

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1028

**DAVID BALLARD, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
RESPONDENT BELOW,**

PETITIONER,

vs.

**BRIAN BUSH FERGUSON,
PETITIONER BELOW,**

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

In 2002, Brian Ferguson, a West Virginia University sophomore, was convicted of the murder of Jerry Wilkins. The police report provided to Mr. Ferguson's trial counsel, James Zimarowski, stated that a woman named Mary Jane Linville told the lead police investigator that a man named Robbie Coles had confessed to the shooting in front of three people: Linville, a woman named Spring King, and an unidentified "heavysset" white woman who accompanied Coles. Although the sole defense presented by Mr. Zimarowski at trial was third-party guilt, Mr. Zimarowski failed to investigate the Coles confession. Due to his failure to investigate, Mr. Zimarowski was unable to present available, credible testimony supporting his alternate shooter defense, to obtain an avowedly "key" jury instruction regarding third-party guilt, or to effectively cross-examine State witnesses who incorrectly claimed to have "ruled out" Coles as a suspect. As a result, Mr. Ferguson is serving a life sentence without the possibility of parole.

On March 28, 2006, Mr. Ferguson filed a petition for post-conviction habeas corpus relief in the circuit court for Monongalia County, asserting that he had been denied the effective assistance of counsel by virtue of Mr. Zimarowski's failure to investigate Coles. On September 24, 2008, after Mr. Ferguson's habeas petition was denied by the circuit court, this Court reversed and remanded for an omnibus evidentiary hearing. That hearing was conducted by Judge Phillip D. Gaujot over three days in September 2011.

At the hearing, Judge Gaujot assessed the credibility of seven fact witnesses, including the live testimony of Ms. Linville and Ms. King, as well as four expert witnesses. After considering that evidence and a "careful stud[y] [of] the trial record," on August 8, 2012, Judge Gaujot issued a 50-page order making detailed factual findings and granting the writ. *See* Comprehensive Order Granting Writ Of Habeas Corpus, Appendix Volume I ("Order"), at 44.

First, the circuit court properly concluded that Mr. Zimarowski's failure to investigate the "obvious, potentially fruitful leads" in the police report was "deficient under an objective standard of reasonableness." Order at 43. The police report made clear that the "police failed to make contact with Spring King, with the unidentified woman . . . or with anyone else possessing potentially relevant information" regarding Coles. *Id.* at 40-41. Mr. Zimarowski nevertheless "declined" to investigate the Coles lead, and thus never spoke with Ms. Linville, Ms. King, or the unidentified woman, and never sought to learn about Coles' "whereabouts" on the night of the shooting, his "physical characteristics," his "criminal history," his "access to firearms," or any of the other "questions left unanswered by the police report." *Id.* at 41. Under these circumstances, the circuit court correctly rejected Mr. Zimarowski's attempt to justify his inaction as "strategy," finding that he "never accumulated the information necessary to convert mere assumptions to reasonably supported tactical judgments." *Id.* at 42. In other words, the circuit court rightly found that Mr. Zimarowski could not have made a "strategic" choice to forgo reliance on critical evidence when he made no investigation of that evidence.

Second, the circuit court found that, had Mr. Zimarowski "presented evidence derived from a proper investigation of the Coles confession, there is a reasonable probability that the result of Mr. Ferguson's trial would have been different." *Id.* at 44. As the court explained, the case presented against Mr. Ferguson at trial was purely "circumstantial": "the State produced no murder weapon, much less any physical evidence linking Mr. Ferguson to the murder weapon," "none of the eyewitnesses [to the shooting] (whose descriptions of the assailant did, in fact, vary) identified Mr. Ferguson as the assailant," and Mr. Wilkins himself "never identified Mr. Ferguson as the shooter," despite the fact that the two knew each other. *Id.* at 44-45.

At the evidentiary hearing, Mr. Ferguson presented live testimony from Ms. Linville and Ms. King regarding Coles' confession. The circuit court found that Ms. King and Ms. Linville offered "cogent testimony" at the hearing, presenting "themselves in such a manner as to demonstrate a strong resolve as to their central assertion: [that] on a night in early February, 2002, Robbie Coles arrived at Spring King's trailer and told them that he had *just* shot a man." *Id.* at 47-48. The court specifically found, after assessing their credibility, that "a reasonable juror could very well have credited the testimony of Ms. Linville and Ms. King in such a way as to create a reasonable doubt regarding Mr. Ferguson's guilt." *Id.* at 48. The court further found that "evidence derivative of a proper investigation of the Coles confession" would have enabled the defense to "far more effectively challenge[] the State's assertion[] that Jerry Wilkins' murder had been fully investigated" and to "present[] evidence that Robbie Coles shot and killed Jerry Wilkins, thereby providing substance to the defense's theory of third-party culpability." *Id.* at 48-49. Among other things, the circuit court found that an adequate investigation would have enabled Mr. Zimarowski to present evidence that Coles' attire on the night of the shooting was "notably similar to eyewitness accounts of the shooter" and that "the police had . . . fallen short of a complete investigation, especially with regard to the Coles confession." *Id.* at 47-48. As such evidence was necessary to "meet the circumstantial evidence presented against Mr. Ferguson" at trial, the circuit court correctly concluded that Mr. Ferguson was prejudiced by Mr. Zimarowski's deficient performance. *Id.* at 49.

The circuit court's conclusions are firmly grounded in the well-established law governing ineffective assistance of counsel, correctly applied in the court's Order. The court's detailed findings of fact, based on three days of live testimony, are reasonable and entitled to substantial deference from this Court. Accordingly, the Court should affirm the decision below.

COUNTER-STATEMENT OF THE CASE

Two days after the applicable deadline, on December 12, 2012, the State submitted a brief seeking reversal of the circuit court's carefully reasoned decision. The State's brief almost entirely ignores the circuit court's detailed findings of fact and supporting record citations. In addition, and contrary to this Court's rules, the brief also contains myriad assertions made without "appropriate and specific" record references. *See* W. Va. R. App. Proc. 10(c)(4), (d). Many of the State's assertions, moreover, find no support in the record or are directly refuted by record evidence. The most egregious of these misstatements are addressed below.

A. The Shooting Of Jerry Wilkins And The Police Investigation

On the night of February 2, 2002, Jerry Wilkins, a West Virginia University graduate student, was fatally shot near his University Avenue apartment building in Morgantown. Order at 2. The earliest witness to the incident, Kathryn Metcalfe, first saw Mr. Wilkins and his assailant running behind her car, along University Alley, as her car slowed to a stop at the intersection with Inglewood Boulevard. *Id.* at 5; App. Vol. 5 at 1013:1-21. Contrary to the State's unsupported assertions, no witness saw where the assailant first confronted Mr. Wilkins or testified that Mr. Wilkins was accosted as he emerged from his apartment.

There were four witnesses to the shooting. Although they all described the shooter as wearing a "black or blue" sweatshirt and "black pants," App. Vol. 5 at 1017:20-23, 1036:2-17, 1043:5-9, the circuit court found that their "descriptions of the assailant" otherwise "var[ied]." Order at 45. None of the witnesses "identified Mr. Ferguson as the assailant." *Id.* Indeed, the police did not even ask them to attempt to identify him. *See* App. Vol. 2 at 526:8-527:14.

Jerry Wilkins was communicative after the shooting. He stated that he "didn't want to die" and told his friend Andre Fisher that he had been "shot." Order at 7; *see* App. Vol. 5 at 1034:12-14, 1044:14-19. Mr. Wilkins was still at least "semi-conscious" by the time the first

emergency responder, Sergeant Scott of the Morgantown Police Department, arrived. Order at 12. Mr. Wilkins informed Sergeant Scott that “I am shot.” App. Vol. 5 at 1087:20. Yet “Mr. Wilkins, who knew Mr. Ferguson, never identified Mr. Ferguson as the shooter.” Order at 45.

Nevertheless, based entirely on statements made by Mr. Wilkins’ fraternity brothers on the night of the shooting regarding what the circuit court described as “two relatively brief” and “temporally removed” interactions between Mr. Ferguson and Mr. Wilkins, *see* Order at 45, the police focused their investigation on Mr. Ferguson from its earliest moments. App. Vol. 2 at 509:22-510:7. The police visited Mr. Ferguson immediately, conducted consensual searches of his apartment, his car, and his friend’s apartment, and questioned Mr. Ferguson at the police station – all within a few hours of the shooting. *See* Order at 12-14.

Despite this early focus, no physical evidence linking Mr. Ferguson to the Wilkins shooting was ever uncovered. *Id.* at 44-45; App. Vol. 5 at 1212:21-24. Nor did the police ever find any black pants or black sweatpants – like those worn by Mr. Wilkins’ assailant – in Mr. Ferguson’s possession. Order at 14; App. Vol. 5 at 1137:24-1138:4.

The police determined that the weapon used to kill Mr. Wilkins was a .44 caliber revolver, *not* the 9mm handgun or the .50 caliber Desert Eagle that Mr. Ferguson lawfully owned. Order at 16; App. Vol. 5 at 991:10-14. Although the police went to great lengths to find the murder weapon – including by dredging several ponds along the path that, according to the State, Mr. Ferguson would need to have taken after the shooting – the gun used in the Wilkins shooting was never recovered. Order at 45; App. Vol. 2 at 272:18-23; App. Vol. 5 at 1121:3-19, 1141:2-1142:18. Nor, as the circuit court explained, did the State produce “any physical evidence linking Mr. Ferguson to the murder weapon” or to the bullet or bullet jacket fragments located at the crime scene. Order at 45; *see id.* at 15-16.

