

3/31

NO. 34713

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

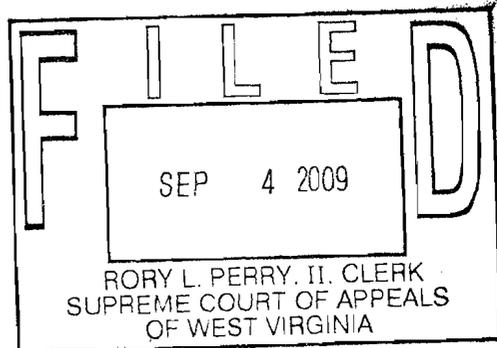
STATE OF WEST VIRGINIA ex rel.
MAX PAUL KITCHEN,

Appellant,

v.

HOWARD PAINTER, Warden,
MOUNT OLIVE CORRECTIONAL
COMPLEX,

Appellee.



BRIEF OF APPELLEE

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar No. 7370
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	1
III. STANDARD OF REVIEW	5
IV. ARGUMENT	5
A. DEFENSE COUNSEL’S ACTIONS WERE OBJECTIVELY REASONABLE	5
1. Trial Counsel’s Decision Not to Introduce Mitigating Evidence Was Based on Adequate Investigation and Was a Reasonable Strategy Given the Potential for Damaging Rebuttal by the State	9
2. Trial Counsel’s Decision Not to Present an Opening Statement Was a Matter of Trial Strategy and Harmless in Light of the Overwhelming Evidence of Guilt Presented at Trial.	16
3. Appellant’s Challenge to Trial Counsel’s Cross-Examination Is Impermissible Second-Guessing	19
4. Counsel’s Decision Not to Bifurcate Was Sound Trial Strategy in Light of the Potential for Damaging Rebuttal under Loosened Rules of Evidence	23
5. Decision Not to Argue Mercy Was Not Ineffective or Prejudicial. Trial Counsel Had No Viable Evidence at Trial That Supported Mercy	26
6. The Record Reveals Trial Counsel Attempted to Build a Theory of Defense on Cross-Examination.	29
7. Appellant’s Remaining Claims Consist of Second-Guessing Trial Counsel’s Decisions During Pre-trial and Post-trial Proceedings	31
B. EVIDENCE OF APPELLANT’S MARIJUANA CULTIVATION WAS INTRODUCED TO SHOW MOTIVE FOR THE ATTACKS	33

1.	Standard of Review	33
2.	The Evidence Was Properly Admitted under Rule 404(b)	33
3.	The Evidence Was Admissible as Intrinsic Evidence Independently of a Rule 404(b) Analysis	36
4.	A Violation of Rule 404(b) Does Not Give Rise to a Claim of a Constitutional Violation and Therefore Is Not Grounds for Habeas Relief	38
C.	THE PROSECUTOR’S STATEMENTS REGARDING APPELLANT’S CULTIVATION OF MARIJUANA WERE HARMLESS. THE PROSECUTOR WAS MERELY REBUTTING PRIOR STATEMENTS BY THE DEFENSE.	39
1.	Standard of Review.	39
2.	The Prosecutor Did Not Say That the Appellant Was Convicted of a Felony	39
D.	FAILURE TO STRIKE A JUROR FOR CAUSE, FORCING THE DEFENDANT TO EXERCISE A PEREMPTORY CHALLENGE, IS NOT GROUNDS FOR RELIEF IN HABEAS CORPUS	40
1.	Standard of Review	40
2.	There Is No Constitutional Right to a Jury Panel “Free from Exception.”	41
E.	THERE CAN BE NO CUMULATIVE ERROR WHERE THERE WAS NO INDIVIDUAL ERROR TO ACCUMULATE	43
V.	CONCLUSION	45

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Alexander v. Jennings</i> , 150 W. Va. 629, 149 S.E.2d 213 (1966)	19
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987)	10
<i>Cole v. White</i> , 180 W. Va. 393, 376 S.E.2d 599 (1988)	38
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	9, 10
<i>Fox v. Ward</i> , 200 F.3d 1286 (10th Cir. 2000)	17
<i>Gerlaugh v. Stewart</i> , 129 F.3d 1027 (9th Cir. 1997)	10
<i>Grundler v. North Carolina</i> , 283 F.2d 798 (4th Cir.1960)	44
<i>Hatcher v. McBride</i> , 221 W. Va. 5, 650 S.E.2d 104 (2006)	44
<i>Hoover v. West Virginia Board of Medicine</i> , 216 W. Va. 23, 602 S.E.2d 466 (2004)	16
<i>Hunt v. Lee</i> , 291 F.3d 284 (4th Cir. 2002)	10
<i>Lewis v. United States</i> , 11 F.2d 745 (6th Cir. 1926)	17
<i>Mathena v. Haines</i> , 219 W. Va. 417, 633 S.E.2d 771 (2006)	5, 33
<i>Moss v. Hofbauer</i> , 286 F.3d 851 (2d Cir. 2002)	17, 18
<i>Pethtel v. McBride</i> , 219 W. Va. 578, 638 S.E.2d 727 (2006)	43
<i>Polk v. State</i> , 620 S.E.2d 857 (Ga. App. 2005)	16
<i>Schofield v. West Virginia Department of Corrections</i> , 185 W. Va. 199, 406 S.E.2d 425 (1991)	13, 28
<i>State ex rel. Daniel v. Legursky</i> , 195 W. Va. 314, 465 S.E.2d 416 (1995)	6, 8, 29-30
<i>State ex rel. Myers v. Painter</i> , 213 W. Va. 32, 576 S.E.2d 277 (2002)	6
<i>State ex rel. Postelwaite v. Bechtold</i> , 158 W. Va. 479, 212 S.E.2d 69 (1975)	5

<i>State ex rel. Shelton v. Painter</i> , 221 W. Va. 578, 655 S.E.2d 794 (2007)	7, 9, 27
<i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994)	41
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	31
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	<i>passim</i>
<i>State v. McGinnis</i> , 193 W. Va. 147, 455 S.E.2d 516 (1994)	<i>passim</i>
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	6, 8, 9
<i>State v. Ocheltree</i> , 170 W. Va. 68, 289 S.E.2d 742 (1982)	40
<i>State v. Peacher</i> , 167 W. Va. 540, 280 S.E.2d 559 (1981)	40
<i>State v. Phillips</i> , 194 W. Va. 569, 461 S.E.2d 75 (1995)	42
<i>State v. Rygh</i> , 206 W. Va. 295, 524 S.E.2d 447 (1999)	23, 26
<i>State v. Sugg</i> , 193 W. Va. 388, 456 S.E.2d 469 (1995)	39
<i>State v. Thomas</i> , 157 W. Va. 640, 203 S.E.2d 445 (1974)	7, 38
<i>State v. Wilcox</i> , 169 W. Va. 142, 286 S.E.2d 257 (1982)	41
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	<i>passim</i>
<i>United States v. Cronin</i> , 466 U.S. 648 (1984)	19, 20, 29
<i>United States v. Hasting</i> , 461 U.S. 499 (1983)	31
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	10
STATUTES:	
W. Va. Code § 53-4A-1 (1967)	44
W. Va. Code § 62-3-3	41
OTHER:	
W. Va. R. Evid. 1101(3)	26

NO. 34713

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
MAX PAUL KITCHEN,

Appellant,

v.

HOWARD PAINTER, Warden, MOUNT
OLIVE CORRECTIONAL COMPLEX,

Appellee.

BRIEF OF APPELLEE

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Max Paul Kitchen (hereafter "Appellant") appeals the August 29, 2007, judgment of the Circuit Court of Kanawha County¹ (Berger, J.), denying his petition for a writ of habeas corpus challenging the constitutionality of his incarceration upon his conviction for first degree murder and sentence of life without mercy. On appeal, Appellant contends that his trial counsel was ineffective and that certain rulings of the trial court rendered his trial unfair.

II.

STATEMENT OF FACTS

On October 1, 1995, the Appellant, Max Kitchen, killed Andrew Caldwell by fracturing his skull with an aluminum baseball bat while in the presence of five witnesses, including a surviving

¹On November 16, 2004, this Court granted Logan County Circuit Court Judge Roger Perry's motion for recusal and appointed Kanawha County Circuit Judge Irene Berger as Special Judge.

victim and the Appellant's co-conspirator. The crime was not an "apparent altercation" that "resulted" in "injuries" to the victim, as described by Appellant. It was a cold-blooded attack that resulted in the death of Andrew Caldwell.

According to the eye witness testimony the Appellant and Hank Mosley attacked Carl Starkey and Andrew Caldwell for stealing from their marijuana patch. They planned the attack earlier in the evening. They secured baseball bats for the attack, and lay in wait along a four-wheeler path where the victims were traveling. When the victims approached, Appellant and Mosley set upon them in a surprise attack. Neither victim was armed.

Mosley testified on behalf of the State pursuant to a plea agreement and identified Appellant as Andrew Caldwell's killer. The survivor of the attack, Carl Starkey, also identified Appellant as Caldwell's killer. Four other eye witnesses testified to seeing varying stages of the attack; all named Appellant as Caldwell's attacker.

The coroner testified that each blow inflicted by Appellant to Caldwell's skull was sufficient to cause death. The coroner further testified that impact blows to Caldwell's head resulted in fractures so severe, they extended all the way down into his nose.

