NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JAYRIONTE THOMAS, Petitioner

v.

STATE OF WEST VIRGINIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

JARIONTE THOMAS, PETITIONER

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ISSUE PRESENTED FOR REVIEW

Whether the West Virginia Supreme Court of Appeals erred in declining to hold, on direct criminal appeal, that the Petitioner received ineffective assistance of counsel in a First-Degree Murder case.

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I.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution – Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

I.

TABLE OF AUTHORITIES

CASES:

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OTHER AUTHORITIES:

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I.

LIST OF PARTIES

All parties appear in the caption of the case on the front page.

II.

OPINIONS BELOW

The March 23, 2021, Memorandum Decision of the West Virginia Supreme Court of Appeals affirming the Petitioner's conviction and sentence appears at Appendix "A" to the Petition. The December 23, 2019, Circuit Court of Kanawha County, Charleston, West Virginia, Sentencing Order appears at Appendix "B" to the Petition.

III.

STATEMENT OF JURISDICTION

The Circuit Court of Kanawha County, Charleston, West Virginia, had jurisdiction over the criminal case, State of West Virginia v. Jayrionte Thomas, pursuant to West Virginia Code § 51-2-2. The West Virginia Supreme Court of Appeals exercised appellate jurisdiction under West Virginia Code § 51-1-3. This Honorable Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

IV.

STATEMENT OF THE CASE

The Petitioner, Jayrionte Thomas (hereinafter, "the Petitioner"), seek review of the March 23, 2021, Memorandum Decision by the West Virginia Supreme Court of

Appeals, affirming his conviction of First-Degree Murder following the Petitioner's plea of guilty, and his sentence to life in prison without mercy entered by the Honorable Tera L. Salango, Kanawha County Circuit Court Judge, on December 19, 2019.

V.

STATEMENT OF THE FACTS

On December 14, 2017, the Petitioner was walking to a Charleston West Side Market & Deli (also known as "MJ's") at 1724 7th Avenue, Charleston, West Virginia, in the company of Marcus Young ("Young"). The Petitioner was listening to the music and was rhythmically "rapping" thereto. As they approached the store, the Petitioner, Young and Freeman observed Terrell Davenport ("Davenport") sitting in a vehicle in front of MJ's. Davenport made a comment to the group, although the Petitioner may not have heard it because of the noise created by his music. However, as the nearby video cameras ultimately revealed, Davenport and the three friends gestured and exchanged words. The trio then went inside the store and, soon thereafter, Davenport followed the Petitioner, Young and Freeman inside MJ's.

Inside the store, the Petitioner, Young and Freeman started ordering food and buying groceries and cigarettes. The Petitioner stood with Freeman in front of the drink machine when Davenport approached him aggressively and confronted the Petitioner in his personal space. According to a witness, the owner of the store, Davenport was upset that Young had looked at him "some sort of way," and confronted Young, presumably about a gang affiliation. Young called Davenport "a bub," an apparently contemptuous slur. Davenport was not purchasing anything inside MJ's on that occasion and appeared to

come inside solely for the purpose of confronting the Petitioner, Young and Freeman. Once angry words were exchanged, Davenport, still in the close proximity to the Petitioner, moved towards the door but kept reaching around his pants' waist band, as if to pull out and shoot a weapon before running out of the store. The Petitioner, out of fear, pulled out his revolver and shot all five bullets before running out of the store. Young also fired shots inside MJ's, hitting Davenport, although all the bullets, but one, were ultimately found to be too fragmented to be attributed to a specific weapon. Davenport, well alive, staggered outside the store. The Petitioner, once running outside the store himself, was out of bullets, and kept running. Davenport appeared to be injured in the leg or hip area but, again, was very much alive and not mortally wounded by the shots fired inside MJ's.

As Davenport fell on the ground outside the store, the Petitioner was running away from the scene with an empty gun. With the events captured on a surveillance camera, Young ran out of MJ's and fired at least three shots into Davenport, point blank. Two of the shot visibly struck Davenport, causing his demise. One of the bullets was fired when Young put the weapon to Davenport's head and pulled the trigger. There was no indication that in that brief amount of time the events took place, the Petitioner and Young agreed in any manner to undertake any concerted effort to shoot Davenport. The Petitioner and Young were shooting independently of each other and Freeman ran out of the store without any weapon.

The Petitioner and Young were ultimately apprehended and charged with First-Degree Murder. In addition, the Kanawha County Grand Jury indicted the Petitioner and Young on several counts of possession and distribution of Fentanyl. The State of West

Virginia claimed that the Petitioner and Young arrived to Charleston, West Virginia, from Detroit, Michigan, for the sole purpose of distributing narcotics.

The Petitioner, once indicted upon the charge of murder was appointed two attorneys, including Joey Spano, Esquire ("Spano" or "trial counsel"). His first co-counsel, Robby Long, Esquire, was replaced by Adam Campbell, Esquire, who, in turn was substituted by Troy Giatras, Esquire, who never appeared for the in-court proceedings and who to this day appears to be unknown to the Petitioner.

At some point in the pre-trial proceedings Spano approached the Kanawha County Prosecuting Attorney's Office and requested a debriefing of the Petitioner in the furtherance of the potential plea agreement. The Petitioner, Spano, two Assistant Prosecuting Attorneys and Detective Basford with the Criminal Investigative Division, Charleston Police Department, met with the incarcerated Petitioner and the following dialogue occurred:

MC: (Marryclaire Akers – Prosecutor); why is he doing this?