While the police “found a .44 magnum casing lying loose at the bottom of [a] dumpster” in Mr. Ferguson’s apartment complex, *id.* at 15, they never linked that casing either to Mr. Ferguson or the Wilkins shooting. As the circuit court explained, the casing was not in Mr. Ferguson’s trash, the police did not find his fingerprints on the casing, and the police were unable even to establish that the dumpster “stayed permanently at Mr. Ferguson’s apartment complex” (as opposed to moving around the community). *Id.* at 15, 17. The police also were “unable to match the .44 magnum casing” found in the dumpster “to the bullet fragments” found at the crime scene. *Id.* at 17. To the contrary, different manufacturers made the bullet fragments found at the crime scene and the casing found in the dumpster. *See* App. Vol. 5 at 1173:3-22. Contrary to the State’s assertion, *see* State’s Br. at 39, no “bullet” was found in the dumpster.

B. Defense Counsel’s Pretrial Activities

Mr. Zimarowski was retained to represent Mr. Ferguson in February 2002. He was solely responsible for Mr. Ferguson’s entire pretrial and trial defense, and had all the resources he needed to conduct his investigation, including an investigator. App. Vol. 2 at 35:17-22, 79:19-23.

From the earliest days of his representation, Mr. Zimarowski’s defense was that someone other than Mr. Ferguson shot Mr. Wilkins. While he was developing that defense, and with ample time to investigate, Mr. Zimarowski received the Wilkins police report in response to his request for “exculpatory information.” *Id.* at 61:7-22. The report stated that a woman named Mary Jane Linville told Detective Steven Ford, the lead investigator of the Wilkins shooting, that Coles had confessed to the shooting in front of three people: Linville, Spring King, and an unidentified “heavysset” white woman who accompanied Coles. App. Vol. 3 at 817-18. The report also revealed that the police did not speak with Coles for the first time until nearly a month after his confession was reported, which was *after* Mr. Ferguson had been indicted, and

the police closed the file on Coles based solely on his having purportedly “passed” a polygraph. *See* Order at 30-31; App. Vol. 2 at 84:12-19.

As the circuit court found, the police report makes clear that “the police failed to make contact with Spring King, with the unidentified woman who purportedly accompanied Mr. Coles to Spring King’s trailer, or with anyone else possessing potentially relevant information.” Order at 40-41; *see* App. Vol. 2 at 518:15-519:15. They never called the phone number provided by Ms. Linville for Ms. King or followed up on Ms. Linville’s offer to take a polygraph exam. App. Vol. 2 at 518:9-519:15; *see* Order at 30. They did not search Coles’ property, speak with his associates, or ask him for an alibi. App. Vol. 2 at 523:11-14, 524:22-525:17; *see* Order at 30.

After receiving the police report, Mr. Zimarowski “declined” to undertake *any* investigation into Coles, despite the “obvious, potentially fruitful leads” regarding Coles set out in the police report. Order at 41, 43; *see* App. Vol. 2 at 99:23-100:1, 101:17-18. Instead, Mr. Zimarowski simply “*assume[d] what [Coles] said was true*” when Coles denied his guilt. App. Vol. 2 at 136:10-17 (emphasis added). Based on this unsupported assumption, Mr. Zimarowski “made no effort to contact Mr. Coles, Ms. Linville, Ms. King, or anyone connected to these individuals.” Order at 41; *see* App. Vol. 2 at 69:22-70:10, 74:2-5, 75:22-24, 77:10-20. “He made no effort to identify and establish contact with the unidentified woman who purportedly accompanied Mr. Coles.” Order at 41; *see* App. Vol. 2 at 75:22-24. “He made no effort to determine Mr. Coles’s whereabouts on February 2, 2002, Mr. Coles’s physical characteristics, Mr. Coles’s criminal history, or Mr. Coles’s access to firearms.” Order at 41; *see* App. Vol. 2 at 71:2-19, 72:16-73:7. “In fact, Mr. Zimarowski failed to explore *any* of the questions left unanswered by the police report, including whether the report itself was complete and accurate.”

Order at 41 (emphasis added). Instead, as Mr. Zimarowski admitted, he simply accepted what was in the police report “[a]nd did nothing further.” App. Vol. 2 at 69:23-70:3.

Prior to Mr. Ferguson’s trial, Mr. Zimarowski mentioned the police report to Mr. Ferguson “simply as a checklist type of thing of here is what we are doing and why.” App. Vol. 2 at 68:15-24. He “probably did not” explain “any of the strategic implications” of that decision, *id.*, because it is not his practice to ask his clients “what do you think of this, or should we do A or should we do B” because “[t]hat’s the purview of the attorney.” *Id.* at 141:10-21. Nor did Mr. Zimarowski ever share discovery or consult with any of Mr. Ferguson’s family members regarding the Coles information prior to trial:

Q. [by the State] Did you share with them all of the discovery that was produced to you by the State?

A. No. . . .

. . . .

Q. [by counsel for Mr. Ferguson] Did you consult with any of the family members about Coles *before trial*?

A. Consult is a strong word. *I doubt I consulted with anyone prior to trial.*

Id. at 140:19-141:5, 150:23-151:2 (emphasis added). Rather, as Mr. Zimarowski forthrightly acknowledged, he was the *only* lawyer “responsible for the pretrial investigation” and “the buck stopped with [him] in terms of making trial decisions.” *Id.* at 36:14-23.

Before trial, Mr. Zimarowski moved *in limine* regarding certain unproven prior acts allegedly involving Mr. Ferguson. At the time, the State conceded that most of the allegations were neither “relevant [nor] admissible,” the trial judge, Robert B. Stone, excluded testimony

with respect to an alleged uncharged offense, and no evidence regarding any of the alleged acts was subsequently offered into evidence at trial. App. Vol. 5 at 1000:1-22, 1004:4-22.¹

C. The Trial

The State's case against Mr. Ferguson was purely circumstantial. App. Vol. 2 at 629:15-16, 630:5-6 (State's expert conceding it was "a purely circumstantial case, no direct evidence whatsoever"); *see* Trial Tr. X 3:15-24 (Judge Stone: "obviously a circumstantial case"). The State did not offer any eyewitness testimony identifying Mr. Ferguson as the shooter. Order at 45; *see* App. Vol. 2 at 629:17-18. Nor did the State offer any physical evidence linking Mr. Ferguson to the shooting or to the murder weapon. *See* Order at 45; App. Vol. 5 at 1212:21-24.

Rather, the core of the State's case was that Mr. Ferguson had a motive to kill Mr. Wilkins, based solely on what the circuit court accurately described as two "brief" incidents spread out "over the course of approximately seventeen months." Order at 45-46; *see* App. Vol. 2 at 702:13-17. The first event, lasting no more than five minutes, "occurr[ed] in Ebony Gibson's vehicle in the fall of 2000 (over a year prior to the shooting)." Order at 45; App. Vol. 2 at 701:12-18. While the State offered hearsay testimony from Mr. Wilkins' associates that Mr. Wilkins said that Mr. Ferguson brandished a knife during the car ride, the only witness to the incident testified that there was no knife. Order at 22. The second incident took place "at a fraternity party in the fall of 2001 (one year after the 2000 event and several months prior to the shooting)." *Id.* at 45. Here, Mr. Ferguson was the *victim* of an attack at which Mr. Wilkins was not even present. App. Vol. 5 at 1067:5-9, 1070:3-16; *see* Order at 45-46 ("There was no physical confrontation between Mr. Ferguson and Mr. Wilkins during the fraternity party.").

¹ These allegations included a purported boast by Mr. Ferguson, referenced in the State's brief, regarding a shooting in Washington, DC. *See* State's Br. at 26. The State, however, admitted in a pre-trial hearing that "there [wa]s no evidence of it having happened," and Judge Stone rightly excluded it at trial: "That's not relevant." App. Vol. 5 at 1004:4-1005:23.

Faced with these facts, Mr. Zimarowski's "theory of the case" understandably was that "someone other than Mr. Ferguson shot Jerry Wilkins." Order at 41, *see* App. Vol. 2 at 41:5-7. In both his opening and closing statements, Mr. Zimarowski described the case as "a who-done-it" and emphasized Mr. Wilkins' failure to identify Mr. Ferguson as his assailant, despite Mr. Wilkins' familiarity with Mr. Ferguson and communicativeness with the police and witnesses. App. Vol. 2 at 41:10-12; App. Vol. 5 at 1012:5-6, 1012:22-24, 1210:9-1211:10, 1213:20. Mr. Zimarowski also argued that the eyewitness descriptions of the shooter varied widely, App. Vol. 5 at 1214:7-1215:7, that the "police conducted a sloppy, incomplete investigation," and that there was a "rush[] to judgment" against Mr. Ferguson, who became the focus of the police investigation within hours of the shooting. Order at 41-42; *see* App. Vol. 2 at 527:20-22.

Although, as the circuit court found, "third party guilt" was the "overarching theory of the defense," Order at 42, Mr. Zimarowski put on no evidence identifying another shooter or suggesting that there was another shooter. Instead, despite having conducted no investigation regarding Coles, Mr. Zimarowski briefly raised the Coles confession once, during the cross-examination of Detective Ford, in a way that inexplicably cast doubt on the confession and undermined Mr. Ferguson's defense:

Q. [T]here was a report that someone admitted to the shooting. Do you recall that?

A. Yes, sir.

Q. Now, the person that admitted to the shooting was, to put it kindly, not very credible?

A. We know who he is, yes.

Q. Did you interview him?

A. Yes.

...

Q. What did he say, if you recall?

A. He said he never said those things.

App. Vol. 3 at 918:5-17.

As the circuit court explained, the State took advantage of Mr. Zimarowski's failure to investigate Coles, "slamm[ing] . . . shut" the door "feebly" opened by Mr. Zimarowski's questioning. Order at 46; *see* App. Vol. 5 at 1146:24-1149:19. On redirect, Detective Ford categorically asserted that "nobody confessed to the shooting," that the police "followed up" the Coles lead, and that they "ruled him out" as a suspect. App. Vol. 5 at 1147:2, 1149:14-19. Due to his failure to investigate, Mr. Zimarowski was unable to respond in any way to Detective Ford's incorrect assertions. App. Vol. 5 at 1150:21 ("No questions, Your Honor."). The jury was thus given the false impression that the police had definitively ruled out the single real-world alternate shooter that Mr. Zimarowski referenced, which the State reinforced in closing. App. Vol. 3 at 920:17-921:5 (referring to a "bogus confession" and arguing that the police "checked out every lead," "searched all over the place," and "talked to I don't know how many people," and "all of their leads, all of the evidence, directed them to Brian Ferguson, nobody else").

