
NO. 33321

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

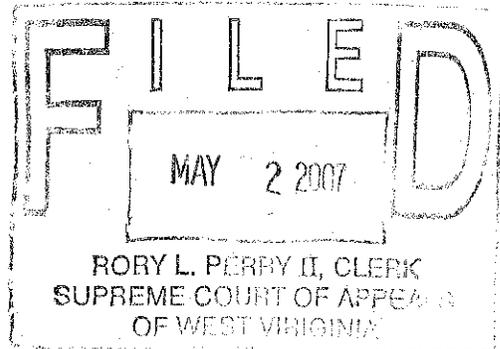
GARY ALLEN GIBSON,

Petitioner below, Appellee,

v.

THOMAS McBRIDE, Warden,
Mt. Olive Correctional Facility,

Respondent below, Appellant.



APPELLANT'S BRIEF

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APPELLANT'S BRIEF

I.

STATEMENT OF THE CASE

Thomas McBride, Warden, Respondent below ("Warden"), appeals an order by the Cabell County Circuit Court ("habeas court") (Pancake, J.) granting Gary Allen Gibson's ("Gibson") petition for habeas corpus relief under West Virginia Code § 53-4A-1(a). Gibson filed his petition on October 3, 1993, alleging ten grounds for relief. Rejecting all but three of these grounds, the habeas court found that grounds seven through nine, although individually harmless, constituted a single constitutional claim meriting reversal under the cumulative error doctrine. The Warden filed his Petition for Appeal on September 7, 2006. By order entered February 27, 2007, this Court accepted the Warden's appeal.

II.

SUMMARY OF ARGUMENT

The Warden's appeal addresses two issues. First, did the habeas court erroneously reverse discretionary rulings made by the trial court 20 years earlier? Second, did the habeas court's application of the cumulative error doctrine transform Gibson's habeas petition into a second appeal?

By cumulating grounds for relief which, standing alone are not cognizable, the habeas court revisited ordinary trial court rulings which were fully, and fairly adjudicated by the trial court at Gibson's original trial, and rejected by this Court on appeal. The proceedings below were collateral in name only.

The Warden simply asks this Court to acknowledge longstanding distinctions between the scope of appellate and habeas review. "The right to habeas relief is, *by necessity*, limited. If it were not, criminal convictions would never be final and would be subject to endless review." *Pethel v. McBride*, 219 W. Va. 578, 588, 638 S.E.2d 727, 737 (2006) (emphasis added).

The habeas court's final order demonstrates the danger of "free range" cumulative error in state habeas proceedings. The habeas court improperly second-guessed the trial court, and arbitrarily combined them into one constitutional claim. In effect, the habeas court ruled that $0+0+0=1$.

If this Court were to accept the habeas court's reasoning, no ruling would be final, no issue too trivial to re-litigate. This result, if not rejected, will improperly expand the parameters of habeas review, and render long-established distinctions between direct appeals and collateral attacks meaningless.

III.

STATEMENT OF FACTS

Although the State habeas court found that Gary Gibson's conviction was supported by legally sufficient evidence, it qualified its ruling:

In order to convict someone of the crime of conspiracy, "the State must demonstrate that the defendant agreed with at least one other person to commit an offense against the State and that one of the conspirators committed an overt act to effectuate the offense." *State v. Stevens*, 436 S.E.2d 312, 315 (W. Va. 1993). This Court is of the opinion that the State arguably sustained its burden under the letter of the law.

The Court finds that the *mere fact that Appellee evidently knew of the plot and stood in the location witnesses testified he was to stand at the time of the murder* meets the State's burden. Under such a heavy burden, this Court cannot say that the record contains *no evidence* from which a jury could find guilt beyond a reasonable doubt; however, as will be discussed below, the cumulative error in this case caused the inferences to lean unconstitutionally in favor of the State.

Court's Opinion Order Granting Writ of Habeas Corpus (hereinafter "Habeas Order") at 8 (emphasis added/supplied).¹

The habeas court's analysis ignores most of the evidence. The record proves that Gary Gibson conspired with four other members of a prison gang, the Aryan Brotherhood--David Morgan, John Perry, Paul Brumfield, and Gary Gillespie--to murder rival gang-leader Danny Lehman.² *See*

¹Approximately 20 years passed between Gibson's conviction and the habeas court's final order. None of the original participants were called to testify at Gibson's omnibus hearing. The trial judge did not preside over Gibson's habeas hearing.

²A Wood County jury convicted Gary Gibson of voluntary manslaughter on June 15, 1978. In 1982 Gibson was indicted for two counts of burglary. (R. 12.) On February 19, 1982, Gibson pled guilty to burglary. In 1985 Gibson was again indicted for two counts of burglary. (R. 21.) He was convicted on August 5, 1985. (R. 26.) Upon his burglary conviction the State filed a recidivist information. On September 20, 1985, a jury found that Gary Gibson was the same person named in the prior felony convictions. On September 23, 1985, the trial court sentenced Gibson to life with mercy. (R. 284, 409-12.)