The evidence at trial was that in the early evening of October 1, 1995, Carl Starkey (hereafter "Starkey") and Andrew Caldwell (hereafter "Caldwell") headed to Dehue Hollow in Logan County together on a four-wheeler. (Tr., 76, June 4, 1996.) Starkey was driving and Caldwell was the passenger when they set out for the head of the hollow. The road Starkey and Caldwell took into the hollow went past Tommy Miller's house where Appellant, Brian Lambert, Rod Nelson, Jake White, and Appellant's co-defendant James Hank Mosley (hereafter "Mosley") were socializing and

drinking beer. (Tr., 131, 162, 189, June 4, 1996; Tr., 7, 42, June 5, 1996.) On their way into the hollow, Caldwell and Starkey passed unimpeded through an unlocked gate. (Tr., 78, June 3, 1996.)

When Starkey and Caldwell drove by the house where Appellant and the others were gathered, everyone took notice. (Tr., 7, 43, June 5, 1996.) After Starkey and Caldwell drove by, Mosley testified that Appellant “was talking about whipping their a** for stealing our weed.” (*Id.* at 43.) Brian Lambert testified that after Starkey and Caldwell drove by, Appellant and Mosley said they were going to “beat [] up” Carl Starkey. (Tr., 132, June 4, 1996.) Rodney Nelson testified that: “Hank said, when he was walking by me, we should just go get them now.” (*Id.* at 163.)

After Starkey and Caldwell went by, the group headed after them up into the hollow on foot. On their way, Appellant and Mosley stopped by the adjoining duplexes where they lived and retrieved two aluminum baseball bats, one each, to use in the attack. (Tr., 164, 191, June 4, 1996; Tr., 10, 45, June 5, 1996.) The group then proceeded further up the road and Mosley locked the gate leading out of the hollow. (Tr., 46, June 5, 1996.) Mosley testified that he locked the gate so Starkey and Caldwell would be forced to take the four-wheeler path that ran along the creek where he and Appellant would be hiding. (*Id.* at 49.) After Mosley locked the gate, he told the other parties “to scatter so they wouldn’t be involved.” According to Mosley “then me and Mr. Kitchen hid . . . hid in the woods.” (*Id.* at 52.)

The parties were gathered in areas around the creek bank where they continued to drink beer. They threw their cans down on the ground when they heard a four-wheeler coming. (Tr., 132, 168, 193-94, June 4, 1996; Tr., 12, June 5, 1996.) Mosley hid in the weeds and Appellant hid behind a rock. (*Id.* at 52.)

When Starkey saw the locked gate, he turned down the four-wheeler path where Mosley and Appellant were hiding. (Tr., 169-70, June 4, 1996.) When Caldwell and Starkey approached the hiding place, Appellant and Mosley sprang out and used the ball bats to knock Caldwell and Starkey off the moving four-wheeler. Starkey testified that Mosley and Appellant “said we just stole their pot” and the fight ensued. (Tr., 82, 87, June 4, 1996; Tr., 53-54, June 5, 1996.)

Mosley attacked Starkey and Appellant attacked Caldwell. (Tr. 82-83, June 4, 1996.) Rodney Nelson testified: “I turned around and I seen [the victim] in the water on his knees, and he like raised up and I seen [Appellant] hit him.” (*Id.* at 172.) Thomas Miller testified: “I saw [Appellant] hit [Caldwell] with the bat.” (*Id.* at 198; *see also id.* at 137-40, testimony of Brian Lambert.)

After the first blow, Caldwell went down on his knees and tried to protect himself by holding out his arms and pleading for mercy. (Tr., 141, 173, June 4, 1996.) Appellant struck Caldwell two more times in the head sending him to his hands and knees and then face down into the creek where he lay “bubbling in the water.” (*Id.* at 204; *see also id.* at 117, 172, 177, 198-203.) At some point, Starkey fell unconscious. When he came to, Caldwell was in the creek. Before fleeing with the others, Thomas Miller helped Starkey pull Caldwell out of the water and up on the bank. (*Id.* at 100, 204-05.)

In all, Appellant inflicted three blows to the victim’s head. (*Id.* at 115-18.) After the attack, Starkey summoned help and both were taken to the hospital. Caldwell died on October 6, 1995.

The coroner testified that Caldwell’s skull displayed blows to the top of the right eyebrow, above the right ear, and the back of his head. (*Id.* at 114.) The coroner also testified that fractures radiated from behind Caldwell’s ear to the base of his skull. (*Id.* at 115.) The coroner stated that because of the nature of head injuries, the site of the trauma can often be on the opposite side of the

point of impact which appeared to be the case in Caldwell's injuries. (*Id.* at 116.) The blows inflicted by Appellant further created "linear" fractures, two of which originated above Caldwell's eyes and joined together and extended into his nose. (*Id.* at 118.) Caldwell also displayed a defensive wound on his left upper arm. (*Id.* at 117.)

Because of the nature of the injuries and the severity of each blow, the coroner was unable to determine which of the major blows was fatal.

III.

STANDARD OF REVIEW

This Court has held that "[f]indings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong." Syl. Pt.1, *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975). This Court has also explained that,

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

IV.

ARGUMENT

A. DEFENSE COUNSEL'S ACTIONS WERE OBJECTIVELY REASONABLE.

Strickland v. Washington sets forth the two-pronged test used to determine if counsel's performance was ineffective under the Sixth Amendment:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel

made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. 668, 687 (1984).

“In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).” Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). “Failure 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. Myers v. Painter*, 213 W. Va. 32, 35, 576 S.E.2d 277, 280 (2002), citing *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995).

In the case at bar the habeas court held:

The Court finds that the petitioner met the first prong of the [*Strickland/Miller*] analysis. The Court finds defense counsel’s performance in failing to make a motion to bifurcate guilty and mercy states of trial, failing to call character witnesses in mitigation, failing to argue for mercy, and failing to object to state’s argument for not mercy was deficient under any objective standard of reasonableness since no reasonable explanation for the failures were tendered during the habeas proceedings.

(R. at 744-45.)

The habeas court further held that in light of the quantity and nature of the evidence of guilt presented at trial, Appellant failed to meet the burden of showing prejudice under the second prong of the analysis.

Although the habeas court did apply the proper standard to the second prong of the *Strickland/Miller* test, the court failed to apply the proper standards to its findings that trial counsel was deficient under the first prong of the analysis.

Before Appellant can demonstrate that trial counsel was deficient under the first prong of the *Strickland* analysis, he must overcome the presumption that trial counsel's actions were a matter of sound trial strategy. "We recognize, however, that matters which are regarded as trial strategy do not rise to the level of ineffective assistance ' . . . unless no reasonably qualified defense attorney would have so acted in the defense of an accused.'" *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 584, 655 S.E.2d 794, 800 (2007), citing Syl. Pt. 21, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). This analysis is conducted in light of whether or not trial counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Pursuant to *Strickland* such an analysis is made under "prevailing norms of practice." (*Id.* at 688.)²

"The strong presumption that counsel's actions were the result of sound trial strategy . . . can be rebutted only by clear record evidence that the strategy adopted by counsel was unreasonable." *State v. LaRock*, 196 W. Va. 294, 309, 470 S.E.2d 613, 628 (1996), citing *Strickland*, 466 U.S. at 689.

This Court has previously held that a showing trial counsel conducted an adequate investigation prior to making a strategic decision is sufficient to create a presumption of reasonableness:

²The Court suggested using the American Bar Association standards on this point but cautioned that they "are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688.

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

Syl. Pt. 3, *State ex rel. Daniel v. Legursky, supra*.

This Court has interpreted *Strickland* to impose a duty on a reviewing court to determine 1) whether trial counsel's actions were within industry recognized norms and standards; and 2) whether trial counsel's actions were made following an adequate investigation. The habeas court made no such findings regarding whether trial counsel's decisions were a matter of strategy and thus entitled to a heightened level of deference other than to find that "no reasonable explanation for the failures were tendered during the habeas proceedings." (R. at 744) The record in this case controverts the findings of the habeas court on this point both as a matter of law and fact. As will be more fully set forth below, trial counsel explained on the record the substance and results of the investigations that formed the foundation for each of her strategic decisions.

Appellant's argument that the habeas court erred in finding no prejudice flowing from trial counsel's representation is set forth in a vacuum of second-guessing irrespective of the weight and sufficiency of the State's case that is forbidden under *Strickland/Miller*.

In fact, Appellant's argument gives little more than lip service to the tenets of *Strickland* and its progeny, and operates solely as an attack on trial counsel's representation almost exclusive of the record. *Strickland* is well known as the standard-bearer for evaluating whether a defendant's representation meets constitutional muster; yet it sets limits as well.

Although *Strickland* does not stand for the proposition that overwhelming evidence of guilt lowers the standard of representation, it nonetheless holds that its prejudice prong is performed based on the weight of evidence presented at trial. “[A]n ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Strickland*, 466 U.S. at 695. “Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 696. Likewise, defendants are entitled to representation that results in a fair trial. “[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation[.] The purpose is simply to ensure that criminal defendants receive a fair trial.” *State ex rel. Shelton v. Painter*, 221 W. Va. at 584, 655 S.E.2d at 800, citing *Strickland*, 466 U.S. at 689.

