FILED
January 12, 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Thomas E. Leftwich,
Petitioner Below, Petitioner

vs.) No. 20-0143 (Raleigh County 10-C-22-B)

Donnie Ames, Superintendent, Mt. Olive Correctional Complex,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Thomas E. Leftwich, by counsel G. Todd Houck, appeals the order of the Circuit Court of Raleigh County, entered on January 28, 2020, dismissing his petition for writ of habeas corpus. Mr. Leftwich is incarcerated for a term of life, without mercy, for his 2008 conviction of first-degree murder by use of a firearm. He also is sentenced to serve a consecutive term of imprisonment for a term of one to five years for his conviction of conspiracy related to the same murder, the slaying of undercover police officer Cpl. Charles "Chuck" Smith of the Beckley Police Department. Mr. Leftwich was indicted with a co-defendant, convicted in a jury trial, and sentenced as described above. His petition for appeal was denied by this Court in 2009. Respondent State of West Virginia appears by counsel Patrick Morrisey and Mary Beth Niday.

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 affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Leftwich filed a petition for a writ of habeas corpus in the Circuit Court of Raleigh County in 2010, asserting numerous grounds for relief. The circuit court dismissed the petition by a comprehensive order entered on January 28, 2020, that thoroughly addressed the grounds asserted by Mr. Leftwich.

The matter before us is an appeal from the circuit court's order of a dismissal of a petition for habeas corpus. We, accordingly, review as follows:

> "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." Syllabus point 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Meadows v. Mutter*, 243 W. Va. 211, 842 S.E.2d 764 (2020). Further, a habeas petitioner bears the burden of establishing that he is entitled to the relief sought. *See Markley v. Coleman*, 215 W. Va. 729, 734, 601 S.E.2d 49, 54 (2004); Syl. Pts. 1 and 2, *State ex rel. Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486 (1966).

On appeal, Mr. Leftwich asserts three assignments of error. He argues that the circuit court erred, first, in concluding that he failed to prove that he did not have effective assistance of counsel; second, in concluding that his constitutional right to assert self-defense was not violated; and, third, in concluding that his constitutional rights were not violated by the State's bolstering the credibility of a particular witness. With respect to the issues implicated in these assignments of error, Mr. Leftwich's arguments to this Court are nearly identical to the arguments he made to the circuit court in his underlying habeas action. It appears, in fact, that entire portions of Mr. Leftwich's amended habeas petition were pasted (albeit, reordered) into his appellate brief. In repackaging the arguments that were adequately addressed by the habeas court, Mr. Leftwich failed to argue or demonstrate that the habeas court's analysis was flawed or that its conclusions were in error. Thus, upon our review and consideration of the parties' arguments, the record on appeal, and pertinent legal authority, we find no error in the circuit court's order denying Mr. Leftwich post-conviction habeas corpus relief.

In light of our conclusion that the circuit court's order and the record on appeal reflect no clear error, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignments of error raised herein and direct the Clerk to attach to this memorandum decision a copy of the circuit court's January 28, 2020, "Dismissal of Petition."

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton

DISQUALIFIED:

Chief Justice John A. Hutchison

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

State of West Virginia, ex rel.
Thomas E. Leftwich,
Petitioner

v. **Civil Action No. 10-C-22-B**

David Ballard, Warden
Respondent

MEMORANDUM ORDER
Dismissal of Petition

Petitioner was convicted by jury trial in the Circuit Court of Raleigh County on the charges of (1) first degree murder by use of a firearm and (2) conspiracy to commit a felony. The appeal of the conviction was refused by order entered June 3, 2009.

On January 28, 2010, Petitioner, then self-represented, filed a petition for writ of habeas corpus. On May 28, 2010, G. Todd Houck, Esq., filed a notice of appearance as counsel for the Petitioner. By order entered July 30, 2010, the Hon. H. L. Kirkpatrick III appointed Mr. Houck as counsel for Petitioner.

By order entered December 10, 2012, following a status conference on that date, this court required counsel to file an amended petition on or before February 28, 2013. The amended petition for habeas corpus was timely filed on March 1, 2013, and the response was filed on April 30, 2013.