W. Va. Code § 61-10-31(1). On November 26, 1986, John Perry fatally stabbed Mr. Lehman in the right eye with a homemade shank. (Trial Tr. 69.)

The State did not only prove that Gary Gibson knew about the conspiracy, or that he just happened to be present when the victim was murdered. (Habeas Order at 8.) The State proved that a conspiracy existed, that the conspiracy's objective was to kill Danny Lehman, that all of the conspirators belonged to the Aryan Brotherhood, that all of the conspirators requested help from fellow prisoners Ervil Bogard and Wallace Jackson, that Gibson acted as a cutoff man, standing 15 feet from the Lehman with a knife in his hand while Perry stabbed Lehman, and later confronted member's of Lehman's gang with the same knife in his hand.³

One day before the murder, co-conspirator David Morgan asked fellow inmate Ervil Bogard to come to the recreation yard.⁴ (Trial Tr. 143.) Once he arrived, Bogard was approached by Morgan, Paul Brumfield, and John Perry. (Trial Tr. 148.) In fear for his safety, Bogard only allowed the co-conspirators to approach him one at a time. (*Id.*) Morgan was to first to approach Bogard. He asked him to join the Aryan Brotherhood, told him that the Brotherhood intended to kill Lehman, and asked Bogard to act as a "cutoff man." (Trial Tr. 149, 151.) John Perry then approached him,

³Although the defense claimed that Gary Gibson walked away because he was not involved in the conspiracy, Bogard testified that it is a cutoff man's responsibility to make sure that no one comes to help the victim. A preliminary internal report suggested that two other individuals, Mike McMillion and Danny Worley, attempted to come to Lehman's aid. As they were approaching Lehman, Gary Gibson walked towards them with a knife in his hand. (Trial Tr. 162; R. 238.)

In return for his guilty plea to the recidivist charge, the State agreed to drop institutional charges related to the Lehman-McMillion murders, and the stabbing of Danny Worley. (R. 459.)

⁴Bogard testified pursuant to a plea agreement with the State which agreed to drop eight pending felonies, transport him to Huttonsville to serve out the remainder of his sentence (a wise precaution), and recommend parole at Bogard's next hearing. (Trial Tr. 142.) All of this information was conveyed to the jury.

asked him to join the Aryan Brotherhood, and told him that all he had to do was make sure that none of Lehman's gang, the Avengers, stepped in to help Lehman.⁵ (Trial Tr. 150.) Both Brumfield and Gillespie asked Mr. Bogard if he planned to join the Aryan Brotherhood. (Trial Tr. 161.) Later that same day Gibson asked him the same question.

Bogard took Lehman's request in context. That day, four other Aryan Brothers had asked him to join their gang. The evidence suggests that the Brotherhood was not looking for mercenaries. The murder was intended as a signal from the Brotherhood to Lehman's Avengers. Thus, any participant had to be a member of the Brotherhood. Morgan and Perry did not ask for Bogard's help until they asked him to join the Brotherhood.

Bogard testified that it was common knowledge in the North Hall that a clash between the Aryan Brotherhood and the Avengers was imminent:

The battle [between the Aryan Brotherhood and the Avengers] had to start sometime, *everybody knew that*. I mean, it was like when you have two different groups that close together and you can't get away from each other, and they're that far apart on what they want to do there's got to be a clash, and Danny being the president, take away the head and the body falls, that's the way I figured [the Aryan Brotherhood was] thinking too.

(Trial Tr. 153; emphasis added.)

Co-conspirator Gary Gillespie readily admitted there was bad blood between Lehman and him. (Trial Tr. 321-23.) Gillespie, a former member of the Avengers, attributed the hostility to his expulsion from the gang. (Trial Tr. 322.) After he left the Avengers he joined the Aryan Brotherhood. (Trial Tr. 335.) He also testified that he had numerous confrontations with Mr. Lehman before the murder. (Trial Tr. 331.)

⁵A "cutoff man" is some who intentionally obstructs the guards view, and intervenes when the prospective victim's friends try to interfere. (Trial Tr. 151.)

Bogard's testimony established that Morgan and Perry had entered into a conspiracy to murder Lehman. Proof of an overarching conspiracy effects the weight jurors should afford to circumstantial evidence suggesting a defendant's participation. In *United States v. Pressler*, 256 F.3d 144, 151 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit found:

We do not suggest that the Government's burden of proof is higher where the existence of an underlying group is contested. Instead we emphasize that certain types of circumstantial evidence become substantially more probative if it can be established that a conspiracy existed and the only remaining question is whether the defendant was a part of it.

