted to call the police on Starkey and Caldwell]. Do we really believe that anyone *who is guilty of the crime of cultivation of marijuana, a felony, is going to call the police and say hey, somebody's stealing my dope?* The State would submit to you that is not within the realm of possibility. (Trial Tr. 5, Day 4, p. 9)

(emphasis added).

Clearly, without admission of this evidence, the State lacked "motive" for the crime, and the record lacks sufficient support for Kitchen's convictions of conspiracy or first degree murder. It is also clear from the trial record that the trial court failed to engage in the first step of the McGinnis analysis by not determining whether sufficient evidence existed to demonstrate that the prior acts occurred. Absent from the record is any extrinsic proof that a marijuana field even existed or that it was cultivated by Kitchen. Even the statements elicited from the witnesses fail to disclose any indicia of proof that Kitchen was even in possession of marijuana and certainly none that demonstrates he was cultivating it.

In State v. LeRock, this Court emphasized the importance of McGinnis, stating "(t)his Court takes seriously claims of unfair prejudice ... and in McGinnis we recognized the prejudice

inherent in admitting evidence of other crimes.”, LeRock, 196 W.Va. 294, 311, 470 S.E.2d 613, 630 [internal citations omitted]. Thus, if this Court does not embrace the policy and purpose behind Rule 404(b) and reverse this conviction, then it stands to reason that future trial courts will have the evidentiary authority to permit evidence to come in simply because the person says it happened. It must draw the line here and reverse the conviction because Kitchen’s fundamental rights to a fair trial were denied with the admissibility of this highly prejudicial and improper evidence against him.

Although co-defendant Mosley was never charged with this felony offense of marijuana cultivation, he entered a guilty plea to it just three days before Kitchen’s murder trial commenced. Upon habeas review, the habeas court failed to issue specific conclusions of law on this alleged error, and erroneously found that “(t)he evidence of pleas of co-defendants did not serve to enhance their credibility. (Final Habeas Order, p. 6, ¶ 17). Specifically, it found that “(t)he introduction of guilty pleas of co-defendant was not error, and would not bolster the credibility of the testimony of co-defendant. It would very possibly substantially reduce the credibility of said co-defendant’s testimony.” Id., p.2, ¶ 17. Thus, it is not entirely clear from the Court’s Order what legal basis it used to conclude the instructions were proper since current case law does not appear to base reversible error on whether the co defendant’s guilty plea did or did not enhance their credibility for purposes of a jury’s evaluation of the evidence.

Prior to Mosley’s testimony, the trial court ruled that “Mr. Mosley’s guilty pleas would be admissible where that testimony is offered not for the purpose of proving the guilty of Kitchen, but on the issue of Mr. Mosley’s credibility.” (May 31, 1996 Pretrial T., pp. 39-40). The Court further opined that if the State offered such evidence, he would give a limiting instruction that

explained the limited purpose of its admissibility. *Id.*

In reaching its ruling, the trial court referred to and reportedly relied upon this Court's holdings in State v. Caudill, *supra*, and State v. Farmer, *supra*. *Id.* However, both cases limit the admissibility of an accomplice's testimony regarding his guilty plea only to those crimes also charged against the defendant:

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

*Syl. pt. 2, State v. Farmer*, 191 W.Va. 372, 445 S.E.2d 759 (1994)(quoting *Syl. pt. 3, State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 748 (1982))(emphasis added). Thus, the trial court improperly extended Farmer and Caudill beyond what the Supreme Court contemplated in these two decisions. In short, the admission of Mosley's testimony regarding his plea to felony marijuana cultivation, a crime which Kitchen was never charged with committing, unquestionably goes beyond the bounds of permissible evidence contemplated by the West Virginia Supreme Court.

