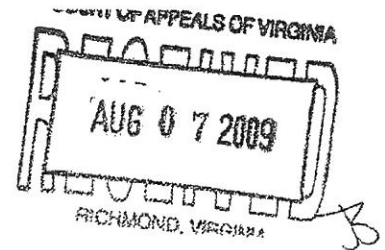


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IN THE
Court of Appeals of Virginia

RECORD NO. 0833-09-3

DONNA JEAN REEDY HOCKMAN

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent,

PETITION FOR APPEAL

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August 5, 2009

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I. STATEMENT OF THE CASE

The Petitioner was indicted on two charges arising from events that occurred on or about July 25, 2008. Docket Number 39919, charged the Petitioner with first-degree murder pursuant to Virginia Code Section 18.2-32, and Docket Number 39920 charged use of a firearm while committing murder pursuant to Virginia Code Section 18.2-53.1. (RN 1-2 (File #1); Tr. 01/26/09, p. 3, Ins. 8-24).

On October 21, 2008, co-counsel was appointed. (Tr. 10/21/08, p. 9, Ins. 16-23). On January 8, 2008, co-counsel for Petitioner withdrew due to a conflict of interest and the Petitioner moved for a continuance. (Tr. 01/08/09, p. 13, In. 1 through, p. 16, In. 21). The Court overruled the motion of Petitioner. (Tr. 01/08/09, p. 16, Ins. 17-21).

The case proceeded to a jury trial on January 26, 2009. Immediately prior to the commencement of trial, Counsel for Petitioner moved for a continuance which was denied. (Tr. 01/26/09, p. 16, In. 23 through p. 18, Ins. 13). After the presentation of the Commonwealth's case-in-chief, the Court denied the Petitioner's Motion to Strike. (Tr. 01/29/09, p. 4, In. 22 through p. 9, In. 3). After presenting evidence, the Petitioner renewed her Motion to Strike. (Tr. 01/29/09, p. 205, In. 18 through p. 208, In. 3). The Court denied the Petitioner's second Motion to Strike. (Tr. 01/29/09, p. 208, Ins. 4-12). After closing argument, the jury found the Petitioner guilty of the

Indictments. (Tr. 01/30/09, p. 5, In. 24 through p. 6, In. 10). The jury proceeded to sentence the Petitioner to imprisonment for life on Docket Number 39919, and imprisonment for three years on Docket No. 39920. (Tr. 01/30/09, p. 36, Ins. 1-16).

Prior to sentencing on March 17, 2009, and after argument thereon, the Court overruled Petitioner's Motion to Set Aside the Jury Verdict. (Tr. 03/17/09, p. 4, In. 1 through p. 28, In. 20). The Court imposed the sentence recommended by the jury with the addition of a three year suspended sentence for a period of post-release supervision. (Tr. 03/17/09, p.57, Ins. 1-20). The Petitioner subsequently filed a Notice of Appeal (RN 311-312 (File#2)).

II. QUESTIONS PRESENTED

- A) WAS THERE SUFFICIENT EVIDENCE FOR THE COURT TO CONVICT THE PETITIONER OF THE INDICTMENTS? (Tr. 01/29/09, p. 4, In. 22 through p. 9, In. 3)(Tr. 01/29/09, p. 205, In. 18 through p. 208, In. 12) (Tr. 03/17/09, p. 4, In. 10 through p. 7, In. 20; p. 23, Ins. 2-14; p. 28 Ins.9-14).**
- B) DID THE COURT ERR IN DENYING A MOTION TO CONTINUE THE MATTER AFTER CO-COUNSEL FOR PETITIONER WAS REMOVED DUE TO A CONFLICT OF INTEREST? (Tr. 01/09/09, p. 12, In. 18 through p. 14, In. 14; p. 16, In. 3-21; p. 17, In. 18-25)(Tr. 01/26/09, p. 16, In. 23 through p. 17, In. 2; p. 18 Ins. 2-14)(Tr. 03/17/09, p. 8, In. 6 through p. 9, In. 9; p. 23, In. 14 through p. 24, In. 8; p. 28 Ins. 9-14).**
- C) DID THE COURT ERR IN ALLOWING IRRELEVANT TESTIMONY OF JEFF SMITH REGARDING A WAGER OF A SEXUAL NATURE? (Tr. 01/28/09, p. 200, In. 15 through p. 203, Ins. 10).**