In the case at bar trial counsel was facing an unsympathetic client, overwhelming evidence of guilt, and a particularly brutal crime. Yet despite *Strickland’s* admonitions, participants in the post-conviction proceedings in the instant case (from the habeas court judge to the trial expert who testified at Appellant’s habeas hearing to post-conviction counsel) have called a competent attorney who did the best she could with what she had, incompetent. This Court has repeatedly refrained from engaging in such “Monday morning quarterbacking” and should do so in this case. “We are not interested in grading lawyers’ performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.” *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127.

1. **Trial Counsel’s Decision Not to Introduce Mitigating Evidence Was Based on Adequate Investigation and Was a Reasonable Strategy Given the Potential for Damaging Rebuttal by the State.**

In *Darden v. Wainwright*, 477 U.S. 168, 184 (1986), the United States Supreme Court evaluated a claim that counsel was ineffective for failing to put on mitigating evidence at a capital

sentencing hearing. In *Burger v. Kemp*, 483 U.S. 776, 788 (1987), the Supreme Court examined a challenge to counsel's decision at a capital sentencing hearing not to offer *any* evidence during a sentencing proceeding.

The Court found in both instances that the decision whether or not to put on mitigating evidence was a matter of trial strategy because of the potential for damaging rebuttal evidence which the Ninth Circuit likened to a "basket of cobras." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1035 (9th Cir. 1997). Although the *Darden-Burger* courts dealt with mitigating evidence of severe psychiatric disturbances that had the potential to support a more severe sentence rather than to mitigate the crime, both courts addressed the issue purely as a matter of trial strategy.

Appellant's failure to consider the totality of the record in arguing this ground for error, amounts to a claim of facially ineffective assistance of counsel. However, it has never been held by the courts that mitigation is mandatory in a murder case. "[N]either the Supreme Court nor this court has ever held that it is *per se* ineffective assistance of counsel not to introduce mitigating evidence at sentencing." *Hunt v. Lee*, 291 F.3d 284, 292 (4th Cir. 2002) (holding that sufficient investigation rendered a decision to introduce mitigating evidence a matter of trial strategy).

Most recently, the Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), reaffirmed and applied the *Darden-Burger* line of cases by offering some guidance on what constitutes both deficient performance and prejudice when analyzing a strategic decision not to offer mitigating evidence. The Court in *Wiggins* held that the petitioner had proven prejudice because he did not have a record of "violent conduct" the state could have introduced to offset the *legitimate* mitigating evidence his attorney failed to offer. *Wiggins*, 539 U.S. at 537.

In this case, trial counsel met both the burden of proving that her decision was entitled to the heightened deference of trial strategy and that it was reasonable in light of both the quality and nature of Appellant's mitigating evidence and the potential for damaging rebuttal by the State.

Trial counsel testified at the habeas hearing that she discussed with Appellant putting his character into evidence to mitigate the crime but that *they* decided against it:

Q. You said a couple of those [potential character witnesses] would not have helped his character evidence from a defense standpoint. couldn't you have called the other character witnesses?

A. Well, we could have but as a matter of strategy I think we decided not to place his character in issue.

Q. Did you discuss that issue with Mr. Kitchen?

A. I discussed everything with Mr. Kitchen.

Q. Do you remember what specific facts those witnesses would have testified to that would have called his character into ill repute?

A. 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 citizens because some of those individuals would have smoked marijuana with him, known something about the marijuana situations.

(Hab. Tr., 37-38, Sept. 9, 2001.)

Trial counsel elaborated in the second habeas hearing:

Q. And you also testified in a previous hearing, if you'll recall, that one of your concerns in not calling certain character witnesses was that you referred to as the marijuana issue. Do you recall that?

A. That's correct.

Q. An I think you further elaborated that some concerns in not calling certain character witnesses was that you referred to as the marijuana issue. Do you recall that?

A. That's correct.

Q. An I think you further elaborated that some concern was that either it would come out that he was smoking pot and/or selling pot to friends. Would that be your recollection?

A. Well, there's more to that than just that, I think. But I don't -- it I recall, certain witnesses would have not only testified about him smoking pot in the past, certain witnesses would have also talked about him growing pot in the past, certain witnesses would have also talked about some altercation that he had gotten into involving a ball bat in the past. I don't know which witnesses. This is a vague recollection, but I know that there were witnesses that he had brought, you know, and told me to look into that would be good character witnesses for him that ended up not being such good character witnesses.

(Hab. Tr., 16-17, Aug. 24, 2005.)

Trial counsel also testified that Appellant was not forthcoming during the preparation of his defense:

A. Well, let me just explain something to you, if I may. Mr. Kitchen had no prior criminal record. If he did, it might have been a traffic violation or something like that. He, he had some good character witnesses. Mr. Kitchen, from the git-go, was not forthcoming with trial counsel; and he, he himself may have-- I could tell he wasn't forthcoming with me, and I stressed from day one how important it was for him to tell me the truth so that we could properly prepare a defense. We had prepared a defense that would have had substantial character evidence, but Mr. Kitchen two days before--or whenever the plea from his co-defendant came through was when the ultimate factors came out. That's when he finally told me exactly what I needed to know to properly defend him.

(*Id.* at 15-16.)

Trial counsel's testimony was sufficient to create a presumption under *Strickland* that her decision was a matter of sound trial strategy resulting from adequate investigation. In order to rebut that presumption, Appellant would be required to show that trial counsel's decision not to mitigate was unreasonable in light of prevailing norms of practice.

Appellant cites to *Schofield v. West Virginia Department of Corrections*, 185 W. Va. 199, 406 S.E.2d 425 (1991), for the proposition that trial counsel is required to present mitigating evidence in a murder trial. However, *Schofield* creates no such standard. In *Schofield*, like *Wiggins*, *supra*, this Court determined that *Schofield* had *viable* mitigating evidence available that could have been introduced “without inviting overwhelming counter-evidence on the part of the State.” *Id.* at 204, 406 S.E.2d at 430. *Schofield* never created a requirement that mitigating evidence be part of a murder trial irrespective of the facts. Therefore, the standard for determining reasonableness would be to weigh the strength and quality of the mitigating evidence against both the weight and sufficiency of the State’s case and the potential for damaging rebuttal from the State. “The question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695.³

This crime was particularly brutal and merciless. Appellant lay in wait, and set upon an unarmed man with a baseball bat. Appellant then proceeded to split the victim’s head open while he pled for his life. As noted by the habeas court, “there was never any real evidence solicited that would support a self defense claim or show that this incident was anything other than an unprovoked attack by [Appellant] and the co-defendant.” (R. at 745.)

First, in this analysis, it is worthy to note that none of Appellant’s suggested mitigating evidence actually mitigated the crime itself. There was no legitimate evidence that Appellant was

³Because West Virginia has no death penalty and no death penalty proceedings, *Strickland’s* standard of evaluating an ineffective assistance claim in the sentencing phase of the trial has not been adopted by this Court. *Strickland’s* standard in this regard, however, is consistent with this Court’s directives to evaluate claims of ineffective assistance of counsel in light of the record as a whole.

provoked, impaired, insane, incompetent, threatened, acting in the heat of passion or diminished in any way, that could have reduced his culpability. Rather Appellant's mitigation evidence consists of character evidence of highly debatable worth easily undermined by the facts.

Appellant suggests that evidence he was a single father could have been beneficial. However, the record shows that instead of being at home with his "little girl" on a Sunday, making her dinner or otherwise caring for her, Appellant was out partying and tending his marijuana patch.⁴ Likewise, Appellant apparently gave little thought to exposing himself to a potential prison term and leaving his daughter fatherless when he not only planned the instant crime and carried it out, but also when he engaged in a career cultivating marijuana.

Appellant further claims that his mother and grandmother would have offered beneficial testimony about his character and work history. Irrespective of the reliability of the underlying factual basis for any such testimony, a jury might tend to look askance at glowing reports from a mother and grandmother.

Appellant further argues that his work history could have mitigated the crime. However, evidence in the record of Appellant's work history consists mostly of sketchy reports that he was sometimes employed as a janitor. Appellant's mother also testified that after Appellant worked on an in-ground pool for a Logan County politician, the politician was so impressed he got Appellant a job with the State. (Hab. Tr., 54-55, Aug. 24, 2005.) That information could lend itself to differing conclusions, but overall Appellant's work history is dubious at best. It is not as if Appellant was a

⁴There is also ancillary evidence in the record that Appellant's daughter was later molested by his brother-in-law Melvin Mosley, who was also the brother of Appellant's co-defendant and, therefore, a known associate. Although the molestation of Appellant's daughter happened after he was incarcerated and is utterly irrelevant, it is telling. (Hab. Tr., 53, Aug. 24, 2005; R. at 264.)

teacher, banker or business owner with a solid history of employment. Moreover, the State could have easily rebutted Appellant's "work history" with evidence of his supplemental "career" cultivating and selling drugs.

Appellant also claims that evidence of his lack of criminal history was mitigating. Again, evidence of Appellant's drug dealing was available to the State to rebut this assertion, whether it was introduced as part of the State's case-in-chief or not. Trial counsel also noted in her testimony that there was a prior criminal incident in Appellant's past involving a baseball bat. (Hab. Tr., 43, Sept. 9, 2001.) Appellant disclaimed the incident in self-serving testimony that was never verified either way.

