12-1028

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

BRIAN BUSH FERGUSON,

Petitioner,

v.

Case No. 06-C-202
Judge Phillip D. Gaujot

DAVID BALLARD, Warden,
Mt. Olive Correctional Complex,

Respondent.

**COMPRHENSIVE ORDER GRANTING WRIT OF HABEAS CORPUS**

On the 20th, 21st, and 22nd days of September, 2011, the parties appeared before the Court pursuant to Rule 9(b) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, and pursuant to the remand order of the West Virginia Supreme Court of Appeals in *Ferguson v. McBride*, No. 34331 (Sept. 25, 2008), for an omnibus evidentiary hearing on Mr. Ferguson's Petition Under W. Va. Code § 53-4A-1 for Writ of Habeas Corpus ("Petition" or "Habeas Petition"). The Petitioner appeared in person and by his counsel, Paul W. Schmidt, Sarah Wilson, Sarah K. Frederick, Sharon B. Jacobs, and Darrell Ringer; the Respondent appeared by his counsel, Marcia L. Ashdown, Monongalia County Prosecuting Attorney, and Perri J. DeChristopher, Monongalia County Assistant Prosecuting Attorney.

Having considered the evidentiary presentations in this case, having studied the record, having read the parties' written submissions, and having consulted pertinent legal authority, the Court hereby finds that a writ of habeas corpus should be, and hereby is, GRANTED.

## I. FACTUAL AND PROCEDURAL HISTORY

### a. Overview

On February 2, 2002, Jerry Wilkins, a graduate student at West Virginia University, was shot outside his apartment building near University Avenue in the Evansdale area of Morgantown, West Virginia. Mr. Wilkins ultimately died.

During its investigation, the Morgantown Police Department identified the Petitioner, Brian Bush Ferguson, as the shooter. A Monongalia County grand jury subsequently indicted the Petitioner for murder in the first degree.

The Honorable Robert B. Stone presided over Mr. Ferguson's jury trial. Marcia L. Ashdown, Monongalia County Prosecuting Attorney, and Perri J. DeChristopher, Assistant Prosecuting Attorney, presented the State's case. James B. Zimarowski presented Mr. Ferguson's defense. Counsel presented opening statements on November 19, 2002, and the jury delivered its verdict -- guilty of murder in the first degree with no recommendation of mercy -- on November 26, 2002. On February 24, 2003, Judge Stone sentenced Mr. Ferguson to life imprisonment without the possibility of parole.

Mr. Ferguson initiated a direct appeal by and through his counsel, Mr. Zimarowski and Franklin D. Cleckley. After due consideration, the West Virginia Supreme Court of Appeals affirmed the Petitioner's first degree murder conviction. *State v. Ferguson*, 216 W. Va. 420, 607 S.E.2d 526 (2004). The Supreme Court of the United States subsequently denied Mr. Ferguson's Petition for Writ of *Certiorari*. *Ferguson v. West Virginia*, 546 U.S. 812, 126 S.Ct. 332 (2005).

On March 28, 2006, Mr. Ferguson, by and through new counsel, filed his Habeas Petition. By that Petition, Mr. Ferguson asserts as follows: 1) that his state and federal constitutional rights were violated when the State failed to disclose evidence affecting the

credibility of a prosecution witness; 2) that his state and federal constitutional rights were violated by the ineffective assistance of trial counsel; and 3) that his state and federal constitutional rights were violated by the ineffective assistance of appellate counsel. (Pet. 4-5.) The Respondent[1] filed his Answer on September 18, 2006.

By order dated December 11, 2007, Judge Stone, having found an omnibus evidentiary hearing in this matter unnecessary, denied Mr. Ferguson's Petition. By order dated February 28, 2008, Judge Stone also denied Mr. Ferguson's Rule 60(b) Motion to Alter or Amend the Judgment.

Shortly thereafter, Mr. Ferguson appealed to the West Virginia Supreme Court of Appeals, at which time Mr. Ferguson argued that "[his] habeas petition presents a paradigmatic case of constitutionally ineffective assistance of trial counsel."[2] (Pet. for Appeal 5, April 10, 2008.) The Supreme Court of Appeals ultimately reversed Judge Stone's judgment and remanded the case for an omnibus evidentiary hearing. *Ferguson v. McBride*, No. 34331 (W. Va. Sept. 25, 2008).

During the omnibus evidentiary hearing, the parties, by their presentations, addressed one question, and one question only: Is Mr. Ferguson deserving of a new trial because he received ineffective assistance of trial counsel?

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[1] Mr. Ferguson's Habeas Petition names Thomas L. McBride, Warden of the Mt. Olive Correctional Complex, as the Respondent in this case. During the pendency of this action, David Ballard succeeded Mr. McBride as Warden. Accordingly, Mr. Ballard replaced Mr. McBride as the named Respondent.

[2] Mr. Ferguson did not contest Judge Stone's ruling relative to the State's alleged failure to disclose evidence pertinent to the credibility of a prosecution witness, nor did he assign error to Judge Stone's ruling regarding the alleged ineffectiveness of appellate counsel.

**b. Jury Trial**

On November 20, 2002, the State of West Virginia called the following witnesses to testify: Kathryn Metcalfe, Rachel Herman, Holly Breuer, Matt Ingram, Andre Fisher, Terrance Stuart, Ronald Williams, Carolyn McDaniel, and Solomon Wright. With Judge Stone's approval, the defense called Herman Moses to testify after Ms. McDaniel, and before Solomon Wright.

On November 21, 2002, the State of West Virginia called the following witnesses to testify: Derrick Hairston, Dr. James Frost, David Carter, Antwan Skinner, Bernard Russ, George Gaylock, Robert Dixon, Keith Hall, Sergeant Phil Scott, and Detective Matt Metheney.

On November 22, 2002, the State of West Virginia called the following witnesses to testify: Brian Johnson, Robert Gilmore, Detective Steve Ford, Detective Harold Sperringer, Jeff Field, Gregory Morrison, Sergeant John Giacalone, and Lieutenant Clarence Lane. Upon Lieutenant Lane's excusal, the State rested. Shortly thereafter, Judge Stone denied Mr. Ferguson's motion for judgment of acquittal, though he noted that "this is obviously a circumstantial evidence case . . . ." (Trial Tr. 3:15 – 3:16, Nov. 25, 2002.) Next, the defense called Robert White.

On November 25, 2002, the defense called the following witnesses to testify: Ebony Gibson, Harold Crawley, Ramon Vega, and Brian Ferguson. The defense then rested, after which the State called Adrienne Batkins and Andre Fisher as rebuttal witnesses.

Relevant testimony from the trial witnesses is recounted below.

**1. Kathryn Metcalfe**

In the early evening hours of February 2, 2002, Kathryn Metcalfe visited a friend's apartment located just off University Avenue. (Trial Tr. 15:16 – 16:14, Nov. 20, 2002.) At

some time between 6:45 p.m. and 7:00 p.m., Ms. Melcalfe left her friend's apartment, and began driving away. (Trial Tr. 22:4 – 22:11, Nov. 20, 2002.)

As she drove down University Alley toward Inglewood Boulevard, she heard a noise, as if a car had backfired, and looked in her rear-view mirror. (Trial Tr. 22:20 – 22:24, Nov. 20, 2002.) She saw a person running from behind her vehicle, toward the driver's side of her vehicle. (Trial Tr. 23:2 – 23:8, Nov. 20, 2002.) The individual ran along the driver's side of her vehicle, slid, as if on gravel, and fell three to four feet from the driver's side door. (Trial Tr. 25:5 – 25:12, Nov. 20, 2002.) The individual yelled to Ms. Metcalfe that someone was shooting. (Trial Tr. 25:23, Nov. 20, 2002.)

Within three to four seconds, another individual arrived on foot where the first individual had fallen. (Trial Tr. 26:11 – 26:13, Nov. 20, 2002.) The second person ran slightly past the fallen individual, and as the fallen individual attempted to regain his footing, the second person fired a dark colored handgun toward the upper back of the fallen individual. (Trial Tr. 26:17 – 26:20, 28:12 – 28:18, 29:3 – 29:5, Nov. 20, 2002.) The assailant then ran toward, and ultimately across, University Avenue. (Trial Tr. 29:16 – 29:21, Nov. 20, 2002.)

Ms. Metcalfe described the shooter as African-American, medium build, and approximately six feet to six feet, two inches in height. (Trial Tr. 27:2 – 27:9, Nov. 20, 2002.) The shooter wore a black or blue, bulky, long-sleeved jacket or sweatshirt with a hood. (Trial Tr. 27:13 – 27:23, 34:7 – 34:9, Nov. 20, 2002.) At the time of the shooting, the hood was up, over the assailant's head, casting a shadow over the assailant's face. (Trial Tr. 47:22 – 48:3, Nov. 20, 2002.)

## 2. Rachel Herman and Andre Fisher[3]

Rachel Herman testified that, at approximately 7:45 p.m. on February 2, 2002, she arrived at Andre Fisher's apartment building on Inglewood Boulevard, where she intended to watch a movie with Mr. Fisher. (Trial Tr. 60:1 – 60:24, Nov. 20, 2002.) As Ms. Herman ascended the steps to Mr. Fisher's apartment, she heard a gunshot. (Trial Tr. 61:22 – 62:1, Nov. 20, 2002.) Mr. Fisher heard the same noise from inside his apartment, but believed it to be a firecracker. (Trial Tr. 131:10 – 131:11, Nov. 20, 2002.) Ms. Herman looked out toward the parking lot in the back of the building and saw two men running; one man was being chased by another man with a long, silver gun. (Trial Tr. 62:1 – 62:4, Nov. 20, 2002.)

When she arrived at the door of Andre Fisher's apartment, she heard a second shot. (Trial Tr. 64:22 – 65:1, Nov. 20, 2002.) Mr. Fisher responded to the second noise by moving toward his front door, where he met Ms. Herman. (Trial Tr. 131:11 – 131:15, Nov. 20, 2002.) Mr. Fisher and Ms. Herman subsequently looked over the balcony and saw someone lying on the street next to a car; Mr. Fisher recognized the victim as Jerry Wilkins. (Trial Tr. 65:7-65:8, 131:16 – 131:22, Nov. 20, 2002.)

According to Ms. Herman, the assailant ran across University Avenue. (Trial Tr. 65:11 – 65:16, 76:10 – 76:14, Nov. 20, 2002.) He wore black pants and a black, hooded sweatshirt. (Trial Tr. 66:21 – 67:5, Nov. 20, 2002.) He had a lanky build and weighed approximately 190 pounds. (Trial Tr. 71:22 – 72:6, Nov. 20, 2002.)

Ms. Herman and Mr. Fisher recalled being the first bystanders to attend to Mr. Wilkins. (Trial Tr. 69:3 – 69:5, Nov. 20, 2002.) According to Ms. Herman, they asked Mr. Wilkins where he had been injured; while groaning and speaking in incomplete sentences, Mr. Wilkins

[3] Mr. Fisher offered competent testimony as a crime scene witness and as a friend and fraternity brother of Mr. Wilkins. Testimony derived from this latter capacity is set forth separately.

responded that he had been stabbed in the leg. (Trial Tr. 69:8 – 69:17, Nov. 20, 2002.) Mr. Fisher recalled Mr. Wilkins stating that he had been shot in the leg. (Trial Tr. 133:23 – 134:4, Nov. 20, 2002.) Both witnesses testified that, thereafter, Mr. Wilkins did not communicate coherently, apart from stating that he was having difficulty breathing. (Trial Tr. 70:6 – 70:14, 134:23 – 135:2, Nov. 20, 2002.)