By reference to the so called "Losh List" the Petitioner asserts the following grounds for relief:

1. Consecutive sentences
2. Coerced confessions
3. Ineffective assistance of counsel
4. Defects in the indictment
5. Constitutional errors in evidentiary rulings
6. Instructions to the jury
7. Claims of prejudicial statements by the prosecutor
8. Excessive sentence
9. Challenges to composition of the jury

Grounds One and Eight - Consecutive and excessive sentences

The trial court imposed consecutive sentences of (1) life without eligibility for parole for first degree murder and (2) one to five years for conspiracy to commit a felony.

The record reflects that defendant's trial counsel did not at the sentencing hearing present arguments for concurrent sentencing and that his appellate counsel did not raise this issue in the petition for appeal. For those reasons, it is the court's opinion that the petitioner waived this point at trial and on appeal.

In the alternative, should it be determined upon appellate review that the point was not waived in trial and on appeal, it is this court's opinion that this claim is not supported by law. Consecutive sentencing on the facts of this case for crimes of first-degree murder and conspiracy to commit a felony satisfies the *Blockburger*[1] test because the two crimes require separate and distinct elements of proof.

A prosecution for first degree murder, whether grounded on a homicide by "poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing or in the commission of, or attempt to commit... " certain enumerated crimes (*W.Va. Code* § 61-2-1) requires proof that is entirely separate and distinct from a prosecution on the charge of conspiracy (*W.Va. Code* § 61-10-31).

Applying the *Miller/Strickland* analysis discussed below, the point that trial counsel did not argue for concurrent sentencing and that it was not raised on appeal does not support a claim of ineffective assistance of counsel as to either. If trial counsel had asked the trial court to consider concurrent sentencing as to these two convictions, the question whether to grant concurrent sentencing remained within the trial court's discretion according to the *Blockburger* principle. It is very unlikely that the Supreme Court of Appeals would have found that the imposition of consecutive sentences was an abuse of the trial court's discretion.

Ground Two - Coerced confession.

Petitioner argues, in effect, that all statements by him following the placement of handcuffs during the execution of a search warrant of his house should have been found by the trial court to be involuntary and inadmissible.

At the suppression hearing conducted on February 21, 2008. Raleigh County Sheriff Dept. Cpl. Canaday testified that a search warrant of the Petitioner's residence had been granted. He testified that when officers arrived at the Petitioner's residence they handcuffed all persons present, including Petitioner, as a safety measure and advised all persons that they were not under arrest. Cpl. Canaday testified that Petitioner was the first person he encountered and that Petitioner initiated communications with Cpl. Canaday. He told Cpl. Canaday that he was the one who shot the victim. Petitioner then took Cpl. Canaday to where the gun was hidden.

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[1] *Blockburger v. United States*, 284 U.S.299 (1932)

State Police Captain Van Meter testified that when he arrived at the Petitioner's residence the Petitioner had already shown Cpl. Canaday where the gun was hidden. Van Meter asked Petitioner to accompany him to the State Police office and Petitioner agreed to do so. Petitioner gave a statement while traveling to the State Police office and a more extended statement at the office. Captain Van Meter gave the petitioner the required Miranda warnings for the statement taken while traveling and in the office.

At the close of the suppression hearing, counsel for Petitioner said "I'm not going to sit here and say this is the worst statement I've ever seen. I cannot join in—I don't think—as a defense lawyer to say I agree with admissibility." It is this court's opinion that this constitutes a general objection without reference to a specific defect that affects the statement's admissibility. The trial court then ruled that both statements were admissible.

The direct appeal filed noted three assignments of error, none of which argues that statements were not voluntary or that the trial court was in error in its ruling at the suppression hearing and at trial that the statements were admissible.

Aside from the nonspecific general objection made by trial counsel at the suppression hearing, this point was not raised or pursued at any time before or during trial or on appeal. At trial, Cpl. Canaday testified consistently with his testimony at the suppression hearing including the information and statements given by Petitioner while at his residence, all without objection by trial counsel.

Likewise, Captain Van Meter testified at trial in a manner consistent with his testimony at the suppression hearings. At the point when the two statements given by the Petitioner to Captain Van Meter were offered into evidence, trial counsel preserved by reference the objections he made at the suppression hearing of February 21, 2008. As noted above, no specific objections were made at that time. Upon this record this court concludes that this issue of voluntariness and admissibility of the petitioner's statements was waived.

