
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101510

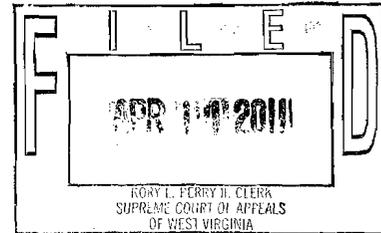
STATE OF WEST VIRGINIA *ex rel.*
CHARLES L. MITTER,

Petitioner,

v.

DAVID BALLARD, WARDEN,

Respondent.



BRIEF OF THE RESPONDENT

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BRIEF OF THE RESPONDENT

Comes now the Respondent, David Ballard, Warden, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files the within Brief in response to the issues raised in the Petition for Appeal.

I.

ASSIGNMENTS OF ERROR

1. Whether the court below erred in concluding that the performance of Petitioner's second habeas counsel was not ineffective under the test established by *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), when counsel failed to call first habeas counsel to testify at the omnibus hearing.

2. Whether the court below erred in concluding that the performance of Petitioner's second habeas counsel was not ineffective under the *Strickland/Miller* test, when counsel failed to notify the Petitioner of the court's adverse ruling.

3. Whether the court below erred in concluding that the performance of Petitioner's second habeas counsel was not ineffective under the *Strickland/Miller* test, when counsel failed to notify the Petitioner of his right to appeal from the court's adverse ruling.

4. Whether the court below erred in denying the Petitioner's Rule 59/60 Motion to Alter or Amend Judgment and/or Relief from Judgment.

II.

STATEMENT OF THE CASE

This is an unusual case in which the Petitioner appeals from the lower court's denial of his third petition for writ of habeas corpus. The allegation in the writ is that the Petitioner received ineffective assistance of counsel in his second habeas corpus proceeding, which in turn alleged ineffective assistance of counsel in his first habeas proceeding, which in turn alleged ineffective assistance of counsel at trial.

The real gravamen of the Petitioner's claim, after one works his or her way through the labyrinth of the record, is that after nineteen years and eight lawyers, two of whom have apparently been disbarred, the Petitioner has never had a full and fair opportunity to litigate his primary claim: that he received ineffective assistance of counsel at his trial. In order to fairly evaluate the decision of the court below that is at issue in this case, it is necessary to "peel back the layers of the onion," so to speak.

A. THE UNDERLYING CASE

In the October, 1991 term of the Preston County Grand Jury, the Petitioner was indicted on nine counts of 1st degree sexual assault and seven counts of sexual abuse by a custodian against his stepdaughter, BGO; and seven counts of 1st degree sexual assault and five counts of sexual abuse by a parent against his daughter, ADM. W. Va. Code §§ 61-8B-3 & 61-8D-5. **(R2, Opinion Letter of 4/18/07, p. 1.)**¹

The Petitioner was represented at trial by Gregory Michael, who, as will be more fully developed herein, is the key actor in this case, and about whom we know virtually nothing.²

At the close of the State's evidence at trial, the State dismissed the twelve counts involving ADM, conceding that the evidence was insufficient to convict without the testimony of ADM. **(R1, p. 195.)**³ Trial proceeded on the sixteen counts involving BGO.

¹After the instant appeal was filed, this Court granted the Respondent's motion for submission of certain documents relating to the Petitioner's first and second habeas corpus proceedings. Said documents were forwarded to the Court by the Circuit Clerk of Preston County, and references thereto are designated as "R1 at __," records from the first habeas proceeding, and "R2 at __," records from the second habeas proceeding. References to the records from the third habeas proceeding, which were submitted with the instant Petition for Appeal, are designated as "R3 at __."

It should be noted that the documents contained in R1 and R3 are paginated, except for the transcripts included therein. The documents contained in R2 are not paginated. Therefore, undersigned counsel will refer to the R1 and R3 documents by page number, other than the transcripts, while referring to the R2 documents by name.

²In this regard, all the Respondent can ascertain – this from a review of the West Virginia State Bar Membership Directory – is that in 2011 Mr. Michael is no longer a member of the Bar, either active or inactive. Although the failure to call Mr. Michael as a witness in the Petitioner's first habeas proceeding on May 29, 2001 is the primary issue in this case, there is no indication in the record as to whether Mr. Michael was available to testify at that time.

