STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State ex rel. Ernest "Sonny" Tucker,
Petitioner Below, Petitioner

vs) No. 11-0593 (Berkeley County 07-C-281)

Thomas L. McBride, Warden,
Respondent Below, Respondent

FILED
March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ernest "Sonny" Tucker, by counsel, Nicholas Forrest Colvin, appeals from the circuit court's order denying his petition for post-conviction habeas corpus relief. The State of West Virginia, by counsel, Christopher C. Quasebarth, has filed its response on behalf of respondent, Thomas L. McBride, Warden. Petitioner seeks a reversal of the circuit court's decision, a vacation of his conviction, and a remand to the circuit court for either a new trial or a reduction of his sentence.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record 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 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 Revised Rules of Appellate Procedure.

Petitioner was convicted by a jury of first degree murder with a recommendation of mercy on November 29, 1995. Petitioner's appeal from his criminal conviction was denied by the Court on March 26, 1998. On April 6, 2007, petitioner filed a pro se petition for a writ of habeas corpus in the circuit court. The circuit court appointed habeas counsel who filed an amended petition. On February 15, 2011, the circuit court entered its "Order Denying Petition for Writ of Habeas Corpus Ad Subjiciendum" without an evidentiary hearing.

Petitioner now appeals the denial of his habeas corpus petition below and raises multiple issues, including ineffective assistance of trial counsel. "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).

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal and has reviewed the record designated on appeal. Finding no error in the denial of habeas corpus relief, the Court affirms the decision of the circuit court and fully incorporates and adopts, herein, the lower court's detailed and well reasoned "Order Denying Petition for Writ of Habeas Corpus Ad Subjiciendum" entered on February 15, 2011. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

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

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
ERNEST "SONNY" TUCKER,

Petitioner,

v.

CASE NO: 07-C-281
HONORABLE GINA M. GROH

THOMAS L. MCBRIDE, Warden,
Mount Olive Correctional Center,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

This matter came before the Court on the 15th day of February, 2011 on the Petitioner's *Petition for Writ of Habeas Corpus ad Subjiciendum*, and the Respondent's Answer and Motion to Dismiss.

The Court has considered the Petitioner's Petition, the Respondent's Answer and Motion to Dismiss, the parties' respective memoranda of law, and examined pertinent legal authorities. As a result of these deliberations and for the reasons set forth in the following Opinion, the Court concludes that the Petition must be **DENIED**.

OPINION

Findings of Fact

1. On December 20, 1994 the Petitioner was charged by Indictment with one count of Murder in the First Degree in connection with the death of David Milton Frazier (hereinafter "David Frazier"), which death occurred during an armed robbery in Berkeley County, West Virginia.

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CC
N Colvin
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E Tuckee
T McBride

2. The underlying criminal case was styled State of West Virginia v. Ernest Melvin Tucker, Berkeley County Circuit Court Case No. 94-F-137. For all pretrial and trial matters the Petitioner was represented by Steven M. Askin of Martinsburg, West Virginia.

3. A pretrial hearing was held on November 28, 1995.

4. At said pretrial hearing, the Petitioner raised the issue of certain mental health records pertaining to co-defendant Ronald Linaburg, which records were not in the possession of the State. Without objection, the circuit court granted the Petitioner's motion and entered an order for the production of those documents by the Eastern Panhandle Mental Health Center.

5. At said pretrial hearing, the State raised the issue of the Petitioner's counsel currently representing a witness, John Palmer (hereinafter "Palmer"), that the State would call at the Petitioner's pretrial suppression hearing but not at trial. The Petitioner's trial counsel averred that he represented Palmer in an unrelated Fourth Circuit appeal, and that both the federal district court and the Fourth Circuit Court of Appeals had concluded that there was no conflict of interest with regard to his representation of both John Palmer and the Petitioner. The circuit court appointed separate counsel for Palmer for purposes of his giving testimony in the underlying proceedings.

6. At said pretrial hearing, Palmer testified that the Petitioner had approached Palmer in order to assist Palmer in a federal prosecution which was pending against Palmer. The Petitioner offered to provide information to Preston B. Gooden, Sheriff of Berkeley County (hereinafter "the Sheriff"). Palmer arranged

a meeting between the Petitioner and the Sheriff at Palmer's residence in Williamsport, Maryland.

7. At said pretrial hearing, the Sheriff testified that Palmer had contacted him about someone having information regarding the David Frazier homicide and that Palmer subsequently arranged a meeting between the Petitioner and the Sheriff at Palmer's residence in Maryland. Said meeting took place on October 19, 1994. The Sheriff testified that he advised the Petitioner that he should speak with a lawyer, to which the Petitioner responded that he had a lawyer but he wanted to speak to the Sheriff anyway. The Sheriff testified that he was not involved in the actual investigation of the David Frazier homicide beyond the taking of the Petitioner's statements, that he made no promises to the Petitioner, and that at the time of the conversation at Palmer's residence the Petitioner was not in custody or under arrest and was free to leave. The Sheriff testified that he did not have a rights waiver form with him at the time of the taking of the Petitioner's initial statement; he only had a legal pad on which to take notes. The Sheriff testified that he did not record the Petitioner's statement because the Petitioner requested that he not do so. According to the Sheriff's testimony, the Petitioner told him that he was approached by one of David Frazier's sons about killing and robbing David Frazier, and that the Petitioner had arranged for Ronald Linaburg and Kevin Fowler to carry out the job. The Petitioner advised the Sheriff that cash and a briefcase were taken from the person of David Frazier, and that the Petitioner had disposed of a shotgun in the Shenandoah River and a revolver in a stream. The Petitioner stated that Fowler and Linaburg approached Frazier in his

van, shot him twice in the van, drove the van to a nearby quarry and there shot Frazier again for a third time. Fowler purportedly received $10,000 as a result of his participation transaction; Linaburg purportedly received $2500.

8. At said pretrial hearing, upon cross-examination, the Sheriff stated that he did not know whom he was to meet with at Palmer's residence until he arrived there, that he began to *Mirandize* the Petitioner from memory but the Petitioner stated that he was aware of his rights and knew how to get in touch with his lawyer, and that the Sheriff did not record the Petitioner's statement at the Petitioner's request. Upon cross-examination, the Petitioner obtained the Sheriff's handwritten notes from this initial meeting between the Sheriff and the Petitioner, which notes had previously been typed into the Sheriff's official report which was provided to the Petitioner during discovery, and Petitioner's counsel acknowledged that he was not contesting the fact that the initial meeting between the Sheriff and the Petitioner did not amount to a custodial interrogation. The Sheriff stated that the Petitioner had requested immunity but averred that no promises had been made to the Petitioner.

9. At said pretrial hearing, further testimony was taken from the Sheriff regarding subsequent phone calls and meetings with the Petitioner, all of which were recorded. The Sheriff stated that he did not believe the Petitioner sounded like he was under the influence of drugs or alcohol at the time of the recording of these tapes.