As Bogard testified:

A: Whether I can remember plainly [Gary Gibson] saying are you going to help us kill Danny or something like that, I can't say, that doesn't sound right, but what I do remember it was implied. I knew what they were talking about. You'd have to be blind and dumb not to know what they were talking about after David Morgan initiated it. His exact words I can't remember, but it was my understanding what they wanted from me and what they would give in return.

Q: How did you get that understanding from [Gary Gibson.]

A: From knowing the position that he was in and more or less living in North Hall that long and knowing what was going on and, basically, that was a hellhole to live in and there was no doubt in my mind that when Gary Gillespie or any of them talked after Morgan talked to me, there was no doubt in my mind any other four meant the same thing, because when they asked me if I was going to join, it wasn't so much to join, it was to help with.

(Trial Tr. 179.)

Prisoner Wallace Jackson testified that these same five people approached him in his cell the night of the murder.⁶ (Trial Tr. 184.) Gillespie handed him a knife and told him to put it under his

⁶Jackson testified after the State agreed to transfer him out of Moundsville if he agreed to testify in the Gibson trial. (Trial Tr. 183.)

pillow. (*Id.*) The group of men, including Gillespie, began talking about killing Lehman. (*Id.*)

Before Lehman arrived John Perry told everyone where to stand:

[John Perry] was just standing outside the door and he told David Morgan and [Gary Gibson] to stand outside the door where I was at in 1A-13 and Gary Gillespie and Paul Brumfield was to stand over near the fence and John Perry stood over towards the cell doors . . . He told [Gibson] where to get at on the tier [which was] on the other side of my door to the left.

(Trial Tr. 186.)

Jackson's testimony proved that Gibson had agreed to act as a cutoff man. "John Perry told [Gibson] and David Morgan to stay on the other side of [Jackson's] door to cut off anyone who came down the tier." Gibson stood where he was told with a knife in his hand. (Trial Tr. 186, 189, 191.)

Contrary to the habeas court's ruling, the evidence was more than legally sufficient. Even without the benefit of presumptions, the State proved its case. It proved the existence of a conspiracy to kill Lehman. It proved that there was bad blood between Lehman's gang and the Aryan Brotherhood. It proved that every member of the conspiracy belonged to the Aryan Brotherhood. It proved that every person involved in Lehman's murder had asked Ervil Bogard to join the brotherhood the day before the murder.

The State introduced eyewitness testimony placing Gibson at the scene of the crime, armed with a knife. He stood by the side of Jackson's cell door, blocking the view of anyone looking from the front of the tier to the back. He then moved towards the front of the tier, knife in hand, towards members of Lehman's gang.

IV.

ASSIGNMENTS OF ERROR

1. Gary Gibson's grounds for relief are not cognizable in habeas corpus, and do not constitute ordinary trial error.
2. The lower court applied the wrong "cumulative error" standard to the case at bar.
3. Gibson received a fair trial.
4. The lower court failed to provide the State with a reasonable opportunity to retry Gibson.

V.

ARGUMENT

A. STANDARD OF REVIEW.

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action we apply a three-prong deferential 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 *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 418, 633 S.E.2d 771, 772 (1995).

B. SINCE THE TRIAL COURT'S ORIGINAL RULINGS WERE CORRECT, THERE IS NO ERROR TO ACCUMULATE.

"Cumulative error analysis applies when there are two or more actual errors; it does not apply to the cumulative effect on non-errors." *United States v. Nichols*, 169 F.3d 1255, 1269 (10th Cir. 1999), *cert. denied*, 528 U.S. 934 (1999). "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979), *cert denied*, 464

U.S. 831 (1983). *See also State ex. rel. Phillips v. Legursky*, 187 W. Va. 607, 608, 420 S.E.2d 743, 744 (1979).

The habeas court ruled that the trial court violated Gibson's right to a fair trial by admitting a single post-mortem photo of the victim, requiring defense witnesses testify in shackles and prison garb while allowing the State's witnesses to testify in street clothes, and failing to grant defense counsel's motion for a continuance filed the day of the trial so she could review materials provided to her by the State four days before trial.

These three issues were litigated below.⁷ Each decision was entrusted to a trial court's sound discretion. The court did not abuse that discretion. Since there is no error, there is no cumulative error.

Defense witnesses' testimony in prison garb and shackles

The habeas court found:

In the case at bar, the issue is not so much that Petitioner's witnesses had to appear in garb and chains, but rather that the State's witnesses, who were incarcerated, were *ordered* to appear in street clothes. In order to guarantee a fair trial, the trial Court could have ordered all the incarcerated witnesses to appear in garb and shackles or street clothes. The trial Court's order unfairly tilted the psychological credibility scale in favor of the State. Combined with other errors, this ruling added to the weight of the building cumulative error.

(Habeas Order at 12; emphasis supplied.)