³The State apparently elected not to call ADM as a witness because of her tender years and the recommendation of a psychologist that testifying could be harmful to her.

On January 20, 1992, the Petitioner was convicted on three counts of 1st degree sexual assault and one count of sexual abuse by a custodian, following which he received an effective sentence of 45-75 years in the penitentiary. (**Petition for Appeal, p. 1; R2, Opinion Letter of 4/18/07, pp. 1 & 2.**)

On or about September 24, 1992, the Petitioner filed his Petition for Appeal, which was denied by this Court on January 27, 1993. (**R1, p. 170.**)

B. THE FIRST HABEAS PETITION, 93-C-191

On June 24, 1993, the Petitioner filed a *pro se* petition for a writ of habeas corpus. (**R1, p. 2.**) Thereafter, seven years and three lawyers later,⁴ counsel James Flanagan was appointed to represent the Petitioner. (**R1, pp. 172-173.**) Mr. Flanagan filed an amended petition raising ten grounds for relief. (**R1, pp. 90-120.**) An omnibus hearing was held which was brought on for hearing on March 16 and May 29, 2001. (**R1, Tr. Of 3/16 & 29, 2001.**) At the hearing, in which the primary issue was ineffective assistance of trial counsel, Mr. Flanagan did not call trial counsel, Gregory Michael, as a witness. Rather, Mr. Flanagan argued solely on the basis of trial counsel's time sheets that there had been insufficient investigation and preparation of the Petitioner's case; and argued solely on the basis of the trial transcript that trial counsel was ineffective in failing to move for a mistrial, failing to object to evidence, failing to call witnesses on the Petitioner's behalf, and the like. Mr. Flanagan did call three witnesses, the Petitioner's sister, brother and sister-in-law, who testified that the Petitioner was a caring family man who appeared to have a good relationship

⁴The court originally appointed attorney Tim Sigwart in 1993 to represent the Petitioner. Thereafter, Mr. Sigwart was replaced by attorney Joe Moses in February, 1995, who was replaced by attorney Ed Rollo in October, 1995, who was replaced by James Flanagan in June, 2000. (**R2, Opinion Letter of 10/18.02, pp. 2-5.**)

with his stepdaughter and his children. They also testified, albeit by inference, that the case against the Petitioner had been drummed up by his mother-in-law, who had previously reported him to CPS on what were, in the witnesses' opinion, bogus charges.

By Opinion Letter and separate Order, both dated October 18, 2002, the habeas court denied relief. **(R1, pp. 169 & 210.)** Thereafter, in December, 2002, Mr. Flanagan was replaced by attorney John Brooks, and on July 18, 2003, the court vacated and re-filed its opinion in order to restart the time for appeal. **(R2, Corrective Order Denying Petitioner's Request for Habeas Corpus Relief.)** On January 29, 2004, Mr. Brooks filed a petition for appeal, which was denied by this Court on September 9, 2004. **(R3, Petition for Appeal, binder clipped to the back of the record; R2, Order denying Petition for Appeal.)**

C. THE SECOND HABEAS PETITION, 05-C-56

On or about April 11, 2005, the Petitioner filed a second *pro se* petition for a writ of habeas corpus, alleging (again) ineffective assistance of trial and appellate counsel, and ineffective assistance of counsel in his first habeas proceeding. **(R2, Order of 6/9/05, p. 1.)** The first issue was denied without a hearing,⁵ and the court appointed attorney Tim Houston to represent the Petitioner with respect to the second issue only. **(Id., p. 6.)** On January 5, 2007, an omnibus hearing was held. **(R2, Tr. of 1/5/07.)** No witnesses were called; Mr. Houston represented to the court that Mr. Flanagan, whose ineffectiveness in the first habeas proceeding was at issue, was now "homeless, goes from place to place, doesn't have a phone number or a residence and is unreachable even by [his wife]." **(R2, Tr. of 1/5/07, p. 9.)**