Irrespective of the weakness of Appellant's character evidence and trial counsel's pre-trial investigation, trial counsel testified that it was a mutual decision between her and Appellant not to put his character into evidence. Not only that, Appellant hindered his own representation by not coming clean with trial counsel. This alone is sufficient to defeat this claim. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691. *Strickland* further noted that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

Appellant has not demonstrated that there was evidence sufficiently compelling to mitigate the crime in light of the record as a whole, or to overcome the presumption that trial counsel's actions were sound strategy. The *Strickland* Court concluded when examining a similar claim:

“The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help.” 466 U.S. at 699. The same is true under the present set of facts.

This argument does not support a finding that trial counsel was ineffective.

2. Trial Counsel’s Decision Not to Present an Opening Statement Was a Matter of Trial Strategy and Harmless in Light of the Overwhelming Evidence of Guilt Presented at Trial.

Appellant next complains that trial counsel was ineffective for not giving an opening statement. Irrespective of the fact that Appellant’s dramatic assertion that he was on trial “fighting for his life” is wildly ironic in light of evidence that he brought a baseball bat down on a man’s skull who was on his knees begging for his life, trial counsel’s decision not to offer an opening: 1) was a matter of trial strategy, and 2) had absolutely no demonstrable effect on the outcome of this trial.

It has never been held in this jurisdiction, or any, that an opening statement is a forum in which trial counsel is required to overcome the reality of a case by arguing a defense not factually supported by the evidence.

“An opening statement . . . , having no evidentiary value, cannot operate to place an issue in controversy.” *State v. Richards*, 190 W. Va. 299, 303, 438 S.E.2d 331, 335 (1993) (quoting *United States v. Green*, 648 F.2d 587, 595 (9th Cir.1981)). *See also Alexander v. Jennings*, 150 W. Va. 629, 636, 149 S.E.2d 213, 218 (1966) (“In this jurisdiction and in general, the opening statement of counsel is ordinarily intended to do no more than to inform the [factfinder] in a general way of the nature of the action and the defense in order that the [factfinder] may better be prepared to understand the evidence.”).

Hoover v. West Virginia Bd. of Medicine 216 W. Va. 23, 26, 602 S.E.2d 466, 469 (2004).

Because an opening statement is of no evidentiary value and is little more than a preview of the evidence, the decision whether or not to offer an opening remains squarely in the category of

trial strategy. *Polk v. State*, 620 S.E.2d 857, 860 (Ga. App. 2005) (“The mere waiver of an opening statement can be characterized as a trial tactic which cannot be equated to ineffective assistance of counsel.”) (quoting *Futch v. State*, 260 S.E.2d 520 (Ga. App. 1979)). See *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (“While opening and closing statements are not to be lightly waived in a capital case, it is well-settled that the decision to waive an opening or closing statement is a commonly adopted strategy and, without more, does not constitute ineffective assistance of counsel.”).

When considering the same claim in a case where, as in the instant case, there was overwhelming evidence of guilt, the court in *Moss v. Hofbauer*, 286 F.3d 851 (2d Cir. 2002), noted:

A trial counsel’s failure to make an opening statement, however, does not automatically establish the ineffective assistance of counsel. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir.1993) (holding that defense counsel’s decision not to present an opening statement because he did not know what Haddock would say on the witness stand was not constitutionally deficient performance); *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir.1985) (“The timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel.”); *United States v. Salovitz*, 701 F.2d 17, 20-21 (2d Cir.1983) (noting that trial counsel’s decision to waive an opening statement is often a matter of trial strategy “and ordinarily will not form the basis for a claim of ineffective assistance of counsel.”).

Moss at 863.

The *Moss* court went on to note that waiving an opening argument is the wiser strategy in a case where there is powerful evidence of guilt and no witnesses to back up the opening statements. “[A]n opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it.” *Id.* citing *Lewis v. United States*, 11 F.2d 745, 747 (6th Cir. 1926). The *Moss* court concluded:

Even if this decision was not a strategic one, Moss has not articulated how the absence of an opening statement prejudiced him. Moss's conclusory allegations are insufficient to justify a finding that an opening statement would have created the reasonable probability of a different outcome in his trial. *Nguyen v. Reynolds*, 131 F.3d 1340, 1350 (10th Cir.1997) (holding that "[d]efense counsel's failure to make an opening statement was nothing more than a tactical decision that did not adversely affect Nguyen"). We therefore conclude that Modelski's failure to make an opening statement did not constitute a constitutionally deficient performance.

Moss, 286 F.3d at 864.

At the habeas hearing, trial counsel testified that she did not give an opening statement because she wanted to see how the State's case developed during the testimony. Trial counsel also testified that she did not do an opening after the State's case because there were inconsistencies in the evidence she wanted to go unanswered until she raised them in closing so as not to give the State the opportunity to call rebuttal witnesses. (Hab. Tr., 39-40, Sept. 9, 2001.) Nothing in trial counsel's explanation supports a finding that her actions were not perfectly reasonable in light of the evidence of guilt and the absence of a factual basis for a legitimate defense.

Irrespective of the lack of evidence sufficient to rebut the presumption that trial counsel's decision was a reasonable trial strategy, no prejudice flowed from the lack of an opening statement for the defense. Trial counsel offered her defense theories in the closing arguments and there is nothing in the record to suggest that had trial counsel given an opening, the verdict would have been more favorable. Although Appellant cites to many suggestions for an opening such as a non-existent defense unsupported by subsequent factual development and dubious mitigating evidence, Appellant fails to adequately explain how any such opening could have overcome the evidence of guilt presented at trial and resulted in a more favorable verdict.

The fact is, no plausible defense emerged at trial and it was not because trial counsel did not do an opening, it was because of the facts.⁵ “[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.” *United States v. Cronin* 466 U.S. 648, 656 n.9 (1984).

3. **Appellant’s Challenge to Trial Counsel’s Cross-Examination Is Impermissible Second-Guessing.**

Again, Appellant unfairly engages in “Monday morning quarterbacking” by claiming that if trial counsel had properly cross-examined the State’s witnesses, she could have elicited information that would have supported the defense; namely, that Appellant did not do it, or that he was acting in self-defense after planning the attack, or if he did do it, he should get second degree. It is clear from the record that trial counsel’s cross-examination of the State’s witnesses was more than satisfactory and the record herein refutes every claim made by Appellant on this point. While others who have the benefit of sitting in judgment from a cold record might have done it differently, trial counsel, nonetheless, submitted the State’s case to meaningful adversarial testing as required to satisfy the Sixth Amendment. Moreover, as noted previously herein, effective assistance of counsel does not require a defense counsel to either perform miracles or put on a defense not supported by the facts or available evidence. As the Court further noted on this point in *Cronin*, even if defense counsel may have made demonstrable errors, “[w]hen a true adversarial criminal trial has been

⁵In civil a trial, a factually deficient opening statement can be grounds for directed verdict. *See Alexander v. Jennings*, 150 W. Va. 629, 636, 149 S.E.2d 213, 218 (1966). “Thus, in order to justify the entry of a judgment against a [plaintiff] on his opening statement, the admissions therein should be distinct and such as absolutely preclude a recovery; in other words counsel must clearly ruin his own case” *Id.* at 634, 149 S.E.2d at 217 (authority and citations cited therein omitted).

conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred.” 466 U.S. at 656.

Aside from the conflict between actual innocence and being willing to settle for second degree murder, the inconsistencies in the statements of the witnesses were brought out not only by the defense but by the State during direct examination of its own witnesses. During the State’s case-in-chief, witnesses testified they lied in their initial statements to law enforcement because they did not want to end up like Andrew Caldwell.

During the direct examination of Brian Lambert by the State, Lambert testified:

A. When I come off the hill, I seen [Appellant] hit Andrew on the arm.

Q. Did you initially tell Trooper Schoolcraft that when you talked to him some months back?

A. No, sir.

Q. Why did you not tell him that?

A. I was scared.

Q. What were you scared of?

A. Max and Hank, I reckon.

(Tr., 137, June 4, 1996.)

On cross-examination, trial counsel elicited testimony from Lambert that he never actually saw Starkey driving toward the area of the crime on the four wheeler but just “figure[d] it was [him].” (*Id.* at 143.) Trial counsel also managed to elicit an admission from Lambert that he did not actually see the moment of the strike on Caldwell by Appellant but only saw him “bringing the ball bat away from Andrew’s arm.” (*Id.* at 146.) Trial counsel further elicited testimony from Lambert that he initially stated that someone was yelling that Caldwell had a gun and he himself

relayed this information to the others. (*Id.* at 147.) In fact, trial counsel went into great detail with Lambert on his initial statements that he had reason to believe Caldwell had a gun, going so far as to bring out that Lambert himself saw Caldwell make a move towards his waistband as if he were retrieving a gun. In further support of a potential self-defense theory, trial counsel elicited testimony from Lambert that he had stated in his original statement to law enforcement that Carl Starkey had threatened Appellant on prior occasions. (*Id.* at 151.)

On the cross-examination of Lambert alone, trial counsel brought out evidence that there was a point where there was reason to believe Caldwell had a gun and that Appellant had been threatened by Caldwell before the crime. On direct, Lambert admitted his story had been inconsistent and that he had lied because he was afraid.