III. FACTS

The Petitioner, Donna Jean Reedy Hockman, met the decedent, Dustin Stanley in February 2008. (Tr. 01/29/09, p. 10, In. 24). The relationship started out well with the Petitioner getting along with the Stanley family. (Tr. 01/29/09, p.11, In. 18 through p. 12. In. 16). In March 2008, Stanley began staying the night at Petitioner's residence frequently. (Tr. 01/29/09, p. 14, Ins. 19-24). Petitioner resided there as well with her son and her daughter would stay on weekends. (Tr. 01/29/09, p. 15, Ins. 3-19).

In April 2008, the relationship began to change when Petitioner confronted Stanley about the possibility of his being a confidential informant and thus around drugs. (Tr. 01/29/09, p.18, In. 22 through p. 19, In. 19). While Stanley said he was not an informant, Petitioner was unsure and used a tape recorder to confirm this. (Tr. 01/29/09, p. 20, In. 3, 12-14). Stanley became angry about this and would curse and threaten the life of the Petitioner. (Tr. 01/29/09, p.22, Ins. 10-23).

In May 2008, Stanley began to physically abuse the Petitioner. (Tr. 01/29/09, p.23, Ins. 2-5). He punched her and she bled over the console and steering wheel of her car. (Tr. 01/29/09, p. 23, In. 22 through p. 24, In. 1). Brandon Harter, a prosecution witness saw the aftermath of this attack as there was still blood in her vehicle. (Tr. 01/29/09, p. 25, Ins. 6-10). After

the attack, Stanley dared Petitioner to call the police and said they would do nothing since he was an informant. (Tr. 01/29/09, p. 24, Ins. 6-10).

Stanley's mother testified that Petitioner told her that she had been accidentally hit by Stanley while he was drunk. (Tr. 01/29/09, p. 199, Ins. 5-19).

The abuse continued into June 2008, when Stanley bashed the Petitioner's head into a bed board after another argument on June 8th. (Tr. 01/29/09, p., In. 3-25). The attack left the Petitioner bloody and she was able to photograph her injuries. (Tr. 01/29/09, p. 27, Ins. 4-12; Def. Ex. 4, 5, 6, 7). The Petitioner did not call police as Stanley threatened her life if she did so. (Tr. 01/29/09, p. 30, Ins. 11-13). Later in the month, Stanley attacked Petitioner again by wrapping a telephone cord around her neck and brandishing a knife. (Tr. 01/29/09, p. 31, Ins. 15-25). In another instance, Stanley grabbed the Petitioner and left a bruise on her arm. (Tr. 01/29/09, p. 32, In. 15 through p. 33, In. 3). He then threatened to put Petitioner in a body bag. (Tr. 01/29/09, p. 33, Ins. 4-5). After yet another one of these attacks on June 21, 2008, Petitioner contacted the police, and they did not arrest Stanley, thus having the Petitioner rely on a trespass notice. (Tr. 01/29/09, p.39, In. 1 through p. 41, In. 25; Tr. 01/28/09, p.121, Ins. 13-116, p. 125, Ins. 1-4). Petitioner believed that Stanley was not arrested because he was an informant for law enforcement. (Tr. 01/29/09, p. 42, Ins. 1-7).

Stanley damaged Petitioner's car on other occasions as he threw a phone at it, kicked the door, and tore the inside panel of a door off. (Tr. 01/29/09, p. 57, Ins. 3-14). Stanley also damaged the residence of Petitioner by kicking and punching holes in walls. (Tr. 01/29/09, p. 58, Ins. 6-10).

Despite these attacks and threats the Petitioner stayed in the relationship because she was fearful of Stanley and she also hoped that he would get help. (Tr. 01/29/09, p. 33, Ins. 11-19). Even with such bad events, the Petitioner noted that there were still some good times in the relationship. (Tr. 01/29/09, p. 34, Ins. 2-7).