In the alternative, should it be determined upon appellate review that the point was not waived in trial and on appeal, it is this court's opinion that the claim is not supported by law. Petitioner's argument is that when Petitioner was placed in handcuffs while the search was in progress he should be deemed to be in custody and all subsequent questioning required *Miranda* warnings, citing to *State v. Middleton*, 220 W.Va. 89 (2006) and *State v. Preese*, 181 W.Va. 633 (1989).

The evidence presented at the suppression hearing indicates that there is no dispute that Captain Van Meter gave Petitioner the required *Miranda* warnings before the petitioner gave the statement in the car and again when he interviewed the Petitioner at the State Police office. Trial counsel understandably declined at the suppression hearing to concede admissibility of all of the statements, and again preserved that general objection at trial, but he did not identify any specific argument any of the statements were inadmissible and none have been identified in the petition

except that he was handcuffed when he voluntarily spoke to Cpl. Canaday at the Petitioner's residence.

The Petitioner's communications to Cpl. Canaday at his residence were not the product of a custodial interrogation. He was handcuffed, as were all persons present, for the purpose of safety while the search warrant was being executed. He was advised, as were all persons present, that he was not under arrest. He and the other persons present were obviously not free to leave while they were handcuffed, but Petitioner and all the others had been advised of the purpose of the restraints and that they were not in custody. Petitioner was not questioned by Cpl. Canaday, but voluntarily initiated communications with Cpl. Canaday about his ownership of and the location of the weapon.

Applying the *Miller/Strickland* analysis discussed below, this court concludes that there existed no grounds upon which trial counsel could have persuaded the trial court that any of the communications by Petitioner to Cpl. Canaday or to Captain Van Meter had been given involuntarily and should not be admitted into evidence and that trial counsel's conduct on those points did not constitute ineffective assistance of counsel.

Likewise, this court concludes that there exists no grounds shown in the record on which appellate counsel could have persuaded the Supreme Court of Appeals on those issues and that the absence of that issue from the Petition for Appeal did not constitute ineffective assistance of appellate counsel.

Ground 3 – Ineffective assistance of counsel

Petitioner identified five categories of claimed ineffective assistance of counsel which will be discussed in the order presented.

Claims of ineffective assistance of counsel are governed by the *Miller/Strickland* analysis:

> The standard for assessing the efficiency of counsel was announced in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires the defendant to prove two things: (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." 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. When assessing whether counsel's performance was deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. To demonstrate prejudice, a defendant must prove there is a "reasonable probability" that, absent the errors, the jury would have reached a different result. 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. *State v Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Category 1 - Jury selection.

Petitioner argues that trial counsel should have moved to exclude prospective jurors Cook and Wiseman from the panel for cause because they both "knew a lot about the case."

This issue is governed by *State v. Sutherland*, 231 W.Va. 410 (2013). The standard for removal of a prospective juror from the panel for cause is not the venireman's knowledge of the case, but whether he or she is biased, prejudiced, or has formed prejudgments or opinions about the case which interfere with the juror's duty to decide the case on the evidence and the law. Each of these prospective jurors stated that he or she could perform that duty. A motion to exclude either of these jurors to which the petition referred for cause would have been refused by the trial court.

Petitioner also argues that the court's general method of jury selection was defective. The jury was selected in January 2008 and the trial began in March of that year. Petitioner speculates that "this gave the venire two months to be exposed to press accounts and community talk of the upcoming trial..." The record demonstrates, however, that trial counsel objected to this method and asked for a stay to enable him to file a petition for writ of prohibition. The record supports the conclusion that trial counsel competently pursued this point and that his conduct was not "deficient under an objective standard of reasonableness."

The Petitioner does not claim that the trial court was in error in this regard and the point was not raised by appellate counsel. The record supports appellate counsel's decision not to raise this point on appeal. When the trial resumed in March the trial court inquired as to whether the jurors had followed its instructions not to allow themselves to be exposed to media reports or to discuss this case or its companion case, and trial counsel was invited to make similar inquiry. No evidence emerged that would support the conclusion that this method of jury selection caused any member of the jury to be exposed to such influences.

Upon application of the *Miller/Strickland* standard to this issue, this court concludes that the conduct of trial and appellate counsel was not "deficient under an objective standard of reasonableness."