The testimony of Brian Nelson was similar. Nelson admitted, on direct examination, that he lied in his initial statement because he too was afraid. (Tr., 176, June 4, 1996.) In fact, within only a few weeks after the crime, Nelson relocated to Tennessee. (*Id.*) On cross-examination, trial counsel questioned Nelson about the inconsistencies in his statements. (*Id.* at 181-82.) Trial counsel also raised the issue that Appellant might not have been the killer when she questioned Nelson about whether or not he wielded any sort of weapon during the attack. (*Id.* at 184.)

Tommy Miller's testimony was more of the same. On cross he admitted that he lied in his statements (Tr., 206, June 4, 1996.) Trial counsel questioned Miller about his motivations, his truthfulness and questioned his level of involvement. (*Id.* at 214.) In fact, trial counsel flatly asked Miller if he conspired with the others to "pin this on [Appellant]." (*Id.* at 215-16.)

The record indicates that trial counsel was more than competent on cross-examination. Trial counsel elicited testimony that there was talk of a gun, that some of the witnesses did not actually

see the strikes, that Caldwell may have previously threatened Appellant, and that they had all flat out lied in their initial statements to police.

Perhaps Appellant's most shameless second-guessing on this claim is his argument that trial counsel should have been able to establish on cross-examination that he either did not do it, or if he did it he was acting in self-defense, or if he did it then trial counsel should have at least been able to get him mercy on the strength of his employment record and parenting skills.

As far as inconsistencies in the witnesses' statements supporting a "frame-up" defense, the fact is the witnesses were hanging around a hollow drinking beer with a known marijuana dealer who attacked and killed a man (after telling them he was planning to do just that) *and* after they engaged in a certain amount of what could be viewed as conspiratorial conduct. Not surprisingly their statements were less than forthcoming and contradictory, and as such do not necessarily support a frame-up defense.

Appellant's argument on this point proceeds from second-guessing to the absurd. Appellant argues that trial counsel should have elicited testimony that he so kindly pulled his co-defendant off the other victim out of "concern" that the victim might drown in the creek. (Appellant's Brief at 23.) Presumably, Appellant committed this act of kindness before finishing off Andrew Caldwell--or maybe afterward. Appellant also faults trial counsel because counsel did not get it before the jury that he had no intent to kill anyone. Perhaps that means Appellant just meant to teach Caldwell and Starkey a lesson but it went too far. This appears to conflict with his complaints that trial counsel did not manage to put on a self-defense or actual innocence defense.

With regard to Appellant's claim that trial counsel failed to elicit any testimony from the medical experts that supported her theory of defense, there was none and Appellant fails to cite to

any. According to trial counsel's testimony, her expert only corroborated the State's medical testimony and refuted Appellant's claims that he saw someone else stomp Andrew Caldwell's head during the attack. (Hab.Tr., 25, Sept. 9, 2001.) It would appear that Appellant sent trial counsel on a wild goose chase with his story.

This claim is speculative, and easily controverted by the record (and common sense).

4. **Counsel's Decision Not to Bifurcate Was Sound Trial Strategy in Light of the Potential for Damaging Rebuttal under Loosened Rules of Evidence.**

In this claim, Appellant faults trial counsel for failing to bifurcate the sentencing proceedings. Again, Appellant cites to the anomalous evidence of his "good character traits" to support his argument that if trial counsel had bifurcated the proceedings, he may have perhaps had a different outcome. But again, Appellant fails to account for the weight and sufficiency of the evidence, the part he himself played in trial counsel's decision, and the potential for damaging rebuttal by the State.⁶

Because bifurcation of the sentencing proceeding is not mandatory in West Virginia, the decision whether or not to conduct a unitary or bifurcated trial is a matter of trial strategy. "In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court authorized the discretionary bifurcation of a murder trial into a 'guilt phase' and a 'mercy phase,' as a matter of trial management procedure." *State v. Rygh* 206 W. Va. 295, 297 n.1, 524 S.E.2d 447, 449 n.1 (1999). It was never held by this Court or any federal court that West Virginia's unitary trial system was unconstitutional

⁶In further support of this claim, Appellant cites to a recent circuit court order granting habeas relief to a petitioner in a state habeas proceeding, *State v. Rodoussakis*, a record not before this Court. The State will not address the findings of a circuit court in a habeas proceeding which carries no authority, particularly in a factually distinguishable case where the crime was a non-violent homicide involving the unintentional lethal administration of drugs to the victim.

or that bifurcation of the sentencing proceeding in non-death penalty states is a constitutional right. *See LaRock*, 196 W. Va. at 313, 470 S.E.2d at 632 (“[A] unitary criminal trial in a first degree murder case meets muster under both the United States and West Virginia Constitutions.”). Therefore, it cannot be said that trial counsel’s failure to bifurcate the sentencing was facially or *per se* ineffective.

As with Appellant’s prior claim that trial counsel was ineffective for failing to introduce mitigating or character evidence, this claim fails as a challenge to trial strategy and fails as a challenge to the trial counsel’s decision isolated from the record as a whole.

Trial counsel testified during the omnibus hearing that right up until Appellant’s co-defendant pled guilty and fingered him, Appellant stonewalled her about the extent of his role in the crime. (Hab. Tr., 21, Aug. 24, 2005.) Trial counsel stated that she based her decision not to bifurcate on the information provided by Appellant himself *after* Mosley’s plea on the Friday before trial. Trial counsel also testified that she chose not to call character witnesses after Appellant gave her information that led her to believe the suggested witnesses had the potential to do more harm than good. Trial counsel stated flat out that based on the amount and nature of the information she was given by Appellant prior to Mosley’s plea, she would have bifurcated the sentencing but evidently once Appellant gave her the whole story, she thought it most unwise and acted accordingly. (*Id.*)

The reality of the situation is that Appellant was an intermittently employed janitor who was a single father because he had little choice and who was putting both himself and his child at risk by cultivating marijuana. The fact that he had no criminal history was of little value in light of his second career cultivating marijuana and his past history with baseball bats. His cultivation of

marijuana undermined all of his mitigating evidence and would have most surely been introduced at any bifurcation hearing along with the prior act of violence alluded to by trial counsel in her habeas hearing testimony.

Trial counsel's assertions that she decided not to bifurcate, after a reasonable investigation and based upon the assertions of her own client, provide trial counsel's actions with the almost impenetrable protection of trial strategy. Nothing in trial counsel's assertions suggests that her decision was outside the prevailing norms of practice or even that they were even ill-advised. Rather, trial counsel's grounds can be summed up by saying that her client held out on her until he was nailed by his co-defendant and only then did he give her the full picture of both his involvement in the crime and the true nature of his "character" only one judicial day before trial.⁷

Irrespective of trial counsel's sound strategy based on adequate investigation, Appellant only now argues, after knowing the result of a unitary trial, that he would have insisted on bifurcation since he would have nothing to lose under such a scenario. Had trial counsel bifurcated the proceedings and the State ravaged his mitigating evidence under loosened rules, Appellant would most surely be accusing trial counsel of incompetence for allowing the State to exploit a bifurcation proceeding to obliterate his chances for mercy. At least during the guilt phase of the trial, the State would be somewhat restricted in what sort of rebuttal evidence it could introduce in answer to mitigation. In a bifurcated sentencing proceeding, no such limitations on the evidence exist. "We recognize, of course, that the evidentiary opportunities that a defendant may have in a mercy phase, as a result of bifurcation, may in turn affect the evidentiary limitations of the prosecution in rebuttal

⁷During a pre-trial on the day of the trial, trial counsel noted that she had been notified of Appellant's co-defendant's plea on the Friday afternoon next preceding the trial. (Hr'g, 7, June 3, 1996.)

or impeachment.” *State v. Rygh*, 206 W. Va. at 299 n.1, 524 S.E.2d at 451 n.1. (*See* W. Va. R. Evid. 1101(3)).

Moreover, juries are not stupid and their actions and reactions cannot be dictated or predicted by lofty legal precedent. They could see the situation for what it was and it was not pretty nor were the players. Although there is no way to determine what sort of character witnesses Appellant had in the way of friends and family, the record does provide enough information to safely guess that any such potential witnesses were not nuns, school teachers or bankers. Trial counsel testified that when she interviewed his potential character witnesses she came to the conclusion they were not in any position to vouch for anyone’s character and had the potential to do more harm than good. The evidence in the record regarding the sexual abuse of Appellant’s daughter by his brother-in-law who was also the brother of his known associate (namely, his co-defendant Hank Mosley) further supports trial counsel’s limited options with providing character witnesses for Appellant.

Appellant has not argued nor demonstrated that it was either deficient or prejudicial to the defense for trial counsel not to bifurcate the proceedings given the weight and sufficiency of the State’s evidence and the potential for the State to unleash a “nest of cobras” in a bifurcated sentencing proceeding. This argument fails to either support a finding of prejudicially deficient counsel or a finding that the habeas court’s findings were wrong as a matter of law.

5. Decision Not To Argue Mercy Was Not Ineffective or Prejudicial. Trial Counsel Had No Viable Evidence at Trial That Supported Mercy.

Mr. Campbell, the trial expert who testified at the second habeas hearing, testified that trial counsel’s decision not to argue mercy just sent the whole defense “to heck in the handbasket.” No it did not. Appellant’s decision to crack a man’s head wide open with a baseball in front of half a

dozen people (including his friend who testified against him) sent Appellant's defense to heck in a hand basket and that is why this entire claim fails as a matter of law.