Stanley relied on Petitioner to provide him a cell phone and the use of her vehicles. (Tr. 01/29/09, p. 16, Ins. 7-12; p. 17 Ins. 14-20; p. 18, Ins. 2-6). He also had difficulty paying his child support. (Tr. 01/29/09, p.13, Ins. 8-15). Stanley, at 234 pounds, and 72 inches tall, was also considerably larger than Petitioner who weighed 150 pounds. (Tr. 01/29/09, p.15, Ins. 23 through p. 16, In. 3; Tr. 01/28/09, p. 334, Ins. 23-24).

Many friends and family of the Petitioner testified that they would see marks and bruising on her as well as damage to property. (Tr. 01/29/09, p. 149, Ins. 1-22; p.153, Ins. 3 through p. 154; p. 189, In. 1-8, p. 193, Ins. 1-13, Tr. 01/26/09, p. 217, Ins. 4-22). Petitioner was able to confide in a close friend, Carrie Rodocher, that she suffered abuse from Stanley and Rodocher witnessed bruising on her. (Tr. 01/29/09, p. 166, Ins. 21-22; p.

167, In. 7 through p. 168, In. 11). Another friend Lucinda Brill, observed bruising on her arms at a party. (Tr. 01/29/09, p. 173, In. 4-10). At a later date, Brill observed bruising around Petitioner's eye as well as cut on her head, and Petitioner confirmed to her that Stanley had gotten physical with her. (Tr. 01/29/09, p. 174, In. 8 through p. 175, In. 11). Yet another friend, Jacqueline Harris, observed Stanley grab her arm forcibly and whisk her to face him when he was unhappy about an order of chinese food that they had ordered. (Tr. 01/29/09, p. 181, In. 10 through p. 182, In. 15). Harris noted that Petitioner looked scared and embarrassed. (Tr. 01/29/09, p. 182, Ins. 12-13).

Stanley had been aggressive toward Petitioner by pushing her in front of Kristopher George, her son, to the point that George called the police. (Tr. 01/27/09, p. 8, Ins. 11-23). Stanley had also threatened George on a few occasions and had done it even when Petitioner was present. (Tr. 01/27/09, p. 12, Ins. 6-16).

In the few days before the shooting the relationship deteriorated. Stanley threatened to hurt Petitioner's son, became angry when she shut off his cell phone, and began to threaten Petitioner. (Tr. 01/29/09, p. 49, Ins. 7-23). One of the threats was that he would gut her like a deer. (Tr. 01/29/09, p. 49, Ins. 23-25). The Petitioner investigated the purchase of a taser gun at a Pawn Shop. (Tr. 01/29/09, p. 50, Ins. 5-10). The conversation turned to firearms and ammunition. (Tr. 01/29/09, p. 51, Ins. 2-7).

When Petitioner was unable to purchase a firearm at that establishment she purchased a firearm and ammunition at the Rockingham Co-op. (Tr. 01/29/09, p. 53, Ins. 7-25). Petitioner had never owned or used a gun before. (Tr. 01/29/09, p. 54, Ins. 6-12). She had a friend, Brandon Harter, train her at his home, and he loaded the weapon for her. (Tr. 01/29/09, p. 55, Ins. 5-19).

Stanley slept over at the Petitioner's residence on July 24, 2009, the night before the shooting which occurred on the morning of July 25, 2009. (Tr. 01/29/09, p. 60, Ins. 3-18; 01/26/09, p. 283, Ins. 1-11). When he woke that morning he became enraged over a dispute having to do with personal items. He started screaming, cursing and followed Petitioner to the garage where he kicked and punched her truck. (Tr. 01/29/09, p. 61, In. 12 through p.62, In. 11). Petitioner was scared and Stanley grabbed her, punched at her, and pushed her to the ground. (Tr. 01/29/09, p. 62, Ins. 13-25).

They went inside and then came back to the garage as Petitioner thought Stanley was agreeable to be driven away from the residence. (Tr. 01/29/09, p.63, Ins. 8-16). Stanley, who had a knife, grabbed her by the neck, drug her to the driveway and stated that he would kill her son and then kill her. (Tr. 01/29/09, p. 63, Ins. 16-25). Petitioner believed the knife to be open. (Tr. 01/29/09, p. 63, In. 22 through p. 64, In. 7). The Petitioner was able to identify the knife in photographs. (Tr. 01/29/09, p. 64, Ins. 1-9).