Category 2 – Rule 404(b)

Rule 404(b)(1) deems inadmissible "evidence of a crime, wrong or act... to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Section (b)(2) identifies permitted uses of such evidence. A party who intends to offer evidence of a past "crime, wrong, or act" on the theory that it is permitted by section (b)(2) must give pretrial notice thereof, unless permitted during trial for good cause, so that the court can determine whether the evidence is admissible for a permissible identified purpose. That determination requires a pretrial or *in camera* hearing identified in West Virginia jurisprudence as a *McGinnis* hearing.[2]

[2] *State v. McGinnis*, 193 W.Va. 147 (1994)

The petitioner identified in sections (1) through (6) of his discussion of Category 2 certain items that were admitted into evidence with footnotes that direct the reader to locations in the trial transcript. Petitioner contends that these categories of evidence were subject to a Rule 404(b) analysis which was not demanded or was demanded ineffectively by trial counsel.

The respondent's answer (1) notes that a Rule 404(b)(2) notice was given as to prior acts within the scope of Rule 404(b) but did not offer that evidence at trial, and (2) the evidence summarized in the petition was not offered to prove prior conduct in order to prove the character of the defendant, but was instead intrinsic evidence of contemporaneous activities in drug and firearms, his possession of the murder weapon, and his motive and intent.

The State's Rule 404(b)(2) notice was attached as an exhibit to the response and is a part of the trial record. Upon examination of that notice and the portions of the transcript to which petitioner directs the court, the court concludes that the respondent is correct that the evidence summarized in this part of the petition was not prohibited by Rule 404(b)(1).

1. Photographs of items found in Petitioner's home.

This evidence is described as an "array [of] photos depicting numerous weaponry/guns in Defendant's home/bedroom." Defense counsel stated a Rule 404(b) objection only as to weapons that were allegedly stolen. The remaining photographs were objected to on grounds of general relevancy. The State's response was that photographs that depict stolen weapons are not evidence of prior acts by the defendant within the scope of Rule 404(b)(1). The court overruled the defendant's objection and admitted this group of exhibits.

Counsel's Rule 404(b) objection, while unsuccessful, was not deficient under the *Miller/Strickland* analysis and did not constitute ineffective assistance of counsel. The petition does not articulate a theory upon which the trial lawyer could have successfully objected to this evidence under Rule 404(b) or that a *McGinnis* hearing was necessary.

2. State's Exhibit 60

State's Exhibit 60 was an item found in Petitioner's home consisting of a depiction of a police officer with bullet holes in it. Defense counsel objected on the grounds that the defense was self-defense and that defendant did not know that the victim was a police officer. The court admitted the exhibit upon the court's recollection that evidence, although disputed, was in the record that the victim had displayed his badge.

Defense counsel did not make a Rule 404(b) objection to this exhibit. The petition does not articulate a theory upon which the trial lawyer could have successfully objected to this evidence under Rule 404(b) or that a *McGinnis* hearing was necessary.

3. Evidence that petitioner was a drug dealer

This evidence is described as "statements or pictures indicating defendant was a crack cocaine or drug dealer," referring to various pages of the trial transcript. The first of those references (March 11, 2008, TT 194-199) consists of testimony and exhibits that describe firearms, pills, and cellphones found in Petitioner's residence.

The second reference (March 12, 2008, TT 46-49) consists of testimony from the Petitioner's brother, Kenneth Leftwich, to the effect that he had an uncertain recollection whether he told the police that the Petitioner dealt in crack cocaine and as to whether drugs were somehow involved in the incident in question. He did not testify to any specific past act of the Petitioner.

The third reference (March 13, 2008, TT 13) is to a portion of the trial judge's *Neuman*[3] colloquy with the Petitioner on the question whether he would testify in his defense.

None of these excerpts contain evidence offered by the prosecution of a past act attributed to the Petitioner which is offered "to prove his character...in order to show that on a particular occasion [he] acted in accordance with the character..." The petition does not articulate a theory upon which the trial lawyer could have successfully objected to this evidence under Rule 404(b) or that a *McGinnis* hearing was necessary.

Petitioner also disclosed in his trial testimony that the purpose of his activity at the time of the shooting was to sell crack cocaine and that he had sold crack cocaine at times previous to that event. It is this court's opinion that a Rule 404(b) issue does not arise here because the defendant, not the state, chose to disclose this evidence to the jury.