In support of Appellant's claim that trial counsel was ineffective for not arguing mercy, Appellant cites to *Shelton v. Painter, supra*, for the proposition that the failure to argue mercy is facially ineffective irrespective of the record as a whole. Appellant argues that *Shelton* holds that it is ineffective for trial counsel not to "introduce any evidence in support of mercy or to make any meaningful plea for mercy." (Petition at 11.) However, *Shelton* is a factually distinguishable case that does not create a blanket requirement that defense counsels argue for mercy or that the failure to do so is *per se* ineffective.

In *Shelton*, trial counsel told the jury that the defendant did not deserve mercy and he was only arguing mercy because it was his duty. *Shelton*, 221 W. Va. at 585, 655 S.E.2d at 781. In fact, trial counsel in *Shelton* implored the jury to exact vengeance on his client and even made statements before the jury about the impact of his client's crimes on the victim's family. Not only that, trial counsel told the jury they did not have to recommend mercy if they did not want to. This Court found that trial counsel in *Shelton* betrayed his client and breached his duty of representation not because he did not argue mercy, but because he argued *against* it on behalf of his client. This Court did not hold that trial counsel must argue mercy to avoid a claim of ineffective assistance of counsel or that failure to argue mercy is *per se* ineffective. A finding by this Court that trial counsel was deficient for not arguing mercy, irrespective of the record as a whole, would inject a mandatory element into final arguments, which is not evidentiary and would do no more than place yet another procedural burden into the trial proceedings.

Because it is not mandatory under the law for trial counsel to argue mercy in a non-death penalty case, it is therefore a matter of trial strategy as such entitled to the presumption that is was sound absent a showing of unreasonableness. Appellant has made no such showing. As previously argued, there was nothing in Appellant's evidence cited to support mercy that would either outweigh the evidence of guilt or that was reliable or compelling enough to suggest it would have resulted in a more favorable outcome.

Moreover, the record reveals that trial counsel's strategy was to undermine the credibility of the witnesses. Any argument for mercy could have opened the door to the State to invoke any number of potential rebuttals and undermine trial counsel's defense. There is nothing in the record or trial counsel's explanation for her decision that suggests her strategy was outside the prevailing norms of recognized standards.

Because trial counsel's decision was a matter of strategy and Appellant has failed to demonstrate that it was unreasonable, this Court would be creating a duty to argue mercy on defense counsel. Indeed, Justice Workman's oft-cited dissent in *Schofield v. West Virginia Department of Corrections*, 185 W. Va. at 207, 406 S.E.2d at 433, suggests just that:

The determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits.

However, this Court has consistently declined to create a mandatory duty to argue mercy or bifurcate the sentencing phase of a trial in murder cases. Therefore, *Strickland* prevails under the present set of facts. Unless and until this Court adopts a mandatory bifurcation or mercy proceeding

in cases involving a life sentence, it will be a matter of trial strategy and as a challenge to trial counsel's strategy, this assignment of error fails.

6. The Record Reveals Trial Counsel Attempted to Build a Theory of Defense on Cross-Examination.

Appellant argues that trial counsel was ineffective for failing to develop a consistent and cogent defense during the trial. Again, Appellant makes this argument irrespective of the facts and the record as a whole.

The role of this Court is not to step into the shoes of trial counsel, from a cold record, and critique her performance with the benefit of hindsight. The role of this Court is to determine if the Sixth Amendment was satisfied by trial counsel's performance.

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743, 87 S. Ct. 1396, 1399, 18 L. Ed. 2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, 466 U.S. at 659.

This Court has held in this regard:

There is no precise formula guiding a determination of when the failure to raise an available defense will constitute ineffective assistance of counsel. The absence of clear standards may be unavoidable, since the strength of an available defense in each particular circumstance may vary as broadly as the factual occurrences that give rise to a criminal prosecution. Thus, a determination of ineffective assistance of counsel for failure to raise an available defense involves a case-by-case examination of the particular facts in order that the issues those facts fairly raise can be compared with the defenses actually presented by counsel. See Annot., *Modern Status of Rule as to Test in Federal Court of Effective Representation by Counsel*, 26 A.L.R. Fed. 218, § 10(a) (1976).

State ex. rel Daniel v. Legursky 195 W. Va. at 328, 465 S.E.2d at 430.

As previously argued, trial counsel was faced with nearly insurmountable evidence of guilt. No viable evidence of actual innocence emerged from the testimony and Appellant does not account for why his friend and co-defendant, along with the surviving victim of the attack, would seek to frame him for the crimes and protect the actual attacker(s). No evidence suggests that Carl Starkey would purposefully cooperate with the other witnesses to protect them from prosecution if they did indeed attack him and his friend so mercilessly.

In the absence of facts to support a legitimate defense, trial counsel instead focused on inconsistencies in the witnesses' accounts and the medical evidence. However, the inconsistencies were accounted for in the testimony and were not sufficient to create a reasonable doubt about Appellant's guilt.

Appellant's arguments in this case are also inconsistent. He complains in a prior argument that trial counsel did not adequately present evidence to support a potential self-defense or actual innocence defense, but herein argues that because evidence of both were brought up, trial counsel should be faulted for advancing inconsistent defenses.

A reading of the transcript also indicates that trial counsel attempted to discredit the State's witnesses and cast doubt on Appellant's level of culpability. Trial counsel testified that her strategy was to discredit the State's witnesses and to develop reasonable doubt through cross-examination. (Hab. Tr., 38, Sept. 9, 2001.) From trial counsel's testimony and from the record it appears she was trying to form a defense, on her feet, through cross-examination and it was only after the conclusion of the State's case that trial counsel knew whether she had been able to effectively create the

foundation for a possible defense. Appellant advances several theories on a potential defense but what this argument amounts to is yet another expectation that trial counsel overcome the facts.

Given trial counsel's limited options and her attempt to fashion a defense by cross-examination, there is nothing to indicate that trial counsel's strategy was outside the wide range of professionally competent assistance. *Strickland, supra*.

7. **Appellant's Remaining Claims Consist of Second-Guessing Trial Counsel's Decisions During Pre-trial and Post-trial Proceedings.**

Appellant's remaining argument consists of attacking trial counsel's pre-trial and post-conviction representation. Appellant faults trial counsel for not adequately manufacturing grounds for appeal out of a fair trial. Appellant also faults trial counsel for other sundry actions throughout the pre-trial and post-trial proceedings that had no effect on the outcome of the proceedings, such as trial counsel's decision to waive the preliminary hearing. None of Appellant's argument in support of pre-trial and post-trial ineffective assistance of counsel raise a genuine issue of error in Appellant's trial.

The reality of the criminal justice system is that there is no such thing as a perfect trial. As this Court has observed: "Similarly, the United States Supreme Court has acknowledged that given 'the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.'" *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995), citing *United States v. Hasting*, 461 U.S. 499, 508-09 (1983). While not a perfect trial, Appellant was not entitled to such and as an imperfect trial, there is nothing in the record to suggest that reversible error occurred sufficient to result in the reversal of Appellant's conviction--as evidenced herein.

Again, Appellant cites to several of trial counsel's actions as facially ineffective without benefit of the proper legal analysis and, in some cases, factual support from the record. Appellant claims trial counsel was ineffective for waiving the preliminary hearing but fails to demonstrate how the outcome of the proceedings would have been different if a preliminary hearing had been held. This is insufficient to sustain a finding that Appellant's Sixth Amendment rights were violated by inadequate representation. Appellant cannot merely speculate about potential prejudice but must "affirmatively prove" that the result of the proceedings would have been different but for the deficient performance of trial counsel. *See Strickland*, 466 U.S. at 693.

Appellant further argues that trial counsel was ineffective for not moving the court for a *McGinnis* hearing on the admission of evidence about Appellant's cultivation of marijuana via evidence of the conditions of Hank Mosley's plea. However, the trial court fulfilled the requirements of *McGinnis* on the record. Moreover, Appellant does not consider the impact it would have had on the jury for the crime to appear to be an unmotivated random attack. Irrespective the fact that the challenged testimony provided the State with the element of motive, were it not for the testimony that the attack was intended as retaliation for theft of Appellant's marijuana, the crime would have appeared to be even more brutal than it was. While a missing motive can be fatal to achieving conviction in some murder cases, the motive in this instance was direct evidence intrinsic to the crime and was ruled so by the trial court. A conviction under the set of facts presented in the instant case did not hinge on a motive; rather, the motive was interwoven with the crime itself.

Trial counsel could have made all of the arguments advanced here by Appellant under *State v. McGinnis*, and the ruling of the trial court would not have been one whit different. Whether the evidence of Appellant's marijuana business came out via his co-defendant's plea or from the

testimony of the witnesses, is irrelevant. The trial court ruled that the marijuana cultivation was both intrinsic evidence, and admissible under Rule 404(b) as motive for the crime. Any ruling under *McGinnis* would have produced the same result.

None of Appellant's arguments that trial counsel's actions in pre-trial and post-conviction proceedings were deficient support a finding that his conviction was a violation of due process or the Sixth Amendment.

Appellant, the habeas court, and Appellant's trial expert attacked a competent attorney and accused her of being unfit professionally, deficient and ineffective. Appellant's argument in support of this assignment of error violates the very spirit of prevailing precedent that consistently admonishes against second-guessing and armchair quarterbacking. The record in this case speaks for itself. The law and the record will defend trial counsel and this Court should so find.