Stanley then took off towards the house. (Tr. 01/29/09, p. 64, ln. 14). The Petitioner believed he was going to kill her son so she popped the trunk of her car open and grabbed her firearm. (Tr. 01/29/09, p. 64, lns. 15-22). She believed that her son was still in bed. (Tr. 01/29/09, p. 63, lns. 1-7). The Petitioner did not remember the shooting, stating that she went black and awoke in the house where her son took the gun from her hands. (Tr. 01/29/09, p. 64, ln. 22 through p. 65, ln. 11). She would later describe to Investigator Hensley of the Rockingham County Sheriff's Office, one of the first responders, that she snapped. (Tr. 01/29/09, p. 65, lns. 17-20). The Petitioner testified that she fired the gun because she believed Stanley would kill her and then kill her son. (Tr. 01/29/09, p. 75, lns. 8-10).

Petitioner's son, Kristopher George, came from his bedroom to the scene of the shooting and he did not observe a knife in Stanley's hand or any injuries on Petitioner. (Tr. 01/26/09, p. 285, lns. 14-20). He observed, Petitioner standing in front of Stanley with the gun in her hand. (Tr. 01/26/09, p. 284, lns. 15-23). Stanley's cause of death was five gunshot wounds. (Tr. 01/28/09, p. 335, lns. 4-10).

The Petitioner decided not to contact police because she did not think that they would believe her. (Tr. 01/29/09, p. 66, lns. 3-9; Tr. 01/26/09, p. 284, lns. 20-25). According to George he asked her to call the police as it took Stanley two minutes to die. (Tr. 01/26/09, p. 285, lns. 3-13). Instead she contacted John Metzler, and she and her son attempted to clean up the

1-15). Hensley saw a bruise on her face. (Tr. 01/29/09, p. 72, Ins. 17-23; Tr. 01/26/09, p. 237, Ins. 2-11). Petitioner eventually stated that Stanley was in the house and that she was the victim of domestic violence. (Tr. 01/26/09, p. 234, Ins. 20-24, In.). Furthermore, she made a comment about making a decision in a split second and that she did not plan any of this. (Tr. 01/26/09, p. 235, In. 15 through p. 236, In. 8).

Petitioner told the magistrate that Stanley had made threats and she shot him in the back because he had said that he was going to kill her son. (Tr. 01/26/09, p. 274, Ins. 1-11). Photographs of the Petitioner, taken later by her counsel, reveal bruises to her face and body that were caused by Stanley in his attack immediately prior to the shooting. (Tr. 01/29/09, p. 73, In. 5 through p. 74, In. 25; Def Ex. 17-21).

On October 21, 2008, Counsel for Petitioner made a motion for co-counsel to be appointed due to the large amount of discovery in the case. (Tr. 10/21/08, p. 3, In 18 through p. 6, In 4). That motion was granted. (Tr. 10/21/08, p. 9, Ins. 16-23). On January 8, 2008, co-counsel for Petitioner had to withdraw due to a conflict of interest and the Court granted the request. (Tr. 01/8/09, p. 3, Ins. 14-24; p. 16, Ins. 1-2, 20). Counsel noted that co-counsel had to stop work three weeks before that hearing and that he needed more time to properly prepare the defense of Petitioner. (Tr. 01/08/09, p. 13, In. 1, through p. 14, In. 14). Counsel also noted to the Court that laboratory analyses were coming in during the time of the

conflict. (Tr. 01/08/09, p. 13, In. 24, through p. 14, In. 2). The Court overruled the motion. (Tr. 01/08/09, p. 16, Ins. 3-20). Counsel subsequently made the same motion on the day of trial for the same reasons argued previously and that motion to continue was again overruled. (Tr. 01/26/09, p. 16, In. 23 through p. 17, In. 2; p. 18 Ins. 2-14).

On the third day of trial, the Commonwealth called Jeff Smith, the boss of the Petitioner to testify. Over objection of the Petitioner, he was permitted to testify to a wager between Petitioner and Stanley. (Tr. 01/27/09, p. 200, In. 15 through p. 203, In. 13). The Commonwealth had argued that it showed the obsessive and possessive nature of the relationship. (Tr. 01/27/09, p. 202, Ins. 11-12). Smith had heard them discuss a wager that Petitioner won and as a consequence Stanley would have to perform cunnilingus on her. (Tr. 01/27/09, p. 204, In. 7-19).