Ultimately, Ms. Herman and Mr. Fisher determined that Mr. Wilkins had been wounded in the back of the shoulder. (Trial Tr. 69:6 – 69:20, 134:18 – 134:20, Nov. 20, 2002.) Mr. Wilkins did not identify the assailant. (Trial Tr. 68:13 – 70:21, 133:4 – 135:11, Nov. 20, 2002.)

**3. Holly Breuer and Matt Ingram**

On February 2, 2002, Ms. Breuer lived on University Avenue. (Trial Tr. 83:6 – 83:7, 83:16 – 83:18, 106:1 – 106:4, Nov. 20, 2002.) At approximately 7:15 p.m., she and her boyfriend, Matt Ingram, heard what they believed to be a car backfiring. (Trial Tr. 86:2 – 86:3, 86:18, 107:15 – 107:16, Nov. 20, 2002.) The pair paid little attention to the noise until they heard two more reports, at which time they looked through the window of the front door and observed a man running toward Ms. Breuer's residence. (Trial Tr. 86:2 – 86:9, 107:19 – 107:21, 108:17 – 108:19, Nov. 20, 2002.)

The man running toward Ms. Breuer's residence wore all black clothing, including a black jacket or sweatshirt with the hood up, and black pants. (Trial Tr. 87:2 – 87:15, 109:5 – 109:9, Nov. 20, 2002.) Ms. Breuer described the man as being African-American; six feet, one inch to six feet, two inches tall; 180 to 190 pounds; and with an athletic build. (Trial Tr. 87:11 – 87:20, 101:12, Nov. 20, 2002.) Mr. Ingram described the man as being six feet to six feet, one inch tall; and from 180 to 210 pounds; Mr. Ingram did not discern the color of the man's skin. (Trial Tr. 109:15 – 109:17, Nov. 20, 2002.) Mr. Ingram declined to offer any additional

description of the man's body type due to the man's baggy clothing. (Trial Tr. 115:14 – 115:16, Nov. 20, 2002.)

As the unidentified man ran toward the house, Mr. Ingram locked the doors and called 911. (Trial Tr. 119:2 – 119:11, Nov. 20, 2002.) As he called 911, Mr. Ingram looked out the back window of the house and observed a car speeding off. (Trial Tr. 119:12 – 119:15, Nov. 20, 2002.) Mr. Ingram described the car as being a 1990's vehicle with square taillights and a brake light in the bottom of the rear window. (Trial Tr. 119:16 – 119:22, Nov. 20, 2002.) He described the vehicle to police as a Cavalier. (Trial Tr. 120:1 – 120:3, Nov. 20, 2002.)

After Mr. Ingram called 911, he and Ms. Breuer ran across University Avenue, where they offered assistance to the victim. (Trial Tr. 89:20 – 89:24, 113:6 – 114:23, Nov. 20, 2002.)

**4. Fraternity Witnesses**

Andre Fisher joined the Alpha Phi Alpha Fraternity ("Alpha") two years before Mr. Wilkins joined the fraternity. (Trial Tr. 127:15 – 127:17, Nov. 20, 2002.) The two men were close friends. (Trial Tr. 127:23, Nov. 20, 2002.)

Mr. Fisher testified that there was no love lost between Mr. Wilkins and Mr. Ferguson. (Trial Tr. 143:22 – 143:24, Nov. 20, 2002.) This animosity stemmed from two incidents that occurred approximately one year apart. (Trial Tr. 159:16 – 159:20, Nov. 20, 2002.)

In the fall of 2000, Jerry Wilkins told Terrance Stewart, David Carter, Antwan Skinner, and Bernard Russ that an individual pulled a knife on him earlier that same day. (Trial Tr. 175:1 – 176:20, Nov. 20, 2002; Trial Tr. 49:9 – 51:4, 85:6 – 86:11, 96:2 – 96:14, November 21, 2002.) Mr. Wilkins told Terrance Stewart and David Carter that, as he rode in a vehicle driven by Ebony Gibson, Brian Ferguson brandished a knife and told Mr. Wilkins to stop calling Ms. Gibson. (Trial Tr. 177:6 – 177:10, Nov. 20, 2002; Trial Tr. 51:14 – 51:24, Nov. 21, 2002.) Mr.

Wilkins appears to have informed Mr. Skinner only that a knife had been pulled on him. (Trial Tr. 86:8 – 86:24, Nov. 21, 2002.)

In the fall of 2001, during West Virginia University's homecoming weekend, the Alpha Phi Alpha Fraternity hosted a house party. (Trial Tr. 55:20 – 56:4, 91:21 – 92:24; 120:5 – 120:23, 136:9 – 137:15, Nov. 21, 2002.) During the party, Jerry Wilkins told Bernard Russ that Brian Ferguson, the man who pulled a knife on him, was in attendance, and that Mr. Ferguson needed to leave. (Trial Tr. 94:1 – 94:5, Nov. 21, 2002.) As Mr. Russ escorted Mr. Ferguson out of the house, Mr. Ferguson elbowed Mr. Russ, at which time Mr. Russ punched Mr. Ferguson. (Trial Tr. 95:1 – 95:9, Nov. 21, 2002.) According to Mr. Russ, Mr. Ferguson stated, "Don't worry. I am going to get Jerry when his fraternity brothers are not here." (Trial Tr. 95:17 – 95:23, Nov. 21, 2002.)

Another fraternity brother, David Carter, intervened shortly thereafter. (Trial Tr. 58:3 – 58:15, 95:12 – 95:16, Nov. 21, 2002.) Mr. Carter and another fraternity member, George Gaylock, escorted Mr. Ferguson down the street, away from the party. (Trial Tr. 61:3 – 61:6, 122:18 – 122:21, 141:1 – 141:22, Nov. 21, 2002.) As they did so, Mr. Ferguson said that he would get Mr. Wilkins. (Trial Tr. 61:7 – 61:9, 81:7 – 81:9, 122:22 – 123:1, 142:16 – 143:8, Nov. 21, 2002.) Mr. Carter responded by punching Mr. Ferguson; Mr. Gaylock kicked Mr. Ferguson after Mr. Ferguson fell to the ground. (Trial Tr. 61:10 – 61:16, 81:7 – 81:9, 123:6 – 123:11, 143:20 – 143:22, Nov. 21, 2002.)

Solomon Wright, another member of the Alpha Phi Alpha Fraternity, testified that, in January of 2002, he and Jerry Wilkins had a serious conversation, during which Mr. Wilkins shared concern about the possibility of an upcoming physical conflict with Mr. Ferguson. (Trial Tr. 252:15 – 252:17, 265:19 – 266:24, Nov. 20, 2002.) At that time, Mr. Wilkins told Mr.

Solomon that, if anything happened to him, he (Mr. Solomon) would know who did it. (Trial Tr. 267:4 – 267:6, Nov. 20, 2002.) According to Mr. Solomon, Mr. Wilkins made this statement in reference to Mr. Ferguson. (Trial Tr. 267:24 – 268:1, Nov. 20, 2002.)

On February 2, 2002, between 6:30 and 7:00 p.m., several members of the Alpha Phi Alpha Fraternity, including Solomon Wright and Derrick Hairston, met to play basketball at the West Virginia University Recreation Center ("Rec Center") on the Evansdale campus. (Trial Tr. 252:23 – 254:4, Nov. 20, 2002; Trial Tr. 6:10 – 6:22, 7:21 – 7:23, Nov. 21, 2002.) Sometime between 7:00 and 7:15 p.m., Solomon Wright received a call on his cell phone from Jerry Wilkins; Mr. Wright told Mr. Wilkins to hurry-up because the fraternity brothers had already started playing. (Trial Tr. 254:21 – 255:3, Nov. 20, 2002.)

Later that evening, while playing basketball at the Rec Center, Solomon Wright and Derrick Hairston saw Mr. Ferguson shooting baskets by himself on a neighboring court. (Trial Tr. 255:18 – 256:10, Nov. 20, 2002; Trial Tr. 7:17 – 8:18, Nov. 21, 2002.) Solomon Wright recalled that Mr. Ferguson wore a dark sweatshirt and dark pants. (Trial Tr. 256:14 – 256:16, Nov. 20, 2002.) Derrick Hairston recalled that Mr. Ferguson wore a black, hooded sweatshirt. (Trial Tr. 13:8 – 13:10, Nov. 21, 2002.)

**5. Keith Hall**

Keith Hall was not a member of the Alpha Phi Alpha Fraternity, but he was friends with Jerry Wilkins. (Trial Tr. 150:22 – 151:5, Nov. 21, 2002.) Mr. Wilkins told Mr. Hall about the 2000 knife incident the same morning it occurred. (Trial Tr. 159:17 – 160:15, Nov. 21, 2002.)

On January 14 or 15, 2002, at approximately 7:00 p.m., Mr. Hall drove to Mr. Wilkins's residence to show Mr. Wilkins his new car. (Trial Tr. 159:17 – 160:15, Nov. 21, 2002.) As he approached Mr. Wilkins's apartment in his vehicle, Mr. Hall observed a champagne colored

Lexus SUV with District of Columbia plates, which he recognized as Mr. Ferguson's vehicle. (Trial Tr. 151:18 – 151:22, 162:3 – 162:8, 163:13 – 163:15, Nov. 21, 2002.) When he arrived at Mr. Wilkins's apartment, Mr. Wilkins immediately asked Mr. Hall whether Mr. Hall had seen Mr. Ferguson's vehicle outside the apartment. (Trial Tr. 172:10 – 172:18, Nov. 21, 2002.)

**6. Ronald Williams**

Ronald Williams worked at West Virginia University as a residence hall coordinator and as an educational programmer. (Trial Tr. 196:14 – 196:16, Nov. 20, 2002.) On February 2, 2002, Mr. Williams went to the Rec Center for a basketball game that was scheduled to start at 7:00 p.m. (Trial Tr. 199:4 – 199:12, Nov. 21, 2002.) While at the Rec Center, he observed Brian Ferguson shooting a basketball. (Trial Tr. 202:5 – 202:17, Nov. 21, 2002.) Mr. Ferguson wore dark clothing, including black sweatpants. (Trial Tr. 203:23 – 204:6, Nov. 21, 2002.)

**7. West Virginia University Witnesses**

Carolyn McDaniel testified as the Coordinator of Mountaineer Card Services at West Virginia University. (Trial Tr. 232:6 – 232:7, Nov. 20, 2002.) Mountaineer Card Services manages student identification cards, which are used by students to access university facilities and services. (Trial Tr. 232:12 – 232:16, Nov. 20, 2002.) According to Ms. McDaniel, Mr. Ferguson's student identification card was used for access to the Rec Center on February 2, 2002, at 7:39 p.m. (Trial Tr. 235:17 – 235:24, Nov. 20, 2002.)

Herman Moses testified as Associate Vice President and Dean of Student Affairs at West Virginia University. (Trial Tr. 240:5 – 240:8, Nov. 20, 2002.) In the evening hours of February 2, 2002, Mr. Moses reported to the intensive care unit of Ruby Memorial Hospital to provide support and assistance to students and family who congregated in response to Mr. Wilkins's shooting. (Trial Tr. 240:12 – 240:23, Nov. 20, 2002.) As he attended to the student

congregation, he became aware that students were assigning responsibility for the shooting to Mr. Ferguson. (Trial Tr. 247:2 – 247:13, Nov. 20, 2002.) Mr. Moses testified that Brian Ferguson was a good student, with a 3.0 GPA or better. (Trial Tr. 250:9 – 250:15, Nov. 20, 2002.)