4. Evidence that firearms in Petitioner's possession had been stolen.

This evidence is described as "various witnesses and pictures that the guns in defendant's possession were stolen," referring to various pages of the trial transcript. The first of those references (March 11, 2008 TT 226-229) consists of testimony by a police officer that the Alcohol, Tobacco, and Firearms (ATF) research revealed that some of the nineteen weapons found in Petitioner's household, including the weapon believed to be the murder weapon, were reported as stolen. The officer did not testify, however, that it was the Petitioner who stole them. The testimony is a part of the description of the weapons and it did not constitute evidence of a past bad act by the petitioner. Trial counsel objected on relevance grounds to evidence that guns in defendant's possession were stolen and that there had been no hearing to determine "whether other crimes or other acts can be admitted..." The trial court overruled the objection.

The second reference (March 12, 2008 TT 88) consists of the state's redirect examination of a police officer who testified that a firearm used in the sale of drugs would be illegal. As with the immediately preceding reference, this does not constitute evidence of a past bad act by the petitioner.

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[3] *State v. Neuman*, 179 W.Va. 580 (1988)

The petition does not articulate a theory upon which the trial lawyer could have successfully objected to this evidence under Rule 404(b) or that a *McGinnis* hearing was necessary.

5. Evidence that Petitioner used or possessed guns in conjunction with drug dealing

The Petition describes this evidence as "various witnesses and pictures that the defendant used or possessed guns, in conjunction with drug dealing and this conduct would have violated various federal laws," referring to the transcript of March 12, 2008, pp 24, 72-23, and 88. The cited portions of the record indicates that trial counsel objected to exhibits 76 through 84 on the grounds that it was not illegal to possess the firearms identified therein, whereupon the prosecuting attorney elicited testimony from the police officer that if the firearms had been used in conjunction with a drug transaction it would be illegal to possess them.

A distinction may be perceived between evidence that the petitioner was in possession of firearms, which is arguably relevant in a prosecution of a homicide by the use of a firearm, and evidence that it was illegal for the petitioner to possess the firearms. The latter might qualify as "evidence of a crime, wrong or act" within the meaning of Rule 404(b). The missing element, however, is that the record does not indicate that the purpose of offering that evidence was "to prove [the Petitioner's] character in order to show that he acted in conformity therewith on a particular occasion." A Rule 404(b) objection to these exhibits would likely not have been sustained by the trial court.

Counsel's objection to exhibits 85 through 94 was that they depicted the Petitioner engaged in criminal activity consisting of smoking marijuana. That objection is not sufficient to invoke Rule 404(b). If counsel had made a Rule 404(b) objection, it is likely that the trial court would have overruled it because it does not appear from the record that the evidence was offered to prove the character of the defendant in order to show that he acted in conformity therewith.

As a result, the point that trial counsel did not make a Rule 404(b) objection to either of these groups of exhibits does not satisfy both elements of the *Miller/Strickland* analysis because such an objection would likely not have been sustained by the trial court and a proper objection would not have changed the outcome of those rulings.

The petition does not articulate a theory upon which the trial lawyer could have successfully objected to this evidence under Rule 404(b) or that a *McGinnis* hearing was necessary.

6. Pictures that depicted Petitioner pointing guns at others.

Petitioner describes this evidence as "various witnesses and pictures that depicted defendant pointing guns at others and this conduct would have been in violation of state and federal law," with transcript references to March 12, 2008, TT 76-79, 81-82. Upon cross examination, the officer testified that the possession of the weapons shown in the photographs was not illegal, and

upon redirect the witness testified that the possession of the weapons would be illegal if associated with illegal drug transactions.

Trial counsel did not state a Rule 404(b) objection. The petition does not articulate a theory upon which the trial lawyer could have successfully objected to this evidence under Rule 404(b) or that a *McGinnis* hearing was necessary.

Category 3 – Self defense

Petitioner claims that trial counsel was ineffective because he gave notice that the defense would be self-defense which according to Petitioner is not available in a felony murder prosecution.