At trial, Mosley testified about the events that transpired on October 1, 1995, including acts he committed and that prompted his guilty plea to malicious assault and conspiracy to commit malicious assault on Starkey. *Trial Tr. 4, Day 3, pp. 42-62*. Mosley also told the jury that he pled guilty to cultivation of marijuana, but neither he nor the State offered testimony or evidence that described acts he committed to support his guilt of this particular crime. *Id.* Nor was the jury ever told that he was not initially charged with the cultivation of marijuana and

instead pled guilty to it by “information” only three days before Kitchen’s trial began. Id.

After Mosley’s testimony, the court exacerbated its previous error created by its improper admission, by giving a confusing cautionary instruction that was inconsistent with Caudill and Farmer and which resulted in reversible error. Specifically, despite the Court’s pretrial ruling to limit the admissibility of Mosley’s testimony regarding his guilty plea to the marijuana charge to the issue of Mosley’s credibility, the instruction arguably opened the door to multiple uses and interpretations by the jury:

THE COURT: ... Members of the jury, you have heard evidence that the witness, James Hank Mosley, has plead guilty to crimes which arose out of the same events for which the defendant is on trial here and to the cultivation of marijuana. You are reminded that Max Paul Kitchen is not charged in this indictment with the cultivation of marijuana. Those pleas are not evidence that the defendant on trial is guilty or that the crime charged in the indictment was committed by Max Paul Kitchen. You may consider this witness’ guilty plea only for the purpose of determining how much, if at all, to rely upon his testimony. The guilt or innocence of the defendant on trial must be determined solely by you, solely by the evidence introduced in the trial of this case. (Trial Tr. 4, Day 3, pp. 62-63).

The Court, however, did not confine its cautionary instruction to the one set forth above; instead, it continued with another four paragraph instruction which created confusion and inconsistencies and to which defense counsel objected:

THE COURT: Once again, you have heard evidence concerning the alleged conduct or acts of the defendant concerning the cultivation or possession of marijuana which are not charged in the indictment in this case. You are again instructed that such evidence is admitted for a limited purpose only, and it may be considered by you only whether deciding whether a given issue or element relevant to the present charges has been proven. In this instance, the evidence may be considered only for the purpose of determining whether the State has proven and

established a motive of the defendant and whether there was any preparation and planning of the acts charged in the indictment. The defendant is not now being tried for any of the specific acts to which this evidence relates, that being the cultivation or possession of marijuana, and you should bear this fact definitely in mind. Such evidence was admitted and should be considered by you only so far as in your opinion it may go to show the motive of the defendant in connection with the offenses of murder and malicious assault and with which he is charged in this indictment, and it may go to show either there was preparation and planning of the acts in connection with the offenses of conspiracy to which he is charged in this indictment.

Id. at p. 63. Because this instruction is almost impossible for a reader with the benefit of repeated review and scrutiny to understand, it is logical to assume that a jury had even more difficulty understanding this instruction that was read to it only once. A cursory examination of the instruction reveals that the Court was telling the jury it could consider the testimony of evidence offered by Mosley for different reasons, and it is not clear at all that Mosley's testimony with respect to his guilty plea to the cultivation of marijuana was to be considered only on the issue of Mosley's credibility. In fact, the Trial court never even used the word "credibility" in the entire instruction.

The West Virginia Supreme Court has stated that "(a) guilty plea made by an accomplice cannot be used as an attempt to show guilt by association." Caudill, 170 W.Va. at 81, 289 S.E.2d at 755. The concern [where the testimony regarding the accomplice's plea is a small part of his testimony] is "that the jury may misinterpret the purpose for which the testimony is offered. That is why federal courts require a limiting instruction." Id. Furthermore, "(a) jury instruction is erroneous if it has reasonable potential to mislead the jury as to the correct legal principle or does

not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless.” State v. Miller, 197 W.Va. 588, 607, 476 S.E.2d 535, 554 (1996); See also State ex rel Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975). Accordingly, it is entirely possible that the jury could have understood this muddled instruction to mean they could consider Mosley’s testimony regarding his guilty plea to marijuana cultivation for a number of reasons and that it was not just relevant to Mosley’s credibility. Under Caudill and Farmer, *infra*, failure to give a proper limiting instruction is reversible error. By improperly admitting evidence of an accomplice’s guilty plea to a crime to which Kitchen was never charged and giving a limiting instruction that was misleading and confusing to the jury effectively denied Kitchen’s constitutional rights to a fair trial and created unfair and unconstitutional prejudice.