**8. Police and State Forensics Witnesses**

On February 2, 2002, Sergeant Phil Scott of the Morgantown Police Department was the first emergency responder on scene after the shooting. (Trial Tr. 192:6 – 192:8, Nov. 21, 2002.) Emergency medical services arrived approximately two minutes after Sergeant Scott arrived. (Trial Tr. 193:2 – 193:4, Nov. 21, 2002.) During this period, Mr. Wilkins was semi-conscious, and he did not identify his assailant. (Trial Tr. 193:5 – 193:6, 194:18 – 194:19, Nov. 21, 2002.)

When Detective Matthew Metheney arrived at the crime scene, he reported to the detective supervisor, Corporal Kevin Clark. (Trial Tr. 196:13 – 196:15, Nov. 21, 2002.) Shortly thereafter, Corporal Clark requested that Detectives Metheney and Mezzanotte report to the hospital to make contact with witnesses. (Trial Tr. 197:9 – 197:15, Nov. 21, 2002.)

Witnesses at the hospital informed Detective Metheney that Jerry Wilkins had an ongoing dispute with Mr. Ferguson, and that the dispute involved a woman. (Trial Tr. 199:11 – 199:24, Nov. 21, 2002.) Ultimately, Detectives Metheney and Mezzanotte identified Mr. Ferguson's girlfriend as Ebony Gibson and traveled to her residence where they found a gold Lexus SUV parked outside. (Trial Tr. 200:8 – 201:20, Nov. 21, 2002.) At that time, they were instructed to wait for Detectives Ford and Sperringer to arrive. (Trial Tr. 202:4 – 202:13, Nov. 21, 2002.) Prior to the arrival of Detectives Ford and Sperringer, however, a woman subsequently identified as Ebony Gibson exited the apartment. (Trial Tr. 202:18 – 203:1, Nov. 21, 2002.) Ms. Gibson advised Detective Metheney that Mr. Ferguson was inside her apartment, and that she consented

to a search of the apartment. (Trial Tr. 203:3 – 203:9, Nov. 21, 2002.) Detectives Ford and Sperringer arrived moments later. (Trial Tr. 203:11 – 203:12, Nov. 21, 2002; Trial Tr. 99:22 – 100:1, Nov. 22, 2002.)

When the four detectives entered the apartment, they found Mr. Ferguson lying on Ms. Gibson's bed, watching television. (Trial Tr. 203:13 – 203:20, Nov. 21, 2002; Trial Tr. 100:9 – 100:12, Nov. 22, 2002.) He wore black jean shorts, a white tee-shirt, and a dark blue, hooded jacket. (Trial Tr. 207:18 – 207:20, Nov. 21, 2002.)

Detectives Metheney and Ford interviewed Mr. Ferguson as Detectives Sperringer and Mezzanotte searched the premises. (Trial Tr. 197:9 – 197:15, Nov. 21, 2002.) Mr. Ferguson reported the following to Detectives Metheney and Ford: He went to the Rec Center around 7:00 where he played basketball, went swimming, and took a shower; he was at the Rec Center for approximately 45 minutes; next, he went to Brian Johnson's house for approximately one hour to play video games; thereafter, he went to Ebony Gibson's residence for dinner. (Trial Tr. 204:22 – 205:17, Nov. 21, 2002; Trial Tr. 101:22 – 102:12, Nov. 22, 2002.) Mr. Ferguson also informed the detectives that he owned a .50 caliber Desert Eagle semi-automatic handgun. (Trial Tr. 206:2 – 206:3, 206:23 – 207:1, Nov. 21, 2002; Trial Tr. 102:18 – 102:23, Nov. 22, 2002.)

Thereafter, Mr. Ferguson agreed to accompany the detectives to the police department for additional questioning. (Trial Tr. 205:20 – 205:24, Nov. 21, 2002; Trial Tr. 103:24 – 104:2, Nov. 22, 2002.) While traveling to the police station, Mr. Ferguson told Detectives Metheney and Ford that he last fired a gun approximately one year ago, and that he never fired the Desert Eagle because he couldn't find appropriate ammunition. (Trial Tr. 208:19 – 209:1, Nov. 21, 2002; Trial Tr. 105:12 – 105:22, Nov. 22, 2002.)

As Mr. Ferguson interacted with Detectives Ford and Metheney, Detectives Sperringer and Mezzanotte searched Ms. Gibson's apartment, but found nothing of significance. (Trial Tr. 172:9 – 172:15, Nov. 22, 2002.) With Mr. Ferguson's consent, Detectives Sperringer and Mezzanotte also searched Mr. Ferguson's vehicle, where they found a damp, dark, hooded sweatshirt and a pair of swim trunks in the rear cargo area. (Trial Tr. 172:17 – 173:14, Nov. 22, 2002.) The detectives collected the sweatshirt. (Trial Tr. 172:17 – 173:14, Nov. 22, 2002.) Additionally, with Mr. Ferguson's consent, Detectives Sperringer and Mezzanotte searched Mr. Ferguson's apartment, where they found a black, semi-automatic, .50 caliber, Desert Eagle pistol, which the detectives collected. (Trial Tr. 175:10 – 176:22, Nov. 22, 2002.) The detectives did not find black sweatpants or black pants at any of these locations, nor did they find such clothing in Mr. Ferguson's possession. (Trial Tr. 128:11 – 128:16, Nov. 22, 2002; Trial Tr. 192:12 – 193:1, Nov. 22, 2002.)

At the police station, Detective Metheney informed Mr. Ferguson that he and Detective Ford intended to administer a gunshot residue kit to determine whether Mr. Ferguson had fired a weapon. (Trial Tr. 211:7 – 211:12, Nov. 21, 2002; Trial Tr. 107:21 – 107:23, Nov. 22, 2002.) Shortly thereafter, Mr. Ferguson removed his jacket and "vigorously" wiped the backs and palms of his hands on the sleeve of his jacket. (Trial Tr. 212:2 – 212:5, Nov. 21, 2002; Trial Tr. 109:16 – 109:21, Nov. 22, 2002.) Mr. Ferguson also began to sweat and cough. (Trial Tr. 213:6 – 213:8, Nov. 21, 2002; Trial Tr. 112:2 – 112:4, Nov. 22, 2002.)

Detective Ford performed the gunshot residue sampling in two or three minutes, taking samples from Mr. Ferguson's left hand, right hand, and face. (Trial Tr. 112:11 – 113:2, Nov. 22, 2002.) After Detective Ford completed the gunshot residue test, Detective Metheney conducted a brief, taped interview with Mr. Ferguson, during which Mr. Ferguson stated his height to be six

feet, two inches, and his weight to be 210 pounds. (Trial Tr. 116:4 – 116:6, 117:2 – 117:5, Nov. 22, 2002.) After the interview, and after Detective Ford collected Mr. Ferguson's jacket for evidentiary purposes, the detectives allowed Mr. Ferguson to leave the police station. (Trial Tr. 117:2 – 117:5, Nov. 22, 2002.)

The next day, on February 3, 2002, Detective Metheney interviewed witnesses at the police department. (Trial Tr. 214:21 – 214:24, Nov. 21, 2002.) One of these interviews was interrupted when Mr. Ferguson called the police department to report a stolen Ruger 9mm handgun; Mr. Ferguson stated that he purchased the Ruger in recent weeks. (Trial Tr. 215:4 – 215:22, Nov. 21, 2002.)

Later on February 3, 2002, Detectives Metheney and Sperringer searched the crime scene with other detectives. (Trial Tr. 217:23 – 218:2, Nov. 21, 2002; Trial Tr. 177:22 – 177:24, Nov. 22, 2002.) The detectives found and collected a piece of a copper bullet jacket in the alley where the shooter had been seen chasing Mr. Wilkins. (Trial Tr. 218:13 – 218:23, Nov. 21, 2002; Trial Tr. 178:2 – 178:19, Nov. 22, 2002.)

Around this time, Detective Gilmore, who had been assigned to search the area around Mr. Ferguson's residence at 230 Beechurst Avenue, searched the dumpsters at that location. (Trial Tr. 78:6 – 78:17, Nov. 22, 2002.) In the dumpster labeled "230," Detective Gilmore found a bag of Mr. Ferguson's trash; in addition, Detective Gilmore found a .44 magnum casing lying loose at the bottom of the dumpster. (Trial Tr. 83:7 – 83:22, Nov. 22, 2002.) The Morgantown Police never determined whether this dumpster stayed permanently at Mr. Ferguson's apartment complex, or whether it moved around the community. (Trial Tr. 89:21 – 90:12, Nov. 22, 2002.)

Detective Sperringer fumed the .44 magnum casing with super glue to determine whether latent fingerprints could be found on that casing; the detective found no fingerprints. (Trial Tr.

181:12 – 181:23, Nov. 22, 2002.) He also administered a gunshot residue kit to collect any potential gunshot residue evidence from the casing, from the sweatshirt found in the cargo area of Mr. Ferguson's vehicle, as well as from the blue jacket collected from Mr. Ferguson at the police department. (Trial Tr. 182:7 – 182:11, 186:7 – 186:15, Nov. 22, 2002.) Detective Sperringer subsequently prepared all of the gunshot residue kits for submission to the State Police Crime Lab. (Trial Tr. 190:14 – 191:4, Nov. 22, 2002.)

Sergeant Giacalone, a member of the trace evidence section of the State Police Crime Lab, tested the gunshot residue kits administered by Detectives Ford and Sperringer. (Trial Tr. 226:4 – 246:14, Nov. 22, 2002.) Sergeant Giacalone compared gunshot residue to chalk dust in that it can be easily transferred from one object to another. (Trial Tr. 222:5 – 222:21, Nov. 22, 2002.) Sergeant Giacalone added that gunshot residue can be removed by rubbing it away, brushing it away, swimming, showering, or simply with time and activity. (Trial Tr. 222:22 – 223:14, 254:2 – 254:4, Nov. 22, 2002.) Sergeant Giacalone also explained that there is no way to determine the age of gunshot residue particles. (Trial Tr. 254:14 – 254:15, Nov. 22, 2002.)

Sergeant Giacalone was unable to detect the presence of gunshot residue from the samples taken from Mr. Ferguson's hands and face. (Trial Tr. 234:4 – 234:19, 248:13 – 248:17, Nov. 22, 2002.) He did detect the presence of a small number of gunshot residue particles on samples taken from the blue jacket collected from Mr. Ferguson at the police department, as well as on samples taken from the black sweatshirt found in the cargo area of Mr. Ferguson's vehicle. (Trial Tr. 236:16 – 242:4, 242:22 – 246:14, 248:23 – 249:4, Nov. 22, 2002.)

Lieutenant Clarence Lane, a firearm and tool mark examiner with the West Virginia State Police, testified that the bullet fragments taken from the victim's body and the copper casing fragment located at the crime scene came from a .44 caliber bullet. (Trial Tr. 263:1 – 263:21,

Nov. 22, 2002.) According to Lieutenant Lane, the aforementioned bullet fragments could have been fired from a revolver made by Ruger, Sauer & Son, Interarms Dakota, or Virginia Dragoon. (Trial Tr. 270:2 – 270:3, 271:12 – 271:14, Nov. 22, 2002.) Lieutenant Lane also testified that he was unable to match the .44 magnum casing located in the dumpster outside Mr. Ferguson's apartment to the bullet fragments. (Trial Tr. 265:11 – 268:17, Nov. 22, 2002.)