JS: (Joey Spano): It's his only shot at a ….. mercy. I don't think there is any …. I mean when you read the, I mean you guys know the principal in the second degree to murder to the first degree, there is no defense there. In 1995, what was it MILLER? Whatever case, it's directly on point where the guy stabs him the bar? It's not MILLER it's …. Whatever, it's the last case, the guy – one guy stabs and the other guy kills and he appeals and said I wasn't contributing – I wasn't the …. it's your principal in second degree murder in the first degree.

MC: Yeah.

JS: There's no gun so self-defense is out I mean come on, you know the case.

MC: Yeah but I just wondered why because …..

JS: Because I think it ….. if I go to a sentencing hearing and he's cooperated ….

MC: Oh he don't have a better shot.

JS: Oh when you watch the video MARCUS is the killer.

MC: Right but you …. but ….

JS: I've explained all of this to him.

Shortly thereafter, the Petitioner appeared before the Honorable Tera Salango, Circuit Court Judge, and, on the day of the plea, was given an amended plea agreement letter, wherein the Petitioner obligated himself to plead to First-Degree Murder and expect mercy recommendation from the State in the hope for the life-with-mercy sentence form the Circuit Court. In exchange, the State of West Virginia promised to make the recommendation of mercy at sentencing. The Petitioner was required to testify at co-defendant Young's trial. The State's recommendation of mercy was incorporated into the plea agreement shortly before the day of the plea hearing. As already mentioned, the Petitioner's co-counsel did not appear for the Petitioner's plea hearing or, for that matter for the Petitioner's sentencing.

The trial counsel recommended that the Petitioner plead guilty to First-Degree Murder without any safeguards as to mercy. The plea agreement called for an open-ended life-without-parole sentencing option for the Trial Judge. No attempt was made to secure a plea pursuant to Rule 11(c) of the West Virginia Rules of Criminal Procedure (also known as "a binding plea") or any other sentencing variant which would guarantee the Petitioner a sentencing cap or a known parole eligibility date.

At the time of the plea hearing the Petitioner admitted to shooting and killing Davenport, but claimed he did it out of "fear (o)f him. Of him killing me." The Petitioner never offered any other explanation or reason for his actions nor did he indicate any concerted action with the co-defendant Young. No one addressed the elements the First-Degree Murder during the plea colloquy. There was no indication in the Petitioner's admission of guilt that he acted with any premeditation, deliberation, malice, or purely human malevolence towards Davenport during the time in question. The sum total of factual basis for the First-Degree Murder in the Petitioner's case suggested no more than the firing of a weapon in self-defense or, at worst, in the heat-of-passion once the shooting started.

The Petitioner's counsel, however, stepped in and offered the statement wherein counsel claimed, without any supporting facts, that the Petitioner "acted in concert with someone." The Prosecutor also chimed in claiming that the Petitioner did not act, or could not have acted in self-defense, because the Petitioner did not see Davenport and that a verbal exchange (rather than altercation) between Davenport and Young could not have led a reasonable person to "fear for their life."

Despite the factually incomplete or inaccurate comments by the Prosecutor and the factually groundless explanations by the defense counsel, the Petitioner's assertion of fear and self-defense was not changed, modified, or repudiated by the Petitioner himself. For that matter, even a cursory review of the record revealed the Petitioner's "confrontation" with Davenport, invasion of the Petitioner's personal space by the aggressive Davenport, and the Petitioner's fear that Davenport would have had a chance to "pull out or whatever he had or even if he had anything...." In addition, there was no evidence that the

Petitioner chased Davenport outside – in fact, the Petitioner ran past Davenport while running away from the scene. To say that the Petitioner did not consistently assert fear – or self-defense – would be a serious misinterpretation of the existing facts of the case. The trial court nevertheless accepted the guilty plea, and found "a basis in fact for said plea." Trial counsel's insistence on the Circuit Court's acceptance of the plea agreement upon the trial court in light of the Petitioner's assertion of a viable affirmative defense constituted ineffective assistance of counsel.

On the day of the co-defendant's trial the Petitioner stood ready to assist the State of West Virginia with his testimony. However, the prosecution elected not to utilize the Petitioner's testimony and was, nevertheless, successful in obtaining the life-without-mercy conviction against the co-defendant, Marcus Young.

At sentencing, the Petitioner's counsel requested mercy for the Petitioner citing his young age (eighteen (18) at the time of the crime), his rough childhood, and the acceptance of responsibility by attempted cooperation with the prosecution. The State of West Virginia, in one sentence, recommended mercy for the Petitioner to the Court. No other favorable-to-the-Petitioner evidence or mitigating testimony was presented on behalf of the Petitioner. The victim impact statement was received by the Court.

The Court, in sentencing the Petitioner, declared the latter to be "part of a team who executed another person" and "a Detroit drug dealer coming into our community … and poisoning this community." The Circuit Court, in sentencing the Petitioner to life in prison without mercy disregarded prosecution's mercy recommendation, ignoring the facts of Davenport's initiation of the store confrontation and his threat to the Petitioner inside the mini-mart.