10. At said pretrial hearing, the Petitioner testified that Palmer requested the Petitioner speak with the Sheriff regarding the Petitioner's knowledge of the

David Frazier homicide. The Petitioner testified that the Sheriff stated any information divulged by the Petitioner would not subsequently be used against him. The Petitioner further testified that the initial statement which he gave to the Sheriff at Palmer's residence had been tape-recorded by the Sheriff. The Petitioner testified that during at least one of the phone conversations he had with the Sheriff the Petitioner believed that he had been under the influence of Dilaudid. Upon cross-examination, the Petitioner acknowledged that he had voluntarily gone to Palmer's residence believing that he was assisting Palmer by speaking with the Sheriff.

11. At said pretrial hearing, the circuit court ruled that the Petitioner's statements were admissible. The circuit court found that the initial statement given by the Petitioner to the Sheriff at Palmer's residence was voluntary on the Petitioner's part, was non-custodial, that the Petitioner had knowingly and effectively waived his right to counsel with regard to the statement he gave to the Sheriff, that no promises of leniency or immunity had been extended to the Petitioner, and that while the last recorded phone conversation between the Petitioner and the Sheriff may have demonstrated some signs of intoxication on the Petitioner's behalf, any such intoxication did not rise to the level of overcoming the Petitioner's mentality and reasoning.

12. On November 29, 1995 a jury trial was held in the Petitioner's criminal case, at which the jury found the Petitioner guilty of Count 1-First Degree Murder with a recommendation of mercy. The circuit court denied the Petitioner's request for an instruction of Accessory After the Fact to Murder as unsupported by the evidence.

On December 1, 1995, at the conclusion of his trial, the Petitioner was sentenced by the circuit court to life imprisonment with parole eligibility.

13. On December 11, 1995 Steven Askin filed a motion for new trial, alleging the following grounds: (1) that the circuit court erred in denying the Petitioner's motion to suppress and by admitting certain statements and evidence in violation of the Petitioner's constitutional rights; (2) that the circuit court erred in denying the Petitioner's motion for directed verdict; (3) that the circuit court erred in refusing to allow the Petitioner the right to an instruction of Accessory after the Fact to Murder; and (4) that the circuit court erred in denying the Petitioner's motion for mistrial. Thereafter, Steven Askin withdrew from his representation of the Petitioner, and Deborah A. Lawson of Martinsburg, West Virginia was appointed as the Petitioner's counsel for the appellate process.

14. On March 6, 1997 the circuit court issued a post-trial motions order, outlining the following findings by the circuit court: (1) that the initial statement made by the Petitioner to John Palmer was done at the invitation of the Petitioner, was non-custodial, and was admissible; (2) that a certain taped conversation between the Petitioner and the Sheriff had been properly admitted because it was non-custodial and based on the Petitioner's request to assist the Sheriff in finding a gun; (3) that the circuit court did not believe that a principal in the first degree must have been convicted in order to sustain the verdict against the Petitioner of principal in the second degree; (4) that the evidence had been sufficient to support the jury's verdict; (5) that the defense had approved the verdict form and wanted

"all or nothing;" and (6) that the Petitioner had been aware of a potential conflict involving his trial counsel and had waived that conflict.

15. In February of 1997 a direct appeal was filed but later refused by the Supreme Court of Appeals of West Virginia. The appeal was made on three (3) grounds: (1) that the statement to the Sheriff was taken in violation of the Petitioner's Sixth Amendment right to counsel; (2) that all subsequent statements were likewise excludable pursuant to the "fruit of the poisonous tree" doctrine; and (3) that the trial court erred in failing to give the Petitioner's requested lesser-included jury instruction of Accessory After the Fact to Murder.
16. On April 6, 2007 the Petitioner filed the petition at issue in the instant case in the Circuit Court of Berkeley County, West Virginia.

Conclusions of Law

This matter comes before the Court upon the Petitioner's *Petition for Writ of Habeas Corpus ad Subjiciendum.* This Court has previously appointed counsel, who filed an amended petition, and subsequent to an initial review the Court has ordered the Respondent to file an answer. At this point in the proceedings the Court is to review the relevant findings, affidavits, exhibits, records, and other documentary evidence attached to the Petition to determine if any of the Petitioner's claims have merit and demand an evidentiary hearing to determine if the writ should be granted. Otherwise the Court must issue a final order denying the Petition.

The procedure surrounding petitions for writ of habeas corpus is "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." W. Va. Code § 53-4A-1(a); *State ex rel. Harrison v. Coiner*, 154 W. Va.

467 (1970). A habeas corpus proceeding is markedly different from a direct appeal or writ of error in that only errors involving constitutional violations shall be reviewed. Syl. Pt. 2, *Edwards v. Leverette*, 163 W. Va. 571 (1979).

> If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence . . . show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought. W. Va. Code § 53-4A-7(a).

If the Court upon review of the petition, exhibits, affidavits, or other documentary evidence is satisfied that a petitioner is not entitled to relief the court may deny a petition for writ of habeas corpus without an evidentiary hearing. Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467 (1973); *State ex rel. Waldron v. Scott*, 222 W. Va. 122 (2008). Upon denying a petition for writ of habeas corpus the court must make specific findings of fact and conclusions of law as to each contention raised by the petitioner, and must also provide specific findings as to why an evidentiary hearing was unnecessary. Syl. Pt. 1, *State ex rel. Watson v. Hill*, 200 W. Va. 201 (1997); Syl. Pt. 4, *Markley v. Coleman*, 215 W. Va. 729 (2004); W. Va. R. Hab. Corp. 9(a). On the other hand, if the court finds "probable cause to believe that the petitioner may be entitled to some relief . . . the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced . . . ." W. Va. Code § 53-4A-7(a).

When reviewing the merits of a petitioner's contention the court will recognize that "there is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed." Syl. Pt. 2, *State ex rel. Scott v. Boles*, 150 W. Va. 453 (1966).

Furthermore, specificity is required in habeas pleadings; thus a mere recitation of a ground for relief without detailed factual support will not justify the issuance of a writ or the holding of a hearing. W. Va. Code § 53-4A-2; *Losh v. McKenzie*, 166 W. Va. 762, 771 (1981). "When a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation because the petition does not provide adequate facts to allow the circuit court to make a 'fair adjudication of the matter,' the dismissal is without prejudice." *Markley v. Coleman*, 215 W. Va. at 734; *see* W. Va. R. Hab. Corp. 4(c). However, rather than dismissing without prejudice the court may "summarily deny unsupported claims that are randomly selected from the list of grounds" laid out in *Losh*. *Losh v. McKenzie*, 166 W. Va. at 771; *Markley v. Coleman*, 215 W. Va. at 733.

In addition to a review on the merits, the court must determine if the contentions raised by the petitioner have been previously and finally adjudicated or waived. "West Virginia Code § 53-4A-1(b) (1981) states that an issue is 'previously and finally adjudicated' when, at some point, there has been 'a decision on the merits thereof after a full and fair hearing thereon' with the right to appeal such decision having been exhausted or waived, 'unless said decision upon the merits is clearly wrong.'" *Smith v. Hedrick*, 181 W. Va. 394, 395 (1989). But, a "rejection of a petition for appeal is not a decision on the merits precluding all future consideration on the issues raised therein . . . ." Syl. Pt. 1, *Id.* However, "there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance." Syl. Pt. 1, *Ford v. Coiner*, 156 W. Va. 362 (1972).

In addition, any grounds not raised in the petition for habeas corpus are deemed waived. *Losh v. McKenzie*, 166 W. Va. 762.

The Court, in reviewing the Petition, Answer, affidavits, exhibits, and all other relevant documentary evidence, finds that the Petitioner's *Petition for Writ of Habeas Corpus ad Subjiciendum* must be **DENIED**. The Court is satisfied based on the pleadings and exhibits that the Petitioner is entitled to no relief, and below the Court will discuss the grounds for its denial of each contention and its determination that no evidentiary hearing is required in this matter.

1. *Contentions not raised by a petitioner on direct appeal or specified on the petitioner's* Losh *list are deemed waived.*

In a post-conviction habeas corpus proceeding, there exists a rebuttable presumption that any contention or ground in fact or law which a defendant could have raised on direct appeal but did not has been knowingly and intelligently waived. Syl. Pts. 1 & 2, *Ford v. Coiner*, 156 W. Va. 362 (1972). Therefore, "the burden of proof rests on [the] petitioner to rebut the presumption that he intelligently and knowingly waived any contention or ground for relief which theretofore he could have advanced on direct appeal." *Id.* The Court finds that the Petitioner has thus waived any allegations of trial court error in denying a mistrial, late disclosure of evidence, and insufficiency of the evidence.

Additionally, the Petitioner completed a Habeas Corpus Notification Form containing a checklist of grounds for post-conviction habeas corpus relief (hereinafter "the *Losh* list"), which follows the list of grounds provided by the Supreme Court of Appeals in *Losh v. McKenzie*, 166 W. Va. 762. The Petitioner expressly waived the following grounds for relief: trial court lacked jurisdiction; statute under which

conviction obtained unconstitutional; indictment shows on face that no offense was committed; denial of right to speedy trial; involuntary guilty plea; language barrier to understanding the proceedings; denial of counsel; unintelligent waiver of counsel; failure of counsel to take an appeal; consecutive sentences of same transaction; state's knowing use of perjured testimony; falsification of transcript by prosecutor; unfulfilled plea bargain; information in pre-sentence erroneous; double jeopardy; irregularities in arrest; excessiveness and denial of bail; no preliminary hearing; illegal detention prior to arraignment; irregularities or errors in arraignment; challenges to the composition of grand jury or the procedures; failure to provide copy of indictment to defendant; defects in indictment; pre-indictment delay; refusal of continuance; refusal to subpoena witnesses; prejudicial joinder of defendants; lack of full public hearing; non-disclosure of grand jury minutes; instructions to the jury; claims of prejudicial statements by trial judges; claims of prejudicial statements by prosecutor; defendant's absence from part of the proceedings; improper communication between prosecutor or witnesses and jury; question of actual guilt upon acceptable guilty plea; more severe sentence than expected; excessive sentence; mistaken advice of counsel as to parole or probation eligibility; amount of time served on sentence, credit for time served; and any other grounds which the Petitioner could have asserted at the time of filing this *Petition for Writ of Habeas Corpus*.

In addition, the Court may "summarily deny unsupported claims that are randomly selected from the list of grounds" laid out in *Losh v. McKenzie*. *Id.* at 771; *Markley v. Coleman*, 215 W. Va. at 733. Even though the Petitioner did not expressly waive many of the claims in the *Losh* list, any claim that is not addressed below is

hereby summarily denied because the Petitioner provided no support for the claim in his *Petition for Writ of Habeas Corpus*.

> a. *The Petitioner's allegation of trial court error in failing to grant the Petitioner's motion for mistrial due to improper admission of prejudicial and inflammatory evidence is deemed waived by virtue of the Petitioner's failure to advance said allegation on direct appeal.*

According to the Petitioner, during the proceedings against him the State elicited testimony regarding the Petitioner's marital infidelity, in response to which the Petitioner moved for a mistrial. Trial Transcr. 128:7 to 130:7 (Nov. 29, 1995). The circuit court denied the motion, but admonished the jury to disregard the testimony. *Id.* The Petitioner maintains that the trial court erred in so doing, as the evidence was irrelevant and unfairly prejudicial and inflammatory in violation of West Virginia Rules of Evidence 403 and 404.

The Petitioner, however, did not raise this contention on direct appeal, *see* Petr's Pet. Appeal 4 (Aug. 9, 1997), and makes no showing sufficient to rebut the presumption that he thereby knowingly and intelligently waived this assignment of error. Therefore, the Court finds that said ground has been waived.

> b. *The Petitioner's allegation of late disclosure of evidence by the State is deemed waived by virtue of the Petitioner's failure to advance said allegation on direct appeal.*

The Petitioner argues that his case was prejudiced by the State's failure to timely disclose certain evidence which would have been helpful to the Petitioner's cross-examination of certain State witnesses. The Petitioner, however, did not raise this contention on direct appeal, *see* Petr.'s Pet. Appeal 4 (Aug. 9, 1997), and makes no showing sufficient to rebut the presumption that he thereby knowingly and intelligently

waived this assignment of error. Therefore, the Court finds that said ground has been waived.

c. The Petitioner's allegation that insufficient evidence existed to support his conviction is deemed waived by virtue of the Petitioner's failure to advance said allegation on direct appeal.

The Petitioner argues that the evidence introduced to the jury during the Petitioner's trial was insufficient to support a conviction for the offense of Principal in the Second Degree to Felony Murder. The Petitioner, however, did not raise this contention on direct appeal, *see* Petr.'s Pet. Appeal 4 (Aug. 9, 1997), and makes no showing sufficient to rebut the presumption that he thereby knowingly and intelligently waived this assignment of error. Therefore, the Court finds that said ground has been waived.

2. The Petitioner has presented insufficient evidence from which to conclude that the trial court's evidentiary ruling with regard to the Petitioner's motion to suppress was "clearly wrong."

"Habeas corpus is an appropriate remedy to challenge a conviction based on a confession which, because coerced, was obtained in violation of the Fifth and Fourteenth Amendments." *State ex rel. Justice v. Allen*, 189 W. Va. 437, 439 (1993). When representations of one in authority are calculated to "ferment hope or despair in the mind of the accused to any material degree," a resulting confession cannot be deemed voluntary. *Id.* (*quoting* Syl. Pt. 7, *State v. Persinger*, 169 W. Va. 121 (1982)). Where misrepresentations or other deceptive practices by police officers affect a confession's voluntariness or reliability, a resulting confession may be invalidated. *State v. Bradshaw*, 193 W. Va. 519, 534 (1995). Voluntariness is gauged by whether or not the decision to confess is the product of free and unconstrained choice by its maker. *State ex rel. Bass v.*

Legursky, 195 W. Va. 435, 442 (1995) (*citing Malloy v. Hogan*, 378 U.S. 1, 7 (U.S. 1964).