V. ARGUMENT

A) THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE PETITIONER OF THE INDICTMENTS BECAUSE THE KILLING WAS IN THE DEFENSE OF ANOTHER, WAS WITHOUT MALICE AND WAS NOT "WILLFUL, PREMEDITATED, AND DELIBERATE."

There was insufficient evidence to convict the Petitioner of the indictments. "On review of a challenge to the sufficiency of the evidence,

we view the evidence in the light most favorable to the Commonwealth, the prevailing party, and grant to it all reasonable inferences fairly deducible therefrom." Robertson v. Commonwealth, 31 Va. App. 814, 820, 525 S.E. 2d 640, 643 (2000), see Commonwealth v. Jenkins, 255 Va. 516, 521, 499 S.E.2d 263, 265 (1998). While this Court will read the record with all inferences in favor of the Commonwealth, this Court must determine there was insufficient evidence to convict the Petitioner of the indictments.

The Petitioner acted out of the defense of another, her son. Therefore, the jury would have to find that there was a reasonable doubt as to whether she had committed any grade of homicide beyond a reasonable doubt. "The limitations on the right to defend one's self are equally applicable, with slight modifications, to one's right to defend another. One must reasonably apprehend death or serious bodily harm to another before he or she is privileged to use force in defense of the other person. The amount of force which may be used must be reasonable in relation to the harm threatened." Foster v. Commonwealth, 13 Va. App. 380, 385-386, 412 S.E. 2d 198, 202 (1991).

The Petitioner testified that she shot Stanley because she believed that he was going to kill her child, Kristopher George, and then he would kill her. Stanley was far larger than the Petitioner, and she believed him to be armed with a knife. In fact, a knife was found in his pocket after the

shooting. Stanley had made threats to harm George before and Petitioner had certainly seen that he was capable of violent acts due to the abuse she suffered at his hands. Stanley had likewise used a knife before by brandishing it to John Metzler after the two had a fight. The Petitioner believed that her son was still in bed when the altercation began. It would be difficult for George to be more vulnerable to a knife wielding assailant in that state and therefore, Petitioner had to act to protect him. The Petitioner had no other reasonable alternative than to use deadly force to stop Stanley. Stanley, a large man, had already attacked her, was armed, threatened to kill her child, and headed in that direction to follow through on his threat.

Neither the Petitioner nor her son was at fault in bringing on the difficulty. As such, it is clear that the shooting of Stanley was justified, and the Petitioner is not guilty of any homicide, nor the additional indictment charging use of a firearm in the commission of murder. Virginia Code Section 18.2-53.1, 1950, as amended, prohibits the use of a firearm in the commission of enumerated crimes. Certainly, a judgement can be entered on a compound offense although a person is found not guilty of the underlying offense. Reed v. Commonwealth, 239 Va. 594, 598, 391 S.E.2d 75,77 (1990). In this case however, the shooting was justifiable and the defense applies to that indictment as well.

Even if this Court determines that there was sufficient evidence to support some level of homicide, the jury could find no more than voluntary manslaughter. The element that elevates an intentional killing from voluntary manslaughter to second-degree murder is malice.

Petitioner relied on the theories of defense of self and others at the trial. While the jury did not make a finding in favor of these defenses, they still play an important role in discerning whether the jury had enough evidence in the case to determine that the Petitioner acted with malice.

"Malice is evidenced either when the accused acted with a sedate, deliberate mind, and formed design, or committed any purposeful and cruel act without any or without great provocation." Branch v. Commonwealth, 14 Va. App. 836, 841, 419 S.E.2d 422, 426 (1992), *citing* Essex v. Commonwealth, 228 Va. 273, 280, 322 S.E.2d 216, 220 (1984). "Malice and heat of passion are mutually exclusive; malice excludes passion, and passion presupposes the absence of malice." Barrett v. Commonwealth, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986). "In order to determine whether the accused acted in the heat of passion, it is necessary to consider the nature and degree of provocation as well as the manner in which it was resisted." Robertson v. Commonwealth, 31 Va. App. 814, 823 525 S.E.2d 640, 645 (2000), *quoting* Miller v. Commonwealth, 5 Va. App. 22, 25, 359 S.E.2d 841, 842 (1987).