A defendant has no constitutional right to have his prison witnesses appear at trial in street clothes. *State ex. rel. McMannis v. Mohn*, 163 W. Va. at 137, 254 S.E.2d at 809. Such claims are

⁷All three issues were raised at trial, Gibson's motion for a new trial, his direct appeal, and his second *pro se* habeas petition filed with this Court. They were rejected each time.

not cognizable in habeas corpus. (*Id.*) In the case at bar, the habeas court ducked *McMannis*' unequivocal holding by re-framing issue.

The court claims that making Gibson's witnesses appear in prison garb and shackles did not run afoul of the Constitution. Had every incarcerated prisoner appeared in prison garb and shackles, Gibson's trial would have been fair. The corollary being: Had every witness appeared in street clothes, Gibson's trial would have been fair. Because Gibson's witnesses testified in prison garb and shackles, while the State's witnesses testified in street clothes, his trial was unfair. The substance, as opposed to presentation, of the trial court's position is exactly the same as the position rejected by this Court in *McMannis*..

Gibson has no constitutional right to force the State's witnesses to appear in prison garb or shackles, no matter how his witnesses are clothed. The focus of this inquiry revolves around the circumstances surrounding the trial. Due process does not mandate a perfect balance between both pans of the scale. Such an approach would render the analysis impossibly result-oriented. Every decision benefits one side at the expense of the other. Due process, at its essence, means playing by the rules. It is not a *deus ex machina* to be arbitrarily invoked to conform with personal conceptions of fairness. Well reasoned rulings firmly rooted in precedent and the fundamental notions of justice are well within the bounds of due process.

In the case at bar the trial court's decision was fair. The trial court did not, *sua sponte*, order the State's witnesses to appear in street clothes. The court signed a pre-trial order drafted by the State permitting its incarcerated witnesses to appear in street clothes: Defense counsel never submitted a similar order. "Because prison witnesses do not appear in court without some prior arrangement with the custodial authorities, we believe *it is incumbent upon defense counsel . . . to*

make voluntary arrangements with the custodial authorities for them to appear in civilian attire. If a voluntary arrangement cannot be made, he should move the court for an answer *in advance of trial.*" *McMannis*, 163 W. Va. at 137 n.3, 254 S.E.2d at 809 n.3(emphasis added.) Before Gibson's witnesses testified the trial court instructed the jurors not to allow their appearance sway their judgment. (Trial Tr. 301.)

The trial court's ruling applied to every witness transported from Moundsville. Had the State called witnesses from Moundsville, the trial court's ruling would have required them to wear the same attire. Indeed, the defense also called inmate John Tompkins⁸ (Trial Tr. 372), and former inmate Doug Swisher (Trial Tr. 450). Both appeared in street clothes. Their testimony corroborated several of Gibson's witnesses who testified in prison attire and shackles. Neither had anything to gain by lying. In fact, Swisher had been released on parole and was working. (Tr. at 451.)

The jury knew that the State's incarcerated witnesses had been offered generous plea bargains in exchange for their testimony. Notwithstanding defense witnesses' attire, the jury had all of the information it needed to weigh each witness's credibility. Having rendered its verdict, this Court should not reevaluate the issue.

Nor could Gibson argue that his witnesses' garb undermined his credibility. Mr. Gibson was not in a position to pick and choose his associates any more than he was to pick and choose his witnesses. North Hall was not evenly divided between angels and devils. Gibson did not shun the good to associate with the bad: they were all bad. One cannot reasonably believe that Gibson *voluntarily* chose to run with a "fast and dangerous crowd." Although a man may be judged by the

⁸Tompkins was incarcerated at Huttonsville when he testified. (Tr. at 372.)

company he keeps, a reasonable person should know that this same man's company is often the product of where he is kept.

The trial court ordered witnesses transported from Moundsville shackled and clothed in prison garb for safety reasons. (R. 452.) See Syl. Pt. 5, *State v. Allah Jamal W.*, 209 W. Va. 1, 543 S.E.2d 282 (2000) (court may order witnesses shackled for safety reasons). Although there is nothing from the trial transcript setting forth the trial court's reasoning, because defense counsel never asked for a hearing on the record, the court's decision is sound both substantively and procedurally. (*Id.*) The trial court had no constitutional obligation to set forth its reasons on the record. Certainly *McMannis* does not require it. Even *Allah Jamal W.*, a case decided after Gibson's trial, requires defense counsel to "timely move" that incarcerated defense witnesses appear in street clothes. Only after such a motion is filed must the trial court enter its reasons for requiring the witnesses to appear in prison garb and shackles. *Id.*, Syl. Pts. 4 and 5. Defense counsel never filed such a motion.

The trial court was faced with a sizeable group of convicted felons and little space to put them. The defense called 10 incarcerated witnesses. (Trial Tr. at 299.) Co-conspirators Gary Gillespie and David Morgan,⁹ were both housed in the maximum security wing at Moundsville. (Trial Tr. 342, 408.) William Wayne, Tony Kile, Robert Hall, and James Adkins,¹⁰ were all housed in Moundsville's general population. (Trial Tr. 347, 384, 395, 439.) The Cabell County courthouse was ill-equipped to handle such a large influx of convicted criminals. Upon their arrival these

⁹Mr. Morgan was convicted of three first degree murders. (Trial Tr. 419.)