At the close of trial, Mr. Zimarowski sought a standard *Harman* jury instruction, which would have told the jury that they could acquit Mr. Ferguson if evidence of third-party guilt "raises within the jury's mind a reasonable doubt that this Defendant committed the offense." App. Vol. 3 at 930. Mr. Zimarowski told Judge Stone that this instruction was "very key" and "basically the defense theory." *Id.* at 820:9-11. But Judge Stone denied the request because there was not any "evidence linking another person [to the crime]." *Id.* at 821:22-822:2 (no alternate shooter "identified" or "suggested reasonably by the evidence"); *see also* Order at 26-27.

In November 2002, Mr. Ferguson was convicted of murder without a recommendation of mercy and subsequently sentenced to life in prison with no possibility of parole.

D. The Omnibus Evidentiary Hearing

At a three-day hearing in September 2011, Mr. Ferguson presented testimony from Mr. Zimarowski establishing his failure to conduct any investigation. The court also heard from 10 other fact and expert witnesses, including two of the three women who heard Coles confess.²

Testimony Regarding Coles' Confession. The trial court found that Ms. King and Ms. Linville offered "cogent testimony" at the hearing, presenting "themselves in such a manner as to demonstrate a strong resolve as to their central assertion: on a night in early February, 2002, Robbie Coles arrived at Spring King's trailer and told them that he had *just* shot a man." Order at 47-48. The testimony, offered by two witnesses who have never met Mr. Ferguson, was consistent on all material points.

Ms. Linville was in Ms. King's trailer home "watch[ing] a VHS movie" in the "first part of February" 2002, when Robbie Coles arrived "real anxious and very nervous and just fidgety." App. Vol. 2 at 157:3-158:21 (Linville); *see also id.* at 226:12-13, 227:11-13 (King: Coles was "very nervous" and "acting really strange"). Although Ms. Linville and Ms. King both knew Mr. Coles, he was principally an acquaintance of Ms. King's roommate. *See id.* at 243:11-14; *see also id.* at 225:19-226:5. After entering the trailer, Coles stated that he had "just shot a f*ck*ng n*gg*r" coming "down from the school." *Id.* at 159:22-24 (Linville); *see also id.* at 227:16-18 (King: Coles stated he had "just shot a man down the hill").

Coles was wearing "baggy pants that were dark in color" and an "oversized," "blue or black" "hoodie . . . pullover." *Id.* at 161:23-162:10, 182:20 (Linville); *see also id.* at 227:7-9

² The third witness to the confession has never been located. The police and Mr. Zimarowski made no effort to locate her at the time, and Mr. Ferguson's counsel have been unable to locate her these many years later.

(King: “dark” pants and “dark hoodie”).³ He was looking for “a place to hide out,” and possibly “smoke pot or something.” *Id.* at 159:19-20, 202:10-14 (Linville); *see id.* at 232:18, 243:21-22 (King: Coles wanted to “smoke a blunt” and wanted to stay at her residence because he was “scared to go home”). He was accompanied by a white woman who was “maybe 20, 25 pounds overweight.” *Id.* at 159:12 (Linville); *see id.* at 226:19-20 (King: woman was “kind of thicker”).

Ms. Linville left the trailer about ten minutes after Coles arrived, and returned shortly after he left. *Id.* at 162:23-164:3 (Linville), 227:24-228:4 (King). Both women were leery of Coles: Ms. Linville knew him as a “shady customer” who “sold and bought drugs” and had “robbed people before,” and Ms. King was “scared” of Coles, who had “spit” on her on a previous occasion. *Id.* at 193:14-16 (Linville), 251:11-12, 248:9-11 (King). Both women recalled Ms. King asking Coles to leave. *Id.* at 209:6-8 (Linville: “She was telling him he had to go.”), 227:19-22, 232:24-233:1 (King: “you need to leave my residence immediately”).

Neither Ms. Linville nor Ms. King has any connection to Mr. Ferguson or his family, and neither was promised or has received anything in exchange for her testimony. *Id.* at 166:22-167:7, 229:13-19. Both would have testified at Mr. Ferguson’s trial in 2002 if asked. *Id.* at 167:17-22 (Linville), 229:20-23 (King: “Absolutely”).

Both Ms. Linville and Ms. King provided recorded statements to counsel for Mr. Ferguson in March 2006, shortly after they were located by Mr. Ferguson’s private investigator, Nancy Stephens, in February 2006. State’s Br. at 13; *see App. Vol. 2* at 173:5-19, 234:7-15. There are no material differences between their March 2006 recorded statements – which were

³ Ms. Linville also testified that Coles was “about 5-10 or 11,” a “medium-sized guy” with “medium” skin tone, and in his “early 20s” at the time of the shooting. *App. Vol. 2* at 162:11-19. As represented by counsel for the State, Coles’ prison and conviction records indicate that Coles is 5-10 or 5-11. *See App. Vol. 4* at 988:7-14. He was 23 years old at the time of the Wilkins shooting.

provided to the State as part of discovery in this habeas action – and the sworn affidavits they signed in late 2007/early 2008.⁴

There is no evidence that, prior to signing their affidavits, either woman was provided material information regarding Robbie Coles or Brian Ferguson by counsel for Mr. Ferguson or anyone acting on counsel's behalf. To the contrary, Ms. Linville's testimony makes clear that she was not provided with any information regarding this case until after she signed her affidavit. *See* App. Vol. 2 at 213:20-23; *see also id.* at 206:7-9. The record is also clear that, prior to signing their affidavits (in which they gave highly consistent statements about Coles' confession), Ms. Linville and Ms. King had not spoken with one another since the night of the confession. App. Vol. 3 at 813.

Testimony Regarding Coles' Polygraph. Mr. Zimarowski confirmed that, but for the State informing him that Robbie Coles had passed a polygraph, he would have investigated Coles. Order at 33; *see* App. Vol. 2 at 84:7-8. At the hearing, Mr. Ferguson presented expert testimony from Barry Colvert, a retired FBI special agent who has polygraphed over 3000 individuals. App. Vol. 2 at 335:13-336:10, 337:20-341:3. Mr. Colvert scored the Coles polygraph using the same methodology as the original police examiner, Officer Clark, and found that the "responses on that test were indicative of deception" – or, in "laymen's" terms, that Coles "failed the test." *Id.* at 343:4-7, 342:8-22. According to Mr. Colvert, there is no "way to accurately score Robbie Coles' test and come up with a passing score." *Id.* at 366:19-22; *see id.* at 355:4-7, 400:18-21.

⁴ The State argues that an assertion in Ms. King's handwritten statement – that Coles "may have said something about shooting someone that night" – was "left out of the typed signed affidavit." State's Br. at 13. However, as Ms. King testified, she dictated the handwritten statement and – prior to signing – "correct[ed]" the statement to clarify that Mr. Coles said that he had "shot someone down the hill." App. Vol. 2 at 252:10-53:10; *see id.* at 238:11-16, 240:3-6; App. Vol. 3 at 811-813. The statement that appears in the subsequent typewritten affidavit reflects Ms. King's contemporaneous correction.

Thus, the polygraph test, properly scored, actually indicated that Coles was lying when he denied killing Mr. Wilkins.

Officer Clark, who had not conducted a polygraph in over five years at the time of the hearing, testified that he was “not comfortable” rescoring his own polygraph results, which he had originally spent ten minutes generating. *Id.* at 312:19-313:4. Officer Clark agreed that (other than his original scoring) he had “nothing [to] rely on today to say here’s why [Mr. Colvert is] wrong.” *Id.* at 318:24-319:3. The State declined to call its polygraph expert, Preston County Sheriff Dallas Wolfe, despite his presence in the courtroom during the hearing.

SUMMARY OF ARGUMENT

A petitioner asserting ineffective assistance of counsel is entitled to a new trial if (1) his trial counsel’s performance was “deficient under an objective standard of reasonableness,” and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” Syl. Pt. 2, *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 691 S.E.2d 183 (2010) (per curiam). In a detailed order issued after weighing live testimony from eleven witnesses, Judge Gaujot determined under this well-established law that Mr. Ferguson is entitled to a new trial. The State’s challenges to that ruling fall far short of showing an abuse of discretion or clearly erroneous factual findings.

The State’s first assignment of error is that the circuit court abused its discretion in finding Mr. Zimarowski’s complete failure to investigate the only lead he obtained regarding his core defense (an alternate shooter) fell below the constitutional minimum for the effective assistance of counsel. The circuit court’s conclusion that Mr. Zimarowski’s admitted failure to investigate available evidence regarding Robbie Coles was deficient, however, is amply supported by both controlling law and established facts.

In its fifth assignment of error, the State asserts that the circuit court “incorrectly assessed” the credibility of Ms. Linville and Ms. King, and thus wrongly concluded that Mr. Ferguson was prejudiced by Mr. Zimarowski’s deficient performance. However, as the circuit court found, a “reasonable juror could very well have credited” the consistent and corroborative testimony of Ms. Linville and Ms. King regarding the “central assertion” that Coles confessed to the shooting. Order at 47-48. This credibility determination, based on the live testimony of Ms. Linville and Ms. King after vigorous cross-examination by the State, is entitled to substantial deference, and the State does not come close to establishing that it was clearly erroneous. Nor can the State demonstrate that the circuit court’s conclusion that Mr. Ferguson was prejudiced by Mr. Zimarowski’s deficient performance constitutes an abuse of discretion. Accordingly, the State’s fifth assignment of error is unavailing.