On appeal, the Petitioner, in making more than sixty (60) references to the trial court record, and citing more than thirty (30) decisional and procedural authorities, invited the State's Highest Court to declare that his counsel was ineffective per se by recommending an open-ended guilty plea which exposed the Petitioner to a life sentence without mercy. The West Virginia Supreme Court declined the Petitioner's invitation and rejected the Petitioner's argument in a Memorandum Decision. See Appendix "A." While seemingly the West Virginia Supreme Court of Appeals addressed the issue the trial court's acceptance of the plea based on ineffective representation of his counsel, the Appellate Court declined to address "the merits of petitioner's ineffective assistance of counsel claim" because of the insufficiency of "information contained at this juncture." Appendix "A," p. 5.

Because the West Virginia Supreme Court of Appeals misapprehended the underlying facts leading to the Petitioner's plea of guilty and erred in holding that the record upon which to determine ineffectiveness of counsel is insufficient, this submission follows.

VI.

SUMMARY OF ARGUMENT

The Petitioner received multifaceted ineffective assistance of counsel at the pre-trial, plea and sentencing stages of the proceedings in the trial court, necessitating the setting aside the plea agreement on direct criminal appeal and the record is complete and sufficient to demonstrate trial counsel's ineffectiveness. It is the Petitioner's contention that any recommendation of a plea to a potential life sentence without parole amounts to

ineffective assistance of counsel per-se, and the West Virginia Supreme Court of Appeals' rejection of the Petitioner's invitation to so hold constituted reversible error.

Based upon the facts and circumstances of the present case it appears that the Petitioner acted in self-defense and in response to the menacing conduct of Davenport inside the store. The recitation of the incomplete facts by the West Virginia Supreme Court of Appeals led the State's Highest Court to the rejection of the Petitioner's assertion of an affirmative defense clearly enunciated by the Petitioner at the time of the plea in the trial court - the Petitioner, in response to the trial court's question as to his motive for opening fire inside MJ's, responded "out of fear" suggesting a self-defense reaction to the V's actions. Despite the parties' counsel's supplementation of the Petitioner's plea admission, the Petitioner himself never adopted such supplementation to his own admission and his self-defense statement during the colloquy remained unchanged. The Circuit Court should not have accepted the plea from the Petitioner who asserted a valid (and legal) response for his conduct.

The Petitioner's guilty plea and the Circuit Court's acceptance thereof was induced and predicated upon the theory of the Principal in the Second Degree, inasmuch as the Defendant was not the actual killer of Davenport. Since the essential element of the "principality" of action is the commonality of interests of the actor and the accomplice and the meeting of the minds of the existing actors in furtherance of the common goal. A careful review of the record showed no agreement, contract, meeting of the minds and commonality of interests between Petitioner and Young other than their independent shooting at their potential assailant. Since that line of defense was available to the Petitioner, the lower court should not have accepted the guilty plea under the theory of

"Principal in the First Degree" and "the Accomplice," or "Principal in the Second Degree." The trial counsel's misreading of the facts of the case resulted in the Petitioner's guilty plea to a crime of First Degree Murder under the theory of Principal and Accomplice wherein the Petitioner was neither a principal in the Second-Degree nor an Accomplice.

VII.

REASONS FOR GRANTING THE PETITION

"Rarely does this Court ... find ineffective assistance of counsel on direct appeal," held the West Virginia Supreme Court in State v. Triplett, 187 W.Va. 760, 771, 421 S.E.2d 511, 522 (1992), cited in State v. Hottle, 197 W.Va. 529, 535, 476 S.E.2d 200, 206 (1996). Yet despite this very cautious approach to finding that counsel has been ineffective on direct appeal, State v. Bias, 171 W.Va. 687, 301 S.E.2d 776 (1983), the West Virginia Supreme Court of Appeals held on numerous occasions that where it conclusively appears in the trial record that the defendant not provided effective representation of counsel, the claim of ineffective assistance will be considered on direct appeal. State v. Pelfrey, 163 W.Va. 408, 256 S.E.2d 438 (1979); State v. Bush, 163 W.Va. 168, 255 S.E.2d 539 (1979) (finding ineffective assistance of counsel per se where counsel had only a weekend to prepare for trial in the case involving a possible life sentence); Housden v. Leverette, 161 W.Va. 324, 241 S.E.2d 810 (1978) (lateness of appointment of counsel creating ineffectiveness of counsel per-se). The record in the present case is more than sufficient to address and determine the ineffectiveness of the trial counsel's representation.

In Bias, supra, the State's High Court found ineffective assistance of counsel on direct appeal where the record conclusively demonstrated the trial attorney's inadequate preparation of insanity defense. Once the record of the proceedings in the court of the first instance is complete and the complaints about trial counsel's representation are based upon the facts appearing in that record, appellate courts will consider the merits of the claim of ineffective assistance of counsel on direct appeal. Id.; State v. Wickline, 184 W.Va. 12, 399 S.E.2d 42 (1990).

The Appellate Court's pronouncements are consistent with those enunciated by the Federal Courts of Appeals which consistently held that a claim of ineffective assistance of counsel can be raised by a defendant on direct appeal if it conclusively appears from the record that the trial counsel did not provide effective representation. United States v. Martinez, 136 F.3d 972 (4th Cir. 1998); United States v. Faulls, 821 F.3d 502 (4th Cir. 2016) (record must be conclusive in order to be raised on direct appeal).