B. EVIDENCE OF APPELLANT'S MARIJUANA CULTIVATION WAS INTRODUCED TO SHOW MOTIVE FOR THE ATTACKS.

1. Standard of Review.

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

2. The Evidence Was Properly Admitted under Rule 404(b).

The standard of review for a 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 *de novo* whether the trial court correctly found the evidence was

admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. at 310, 470 S.E.2d at 629.

This Court has held that "Rule 404(b) adopts an inclusionary rather than an exclusionary approach making evidence of prior crimes, wrongs, or acts potentially admissible" *State v. McGinnis*, 193 W. Va. 147, 154, 455 S.E.2d 516, 523 (1994). Therefore, "Rule 404(b) permits the introduction of specific crimes, wrongs, or acts for 'other purposes' when character is not, at least overtly, a link in the logical chain of proof." (*Id.*) In the present case, the testimony was not admitted to influence the jury's opinion of the defendant's character, but was given solely for the permissible purpose of showing motive.

In its final order denying habeas relief, the circuit court found "that as to uncharged misconduct, the evidence was relevant and admissible on the issue of motive and/or intent and premeditation and the court gave an appropriate limiting instruction each time evidence of uncharged misconduct was raised." (R. at 744.)

In light of the testimony of the living victim, Starkey, indicating that Appellant and his co-defendant told him that the attack was a result of the victims stealing their pot, the judge properly concluded that the evidence was admissible for a legitimate purpose as it went to show motive. (Tr., 82, 87, June 3, 1996; Tr., 53-54, June 4, 1996.)

Appellant repeatedly asserts that the lower 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 . . .” in accordance with *State v. McGinnis*.⁸ (Appellant’s Brief at 36.)

However, the circuit court held “that over the course of two separate days, the trial court appropriately held an *in camera* hearing regarding this evidence prior to its admission.” (R. at 744.) The trial court heard the arguments of counsel regarding the admissibility of this evidence in a pre-trial hearing. (R. at 448.) During this hearing, the court concluded that:

[t]he purported statements of Carl Starkey would be admissible in the State’s case-in-chief. That would be the alleged statements made by the defendant and the alleged statement made by the co-defendant during the alleged commission of these acts. I find it’s relevant on the issues of motive, and I do not find that any prejudice is not outweighed by the probative value. I believe it’s very probative on that issue in the State’s case as showing the reasons for the alleged attack. So the State would be allowed to introduce those comments. We would need and would give a limiting instruction

(R. at 455-56.)

This pre-trial hearing was a sufficient *McGinnis* hearing where the trial judge properly conducted the required balancing test.

The trial court also heard direct testimony from the co-defendant in which he admitted that he and the defendant beat the victims for stealing some weed that they had cultivated. (Tr., 44,

⁸Syl. pt. 2, *State v. McGinnis*, 193 W. Va. at 151, 455 S.E.2d at 520, holds that

where an offer of evidence is made under Rule 404(b), the trial court, pursuant to Rule 103(a), is to determine its admissibility. 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 arguments 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 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 admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted.

June 5, 1996.) In light of this testimony, it was reasonable to conclude that the trial court was satisfied by a preponderance of the evidence that the collateral crime occurred and that Appellant committed such act. It is important to note, however, that the testimony was not offered not to prove that the marijuana field existed or that defendant was actually guilty of cultivating marijuana, but rather was admitted simply to show motive. Therefore, the trial court's determination that there was "sufficient evidence to show the other acts occurred" was not clearly wrong. *LaRock*, 196 W. Va. at 310, 470 S.E.2d at 629.

Furthermore, "[t]he Court finds admission of evidence of co-defendant's guilty plea pursuant to his plea agreement was relevant on issue of co-defendant's credibility and was not unduly prejudicial." (R. at 744.) This was a legitimate purpose for the admission of this evidence, and the trial court committed no error in allowing it in.

3. The Evidence Was Admissible As Intrinsic Evidence Independently of a Rule 404(b) Analysis.

In determining whether the admissibility of evidence of "other bad acts" is governed by Rule 404(b), we first must determine if the evidence is "intrinsic" or "extrinsic." *See United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990): "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." (Citations omitted). If the proffer fits in to the "intrinsic" category, evidence of other crimes should not be suppressed when those facts come in as *res gestae* – as part and parcel of the proof charged in the indictment. *See United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980) (stating evidence is admissible when it provides the context of the crime, "is necessary to a 'full presentation' of the case, or is . . . appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the "res gestae""). (Citations omitted).

LaRock, 196 W. Va. at 312 n.29, 470 S.E.2d at 631 n.29.

In the present case, Mosley, Appellant's co-defendant, testified that he had pled guilty to the charge of cultivation of marijuana. His testimony indicated that Appellant was involved in this

enterprise with him, and that he and Appellant planned to attack Caldwell and Starkey because they were stealing pot from them. As such, this testimony is “inextricably intertwined” with the crime of first degree murder because it shows Appellant’s motive for the attack.

Furthermore, this testimony and evidence helps the jury to paint a logical picture of the crime and determine the sequence of events leading up to the murder. Therefore the evidence should be allowed in as *res gestae*. “Indeed, evidence admissible for one of the purposes specified in Rule 404(b) and *res gestae* not always is separated by a bright line.” *LaRock*, 196 W. Va. at 312 n.29, 470 S.E.2d at 631 n.29 (citations omitted).

In *LaRock*, a father was convicted for the first degree murder of his 19-month-old child. During *LaRock*’s trial, the court allowed the admission of evidence regarding prior uncharged abuse as being admissible under Rule 404(b) to show motive. *LaRock*, 196 W. Va. at 310, 470 S.E.2d at 629. This court held in that case that “the acts complained of were so temporally close in time that they very well could be considered admissible independently of Rule 404(b),” and that “[e]vidence of the prior attacks and beatings not only demonstrated the motive and setup of the crime but also was necessary to place the child’s death in context and to complete the story of the charged crime.” *LaRock*, 196 W. Va. at 312-13, 470 S.E.2d at 631-32.

Similarly, the evidence of Appellant’s involvement in the uncharged cultivation of marijuana was necessary to show motive and also to “complete the story of the charged crime,” and was therefore admissible both under Rule 404(b) and independently of Rule 404(b). *LaRock*, 196 W. Va. at 312-13, 470 S.E.2d at 631-32.

4. **A Violation of Rule 404(b) Does Not Give Rise To a Claim of a Constitutional Violation and Therefore Is Not Grounds for Habeas Relief.**

Whether or not this evidence was properly admitted, the lower court did not err when it denied the defendant's habeas petition because a violation of the Rules of Evidence is a trial error to be discussed on direct appeal.

“A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt. 4, *State ex rel McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). Syl. Pt. 2, *Edwards v. Leverette*, 163 W. Va. 571, 258 S.E.2d 436 (1979).” Syl. Pt. 7, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988).

Appellant contends that the case of *State v. Thomas* elevates the violation of Rule 404(b) to a constitutional violation. In *Thomas*, this court held 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.” 157 W. Va. at 657, 203 S.E.2d at 456. That case is distinguishable, however, because in the case of Appellant, admission of Rule 404(b) evidence was far from “excessive.” Appellant only cites five instances where the allegedly inadmissible Rule 404(b) was even discussed. The court also gave a limiting instruction on each occasion.

Furthermore, in *White*, this court held that “[t]he violation of Rule 44 (c) of the West Virginia Rules of Criminal Procedure and its standard of a likely conflict is not an error which can be reached in a habeas corpus proceeding.” Syl. Pt. 8, *Cole v. White, supra*. Similarly, it would stand to reason that a simple violation of a Rule of Evidence, without extraordinary prejudice, does not rise to the level of a constitutional violation such that Appellant would be entitled to habeas relief.

C. THE PROSECUTOR'S STATEMENTS REGARDING APPELLANT'S CULTIVATION OF MARIJUANA WERE HARMLESS. THE PROSECUTOR WAS MERELY REBUTTING PRIOR STATEMENTS BY THE DEFENSE.

1. Standard of Review.

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

2. The Prosecutor Did Not Say That the Appellant Was Convicted of a Felony.

Appellant cites to a portion of the State's closing wherein the prosecutor commented on the testimony that Appellant tried to dissuade Mosley from carrying out the attack by suggesting they call law enforcement instead. The prosecutor effectively dispatched this attempt by the defense to reduce Appellant's culpability by noting that most times drug dealers do not report the theft of their product to law enforcement.

The prosecutor did not tell the jury Appellant was convicted of a felony. The prosecutor correctly pointed out that "*anyone* who is guilty of the crime of cultivation of marijuana, a felony, is[n't] going to call the police and say, hey, somebody's stealing my dope[.]" (Tr., 47, June 6, 1996.) The prosecutor's statements were not meant to inflame the jury but to address the absurdity of a drug dealer calling police to report a theft of a substance that is a felony to cultivate as in the instant case. Moreover, the trial court instructed the jury during the introduction of evidence of Appellant's

cultivation of marijuana that it was unrelated and not subject of the proceedings. (Tr., 92, June 4, 1996.)