The State’s other three assignments of error are frivolous. The circuit court did not ignore the opinions of the State’s ineffectiveness expert; rather, the circuit court simply disagreed with the expert’s ultimate opinions. Nor did the circuit court abuse its discretion in limiting testimony from the State’s second attorney expert because, as the State effectively concedes, that testimony was cumulative. Finally, the circuit court did not establish any “mechanical rule” for finding deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984); rather, the court simply (and correctly) found that Mr. Zimarowski’s failure to investigate the Coles information, on the facts of this case, deprived Mr. Ferguson of his right to a fair trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Affirmance of the decision below would not require oral argument. *See* West Virginia Rule of Appellate Procedure 18(a). Should the Court disagree, Mr. Ferguson requests argument under Rule 19 because the State’s assignments of error involve the application of settled law,

seek to challenge the exercise of the circuit court's discretion, or ask the Court to overturn the decision below as contrary to the evidence. Argument under Rule 20 would not be appropriate.

ARGUMENT

I. STANDARD OF REVIEW

This Court applies “a three-prong standard of review” in “reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action.” Syl. Pt. 3, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). It reviews “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.” *Id.* (citations omitted). Under the abuse of discretion standard, this Court will “not disturb [the] circuit court’s decision unless the circuit court ma[de] a clear error of judgment or exceed[ed] the bounds of permissible choices in the circumstances.” *Hensley v. West Virginia Dep’t of Health & Human Res.*, 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (1998).

II. THE CIRCUIT COURT CORRECTLY HELD THAT DEFENSE COUNSEL’S PERFORMANCE WAS OBJECTIVELY UNREASONABLE.

As this Court has explained, “[t]he fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel’s investigation.” Syl. Pt. 3, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). Accordingly, the U.S. Supreme Court established a bright line rule: “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; see ABA Standards for Criminal Justice, Prosecution Function & Defense Function 4-4.1(a) (3d ed. 1993) (defense counsel has duty to “explore all avenues leading to facts relevant to the merits of the case”).

Here, it is undisputed that Mr. Zimarowski did nothing to investigate the Coles confession, and his failure to investigate was facially unreasonable. He did not speak with Ms. Linville or

Coles, and he did not speak with Ms. King or the unidentified third witness to the confession, despite knowing that the police never spoke with either of these women. He “declined” to investigate Coles despite the facts that his “overarching” defense was third party guilt, the Coles information was his only concrete lead regarding an alternate shooter, and Coles fit perfectly with his theory that Mr. Wilkins was shot by a stranger. He failed to develop evidence – plain from the face of the police report – that the police investigation into Coles was incomplete, despite his argument that the police investigation of the Wilkins murder was “sloppy.” And he decided to rely solely on the police report to exonerate Coles, despite knowing that the police did not even speak with Coles until *after* seeking an indictment of Mr. Ferguson and telling the jury that there was a “rush to judgment” against Mr. Ferguson.

The State nevertheless asserts that Mr. Zimarowski’s “decision not to call witnesses regarding the Robbie Coles [] statements was strategic,” that this “strategic” judgment was entitled to a “heavy measure of deference,” and that, applying appropriate deference, the decision “fell within the wide range of reasonably ‘professional assistance.’” *See* State’s Br. at 23-24, 27. Absent an adequate investigation, however, the decisions made by counsel are not properly “strategic,” and so are not entitled to deference. Here, to credit Mr. Zimarowski’s total abdication of his duty as defense counsel to investigate obvious leads supporting his own theory of the case as “strategic” would rob that term of all substance. The State’s first assignment of error is thus unavailing.

A. Mr. Zimarowski’s Failure To Investigate Was Negligence, Not Strategy.

As the circuit court recognized, counsel in ineffective assistance cases are “strongly presumed to have rendered adequate assistance.” Order at 37 (citations omitted). However, as this Court has held, this “presumption *is simply inappropriate if counsel’s strategic decisions are made after an inadequate investigation.*” Syl. Pt. 4, *State ex rel. Bess v. Legursky*, 195 W. Va.

435, 465 S.E.2d 892 (1995) (per curiam) (emphasis added); *see Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (“*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision.”). Applying this well-established law, the circuit court determined that Mr. Zimarowski’s purported “strategy” should not be afforded the same high level of deference “frequently reserved for strategic decisions of counsel” because it rested on “a weak informational foundation.” Order at 42.

After Mr. Zimarowski received the police report, he was put on notice regarding “obvious, potentially fruitful leads” supporting his own “theory of the case – that someone other than Mr. Ferguson shot Jerry Wilkins.” *Id.* at 41, 43. He also was put on notice that the State had conducted only a perfunctory investigation into Coles, ruling him out based solely on the fact that he reportedly passed a polygraph exam.⁵ *See id.* at 40-41. Yet, despite his recognition that the police regularly “get facts wrong” and that it is inappropriate to rely on the police to assess the credibility of potential witnesses, App. Vol. 2 at 51:4-52:3, Mr. Zimarowski undisputedly did *nothing* to follow up on the Coles lead:

He made no effort to identify and establish contact with the unidentified woman who purportedly accompanied Mr. Coles. He made no effort to determine Mr. Coles’s whereabouts on February 2, 2002, Mr. Coles’s physical characteristics, Mr. Coles’s criminal history, or Mr. Coles’s access to firearms. In fact, Mr. Zimarowski failed to explore any of the questions left unanswered by the police report, including whether the report itself was complete and accurate.

⁵ By Mr. Zimarowski’s own admission, he would have conducted an independent investigation if the police report stated that Coles failed the polygraph or was inconclusive. Order at 33. However, it was plainly unreasonable to place determinative reliance on the polygraph where, as here, Mr. Zimarowski believed the polygraph result conclusorily set out in the police report to be both immune from testing through pre-trial discovery and inadmissible at trial, *see* App. Vol. 2 at 88:12-89:1, 102:16-18. In this case, the unreasonableness of Mr. Zimarowski’s unquestioning reliance on the reported polygraph result is further highlighted by the fact that Coles failed the polygraph exam. *See supra*, pp. 14-15.

Order at 41; *see* State’s Br. at 27 (conceding that trial counsel “declined to investigate [Coles]”). Instead, as the circuit court found, Mr. Zimarowski merely “*assumed* that the testimony of Mr. Coles, Ms. Linville, and Ms. King would, in the aggregate, be incredible.” *Id.* (emphasis added).

Courts routinely find deficient performance in circumstances, like this one, where counsel’s pre-trial investigation was insufficient to justify their purported trial strategy.⁶ For example, in *Sanders v. Ratelle*, the court rejected the argument that counsel had made a “strategic” choice not to investigate an alternate shooter who had confessed because counsel had “failed to conduct even the minimal investigation that would have enabled him to come to an informed decision about what defense to offer and whether to call [the possible alternate shooter] as a witness.” 21 F.3d at 1456. As in *Sanders*, justifying Mr. Zimarowski’s failure to investigate as “strategic” here would “strip[] that term of all substance.” *Id.*⁷

As demonstrated by numerous decisions of this and other courts, moreover, the law is especially clear that counsel does not fulfill the duty to investigate simply by relying on materials prepared by the State. *State ex rel. Quinones v. Rubenstein*, 218 W. Va. 388, 395, 624 S.E.2d 825, 832 (2005) (per curiam) (counsel ineffective when he “checked with the prosecutor who

⁶ *See Ramonez v. Berghuis*, 490 F.3d 482, 488 (6th Cir. 2007) (“[T]he investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the ‘strategic’ choice erected upon it rest upon a rotten foundation.”); *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) (holding, in reference to an unexamined third-party confession, that a lawyer’s duty “includes the obligation to investigate all witnesses who may have information concerning his or her client’s guilt or innocence”); *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (noting that a decision must be “informed” in order to “be deemed ‘strategic’”); *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987) (holding that counsel’s failure “to investigate a known and potentially important alibi witness” constituted ineffective assistance because “counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary”).

⁷ The failure to investigate evidence supporting counsel’s principal defense is an especially “strong basis” for finding counsel ineffective. *Sanders*, 21 F.3d at 1458; *accord Coleman v. Brown*, 802 F.2d 1227, 1234 (10th Cir. 1986) (holding that “it was improper for [the] attorney to fail to investigate what was perhaps [defendant]’s sole line of defense”). Here, Mr. Zimarowski’s failure to investigate was particularly egregious because the Coles confession was not ancillary to his defense: it *was* his defense. *See* Order at 42 (third party guilt was the “overarching theory of the defense”).

had indicated that he had provided all of the information he had to [petitioner's former counsel], [*because*] *reliance on that representation is simply not acceptable*") (emphasis added); *State ex rel. Stroger v. Trent*, 196 W. Va. 148, 154, 469 S.E.2d 7, 13 (1996) (per curiam) (failure to investigate confession, based on "review of the file of the prosecuting attorney," was objectively unreasonable).⁸ As the Fourth Circuit has explained, unquestioning reliance on the "integrity" and "infallibility" of police work is "*abhorrent to Strickland*, which was designed to protect the Sixth Amendment right to a reliable adversarial testing process." *Elmore v. Ozmint*, 661 F.3d 783, 859 (4th Cir. 2011) (emphasis added). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985); *accord Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990) ("failure to attempt to find and interview [potential alibi witnesses] falls short of the diligence that a reasonably competent attorney would exercise under similar circumstances"). Thus, Mr. Zimarowski's complete reliance on the police report to exonerate Coles was plainly deficient.