**III. THE LOWER COURT ERRED BY FAILING TO MAKE FINDINGS REGARDING THE TRIAL COURT’S FAILURE TO INSTRUCT THE JURY ON MISLEADING AND PREJUDICIAL REMARKS MADE BY THE PROSECUTOR IN CLOSING ARGUMENT AND BY RULING THAT THOSE REMARKS WERE NOT IMPROPER**

The Habeas Court erroneously found that “(t)he trial court did not err by not instructing the jury to disregard remarks of the Prosecuting Attorney in closing argument for the reason that they were based on direct evidence, and if the same remarks were improper, they were harmless.” (Final Habeas Order, p.2, ¶ 6).

In *Syl. Pt. 2* of State v. Caudill, this Court held ““(w)here the prosecution improperly introduces evidence of other criminal acts as part of the *res gestae* or same transaction beyond that reasonably required to accomplish the purpose for which it is offered, and makes remarks concerning such other crime evidence in argument for the purpose of inflaming the jury, the

conviction will be reversed on the ground that the defendant was denied the fundamental right to a fair trial.” *Syl. pt. 2, Caudill, infra*, (quoting *Syl. pt. 3, State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978)). Furthermore, in *Syl. pt. 7 of State v. Beckett*, the Court held that “(a) judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which *do not clearly prejudice the accused or result in a manifest injustice.*” *Syl. pt. 7, Beckett*, 172 W.Va. 817, 310 S.E.2d 883, (quoting *Syl. pt. 5, State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982))(emphasis added). Thus, these cases clearly demonstrate that an accused’s fundamental rights to a fair trial are violated when a prosecutor’s improper remarks in argument are used to inflame a jury and result in clear prejudice and a manifest injustice to the accused.

In the current case, it is undisputed that Kitchen was never charged with cultivation of marijuana. It is also undisputed that the Court failed to conduct an in camera hearing to determine by a preponderance of the evidence that a marijuana field was ever even cultivated or that this act was committed by Kitchen. Nor did the State ever offer any extrinsic evidence that this act occurred or that it was committed by either Kitchen or Mosley. The only evidence of this act is a guilty plea entered by co-defendant Mosley three days before Kitchen’s trial commenced, and which resulted in the dismissal of the murder charge against Mosley in exchange for his testimony against Kitchen. However, neither Mosley’s guilty plea by way of information or his testimony extracted evidence of this marijuana field.

Yet, during his closing argument to the jury, the State repeatedly referred to and made improper prejudicial use of the uncharged misconduct of Kitchen to inflame the jury.

Prosecutor White [closing argument]: There was some mention made with regard to calling the police with regard to someone stealing pot [referring to testimony that Max Kitchen wanted to call the police on Starkey and Caldwell]. Do we really believe that

*anyone who is guilty of the crime of cultivation of marijuana, a felony, is going to call the police and say hey, somebody's stealing my dope?* The State would submit to you that is not within the realm of possibility.

(Trial Tr. 5, Day 4, p. 39)(emphasis added). Clearly, the prosecutor intended these blatantly improper remarks to inflame the jury and prejudice Kitchen.

This Court has held that a prosecutor must keep within the evidence proven at trial and may not make statements to improperly influence, prejudice or mislead the jury. See State v. Kennedy, 162 W.Va. 244, 249 S.E.2d 188 (1988). However, by pronouncing Kitchen “guilty” of the “felony” crime of cultivation of marijuana, an uncharged act, the State attempted to and likely succeeded in improperly prejudicing the jury against Kitchen. Further, the State improperly called into question Kitchen’s character with the proclamation of Kitchen’s guilt for the cultivation of marijuana. With its reference to the alleged act as a “felony” committed by Kitchen in its closing argument, the State violated the mandates of the McGinnis decision. The McGinnis Court specifically urged courts to avoid such prejudicial references by recommending that a court’s Rule 404(b) limiting instructions avoid words such as ‘criminal,’ ‘crime,’ or ‘offense.’ See McGinnis, note 17, at 529. However, the State’s prosecutor violated the principles espoused in McGinnis by not referring to the uncharged conduct as a felony and stating that Kitchen was guilty of committing the act, a blatantly false and misleading representation that was exactly opposite from what the Court had instructing in his previous limiting instruction. It is evident from the specific context of the prosecutor’s comments referenced above, that he was not referring to motive, deliberation or preparation of the alleged crime; instead, he was simply using these inflammatory statements to reintroduce and reinforce the specter of drug cultivation and usage to hammer home that Kitchen was a criminal and felon.

The Trial court's failure to take curative measure to correct the State's improper remarks or admonish the jury presented an "aggravating circumstance that exacerbated the prejudice to the defendant." U.S. v. Mitchell, 1 F.3d 235, 243, note 6 (4<sup>th</sup> Cir. 1993)(finding plain error and reversing conviction where prosecutor repeatedly misrepresented to jury in closing and throughout trial that defendant's brother had been convicted for involvement in drug conspiracy); see also State v. Myers, *overruled on other grounds*, 159 W.Va. 253, 262, 222 S.E.2d 300, 306 (1976)("if the remark has the potential of prejudicing the defendant... the court, in the existence of its discretion, should do everything reasonably possible to obliterate . . . prejudicial influence."). Instead, the Court remained silent when the State made these improper and highly inflammatory remarks, perpetuating this manifest injustice and denying Kitchen a fair trial. See State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Accordingly, this Court should honor the court's long-standing requirement of "fundamental fairness" which was abandoned by the State's improper remarks and Trial court's failure to act to preserve Kitchen's constitutional rights to a fair trial, and reverse Kitchen's convictions.

**IV. THE LOWER COURT ERRED BY RULING THAT THE TRIAL COURT'S REFUSAL TO DISQUALIFY TWO JURORS WITH STRONG TIES TO THE PROSECUTOR WAS PROPER AND CONSTITUTIONALLY PERMISSIBLE.**

The habeas court erred by ruling that "(t)he trial court did not abuse its discretion in not striking jurors for cause after making inquiry of the jurors that they could render an impartial decision...." Final Habeas Order, p. 4, ¶ 6. Specifically, the trial court committed reversible error when it failed to disqualify, for cause, two prospective jurors, Carol Melton ("Melton"), a neighbor and personal friend of the State's prosecutor, Jerry White, who also served as her son's

ball coach; and Annie Hall (“Hall”), a relative by marriage to Benny Adkins, the prosecutor’s investigator who was present at counsel table through Kitchen’s trial and who assisted with the investigation of this case. Consequently, Kitchen was forced to utilize two (2) pre-emptory challenges to remove these jurors from the panel.

It is well-recognized that “(t)he right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14 of the West Virginia Constitution.’ *Syllabus point 4*, (in part) State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559 (1981).” *Syl. pt. 2*, State v. Varner, 212 W.Va. 532, 575 S.E.2d 142, (quoting *Syl. pt. 4*, in part, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994)); *See also* U.S.C.A. Const. Amends. 6, 14; and W.V. Const. Art. 3, § 14)).