The Petitioner contends that his case belongs to the minority of appellate cases where the record is complete and conclusively demonstrative of ineffective assistance of trial counsel. Therefore, "nothing would be gained by postponing the consideration of (the Petitioner's) sixth amendment claim (of ineffective assistance of counsel)." United States v. Fisher, 477 F.2d 300, 302 (4th Cir. 1973). Nevertheless, the West Virginia Supreme Court of Appeals held that on a direct appeal and before a guilty plea will be set aside based upon ineffectiveness of counsel, it must be shown that: (1) counsel did act incompetently; (2) the incompetency related to a matter which would have substantially affected the fact finding process if the case had proceeded to trial; and (3) the guilty plea must have been motivated by this error. State v. Sims, 162 W.Va. 212, 248 S.E.2d 834

(1978). And the Appellate Court consistently "has entertained direct appeals in convictions based on a guilty plea." Id., citing State v. Barnett, 161 W.Va. 6, 240 S.E.2d 540 (1977); State v. Cunningham, 160 W.Va. 582, 236 S.E.2d 459 (1977); State v. Stone, 101 W.Va. 53, 131 S.E. 872 (1926); and State v. Hill, 81 W.Va. 676, 95 S.E. 21 (1918). In all of this Court's decisions, the guiding principle for an appeal from a criminal conviction based on a guilty plea is the voluntariness of the guilty plea or the legality of the sentence. Sims, ibid. And, again, the controlling test as to the voluntariness of a on a direct appeal is the competency of the advice given to a criminal defendant by his counsel. Id. The Petitioner again contends that he had demonstrated ineffectiveness of his counsel and the record in the trial court was more than sufficient to make that determination.

In State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (W.Va. 1995), the West Virginia Supreme Court of Appeals has adopted the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984) to evaluate claims of ineffective assistance of counsel. First, the court must determine whether "counsel's performance was deficient under the objective standard of reasonableness." Secondly, it must be proven that there is "a reasonable probability that, for counsel's unprofessional errors, the result of the proceedings would have been different." Miller, supra, 194 W.Va. at 3, 459 S.E.2d at 114. Further, when reviewing counsel's performance under Strickland:

> "... courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts of omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted in the case at issue. Miller, supra (...), 194 W.Va. at 4, 495 S.E.2d at 115.

Moreover, and most importantly, as the United States Supreme Court held, "a single error by counsel if egregious and prejudicial, (...) can constitute a denial of the right to effective assistance of counsel." Murray v. Carrier, 477 U.S. 478 (1986).

Here, the trial counsel not only misinterpreted the law of First- and Second-Degree principals as they applied to the facts of this case but also misapplied them to the present facts. Moreover, counsel disregarded the Petitioner's persistent claims of self-defense, claims supported by the objective facts: Davenport initiating the hostile exchange outside the store; Davenport following the Petitioner inside MJ's; Davenport arguing with the Petitioner and Young inside the store; Davenport keeping his hand in his clothes and reaching in his clothes for what the Petitioner could have easily perceived as a deadly weapon. Based upon these misconceptions, counsel recommended to the young and impressionable twenty-year-old Petitioner an open-ended plea to a life sentence without any protection of a binding sentence or a parole-eligibility date. Representing to the Petitioner that said plea was the only "shot at mercy," counsel for the "drug-dealer-turned murderer" Petitioner not only solicited but also insisted on the Petitioner's guilty plea to a life sentence without any safeguards or protections against such an ultimate sentence. The lack of understanding the facts and the theories of prosecution motivated (and resulted in) the disastrous plea recommended to the Petitioner by his counsel. Worse, once the only trump card - i.e. the Petitioner's cooperation against Young came to naught, the Petitioner's counsel had nothing to offer, and indeed, offered nothing in terms of mitigating evidence at sentencing. Recommending without safeguards or reservations a plea to the ultimate penalty in West Virginia jurisprudence – life in prison without mercy - is ineffective assistance of counsel per se.

It is this invitation to address the novel proposition that the West Virginia Supreme Court of Appeals misapprehended and mistook for the absence of the controlling authority. Furthermore, the Appellate Court's recitation of the facts upon which it based its rejection of the Petitioner's argument omits several important aspects. First, while the Appellate Court acknowledged the exchange of angry words between Davenport and, apparently, all three friends, inside the store, the Court never acknowledged the undisputed fact of Davenport menacingly approaching the Petitioner and confronting him in the Petitioner's personal space. Secondly, the Appellate Court did not mention any surreptitious action of Davenport inside the store, i.e. reaching around his pants' waist, as if to pull out a weapon and the Petitioner's fearful reaction thereto. Thirdly, the West Virginia Supreme Court of Appeals' recitation of facts attributed five (5) bullets shot from the Petitioner's weapon to hit Davenport, although there was no evidence of it because of the fragmentation of the bullets. Finally, the State's Court of Appeals not only did not mention the co-defendant, Young, as the shooter of lethal bullets, aimed point blank into Davenport's head outside the store, while the Petitioner was running away from the scene, but also did not point out to any facts which would lead to the conclusion that the Petitioner and Young acted in concert.

The facts in the present case strongly suggested the self-defense defense. After all, the Petitioner and his friends were walking towards (and ultimately went inside) the mini-mart minding their own business, without bothering anyone. Once confronted by Davenport outside the store, they ignored his hostile comments. But Davenport would not relent. He followed the Petitioner, Young, and Freemen inside the store, and, certainly, not for the purpose of purchasing food, drinks or tobacco. The only reason for

his presence inside the store was confrontation with the three friends. And that he accomplished, according to all witnesses. Once Davenport gestured as if he had a weapon inside his winter clothes, and was willing to use it and escape any consequences of for his actions or retributions by quickly leaving the store, the Petitioner fired his weapon out of fear for his life, as he told the plea-accepting Circuit Court Judge.