In sum, "[c]onstitutionally effective counsel must develop trial strategy in the true sense – not what bears a false label of 'strategy' – based on what investigation reveals witnesses will

⁸ See *Origer v. Iowa*, 495 N.W.2d 132, 137 (Iowa Ct. App. 1992) (unreasonable not to have followed up on witness statement that, if pursued, would have led to two witnesses who possessed evidence of a third-party confession of guilt); *Wisconsin v. Mayo*, 734 N.W.2d 115, 130-31, 136 (Wis. 2007) (deficient to rely "completely upon police reports" and "fail[] to conduct any independent investigation"); see also *Dugas v. Coplan*, 428 F.3d 317, 330 (1st Cir. 2005) (deficient "to accept the characterization of the fire scene by the state's experts rather than conduct an independent investigation"); *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir. 1986) (deficient for counsel to forego witness interviews based "solely on his reading of a police report"); *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984) (review of "material in the prosecutor's file [did not] constitute adequate investigation"); *Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984) ("We do not agree that police statements can generally serve as an adequate substitute for a personal interview."); *Schlup v. Bowersox*, No. 4:92CV443 JCH, 1996 WL 1570463, at *14 (E.D. Mo. May 2, 1996) (investigation unreasonable where counsel relied on state interviews instead of conducting his own).

actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.” *Ramonez*, 490 F.3d at 489. Here, because Mr. Zimarowski made no investigation into Coles’ confession and did not know what the witnesses would say about it, he could not have made a *strategic* decision not to present evidence regarding Coles at trial. *See* Order at 41 (“Mr. Zimarowski assessed the potential weight of testimonial evidence having never communicated with the witnesses from whom that evidence could be elicited.”). This complete failure “to investigate and interview promising witnesses . . . constitutes negligence, not trial strategy.” *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992).⁹

B. The State’s Justifications Do Not Excuse Mr. Zimarowski’s Inaction.

The State offers various excuses for Mr. Zimarowski’s decision to forego an investigation. But these purported justifications reinforce the unreasonableness of his conduct.¹⁰

Mr. Ferguson And His Family. The State asserts, without citation, that Mr. Zimarowski had “discussions with [Mr.] Ferguson’s relatives regarding the evidence and trial strategy.” State’s Br. at 22. Any suggestion that Mr. Ferguson’s family members knew about the Coles evidence prior to trial, however, is false, as established by Mr. Zimarowski’s testimony.

⁹ *See United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (“Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he has not yet obtained the facts on which such a decision could be made.”); *see also Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (“decision not to present the [alternate shooter] theory through the testimony of [eyewitnesses] – a decision made without interviewing the witnesses . . . – was unreasonable”); *Mitchell v. Henry*, No. C-93-4299, 1997 WL 711055, at *18 (N.D. Cal. Nov. 6, 1997) (counsel ineffective where he “chose an identity defense, yet failed to investigate the most obvious lead to support that defense”); *People v. Bryant*, 907 N.E.2d 862, 873 (Ill. App. Ct. 2009) (“counsel’s chosen strategy was unreasonable” where defense “theory was left unexplored and undeveloped” despite “the availability of witnesses whose testimony could have been used to support the defense theory that [others] were the real killers”).

¹⁰ Many of the State’s justifications were also disavowed by Mr. Zimarowski at the hearing, *see* App. Vol. 2 at 79:10-15, and so the State may not rely on them now. *See Davis v. Lambert*, 388 F.3d 1052, 1064 (7th Cir. 2004) (“[A] reviewing court should not . . . construct strategic defenses which counsel does not offer.”); *see also Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986).

At the hearing, Mr. Zimarowski admitted that he did not provide the police report referencing Robbie Coles to Mr. Ferguson’s family and did not consult with Mr. Ferguson’s family regarding the Coles evidence prior to trial. App. Vol. 2 at 140:19-141:5, 150:23-151:2.¹¹ Nor did Mr. Zimarowski explain to Mr. Ferguson the full import of the police report or the “strategic implications” of his pre-trial decisions, including the decision not to investigate the Coles information. App. Vol. 2 at 68:15-24; *see id.* at 141:10-21. Had the State presented any evidence to the contrary at the hearing, which it could not, Mr. Ferguson would have refuted it with testimony from himself and his family.

Even if Mr. Zimarowski had consulted with Mr. Ferguson or his family, it would have no relevance to the issues before this Court. Prevailing professional norms, to which *Strickland* refers courts for guidance, do not qualify the duty to investigate according to the legal sophistication of the client or his family. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1 (3d ed. 1993); *see also Strickland*, 466 U.S. at 688.¹²

Drug Debriefing. The State asserts that Mr. Zimarowski was justified in ignoring the Coles information because Ms. Linville’s statements arose in the context of a “debriefing in a federal case of drug charges against her.” State’s Br. at 24. Both Mr. Zimarowski and Detective Ford, however, agreed that accurate information can be obtained from drug debriefings; indeed,

¹¹ The deposition testimony on which the State purports to rely was not admitted into the record. *See* App. Vol. 2 at 154:8-15. Nor does that testimony establish that any of Mr. Ferguson’s family knew about Coles or Mr. Zimarowski’s failure to investigate the Coles lead before trial.

¹² Equally irrelevant is the State’s assertion (at 21) that Mr. Zimarowski was “retained” rather than “appointed from the criminal appointment list.” *See Holland v. Florida*, 130 S. Ct. 2549, 2571 n.5 (2010) (standard for ineffective assistance the same regardless of whether counsel is appointed or retained). Nor do Mr. Zimarowski’s qualifications and experience change the Court’s analysis. *See* State’s Br. at 24. Mr. Ferguson’s Sixth Amendment right to receive effective assistance is tested by the assistance he received, not the assistance his lawyer may have provided to other clients. *See* Order at 42 (“[W]hile this Court’s respect for Mr. Zimarowski is [] well deserved, esteem can neither dilute, nor alter, a conclusion quite plainly drawn from application of fact to law.”).

that is the purpose of such debriefings. App. Vol. 2 at 80:19, 513:7-514:5. Thus, the State is simply wrong to assert that the context of Ms. Linville's disclosure rendered the information she provided so inherently incredible that Mr. Zimarowski may be excused for failing to follow up on the Coles confession. *See generally Barrera v. State*, 321 S.W.3d 137 (Tex. App. 2010) (upholding criminal convictions based on evidence received during a drug debriefing).

In any event, the context of Ms. Linville's statement cannot excuse Mr. Zimarowski's failure to pursue the Coles information through *other* readily available avenues, such as by investigating Coles directly or speaking with the two other witnesses to the confession.

Statement Inconsistencies. The State asserts that Mr. Zimarowski was justified in ignoring the Coles information because "Linville's reported information [in the police report] was not corroborated by the physical facts of the murder of Jerry Wilkins." *See State's Br.* at 14. However, as Mr. Zimarowski recognized, officers sometimes "get facts wrong in their police reports." App. Vol. 2 at 51:19-21. Thus, it was inconsistent with his duty as defense counsel to accept the purported inconsistencies in the report without interviewing Ms. Linville himself.

Had Mr. Zimarowski followed up with Ms. Linville, moreover, he would have learned that the asserted inconsistencies in her statement vanish. For instance, Ms. Linville's consistent recollection is that Coles indicated that the bullet entered the victim's body in the back/neck/shoulder area, *not* (as the police report states) in the chest. App. Vol. 2 at 160:5-8; 211:21-212:10; *see Order* at 48 ("Ms. Linville vehemently denied saying anything . . . to suggest that Coles confessed to shooting someone in the chest."). Thus, Ms. Linville's actual testimony is wholly consistent with the way Mr. Wilkins was shot. Similarly, her consistent testimony has been that Coles confessed to the shooting "just" after it happened, *not* (as the police report suggests) a number of days later. *See, e.g., App. Vol. 2* at 159:22-160:4; *see Order* at 48 & n.7.

Motive. The State argues that Mr. Zimarowski's inaction should be excused because there was no known connection between Coles and Mr. Wilkins. *See* State's Br. at 25-26. But Mr. Zimarowski had no way of knowing whether this was true, because he conducted no investigation. This excuse also cannot be squared with Mr. Zimarowski's own claim to the jury that Mr. Wilkins was killed by "somebody he didn't know." App. Vol. 2 at 45:20-46:10; App. Vol. 5 at 1012, 1216-1217. Nor can it be squared with the possibility of motives – such as robbery – fitting with Coles' history of violent criminal behavior. *See* App. Vol. 2 at 514:22-515:18 (Ford testifying that he knew Coles due to "multiple criminal violations" and his "drinking problem"); *see also id.* at 193:14-16 (Linville testifying that Coles "robbed people").

III. THE CIRCUIT COURT'S FINDING THAT MR. FERGUSON WAS PREJUDICED IS AMPLY SUPPORTED BY THE RECORD.

The circuit court determined that, but for Mr. Zimarowski's deficient representation, there is a reasonable probability that the result of Mr. Ferguson's trial would have been different. In its fifth assignment of error, the State asserts that this conclusion "is clearly erroneous," principally because the circuit court "incorrectly assessed" the credibility of Ms. Linville and Ms. King. State's Br. at 2. The State falls far short of meeting the high bar it faces in establishing that the circuit court's credibility determinations were clearly erroneous, and the record below makes plain that the circuit court's finding of prejudice falls well within its allowable discretion.

Under the "prejudice" prong of *Strickland*, a habeas petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The showing required to establish a reasonable probability is less exacting than the "preponderance of the evidence" standard. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004).

The factual findings underlying the circuit court’s decision – including its assessment of the credibility of Ms. Linville and Ms. King – are subject to review for clear error. Under this highly deferential standard of review, “if the lower tribunal’s conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently.” *Graham v. Putnam Cnty. Bd. of Educ.*, 212 W. Va. 524, 531, 575 S.E.2d 134, 141 (2002). Moreover, this Court has emphasized that a lower court’s findings are entitled to “great weight” where “the factual determinations largely are based on witness credibility.” *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994).