The jury was not misled. The prosecutor did not say that Appellant had committed or was convicted of a felony. The remarks were a small portion of the closing and were a secondary reference to a generality and not to Appellant. If the remarks had been removed from the closing, there is nothing to suggest that the jury would have acquitted or granted mercy. With regard to whether the comments were interjected deliberately by the State to draw attention to a prior bad act, that was not necessary. The trial was replete with references to Appellant's drug activity irrespective of the prosecutor's statements. Syl. Pt. 5, *State v. Ocheltree*, 170 W. Va. 68, 289 S.E.2d 742 (1982), explains 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 manifest injustice." In light of the overwhelming evidence of guilt presented at trial as well as the evidence of Appellant's drug activity introduced at trial, the prosecutor's statements were inconsequential at best and harmless at worst. Therefore, the statements were not prejudicial to the outcome of the trial.

D. FAILURE TO STRIKE A JUROR FOR CAUSE, FORCING THE DEFENDANT TO EXERCISE A PEREMPTORY CHALLENGE, IS NOT GROUNDS FOR RELIEF IN HABEAS CORPUS.

1. Standard of Review.

The 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. A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right.

Syl. Pt. 4, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981).

2. **There Is No Constitutional Right to a Jury Panel “Free from Exception.”**

West Virginia Code § 62-3-3 states that:

In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forth with summoned and selected, until a panel of twenty jurors, free from exception, be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors. . . .

This section of the West Virginia Code gives a defendant on trial for a felony the right to have a jury panel of twenty jurors, free from exception, before the defendant must exercise one of his six peremptory challenges. Indeed, this court has frequently reiterated the importance of this right and the constitutional right to an impartial jury.

In *State v. Derr*, this Court held that “‘The 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.’ Syl. Pt. 4, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981).” Syl. Pt. 4, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Furthermore,

[i]t is not disputed that a criminal defendant in a felony trial is entitled to exercise six peremptory strikes against a panel of twenty jurors who are free from challenge for cause under common law. Under this rule, it is reversible error to deny a valid challenge for cause even if the disqualified juror is later struck by a peremptory challenge.

State v. Wilcox, 169 W. Va. 142, 144, 286 S.E.2d 257, 258-59 (1982).

If this were a direct appeal based on such a trial error, we would next reach the merits of the Defendant's argument that the trial court erred in failing to strike two prospective jurors. However, because the present case is appealing the denial of habeas relief, such analysis is unnecessary.

The right to a panel of 20 jurors free from exception is a statutory right, not a right of constitutional magnitude. This Court held as much in *State v. Phillips*. The Court held that:

The mere presence of a biased prospective juror on a jury panel, although undesirable, does not threaten a defendant's constitutional right to an impartial jury if the biased panel member does not actually serve on the jury that convicts the defendant. Although a defendant may be forced to use a peremptory challenge to remove a juror that should have been removed for cause does not alone invalidate the fact that "the juror was 'thereby removed from the jury as effectively as if the trial court had excused him for cause.'" *U.S. v. Cruz*, 993 F.2d 164, 168 (8th Cir. 1993), quoting *Ross v. Oklahoma*, 481 U.S. at 86, 108 S. Ct. at 2277, 101 L.E.2d at 88.

194 W. Va. 569, 587, 461 S.E.2d 75, 93 (1995).

Therefore, the Court determined that:

A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.

Id., Syl. Pt. 7.

In the present case, the two jurors that allegedly should have been removed for cause were removed from the jury panel by use of two of the Appellant's peremptory strikes. Therefore, the Appellant has not been prejudiced and his constitutional rights have not been violated. For this reason, the Appellant was rightfully denied habeas relief.

E. THERE CAN BE NO CUMULATIVE ERROR WHERE THERE WAS NO INDIVIDUAL ERROR TO ACCUMULATE.

The evidence of guilt presented at trial in this case was overwhelming. Eyewitnesses testified, Appellant's co-conspirator testified, and a victim survived and named Appellant as the murderer. Witnesses consistently testified that Appellant voiced his plan to attack the victims. He secured the murder weapon, he lay in wait, and he set upon an unarmed man and crushed his head with a baseball bat. Yet, Appellant claims he was found guilty where otherwise he would not have, because his lawyer was not Perry Mason and the prosecutor ridiculed his attempt to reduce his culpability by pointing out that drug dealers do not normally call the law to settle their disputes.

In this assignment of error Appellant reargues his previous claims, and because they have been addressed by Appellee already, will not be reasserted herein except to say that without demonstrating resulting prejudice or the denial of a fundamental constitutional right, there can be no cumulative error in a habeas proceeding. *See, e.g., Pethel v. McBride*, 219 W. Va. 578, 588-89, 638 S.E.2d 727, 737-38 (2006) ("The right to habeas relief is, by necessity, limited. If it were not, criminal convictions would never be final and would be subject to endless review Accordingly, habeas relief is available only where: (1) there is a denial or infringement upon a person's constitutional rights; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the legal maximum; or (4) the conviction would have been subject to collateral attack by statute or at common-law prior to the adoption of W. Va. Code § 53-4A-1."). None of the claims argued herein rise to the level of a constitutional violation and amount to little more than matters of trial error.

E. THERE CAN BE NO CUMULATIVE ERROR WHERE THERE WAS NO INDIVIDUAL ERROR TO ACCUMULATE.

The evidence of guilt presented at trial in this case was overwhelming. Eyewitnesses testified, Appellant's co-conspirator testified, and a victim survived and named Appellant as the murderer. Witnesses consistently testified that Appellant voiced his plan to attack the victims. He secured the murder weapon, he lay in wait, and he set upon an unarmed man and crushed his head with a baseball bat. Yet, Appellant claims he was found guilty where otherwise he would not have, because his lawyer was not Perry Mason and the prosecutor ridiculed his attempt to reduce his culpability by pointing out that drug dealers do not normally call the law to settle their disputes.

In this assignment of error Appellant reargues his previous claims, and because they have been addressed by Appellee already, will not be reasserted herein except to say that without demonstrating resulting prejudice or the denial of a fundamental constitutional right, there can be no cumulative error in a habeas proceeding. *See, e.g., Pethtel v. McBride*, 219 W. Va. 578, 588-89, 638 S.E.2d 727, 737-38 (2006) ("The right to habeas relief is, by necessity, limited. If it were not, criminal convictions would never be final and would be subject to endless review Accordingly, habeas relief is available only where: (1) there is a denial or infringement upon a person's constitutional rights; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the legal maximum; or (4) the conviction would have been subject to collateral attack by statute or at common-law prior to the adoption of W. Va. Code § 53-4A-1."). None of the claims argued herein rise to the level of a constitutional violation and amount to little more than matters of trial error.

Although Appellant pays lip service to the constitutional notions of Due Process and the right to a fair trial under the Sixth Amendment, he nonetheless attacks rulings of the trial court based on West Virginia precedent, statutes and rules of evidence. These sort of claims do not form the basis for relief in habeas corpus. "Absent 'circumstances impugning fundamental fairness or infringing specific constitutional protections,' admissibility of evidence does not present a state or federal constitutional question. *Hatcher v. McBride*, 221 W. Va. 5, 11, 650 S.E.2d 104, 110 (2006) citing *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir.1960).

Nor has Appellant demonstrated that the findings of the habeas court were clearly wrong, as is required for this Court to overturn such findings.

West Virginia Code § 53-4A-1 (1967) states, in relevant part, as follows:

Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief

Nothing in Appellant's assignments of error has proven that he is imprisoned as the result of an infringement of his rights under the Constitution of the United States or of this State. The evidence was overwhelming, and no ruling of the trial court or action of trial counsel unfairly prejudiced the verdict. Trial counsel could have given an opening, objected to the prosecutor's closing, requested a curative instruction on an inconsequential comment by the prosecutor, moved to bifurcate, and argued for mercy, and Appellant would still have been convicted of a murder he

clearly committed. The evidence of Appellant's marijuana cultivation was admissible under Rule 404(b) and *McGinnis*. Had the prosecutor not pointed out that drug dealers do not normally call the law to settle their disputes, Appellant would still have been convicted. Had trial counsel not been required to use her peremptory strikes to unseat two jurors, the outcome would have been the same.

Appellant has failed to show that the ruling of the habeas court was in violation of a state or federally protected constitutional right such that its findings were wrong as a matter of law. Appellant's conviction and term of imprisonment was a result of due process and this Court should affirm the conviction and sentence.

V.

CONCLUSION

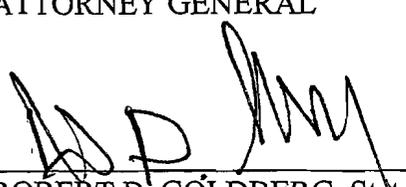
For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

HOWARD PAINTER, Warden,
Mount Olive Correctional Complex,
Appellee,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

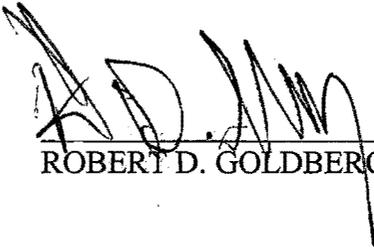


ROBERT D. GOLDBERG, State Bar No. 7370
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 4th day of September, 2009, addressed as follows:

To: Carrie L. Webster, Esq.
Bucci, Bailey & Javins
P.O. Box 3712
Charleston, West Virginia 25337



ROBERT D. GOLDBERG