According to Detective Ford, the evidence collected by his department suggested that Mr. Wilkins had not been robbed. (Trial Tr. 125:13 – 125:22, Nov. 22, 2002.) Detective Ford testified that, during its investigation, the Morgantown Police Department identified only one suspect: Mr. Ferguson. (Trial Tr. 123:3 – 123:16, Nov. 22, 2002.)

During Mr. Zimarowski's cross-examination of Detective Ford, the following exchange occurred:

> Q: There was also some reports about -- actually, there 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: Attempt to verify his confession?
> A: He didn't confess.
> Q: What did he say, if you recall?
> A: He said he never said those things.
> Q: All right. It was just reported that he said those things?
> A: Uh huh.

(Trial Tr. 141:5 – 141:20, Nov. 22, 2002.)

Shortly thereafter, counsel approached the bench for a conference out of the hearing of the jury. (Trial Tr. 152:22 – 156:13, Nov. 22, 2002.) At that time, Judge Stone ruled that there would be no testimony related to polygraph examinations. (Trial Tr. 155:6 – 156:1, Nov. 22,

2002.) Judge Stone then allowed Ms. Ashdown to instruct the witness, Detective Ford, accordingly. (Trial Tr. 156:9 – 156:13, Nov. 22, 2002.)

On redirect examination, Detective Ford reiterated that no one confessed to the shooting of Jerry Wilkins. (Trial Tr. 161:2, Nov. 22, 2002.) Detective Ford explained that he and Detective Metheney attended the drug debriefing of a female, federal drug defendant, at which time the defendant told police about a purported confession. (Trial Tr. 161:12 – 162:5, Nov. 22, 2002.) Detective Ford further explained that, according to the defendant, a drunk man stated that he had shot "that Jerry kid in the paper" in the chest, not in the back. (Trial Tr. 161:1 – 161:5, Nov. 22, 2002.)

Detective Ford testified that he eventually located the man and interviewed him. (Trial Tr. 163:5 – 163:6, Nov. 22, 2002.) During the interview, the man denied the confession, denied any involvement in the murder, and denied knowing Jerry Wilkins. (Trial Tr. 163:6 – 163:8, Nov. 22, 2002.) Detective Ford then testified as follows:

> A: There was no connection to Jerry Wilkins. He was not from that part of town. He is not a student. He is never on that side, part of town.
> Q: And that's what you confirmed that he had no connection to Jerry Wilkins?
> A: Yes.
> Q: Did you have any reason in the end of that inquiry to further follow that up or to charge that individual?
> A: We further followed it up, yes.
> Q: And did you learn anything that caused you to think that he was the person to charge?
> A: No. We ruled him out.

(Trial Tr. 163:8 – 163:19, Nov. 22, 2002.)

**9. Harold Crawley and Ramona Vega**

Harold Crawley and Ramona Vega, Mr. Ferguson's friends from Washington, D.C. and Manassas, Virginia, respectively, testified that, in late January or early February of 2002, Mr.

Ferguson returned home for a visit. (Trial Tr. 59:22 – 60:17, 71:6 – 72:9[4], Nov. 25, 2002.) At that time, Mr. Ferguson showed them two, brand new guns. (Trial Tr. 60:23 – 61:10, 72:10 – 72:15, Nov. 25, 2002.) Mr. Crawley described the guns as a chrome 9mm and a big, black gun. (Trial Tr. 61:11 – 61:15, Nov. 25, 2002.) Ms. Vega described the guns as a Desert Eagle and a chrome Ruger. (Trial Tr. 73:5 – 73:7, Nov. 25, 2002.)

Mr. Crawley and Ms. Vega both testified that they test fired the chrome 9mm with Mr. Ferguson. (Trial Tr. 62:10 – 62:13, 73:1 – 73:20, Nov. 25, 2002.) While they test fired the 9mm, Mr. Ferguson wore a dark, hooded sweatshirt or jacket. (Trial Tr. 62:14 – 62:16, 74:17 – 74:18, Nov. 25, 2002.)

**10. Brian Johnson**

Brian Johnson met Mr. Ferguson in the fall semester of 2000, and the two men became friends. (Trial Tr. 13:20 – 13:22, 16:3 – 16:14, Nov. 22, 2002.) According to Mr. Johnson, Mr. Ferguson and Mr. Wilkins didn't get along due to a dispute over a woman, Ebony Gibson; Ebony Gibson was Mr. Ferguson's girlfriend, and Mr. Wilkins tried to convince Ms. Gibson to stop talking to Mr. Ferguson. (Trial Tr. 19:5 – 19:17, Nov. 22, 2002.)

In the fall of 2001, Mr. Johnson attended a homecoming party at the Alpha house with Mr. Ferguson. (Trial Tr. 21:17 – 21:24, Nov. 22, 2002.) He left the party with Mr. Ferguson after Mr. Ferguson's physical altercation with fraternity members. (Trial Tr. 22:1 – 22:5, Nov. 22, 2002.) According to Mr. Johnson, Mr. Ferguson was upset about the encounter at the Alpha house; Mr. Ferguson told him that he would fight Jerry Wilkins if he saw Mr. Wilkins on his own. (Trial Tr. 25:10 – 25:22, Nov. 22, 2002.)

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[4] During Ms. Vega's direct examination, reference was erroneously made to January of 2000. Ms. Vega testified as to the correct year -- 2002 -- on cross-examination. (Trial Tr. 75:2 – 75:8, Nov. 25, 2002.)

Mr. Johnson testified that he did not see Mr. Ferguson on February 2, 2002. (Trial Tr. 29:3 – 29:18, 53:4 – 53:6, Nov. 22, 2002.) On February 4 or 5, 2002, within days of the shooting, Mr. Johnson and Mr. Ferguson had a conversation about the shooting, during which Mr. Ferguson proclaimed his innocence. (Trial Tr. 31:13 – 32:24, Nov. 22, 2002.) Mr. Ferguson explained that, on the evening of the shooting, he visited a woman named Mandy, went to the Rec Center, and ate dinner at Ebony Gibson's residence. (Trial Tr. 33:22 – 33:24, Nov. 22, 2002.) Mr. Ferguson also stated that the murder weapon was long gone, which Mr. Johnson interpreted as a general observation meaning that the police would not find the murder weapon if they hadn't already found it. (Trial Tr. 34:12 – 34:13, 56:3 - 56:6, Nov. 22, 2002.)

Mr. Johnson also testified that, approximately two weeks before the shooting, he observed a stainless steel firearm on the kitchen table in Mr. Ferguson's apartment. (Trial Tr. 39:3 – 40:12, Nov. 22, 2002.) Mr. Ferguson referred to the firearm as a magnum. (Trial Tr. 40:6, Nov. 22, 2002.) Mr. Ferguson also said that the gun, which a friend had given to him, was unregistered. (Trial Tr. 39:20 – 39:21, 72:6 – 72:11, Nov. 22, 2002.)

Mr. Johnson testified that, after the shooting, he talked with the police on three separate days. (Trial Tr. 57:21 – 58:5, Nov. 22, 2002.) Mr. Johnson admitted that, during the final interview, Detectives Metheney and Mezzanotte confronted him because they "caught [him] in a lot of lies." (Trial Tr. 58:10 – 60:10, Nov. 22, 2002.) After being admonished by the detectives, Mr. Johnson informed police about his conversation with Mr. Ferguson on February 4 or 5, as well as about the firearm he observed in Mr. Ferguson's apartment. (Trial Tr. 60:11 - 63:4, Nov. 22, 2002.)

### 11. Jeff Field and Gregory Morrison

Mr. Ferguson purchased two firearms in January of 2002: a stainless steel, semi-automatic, Ruger 9mm from Mr. Field's shop; and a matte black finish, .50 caliber Golden Eagle from Mr. Morrison's shop. (Trial Tr. 207:5 – 207:8, 210:13, 212:23 – 212:24, Nov. 22, 2002.) Approximately one week after he picked-up the Golden Eagle, Mr. Ferguson asked Mr. Morrison whether .44 caliber magnum ammunition could be used in the Desert Eagle. (Trial Tr. 213:6 – 213:16, Nov. 22, 2002.) Mr. Morrison responded that, while it might be possible to use such ammunition in the Desert Eagle, it is not advisable. (Trial Tr. 213:18 – 213:20, Nov. 22, 2002.)

### 12. Ebony Gibson

Ms. Gibson met Brian Ferguson in the summer of 2000, and Jerry Wilkins in the fall of 2000. (Trial Tr. 26:6 – 26:21, Nov. 25, 2002.) During the fall semester of 2000, it appears from Ms. Gibson's testimony that she and Mr. Ferguson shared a friendship, which may have included periods of intimacy, but without exclusivity (though she chose not to date anyone else during this period, she did not object to Mr. Ferguson dating other people); they did not technically become "girlfriend-boyfriend" until September of 2001. (Trial Tr. 27:19 – 32:19, Nov. 25, 2002.)

According to Ms. Gibson, Mr. Wilkins flirted with her, spoke poorly of Mr. Ferguson, and told her that she shouldn't be with Mr. Ferguson. (Trial Tr. 11:4 – 11:10, 38:17 – 38:22, Nov. 25, 2002.) Apparently, Mr. Wilkins didn't appreciate the way Mr. Ferguson looked at him, and Mr. Wilkins insisted that Ms. Gibson tell him so. (Trial Tr. 13:6 – 13:7, Nov. 25, 2002.) She complied. (Trial Tr. 13:12, Nov. 25, 2002.)

Ms. Gibson testified that she occasionally drove Mr. Wilkins to West Virginia University's downtown campus. (Trial Tr. 10:15 – 10:22, Nov. 25, 2002.) In the fall of 2000, after Ms. Gibson passed along the message from Mr. Wilkins to Mr. Ferguson, Ms. Gibson drove

Mr. Wilkins to the downtown campus; Mr. Ferguson also rode in Ms. Gibson's vehicle. (Trial Tr. 14:4 – 14:12, Nov. 25, 2002.) During the ride, there was a heated exchange between Mr. Ferguson, who sat in the front passenger seat, and Mr. Wilkins, who sat behind the driver's seat. (Trial Tr. 14:9 – 16:2, Nov. 25, 2002.) Ms. Gibson testified that Mr. Ferguson did not wield a knife during this encounter; it was Jerry Wilkins who told others that Mr. Ferguson pulled a knife. (Trial Tr. 23:24 – 24:10, 34:12 – 35:5, Nov. 25, 2002.)

When Mr. Wilkins exited the vehicle, he told Ebony Gibson to never talk to him again. (Trial Tr. 16:3 – 16:4, Nov. 25, 2002.) Other than a brief, chance encounter at a local restaurant, she and Mr. Wilkins did not have much contact after this incident, and Ms. Gibson had no interest in any further contact with, or information about, Mr. Wilkins. (Trial Tr. 16:7 – 16:18, 49:18 – 52:15, Nov. 25, 2002.)

After the Alpha Phi Alpha homecoming party in the fall of 2001, Ms. Gibson observed that Mr. Ferguson's jaw was red and swollen. (Trial Tr. 40:13 – 40:23, Nov. 25, 2002.) According to Ms. Gibson, Mr. Ferguson did not assign blame to, or direct anger towards, Mr. Wilkins as a result of the altercation at the fraternity house. (Trial Tr. 41:3 – 42:18, Nov. 25, 2002.)