A. The State’s Case Against Mr. Ferguson Was Weak.

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.” *Strickland*, 466 U.S. at 696. In other words, the “threshold for prejudice is comparatively low” where the State’s evidence is weak because “less would be needed to unsettle a rational jury.” *Dugas v. Coplan*, 428 F.3d 317, 335-36 (1st Cir. 2005).¹³

As the circuit court found, the State’s case against Mr. Ferguson was “circumstantial.” Order at 44. “[N]one of the eyewitnesses to the shooting” – including the victim – “identified Mr. Ferguson as the assailant.” *Id.* at 45. And there was “no direct evidence” linking Mr. Ferguson to the shooting. *See* App. Vol. 2 at 629:12-23. As the circuit court explained, the State “produced no murder weapon, much less any physical evidence linking Mr. Ferguson to the murder weapon,” and “produced no physical evidence linking Mr. Ferguson to the spent shell

¹³ Incredibly, the State’s recitation of the “facts” relating to Mr. Ferguson’s criminal trial are based almost entirely on citations to the habeas hearing testimony of the State’s attorney expert, Mr. Benninger, *not* the trial transcripts. *See, e.g.*, State’s Br. at 38-40. Obviously, an expert’s argumentative and, in places, false recitation of the “facts” is not evidence. *See Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 676-78, 558 S.E.2d 663, 675-77 (2001) (testimony regarding basis for expert’s opinions not admissible for purposes of proving truth of the matter asserted).

casing, the bullet jacket fragment, or the bullet fragments located during the course of the police investigation.” Order at 45.¹⁴

Lacking any eyewitness identification or direct evidence, the State instead relied on hearsay testimony that purportedly established a motive. However, as the circuit court correctly found, the State’s “motive” evidence consisted of, “at most, two verbal confrontations” that were “brief” and “temporally removed from each other, as well as from the shooting.” Order at 45.¹⁵

Thin though it was, the State had little else besides these two brief encounters to support its case. As Judge Stone observed during trial, without such “motive” evidence the State’s “case is much weaker. How’s that for a comment?” App. Vol. 5 at 1206:15-18. Under these circumstances, it “would not have taken much to sway at least some jurors towards acquittal.”

Dugas, 428 F.3d at 335-36.

¹⁴ The State relies on the fact that gunshot residue was found on two of Mr. Ferguson’s jackets (but not on any other clothing or on Mr. Ferguson himself). However, the minute amount of residue found on Mr. Ferguson’s clothing was not consistent with a recent, point blank shooting. App. Vol. 2 at 693:22-694:22, 695:8-12; *see also* App. Vol. 5 at 1158:6-21, 1170:5-8, 1172:13-15. Rather, it was wholly consistent with undisputed testimony regarding two earlier occasions on which Mr. Ferguson had test-fired a gun that was legally in his possession. *See* App. Vol. 5 at 1180:15-1182:24, 1184:7-1185:22. Thus, the circuit court correctly concluded that “Mr. Ferguson presented evidence supporting a plausible, and exculpatory, reason for the presence of those particles.” Order at 45.

¹⁵ In an effort to bolster its motive-related arguments, the State takes great liberty with the record. For instance, no record evidence supports the State’s assertion – made without citation – that Mr. Wilkins was “accosted as he emerged from his apartment.” *See* State’s Br. at 39. Nor is there any testimony from Mr. Ferguson’s criminal trial or habeas hearing to support the State’s assertion – also made without citation – that Mr. Ferguson “was seen parked in his vehicle in the parking lot just outside of Mr. Wilkins’ apartment” during “the days and weeks before” the shooting. *See id.* Rather, the totality of the evidence relating to the State’s “stalking” allegation was the testimony of one friend of Mr. Wilkins who saw a car resembling Mr. Ferguson’s vehicle – but not Mr. Ferguson – driving near Mr. Wilkins’ apartment on a single occasion. *See* App. Vol. 5 at 1078:3-12, 1082:16-19. After originally telling the police that the car had a Maryland license plate, the friend testified nonsensically at trial that the vehicle had “Maryland/DC tags.” *See id.* at 1078:13-1079:8, 1084:8-24. Mr. Ferguson’s car had DC, not Maryland, license plates.

B. Evidence Regarding Coles Would Have Bolstered Mr. Ferguson’s Defense.

This Court has held that evidence regarding third-party guilt is especially important in cases, like this one, that are based entirely on circumstantial evidence. *See, e.g., State v. Welker*, 178 W. Va. 47, 49-50, 357 S.E.2d 240, 242-43 (1987) (holding, in a murder case based entirely on circumstantial evidence, that failure to admit testimony regarding an alleged confession by defendant’s live-in boyfriend constituted reversible error). This is because “[c]ircumstantial evidence will not support a guilty verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence.” Syl. Pt. 1, *Welker id.* (citations omitted).¹⁶

Here, as the circuit court properly concluded, “[e]vidence of the Coles confession was necessary to fully meet the circumstantial evidence presented against Mr. Ferguson at trial.” *Id.* at 49. Because this evidence, if offered, would have established at least a “reasonable hypothesis” of Mr. Ferguson’s innocence, the circuit court did not abuse its discretion in determining that Mr. Ferguson was prejudiced by Mr. Zimarowski’s deficient performance.

Direct Evidence of Third-Party Guilt. As the circuit court found, had Mr. Zimarowski performed an investigation, he would have been able to present credible, direct “evidence that Robbie Coles shot and killed Jerry Wilkins.” Order at 49. Ms. Linville and Ms. King testified at the evidentiary hearing, in very consistent terms, about the key details of Coles’ confession:

- In the winter of 2002, Coles showed up after dark at Ms. King’s trailer, where she and Linville were watching a movie. App. Vol. 2 at 158:2-7 (Linville), 227:2-4 (King).
- Coles was “nervous” – “fidgety” or “pacing back and forth” – and looking for a place to hide out. *Id.* at 158:17-21 (Linville), 226:10-13 (King).

¹⁶ *See also Harris*, 894 F.2d at 879 (finding prejudice where counsel “chose to gamble on his perceptions about the weakness of the prosecution’s case” rather than presenting “available witnesses” to establish defense of third-party guilt); *Bryant*, 907 N.E.2d at 875 (finding prejudice where counsel “vigorously cross-examined the State’s witnesses and exposed various weaknesses in the State’s case” but did not present evidence supporting third-party guilt and so left “the defense theory wholly unsupported”).

- Coles confessed that he had “just shot” someone down on “the hill,” a readily identifiable location on campus. *Id.* at 159:22-160:2 (Linville), *see id.* at 227:14-18 (King: “I can’t believe I just did what I did. I just shot a man down the hill.”).
- Coles was accompanied by a white woman, who was “maybe 20, 25 pounds overweight.” *Id.* at 159:4-12 (Linville), *see id.* at 226:14-20 (King: woman was “kind of thicker”).
- Coles was wearing a “dark” “hoodie” and “dark” pants or jeans. *Id.* at 182:18-21 (Linville), 227:7-9 (King).
- Ms. King asked Coles to leave her home but Coles was scared to go home. *Id.* at 227:19-22, 232:24-233:1, 243:17-244:5 (King), 209:6-8 (Linville).
- Ms. Linville left the trailer while Coles was still there and then returned shortly after he left. *Id.* at 163:16-164:8 (Linville), 227:24-228:4 (King).

As the circuit court correctly determined, this testimony – if offered – would have provided the key missing ingredient in Mr. Zimarowski’s trial presentation, *i.e.*, “substance to the theory of third party culpability.” Order at 49.¹⁷

Harman Instruction. At trial, Mr. Zimarowski requested a so-called *Harman* instruction on third-party guilt, which would have allowed the jury to consider the possibility of an alternate suspect. App. Vol. 2 at 41:13-16. As Mr. Zimarowski acknowledged, this “important instruction” was “very key” to the case because third-party guilt was “basically the defense theory.” *Id.* at 41:22, 43:3. Judge Stone, however, denied the request, explaining that he had “never given this instruction where there hasn’t been evidence linking another person in name, identified, suggested reasonably by the evidence, not generally that it’s somebody else.” App. Vol. 3 at

¹⁷ The State argues that Ms. Linville’s and Ms. King’s testimony regarding Coles’ confession would have been inadmissible hearsay. As the circuit court correctly held, however, because the shooting had “just” occurred and Coles “paced nervously” at the time of his confession, their testimony would have been admissible as an excited utterance. Order at 48 n.7; *see Syl. Pt. 7, State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995) (setting forth elements of the excited utterance exception to the hearsay rule). While the State appears to argue that the excited utterance exception does not apply because the confession occurred a number of days after the shooting, State’s Br. at 41-42, this argument founders on the basic fact that – according to the consistent testimony of Ms. Linville and Ms. King – the confession was made shortly after the shooting took place. App. Vol. 2 at 159:22-160:2, 227:14-18.

821:23-822:2; *see State v. Harman*, 165 W. Va. 494, 498-99, 270 S.E.2d 146, 150-51 (1980) (holding that courts must admit evidence that “provides a direct link to someone other than the defendant,” but not where such evidence is “purely speculative”).

As the circuit court properly concluded, had Mr. Zimarowski introduced evidence regarding Coles, the “request for a *Harman* instruction would likely have been granted, thus strengthening the jury instructions from a defense perspective.” Order at 49. Given the centrality of the third-party guilt defense to Mr. Zimarowski’s trial strategy, the denial of the *Harman* instruction itself substantially prejudiced Mr. Ferguson. *See State v. Arroyo*, 284 Conn. 597, 607-15 (2007) (holding that failure to submit similar jury instruction was not harmless error because “[a] jury instruction regarding the third party culpability evidence from the court may well have tipped the balance” given that it was “not a very strong case for the state”). More fundamentally, the denial also highlights the “purely speculative” nature of the third-party guilt defense presented by Mr. Zimarowski to the jury.

Eyewitness Descriptions. At trial, the State sought to establish that the eyewitness descriptions of the shooter were generally consistent with Mr. Ferguson. In response, Mr. Zimarowski argued that the eyewitness descriptions of the shooter – which, as the circuit court found, “did, in fact, vary,” *see* Order at 45 – were too vague and inconsistent to implicate Mr. Ferguson. *See* App. Vol. 5 at 1214:7-1215:7. However, because he failed to investigate Coles, Mr. Zimarowski was unable to offer available evidence showing that virtually every aspect of the witness descriptions fit Coles at least as well as Mr. Ferguson.

Witnesses to the shooting described the shooter as “medium” or “dark skinned,” approximately six feet tall (“[m]aybe 6 foot, 6-1”), of college age, with a “lanky” to “medium” build. *E.g.*, App. Vol. 5 at 1017:2-9, 1027:6-24, 1032:11-14, 1045:11-13. Coles was

approximately 5-11, “medium lightweight” with “medium” skin tone. *See* note 3, *supra*. Mr. Ferguson is a “light-skinned” African American male and is 6-2. App. Vol. 5 at 1103:8-21, 1120:19-21. Notably, the police never showed Coles’ photograph to the eyewitnesses, App. Vol. 2 at 526:8-10, which Mr. Zimarowski could have used to cast further doubt on the State’s case.

The shooter was described as wearing a pullover “dark hooded sweatshirt” – either “black or blue” – and “black pants.” *E.g.*, App. Vol. 5 at 1017:20-23, 1027:6-24, 1032:11-14. Coles was wearing a “black or blue” pullover “oversized hoodie” and “pants that were dark in color.” App. Vol. 2 at 161:23-162:10. While Coles’ attire was “notably similar to eyewitness accounts of the shooter,” Order at 48, no pants fitting the description of the shooter were ever found in Mr. Ferguson’s possession, despite searches of Mr. Ferguson’s car and apartment and of Ms. Gibson’s apartment within hours of the shooting. App. Vol. 5 at 1136:2-1138:12.

Sloppy Police Investigation. At trial, Mr. Zimarowski argued that the “police conducted a sloppy, incomplete investigation” into the Wilkins murder. Order at 41. As the circuit court found, had Mr. Zimarowski conducted an adequate investigation into Coles, he “could have far more effectively challenged the State’s assertions that Jerry Wilkins’s murder had been fully investigated and that Mr. Coles had been properly ruled out as a suspect.” *Id.* at 48-49. With an adequate investigation, Mr. Zimarowski could easily have established that:

- “Detective Ford did not interview Mr. Coles until a month had elapsed since the Linville debriefing, and by that time, Detective Ford had already testified against Mr. Ferguson before a grand jury” (Order at 48);
- Although Detective Ford knew that “Coles had a criminal history, he chose not to ask Ms. Linville many substantive questions pertaining to her encounter with” Coles, “declined Ms. Linville’s offer to take a polygraph test,” and acted as if he “didn’t care” about Coles’ confession (Order at 30, 48; *see* App. Vol. 2 at 166:2-6, 167:8-16);
- While the police report stated that Coles denied knowing Spring King, this statement was a lie (*see* App. Vol. 2 at 225:19-226:7);

- “[T]he police never spoke with Spring King,” notwithstanding the facts that she was identified by name as a witness to the confession and the police were given her phone number by Ms. Linville (Order at 47; *see App. Vol. 2 at 518:15-519:12*);
- The police “never attempted to locate, much less identify, the unknown woman who purportedly accompanied Mr. Coles to Spring King’s trailer” (Order at 47; *see App. Vol. 2 at 519:13-22*);
- The police “never asked Mr. Coles about his whereabouts on February 2, 2002,” let alone tested any possible alibi (Order at 47; *see App. Vol. 2 at 523:11-524:7*); and
- The police “never spoke with Mr. Coles’s associates” or searched his property for evidence tying him to the shooting (Order at 47; *see App. Vol. 2 at 524:22-525:17*).

In sum, had Mr. Zimarowski “conducted an adequate investigation of the Coles confession, [he] could have armed himself with convincing evidence that the police had, in fact, fallen short of a complete investigation, especially with regard to the Coles confession.” Order at 46-47. Because he failed to do so, however, Mr. Zimarowski allowed the State to paint the inaccurate picture of a thorough and diligent police investigation into the Wilkins shooting.

Cross-Examination of Detective Ford. According to Mr. Zimarowski, part of his trial “strategy” involved “‘throw[ing] Coles out there’ for the jury to consider,” which he attempted to do solely through his cross-examination of Detective Ford. Order at 46. This cross-examination, however, was not only ineffective but affirmatively harmful, since Mr. Zimarowski was not armed with the facts to rebut Detective Ford’s assertions that “nobody confessed to the shooting” and that the police “followed up” on the Coles lead. App. Vol. 5 at 1147:2, 1149:16.

As the circuit court explained, the actual facts surrounding the Coles investigation compel the conclusion that “Detective Ford used the term ‘follow up’ in relation to the Coles confession quite loosely.” Order at 47. “Unfortunately for Mr. Ferguson, the defense had no way to introduce the evidence required to strongly challenge the police investigation of Robbie Coles.” *Id.* Thus, the ultimate result of Mr. Zimarowski’s uninformed questioning was to “relegate[] the Robbie Coles confession to inconsequentiality.” *Id.* at 46 (“[O]nce Mr.

Zimarowski opened the door for examination on the Coles topic, [the State] seized the opportunity on redirect examination to throw any remaining viability the Coles confession retained back through the door by which it so feebly came.”).

Because Mr. Zimarowski did not undertake any investigation, his one reference at trial to an alternate suspect backfired, and left the jury with the false but devastating impression that Coles had been properly ruled out. As the circuit court found, there is at least a reasonable possibility that, but for this failure, the outcome at Mr. Ferguson’s trial would have been different. *See Dugas*, 428 F.3d at 335-36 (“In a close case, the failure of defense counsel to . . . effectively challenge the state’s evidence on important issues can be particularly prejudicial.”).

C. The Testimony Of Ms. Linville And Ms. King Was Credible.

In the decision below, the circuit court concluded that “a reasonable juror could very well have credited the testimony of Ms. Linville and Ms. King in such a way as to create a reasonable doubt regarding Mr. Ferguson’s guilt.” Order at 48. The gravamen of the State’s fifth assignment of error appears to be that the circuit court committed clear error in determining that the testimony of Ms. Linville and Ms. King was sufficiently credible that it could have made a difference at Mr. Ferguson’s trial. *See State’s Br.* at 2. Especially when viewed in light of the highly deferential standard of review applicable here, it is clear that the State’s argument fails.

The question that was properly before the circuit court was not whether the court believed Linville and King, but whether a reasonable juror *could* have had a reasonable doubt based on their testimony. *See Smith v. Cain*, 132 S. Ct. 627 (2012). In conducting this inquiry, even where the State “identifie[s] perceived problems” with testimony supporting a finding of prejudice, it is reversible error “to discount entirely the effect that [the] testimony might have had on the jury.” *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009). In other words, even where the State offers “a reason that the jury *could* have disbelieved [witness] statements,” a court may not disregard

those statements unless it has “confidence that [the jury] *would* have done so.” *Smith*, 132 S. Ct. at 630; *accord Ramonez*, 490 F.3d at 491 (“Even though the jury could have discredited the potential witnesses based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have.”).

Moreover, as this Court has made clear, “great weight” must be given to the circuit court’s “factual determinations. . . based on witness credibility.” *Wirt*, 192 W. Va. at 579, 453 S.E.2d at 413; *see Johnson v. Gen. Motors Corp.*, 190 W. Va. 236, 248, 438 S.E.2d 28, 40 (1993) (“the determination of the weight” that “should be accorded the witness’ testimony” is a “function[] solely for the finder of fact”). Here, the circuit court found, after assessing the credibility of Ms. Linville’s and Ms. King’s live hearing testimony, that both “presented themselves in such a manner as to demonstrate a strong resolve as to their central assertion: on a night in early February, 2002, Robbie Coles arrived at Spring King’s trailer and told them that he had just shot a man.” Order at 48 (emphasis omitted). The circuit court’s finding that a reasonable jury *could* have credited the consistent testimony of Ms. Linville and Ms. King regarding this “central assertion” was not clearly erroneous, and none of the State’s arguments to the contrary has merit.

First, contrary to the State’s unsupported assertions, Ms. Linville and Ms. King corroborated each other at the evidentiary hearing in all material respects. *See supra* pp. 12-14, 29. Even after vigorous cross-examination, the State was unable to undermine the consistent core of their accounts, which were perfectly aligned with respect to the “crucial statement” and “that the event occurred.” App. Vol. 2 at 439:17-18; *see id.* at 489:21-490:5. To be sure, as the circuit court forthrightly acknowledged, “there is no perfect match between Ms. Linville’s recollection and that of Ms. King.” Order at 47-48. However, the purported inconsistencies the State has

identified are trivial in comparison to their consistent and corroborative testimony regarding the “central assertion.” Moreover, it would be surprising if there were *not* minor differences between their recollections of a traumatic event – such as whether Coles wore “boots” or “tennis shoes,” or whether his vehicle was “dark” or “seafoam green,” *see* State’s Br. at 36-37 – particularly when that event occurred over nine years ago. Thus, the circuit court did not clearly err in concluding that a reasonable jury could credit their testimony regarding Coles, notwithstanding the minor variations in their recollection of peripheral details. *See Ramonez*, 490 F.3d at 485 (finding prejudice resulting from failure to investigate potentially exculpatory witnesses despite the fact that “[t]here was some inconsistency in [the witnesses’] testimony”).

Second, the timing and context surrounding Ms. Linville’s report of Coles’ confession to the police do not support the State’s implicit request that the Court “discount entirely the effect that [her] testimony might have had on the jury.” *Porter*, 130 S. Ct. at 455. As the circuit court observed, these circumstances likely would have been “a topic of . . . cross-examination” at Mr. Ferguson’s trial, “as [they] w[ere] during the omnibus evidentiary hearing.” Order at 45. The fact that there may be “grist for the cross-examination mill,” however, is not a basis for reversing as clear error the circuit court’s finding that a reasonable juror could have credited her testimony. *See, e.g., Ramonez*, 490 F.3d at 490 (“While there would have been plenty of grist for the cross-examination mill as to [petitioner’s] three witnesses, the question whether those witnesses were believable for purposes of evaluating [petitioner’s] guilt is properly a jury question.”).