Petitioner cites to *State v. Ward*, 200 W.Va. 637 (1997). In *Ward* the defendant was prosecuted for felony murder where the victim was shot in the process of a drug transaction. The trial court's refusal to give a self-defense instruction was affirmed because in a felony murder prosecution

> "the particular offense that must be established is the felony predicating the felony murder charge. Consequently, any claim of self-defense in response to a charge of-felony murder must be asserted with regard to the predicate felony." *Ward*, at 645.

Ward held that inasmuch as self-defense and provocation are not defenses to the predicating charge of delivery of a controlled substance, it could not be asserted.

In *Stuckey v. Trent*, 202 W.Va. 498 (1998) the court held that the prosecution should not be required to elect between the theories of felony murder and premeditated murder. The court held that election was not necessary because felony murder and premeditated murder are "alternative means of committing the statutory crime of murder of the first degree." *Stuckey*, at 502. The court reiterated the principle stated in *State v Giles*, 183 W.Va. 237 (1990) that ..."in appropriate circumstances, *both theories may be presented to the jury with proper instructions* (emphasis added in *Stuckey.)*" *Stuckey* at 503, citing to *Giles*.

The trial court followed a procedure supported by *Stuckey* and *Ward* and instructed the jury on both felony murder and premeditated murder. The defendant was permitted to assert self-defense on the theory of premeditated murder, which defense was not available on the theory of felony murder. The trial court instructed the jury in a manner consistent with *Stuckey*.

Upon these considerations, it is this court's opinion that the petitioner's argument that the preservation of and the assertion of self-defense constituted ineffective assistance of counsel is unsupported by law and merits no consideration.

Category 4 – Failure to call a material witness.

Petitioner claims the trial counsel's failure to call Alfreda Lawson as a witness constituted ineffective assistance of counsel. The petition asserts that had the trial lawyer presented this witness

> The jury should have considered whether this victim was out investigating the drug culture...or was he bent on mischief and engaged in illegal activity or had he previously exhibited a violent and aggressive behavior, a hostile demeanor or had a reputation of ambushing and robbing others, as suggested by Alfreda Lawson's statement.

It is not clearly articulated in the petition, but the context suggests that the petitioner believes this evidence to be admissible by Rule 404(a)(2)(B) as evidence of a pertinent trait of character of the alleged victim. The difficulty is that the testimony presumably available from Ms. Lawson on that subject consists of evidence that may be prohibited by Rule 404(b)(1). As noted elsewhere herein, that Rule prohibits the use of prior bad acts to prove character in order to show that on a particular occasion the person acted in accordance with that character.

Petitioner attached as Exhibit 1 two statements attributed to Ms. Lawson. The first of these is a hand-printed statement made in the presence of Sgt. TG Bragg on August 29, 2006, and the second is a transcript of a statement given to the State Police on September 7, 2006. [4]

The first statement describes the conduct of two unidentified persons, one wearing a striped shirt and the other wearing a black shirt. The second statement appears to be a transcript of a "West Virginia State Police Interview with Alfreda Lawson 09/07/06 ref: Chuckie Smith shooting." Although this statement refers from time to time to a person named "Smith" it does not confirm that that person is the same person as the victim.

Assuming, however, that the Lawson statements accurately described the victim's conduct at the times indicated, neither statement clearly attributes any conduct to the victim that supports the conclusion that Petitioner knew or could have known known that the victim was "bent on mischief and engaged in illegal activity or had a reputation of ambushing and robbing others..."

The petitioner does not address the question of how this evidence, if admitted, could have supported his claim of self-defense and would have resulted in a different outcome of the trial.

Category 5 – Failure of Defense Counsel to Investigate

Petitioner claims that trial counsel failed to hire an investigator to investigate the reputation and character of the victim to determine whether he "had exhibited any characteristics of being

[4] Although the pages in the second document are sequentially numbered, there are no pages 2 and 3. If the original document had those pages, they were missing from the Petitioner's exhibit.

violently aggressive...engaged in illegal activity...or had ever been accused of robbing or ambushing others."

A similar claim was rejected in *State ex rel. Wensell v. Trent*, 218 W.Va. 529 (2005) on the grounds that in the absence of specific information as to the evidence that an investigator would have discovered, such claim relies on speculation that such an investigation would have produced evidence that would have resulted in a different outcome of the trial as required by the second prong of *Strickland*.