The Petitioner at trial moved to suppress certain statements which he had made to the Sheriff of Berkeley County on grounds that the statements had been illegally and unconstitutionally obtained. Specifically, the Petitioner argued that at the time of his initial meeting with the Sherriff, he was using drugs heavily, he was led to believe that the information he provided to the Sherriff could not be used against him, he was not informed of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (U.S. 1966), and, finally, the Sherriff was aware at the time of questioning that the Petitioner had already retained counsel. The Petitioner argued at his suppression hearing that in spite of these facts, the Sherriff continued to question the Petitioner and elicited inculpatory statements which were later used against the Petitioner at trial. Therefore the Petitioner argues that his initial confession was not a product of free will, and hence not voluntary, and that all subsequent confessions by the Petitioner were derivatively excludable pursuant to the "fruit of the poisonous tree" doctrine. *See State v. DeWeese*, 213 W. Va. 339, 346 (2003). On these grounds, the Petitioner argues that the trial court erred in failing to suppress such statements.

However, the standard of review for an issue previously adjudicated during a criminal proceeding is whether or not the trial court's ruling was "clearly wrong." W. Va. Code § 53-4A-1(b). "[A] trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W. Va. 467 (1978). "Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings

of the circuit court because it had the opportunity to observe the witness and to hear testimony on the issues . . . [t]herefore, the circuit court's factual findings are reviewed for clear error." Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104 (1996).

Given the deferential treatment which must be afforded the circuit court's factual findings, this Court cannot conclude that the circuit court's ruling to admit the Petitioner's statements was "clearly wrong" or "against the weight of the evidence." The evidence presented at the pre-trial hearing tended to show that the Petitioner agreed to speak with the Sheriff in order to assist the Petitioner's friend, John Palmer, with regard to Palmer's federal prosecution in an unrelated case. Although the Petitioner claims that he was led to believe that any statements he made could not be used against him and there was testimony to the effect that the Sheriff knew the Petitioner had retained private counsel with regard to this matter, the circuit court was in the best position to evaluate the testimony of the various witnesses, including the Sherriff and the Petitioner themselves, and the circuit court ultimately concluded that the statements sought to be suppressed were admissible. The circuit court found that the initial statement given to the Sherriff by the Petitioner was voluntary and non-custodial, that the Petitioner had effectively waived his right to counsel at the time such statement was made, that no promises of leniency or immunity were given, and that while one of the recorded statements may have demonstrated some sign of intoxication it was not enough to have overcome the Petitioner's mentality and reasoning. With no information before it different than that which was before the trial court, this Court is unable to conclude that the trial court's ruling was in "clear error." Therefore, the Court finds this allegation by the Petitioner to be without merit.

3. *The Petitioner has failed to meet the legal burden required of him with regard to all of his allegations of ineffective assistance of counsel.*

The right to competent and effective counsel is guaranteed by both the Sixth Amendment to the United States Constitution and Article III, § 14 of the West Virginia Constitution. Claims of ineffective assistance of counsel must be proven by a preponderance of the evidence, *see* Syl. Pt. 3, *State ex rel. Bess v. Legursky*, 195 W. Va. 435 (1995), and are analyzed under a two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Supreme Court of Appeals of West Virginia in *State v. Miller*, 194 W. Va. 3 (1995). Under that test (hereinafter "the *Strickland/Miller* test"), a petitioner seeking to establish the insufficiency of his attorney's conduct must show: (1) that his counsel's performance was deficient under an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3; *see also* Syl. Pt. 1, *State ex rel. Bailey v. Legursky*, 200 W. Va. 769 (1997). Thus a petitioner must show not only deficiency in his counsel's performance but also resulting prejudice to the petitioner.

The first prong of the *Strickland/Miller* analysis is objective and focuses on whether or not a reasonable lawyer would have acted, under the circumstances, as the petitioner's defense counsel acted. *State v. Miller*, 194 W. Va. at 16. There is a strong presumption that counsel's representation was reasonable and adequate. *Id.* The second prong of the *Strickland/Miller* analysis, on the other hand, is necessarily a fact-intensive determination dependent upon the circumstances of each case.

The Petitioner maintains that the representation which he received from his counsel was deficient in seven (7) different ways, each of which was sufficient enough to prejudice the outcome of the Petitioner's case. Each of these assignments of error will be considered in turn.

a. *The Petitioner's counsel's performance with regard to addressing negative pre-trial publicity was not deficient under an objective standard of reasonableness.*

The Petitioner argues that his trial counsel's performance was deficient in that his trial counsel failed to move for a change of venue due to negative pretrial publicity, failed to move for a continuance due to negative pretrial publicity, and failed to move for a mistrial due to negative pretrial publicity, all of which the Petitioner maintains that an attorney acting within an objectively reasonable range of professional conduct would have done. The Petitioner further argues that this failure to address negative pre-trial publicity prejudiced the outcome of the Petitioner's case.

A defendant seeking a change of venue must show "good cause" pursuant to Article III § 14 of the West Virginia Constitution, meaning that the defendant cannot get a fair trial in the county in which the offense occurred because of the existence of locally extensive present hostile sentiment against him. *State v. Beegle*, 188 W. Va. 681, 684 (1992) (*citing* Syl. Pt. 1, *State v. Pratt*, 161 W. Va. 530 (1978)). Widespread publicity and proof that prejudice exists against an accused do not, in and of themselves, require a change of venue unless it appears that the prejudice against the accused is so great that he cannot get a fair trial. *State v. Beegle*, 188 W. Va. at 684 (*citing State v. Gangwer*, 169 W. Va. 177 (1982); *State v. McFarland*, 175 W. Va. 205 (1985)).

The alleviation of negative pretrial publicity constitutes one potential ground for the granting of a continuance. "[W]here there is a reasonable likelihood that prejudicial

news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (U.S. 1966).

A trial court may in its discretion declare a mistrial based on negative pretrial publicity, either on its own motion or by motion of either party. *State v. Nixon*, 178 W. Va. 338, 341 (1987). Such a determination turns on the individual circumstances of a case, such as the content and context of the publicity and how the jury is exposed to the publicity. *Id.* "In determining if the jury's exposure to publicity resulted in probable prejudice, the trial court must examine all the circumstances and exercise its discretion and not simply rely on the jurors' avowals of impartiality." *Id.* (*citing State v. Williams*, 160 W. Va. 19, 26-27 (1976)).

A criminal defendant seeking a mistrial on the grounds that the jury has been improperly influenced by negative publicity must make a showing to the trial court that jurors have been exposed to such publicity. *State v. Williams*, 172 W. Va. at 304-305. The proper method of accomplishing this is through conducting a jury poll at the time that the motion for mistrial is made. *Id.* at 305. All the defendant must show to be entitled to poll the jury is the likelihood of probable prejudice resulting from adverse publicity. *Id.* If a defendant declines to poll the jury when making their motion for mistrial, then the defendant waives their right to object to the prejudicial effect of any pretrial publicity on the impartiality of the jury. *Id.* at 305-306. Such a waiver may only be overcome by evidence "demonstrat[ing] that there was, at least, actual exposure to the prejudicial publicity and, at most, actual prejudice resulting therefrom." *Id.* at 306.