It is the basic tenet of West Virginia law that if a criminal defendant, who was not the aggressor, had reasonable grounds to believe and actually did believe to be in imminent danger of death or serious bodily injury from which he could have save himself only by using deadly force against his assailant, he has the right to employ deadly force in self defense. State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823 (1992). It is axiomatic that a criminal defendant's state of mind is crucial to his decision to employ deadly force in self-defense. If the Petitioner believed that his life was imperiled or it was necessary to ward off great bodily harm, the Petitioner was justified in employing deadly force in self defense. State v. Wykle, 208 W.Va. 369, 540 S.E.2d 586 (2000), and, at trial, would have been entitled to a self-defense jury instruction upon any evidence supporting that theory, regardless of the strength or weakness of that evidence. State v. Shingleton, 222 W.Va. 647, 671 S.E.2d 478 (2008).

Yet in the present case, the Petitioner was not properly advised on the applicability of the self-defense defense. In fact, after noticing the self defense as an affirmative defense, the trial counsel abandoned that line of defense and despite of the Petitioner's indication to the contrary, did not proceed to trial with the viable defense of the Petitioner's self-defense. And the signs of self-defense were pretty clear. The Petitioner was verbally attacked outside by the person who was not afraid to follow, all by himself, all three

individuals inside the MJ's and to continue some gang-related argument. Throughout the confrontation with the Petitioner Davenport acted as if he had a firearm within his immediate grasp. The Petitioner, who had no gang affiliation, was afraid for his life, cornered in a tight place with only one route of escape blocked by the potential assailant. The Petitioner only responded to the perceived threat to his life and that was his argument throughout the proceedings culminating in his statement to the Circuit Court Judge in the presence of his counsel. Having failed to develop the very viable defense, counsel's overall performance in that regard was deficient and the abandonment of the self-defense theory constituted ineffective assistance of counsel.

Finally, the Petitioner's plea was induced by the advice he received from his counsel concerning the Principal in the Second Degree, a person whose criminal liability is predicated upon a concerted action with a Principal in the First-Degree. The case law in West Virginia is clear as to the commonality of interest(s) between a "principal," a criminal actor who actually perpetrates a crime, and an "accomplice," a person who knowingly, voluntarily, and with common intent unites with the "principal" in the commission of a crime. State v. Bradford, 199 W.Va. 338, 484 S.E.2d 221 (1997). The prosecution must demonstrate that a criminal defendant participated in a "concerted action," and that he shared the criminal intent of the Principal in the First Degree. State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998). Therefore, for the Petitioner to become an "accomplice" or an "accessory" he must have possessed prior knowledge of the intent of the principal, State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998), and must have associated himself and contributed to the criminal act of the principal. State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997).

There was no evidence in the present case to suggest that the Petitioner himself was the killer. In fact, Davenport was still alive when he staggered from the store, running away, but not in fear of the Petitioner or Young but in a failed attempt at assaulting the Petitioner while escaping liability for his assaultive actions. The Petitioner had no prior knowledge of Young's intent to kill Davenport. One can only speculate whether Young himself devised the plan to kill Davenport before the first shots were fired. But undisputed facts existed from the inception of this prosecution: that Young dispatched of Davenport with a lethal shot to his head. The Petitioner, by that time was out of bullets. No reliable evidence indicated any words, commands, or shouts inside MJ's suggesting the commonality of interests between the Petitioner and Young in killing Davenport. Counsel for the Petitioner foisted the plea upon the Petitioner based upon the theory which had no application to the facts of the case, and was further based upon the trial counsel's misinterpretation and misreading of the underlying facts. The existing facts of circumstances of the events of December 14, 2017, foreclosed the legal theories propounded by the trial counsel and accepted, without reservation, but supplemented with at least an incomplete or even factually inaccurate explanation at the time of the plea hearing, by the State of West Virginia. Counsel for the Petitioner, in light of his self-defense assertion before the trial court, also supplemented the record stressing the theory of the Principal in the first Degree and the Accomplice, the theory inapplicable to the underlying facts of the case. The trial court, upon further inquiry as to the factual basis of the plea, should not have accepted the plea where it was obvious that the Petitioner was not the principal in any degree but rather an individual who used a deadly force in self-defense.

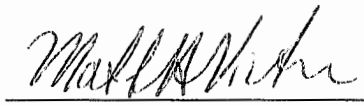
The trial counsel, having misread the facts of the case and having misinterpreted the theory of the Principal in the First Degree and Second Degree, misadvised the Petitioner on this line of defense and, instead, having abandoned yet another viable line of defense, insisted on the Petitioner's disastrous guilty plea. Counsel's actions in that aspect of the case, as in his entire representation of the Petitioner, constituted ineffective assistance.