The Petitioner had suffered greatly at the hands of Stanley prior to the day of the shooting. Weeks before, she had contacted the police who did not arrest Stanley despite the marks on her that friends observed and she received no help at the magistrate's office. She had other friends such as Jacquelyn Harris who directly observed Stanley manhandle the Petitioner during an evening get-together. Other friends saw the remnants of his violent acts as they observed bruising and a black eye on the Petitioner. Stanley had made threatening statements directed at her and her children. Finally, he had threatened a friend of hers by brandishing a knife he concealed in his waistband. Petitioner had talked to friends of her fear of Stanley.

In this crucible of violent acts, stood the Petitioner, a mother of two children who had never used a firearm before. An initially loving and respectful relationship had devolved within a short time frame into a relationship of power struggles and assault. Petitioner herself noted the feelings she had for Stanley, but her testimony clearly outlined the fear she felt in the few days before the shooting. The relationship was falling apart and Stanley's behavior became more and more erratic.

On the day of the shooting, Stanley, far larger than Petitioner, became enraged and attacked her in the garage of her residence. The Petitioner was thrown to the ground and Stanley told her he would kill her child. Pictures reveal bruises and injuries from this assault. Fortuitously,

the pistol she had purchased the day before, was in the car near where she lay. She was able to grab the weapon and shoot Stanley as he entered the home from the garage area, bent on harming her son. It was in that garage that she "snapped" under this fear, as she told Investigator Hensley and John Metzler. It was here that she shot Stanley five times because he was going to kill her son as she told the magistrate. When her son saw her, she was standing over Stanley and she thought no one would believe her.

The only conclusion the jury as the fact-finder could come to in the case was that Stanley through his actions and threats had raised the heat of passion in the Petitioner. For it was not just words alone, but assault, then threats and finally his walking to the house to make good on his threats that enflamed her passions. The timing of Stanley's violent acts and the shooting are nearly concurrent and there was no time for that heat of passion to reasonably abate. Furthermore, the specter of Stanley attacking and possibly killing her son could only have awoken the maternal drive to save her child. The Petitioner noted that she believed her child was asleep. Therefore, he was in such vulnerable state that the heat of passion made her act. Whether we call it assault, mutual combat, or defense of others, at its very essence Stanley's actions that morning called up the heat of passion that dictates the reversal of her first-degree murder conviction. Where heat of passion can not reasonably cool, there is no malice and when there is no malice there is no murder.

The evidence from the witnesses present in the house that morning, from police officers to Kristopher George and the Petitioner herself reveal evidence that is solely consistent with voluntary manslaughter. The Petitioner told an Investigator that she "snapped". The Petitioner testified that she "went black" during the shooting. These are the words of someone who at most, has committed a voluntary manslaughter.

Furthermore, as the evidence does not support a conviction of murder, there is insufficient evidence to convict the Petitioner of the charge of using a firearm in the commission of murder. Therefore that indictment should be dismissed as well. The Petitioner does again note that she is aware of Reed, mentioned above, having to do with inconsistent verdicts. Assuming the Court finds no merit in the contention of a justifiable shooting at this point in argument, the Petitioner would note that there still must be sufficient evidence of a murder as enumerated in Virginia Code Section 18.2-53.1, 1950, as amended. to sustain the conviction. As argued thus far, there is not sufficient evidence to find that element.

Should this Court determine that the jury had sufficient evidence to determine that malice existed at the time of the offense, the evidence presented in the case dictates that a jury find that the killing was not performed in a willful, premeditated and deliberate manner as required to find murder in the first degree.

Certainly, the evidence is clear that she killed Dustin Stanley. She noted that she had intended to purchase a firearm the day before the shooting as she did not have a weapon to defend herself with. She had visited a pawn shop first, but ultimately wound up at the Rockingham Co-op where she purchased the weapon and ammunition that she ultimately used. Petitioner had never used a firearm before, and had to be trained in its use.

While the Commonwealth will likely rely on case law emphasizing that willful, premeditated and deliberate mind-set can arise in an instant, this case involved uncontested evidence showing the lack of that cognition.