Third, the State suggests that Ms. Linville’s testimony was the result of improper influence by Mr. Ferguson’s counsel or by Nancy Stephens, a private investigator working at counsel’s direction. *See* State’s Br. 34-35. No evidence supports this serious charge, which is simply false.

Ms. Linville testified that – in the five-and-a-half years between when she was first contacted by Ms. Stephens in February 2006 and the September 2011 habeas hearing – she had a total of “three or four” substantive communications with Ms. Stephens. *See App. Vol. 2 at 173:5-24, 176:4-14.* Less than one month after Ms. Stephens first contacted Ms. Linville (during Ms. Linville’s first meeting with counsel for Mr. Ferguson), she provided a tape-recorded statement regarding Coles’ confession. *See State’s Br. at 13 (“Audio recorded interview March 2, 2006”).* Notably, while the State was provided with a copy of that recorded statement in discovery and questioned her about it at the hearing, *see App. Vol. 2 at 173:16-24,* the State did not and could not point to any material difference between her March 2006 statement and her December 2007 affidavit. Nor does the State acknowledge – let alone address – Ms. Linville’s unequivocal testimony that she was not provided with any information regarding Mr. Ferguson or the facts of this case until *after* she signed her December 2007 affidavit. *See App. Vol. 2 at 213:21-22 (“[Ms. Stephens] said she couldn’t never tell me anything until I signed my statement. . . .”); see also id. at 206:7-9.* The Court should disregard the State’s unsupported assertion that Ms. Linville’s testimony was the result of undue influence on the part of Mr. Ferguson’s representatives.

* * *

In sum, the circuit court properly concluded that a reasonable jury or juror would have found the testimony of Ms. Linville and Ms. King regarding Coles’ confession sufficiently credible so as to “create a reasonable doubt regarding Mr. Ferguson’s guilt.” Order at 47-48. The State has fallen far short of establishing that the circuit court’s assessment of their credibility was clearly erroneous. Moreover, because evidence regarding Coles would have strongly undermined the State’s circumstantial case against Mr. Ferguson, the circuit court did not abuse its discretion in concluding that Mr. Zimarowski’s “failure to introduce” this evidence “casts a pall over the

fairness” of Mr. Ferguson’s trial. *Id.* at 48. Accordingly, the Court should not disturb the circuit court’s finding – after three days of testimony and the opportunity to weigh the credibility of ten witnesses – that Mr. Ferguson is entitled to a new trial.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ITS CONSIDERATION OF TESTIMONY FROM THE STATE’S EXPERT.

In its second assignment of error, the State claims that the circuit court “abused its discretion” by not giving “due consideration” to the legal opinions offered by the State’s attorney expert, J. Michael Benninger. *See* State’s Br. at 2, 28-31. This assignment of error is frivolous.

Mr. Benninger is a Morgantown lawyer with a primarily civil practice. App. Vol. 2 at 603:13-18. The circuit court’s decision expressly acknowledges his opinion that “Mr. Zimarowski’s performance did not amount to ineffective assistance of counsel.” Order at 35. Of course, the mere fact that the circuit court did not agree with the State “did not mean that it did not consider [the State’s expert’s] testimony.” *See In re P.D.*, No. 11-0979, 2012 W. Va. LEXIS 123, at *12 (W. Va. Mar. 12, 2012). Yet the State offers absolutely no evidence that the circuit court failed to consider Mr. Benninger’s opinions, other than that the court did not agree with his ultimate conclusions. That fact, standing alone, does not establish an abuse of discretion, especially since Judge Gaujot – as the trier of fact – was responsible for determining the “weight, if any,” to be given to the testimony of the parties’ competing experts. *Johnson*, 190 W. Va. at 248, 438 S.E.2d at 40; *see* Syl. Pt. 4, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (trier of fact “determines the weight to be given to the expert’s opinion”).¹⁸

¹⁸ Mr. Ferguson offered expert testimony from Stephen Jory, a criminal defense attorney with over 30 years of experience and the former U.S. Attorney for the Northern District of West Virginia. App. Vol. 2 at 403:6-21. Mr. Jory testified that Mr. Zimarowski’s “failure to investigate thoroughly the matters in this case w[as] deficient,” and “as a result, his representation was ineffective.” App. Vol. 2 at 410:12-20; *see also* Order at 35. Plainly, it was within the circuit court’s discretion as trier of fact to resolve the direct and irreconcilable conflict between the opinions of the parties’ dueling ineffectiveness experts.

In any event, the circuit court's purported failure to consider Mr. Benninger's testimony could not constitute *reversible* error because expert testimony on questions of law – like that offered by Mr. Benninger – is “superfluous.” *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 644, 600 S.E.2d 346, 356 (2004).

V. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING CUMULATIVE EXPERT TESTIMONY.

For its third assignment of error, the State claims that the circuit court abused its discretion by excluding duplicative expert testimony from the second of the State's two attorney witnesses, Morgantown solo practitioner Raymond Yackel. This assignment of error is baseless.

“When considering the propriety of a circuit court's decision whether to admit the testimony of an expert witness, [this Court] will reverse only for a clear abuse of discretion.” *Watson v. INCO Alloys Int'l, Inc.*, 209 W. Va. 234, 238, 545 S.E.2d 294, 298 (2001). Evidence “may be excluded . . . by considerations of needless presentation of cumulative evidence.” W. Va. R. Evid. 403. When applied in the context of proffered expert testimony, this rule affords circuit courts “broad discretion to decide whether to admit expert testimony and, if the court finds that such evidence is unnecessary [or] cumulative . . . the court may then refuse to admit it.” Syl. Pt. 2, *Morris v. Boppna*, 182 W. Va. 248, 387 S.E.2d 302 (1989) (citation omitted).

Here, the State sought to offer identical testimony from two separate attorneys on the subject of ineffective assistance of counsel. *See* App. Vol. 3 at 933-35 (disclosing identical opinions on the part of the State's two lawyer experts). After Mr. Benninger was permitted to opine at length regarding the adequacy of Mr. Zimarowski's representation and the likelihood of prejudice to Mr. Ferguson, the State proffered testimony from Raymond Yackel on precisely the “same issues.” App. Vol. 2 at 747:1. While the State conceded that the two “reach the same conclusion,” it nevertheless suggested that their duplicative testimony would be “helpful”

because – as will almost always be the case – their “educational backgrounds” and “practices” give them “a little bit of different perspective on the case.” *Id.* at 746:8-16.

In essence, the State’s argument is that two experts are better than one. As the circuit court observed, however, there is no end to this logic: “If two is reasonable testifying to the same issues, how many would be unreasonable?” *Id.* at 746:23-747:2. Unsurprisingly, the State fails to identify *any* authority supporting its surprising claim that a court abuses its discretion by refusing to hear multiple expert witnesses offering the same opinions regarding the same issue.

VI. THE CIRCUIT COURT’S ORDER DOES NOT ESTABLISH A MECHANICAL RULE REGARDING DEFICIENT PERFORMANCE.

The State’s fourth assignment of error is that the circuit court’s order “establishes a mechanical rule . . . that trial counsel’s reliance on information in a police report automatically constitutes ineffective assistance of counsel.” State’s Br. at 2. This argument attacks a straw man.

To be sure, the court noted the “general rule” that counsel’s failure to investigate potentially exculpatory information falls below the standard for competent representation. At the same time, it acknowledged that there may be “cases when an attorney can make a rational decision that investigation is unnecessary.” Order at 39 (citation omitted). The circuit court, however, concluded that – in “the case *sub judice*” – an investigation was necessary. *Id.* at 40.

Notably, the circuit court’s analysis of the “prejudice” issues goes far beyond establishing that Mr. Zimarowski relied only on the police report, which is all that would have been necessary under the “mechanical rule” erroneously ascribed by the State to the circuit court. Instead, the circuit court discusses at length the myriad reasons that Mr. Zimarowski’s exclusive reliance on the police report was unreasonable *here*. As the court explained, the information in the police report was crucial to “the central, overarching theory of the defense.” Order at 42. Moreover, the report itself made clear that “the police failed to make contact with Spring King . . . or with

anyone else possessing potentially relevant information” and that the police did not even speak with Coles until *after* presenting grand jury testimony securing Mr. Ferguson’s indictment. *Id.* at 40-41; *see id.* at 30. The circuit court thus correctly concluded, in light of the specific facts of this case and the nature of the information in the police report, that Mr. Zimarowski’s decision not to investigate Coles was unreasonable.

The State also asserts that the circuit court’s decision would require “trial counsel [to] turn over every unlikely stone.” State’s Br. at 34. Not so. While a “defendant is not entitled to an attorney who will ‘leave not the smallest stone unturned,’” the law is clear that “*when the defendant has but one stone, it should at least be nudged.*” *Coleman*, 802 F.2d at 1234 (emphasis added). Here, the circuit court found that the police report contained “obvious, potentially fruitful leads” supporting Mr. Zimarowski’s “overarching theory of the defense.” Order at 42-43. Indeed, the Coles lead constituted the *only* concrete information Mr. Zimarowski had regarding an alternate shooter. Under these circumstances, the circuit court properly concluded that this particular lead should have been investigated, and nothing more. As the circuit court found after having the opportunity to hear the testimony that Mr. Zimarowski failed to present to the jury, moreover, it is clear that Mr. Ferguson was prejudiced by Mr. Zimarowski’s ineffectiveness and is entitled to a new trial.

CONCLUSION

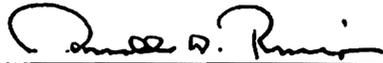
For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,



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January 28, 2013

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1028

**DAVID BALLARD, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
RESPONDENT BELOW,**

PETITIONER,

vs.

**BRIAN BUSH FERGUSON,
PETITIONER BELOW,**

RESPONDENT.

CERTIFICATE OF SERVICE

I, Christian J. Pistilli, hereby certify that, on January 26, 2013, I caused a true and correct copy of **RESPONDENT'S BRIEF IN OPPOSITION** to be served by first class mail to

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