In recognition of these state and federal constitutional protections, the West Virginia Legislature has provided that persons accused of felonies are entitled to jury panels of “twenty jurors, free from exception.” *W.Va. Code* § 62-3-3. Furthermore, the West Virginia Supreme Court of Appeals has clarified this fundamental right in holding that “a criminal defendant in a felony trial is entitled to exercise six pre-emptory strikes against a panel of twenty jurors who are free from challenge for cause.” State v. Wilcox, 169 W.Va. 142, 144, 286 S.E.2d 257, 259 (1982). Thus, “...it is reversible error to deny a valid challenge for cause even if the disqualified juror is later struck by a preemptory challenge.” *Id.*; *See also* State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981); State v. West, 157 W.Va. 209, 217, 200 S.E.2d 859, 864-65 (1973).

The trial court refused to grant defense counsel’s motion to strike for cause prospective jurors Carol Melton and Annie Hall. (See Trial Tr. 2, Day 1, pp. 117-120, 101-103). Defense counsel’s first objection arose when she learned that Hall was related to Benny Adkins, the

prosecutor's investigator, during general voir dire:

THE COURT: Are any of you related by *blood or marriage* to either Max Paul Kitchen or to any of the attorneys that I have identified or to Mr. Adkins, Benny Adkins, that being Mr. White's investigator?

MS. HALL: Benny Adkins is my sister's son-in law.

(Trial Tr. 2, Day 1, pg. 51). Although later in individualized voir dire Hall stated she believed she could fairly hear the evidence and act as a fair and impartial juror Id. at 117-119, defense counsel raised the following motion to strike.

MS. CODISPOTI: Your Honor, I believe that based on the fact that she is related to Mr. Adkins' family, that puts her in too close of a situation as far as this case is concerned, and even though she feels she can fairly hear and determine it, or she has testified as such, I feel that the close connection to the prosecutor's office is a problem and that she should be excused.

THE COURT: Mr. White?

MR. WHITE: Your Honor, Mr. Adkins isn't scheduled to testify in this case. He's basically – The investigating officer in this case was Trooper Schoolcraft, and of course Mr. Adkins is here for his ears more than anything else and because sometimes I don't hear very well and need another hand, but I don't believe that is – Its not a blood relationship and she is a relative of his wife's family, I think. I don't believe that's an automatic ground for excuse for cause.

THE COURT: The motion to strike for cause will be overruled. At this point in time Mr. Adkins is not scheduled to be a witness, and I don't believe the familial to be disqualifying, because she's not related to somebody that works for the Prosecutor's staff with this degree of relationship. She may return to the general panel.

(Trial Tr. 2, Day 1, pp. 117-120).

Melton, another prospective juror, was questioned more extensively by the Court when she disclosed that the prosecutor, Jerry White, represented her with a legal matter on her house, and

that their families [Whites and Meltons] had a personal relationship because they were next door neighbors and that White was her son's ball coach. (Trial Tr. 2, Day 1, pp. 56-58, 101). The following colloquy occurred:

THE COURT: Ms. Melton, you indicated that Mr. White had previously done some legal work for you and he's currently your next door neighbor. Do you believe that that situation would prevent you from fairly and impartially listening to the evidence in this case and deciding the case solely on the evidence that comes out in the courtroom and on the law that the Judge tells you would apply?

MS. MELTON: No, I don't.

THE COURT: In other words, you believe if the State had failed to prove its case, that you could vote for not guilty?

MS. MELTON: Yes.

THE COURT: Even though Mr. White serves your – I assume that not only is he your next door neighbor, that you all have a personal relationship between the families. Is that correct?

MS. MELTON: Right. He's also my son's ball coach.

(Trial Tr. 2, Day 1, pp. 101-103). Mr. White subsequently acknowledged, out of Melton's presence, that she was a friend and he would not object if the Court excused her but believed she sincere. Thereafter, the trial court overruled defense counsel's motion to strike Melton for cause.

Id.