Ms. Gibson testified that, on February 1, 2002, Mr. Ferguson was supposed to meet her for dinner, but he stood her up. (Trial Tr. 18:8 – 18:17, Nov. 25, 2002.) Late that night, or in the early morning hours of February 2, 2002, she visited Mr. Ferguson at his apartment and didn't leave his apartment until approximately 2:00 the following afternoon. (Trial Tr. 18:20 – 19:13, Nov. 25, 2002.)

She next spoke with Mr. Ferguson in the evening hours of February 2 when he called her from a campus number. (Trial Tr. 19:18 – 20:4, Nov. 25, 2002.) Mr. Ferguson arrived at her

residence for dinner some time later. (Trial Tr. 20:9, Nov. 25, 2002.) After dinner, as Ms. Gibson prepared to drive her car to get ice cream, a man with a badge knocked on her vehicle window. (Trial Tr. 20:14 – 20:20, Nov. 25, 2002.)

**13. Brian Ferguson**

Brian Ferguson finished his first year at West Virginia University with a 4.0 grade point average. He admitted that he did not particularly like Mr. Wilkins even before he met him; Mr. Ferguson's negative first impression stemmed from Mr. Wilkins's message, which had been passed through Ebony Gibson, that Mr. Wilkins did not appreciate the way Mr. Ferguson looked at him. (Trial Tr. 84:14 – 84:22, Nov. 25, 2002.)

Mr. Ferguson acknowledged that he and Mr. Wilkins had a verbal altercation in Ebony Gibson's car while riding to the downtown campus. (Trial Tr. 84:23 – 87:22, Nov. 25, 2002.) However, Mr. Ferguson denied that he pulled a knife on Mr. Wilkins, or that a knife played any part in the altercation. (Trial Tr. 87:23 – 87:24, 128:7, Nov. 25, 2002.) According to Mr. Ferguson, Mr. Wilkins told others that a knife was involved. (Trial Tr. 134:18 – 135:4, Nov. 25, 2002.)

With regard to the Alpha homecoming party, Mr. Ferguson decided to attend the party because he had been invited, and because a year had passed since the verbal altercation in Ebony Gibson's vehicle. (Trial Tr. 89:5 – 89:19, 136:1 – 136:6, Nov. 25, 2002.) Additionally, though he was dating Ms. Gibson, Mr. Ferguson planned to meet two women at the party. (Trial Tr. 137:5 – 137:18, Nov. 25, 2002.) Shortly after arriving at the party, however, Mr. Wilkins approached Mr. Ferguson and told Mr. Ferguson to leave. (Trial Tr. 91:12 – 91:18, Nov. 25, 2002.) Mr. Ferguson acknowledged that he was "mouthy" while being escorted to the door, and recalled that a person he didn't know ("a big, black, bald dude") punched him as he exited the

house. (Trial Tr. 92:17 – 96:3, 99:19 – 99:20, Nov. 25, 2002.) He had no recollection of being struck a second time. (Trial Tr. 145:16, Nov. 25, 2002.) Mr. Ferguson denied making any threats toward Mr. Wilkins. (Trial Tr. 145:12 – 145:14, Nov. 25, 2002.)

Mr. Ferguson admitted that he was upset about the incident at the fraternity party. (Trial Tr. 99:22, Nov. 25, 2002.) He described the incident as "cheap" due to the fact that he was so heavily outnumbered. (Trial Tr. 99:22 – 100:2, Nov. 25, 2002.) However, according to Mr. Ferguson, he got over it because he had not been seriously injured. (Trial Tr. 100:4 – 100:6, Nov. 25, 2002.)

In February of 2002, Mr. Ferguson lived alone in an apartment. (Trial Tr. 103:15 – 103:16, Nov. 25, 2002.) On February 1, 2002, Ebony Gibson spent the night at Mr. Ferguson's apartment; she left the following afternoon. (Trial Tr. 103:4 – 103:8, Nov. 25, 2002.) After Ms. Gibson left Mr. Ferguson's apartment, Mr. Ferguson spent time alone in his apartment until the evening hours, at which time he went to the Rec Center to play basketball, run, and swim. (Trial Tr. 103:9 – 103:23, Nov. 25, 2002.) While at the Rec Center, Mr. Ferguson wore black shorts, swimming trucks underneath the shorts[5], and a white tee-shirt; he also wore a blue, nylon jacket. (Trial Tr. 103:24 – 104:10, 111:5 – 111:6, Nov. 25, 2002.)

After playing basketball, running, and swimming, Mr. Ferguson called Ebony Gibson, took a shower, and put on the same clothes he previously wore, minus the wet swim trunks, which he placed in the back of his vehicle where other, previously worn articles of clothing were located. (Trial Tr. 157:4 – 157:19, 160:15 – 160:21, Nov. 25, 2002.) Next, Mr. Ferguson went to Brian Johnson's apartment, where he played video games for forty-five minutes to one hour.

[5] In fact, Mr. Ferguson used soccer shorts as swimming trunks. (Trial Tr. 162:17 – 162:21, Nov. 25, 2002.)

(Trial Tr. 104:13 – 105:12, Nov. 25, 2002.) He then went to Ebony Gibson's residence. (Trial Tr. 157:22 – 157:23, Nov. 25, 2002.)

With regard to his communications with Detectives Ford and Metheney, Mr. Ferguson denied saying that he had not shot a gun in years. (Trial Tr. 168:18 – 170:19, Nov. 25, 2002.) Mr. Ferguson explained that he did not immediately disclose his ownership of a 9mm because the detectives focused the conversation around his Desert Eagle; the 9mm simply didn't cross Mr. Ferguson's mind while the detective interviewed him. (Trial Tr. 171:6 – 173:21, Nov. 25, 2002.) It also never occurred to Mr. Ferguson to advise police he had fired a weapon the previous week because the detectives sought to investigate a shooting that occurred hours earlier. (Trial Tr. 174:21 – 175:13, Nov. 25, 2002.) Furthermore, Mr. Ferguson denied that he vigorously wiped his hands upon learning of the detectives' intent to administer a gunshot residue kit. (Trial Tr. 110:2 – 110:7, Nov. 25, 2002.)

With regard to his conversation with Brian Johnson after the shooting, Mr. Ferguson explained that the State had taken and used the phrase "long gone," if, in fact, he ever used those words, out of context. (Trial Tr. 116:16 – 116:24, 187:21 – 188:1, Nov. 25, 2002.) Mr. Ferguson testified that, as he spoke with Mr. Johnson, he noted that the shooter was likely gone because the police had focused their investigation on the wrong person. (Trial Tr. 188:1 – 188:9, Nov. 25, 2002.)

Mr. Ferguson testified that he did not own black sweatpants or jeans in February 2002. (Trial Tr. 108:18 – 108:20, Nov. 25, 2002.) When asked whether he shot and killed Jerry Wilkins, Mr. Ferguson replied, "Absolutely not." (Trial Tr. 81:10 – 81:12, Nov. 25, 2002.)

**14. Rebuttal Witnesses**

According to Adrienne Batkins, Ebony Gibson told her that Brian Ferguson pulled a knife on Jerry Wilkins in her car. (Trial Tr. 205:16 – 205:20, Nov. 25, 2002.) Ms. Batkins also testified that, in January of 2002, Ebony Gibson told her that she drove to Jerry Wilkins's apartment and that she didn't see him. (Trial Tr. 206:8 – 207:7, Nov. 25, 2002.) Ms. Batkins informed Ms. Gibson that Mr. Wilkins had moved to a nearby apartment. (*Id.*)

Andre Fisher testified that, in January 2002, he ran into Ms. Gibson in public, at which time Ms. Gibson told him that she stopped by Jerry Wilkins's former apartment before recalling that he had moved. (Trial Tr. 213:14 – 214:10, Nov. 25, 2002.)

**15. Jury Charge**

At the close of all evidence, the Court excused the jury and conducted a jury charge conference. (Trial Tr. 217:1 – 229:19, Nov. 25, 2002.) During this conference, the Court heard argument on Mr. Ferguson's eighth proposed instruction, by which the Defendant sought an instruction relative to third-party guilt. (Trial Tr. 222:8 – 225:21, Nov. 25, 2002.) The proposed instruction is a derivative of the following case law:

> In a criminal case, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error.

Syl. Pt. 1, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).

With regard to the proposed *Harman* instruction, Mr. Zimarowski stated as follows: "We consider Jury Instruction No. 8 to be very key. It's basically the defense theory . . . ." (Trial Tr. 222:9 – 222:11, Nov. 25, 2002.) The Court responded as follows:

> And I have 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. That's always the defense when the State hasn't proven the identity that it's somebody else. I think that this is not a case for this instruction to be given.

(Trial Tr. 224:22 – 225:5, Nov. 25, 2002.)

Ultimately, Judge Stone instructed the jury to decide upon one of four possible verdicts: not guilty, guilty of murder in the first degree, guilty of murder in the first degree with a recommendation of mercy, or guilty of murder in the second degree. (Judge's Charge to Jury 8, Nov. 25, 2002.)

**16. Verdict and Sentence**

On November 26, 2002, the jury found Mr. Ferguson guilty of murder in the first degree. The jury made no recommendation for mercy. The Court sentenced Mr. Ferguson accordingly.

**c. Omnibus Evidentiary Hearing**

On September 20, 2011, the Petitioner called the following witnesses to testify: James Zimarowski, Mary Jane Linville, and Spring King.

On September 21, 2011, the Petitioner called the following witnesses to testify: Lieutenant Kevin Clark, Barry Colvert, and Stephen Jory. The Respondent called Detective Steven Ford.

On September 22, 2011, the Court and the parties engaged in a view of the location where the shooting occurred. The Respondent then called the following witnesses to testify: Solomon Wright, Keith Hall, J. Michael Benninger, and Raymond H. Yackel.

**1. Mary Jane Linville and Spring King**

On a night in early February, 2002, Mary Jane Linville and Spring King watched a movie at Spring King's trailer on Burroughs Street in Morgantown, West Virginia. (Omnibus Evid. Hr.

Tr. 157:20 – 158:7, 225:14 – 225:15, 226:21 – 227:6, Sept. 20, 2011.) Without any notice, Robbie Coles, an acquaintance of the two women, arrived at the trailer with an unidentified, short, heavy-set woman. (Omnibus Evid. Hr. Tr. 156:19 – 157:2, 158:10 – 158:16, 159:4 – 159:16, 226:3 – 226:7, 226:14 – 226:19, Sept. 20, 2011.) Ms. King had only interacted with Mr. Coles on one prior occasion, at which time they argued, and Mr. Coles spat in Ms. King's face. (Omnibus Evid. Hr. Tr. 226:3 - 226:7, Sept. 20, 2011.)

After entering the trailer, Mr. Coles paced back and forth nervously. (Omnibus Evid. Hr. Tr. 158:17 – 158:21, 226:10 – 226:13, Sept. 20, 2011.) Mr. Coles, who, according to Ms. Linville, stood approximately five feet, ten or eleven inches tall, wore dark jeans and a dark, hooded sweatshirt. (Omnibus Evid. Hr. Tr. 161:23 – 162:12, 227:7 – 227:8, Sept. 20, 2011.) Ms. Linville estimated that Mr. Coles weighed 150 pounds, "give or take [twenty pounds]." (Omnibus Evid. Hr. Tr. 209:19 – 209:20, Sept. 20, 2011.)