VIII.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
Jayrionte T. Thomas
By Counsel



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APPENDIX "A"

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MAR 2 7 2021

FILED
March 23, 2021
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 20-0055 (Kanawha County 18-F-352)

Jayrionte Thomas,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Jayrionte Thomas, by counsel Matthew A. Victor, appeals the Circuit Court of Kanawha County's December 23, 2019, sentencing order. Respondent the State of West Virginia, by counsel Andrea Nease Proper, filed a response to which petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

On December 14, 2017, Petitioner Jayrionte Thomas, Marcus Young, and Diante Freeman saw Terrel Davenport ("the victim") outside of the West Side Market and Deli ("the market") in Charleston. The four men gestured to one another and exchanged words before petitioner, Mr. Young, and Mr. Freemen entered the market; the victim followed shortly thereafter. The men exchanged words inside the store, possibly related to gang activity or affiliation, and petitioner pulled out a revolver. Petitioner fired five bullets, hitting the victim, before running from the market. Surveillance video showed petitioner trying to shoot the victim while the victim was on the ground outside of the market. The victim was transported to the hospital but died as a result of his injuries the following day. Police interviewed multiple witnesses, including the market owner, and reviewed surveillance videos.

Petitioner was found in Michigan on December 27, 2017. Subsequent to his arrest, on January 22, 2018, petitioner's counsel filed an omnibus discovery motion, and on January 25, 2018, an additional attorney was appointed to represent petitioner. Counsel moved to exclude evidence of petitioner's flight and filed an extensive discovery motion requesting evidence held by the State. Petitioner and Mr. Young were indicted on one count of conspiracy to manufacture, deliver, and possession with intent to manufacture and deliver a controlled substance (Fentanyl)

in violation of West Virginia Code §§ 60A-4-414 and -415; one count of manufacturing, delivering, and possession with intent to manufacture a controlled substance (Fentanyl) in violation of West Virginia Code § 60A-4-415; and one count of murder by use of a firearm in violation of West Virginia Code § 61-2-1. On August 28, 2018, the circuit court reconsidered its prior order severing the trial of the two defendants, reversing the ruling and ordering that both defendants be tried together.

In October of 2018, petitioner moved for appointment of an expert witness on ballistics, moved to sever the drug charges from the murder charge, moved to suppress photograph and in-court identifications from two witnesses, and moved to suppress the fact that petitioner is from Detroit. Petitioner also moved to continue the trial, and that motion was granted. In March of 2019, counsel served notice of an affirmative defense, self-defense. At that time, he renewed his motion to suppress the photographic identification and the motion to suppress evidence of fleeing. He also moved to sever his trial from Mr. Young's, asserting that the State planned to use "the jail house snitch's statement against the co-defendant."

The State made a plea offer to petitioner whereby he would plead guilty to first-degree murder and testify against Mr. Young in exchange for the dismissal of the drug charges. Further, the State agreed to make a recommendation of mercy. Petitioner accepted the offer and pled guilty to first-degree murder with the use of a firearm on October 29, 2019. During the plea colloquy, petitioner confirmed his understanding that the circuit court did not have to accept the State's recommendation of mercy and that the court could sentence him to life in prison without the possibility of parole. Petitioner also signed and initialed a lengthy list of rights he was waiving by pleading guilty. In accordance with that plea agreement, petitioner gave a recorded statement to Detective Bradford of the Charleston Police Department. In that statement, petitioner said that the victim entered the market and confronted petitioner and Mr. Young. Mr. Young called the victim a "bub", which angered him. According to petitioner, the victim was walking around with "his hands in his pants . . . [l]ike he was reachin' for something' or whatever . . . . [B]efore he got the chance to even pull out or whatever he had or even if he had anything you know what I mean I shot." Petitioner admitted that he shot at the victim five times but did not know how many times he hit the victim. After reviewing the surveillance video, petitioner admitted that he aimed his gun at the victim outside of the store and tried to shoot him again, but he was out of bullets. Mr. Young then shot the victim. According to the State, one of the bullets recovered from the victim's body matched Mr. Young's gun while one bullet removed at the hospital matched petitioner's gun. However, the other bullets were too fragmented to match a gun.

Petitioner also stated that he came to West Virginia to sell drugs with Mr. Young. He told the court that he left school in tenth grade and takes Prozac for depression. During the sentencing hearing, petitioner's counsel stated that petitioner was just eighteen years old at the time of the crime, he had a troubled upbringing, he had fifteen siblings, and he had been involved in the juvenile system. Counsel requested mercy for petitioner, telling the circuit court that petitioner had suffered greatly in jail as a result of his choice to plead guilty and testify against Mr. Young, a known gang member. Petitioner apologized to the court and to the victim's family, and the State recommended mercy as set forth in the plea agreement. However, the victim's mother gave a victim impact statement requesting that petitioner not be shown mercy in sentencing. By order

entered on December 23, 2019, petitioner was sentenced to life incarceration without the possibility of parole, with credit for time served.[1] Petitioner appeals from that order.

As we have previously stated,

> "'[t]he Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syllabus Point 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)." Syllabus Point 2, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010).

Syl. Pt. 1, *State v. Varlas*, -- W. Va. --, 844 S.E.2d 688 (2020).

On appeal, petitioner contends that he received multifaceted ineffective assistance of counsel necessitating the setting aside of the plea agreement. While petitioner readily acknowledges this Court's oft-repeated holding that "claims of ineffective assistance of counsel are not properly raised on direct appeal," *City of Philippi v. Weaver*, 208 W. Va. 346, 351, 540 S.E.2d 563, 568 (2000), he asserts that this case is one of the few where the record is complete and conclusively demonstrative of ineffective assistance of trial counsel. Petitioner avers that in all of this Court's decisions, the guiding principle for an appeal from a criminal conviction based on a guilty plea is the voluntariness of the guilty plea or the legality of the sentence. He contends that, on direct appeal, the controlling test as to the voluntariness of a plea is the competency of the advice given to a criminal defendant by his counsel. According to petitioner, his trial counsel misinterpreted first- and second-degree murder principles as they applied to the facts of this case; counsel also misapplied them to the present facts. Petitioner contends that his trial counsel disregarded petitioner's persistent claims of self-defense, which were supported by the following objective facts: the victim initiating the hostile exchange outside the market; the victim following petitioner inside the market; the victim arguing with petitioner and Mr. Young inside the market; and the victim keeping his hand in his clothes and reaching in his clothes for what petitioner could have easily perceived as a deadly weapon. Petitioner asserts that his trial counsel encouraged him to enter into the "disastrous plea." Without citing any authority, he further argues that "[r]ecommending without safeguards or reservations a plea to the ultimate penalty in West Virginia jurisprudence – life in prison without mercy – is ineffective assistance of counsel per se."

Petitioner argues that the facts "strongly suggested the self-defense defense" because he and his friends were "minding their own business, without bothering anyone" until they were confronted by the victim outside the market. He argues that because a criminal defendant, who was not the aggressor, with reasonable grounds to believe he was in imminent danger of death or serious bodily injury has the right to employ deadly force in self-defense, the criminal defendant's state of mind is crucial to his decision to employ deadly force in self-defense. *See State v. Beegle*, 188 W. Va. 681, 425 S.E.2d 823 (1992). Petitioner argues that he was justified in using deadly force in self-defense. He also asserts that he was not properly advised on the applicability of self-defense and that trial counsel abandoned that line of defense by not proceeding to trial with that

[1] Mr. Young went to trial, and the jury convicted him of first-degree murder. He appeals that conviction and his resulting sentence in Case No. 20-0050.

"viable defense." He contends that "[h]aving failed to develop the very viable defense, counsel's overall performance in that regard was deficient and the abandonment of the self-defense theory constituted ineffective assistance of counsel." He further argues that his plea was "induced by the advice he received from his counsel concerning the [p]rincipal in the [s]econd [d]egree . . . ."

Despite the fact that petitioner was the first one to shoot the victim, unloading every bullet in the gun and continuing to try to shoot at the victim once he was on the ground, petitioner argues there was no evidence to suggest that petitioner was the killer. Without citing to the record, petitioner claims that he had no prior knowledge of Mr. Young's intent to kill the victim. He also asserts, without citing to the record, that undisputed facts existed from the inception of the prosecution that Mr. Young fired the lethal shot to the victim's head. Petitioner argues that counsel foisted the plea upon him based upon a theory that had no application to the facts of the case, particularly because it was based on counsel's misinterpretation and misreading of the underlying facts. He contends that the circuit court erred in accepting the plea because "it was obvious that [p]etitioner was not the principal in any degree but rather an individual who used a deadly force in self-defense."

At the outset, we note that this Court considers claims of ineffective assistance of counsel as follows:

> "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (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." Syllabus point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 2, *Meadows v. Mutter*, 243 W. Va. 211, 842 S.E.2d 764 (2020). However, this Court has also repeatedly found

> [i]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992). We have further explained that "the preferred way of raising ineffective assistance of . . . counsel is to file a subsequent petition for a writ of habeas corpus raising the issue in the court below." *Watts v. Ballard*, 238 W. Va. 730, 735-36 n.7, 798 S.E.2d 856, 861-62 n.7 (2017) (internal quotations and citation omitted).

In addition, in cases involving guilty pleas "the prejudice requirement of the two-part test established by *Strickland* . . . and [*Miller*], demands that a habeas petitioner show that there is a

reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Syl. Pt. 6, in part, *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999). We have previously held

> [t]he controlling test as to the voluntariness of a guilty plea, when it is attacked either on a direct appeal or in a habeas corpus proceeding on grounds that fall within those on which counsel might reasonably be expected to advise, is the competency of the advice given by counsel.

Syl. Pt. 2, *State v. Sims*, 162 W. Va. 212, 248 S.E.2d 834 (1978). Further,

> [b]efore a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error.

Id. at 212, 248 S.E.2d at 835, Syl. Pt. 3.

Here, petitioner fails to cite to the record for several of his key factual contentions. He also neglects his duty to cite authority for his contention that recommending a plea deal that could result in life imprisonment without a binding sentence was per se ineffective assistance of counsel. Both of these errors violate Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure.[2] In addition, we do not believe there is sufficient information contained in the record at this juncture to determine whether petitioner received effective assistance of counsel. Therefore, we decline to address the merits of petitioner's ineffective assistance of counsel claim.

Petitioner's second assignment of error is that the circuit court erred in accepting petitioner's plea of guilty to first-degree murder in the absence of a factual basis as to the elements of first-degree murder. Because there was no objection to petitioner's plea before the circuit court, petitioner concedes that this alleged error must be considered under this Court's plain error jurisprudence. In support of his argument, he contends that a first-degree murder conviction required the State to demonstrate the existence of complex mental processes that led petitioner to deliberate and premeditate acts of killing another individual. Without citing to the record, petitioner argues that the record showed the "marked absence, in [p]etitioner's admission, of any deliberate or premeditated acts. Instead, the record indicated [p]etitioner's assertion of fear of [the

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[2] Rule 10(c)(7) provides as follows:

> The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

victim] which triggered the claim of self-defense." He argues that "[n]othing in the [State's] and defense counsel's recitations [of the facts] removed, from the 'perfect guilty plea' the taint created by [p]etitioner's assertion of an affirmative defense, i.e. that of the self-defense." After hearing the representations of counsel, the circuit court asked whether petitioner still wished to plead guilty, and petitioner responded in the affirmative. Petitioner contends that the circuit court never heard evidence of petitioner's premeditation or deliberation that could lead to an admission to any deliberate killing of another person or his nefarious mental processes leading to the premeditated murderous act. Without citing legal authority, petitioner asserts that his plea was unintelligent and involuntary, which affected his substantive and substantial rights by giving up "a plethora of constitutional rights, including the cherished right to trial by jury . . . ."

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In *Miller*, we held that "[h]istorically, the 'plain error' doctrine 'authorizes [an appellate court] to correct only 'particularly egregious errors' . . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings[.]'" *Id.* at 18, 459 S.E.2d at 129. During the plea colloquy in this matter, when the circuit court asked petitioner what he did "to be guilty of" first-degree murder, he responded, "I shot and killed Terrell – Terrell Davenport." Both the State and petitioner's trial counsel addressed the possibility of petitioner's assertion of self-defense, stating that while the victim's hands were around his pants, there was no gun seen on the victim's person. His counsel also told the circuit court that if the altercation had ended inside he believed that manslaughter would have been more appropriate but that they "funnel[ed] outside the building later on, the [victim was] lying there; [petitioner] comes out – [petitioner] has already made a statement that he went to shoot outside and he couldn't, that there were no bullets." Counsel also represented to the circuit court that he had discussed all of that with his client "[i]n depth" and petitioner agreed that he understood "all of that." After making all of the necessary findings, the circuit court accepted petitioner's plea. Based on the record before this Court, we cannot find that the circuit court committed plain error in accepting that plea. For these reasons, we affirm the circuit court's December 23, 2019, sentencing order.

Affirmed.

ISSUED: March 23, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton

APPENDIX "B"

In Lieu of a CDR:
DOB: 5-16-99 SS # _____
Offense Date: Dec. 2017
Arresting Agency: C.P.D.
Charges: 1st Degree Murder

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2019 DEC 23 PM 1:52

KANAWHA COUNTY CIRCUIT CLERK

STATE OF WEST VIRGINIA

v.

Case No. 18-F-352 Count Five
(Judge Tera L. Salango)

JAYRIONTE THOMAS

ORDER

On the 12th day of December 2019, came the defendant, **JAYRIONTE THOMAS**, together with counsel, Joseph Spano, and also came the State of West Virginia by Debra L. Rusnak and Maryclaire Akers, Assistant Prosecuting Attorneys in and for Kanawha County, West Virginia, for disposition in this matter.

Upon defendant's oral and written plea of guilty to the felony offense of First Degree Murder with the Use of a Firearm, as contained in Count Five of Felony Indictment Number 18-F-352, entered in this Court on the 29th day of October 2019, with his counsel then present, it is the judgment of this Court that the defendant, **JAYRIONTE THOMAS**, is guilty of First Degree Murder with the Use of a Firearm.

THEREUPON, it was demanded of the said **JAYRIONTE THOMAS**, if anything he had or knew to say why the Court should not now proceed to pronounce the sentence of the law against him, and no valid reason being offered or alleged in delay of judgment, it is **CONSIDERED** and **ORDERED** by the Court that the defendant, **JAYRIONTE THOMAS**, be confined in the penitentiary of this State for the rest of his natural life, without mercy, with credit for time spent in jail awaiting trial and conviction, which credit for time so spent in jail is six hundred ninty-four (694) days.

Pursuant to Rule 32(c)(5) of the West Virginia Rules of Criminal Procedure, the Court advised the defendant of his appellate rights under Rule 37 of West Virginia Rules of Criminal Procedure, including that the defendant must file a notice to appeal within thirty (30) days of the judgment, that such appeal must be perfected within one hundred twenty (120) days of entry of the circuit court's Order, and the defendant's right to apply for leave to appeal *in forma pauperis* if he is unable to pay the cost to file an appeal. The Court further informed the defendant of his right to file motions under Rule 35 of the West Virginia Rules of Criminal Procedure to request the Court reconsider his sentence or correct an illegal sentence. The defendant acknowledged his understanding of his appellate rights on the records and executed the *Notice of Post-Conviction Rights* which was filed and made a part of the record.

And it is further **ORDERED** that the proper officer do, as soon as practicable, remove and safely convey the said **JAYRIONTE THOMAS**, from the South Central Regional Jail to the Division of Corrections and Rehabilitation, to be kept imprisoned and maintained in the manner prescribed by law.

WHEREUPON, the prisoner was remanded to jail.

It is further **ORDERED** that the Clerk send a certified copy of this Order to all counsel of record and the Division of Corrections and Rehabilitation.

ENTERED THIS 23rd **day of** December, **2019**

TERA L. SALANGO, JUDGE

Date: 12/27/19
Certified copies sent to:
X counsel of record
X parties
X other DOC SCRJ
(please indicate)
By:
X certified/1st class mail
for
hand delivery
Other objections accompanied
Deputy Circuit Clerk