From the record it appears that the trial court overruled defense counsel's motion to strike Melton and Adkins based on their assurances that they could be fair and impartial. However, this Court has cautioned trial courts to "resist the temptation to 'rehabilitate' prospective jurors simply be asking the 'magic' question to which jurors respond by promising to be fair when all the facts

and circumstances show that the fairness of that juror could be reasonably questioned.” O’Dell v. Miller, M.D., 211 W.Va. 285, at 565 S.E.2d 407, 412 (2002)(quoting, in part, *note 1*, Walls v. Kim, 250 Ga.App. 259, 259, 549 S.E.2d 797, 799 (2001)). Instead, “(a) trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in the courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury.” Id., (quoting Id.).

Here, the trial court had two jurors with close ties with the State’s prosecutor and his law enforcement staff. Those facts alone were sufficient to warrant dismissal for cause. In fact, the Court did dismiss for cause prospective juror Number 31, Barbara Clark, because her *daughter in-law worked for Prosecutor Jerry White*. (Trial Tr. 2, Day 1, p. 53)(emphasis added). In that instance, both defense counsel and the prosecutor believed that Carper’s close ties to the prosecutor’s office created grounds to excuse Ms. Clark as a juror, and the trial court excused her upon defense counsel’s motion without even conducting individualized voir dire. Id. at 70-71. Yet, it refused to dismiss for cause Hall or Melton, who also had close ties to the prosecutor and his staff investigator who was actively involved in the prosecution of Kitchen’s case.

The West Virginia Supreme Court of Appeals has found reversible error where trial courts failed to disqualify jurors where similar relationships existed. For example, in State v. Payne 167 W.Va. 252, 310 S.E.2d 883 (W.Va. 1993), the Court held that close friends of the prosecutor should be disqualified as jurors. In Payne, the trial court denied defense counsel’s motion to strike a juror when voir dire “revealed that one juror was a close friend of the special prosecutor and his wife and that the juror’s husband was the Democratic nominee for sheriff of Mercer County.” Id. at 257-58. The Court found that the trial court’s refusal to strike the prospective

juror was error based on the ‘tenuous relationship’ standard in State v. West, 157 W.Va. 209, 200 S.E.2d 859 (1973). In West, the Court held that “...when the defendant can demonstrate even a *tenuous relationship* between a prospective juror and any prosecutorial or enforcement arm of State government, defendant’s challenge for cause should be sustained by the court....” Payne, 167 W.Va. 252, at 258(quoting State v. West, 200 S.E.2d at 866)(emphasis added)).

In the instant case, Melton, at some point shared an attorney-client relationship with Jerry White, the prosecutor, who was also her next door neighbor and coach of her son’s ball team. With that type of “tenuous relationship” evident from voir dire, the court should have disqualified her on the basis of such a close relationship with the prosecutorial arm of government. *Accord Payne and West, infra.*

Regarding Hall, this Court has held that “a prospective juror’s consanguineal, marital, or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification *unless the law enforcement official is actively involved in the prosecution of the case.*” *Syl. pt. 3*, in part, State v. Beckett, 172 W.Va. 817, 310 S.E.2d 883. It is undisputed that Hall’s blood niece was married to Benny Adkins, an employee of the prosecutor who was also actively involved in the underlying case, even sitting at the prosecutor’s table throughout the entire trial. It was therefore entirely disingenuous of Mr. White to minimize Mr. Adkins’ role in the case. His presence speaks for itself and it was evident from the record that Mr. Adkins assisted with the interview and subpoenaing of many of the State’s witnesses. The holding in the Beckett case alone justified disqualification of Hall as a juror due to the employment status of Benny Adkins. *Accord Beckett.*

As this Court has held, “... it is reversible error to deny a valid challenge for cause even if

the disqualified juror is later struck by a pre-emptory challenge.” State v. Wilcox, 169 W.Va. 142, 144, 286 S.E.2d 257, 259. Because the Trial court failed to strike these two jurors for cause, defense counsel was forced to exercise two of her six pre-emptory strikes. Therefore, the Court effectively denied Kitchen his federal and state rights to a fair trial and committed reversible error. For these reasons, the Habeas Court’s ruling was clearly erroneous.