Grounds 4 and 6: Defects in the Indictment and Instructions to the Jury.

The trial court gave State's Instruction No. 2: "Under the law of felony murder, a person who participated in either an actual or attempted transfer of a controlled substance or an actual or attempted robbery is guilty of first-degree murder..."

The petition does not argue that the indictment was defective but rather that State's instruction No. 2 was grounded on a theory that was not charged in the indictment. The indictment, as quoted by petitioner, "charged felony murder theory as follow[s]: 'did ... in the commission of or attempt to commit a felony of delivering a controlled substance, slay, kill and murder one Charles E. Smith III."

Trial counsel's objection to this instruction was that there had been no evidence of robbery. The state's response conceded that there was no evidence of a drug transaction but asserted that "the only other possible reason for him [defendant] having a .357 and shooting and killing the officer is robbery or premeditated malicious murder." Upon the trial court's inquiry whether that was defense counsel's only objection, defense counsel responded, "Yes. The reference to robbery."

Petitioner argues that the reference to "actual or attempted robbery" in the instruction constituted a constructive amendment to the indictment, which identified only the delivery of a controlled substance, and not robbery, as the underlying felony in the felony murder indictment.

The respondent argues that the issue of an alleged defect in the indictment was waived because it was not raised before trial as required by Rule 12(b), *Rules of Criminal Procedure*. Inasmuch as the claim now presented is that the indictment was impermissibly constructively amended during trial, it was not possible to raise this issue before trial pursuant to Rule 12(b), and so it should not be deemed waived by a failure to invoke that Rule.

It is noted, however, that trial counsel's objection to the instruction was not grounded on the theory that the indictment was defective or that the instruction's reference to robbery constituted an impermissible constructive amendment of the indictment. The objection was rather that the evidence did not support the instruction's reference to robbery.

It is correct, as argued by the respondent, that an objection that is based upon a specific ground is limited to that ground and it waives other grounds upon which the objection could have

been made. Thus the objection to State's instruction No. 2 that there was no evidence of robbery constituted a waiver of the objection that giving the instruction constituted the impermissible constructive amendment of the indictment.

As noted by respondent, the court gave state's instruction 5, which was grounded on the principle stated in *State v Hughes*, 225 W.Va. 218 (2010) that the means by which the death of the deceased was caused need not be set forth in the indictment. The response correctly argues that the inclusion of the felony murder concept in the indictment constituted the "insertion of ...words of mere form or surplusage" within the meaning of *W.Va. Code* §62-2-10 which does not invalidate the indictment.

Ground 5 – Constitutional errors in evidentiary rulings

Petitioner identifies three categories of constitutional errors in evidentiary rulings which will be discussed in the order presented.

Category 1: Defendant's claim of self defense

It is not disputed that defendant offered evidence of self-defense and that the trial court instructed the jury on that issue. Defendant asserts, however, that he should have been allowed to "challenge the laboratory finding that the victim's BAC was .07." The petition states that the "defense had indicated a desire to inquire into what the victim did that night and whether the victim was actually undercover... [and] to explore... all issues related to an assertion of self-defense or if the victim was shown to be violently aggressive."

The Petitioner waived this claim of evidentiary error because he did not raise it on direct appeal. In the event it is determined upon appellate review of the present ruling that the claim was not waived, this court finds in the alternative for the reasons stated herein that this claim has no substantive merit.

The petition does not explain how the results of a re-testing of the victim's blood alcohol content would be relevant to the issue of self-defense. The response correctly points out that the blood alcohol content of the victim "does not assist the jury in determining ... whether the defendant reasonably believed that deadly force was necessary to save himself from serious bodily harm or death."

The questions of what the victim had done earlier that night, or whether the victim was a police officer operating undercover, or whether the victim could be "shown" to be violently aggressive, are not relevant to the issue of self-defense unless that information was known by the defendant and was shown to have formed or contributed to the defendant's reasonable belief that deadly force was necessary to defend himself. Absent that context, such evidence is inadmissible because it is character evidence of the victim that is excluded by the general provisions of Rule 404(a)(1) and that is not within the exception stated in Rule 404(a)(2)(B) for an alleged victim's "pertinent character trait." *State v Dietz*, 182 W.Va. 544 (1990).