According to Ms. Linville, Mr. Coles stated as follows: "Man, you-all got to give me a place to hide out. I just shot a fucking nigger up on the hill, come down from the school, and I know he's dead because I shot like three times and I hit him." (Omnibus Evid. Hr. Tr. 159:22 – 160:2, Sept. 20, 2011.) Ms. Linville recalled Mr. Coles gesturing toward his shoulder blade to indicate where the third bullet hit the victim. (Omnibus Evid. Hr. Tr. 160:2 – 160:8, Sept. 20, 2011.) According to Ms. Linville, Mr. Coles also stated that there were police all the way down to the keg store. (Omnibus Evid. Hr. Tr. , Sept. 20, 2011.)

Ms. King recalled that Mr. Coles said, "I can't believe I just did what I did. I just shot a man down the hill." (Omnibus Evid. Hr. Tr. 227:14 – 227:17, Sept. 20, 2011.) Ms. King also recalled that Mr. Coles wanted to stay at her residence because he was scared to go home.

(Omnibus Evid. Hr. Tr. 243:21- 243:22, Sept. 20, 2011.) Ms. King responded by telling Mr. Coles to leave her trailer. (Omnibus Evid. Hr. Tr. 227:17 – 227:22, Sept. 20, 2011.)

Neither of the women reported this encounter until Ms. Linville shared it with police, including Detectives Ford and Metheney, at a drug debriefing that occurred months later. (Omnibus Evid. Hr. Tr. 165:14 – 165:19, Sept. 20, 2011.) Ms. Linville participated in the drug debriefing to obtain a more favorable sentence related to her guilty plea in federal court for aiding and abetting the distribution of one gram of crack cocaine. (Omnibus Evid. Hr. Tr. 165:14 – 166:12, 193:22 – 194:14, 196:8 – 196:16, Sept. 20, 2011.) According to Ms. Linville, the police acted dismissively toward her information about Robbie Coles. (Omnibus Evid. Hr. Tr. 166:2 – 166:6, Sept. 20, 2011.)

**2. Police Witnesses**

Detective Steve Ford[6] testified that, on April 11, 2002, he attended Mary Jane Linville's drug debriefing with Detective Metheney. (Omnibus Evid. Hr. Tr. 498:13 – 498:23, 503:18 – 503:21, Sept. 21, 2011.) Once he returned to the police station, Detective Ford used his notes from the debriefing to update the police report on the Jerry Wilkins murder. (Omnibus Evid. Hr. Tr. 501:15 – 501:21, Sept. 21, 2011.)

Detective Ford updated the police report to reflect Ms. Linville's account as follows: Two days after the shooting, at 3:00 or 4:00 in the morning, Mr. Coles arrived at Spring King's residence with an unknown woman; at that time, Mr. Coles said that the police didn't know what they were talking about because he shot "that Jerry kid," who had been mentioned in the newspaper, in the chest, not in the back. (Omnibus Evid. Hr. Tr. 504:7 – 505:7, Sept. 21, 2011.) According to Detective Ford, the information provided by Ms. Linville lacked credibility

[6] At the time of the omnibus evidentiary hearing, the witness had achieved the rank of First Sergeant with the Morgantown Police Department. In the interest of clarity, however, the Court will continue to refer to this witness as Detective Ford.

because Mr. Wilkins had, in fact, been shot in the back, and because Mr. Coles "is not close to the physical description that was given of the suspect." (Omnibus Evid. Hr. Tr. 507:10 – 507:22, Sept. 21, 2011.)

Though Detective Ford knew that Mr. Coles had a criminal history, he chose not to ask Ms. Linville many substantive questions pertaining to her encounter with Mr. Coles, and he declined Ms. Linville's offer to take a polygraph test. (Omnibus Evid. Hr. Tr. 514:22 – 518:14, Sept. 21, 2011.) Detective Ford could not recall making contact with Spring King, and he could not recall any specific effort to locate the unknown woman who purportedly accompanied Mr. Coles to Spring King's residence. (Omnibus Evid. Hr. Tr. 518:15 – 519:22, Sept. 21, 2011.) Furthermore, Detective Ford did not make contact with any associates of Robbie Coles. (Omnibus Evid. Hr. Tr. 525:13 – 525:17, Sept. 21, 2011.)

On May 15, 2002, two days after presenting grand jury testimony implicating Mr. Ferguson in the shooting of Jerry Wilkins, and approximately one month after Ms. Linville's drug debriefing, Detective Ford located and interviewed Mr. Coles in an attempt to "cover bases." (Omnibus Evid. Hr. Tr. 516:14 – 517:11, 521:9 – 521:11, Sept. 21, 2011.) Not surprisingly, Mr. Coles denied shooting Jerry Wilkins or confessing to same. (Omnibus Evid. Hr. Tr. 514:9 – 514:10, 516:14 – 517:11, Sept. 21, 2011.) Detective Ford could not recall whether he asked Mr. Coles about his whereabouts on February 2, 2002. Detective Ford testified that, even if he had done so, "I'm sure he wouldn't have remembered."

On May 22, 2002, Mr. Coles took a polygraph test administered by Morgantown Police Lieutenant Kevin Clark. (Omnibus Evid. Hr. Tr. 275:11 – 275:14, 284:11 – 284:15, Sept. 21, 2011.) According to Lieutenant Clark, the results of the polygraph test, which he scored, indicated that Mr. Coles was being truthful when he denied shooting Jerry Wilkins. (Omnibus

Evid. Hr. Tr. 315:6 – 315:8, Sept. 21, 2011.) Lieutenant Clark conceded that the score he attributed to the Coles polygraph was the lowest possible passing score; had the test been scored one point lower, Lieutenant Clark would have ruled the test inconclusive. (Omnibus Evid. Hr. Tr. 316:23 – 317:9, Sept. 21, 2011.) Lieutenant Clark has never ruled out a murder suspect based upon an inconclusive polygraph result. (Omnibus Evid. Hr. Tr. 317:10 – 317:13, Sept. 21, 2011.) While Lieutenant Clark acknowledged that mistakes can be made, and that there are subjective elements to the administration of a polygraph examination, he testified that he conducted the test correctly, and that he stands by his scoring of the Coles polygraph. (Omnibus Evid. Hr. Tr. 329:13 – 329:16, 331:22 – 332:7, Sept. 21, 2011.)

Once the results of the Coles polygraph were known, the police closed their investigation. (Omnibus Evid. Hr. Tr. 283:11 – 283:17, 511:21 – 512:6, Sept. 21, 2011.)

**3. Barry Colvert**

Barry Colvert, an independent polygraph examiner, testified as an expert. (Omnibus Evid. Hr. Tr. 335, 341:4 – 341:11, Sept. 21, 2011.) With regard to the type of polygraph examination taken by Mr. Coles, Mr. Colvert explained that a score of six or greater is a passing score, that a score of negative six or less is a failing score, and that anything in between must be deemed inconclusive. (Omnibus Evid. Hr. Tr. 353:14 – 354:13, Sept. 21, 2011.) Having studied the Coles polygraph, including its administration and scoring, Mr. Colvert testified that he scored the Coles polygraph at negative seven. (Omnibus Evid. Hr. Tr. 353:23 – 353:24, Sept. 21, 2011.)

Mr. Colvert deemed the Coles polygraph to be a valid, properly administered test. (Omnibus Evid. Hr. Tr. 374:14 – 314:18, 385:20 – 385:21, Sept. 21, 2011.) Additionally, Mr. Colvert opined that Lieutenant Clark utilized the most widely accepted polygraph testing method. (Omnibus Evid. Hr. Tr. 370:21 – 370:23, Sept. 21, 2011.) According to Mr. Colvert,

however, there is no way to properly score the Coles polygraph results and conclude that Mr. Coles passed the examination. (Omnibus Evid. Hr. Tr. 366:19 – 366:22, Sept. 21, 2011.)

**4. Solomon Wright and Keith Hall**

Solomon Wright testified that, during his interactions with police, he identified Brian Ferguson as the only individual who had a conflict with Mr. Wilkins. (Omnibus Evid. Hr. Tr. 566:20 – 567:11, Sept. 22, 2011.) In 2002, he had no knowledge of a man named Robbie Coles. (Omnibus Evid. Hr. Tr. 568:4 – 568:14, 574:10 – 574:12, Sept. 22, 2011.)

Mr. Hall testified that Mr. Wilkins did not go to bars and did not do drugs; he described Mr. Wilkins as "straight-laced." (Omnibus Evid. Hr. Tr. 585:21 - 586:4, 587:2 – 587:11, Sept. 22, 2011.) Mr. Hall also testified that he had never previously heard of Robbie Coles. (Omnibus Evid. Hr. Tr. 586:13 – 586:23, Sept. 22, 2011.)

**5. James Zimarowski**

Mr. Zimarowski is a seasoned criminal defense attorney having practiced in West Virginia's state and federal courts for approximately thirty years. (Omnibus Evid. Hr. Tr. 105:3 – 105:7, Sept. 20, 2011.) Over the course of his career, Mr. Zimarowski has defended approximately twenty first-degree murder cases; of those cases, he carried approximately two-thirds to jury verdict, some resulting in acquittals. (Omnibus Evid. Hr. Tr. 106:4 – 107:24, Sept. 20, 2011.)

In advance of the underlying murder trial, Mr. Zimarowski received a complete police report, which included entries pertaining to the Linville debriefing and the purported confession of Mr. Coles. (Omnibus Evid. Hr. Tr. 60:19 – 61:22, Sept. 20, 2011.) Though it is Mr. Zimarowski's belief that police reports do, at times, contain erroneous information, he elected to forego an independent investigation of the purported confession of Robbie Coles; Mr.

Zimarowski "took facts . . . from the police report . . . [a]nd did nothing further." (Omnibus Evid. Hr. Tr. 51:19 – 51:21, 62:16 – 62:19, 69:13 – 70:3, Sept. 20, 2011.)

Mr. Zimarowski acknowledged that, had Mr. Coles failed the polygraph examination, or had the polygraph indicated an inconclusive result, he would have investigated Mr. Coles. (Omnibus Evid. Hr. Tr. 84:1 – 84:11, Sept. 20, 2011.) And though he is skeptical of all polygraphs, Mr. Zimarowski "accepted the [Coles] polygraph at face value" and declined to speak with Lieutenant Clark about the examination. (Omnibus Evid. Hr. Tr. 86:14 – 86:18, 90:20, 91:11, Sept. 20, 2011.) According to Mr. Zimarowski, he declined to request information related to the administration and scoring of the Coles polygraph because "[the request] would have been denied." (Omnibus Evid. Hr. Tr. 88:18 – 88:21, Sept. 20, 2011.)

Mr. Zimarowski never made contact with Robbie Coles, Ms. Linville, Ms. King, the unidentified woman who purportedly accompanied Mr. Coles to Spring King's trailer, or anyone else who may have possessed information pertinent to the Coles confession. (Omnibus Evid. Hr. Tr. 70:4 – 70:6, 74:3 – 74:5, 75:22 – 75:24, 77:10 – 77:20, Sept. 20, 2011.) And he gained no new information from conversations with the prosecuting attorneys, or from a brief conversation with Detective Ford at a gas station. (Omnibus Evid. Hr. Tr. 62:20 – 63:15, 95:1 – 95:9, Sept. 20, 2011.)