While the Petitioner points to the existence of widespread media coverage of his trial, which is to be expected in the case of a prosecution for murder, he fails to show that this media coverage coincided with a pervasive hostile sentiment against him in the community which rendered it impossible for him to receive a fair trial. Indeed, the record indicates that only one of the potential jurors indicated that they might be influenced by what they had heard or seen in the media, and that potential juror was struck for cause. Trial Transcr. 42:5 to 44:3 (Nov. 29, 1995).

In *State v. Sette*, 161 W. Va. 384 (1978), the Supreme Court of Appeals found such requisite pervasive hostile sentiment to exist. That case, however, contained truly sensational facts, involving "[a] young and apparently beautiful woman [who was] allegedly murdered by the mistress of the victim's husband; both conspirators had been engaged in a torrid sexual relationship." *Id.* at 389. It was the highly unusual and sensational nature of that case which led the Supreme Court of Appeals to conclude that "a resident of Monongalia County [would have] to be both blind and deaf for him not to have heard the sordid details of the case and to have formulated at least a tentative opinion." *Id.* at 390-391. The Court repeatedly emphasized, however, that "[this] case was in no respect an ordinary murder of the type which fills score of volumes of the West Virginia Reports." *Id.* at 388-389.

Far more commonly the Court has found that the mere existence of widespread publicity and even the existence of actual prejudice against the defendant among certain elements of the community is not enough to show a pervasive hostile sentiment which would preclude the defendant from receiving a fair trial. *See, e.g. State v. Beegle*, 188 W. Va. at 684 ("the record shows that even though there was evidence of widespread

publicity relating to the charges against the defendant . . . that evidence did not show that the defendant could not receive a fair trial . . . the panel of prospective jurors indicated . . . that they could put the pretrial publicity out of their minds . . . the defendant did not challenge the qualifications of any juror who was ultimately chosen to sit on the case."); *State v. Pratt*, 161 W. Va. 530, 534 (1978) ("good cause for change of venue means proof that a defendant cannot get a fair trial in the county where the offense occurred because of the existence of extensive present hostile sentiment . . . here, defendant presented no evidence of poisonous prejudice against him, and the trial court did not a abuse its discretion in denying the motion."); *State v. Boyd*, 167 W. Va. 385, 393-394 (1981) ("inquiry is not focused on the amount of pre-trial publicity, but on whether the publicity has so pervaded the populace of the county as to preclude a fair trial.").

Given the strong presumption that the Petitioner's counsel provided reasonable and adequate representation, as well as the Petitioner's' failure to show that there was anything truly sensational about this crime which would have resulted in local hostile sentiment against him strong enough to preclude the possibility of him receiving a fair trial in Berkeley County, the Court finds that the Petitioner has failed to satisfy his obligation under the first prong of *Strickland/Miller*, which requires him to show that his counsel's performance in not moving for a change of venue, continuance, or mistrial due to negative pretrial publicity was deficient under an objective standard of reasonableness. Because the Court concludes that the Petitioner has failed to meet his obligation under the first prong of *Strickland/Miller*, the Court need not address the second prong.

b. *The Petitioner has failed to show that any failure by his counsel to seek a continuance based on late disclosure of evidence resulted in prejudice to the Petitioner.*

The Petitioner next argues that his counsel's performance was deficient in that his counsel failed to seek a continuance due to late disclosure of evidence by the State. The Petitioner contends that during a pretrial hearing conducted on November 28, 1995, the Petitioner's counsel became aware for the first time of the existence of eight (8) pages of handwritten notes taken by the Sherriff during or immediately after his first conversation with the Petitioner. The Petitioner also argues that shortly before the pretrial hearing his counsel became aware of the existence of mental hygiene records for State witness Ronald Linaburg. Finally, the Petitioner argues that the State failed to provide his trial counsel with statements by State witness John Palmer.

Article III § 14 of the West Virginia Constitution provides a constitutional right to a continuance if a defendant does not have a reasonable time to prepare his defense. Syl. Pt. 3, *Wilhelm v. Whyte*, 161 W. Va. 67 (1977). It is error to refuse a continuance to allow a defendant to obtain evidence which is critical to his defense, the existence of which was discovered only shortly before trial. Syl. Pt. 1, *State v. Demastus*, 165 W. Va. 572 (1980).

Even assuming, *in arguendo*, however, that Petitioner's trial counsel's performance was deficient in not moving for such a continuance, the Petitioner has still failed to meet his burden under the second prong of *Strickland/Miller*, which requires him to show actual prejudice as a result of any such deficiency. The Petitioner avers that "[i]f petitioner's counsel had moved for a continuance due to the State's late disclosure of evidence, petitioner's counsel would have been able to better prepare his defense,

especially the cross-examination of key State witnesses," Petr.'s Pet. Hab. Corp. at 20, but the Petitioner fails to show that had his counsel moved for a continuance there is a reasonable probability that the outcome of his case would have been different. It appears from the record that the handwritten notes which the Petitioner refers to had previously been typed into the Sherriff's typewritten report, which was disclosed to the Petitioner during discovery, and the Petitioner does not allege that there was anything substantively different in the handwritten notes than what was provided to him in the typewritten report.

With regard to the mental health records of the Petitioner's co-defendant Ronald Linaburg, the trial court granted the Petitioner's motion and entered an order for the production of those documents by the Eastern Panhandle Mental Health Center. The Petitioner does not allege that there was anything of substantive use in the mental health records which would have resulted in a reasonable probability of the outcome of his case being different had his counsel moved for a continuance.

Likewise, the Petitioner alleges that the State failed to timely disclose certain statements made by Witness John Palmer and that the Petitioner's counsel failed to move for a continuance in response to said disclosure, but the Petitioner fails to show that had his counsel moved for a continuance there is a reasonable probability that the outcome of his case would have been different because there was exculpatory information contained in the statements. The Petitioner merely states cursorily that "[e]arlier disclosure of such information would have enabled counsel to better prepare for trial, especially the cross-examination of State witnesses," Petr.'s Pet. Writ Hab. Corp. at 20. This is an insufficient showing to sustain a claim for ineffective assistance of counsel, because it

does not address the actual prejudice requirement which forms the second prong of the *Strickland/Miller* analysis. Therefore, the Court finds that the Petitioner has failed to carry his burden with regard to his claim of ineffective assistance of counsel for not moving for a continuance.

c. *The Petitioner has failed to show prejudice with regard to Petitioner's counsel's addressing of Petitioner's competence.*

The Petitioner next asserts that his trial counsel's performance was deficient in that his trial counsel was aware of evidence tending to show that the Petitioner was incompetent at the time of the David Frazier homicide and throughout the subsequent investigation and trial, and that an attorney acting within an objectively reasonable range of professional conduct would have raised the issue of competency with the court. The Petitioner claims that this incompetency was the result of heavy drug use, specifically heavy use of Dilaudid, and the Petitioner further argues that the failure to address the issue of his competency prejudiced his case.