⁵The habeas court held that the claim of ineffective assistance of trial counsel had been finally adjudicated and was res judicata. **(R2, Order of 6/9/05, pp. 4-5.)**

By Opinion Letter and separate Order, both dated April 18, 2007, the court denied relief. **(R2, Opinion Letter of 4/18/07; Order of 4/18/07.)** Mr. Houston did not file an appeal, and the Petitioner claims that he was not informed of the court's opinion, let alone his right to appeal, until long after the appeal time had run. **(Petition for Appeal, Exhibits E, F, G & H; R3, pp. 65-70.)**⁶ Thereafter, attorney Melissa Giggenbach (present counsel) was appointed to represent the Petitioner in all post-conviction matters. **(R3, p. 43.)**

D. THE THIRD HABEAS PETITION, 10-C-10

On January 14, 2010, the Petitioner filed a third petition for writ of habeas corpus, together with a memorandum in support, alleging ineffective assistance of counsel in his second habeas proceeding. **(R3, pp. 1-21.)** On April 27, 2010, an omnibus hearing was held. **(R3, Tr. of 4/27/10.)** By Opinion Letter and Order both dated July 27, 2010, the court denied relief. **(R3, pp. 78, 92.)** On August 9, 2010, Petitioner filed a motion to alter or amend judgment, arguing that counsel had not put on any evidence concerning the performance of trial counsel or first habeas counsel on the good faith belief that the court had already ruled those issues to be res judicata. **(R3, p. 94.)**⁷ The

⁶Timothy Houston, counsel in the second habeas proceeding, disputes the Petitioner's claim that he was not informed of the court's ruling. During the omnibus hearing held in the third habeas proceeding, Mr. Houston testified that he notified the Petitioner both by phone and by letter of the court's ruling. **(R3, Tr. of 4/27/10, pp. 13-14.)**

⁷In fact, counsel was correct; the court had earlier ruled, relying on Syl. Pt. 4, *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), that "a prior omnibus habeas corpus hearing is re judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: Ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively." **(R2, Order of 6/9/05.)**

motion was denied without a hearing, the court noting that “it was the intent of the Court . . . to find and conclude that the Petitioner failed to meet the second ground of the *Strickland* test.” (R3, p. 98.)

This appeal followed.

III.

SUMMARY OF ARGUMENT

The habeas judge correctly concluded that second habeas counsel, Timothy Houston, did not provide ineffective assistance of counsel by failing to call first habeas counsel, James Flanagan, as a witness. There was ample evidence in the record that Mr. Houston tried to find Mr. Flanagan but was unsuccessful, since Mr. Flanagan had been disbarred, gone to rehab, and was now homeless. His whereabouts were unknown. Although Mr. Houston did not hire an investigator to aid in the search for Mr. Flanagan, his failure to do so was not ineffective within the *Strickland/Miller* test. Further, the habeas judge correctly concluded that the result would not have been different but for Mr. Houston’s failure to find Mr. Flanagan.

The habeas judge did not resolve the factual dispute as to whether Mr. Houston informed the Petitioner of the court’s adverse decision in the second habeas proceeding, and/or informed the Petitioner of his right to appeal. The court appears to have concluded that an appeal from the third habeas decision would be an effective substitute for an appeal from the second habeas decision, which is a shaky proposition and leaves this Court with three options: first, assume the facts in a light most favorable to the Petitioner and then determine in the first instance whether an appeal would have affected the outcome of the second habeas; second, dismiss the instant appeal and remand for further proceedings in the third habeas, to allow the habeas judge to make a finding of fact and conclusion of law which resolves the factual dispute and extends the *Strickland/Miller*

analysis to incorporate that finding; or third, dismiss the instant appeal and remand for the court below to dismiss the third habeas and re-enter his Opinion Letter and Order of 4/18/07 in the second habeas, thus giving the Petitioner a right to appeal therefrom.