The basics of the law of homicide are instructive. "The test of murder is malice. Every malicious killing is murder either in the first or second degree--the former if deliberate and premeditated, and the latter if not. Furthermore, there is a Prima facie presumption of malice arising from the mere fact of a homicide, but there is no presumption therefrom of deliberation and premeditation. That is merely another way of stating the familiar rule of law that every homicide is Prima facie murder in the second degree, and that the burden is on the accused to reduce, and on the commonwealth to elevate, the grade of the offense. . . ." Perkins v. Commonwealth, 215 Va. 69, 73, 205 S.E. 2d 385, 387 (1974) citing Bradshaw v. Commonwealth, 174 Va. 391, 398, 401, 4 S.E. 2d 752, 755, 756 (1939).

First and foremost, the Commonwealth went to great pains to elicit the struggles of the Petitioner to hide the incident and thus argue that this element had been proven. It is just this uncontested evidence however that shows that this was no willful, premeditated, or deliberate killing. After the shooting the Petitioner was in disbelief of what had occurred. In addition, she had no plan to dispose of the body. The Commonwealth argued that the purchase of the firearm as well as the training show her willful, premeditated, and deliberate intent to kill. If that intent was there a plan would also have been in place to conceal the shooting. It is apparent from the bungled attempts to deal with Stanley's body that this plan and the commensurate element of "willful, premeditated, and deliberate" did not exist.

In addition, the facts argued above having to do with heat of passion also are factors that dictate that this was not a willful, premeditated, and deliberate act. The statements of the Petitioner regarding blacking out, and "snapping" again show this element did not exist. Therefore, the jury could find the Petitioner guilty of no more than murder in the second degree.

B) THE COURT ERRED IN DENYING COUNSEL FOR PETITIONER'S MOTION TO CONTINUE.

"A trial court's ruling on a motion for a continuance will be reversed on appeal only if it is plainly erroneous and upon a showing of abuse of


discretion and resulting prejudice to the movant." Butler v. Commonwealth, 264 Va. 614, 621, 570 S.E.2d 813, 817 (2002), quoting Mills v. Mills, 232 Va. 94, 96, 348 S.E.2d 250, 252 (1986).

On January 8, 2009, Co-counsel for Petitioner had to be removed due to a conflict of interest that arose in the case. Co-counsel had been appointed in the case due to the unusual amount of discovery in the case. Counsel for Petitioner noted the timing of the conflict in relation to the trial. Co-counsel had to stop assisting in the preparation of the case three weeks prior to the motion to continue on January 8, 2009. Counsel noted that laboratory analysis were coming in and that a continuance was needed. Ultimately, counsel noted that he would be unprepared to go to trial. Despite these arguments the Court abused its discretion and overruled the objection. Replacing co-counsel with another fairly new attorney did not change this need, and counsel again moved for continuance on the day of trial.

Petitioner was left with counsel who plainly advised the Court of the need for continuance. This, in a case where the Court previously granted the motion which noted that co-counsel was required due to the complexity of the case. The conflict that arose was unforeseeable to the parties and the Court and the Petitioner was prejudiced in the ruling because her counsel required more preparation time.

WHEREFORE the Petitioner respectfully requests that the Petition for Appeal be granted for the reasons outlined above.

DONNA JEAN REEDY HOCKMAN

By: 
Counsel

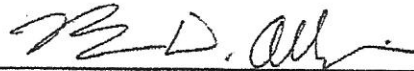
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VSB 38560

CERTIFICATE

I hereby certify that:

- 1) One (1) true copy of the foregoing Petition for Appeal was mailed by first-class postage, prepaid on this 5th day of August, 2009, to Marsha L. Garst, Commonwealth's Attorney of Rockingham County, 53 Court Square, Suite 210, Harrisonburg, Virginia 22801.
- 2) The original Petition for Appeal and three (3) true copies of the foregoing Petition for Appeal were mailed by first class certified mail, return receipt requested, postage prepaid on this 5th day of August, 2009, to the Court of Appeals of Virginia, Attn: Cynthia L. McCoy, Clerk, 109 North Eighth Street, Richmond, Virginia 23219.
- 3) Counsel requests oral argument as to reasons the appeal should be granted.

This 5th day of August, 2009.



Bruce D. Albertson