¹⁰Mr. Adkins was convicted of two institutional murders. (Trial Tr. 443.)

witnesses were not locked in a secure holding place; they waited together in another courtroom.¹¹ (Trial Tr. 300.) When asked to instruct defense witnesses not to discuss their testimony the court noted, “We’re so very limited on how we can separate them each from the other.”

The court, as it was entitled to do, reasonably recognized that transporting ten inmates from the State’s only maximum security prison to Huntington, and placing them in one unsecured room presented substantial security concerns. Concerns more pressing than those resulting from two witnesses transported from step down medium security units such as Huttonsville, and the Preston County Jail.

If this Court were to find error, this claim, standing alone, does not justify relief. Indeed, the habeas court conceded as much. (Habeas Order at 12.) Unless both other grounds for relief are meritorious, there is no cumulative error. *See State v. Allah Jamaal W.*, 209 W. Va. at 5, 543 S.E.2d at 286 (Court has recognized “general prohibition” against forcing witnesses to testify in prison garb, “courts have not overturned convictions on the sole basis that a witness for the defendant was forced to wear prison attire while testifying”); *State v. McKinney*, 178 W. Va. 200, 207, 358 S.E.2d 596, 603 (1987) (defendant’s appearance in restraints without further error not sufficient under cumulative error doctrine).

As argued above, the trial court’s ruling was sound and reasonable.

Gruesome Photograph

The habeas court found that a single photograph illustrating the nature and location of the victim’s wound was so inflammatory as to “prejudice the Appellee as someone who *may* have been

¹¹The record does not suggest how many officers were guarding these prisoners.

involved in a violent act. The photograph unfairly placed a heavy burden on the Appellee in the eyes of the jury.” (Habeas Order at 11; emphasis supplied.)

Although this Court has not previously addressed this issue, federal courts have consistently found that gruesome photographs, standing alone, do not amount to constitutional error. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1032 (9th Cir. 1997) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)) (the introduction of gruesome photographs does not by itself raise the specter of fundamental unfairness such as to violate due process of law); *Cooley v. Coyle*, 289 F.3d 882, 893-94 (6th Cir. 2002).

This Court has ruled that trial court rulings on the admissibility of allegedly gruesome photographs are discretionary decisions, afforded substantial deference on appeal. Syl. Pt. 10, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) (The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse). “A trial court’s evidentiary rulings as well as its application of the Rules of Evidence are subject to review under an abuse of discretion standard.” Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

An abuse of discretion occurs when “a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake weighing them.” *State v. LaRock*, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996).

But, a trial court’s evidentiary rulings may deprive a defendant of his constitutional rights:

While ordinary rulings on the admissibility of evidence are largely within the trial court’s sound discretion, a trial judge may not make an evidentiary ruling which deprives a defendant of certain rights, such as the right to examine witnesses against

him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution.

Syl. Pt. 3, *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995).

The State introduced a single photo to illustrate State Medical Examiner Vasudeo Kashirsagar's direct testimony. (Trial Tr. 289.) Dr. Kashirsagar took the picture before he began Lehman's autopsy. He testified that Lehman died from a single stab wound to his right eye. He opined that the wound indicated that the knife entered the victim's eye upwards and straightened out once it penetrated the victim's brain.

Before its admission, defense counsel objected to the photo's introduction as unduly gruesome and unfairly prejudicial to her client. (*Id.*) After reviewing the photo the trial court found that it was not unduly gruesome, and in a reasonable exercise of its discretion, admitted it into evidence.¹² (Trial Tr. 290.)

The habeas court ruled that the trial court's decision to admit the photo was an abuse of discretion.¹³ Since Gibson did not contest Lehman's death, it found the photograph irrelevant and unfairly prejudicial. *See* W. Va. R. Evid. 403. This Court has never adopted such a narrow interpretation of the law. Conceding the victim's death does not obviate the need for photographs. Photographs may be admissible to prove a number of issues such as malice, premeditation, the manner of death, or the nature of the wounds. They may also be used for impeachment purposes.

¹²A xerox copy of the photo is appended to the end of the trial transcript.

¹³Gibson argued this same issue during trial, in post-trial motions, and in his direct appeal to this Court. The trial court denied Gibson's motion to exclude. This Court refused to hear Gibson's petition for appeal.

See State v. Coppen, 211 W. Va. 501, 566 S.E.2d 638 (2002) (*per curiam*) (gruesomeness alone does not justify exclusion of photos if the photos are more probative than unfairly prejudicial).