The court below did not abuse its discretion in denying the Petitioner's Motion to Alter or Amend Judgment/Relief from Judgment. The basis of the motion was that counsel read the court's order denying habeas relief vis-a-vis second habeas counsel, Mr. Houston, as penalizing the Petitioner for failing to put on evidence concerning trial counsel, Mr. Michael, and/or first habeas counsel, Mr. Flanagan.⁸ In its order denying the motion, the court clarified that its intent was to find that the Petitioner had failed to satisfy the "but for" prong of the *Strickland* test with respect to Mr. Houston, which resolved any concerns about the language of the initial order denying relief.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that this case is appropriate for the Court's Rule 20 docket, as the procedural posture of the appeal – after a trial and three habeas proceedings – is so complex that oral argument may be necessary to aid the Court in determining exactly what issues are res judicata and whether this Petitioner has had a fair shot at the post-trial remedies to which he is entitled.

In this regard, the Respondent believes that the Petitioner has indeed has his fair shot. However, the unusual circumstances of this case – the passage of time, the number of lawyers involved, and the fact that for whatever reason the Petitioner did not have an appeal from the second habeas decision – make this a troublesome case.

⁸As noted earlier, prior to the omnibus hearing the court had ruled that any issues involving Mr. Michael and/or Mr. Flanagan were res judicata.

V.

ARGUMENT

1. **WHETHER THE COURT BELOW ERRED IN CONCLUDING THAT THE PERFORMANCE OF PETITIONER'S SECOND HABEAS COUNSEL WAS NOT INEFFECTIVE UNDER THE TEST ESTABLISHED BY *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984), AND *STATE v. MILLER*, 194 W. VA. 3, 459 S.E.2D 114 (1995), WHEN COUNSEL FAILED TO CALL FIRST HABEAS COUNSEL TO TESTIFY AT THE OMNIBUS HEARING.**

The standard of review for Issues 1, 2 & 3 is that set forth in *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995): "An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court's findings of historical fact for clear error and its legal conclusions de novo. This means that we review the ultimate legal claim of ineffective assistance of counsel de novo and the circuit court's findings of underlying predicate facts more deferentially."

As set forth earlier, the real gravaman of the Petitioner's appeal is his claim that he received ineffective assistance of counsel from trial counsel, Gregory Michael. The Petitioner's argument in this third habeas proceeding is that Tim Houston, second habeas counsel, should have called James Flanagan as a witness in order to prove that Mr. Flanagan, first habeas counsel, should have called Mr. Michael as a witness, all for the ultimate purpose of proving ineffective assistance of counsel at trial.

We will first look at the facts, and then at the law, governing this case; and in order to do so in a meaningful way, it is necessary to evaluate both the third and the second habeas proceedings, even though only the former is at issue in this appeal.

The Facts: Attorney Houston (At Issue in the Third Habeas Proceeding)

The third habeas proceeding alleges ineffective assistance of counsel on the part of attorney Timothy Houston, who represented the Petitioner in his second habeas proceeding. The Petitioner claims that Mr. Houston failed to call any witnesses, and specifically, that he failed to call James Flanagan, who represented the Petitioner in his first habeas proceeding.

We know why Mr. Houston didn't call Mr. Flanagan at the omnibus hearing held in the second habeas proceeding, and it wasn't for lack of trying, although he conceded that he had not engaged an investigator to assist him in the search for this elusive witness. As Mr. Houston spread on the record, Mr. Flanagan had "failed a number of clients and was put on ethics suspension where he currently remains today . . .," and was "homeless, goes from place to place, doesn't have a phone number or a residence and is unreachable even by [his wife]." (R2, Tr. of 1/5/07, pp. 6, 9.) There are no other witnesses this Respondent can think of who would have had evidence relevant to the allegations in the second habeas proceeding, given the court's pre-hearing ruling that limited the scope of the proceeding. (R2, Order of 6/9/05, pp. 4-5.)

The Facts: Attorney Flanagan (At Issue in the Second Habeas Petition)

We don't know why Mr. Flanagan didn't call Mr. Michael as a witness in the first habeas proceeding, and, as set forth above, there's no way to find out. There is only one scintilla of evidence in any of the three habeas records about Mr. Michael: Mr. Houston's comment in the second habeas proceeding, held on January 5, 2007, that "[a]s to Mr. Michael's availability, as of right this moment I'm not sure. As of a year ago, he was available. I don't know right now." (R2, Tr. of 1/5/07, p. 8.)