Criminal defendants have both substantive and procedural due process rights not to be tried while mentally incompetent. *Coleman v. Painter*, 215 W. Va. 592, 597 (2004), (per curiam). "To be competent to stand trial, a defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him." Syl. Pt. 2, *Id.* Trial counsel has an obligation to reasonably investigate possible mental defenses when there are indications that the defendant may have a significant mental defect. *Id.* at 597, n. 6 (*quoting* Syl. Pt. 7, *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W. Va. 11 (1999)). This obligation is triggered by the showing of some sign of incompetence by the defendant. *Id.*

The Petitioner argues that his counsel had information, obtained from both a forensic clinical psychologist and a pharmacology expert, that the Petitioner had not been in a competent state of mind at the time at which he initially gave his statement to the Sheriff to understand the legal position in which he was placing himself. The Petitioner maintains that despite being in possession of this information, his counsel did not raise it with the trial court. The Petitioner states that: "[i]f petitioner's attorney had properly addressed the issue of the petitioner's competency, the petitioner would likely have been able to show that he was incompetent at the time of the David Frazier homicide, at the time the petitioner was interrogated by Sheriff Gooden, and/or at the time of trial . . . [not taking] [s]uch action was outside the acceptable range of reasonably competent representation and prejudiced the petitioner's case." Petr.'s Pet. Writ Hab. Corp. at 24.

However, even assuming that the Petitioner is correct in his contention that his counsel's conduct in not raising the issue of intoxication fell outside the acceptable range of reasonably competent representation, the Petitioner has not shown the requisite prejudice under the second prong of *Strickland/Miller*.

The issue of the Petitioner's competency was raised during a pretrial suppression hearing regarding statements which the Petitioner made to the Sheriff, at which the trial court found that while the Petitioner might have shown some signs of intoxication in his recorded statements, such signs did not "ris[e] to the point that the defendant didn't know or couldn't comprehend what was going on," Pretrial Transcr. 231:3 to 231:24 (Nov. 28, 1995), and this formed part of the basis for the trial court's ruling that the Petitioner's statements were admissible.

The Petitioner does not present any evidence from which to conclude that had his trial counsel subsequently raised the issue of the Petitioner's competency at the time of the commission of the crime, or his competency at the trial itself, as opposed to his competency at the time he gave the incriminating statement to the Sheriff, there is a reasonable probability that the trial court would have decided the issue of his competency differently. Indeed, there was conflicting testimony by a pharmacologist retained by the Petitioner's own counsel that the Petitioner's self-reported dosage of 80-100 mg. per day of Dilaudid was "incredible." Petr.'s Exh. 8. The Petitioner himself, when he was under oath and testifying at his suppression hearing, did not assert that he was consuming Dilaudid in those quantities. Pretrial Transcr. 188:20 to 205:19 (Nov. 28, 1995). There is no evidence from which to conclude that the trial court would have been likely to weigh the evidence and testimony regarding the Petitioner's competence at the time of the commission of the crime or at the time of his trial differently from the evidence and testimony of the Petitioner's competence at the time he made his statements to the Sheriff. Therefore, the Court finds that the Petitioner has failed to make the requisite showing of prejudice under *Strickland/Miller*.

d. The Petitioner has failed to show either that his counsel's conduct in addressing an alleged conflict of interest in the underlying case fell outside an objective standard of reasonableness or that the Petitioner suffered prejudice thereby.

Where a constitutional right to counsel exists under Article III, § 14 of the West Virginia Constitution, there is a correlative right to representation that is free from conflicts of interest. Syl. Pt. 2, *State v. Kirk N.*, 214 W. Va. 730, 736 (2003) (*quoting* Syl. Pt. 2, *Cole v. White*, 180 W. Va. 393 (1988)). To prevail on a conflict of interest theory, the defendant must show, by a preponderance of the evidence, that the attorney

was acting at the direction of another conflicting interest or party. The defendant must show actual conflict to demonstrate a violation of their Sixth Amendment right to counsel. *See* Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* I-68 (2d ed. 1993).

The Petitioner argues that a conflict of interest existed in his case due to his counsel's representation in an unrelated federal matter of John Palmer, a State witness against the Petitioner. Palmer introduced the Petitioner and the Sheriff and arranged the initial meeting between them. The initial conversation between the Petitioner and the Sheriff took place at Palmer's home. The Petitioner claims that he believed he was speaking to the Sheriff in order to assist Palmer in Palmer's federal prosecution.

At trial, the prosecutor told the court that the State did not believe there was a conflict arising from Petitioner's counsel's representation of both the Petitioner and Palmer. Pretrial Transcr. 41:18 to 42:6 (Nov. 28, 1995). Petitioner's counsel informed the court that he represented Palmer in the Fourth Circuit for appellate purposes only, but expressed his opinion that the court should appoint Palmer separate counsel with regard to his testifying in the Petitioner's case. *Id.* at 42:15 to 42:24. Petitioner's counsel also informed the Court that the issue of possible conflict had been raised in Palmer's federal case, where the federal government had objected to Petitioner's counsel's representation of Palmer, in response to which both the federal district court and the Fourth Circuit had concluded that there was no conflict. *Id.* 43:3 to 43:12.

The State represented that its questioning of Palmer would concern his arranging for the Petitioner to meet with the Sheriff in a non-custodial setting to discuss the death of

David Frazier. Palmer was to testify that his motive in assisting the Sheriff was to help his own pending federal case. *Id.* at 46:1 to 46:5.

Petitioner's counsel expressed to the court his belief that no information possessed by Palmer could hurt the Petitioner's case. *Id.* at 44:18 to 45:2. Petitioner's counsel also expressed to the Court his belief that Palmer's arrangement of a meeting between the Petitioner and the Sheriff, and the Petitioner's subsequent statement to the Sheriff, was part of a ". . . behind-the-scene effort un-Mirandized without any effort to use a statement in court . . ." *Id.* at 47:18 to 48:13.

The Court then asked Petitioner's counsel if he planned on calling Palmer as a witness or cross-examining Palmer, to which Petitioner's counsel responded that Palmer was a State witness and that Petitioner's counsel planned on cross-examining him very little, if at all. *Id.* at 43:17 to 44:1.

The Petitioner argues that his counsel's cross-examination of Palmer was insufficient as a direct result of his counsel's dual representation of both the Petitioner and Palmer. The Petitioner asserts that Palmer's testimony could have contributed reasonable doubt in the mind of the jury. Finally, the Petitioner contends that his counsel's representation of Palmer affected his counsel's questioning of the Sheriff, who was called as a character witness for Palmer during Palmer's federal case. *Id.* at 60:24 to 61:8. The Petitioner further maintains that this conflict of interest prejudiced the Petitioner's case by preventing evidence from reaching the jury which could have contributed to reasonable doubt as to the Petitioner's guilt.

However, with respect to this matter the Petitioner fails to meet either prong of the *Strickland/Miller* test. In the first place, the Petitioner has not shown that his

counsel's performance was deficient under an objective standard of reasonableness. Petitioner's counsel raised the issue of the potential conflict with the court, and asked that Palmer be appointed separate counsel for purposes of the Petitioner's case, which the trial court did. The Petitioner cites no legal principle that would prohibit his trial counsel from representing the Petitioner while simultaneously representing Palmer in an unrelated appellate matter. The Petitioner offers no proof, beyond simple speculation, that his counsel's actual cross-examination of Palmer or of the Sheriff was deficient. The Petitioner argues that Palmer's testimony, if properly elucidated, could have contributed reasonable doubt in the mind of the jury, but the Petitioner fails to show what information Palmer had in his possession which, if properly developed, could have created reasonable doubt in the mind of a juror. For this reason, the Petitioner also fails to meet the second prong of the *Strickland/Miller* test, which requires him to show actual prejudice. Therefore, the Court finds that Petitioner's counsel's performance was not ineffective with regard to any alleged conflict of interest.

e. *The Petitioner has failed to show any prejudice with regard to his allegations of ineffective assistance of counsel based upon the failure to call necessary witnesses.*

The Petitioner next argues that his trial counsel was deficient in failing to call certain witnesses and thereby failing to subject the prosecution's case to adversarial testing. In certain cases, an attorney's assistance may be presumed to be ineffective, such as where an attorney entirely fails to subject the prosecution's case to adversarial testing. *United States v. Cronic*, 466 U.S. 648, 659 (U.S. 1984). To establish a violation under *Cronic,* a petitioner must demonstrate that he or she suffered the equivalent of a complete absence of counsel. *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 325 (1995).

First the Petitioner argues that his trial counsel was ineffective in not calling John Palmer as a witness at the Petitioner's trial. Palmer was called as a State's witness at the pretrial suppression hearing, but not at the trial itself. At the suppression hearing, Palmer's testimony essentially corroborated the Sheriff's testimony concerning how Palmer approached the Petitioner to arrange a meeting with the Sheriff so the Petitioner could tell the Sheriff about the David Frazier homicide, and Palmer further testified as to the circumstances surrounding the meeting between the Petitioner and the Sheriff. Pretrial Transcr. 53:16 to 65:1. Certainly this testimony would have been of little use to the Petitioner at trial, after the circuit court had ruled against him at the suppression hearing.

The Petitioner now asserts, however, that "Palmer helped [the Petitioner] make up the story he told [the Sheriff]." The Petitioner argues that Palmer's testimony could therefore have contributed to reasonable doubt in the mind of the jury. The Petitioner offers nothing, though, beyond his own naked assertion which would tend to corroborate the fact that he and Palmer conspired to invent the testimony which the Petitioner gave to the Sheriff. Indeed, the Court finds it incredible that such an issue would not have been raised by the Petitioner at the time of his suppression hearing or trial if it were in fact true. Surely the Petitioner would have informed his counsel of such a fact, but the Petitioner's counsel averred at the time of the suppression hearing that he did not believe Palmer to possess any information which could be exculpatory to the Petitioner, Pretrial Transcr. 41:18 to 42:51 (Nov. 28, 1995), and the Petitioner does not now allege that his counsel possessed information about Palmer which Petitioner's counsel refused to act on. Therefore, the Court finds that with regard to his trial counsel's decision not to call

Palmer as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in not calling a certain Kevin Fowler as a witness. Kevin Fowler was the Petitioner's codefendant at one time, but was acquitted by a jury prior to the Petitioner's trial. The Petitioner does not allege that Kevin Fowler possessed any specific information that could have been exculpatory to the Petitioner if Kevin Fowler had been called as a witness. Therefore, with regard to his counsel's decision not to call Kevin Fowler as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in not calling a certain Fay Ann Fowler as a witness at the Petitioner's trial. The Petitioner states that Fay Ann Fowler was in contact with Kevin Fowler, the Petitioner, and others who may have possessed knowledge regarding the homicide, but the Petitioner does not allege that Fay Ann Fowler possessed any specific information that would have been exculpatory to the Petitioner if Fay Ann Fowler had been called as a witness. Therefore, with regard to his counsel's decision not to call Fay Ann Fowler as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in not calling a certain Darry Palmer as a witness at the Petitioner's trial. Darry Palmer supposedly had a conversation with a certain Joe Myatt, who told her that David Frazier had been shot in the back of the head, and that Frazier deserved it and "had it coming." The Petitioner fails to allege, however, that Darry Palmer possessed any specific information that would have been exculpatory to the Petitioner if Darry Palmer had been called as a witness.

Therefore, with regard to his counsel's decision not to call Darry Palmer as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his trial counsel was ineffective in failing to call a certain Randy Harrison as a witness at the Petitioner's trial. The Petitioner states that Randy Harrison may have had information about the David Frazier homicide, but the Petitioner fails to allege that Randy Harrison possessed any specific information that would have been exculpatory to the Petitioner if Randy Harrison had been called as a witness. Therefore, with regard to his counsel's decision not to call Randy Harrison as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing to call a certain Lorretta Myers as a witness at the Petitioner's trial. The Petitioner states that Lorretta Myers told police officers that she heard the whole story of the David Frazier homicide while visiting Randy Harrison's house, and that Lorretta Myers told the police that a certain Kenny Rickard had gone to the quarry and found the clothes that Kevin Fowler wore when he killed David Frazier, and Kenny Rickard had placed those clothes on the steps of Kevin Fowler's trailer. However, the Petitioner fails to allege that Lorretta Myers possessed any specific information which would have been exculpatory to the Petitioner, who was accused by virtue of his having participated in planning the murder, as opposed to directly carrying it out, if Lorretta Myers had been called as a witness. Therefore, with regard to his counsel's decision not to call Lorretta Myers as a

witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing to call Kenny Rickard as a witness at the Petitioner's trial. Kenny Rickard was found by police officers at Kevin Fowler's home during the course of their investigation and interviewed at that time, but the Petitioner fails to allege that Kenny Rickard possessed any specific information which would have been exculpatory to the Petitioner if Kenny Rickard had been called as a witness. Therefore, with respect to his counsel's decision not to call Kenny Rickard as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing to call a certain Brent Jackson as a witness at the Petitioner's trial. According to the Petitioner, Brent Jackson was an employee of the victim, David Frazier. A few weeks before the victim's disappearance, the victim and Brent Jackson purportedly had a falling out, and Brent Jackson either quit working for the victim or was fired. However, the Petitioner fails to allege that Brent Jackson possessed any specific information which would have been exculpatory to the Petitioner if Brent Jackson had been called as a witness. Therefore, with regard to his counsel's decision not to call Brent Jackson as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing too call a certain Lisa Funk as a witness at the Petitioner's trial. According to the Petitioner, Lisa Funk and Brent Jackson were living together, and Lisa Funk had been aware of the

falling out between Brent Jackson and the victim. However, the Petitioner fails to allege that Lisa Funk possessed any specific information which would have been exculpatory to the Petitioner if Lisa Funk had been called as a witness. Therefore, with regard to his counsel's decision not to call Lisa Funk as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing to call a certain Ray West as a witness at the Petitioner's trial. According to the Petitioner, Ray West was an FBI agent whom the Petitioner supposedly contacted regarding the victim David Frazier's planned "hit" on a local attorney, and regarding David Frazier's son Paul Frazier's desire to arrange a "hit" on his father. However, the Petitioner fails to allege that Ray West possessed any specific information which would have been exculpatory to the Petitioner if Ray West had been called as a witness. Therefore, with regard to his counsel's decision not to call Ray West as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing to call a certain David Frazier, Jr. as a witness at the Petitioner's trial. According to the Petitioner, David Frazier, Jr. could have testified to the existence of certain life insurance policies held by David Frazier, the beneficiaries of which were purportedly David Frazier, Jr., Paul Frazier, their sister Cathy, and possibly the victim's wife, Paula Frazier. The Petitioner further states that David Frazier, Jr. could have testified regarding his father's business and personal relationships, and to the fact that in addition to loaning money to the Petitioner, David Frazier also loaned money to other individuals. However, the Petitioner fails to allege that David Frazier, Jr. possessed any specific information

which would have been exculpatory to the Petitioner if David Frazier, Jr. had been called as a witness. Therefore, with regard to his counsel's decision not to call David Frazier, Jr. as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

The Petitioner next alleges that his counsel was ineffective in failing to call a certain Gretta Wise as a witness at the Petitioner's trial. The Petitioner states merely that Gretta Wise was the victim's daughter, but the Petitioner fails to allege that Gretta Wise possessed any specific information which would have been exculpatory to the Petitioner if Gretta Wise had been called as a witness. Therefore, with respect to his counsel's decision not to call Greta Wise as a witness at the Petitioner's trial, the Petitioner has failed to meet either prong of the *Strickland/Miller* test.

f. The Petitioner has failed to show that he was prejudiced by any defect in his counsel's cross-examination of State witnesses.

The Petitioner alleges that his trial counsel was ineffective in failing to properly cross-examine certain State witnesses, therefore failing to subject the State's case to adversarial testing. The Petitioner argues that this inadequate and ineffective cross-examination prejudiced his case and affected the outcome of his trial.

"The method and scope of cross-examination 'is a paradigm of the type of tactical decision that [ordinarily] cannot be challenged as evidence of ineffective assistance of counsel,'" *Coleman v. Painter*, 215 W. Va. 592, 596 (2004) (*citing State ex rel. Daniel v. Legursky,* 195 W.Va. at 328), though defense counsel ordinarily has the duty to investigate possible methods of impeachment of prosecution witnesses. *Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (4th Cir. 1986). Failing to subject the prosecution's case to adversarial testing can indicate ineffective assistance of counsel. *State ex rel. Daniel v.*

Legursky, 195 W. Va. at 325, 427. The Petitioner asserts that his counsel's cross-examination of three (3) witnesses in particular did not subject the State's case to adversarial testing: John Palmer, Clarence Ralph "Rocky" Lane, and Paula Frazier.

Regarding Palmer, the Petitioner essentially renews the argument that he made in reference to his counsel's failure to call Palmer as a trial witness. The Petitioner asserts that Palmer not only arranged the meeting between the Petitioner and the Sheriff, but that Palmer coached the Petitioner as to what to say to the Sheriff. The Petitioner further asserts that the Sheriff guided what the Petitioner said during their conversation, and that the Sheriff recorded the conversation with the Petitioner and Palmer observed the conversation being recorded. Despite all this, the Petitioner asserts that his counsel asked only five (5) questions on cross-examination of Palmer at the Petitioner's pretrial suppression hearing, failing to properly develop the testimony which the Petitioner believes Palmer possessed.

Again, however, the Petitioner offers no proof beyond his own mere belief that Palmer possessed information which could have been exculpatory to the Petitioner's case if the Petitioner's counsel had, in fact, conducted a lengthier cross-examination. *See Hoots v. Allsbrook*, 785 F.2d at 1221 ("[u]nder *Strickland,* a mere possibility that the result might have been different does not suffice . . . [w]e cannot say that this failure to impeach undermines our confidence in the result, however it may draw in question counsel's industry and acumen in fully developing a basis for defense of this client.").

The Petitioner next alleges that his trial counsel was ineffective in failing to adequately cross-examine Clarence Ralph "Rocky" Lane, who testified as a ballistics expert at the Petitioner's trial. The Petitioner asserts that his counsel's cross-examination

of Lane was limited to asking Lane whether or not Lane could determine if certain bullets had all been fired from the same gun. Again, the Petitioner does not allege that Lane possessed any specific information which would have been exculpatory to the Petitioner if his counsel had more diligently developed it on cross-examination.

Finally, the Petitioner alleges that his trial counsel was ineffective in failing to adequately cross-examine Paula Frazier, the wife of David Frazier, who testified on behalf of the State at trial. The Petitioner argues that trial counsel did not cross-examine Paula Frazier at all, even though cross-examination could have provided a motive for a person other than the Petitioner to cause David Frazier's death.

Again, under *Strickland/Miller* it is not enough to assert that more thorough cross-examination "could have" produced exculpatory evidence. On the Petitioner's counsel's motion the court had already greatly restricted the extent to which Paula Frazier could testify on direct examination. Pretrial Transcr. 22:13 to 39:4 (Nov. 28, 1995). The Petitioner's counsel successfully prevented Paula Frazier from being permitted to testify to certain comments her deceased husband had made to her which would have been inculpatory with regard to the Petitioner. The Petitioner's counsel lodged numerous objections during Paula Frazier's direct testimony. Trial Transcr. 102:9 to 109:5 (Nov. 29, 1995). With regard to the Petitioner's counsel's decision not to cross-examine Paula Frazier concerning certain insurance policies which the Petitioner claims could have provided a motive for someone else other than the Petitioner to kill David Frazier, while such evidence could potentially have been of exculpatory value, given the volume of evidence against the Petitioner the Court finds it improbable that such evidence would have ultimately produced a different outcome in the proceedings. Therefore, the

Petitioner has failed to meet either prong of the *Strickland/Miller* test with regard to his counsel's calling and cross-examination of witnesses.

g. *Because the Court concludes that Petitioner's counsel's performance did not fall below an objective standard of reasonableness in any measure which the Petitioner has alleged, the Court must reject the Petitioner's assertion that the cumulative effect of all of the Petitioner's counsel's alleged deficiencies was to deprive the Petitioner of effective assistance of counsel.*

The Petitioner next asserts that even if the effect of any of his allegations of ineffective assistance of counsel would be in and of itself harmless, the cumulative effect of all such alleged failures resulted in a violation of the Petitioner's right to effective assistance of counsel. However, because the Court has not identified any area in which Petitioner's counsel's performance fell below an objective standard of reasonableness, the Court finds the Petitioner's allegation of cumulative effect to be likewise without merit. *See State ex rel. Bailey v. Legursky, supra.*

4. *The cumulative effect doctrine is inapplicable where no error has been shown.*

Finally, the Petitioner asserts that the cumulative effect of all of the various errors alleged in this Petition amounts to a constitutional violation and subrogation of his right to a fair trial. This contention is without merit because the Court has already found each of the Petitioner's allegations of constitutional violation to be without merit. Where no error is shown the cumulative error doctrine is inapplicable; thus there can be no cumulative error in the matter. *See State v. Knuckles*, 196 W. Va. 416, 425-426 (1996).

ACCORDINGLY, the Court **DENIES** the Petitioner's *Petition for Writ of Habeas Corpus ad Subjiciendum*. The Court notes the objections and exceptions of the parties to any adverse ruling contained herein.