The trial court's decision was correct for a number of reasons. Although the photo is chilling, and there is the presence of blood, it is not unfairly prejudicial. It accurately depicted Lehman's wound, and illustrated the medical examiner's testimony.

The defense did concede that the victim was dead, but claimed that the homicide was justifiable. It alleged that Gary Gillespie killed Lehman in self-defense. Gillespie denied any premeditation or malice, claiming the act occurred on the spur of the moment. He also denied the existence of a conspiracy. (Trial Tr. 318-19.) Gillespie claimed that Lehman attacked him with a knife, and that he was forced to stab him. (Trial Tr. 314-15, 317-19.) He allegedly grabbed Lehman by the neck with his right hand, and brought the knife around in an arc with his left hand. (Trial Tr. 319.)

The photograph undermined Gillespie's testimony. The nature of the wound suggested a stabbing motion, not a slashing one. Dr. Kashirsagar testified that the knife entered the victim's right eye and penetrated into his brain. (Trial Tr. 292.) The doctor also testified that wound's angle suggested that knife stabbed upwards into the victim's eye and then backwards into his brain. (*Id.*) *See Hawkins v. State*, 594 So. 2d 181, 186 (Ala. Cr. App. 1991) (autopsy photo of stab wound above victim's left eye not inadmissible solely because of gruesome nature, when photo served to corroborate pathologists testimony as to nature of wound).

The photo also corroborated Bogard's and Wallace's testimony. Their credibility as to the existence of the conspiracy was intertwined with testimony that they witnessed the murder. Bogard testified that Gary Gibson, along with the four other co-conspirators gathered at the end of the first

tier after recreation. (Tr. 167.) Once Lehman arrived Gillespie grabbed him in a bear hug, and Perry made a stabbing motion towards Lehman's eye:

Q: With [Roger] Perry, what did you see happen? Show me.

A: He just made a swinging motion to the face.

Q: Up like this?

A: More like straight across to the side.

(Trial Tr. 160-61.) Defense counsel thoroughly cross-examined Bogard as to what he could and could not see. (Trial Tr. 168-75.) The jury was entitled to compare a photo of the victim's injury with Bogard's testimony to determine whether Bogard was in a position to see Lehman's murder.

Wallace Jackson testified that, just before the murder, Gary Gibson and his co-conspirators stood in front of his cell. After they discussed Mr. Lehman's murder, John Perry told everyone where to stand, including Gibson. (Trial Tr. 184-87.) Although Jackson was not asked whether he saw how Lehman was killed, he did state that Gary Gillespie grabbed him from behind and Perry stabbed him. He also testified that while this murder was taking place Gary Gibson stood in front of his cell door with a knife in his hand.

The defense claimed that Gillespie stabbed Lehman, not Perry. Indeed, the defense claimed that Perry had nothing to do with it. Bogard's and Wallace's testimony, corroborated by the nature of the wound depicted in the photo, corroborated their testimony as to the incident, and undermined Gillespie's version.

The nature of the wound was also circumstantial evidence of malice and premeditation. Clearly, a premeditated murder is probative as to the existence of a conspiracy. *See State v. Hanna*,

767 N.E.2d 678, 691 (Ohio 2002) (deliberate stab wound to the eye which penetrated to victim's brain evidence of intent to kill).

For the aforementioned reasons it is clear that the trial court's decision was a reasonable exercise of its discretion, and did not deny Gary Gibson his constitutional right to a fair trial.

Nor was its introduction unfairly prejudicial. "The term unfair prejudice, as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the evidence charged." *See generally* 1 J. Weinstein, M. Berger, & J. McLaughlin, *Weinstein's Evidence*, § 403[03] (1996). The evidence was fleeting in character, and was not shown to the jury until they began deliberations. (Trial Tr. 290.) Further, the evidence was not likely to distract the jurors from the central issue of the trial: whether Gibson participated in the conspiracy. If they were inflamed the natural target of their rage would be the killer, allegedly Gillespie. Defense counsel effectively cross-examined the State's pathologist, making it clear that the mere presence of the injury did not necessarily implicate Gibson. (Trial Tr. 295-96.)

Nor is the habeas court's conspiracy/murder distinction persuasive. Gary Gibson was charged with conspiracy to commit murder. Evidence of an overt act in furtherance of this conspiracy, *i.e.* a picture of a victim murdered in a manner suggesting malice and deliberation, is clearly relevant to both the murder charge, and the conspiracy charge. Although a defendant may be convicted of conspiracy before the objectives of the conspiracy are achieved, proof of the conspiracy's ultimate objective is relevant evidence of its existence. *See* 16 Am. Jur. 2d, *Conspiracy*, § 41 at 263-64 "[A] particular defendant's guilt in the conspiracy may be inferred not only from his or her actions but from the actions of his coconspirators."