Mr. Zimarowski justified his conduct as follows:

> The police report itself, you have a statement that is made some 10 weeks after the incident during a drug debriefing by two individuals -- or at least one individual who was attempting to basically better herself in a drug debriefing. I don't believe really anything anyone says in a drug debriefing, including my own clients. They basically are not credible. So first off, the credibility issue of a drug debriefing raises -- you used the term in your opening statements -- a red flag. There is a massive red . . . [t]here is a massive red flag in a drug debriefing. There is a massive red flag in a statement -- a disclosure made 10 weeks after the alleged incident. If these witnesses were so filled with the public spirit, they could have come forward immediately or at least sometime in a reasonable period

> of time. So their credibility was immediately suspect and immediately to be discounted simply because it is a drug debriefing which has credibly unreliable information. It is not timely.
>
> And then you couple that with Mr. Coles denying he made the statements, Mr. Coles taking a polygraph and passing a polygraph . . . . And it was a strategic decision of how I use that information most effectively during the trial. And it was going to be used most effectively during a trial the way I used it, given the theory of the defense.

(Omnibus Evid. Hr. Tr. 63:19 – 64:22, Sept. 20, 2011.) "It's jury presentation if you want to get it down to two words." (Omnibus Evid. Hr. Tr. 79:8 – 79:9, Sept. 20, 2011.)

At trial, Mr. Zimarowski attempted to convince the jury that someone other than Mr. Ferguson shot Jerry Wilkins. (Omnibus Evid. Hr. Tr. 41:5 – 41:6, Sept. 20, 2011.) Mr. Zimarowski attempted to support his theory of the case with a multi-layered strategy: by showing that the State's case was based entirely on circumstantial evidence; by framing the State's evidence as factually incompatible with the Defendant; by depicting the State's case as the product of a rush to judgment, as well as of substandard police work; by showing that Mr. Ferguson had an alibi; and by calling Mr. Ferguson, an intelligent and well-spoken young man, to testify on his own behalf. (Omnibus Evid. Hr. Tr. 41:5 – 41:12, 45:20 – 49:24, 59:16 – 60:11, Sept. 20, 2011.)

In addition to evidentiary considerations involving Ms. Linville's and Ms. King's hearsay testimony, as well as a concern that Mr. Coles would cause a mistrial by blurting out that he had passed a polygraph, Mr. Zimarowski declined to call Ms. Linville, Ms. King, or Mr. Coles because their lack of credibility would have harmed Mr. Ferguson's credibility, and because it would have appeared to the jury as if he was creating a false suspect. (Omnibus Evid. Hr. Tr. 129:20 – 129:24, 130:1 – 131:4, 132:18 – 133:7, 142:7 – 142:10, Sept. 20, 2011.) In this regard, Mr. Zimarowski testified as follows:

> I would much rather have that suspect not present in the courtroom, not identified. Let the jury extrapolate from that if they so desire. That's why I strategically chose to use the same mechanism I used with Steve Ford, the detective, and throw Coles out there but not have him subject to cross-examination.

(Omnibus Evid. Hr. Tr. 131:4 – 131:10, Sept. 20, 2011.) "It was much more strategically productive in my opinion to leave dangling out there in front of a jury. That does not create a false suspect for the jury to look at . . . ." (Omnibus Evid. Hr. Tr. 131:17 – 131:20, Sept. 20, 2011.)

**6. Attorney Expert Witnesses**

Stephen Jory and J. Michael Benninger testified as to Mr. Zimarowski's performance within the framework set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The Court limited Mr. Yackel's testimony to the issues of polygraph testing and the discoverability of polygraph information, both within the context of criminal defense.

Mr. Jory opined that Mr. Zimarowski's performance did amount to ineffective assistance of counsel; Mr. Benninger opined that Mr. Zimarowski's performance did not amount to ineffective assistance of counsel; Mr. Yackel testified that, pursuant to *State v. Doman*, 204 W. Va. 289, 512 S.E.2d 211 (1998), as well as Rule 16 of the West Virginia Rules of Criminal Procedure, Mr. Zimarowski could not have reasonably expected to receive polygraph examination materials via discovery, even if he had formally requested them. (*See* Omnibus Evid. Hr. Tr. 402:1 – 491:18, Sept. 21, 2011; Omnibus Evid. Hr. Tr. 595:10 – 745:2, 752:8 – 778:15, Sept. 22, 2011.)

**7. Post-Hearing Matters**

Upon the close of all evidence, the Court offered the parties the opportunity to submit briefs, as well as proposed findings of fact and conclusions of law. Additionally, pursuant to the guidance set forth in *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), the Court

inquired whether Mr. Ferguson had raised all known grounds for *habeas corpus* relief. The Petitioner, by his counsel, responded in the affirmative.

## II. DISCUSSION

Mr. Ferguson is entitled to a new trial because his trial counsel's performance was deficient under an objective standard of reasonableness, and because there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceedings would have been different. Accordingly, a writ of habeas corpus should be, and hereby is, GRANTED.

Mr. Ferguson's right to effective assistance of trial counsel is rooted in both the West Virginia Constitution, as well as in the Constitution of the United States. Our state constitution provides, "In all [trials of crimes, and of misdemeanors], the accused shall . . . have the assistance of counsel . . . ." W. Va. Const. Art. III, § 14. Likewise, the Constitution of the United States provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Each of these constitutional commands "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (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* . . . (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (internal citation omitted). The Petitioner bears the burden of proof on both prongs of the test. *Strickland*, 466 U.S. at 685, 104 S.Ct. at 2064.

**a. Trial counsel's performance was deficient under an objective standard of reasonableness because he conducted an unjustifiably shallow investigation of the Coles confession, thus rendering his trial strategy uninformed.**

Under the "performance" prong of the *Strickland* analysis, the Court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In other words, the Court must objectively determine "whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue" without "engaging in hindsight or second-guessing of trial counsel's strategic decisions." *Miller* at Syl. Pt. 7 (in part).

"Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. Under the circumstances of this case, for example, the Court notes that, at the time of the challenged conduct, defense counsel had a duty to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . . ." ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1 (3d ed. 1993). Furthermore, trial counsel had a duty to "provide competent representation[, which requires] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." W. Va. R. Professional Conduct 1.1.

In most ineffective assistance cases, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." For this reason, "strategic choices made after thorough investigation are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

However, "courts have had 'no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so.'" *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 153, 469 S.E.2d 7, 12 (1996) (*quoting State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995)).

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

*Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. The West Virginia Supreme Court frames the issue as follows:

> 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.

*State ex rel. Bess v. Legursky*, 195 W. Va. 435, 438, 465 S.E.2d 892, 895 (1995) (*quoting Daniel* at Syl. Pt. 3).

By way of illustration, in *Wiggins v. Smith*, the Supreme Court of the United States, employing the standards set forth in *Strickland*, vacated the Petitioner's death sentence, in part, because counsel failed to investigate beyond a pre-sentence investigation report and social services records in advance of the Petitioner's capital sentencing proceedings, and furthermore, because those sources contained leads that a reasonably performing attorney should have pursued in evaluating a mitigation defense. 539 U.S. 510-534, 123 S.Ct. 2527-2542 (2003). According to the majority opinion, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate

further. . . . *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision. . . ." *Wiggins*, 539 U.S. at 527, 123 S.Ct. at 2538. With this in mind, the Court ruled that "[c]ounsel's investigation into [the Petitioner's] background did not reflect reasonable professional judgment." *Wiggins*, 539 U.S. at 534, 123 S.Ct. at 2541-2542.

Courts have reached the same conclusion in cases where counsel blindly relies upon, and fails to investigate beyond, material information contained within a police report. *See Elmore v. Ozmint*, 661 F.3d 783, 859 (4th Cir. 2011) ("[T]he notion that no investigation of . . . forensic evidence was necessary, because the defense lawyers reasonably trusted in not only the integrity, but the infallibility, of the police . . . is abhorrent to *Strickland* . . . ."); *Hoots v. Allsbrook*, 785 F.2d 1214, 1219-1220 (4th Cir. 1984) (deeming unreasonable "[counsel's] decision not to carry his investigation of possible eyewitness testimony past a review of the police report"); *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."); *Origer v. Iowa*, 495 N.W.2d 132, 137 (Iowa Ct. App. 1992) (holding that it was unreasonable for trial counsel to rely exclusively on a law enforcement investigation and fail to independently investigate a witness statement that, if pursued, would have led to two witnesses who possessed evidence of third-party guilt).

"Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation." *Crisp*, 743 F.2d at 583. It follows that, without adequate investigation, counsel's tactical decisions are subject to suspicion, not deference. *See Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) ("[Counsel's] decision not to present the [alternate shooter] theory through the testimony of [eyewitnesses] -- a decision made

without interviewing the witnesses . . . -- was unreasonable professional conduct."); *Mitchell v. Henry*, No. C-93-4299 CAL, 1997 WL 711055, at *18 (N.D. Cal. Nov. 6, 1997) (finding counsel ineffective where he "chose an identity defense, yet failed to investigate the most obvious lead to support that defense"); *People v. Bryant*, 391 Ill.App.3d 228, 240, 907 N.E.2d 862, 873 (2009) (holding that "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 Maki and Holt were the real killers"). After all, "counsel can hardly be said to have made a strategic choice when [he or she] has not yet obtained the facts on which such a decision could be made." *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (citing *U.S. v. Gray*, 878 F.2d 702, 711 (3d Cir.1989) (emphasis omitted)).

In the case *sub judice*, the Petitioner met his burden of proof as to the "performance" prong of the *Strickland* test. Mr. Ferguson demonstrated that his trial counsel failed to adequately investigate the purported confession of Robbie Coles, and that, as a result, his trial counsel advanced an uninformed trial strategy. Accordingly, the Court finds Mr. Zimarowski's performance deficient under an objective standard of reasonableness.

In advance of trial, Mr. Zimarowski received and reviewed a complete police report, which memorialized all investigatory steps taken by the Morgantown Police Department in relation to the subject shooting. The report included Detective Ford's version of the Linville drug debriefing, at which Ms. Linville discussed the purported confession of Robbie Coles and the existence of two other individuals who witnessed the event. The report indicated that Mr. Coles denied making a confession, and that Mr. Coles passed a polygraph test.

Having received and reviewed the police report, Mr. Zimarowski knew, or should have known, 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. Nevertheless, Mr. Zimarowski declined to independently investigate the purported confession. He made no effort to contact Mr. Coles, Ms. Linville, Ms. King, or anyone connected to these individuals. 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. Such conduct clearly contravened the norms of criminal defense practice in effect at the time, especially in a case which exposed Mr. Ferguson to the most severe criminal penalty under West Virginia law.

Relying exclusively on the police report, Mr. Zimarowski assessed the potential weight of testimonial evidence having never communicated with the witnesses from whom that evidence could be elicited. Mr. Zimarowski assumed that the testimony of Mr. Coles, Ms. Linville, and Ms. King would, in the aggregate, be incredible, and consequently, that their testimony would more likely harm, rather than help, the defense's jury presentation. Moreover, Mr. Zimarowski made assumptions relative to the admissibility of potentially impactful hearsay evidence in that he failed to avail himself of highly relevant, and available, information upon which reliable, pre-trial evidentiary evaluations depended.

At trial, Mr. Zimarowski attempted to advance his theory of the case -- that someone other than Mr. Ferguson shot Jerry Wilkins -- by employing a multi-layered strategy. In addition to "throwing Coles out there" for the jury to consider, Mr. Zimarowski attempted to convince the jury that the police not only rushed to judgment, but that the police conducted a sloppy,

incomplete investigation. Had he himself adequately investigated the Coles confession, Mr. Zimarowski would have, and should have, uncovered evidence highly supportive of these trial themes. For example, when Detective Ford testified on redirect examination at trial that the police had followed up on the Coles confession, Mr. Zimarowski could have introduced evidence strongly rebutting the detective's assertion. This is not to mention the evidence that could have been introduced to support third-party guilt, which, as we know, was the central, overarching theory of the defense.