The court's announcement that it would not permit "trashing" of the character of the victim was followed immediately by the observation that "there will be some...that will be pertinent that defense may want to raise at trial." The trial court notified counsel that on the request of counsel it would conduct a *McGinnis* hearing on Rule 404(b) evidence pertaining to past conduct of the victim. The trial court's management of this issue was consistent with Rule 404(a) and with *Dietz* and does not raise an evidentiary issue of constitutional proportions.

Category 2: The absence of an *in camera* hearing prior to admitting prior bad acts of the petitioner

The petition directs the reader to "*see, supra*, Ground Two, *Category 2*." The court concludes that the petitioner intended to refer to "Ground Three, Category 2," because that section of the petition addresses the claim of ineffective assistance of counsel with respect to the admission of Rule 404(b) evidence of past bad acts of the petitioner.

The court adopts here its above discussion of the evidence claimed by petitioner to be within Rule 404(b) and the question whether a *McGinnis* hearing was necessary as to any category of that evidence identified in the petition.

Category 3: State's evidence as to the credibility of other State witnesses

The record reflects that during defense counsel's cross examination of State's witness Captain Van Meter, defense counsel asked whether the witness knew Jasminda Gonzales prior to "this event with Mr. Smith [referring to the shooting of the victim]?" The witness testified that he did not, and in response to the next question disclosed that he had interviewed her. Defense counsel's next question was whether the witness knew "if she [Gonzales] has any history of drug use, more specifically any illegal drugs such as crack or cocaine?" The prosecution objected but the court overruled the objection. The witness then responded "I have no knowledge myself of that."

A bench conference followed in which defense counsel conceded that he had no evidence that Ms. Gonzales had used drugs. The court then commented that it was "complete conjecture and speculation" and that "it is wrong to place that conjecture in the minds of the jury." The prosecution then asked the line of questions of which petitioner now complains. These questions were a necessary and proper means to address the "speculation and conjecture" that the defense counsel's cross examination had injected into the evidence.

As noted in the response, this issue was waived because defense counsel did not object to the line of questions at trial. This court agrees that the issue was waived, but in the event it is determined on appellate review that it was not waived, this court finds that the petitioner did not articulate a theory upon which the trial court would have sustained an objection if it had been made.

Ground 6 – Instructions to the Jury

Ground 6 is discussed above with Ground 4.

Ground 7 -- Claims of prejudicial statements by the prosecutor

Ground 7 is not addressed in the body of the petition and is therefore waived.

Ground 8 – Excessive Sentences

Ground 8 is discussed above with Ground 1.

Ground 9-- Challenges to the composition of the jury

Petitioner complains that the only African-American who remained on the jury panel was removed by the State's first peremptory strike and that as a result the petitioner, who is African-American, was tried by an all-white jury.

Batson v. Kentucky, 476 U.S. 79(1986) and its progeny prohibits the employment of peremptory challenges for the purpose of creating a jury that excludes members on a racial basis.

The response does not dispute the applicability of the *Batson* principle, and it argues that in *State v. Marrs*, 180 W.Va. 693(1989), West Virginia adopted the procedure approved in *Batson* for the determination by the trial court of a *Batson* challenge to the jury panel. Upon consideration of the response this court concludes that if a *Batson* claim existed it was waived by the failure of defense counsel to object to the peremptory challenge of the juror which would have triggered the *Batson-Marrs* procedure necessary to the determination of the issue.

If it is determined on appellate review that the *Batson-Marrs* issue was not waived, the record supports the conclusion that the trial court would not have granted *Batson-Marrs* relief. The prospective juror testified that he had attended school with persons named Leftwich and that he "probably" knew the defendant. Although these answers did not support a disqualification for cause, they provide an acceptable reason for the prosecution to exercise one of its peremptory strikes. The petitioner did not articulate a theory upon which the trial court might have ruled otherwise.

RULING and ORDER

Upon these considerations the court determines pursuant to Rule 9(a), *Rules Governing Post-Conviction Habeas Corpus Proceedings,* that an evidentiary hearing is not required, upon which it is

ORDERED that the petition should be and it is hereby dismissed.

The Circuit Clerk is directed to mail a copy of this order to counsel of record and to remove this action from the court's active docket.

ENTER January 28, 2020

Robert A. Burnside, Jr.
Circuit Judge