**V. THE LOWER COURT ERRED IN DENYING KITCHEN’S CLAIM THAT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAD BEEN VIOLATED BY RULING THAT ANY CUMULATIVE EFFECT OF FAILURES COMMITTED DURING HIS TRIAL DID NOT RESULT IN INEFFECTIVE ASSISTANCE OF COUNSEL OR PREJUDICE TO HIM.**

The Habeas Court erred in its conclusion that any errors committed by the Court or counsel caused no prejudice to Kitchen. This Court has held:

(w)here 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. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992).

In the instant case, the criminal trial record is replete with individual instances of trial error that violated Kitchen’s constitutional rights to a fair trial and resulted in cumulative error that was fatal to its outcome. Most significantly was the trial court’s failure to follow the procedure set forth in McGinnis for admitting prior bad acts of the accused, pursuant to Rule 404(b) of the West Virginia Rules of Evidence. It is undisputed that the trial court failed to hold an in camera hearing or find by a preponderance of evidence that cultivation of marijuana occurred at DeHue Hollow or that Kitchen committed this unlawful act. However, the Court still permitted the State to

introduce this hearsay evidence that implicated and prejudiced Kitchen without any extrinsic evidence to support it.

Second, the court allowed the testimony of co-defendant Mosley to be introduced regarding his guilty plea to cultivation of marijuana even though Kitchen had never been charged with the crime and then compounded the error by giving a confusing cautionary instruction that mislead the jury. Third, the trial court compounded the error by failing to chastise the prosecutor when he made improper remarks in his closing argument, referring to the uncharged conduct of Kitchen as a “felony” and referring to him as “guilty” in an effort to inflame the jury. The Court failed to take any measures to admonish the jury or issue some curative measure. Fourth, the trial court forced defense counsel to use two pre-emptory strikes when it failed to dismiss two jurors for cause who had arguably close relationships with the prosecutor and his investigator.

Finally, these errors were compounded by defense counsel’s ineffective assistance of counsel at all critical stages, resulting in Kitchen’s first degree murder conviction *without mercy*. Arguments in support of these claims have been fully set forth herein but had she given an opening statement, called character witnesses [after she advised Max to not take the stand in his own defense] when she knew that Kitchen had no criminal record and was raising a little girl or otherwise developed a credible and consistent defense and offered evidence to mitigate his sentence on the issue of mercy, the outcome would have likely been different.

Thus, even assuming *argumento*, that each individual error was harmless, this Court can easily find that the cumulative errors present in Kitchen’s trial amounted to a serious constitutional violation of his right to a fair trial, and should accordingly award him habeas corpus relief.

V.

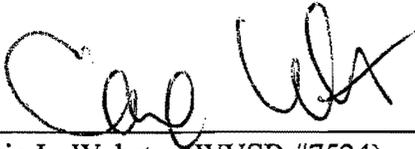
**RELIEF REQUESTED**

Kitchen respectfully requests this Honorable Court void his convictions and sentences as constitutionally invalid. Alternatively, Kitchen respectfully requests this Court reverse and remand for a new trial or remand for full consideration by the trial court those issues not addressed by it.

Respectfully Submitted,

MAX PAUL KITCHEN

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.  
MAX PAUL KITCHEN,

Petitioner

No. 34713

HOWARD PAINTER, WARDEN,  
MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

CERTIFICATE OF SERVICE

I, Carrie L. Webster, do hereby certify that I have served a true and correct copy of the foregoing "PETITIONER'S LEGAL BRIEF IN SUPPORT OF PETITION FOR APPEAL OF HABEAS CORPUS PETITION" on the following individual, via United States mail, postage prepaid , on this 6th day of July, 2009:

Max Paul Kitchen #22779  
Mount Olive Correctional Complex  
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and via hand delivery to:

Dawn Warfield, Esquire  
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1900 Kanawha Blvd., E., Room E-26  
Charleston, WV 25305-0220

  
Carrie L. Webster (W.V.S.B. # 7524)