Denial of Continuance

The habeas court claims that, “the final building block in the cumulative error wall concerns the [trial court’s] unreasonable denial of a continuance after the late disclosure.” (Habeas Order at 12.) Not only does the court fail to identify the substance of the testimony resulting in the error, it does not even disclose the name of this “key co-conspirator.”

“A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.” Syl. Pt. 2, *State v. Bush*, 163 W. Va. 168, 255 S.E.2d 539 (1979). The claim is only cognizable if the appellee can prove that the trial court’s decision caused the trial to be fundamentally unfair. See *United States ex. rel. Searcy v. Greer*, 768 F.2d 906, 913 (Ill. 1985) (“[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence . . . The answer must be found in the circumstances present in every case, particularly the representations presented to the trial judge at the time the request is denied.”) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)) (citations omitted).

The habeas court quoted Syl. Pt. 1, *State v. Johnson*, 179 W. Va. 619, 621, 371 S.E.2d 340, 342 (1988), to support its finding. *Johnson* does not apply to the case at bar. The defense did not request this information in discovery, nor is there any evidence in the record suggesting that the State withheld it in bad faith.

The State provided Gibson’s counsel with this allegedly vital information four days before trial. (Warden’s Petition for Appeal at 17.) Notwithstanding this, according to Gibson’s appellate counsel, trial counsel did not ask for a continuance until the day of trial. (*Id.* at 4.) See *Lisenba v. California*, 314 U.S. 219, 228 (1941) (denial of request for continuance did not violate defendant’s

due process rights when he was on notice of State's proposed testimony and did not ask for a continuance until the State had presented its case-in-chief). Gibson's counsel also found alternate means of obtaining this information. The habeas court did not find that this evidence constituted *Brady* material.¹⁴

Counsel's Discovery Motion, included requests for all statements made by the defendant, all *Brady* material, and all statements which the prosecutor intended to offer into evidence. (R. 55.) Counsel also filed a Motion to Suppress any statements made by co-conspirators. (R. 67.) There is no request for statements made by co-conspirators.

Neither the record, prior pleadings or the habeas court's order support a finding of prejudice. Indeed, the habeas court's order is not ordinary trial error. The record suggests that counsel received this information before trial, had an opportunity to review it, and obtained some of the information from other sources. The trial court soundly exercised its discretion in denying Mr. Gibson's request for a continuance.

C. THE STATE HABEAS COURT ERRONEOUSLY APPLIED THE CUMULATIVE ERROR STANDARD TO THREE NON-COGNIZABLE GROUNDS FOR HABEAS RELIEF.

Discussion.

Gibson did not originally raise this Ground for Relief. The habeas court, *sua sponte*, raised it. (Omnibus Hr'g Tr. at 18.) The habeas court reasoned that ordinary trial court error, not implicating constitutional interests, when combined may constitute a single constitutional ground

¹⁴Even if it was Gibson has conceded that the information was provided four days before trial, and that it was available from other sources.

for relief. The habeas court's order substantially expands the scope of cumulative error review in post-conviction proceedings.

The cumulative error doctrine is grounded in state and federal constitutional notions of due process and fairness. A trial is fundamentally unfair if "there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Kirkpatrick v. Blackburn*, 777 F.2d 272, 278-79 (5th Cir. 1985), *cert denied*, 113 S. Ct. 2928 (1993).

Admittedly, this Court has applied this doctrine to direct appeals. Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972) (cumulative error occurs where the trial court record shows that the cumulative effect of harmless errors prevent the defendant from receiving a fair trial); *State v. Brown*, 210 W. Va. 14, 29, 552 S.E.2d 404, 419 (2001). It has also applied it to civil cases. *See Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995). This Court has held that this doctrine should be applied sparingly.¹⁵ (*Id.*)

These rulings do not apply to the case at bar. This Court has repeatedly held, "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex. rel. McMannis v. Mohn*, *supra*. *See also State ex. rel. Phillips v. Legursky*, 187 W. Va. at 608, 420 S.E.2d at 744.

By aggregating three non-constitutional claims into one constitutional claim the habeas court provided Gibson with an opportunity to re-litigate issue involving ordinary trial court error settled a long time ago. Due process violations require proof of constitutional magnitude. Although these

¹⁵ And it has. Of the 45 civil and criminal cases the Warden found raising this issue only two were reversed. *See State v. Schermerhorn*, 211 W. Va. 376, 381, 566 S.E.2d 263, 268 (2002); *State v. Smith*, *supra*.

violations may be found harmless, there must be proof that they impacted, however slightly, a defendant's due process rights. *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 191 (1995).

Not all errors are reviewed the same. Harmless error is divided into constitutional and non-constitutional error. This Court distinguished them in *State v. Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190:

The harmless error doctrine requires this Court to consider the error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or nonconstitutional. It is also necessary for us to distinguish between an error resulting from the admission of evidence and other trial error. As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment. On the other hand, when dealing with the wrongful admission of evidence, we have stated that the appropriate test for harmless error articulated by this Court is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error.