Trial counsel attempts to justify his cursory investigation of the Coles confession by reference to his trial strategy and the importance of jury presentation. However, as indicated above, because Mr. Zimarowski's tactical decisions rested upon a weak informational foundation, they cannot be afforded the deference frequently reserved for the strategic decisions of counsel. In short, trial counsel never accumulated the information necessary to convert mere assumptions to reasonably supported tactical judgments. Accordingly, the Court finds trial counsel's proposed justifications for an abbreviated investigation of the Coles confession unavailing.

From the evidence presented during the omnibus evidentiary hearing, and from this Court's observations of Mr. Zimarowski in unrelated cases, this Court does not hesitate in believing that Mr. Zimarowski is an exceedingly skilled, well studied, and highly experienced criminal defense attorney. This Court's breadth of knowledge of Mr. Zimarowski's work as a lawyer over the course of a thirty-year career indicates that he has rightfully earned the respect of his peers. And while this Court's respect for Mr. Zimarowski is also well deserved, esteem can neither dilute, nor alter, a conclusion quite plainly drawn from application of fact to law.

Because trial counsel limited his investigation of the Coles confession to a police report that contained obvious, potentially fruitful leads, because trial counsel provides insufficient justification for his cursory investigation of the Coles confession, and because trial counsel acted in contravention of the prevailing norms of practice at the time of the subject investigation and trial, the Court finds trial counsel's performance deficient under an objective standard of reasonableness.

**b. There is a reasonable probability that the result of the underlying trial would have been different had trial counsel presented information derived from an independent investigation of the Coles confession.**

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison,* 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986). Therefore, under the "prejudice" prong of the *Strickland* test, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

"In making the requisite showing of prejudice, 'a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland's* test.'" *Daniel*, 195 W. Va. at 322 n.7, 465 S.E.2d at 424 n.7 (1995) (*quoting Williams v. Washington,* 59 F.3d 673, 682 (7th Cir.1995)). It stands to reason, then, that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a

> reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in [*Strickland*], the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

*Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068-2069. In either context, "[all it takes] is for 'one juror [to] have struck a different balance'" for the result of the proceedings to have been different. *Ramonez v. Berghuis*, 490 F.3d 482, 491 (6th Cir. 2007) (*quoting Wiggins,* 529 U.S. at 537, 123 S.Ct. at 2543).

Having considered the evidence presented at the omnibus evidentiary hearing, and having carefully studied the trial record, the Court finds that, had trial counsel 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. Put simply, trial counsel's failure to present evidence related to the Coles confession undermines this Court's confidence in the adversarial nature, as well as the outcome, of the underlying jury trial.

As an initial observation, the Court agrees with Judge Stone's assessment of the State's case against Mr. Ferguson when he described it as a circumstantial evidence case. At trial, the State presented evidence of the following: gunshot residue on Mr. Ferguson's clothing; Mr. Ferguson's incomplete and/or inaccurate disclosures to police regarding firearms use and ownership; Mr. Ferguson's suspicious conduct in the minutes preceding gunshot residue sampling; Mr. Ferguson's failure to provide a corroborated alibi; the victim's concern about an upcoming physical confrontation with Mr. Ferguson; verbal threats made by Mr. Ferguson against Mr. Wilkins; the presence of Mr. Ferguson's vehicle outside the victim's apartment in January of 2002; the presence of a weapon at Mr. Ferguson's apartment, which, according to Mr. Johnson, Mr. Ferguson described as a .44 magnum; the presence of a .44 magnum shell in the

dumpster outside Mr. Ferguson's apartment; and eyewitness accounts generally consistent with Mr. Ferguson's physical characteristics and clothing.

On the other side of the coin, however, the State produced no murder weapon, much less any physical evidence linking Mr. Ferguson to the murder weapon; the State produced no physical evidence linking Mr. Ferguson to the spent shell casing, the bullet jacket fragment, or the bullet fragments located during the course of the police investigation; none of the eyewitnesses (whose descriptions of the assailant did, in fact, vary) identified Mr. Ferguson as the assailant; while Mr. Ferguson had small amounts of gunshot residue on his clothing, Mr. Ferguson presented evidence supporting a plausible, and exculpatory, reason for the presence of those particles; the police failed to determine whether the dumpster in which they found a .44 magnum shell traveled around the community; the defense attacked the credibility of Mr. Johnson (the witness who testified as to the presence of a .44 magnum in Mr. Ferguson's apartment); Mr. Ferguson presented himself as a talented student and a well-spoken young man; and, Mr. Ferguson denied any involvement in the shooting death of Mr. Wilkins. Additionally, Mr. Wilkins, who knew Mr. Ferguson, never identified Mr. Ferguson as the shooter.

As for motive, the State presented evidence to demonstrate that the conflict between Mr. Ferguson and Mr. Wilkins started, and centered on, Ebony Gibson. The State focused its motive evidence on two events: one occurring in Ebony Gibson's vehicle in the fall of 2000 (over a year prior to the shooting), the other taking place at a fraternity party in the fall of 2001 (one year after the 2000 event and several months prior to the shooting).

Not only are these events temporally removed from each other, as well as from the shooting, but they involve relatively brief encounters between Mr. Wilkins and Mr. Ferguson. There was no physical confrontation between Mr. Ferguson and Mr. Wilkins during the

fraternity party. Moreover, the evidence demonstrates that Mr. Ferguson did not value his relationship with Ms. Gibson nearly as much as the State would like a jury to believe. In sum, the State asked the jury to believe that a student with a 4.0 GPA shot and killed Mr. Wilkins because Mr. Wilkins showed an interest in Ebony Gibson, and because the men engaged in, at most, two verbal confrontations over the course of approximately seventeen months.

As stated above, at trial, Mr. Zimarowski attempted to advance his theory of the case -- that someone other than Mr. Ferguson shot Jerry Wilkins -- by employing a multi-layered strategy. One of the means chosen to advance this theory was to "throw Coles out there" for the jury to consider. Inexplicably, however, and in a manner completely inconsistent with "throwing Coles out there," Mr. Zimarowski elicited responses from Detective Ford on cross-examination, which, in essence, relegated the Robbie Coles confession to inconsequentiality. Then, he moved to another line of questioning.

The record demonstrates that, once Mr. Zimarowski opened the door for examination on the Coles topic, Ms. Ashdown 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. Shortly thereafter, the State slammed that door shut. There had been no evidence of the Coles confession prior to Detective Ford's cross-examination, and no evidence of that confession came in after Detective Ford's redirect examination. Let there be no question why Judge Stone denied Mr. Ferguson's proposed *Harman* instruction, which, according to Mr. Zimarowski, basically represented Mr. Ferguson's theory of the case.

In addition to "throwing Coles out there," Mr. Zimarowski attempted to convince the jury that the police not only rushed to judgment, but that the police conducted a sloppy, careless investigation. Had he conducted an adequate investigation of the Coles confession, Mr.

Zimarowski 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. Contrary to Detective Ford's testimony at trial, which suggests a thorough investigation of the Coles confession, the police never spoke with Spring King, never spoke with Mr. Coles's associates, and never attempted to locate, much less identify, the unknown woman who purportedly accompanied Mr. Coles to Spring King's trailer. Detective Ford testified at the omnibus evidentiary hearing that he never asked Mr. Coles about his whereabouts on February 2, 2002, because "I'm sure he wouldn't have remembered." Such a statement leads the Court to believe that, during redirect examination at trial, Detective Ford used the term "followed up" in relation to the Coles confession quite loosely. Unfortunately for Mr. Ferguson, the defense had no way to introduce the evidence required to strongly challenge the police investigation of Robbie Coles.

At the omnibus evidentiary hearing in this matter, Ms. Linville and Ms. King presented cogent testimony about their encounter with Mr. Coles in early February, 2002. Is this to say that Ms. Linville and Ms. King would be perfect defense witnesses at trial? No. Mr. Zimarowski was, and is, correct in his belief that Ms. Linville's and Ms. King's failure to report the confession in a timely manner would be the topic of strong cross-examination, as it was during the omnibus evidentiary hearing. The context of Ms. Linville's initial disclosure -- a drug debriefing related to a federal conviction -- would also be classic fodder for cross-examination, as it was at the omnibus evidentiary hearing. So, too, would Ms. King's prior relationship with Mr. Coles. After all, one would naturally ask, as Ms. DeChristopher did during the omnibus evidentiary hearing, why Mr. Coles would seek refuge at Ms. King's trailer when he spit in her face during their last meeting. Additionally, there is no perfect match between Ms. Linville's

recollection and that of Ms. King. And the Court is also cognizant of the fact that there was no apparent connection between Mr. Wilkins and Mr. Coles.

That being said, at the omnibus evidentiary hearing, Ms. Linville and Ms. King 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*[7] shot a man. Ms. Linville and Ms. King testified that, when he arrived at Spring King's trailer, Mr. Coles wore dark jeans and a dark, hooded sweatshirt, a description notably similar to eyewitness accounts of the shooter's attire. Moreover, Ms. Linville vehemently denied saying anything at her drug debriefing to suggest that Coles confessed to shooting someone in the chest. In fact, Ms. Linville testified that Mr. Coles gestured toward his shoulder blade to indicate where the third bullet hit the victim.

According to Ms. Linville, the police responded to her information as if they didn't care. Such a perception could certainly be used to support a defense attack on the police investigation: 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.

In sum, the Court finds 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, or to change that juror's perspective as to the issue of mercy. Had evidence derivative of a proper investigation of the Coles confession been introduced at Mr. Ferguson's trial, the defense could have far more effectively challenged the State's assertions

[7] The fact that both women used this word in their omnibus evidentiary hearing testimony, combined with the fact that both women testified that Mr. Coles paced nervously, demonstrates that their testimony as to the confession would, and should, be admissible at a future trial pursuant to the excited utterance exception to the hearsay rule. *See* W. Va. R. Evid. 803(2).

that Jerry Wilkins's murder had been fully investigated and that Mr. Coles had been properly ruled out as a suspect. With such evidence, Mr. Ferguson's request for a *Harman* instruction would likely have been granted, thus strengthening the jury instructions from a defense perspective. With such evidence, the defense could have presented evidence that Robbie Coles shot and killed Jerry Wilkins, thereby providing substance to the defense's theory of third-party culpability.

Evidence of the Coles confession was necessary to fully meet the circumstantial evidence presented against Mr. Ferguson at trial. Its absence casts a pall over the fairness of those proceedings. Accordingly, the Court finds that Mr. Ferguson did suffer prejudice by trial counsel's failure to introduce evidence derived from an independent investigation of the Coles confession.

## III. ORDER

For the foregoing reasons, the Court **ADJUDGES** and **ORDERS** as follows:

1. A writ of habeas corpus is hereby **GRANTED**;

2. Because Mr. Ferguson was denied effective assistance of trial counsel in violation of the West Virginia Constitution, as well as the Constitution of the United States, his conviction for murder in the first degree is hereby **VACATED**;

3. The Petitioner, Brian Bush Ferguson, shall be released from custody within sixty days unless the State of West Virginia takes steps to immediately retry Mr. Ferguson on the underlying charge, or unless the State of West Virginia files a timely notice of appeal;

4. The Circuit Clerk is directed to provide copies of this order to counsel of record.

ENTER: August 8, 2012

PHILLIP D. GAUJOT, JUDGE

STATE OF WEST VIRGINIA, SS:
I, Jean Friend, Clerk of the Circuit and Family Courts of Monongalia County State aforesaid do hereby certify that the attached ORDER is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk