

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**Robert Allen Hager,
Petitioner Below, Petitioner**

vs.)**No. 11-0129** (Mingo County 08-C-187)

**Thomas McBride, Warden, Mount
Olive Correctional Complex,
Respondent Below, Respondent**

FILED

February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mingo County, wherein Petitioner Robert Allen Hager was denied habeas corpus relief following an omnibus evidentiary hearing. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. Respondent Thomas McBride has filed a response brief.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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 Revised Rules.

Petitioner is currently serving two life sentences, without mercy, for two counts of first degree murder. Petitioner filed a direct criminal appeal to this Court, and the appeal was the subject of a published opinion in *State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998). In that opinion, the Court "affirm[ed] the decision of the lower court in all respects." *State v. Hager*, 204 W.Va. 28, 40, 511 S.E.2d 139, 150 (1998). Petitioner later filed a petition for writ of habeas corpus in the circuit court, alleging multiple issues. On December 17, 2010, the circuit court issued a twenty-two page order denying the petition for writ of habeas corpus following an omnibus evidentiary hearing. Petitioner now appeals from the denial of his habeas corpus petition below. "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

On appeal, petitioner alleges the following four assignments of error: 1) that the trial court erred by denying him a continuance based upon a lack of notice of the State's intention to use evidence of his murder of the second victim under West Virginia Rule of Evidence 404(b) during his severed trial for the first victim; 2) that his sentences are excessive; 3) that his multiple convictions for two murders committed on the same day and in close proximity to each other violate his right against double jeopardy; and, 4) that the evidence was insufficient to support his convictions for first degree murder because the State could not satisfy the elements of premeditation and deliberation. A review of the record shows that petitioner raised these exact issues before the circuit court during his habeas proceeding below. The Court has carefully considered the merits of these arguments as set forth in his petition for appeal and in the State's response, and it has reviewed the appendix designated by the petitioner. The Court finds no error in the denial of habeas corpus relief and fully incorporates and adopts, herein, the circuit court's detailed order dated December 17, 2010. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

11-0129

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

ROBERT ALLEN HAGER,

Petitioner,

v.

**THOMAS MCBRIDE, Warden for
the Mount Olive Correctional Complex,**

Respondent.

**Civil Action No.: 08-C-187
Honorable Michael Thornberry**

FILED
MOUNT OLIVE CORRECTIONAL COMPLEX
MINGO COUNTY, WV
DEC 17 A 11:40

**FINAL ORDER DENYING PETITIONER'S OMNIBUS PETITION FOR WRIT OF
HABEAS CORPUS**

This matter comes before the Court pursuant to the Petitioner, Robert Allen Hager's, Motion for Habeas Corpus relief pursuant to the West Virginia Post Conviction Habeas Corpus Act, West Virginia Code § 53-4A-1, et seq. (1994). A hearing was held on the matter on the 7th day of December 2010. The parties appeared as follows the Petitioner, Robert Allen Hager, via video teleconference, and through counsel, Mark Hobbs; and the Respondent Thomas McBride through counsel, Glen Rutledge, Assistant Prosecuting Attorney. The Court now makes the following Findings Of Fact And Conclusions Of Law and Orders, to wit:

Procedural History

1. On July 15, 2008, the Petitioner, Robert Allen Hager, filed the instant Petition For Post Conviction Omnibus Habeas Corpus Relief, and an Amended Petition was filed on December 8, 2008, in which the Petitioner asserts that: the Court violated his right to be free from Double Jeopardy; that due to pre-trial publicity, Mingo County, West Virginia was an improper venue; and that the sentence imposed was excessive. The Petitioner also generally, and without argument or support, listed

that; the Indictment on its face does not show that an offense was committed; he was denied his right to a speedy trial; that he challenges his competency at the time of the crime; that his mental competency at the time of trial was cognizable even if not asserted at proper time or if resolution not adequate; that he had an incapacity to stand trial due to drug use; that there was suppression of evidence helpful to the Petitioner by the prosecutor; that the State knowingly used perjured testimony; ineffective assistance of counsel; that the denial or excessiveness of bail was improper; that there was no preliminary hearing; that he was illegally detained prior to Arraignment; that there were irregularities or errors in his Arraignment; that he is challenging the composition of the Grand Jury or its procedure; that there were defects in the Indictment; that there was Pre-Indictment delay; that the court erred in the refusal of its continuance; that there was a refusal to subpoena witnesses; there was a non-disclosure of Grand Jury minutes; there was a refusal to turn over witness notes after the witnesses testified; claims concerning the use of informers to convict; that improper instructions were given to the jury; that there was improper statements made by the Trial Judge; that there was prejudicial statements made by the Prosecutor; that there was insufficient evidence; that there was improper communication between the prosecutor and the witnesses and/or jury; and there was irregularities in his arrest.

2. On February 20, 2009, the Petitioner filed a *Lash* Checklist in which he waived all factors except those listed in the Amended Petition.
3. On March 20, 2009, the Petitioner filed a Brief Of Petitioner And Amended *Lash* List, ("Brief"), in which he narrows his argument to the following claims: that his

right against Double Jeopardy was violated; that prejudicial pretrial publicity resulted in Mingo County, West Virginia being an improper venue; that the imposed sentence was excessive; that the Court erred in denying the Petitioner's Motion For Continuance on the day of the trial; and that there was insufficient evidence to sustain the convictions.

4. On April 2, 2009, the Petitioner filed an Amended *Losh* Checklist, in which he waived all factors except this listed and argued in the Brief.
5. On November 23, 2010, the Petitioner filed a Notice Of Grounds That Petitioner Will Bring Forward On December 7, 2010, in which he listed as points of error: prejudicial pre-trial publicity, improper venue, double jeopardy, refusal of continuance, sufficiency of evidence, and excessive sentence. The Petitioner stated that all other grounds are waived and filed a second Amended *Losh* Checklist to that effect.
6. The Petitioner was Indicted by the Mingo County, West Virginia Circuit Court Grand Jury on January 23, 2006, for two (2) counts of murder, relating to the deaths of Della Jean Lacy and Sherman Cisco, Jr.
7. The Petitioner filed a Motion To Sever the two (2) counts and have separate trials for each count in the Indictment. The Court granted the Motion To Sever and scheduled separate trials.
8. The Petitioner's trial for the count of murder relating to the death of Della Jean Lacy commenced on May 27, 1997, and concluded on May 29, 1997. The Petit Jury returned a unanimous verdict, which found the Petitioner guilty of Murder in the First Degree and found that such offense was committed with a firearm.

9. On July 7, 1997, the Court sentenced the Petitioner to life imprisonment without the possibility of parole.
10. The Petitioner appealed his conviction to the West Virginia Supreme Court of Appeals asserting: that the trial court admitted improper evidence under West Virginia Rules of Evidence Rule 404(b); that the trial court erred in not granting the Petitioner's Motion For Continuance on the day of trial; that the trial court erred in admitting the Petitioner's confession; that the trial court allowed an improper line of questioning from the Prosecutor; and the Prosecutor committed misconduct by inflaming the jury. The Petitioner also filed a Writ of Prohibition requesting the Petitioner second trial, relating to the death of Sherman Cisco, Jr., be stayed until the appeal had been decided. The West Virginia Supreme Court of Appeals affirmed the Circuit Court and denied the Writ of Prohibition. See *State v. Hager*, 204 W.Va. 28 (1998). The West Virginia Supreme Court of Appeals specifically addressed the Rule 404(b) issues in its holding.
11. On February 26, 1998, the Petitioner proceeded to trial on Count Two of the Indictment, which charged him with the murder of Sherman Cisco, Jr. The Petit Jury returned a verdict finding the Petitioner guilty of Murder in the First Degree, and found that such offense was committed with a fire arm.
12. On March 20, 1998, the Court sentenced the Petitioner to life imprisonment without the possibility of parole for the murder of Sherman Cisco, Jr.
13. The Petitioner filed an appeal with the West Virginia Supreme Court of Appeals arguing that trial that the trial court admitted improper evidence under West Virginia Rules of Evidence Rule 404(b); that the trial court erred in not granting

the Petitioner's Motion For Continuance on the day of trial; that the trial court erred in admitting the Petitioner's confession; that the trial court allowed an improper line of questioning from the Prosecutor; and the Prosecutor committed misconduct by inflaming the jury. The West Virginia Supreme Court of Appeals affirmed this Court's decision and the *Hager* decision is now a leading case in the State of West Virginia on post event Rule 404(b) evidence and the manner in which Rule 404(b) hearings are to be conducted.

Findings Of Fact

1. The Petitioner stated before the Court that he would waive his attorney-client privilege in order that his trial attorney, Cecil Varney, could testify at the Omnibus Evidentiary Hearing.
2. During the Omnibus Evidentiary Hearing, Cecil Varney testified as follows:
 - a. That he was retained as trial counsel for the Petitioner in the underlying criminal matter approximately ten (10) years ago;
 - b. That he appealed the Petitioner's convictions to the West Virginia Supreme Court of Appeals;
 - c. That the West Virginia Supreme Court of Appeals issued a decision affirming the trial court;
 - d. That the Petitioner requested separate trials and the State elected which homicide to try;
 - e. That he wanted the severance to avoid the jury having knowledge of the other homicide;

- f. That the trial began on Monday May 27, 1997, and his office was served with Rule 404(b) Notice on May 22, 1997;
- g. That the Rule 404(b) Notice provided that the State intended to use evidence of the Petitioner's previous domestic abuse of the victim and introduction of evidence of the other victim Sherman Cisco, Jr.;
- h. That he acknowledges the Rule 404(b) Notice was received at his office on May 22, 1997, and the trial court held a Rule 404(b) hearing;
- i. That he appealed the Rule 404(b) issue to the West Virginia Supreme Court of Appeals on behalf of the Petitioner;
- j. That on the morning of trial he requested and the Court denied a Motion For Continuance because of the Notice;
- k. That the Rule 404(b) evidence relating to Sherman Cisco, Jr., was introduced at trial, and he believes the evidence relating to the prior domestic abuse was also admitted;
- l. That he believes the evidence relating to Sherman Cisco, Jr., impacted the jury;
- m. That he recalls that the case garnered significant publicity;
- n. That he did not conduct a poll regarding the need for a change of venue;
- o. That if he thought prejudicial publicity was an issue he would have take steps to remedy it;
- p. That he does not think publicity was an issue in the case;
- q. That during Voir Dire he would have inquired about whether the jurors were prejudiced by publicity;

- r. That the issue of the continuance was not addressed on the direct appeal;
 - s. That the West Virginia Supreme Court Of Appeals affirmed the Court's admission of Rule 404(b) evidence;
3. At the hearing, the Petitioner acknowledged that they were not asserting ineffective assistance of counsel as a ground for Habeas relief, but stated that the Court can provide relief on the issue of pre-trial publicity should it find plain error. The Petitioner argued that it was a prejudicial error for the Court to deny the Petitioner's Motion For Continuance on the day of trial. Further, the Petitioner stated that he deferred to his brief for all other grounds contained in the Notice, and further acknowledged that the West Virginia Supreme Court of Appeals ruled on the introduction of Rule 404(b) evidence.
4. At the Omnibus Evidentiary Hearing, the State argued that Double Jeopardy is inapplicable to the circumstances of the current case because it was two separate murders, that occurred in separate places, at different times. The State asserted that the Petitioner waived his right to argue that his sentences were excessive because he did not present the issue on direct appeal and the sentences were statutorily permitted. As for the prejudicial pre-trial publicity claim, the State contends that it should be denied because it was not presented in appeal, any prejudices would have been elicited during Voir Dire, and there is no claim of ineffective assistance of counsel. Furthermore, the State argues that the grounds relating to the refusal of the continuance should be denied because the West Virginia Supreme Court of Appeals ruled on the Rule 404(b) evidence and affirmed the introduction of said evidence. Moreover, the State asserts that there

was sufficient evidence to support the convictions and points out that this too was not raised on direct appeal. Finally, the State argues that Mingo County, West Virginia was the proper venue because the crimes occurred in said county.

Conclusions Of Law

1. West Virginia Code § 53-4A-1(a) provides, in relevant part:

Any person convicted of a crime and incarcerated under sentence of imprisonment therefore who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

2. West Virginia Code § 53-4A-3, directs that a writ of habeas corpus be granted if it appears to the Court that there is probable cause to believe that the Petitioner may be entitled to some relief, and the contentions or grounds advanced have not been previously and finally adjudicated or waived.

1. Double Jeopardy

3. In the Brief, the Petitioner argues that his right against Double Jeopardy is being violated because he is being punished with separate sentences for the same

criminal transaction. The Petitioner asserts that the two (2) counts of murder were related, occurred on the same day, involved the same elements, and one lead to the other. Thus, the Petitioner contends that he has been sentenced twice for one offense, albeit with two victims. The Petitioner argues that he did not waive his right against Double Jeopardy merely by moving for a severance of trials.

4. In its Response Brief, the State argues that the Petitioner waived this issue by failing to raise it at trial or on direct appeal. Regardless, the State contends that the Petitioner's rights against Double Jeopardy are not violated by being punished separately for multiple murders. The State asserts that multiple punishments for multiple deaths arising from the same transaction is not prohibited by the Double Jeopardy Clause.
5. "The Double Jeopardy Clause to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *State v. Minigh*, 224 W.Va. 112, 120 (2009) (citing *State v. Gill*, 187 W.Va. 136, 138 (1992)).
6. "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." *Minigh* 224 W.Va. at 120 (citing Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680 (1977)).

7. "In order to establish a double jeopardy claim, the defendant must first present a prima facie claim that double jeopardy principles have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant." Syllabus point 2, *State v. Sears*, 196 W.Va. 71 (1996).
8. "Where multiple homicides occur even though they are in close proximity in time, if they are not the result of a single volitive act of the defendant, they may be tried and punished separately under the double jeopardy clause of Article III, Section 5 of the West Virginia Constitution." Syllabus Point 5, *State v. Flint*, 171 W.Va. 676 (1983) (citing Syllabus Point 2, *State ex rel. Watson v. Ferguson*, 166 W.Va. 337 (1980) (overruled on alternative grounds by *State v. Johnson*, 197 W.Va. 575 (1996))).
9. The Petitioner has not been punished twice for the same offense, nor has he been tried for the same crime twice. The facts of the underlying criminal case showed that there were indeed two (2) separate crimes, i.e. the murder of Della Jean Lacy and the murder of Sherman Cisco, Jr. These murders occurred at different times and separate locations. Thus, the Petitioner's claims that his rights against Double Jeopardy have been violated are without merit.
10. The Court FINDS that the Petitioner has not been tried for the same offense after an acquittal or conviction, nor has the Petitioner been punished for the same crime twice.

11. The Court **FINDS** that the deaths of Della Jean Lacy and Sherman Cisco, Jr., were not the result of a single volitive act.
12. Accordingly, in light of the foregoing discussion, the Court **FINDS** that the Petitioner's Double Jeopardy rights were not violated. As such, the Petition will be **DENIED** as to this ground.

II. Pre-Trial Publicity And Venue

13. The Petitioner acknowledges that the Circuit Court of Mingo County, West Virginia clearly maintained jurisdiction over the case, but argues that due to pretrial publicity venue was improper. The Petitioner asserts that due to Mingo County, West Virginia, "being as small as it is," that all the prospective jurors were exposed to pre-trial publicity, and he further contends that the prospective jurors in the second trial would have heard about the Petitioner's previous conviction.
14. The Petitioner's trial counsel testified that he did not believe the pre-trial publicity was an issue in the case. Moreover, he stated that he would have inquired as to any exposure the prospective jurors had to publicity regarding the case during Voir Dire. The Petitioner's trial counsel also testified that had he believed the venue to be improper or publicity to be a problem he would have requested a change of venue. The Petitioner repeatedly stated during the Omnibus Evidentiary Hearing that he was not asserting ineffective assistance of counsel. Thus, he was not questioning the judgment or trial strategies of his trial counsel. However, the Petitioner contends that the Court should still consider the issue of venue pursuant to a plain-error analysis.

15. "To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Syllabus Point 2, *State v. Williams*, 172 W.Va. 295 (1983) (citing Syllabus Point 2, *State v. Wooldridge*, 129 W.Va. 448 (1946).
16. "The 'good cause' which an accused must show to be entitled to a change of venue on the ground of prejudicial pretrial publicity is the existence of a present, hostile sentiment against him, arising from the adverse publicity, which extends throughout the county in which the offense was committed, and which precludes the accused from receiving a fair trial in that county." Syllabus Point 3, *Williams*, 172 W.Va. 295.
17. The aforementioned case law deals with Motions To Change Venue which are made prior to or during trial. Here, the Petitioner made no such motion. Furthermore, the Petitioner's trial counsel testified that no such motion was necessary. Once again, during the Omnibus Evidentiary Hearing the Petitioner continually reiterated that he was not raising ineffective assistance of Counsel. Thus, the Court must determine if the venue was clearly improper.
18. The Petitioner has not produced any evidence to support his argument that he was prejudiced by Pre-Trial publicity, other than his trial counsel's testimony that

there was significant coverage of the case and general statements his in oral argument and Brief to the same effect. By the Petitioner's own admission no polls or studies were conducted to show the impact of publicity, nor has the Petitioner cited or produced any documentation of the alleged prejudicial publicity itself. In fact, the Voir Dire of the jury reflects there was no pervasive publicity and the jury was impaneled with relative ease. As such, there is no basis for the Court to find that the venue was improper, let alone for the Court to find that it was plain error not to raise the issue sua sponte.

19. The Court **FINDS** that the Petitioner did not make a Motion To Change Venue prior to or during trial.
20. The Court **FINDS** that the Petitioner's trial counsel did not deem the venue to be improper, and the Petitioner has not questioned trial counsel's judgment.
21. The Court **FINDS** that there is no evidence to find that the venue was improper or Pre-Trial publicity played a role in the outcome of either case.
22. Thus, the Court **DENIES** the Petition as to this ground.

III. Excessive Sentence

23. The Petitioner next asserts that his two (2) life sentences without the possibility of parole were excessive and the Court abused its discretion when administering said sentences. The Petitioner argues that due to the fact that he was sentenced to life imprisonment without the possibility of parole after his first conviction, receiving the same sentence after his second sentence was excessive and unnecessary.
24. "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United

States Constitution, has an express statement of the proportionality principle:

“Penalties shall be proportioned to the character and degree of the offence.”

Syllabus Point 5, *State v. Phillips*, 199 W.Va. 507 (1997) (citations omitted).

25. “In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.”

Syllabus Point 6, *Phillips*, 199 W.Va. 507.

26. West Virginia Code § 61-2-2 provides that the punishment for “Murder of the first degree shall be . . . confinement in the penitentiary for life.”

27. The Petitioner’s argument that his sentences are excessive is without merit. The Petitioner essentially argues that since he was sentenced to life imprisonment without the possibility of parole for his first Murder in the First Degree conviction he should not be punished for his subsequent Murder in the First Degree conviction. Such contention is totally without any merit.

28. The Petitioner was tried and convicted of two separate counts of Murder in the First Degree. The Court sentenced the Petitioner proportionally for each of his two convictions considering the nature of such convictions.

29. The Court **FINDS** that the Petitioner was convicted of two (2) counts of Murder in the First Degree.

30. The Court **FINDS** that the Petitioner was issued to sentence of life imprisonment without the possibility of parole.

31. The Court **FINDS** that the each punishment was proportionate to each offense.
32. Accordingly, the Court **DENIES** the Motion as to this ground.

IV. Refusal Of Continuance

33. The Petitioner next argues that it was an error for the Court to refuse his Motion For Continuance made on the day of trial. The Petitioner asserts that he was not served with Notice of the State's intent to use Rule 404(b) evidence in time to adequately prepare his defense, and claims that the Court's denial of the Continuance prejudiced him.
34. It is important to note that the Petitioner attempts to "back-door" arguments relating to the admission of the Rule 404(b) evidence while making his arguments relating to the denial of the continuance. However, the Petitioner does acknowledge that such issue has been decided and affirmed by the West Virginia Supreme Court of Appeals. See *State v. Hager*, 204 W.Va. 28, 35-38 (1998). This Court's finding from the Rule 404(b) Hearing are incorporated by reference. Further the issues have been fully addressed and already been affirmed by the West Virginia Supreme Court of Appeals. The Court will address the issue of the denial of the continuance, although the Rule 404(b) and denial of continuance are really the same issue.
35. Decisions regarding whether or not to grant a Motion For Continuance are within the sound discretion of the trial court judge, and such decision will not be disturbed unless the trial court judge abuses such discretion. See generally *State v. Vance*, 168 W.Va. 666, 673 (1981); *State v. Chafin*, 156 W.Va. 264 (1972);

Syllabus Point 1, *Levy v. Scottish Union & National Ins. Co.*, 58 W.Va. 546 (1905).

36. "Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied." Syllabus Point 3, *State v. Bush*, 163 W.Va. 168 (1979).

37. The Petitioner's trial counsel, Cecil Varney, moved for a continuance on the morning the trial was set to begin alleging that he had only received the State's Notice of Rule 404(b) that morning. The evidence is uncontradicted that the State served Notice on Mr. Varney's office on May 22, 1997, and the trial commenced on May 27, 1997, thus, Mr. Varney received the notice five (5) calendar days prior to trial. However, Mr. Varney argued during the Motion and testified during the Omnibus Evidentiary Hearing that he was out of town for hearings and May 22 and May 23, 1997, and his office was closed for the weekend and Memorial Day. Accordingly, Mr. Varney claims he did not receive the Notice until he returned to his office on the morning of trial. The Petitioner now, and Mr. Varney then, claims that the denial of the continuance prejudiced the Petitioner's defense. The Petitioner claims that Mr. Varney had only prepared for the first trial and was left in a position to defend against both counts of the Indictment. Mr. Varney does not dispute that he was retained for both murder offenses and had the opportunity to fully participate in the Rule 404(b) hearing.

38. The Court does not find the Petitioners argument that it abused its discretion when denying the continuance to be convincing. First, while Mr. Varney claims to have only received the Notice on the morning of trial, such Notice was served five (5) days prior. While the Petitioner and Mr. Varney have advanced excuses for why Mr. Varney did not receive the notice, i.e. he was out of town, such excuse is not sufficient cause for the granting of a continuance. The Notice was properly served on Mr. Varney's office and it was duty to retrieve said Notice. The fact that his office was not open to the public would not have prevented Mr. Varney from obtaining documents there within. As discussed above, the Petitioner stated that he is not asserting ineffective assistance of counsel. Thus, the fact that Mr. Varney simply did not retrieve the Notice prior to the morning of trial does not entitle the Petitioner to any relief.

39. The Petitioner claims that five (5) days was not sufficient notice of the State's intent to use Rule 404(b) evidence. The Rule 404(b) evidence the Petitioner and Mr. Varney claim to have been most surprised by and, thus, least prepared to handle, was the evidence relating to the second murder, which they had known of since the outset of the case. While Mr. Varney and the Petitioner might have thought evidence regarding the murder to be tried second would not be admitted in the first case due to the separation of trials, such evidence was known to Mr. Varney and the Petitioner well in advance of the Notice. The same attorney represented the Defendant on both cases. The date of the offenses committed against both victims was September 23, 1995. As such, any surprise should have been minimal. The Petitioner was indicted on January 23, 1996. The first trial

did not commence until May 27, 1997, thus, counsel had ample time to investigate and prepare.

40. The Court **FINDS** that the West Virginia Supreme Court of Appeals affirmed its decision to allow the admission of the Rule 404(b) evidence.
41. The Court **FINDS** that Notice of the State's Intent to use Rule 404(b) evidence was served five (5) business days prior to trial.
42. The Court **FINDS** that the Notice was received by Mr. Varney's office in sufficient time for trial preparation.
43. The Court **FINDS** that under the facts and circumstances presented to the Court at the Motion For Continuance, the Court did not abuse its discretion by denying the Motion.
44. As such, the Court **DENIES** the Motion as to this ground.

V. Sufficiency Of Evidence

45. Finally, the Petition argues that the State presented insufficient evidence regarding malice and premeditation to receive a conviction for Murder in the First Degree. As such, the Petitioner asserts that he should not have been convicted of anything greater than Murder in the Second Degree.
46. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the

relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657 (1995).

47. "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. . . ." Syllabus Point 3, *Guthrie*, 194 W.Va. 657.

48. "In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to for a deliberated and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is sufficient duration for the accused to be fully

conscious of what he intended, is sufficient to support a conviction for first degree murder. . . ." Syllabus Point 6, Guthrie, 194 W.Va. 657.

49. In his confession, the Petitioner stated that he and Della Jean Lacy argued, had a physical confrontation, and then he shot her. The gunshot wound was a close "starburst" contact wound. As for Sherman Cisco, Jr., the Petitioner stated when Mr. Cisco arrived at his home he grabbed the barrel of his shotgun and shot Mr. Cisco. However, the Petitioner eventually recanted his confession.
50. There was witness testimony from William Ace Phelps that the Petitioner grabbed Mr. Cisco's gun and killed him immediately upon their arrival to the Petitioner's home. Mr. Phelps testified that after the Petitioner shot Mr. Cisco he exclaimed "I told you not to f - - - with me!" Mr. Phelps further testified that after the Petitioner killed Mr. Cisco he drove him and two acquaintances to the body of Ms. Lacy.
51. There is no question that viewing the evidence in the light most favorable to the State that reasonable jurors could have concluded that the murder of Sherman Cisco, Jr., was deliberate and committed with premeditation and malice. The question becomes more difficult with Della Jean Lacy cause it could be viewed that it occurred during combat. However, in light of the case law above, and black letter criminal law, premeditation can occur in an instant and does not need to meet a specific time requirement. Thus, as long as the Petitioner formed the intent to kill, carried out that intent, and understood what he intended to do, he can be found guilty of Murder in the First Degree. The jury was properly instructed on lesser-included offenses and the Petitioner does not claim they were

not informed. Yet, after considering the evidence the jury still found the Petitioner guilty of Murder in the First Degree. Such decision was not unreasonable and there was sufficient evidence to support it.

52. The Court FINDS that premeditation can occur instantaneously and does not need to meet any specific time requirements.

53. The Court FINDS that the State presented sufficient evidence to support convictions for Murder in the First Degree.

54. The Court FINDS that a reasonable jury could have, and did, conclude that the Petitioner was guilty of Murder in the First Degree, i.e. deliberately killed Della Jean Stacy and Sherman Cisco, Jr., with malice and premeditation.

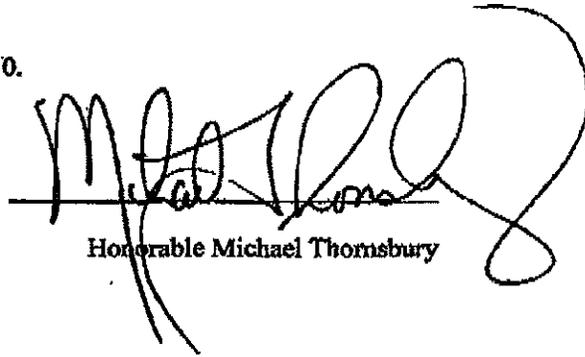
55. Thus, the Petition is DENIED as to this ground.

Judgment

Wherefore, based on the foregoing Findings Of Fact And Conclusions Of Law, the Petition is hereby DENIED.

The Clerk is DIRECTED to send an attested copy of this Order to all parties of record.

Entered: this the 17th day of December 2010.


Honorable Michael Thornsbury