(Citations and footnote omitted.)

Both this Court and the United States Supreme Court have ruled that most constitutional errors may be harmless. See *Arizona v. Fulminante*, 499 U.S. 299 (1991) (coerced confession subject to harmless error analysis); *State ex. rel. Grob v. Blair*, 158 W. Va. 647, 648, 214 S.E.2d 330, 331 (1975).

The habeas court's completely ignored the difference between harmless constitutional and harmless non-constitutional error. Instead, the court assumed that the cumulative effect of *three harmless non-constitutional* errors amounted to a single *constitutional* error. Non-constitutional errors, whether standing alone or accumulated, are not cognizable in habeas proceedings.

Constitutional errors are cognizable but may be harmless. In the case at bar, the habeas court erroneously applied the cumulative error doctrine to three non-constitutional, harmless errors.

For the above reasons, the Warden submits that alleged State trial court errors, which standing alone do not rise to the level of constitutional violations, should not be aggregated to entitle Gary Gibson to habeas corpus relief based on the theory of cumulative error.

D. MR. GIBSON RECEIVED A FAIR TRIAL.

The trial court's alleged errors were, in fact, reasonable exercises of its discretion. The habeas court claims that the admission of the photo and the appearance of the defense witnesses in shackles denied Gibson's due process rights.¹⁶ Neither this Court nor the United States Supreme Court have clearly defined the parameters of the fundamental fairness prong of due process. The United States Supreme Court provided the following:

As applied to a criminal trial, denial of due process is the failure to observe fundamental fairness essential to the very concept of liberty. In order to declare a denial of it we must find that the absence of fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. . . .

Lisenba v. California, 314 U.S. at 237.

The introduction of a single photo, and the failure to grant counsel's request for a continuance did not so infect this trial as to undermine the "very concept of liberty." (*Id.*) The requirement that defense witnesses appear in shackles is a closer call. But, even if this did result in error, the habeas court found it to be harmless.

¹⁶Clearly, the trial court's denial of Gibson's request for a continuance did not unfairly inflame the jury. There is no evidence that they even knew about this.

None of the inmate witnesses, whether shackled or not, were nice people. All were convicted felons, all were housed in the maximum security wing of the State's only maximum security jail. The jury knew this from the beginning.

E. THE HABEAS COURT'S FINAL ORDER AUTHORIZES THE UNCONDITIONAL RELEASE OF MR. GIBSON WITHOUT PROVIDING THE STATE WITH THE OPPORTUNITY TO RETRY HIM.

Discussion.

The habeas court's Final Order sets aside Gary Gibson's conviction, but does not specify whether Mr. Gibson's release is conditional or unconditional. West Virginia Code § 53-4A-7(c) clearly grants the trial court the authority to set aside the appellee's conviction; it also allows the Court to order a retrial. *See Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (habeas petition is broad and does not deny court's power to fashion appropriate relief other than immediate release); *Mitchem v. Melton*, 167 W. Va. 21, 23-24, 277 S.E.2d 895, 897 (1981) (habeas court is not limited to a particular form of relief).

"There is no absolute requirement that the court delay issuance of the final writ until after the State has been afforded a specific period to re-try the petitioner. The [United States] Supreme Court has indicated, however, that the state should be afforded a 'reasonable time' for conducting a retrial." *Latzer v. Abrams*, 615 F. Supp. 1226 (E.D.N.Y. 1985) (citing *Irvin v. Dowd*, 366 U.S. 717, 729 (1961)). In the case at bar Gibson's double jeopardy and sufficiency of the evidence claims were rejected by the habeas court. The errors, if such, were limited to the particular circumstances of that particular trial. Even if this Court affirms the State habeas court's order, there is no reason not to allow the State a reasonable period of time in which to retry Gibson.

VI.

CONCLUSION

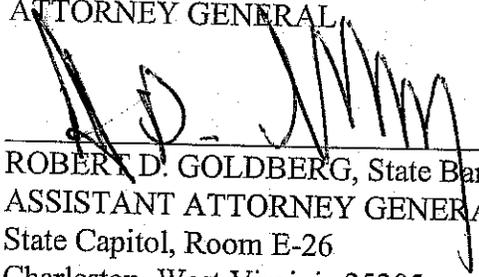
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be reversed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellant,

by Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

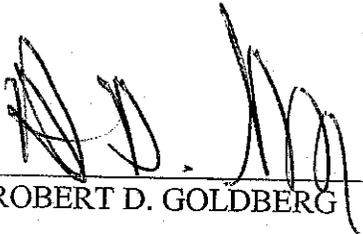


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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellant, do hereby certify that I have served a true and accurate copy of the foregoing "Appellant's Brief" upon counsel for Appellee by depositing said copy in the United States mail, with first-class postage prepaid, this 2nd day of May, 2007 addressed as follows:

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