We have some circumstantial evidence, however, from which it may be reasonably inferred that Mr. Flanagan's failure to call Mr. Michael as a witness was a strategic decision, not a mere blunder made by an attorney who wasn't attending properly to his case.

First, Mr. Flanagan wrote a thirty page Petition for Habeas Corpus, comprehensive, well-written, well-reasoned and well-researched. (R1, pp. 90-120.) It is clear that this attorney was familiar with the record of the underlying case and that he knew criminal law.

Second, Mr. Flanagan put trial counsel's time sheets into evidence, as proof that counsel had spent almost no time – 12.2 hours total -- investigating and/or preparing for the Petitioner's trial on twenty-eight counts of sexual assault and abuse against two separate child victims. (R1, pp. 123-127.) Although the court ultimately concluded that the time sheets, standing alone, weren't sufficient to prove lack of investigation and preparation, they were at least some proof. Mr. Flanagan could have concluded that having Mr. Michael on the stand to justify or explain the time records – or to fill in the blanks – would only weaken the case, not make it stronger.

Third, with respect to the ineffective assistance issues involving the trial itself, Mr. Flanagan made a comprehensive argument, both in his written submission and in his arguments at the first habeas hearing, based on the trial record. (R1, pp. 90-120; Tr. of 3/16 and 3/29/01.) Again, he could have concluded that having Mr. Michael on the stand to justify or explain his actions during the trial, i.e., to claim that these were "strategic decisions" on his part, would only weaken the case, not make it stronger.

The Law: Attorney Houston (At Issue in Third Habeas Proceeding)

The Petitioner argues that with respect to all of his ineffective assistance of counsel claims – his claims against trial counsel, his claims against first habeas counsel, and his claims against

second habeas counsel – the governing law is found in *Strickland v. Washington*, 466 U.S. 668 (1984), *State v Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), and *State ex rel. Bess v. Legursky*, 195 W. Va. 435, 465 S.E.2d 892 (1995). The State agrees.

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.

In reviewing counsel’s performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel’s strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. Pts. 5 & 6, *State v. Miller*, *supra*.

In applying the *Strickland/Miller* standard to the performance of attorney Houston in preparing and presenting the Petitioner’s case, it is clear that counsel’s performance was not deficient under an objective standard of reasonableness. Mr. Houston filed a second petition for habeas corpus relief on the Petitioner’s behalf, making the best arguments the record would allow as to the alleged ineffectiveness of the first habeas counsel, Mr. Flanagan. **(R2, Amended Petition of Habeas Corpus Ad Subjiciendum.)** At the omnibus hearing, however, the witness Mr. Houston needed, Flanagan, was simply unavailable, having been disbarred and then, after an apparent stint in rehab, having become homeless and unreachable. Mr. Houston recounted his efforts to locate Mr. Flanagan, although he conceded he had not retained an investigator to help him with the search. In this regard, the Respondent can find no case law to support what is in essence the Petitioner’s

argument: that failure to retain an investigator under these circumstances constitutes ineffective assistance of counsel under the *Strickland/Miller* test.

Given the facts and circumstances spread upon the record in the third habeas proceeding, the best attorney Houston could do under those circumstances was what he did do: argue based on the transcript of the first habeas hearing and the court's order that:

[W]hat happened after the first habeas proceeding was essentially a failure of evidence. Over and over in that opinion there is – Your Honor is stating that without more, without more evidence, without the evidence showing Mr. Mitter cannot prevail, and the singular reason he wasn't able to prevail was because attorney Michael wasn't called, he wasn't put on the stand and he wasn't asked any questions and, in fact, my client, Mr. Mitter, virtually begged his attorney, Mr. Flanagan, to have Mr. Michael called and questioned and deposed. It was never done.

(R2, Tr. of 1/5/07, pp. 4-5.)

Even assuming *arguendo* that this effort by attorney Houston is deemed to be deficient under the first prong of the *Strickland/Miller* test, the Petitioner has failed to satisfy the second prong: a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. In this regard, the habeas judge made it perfectly clear in his Opinion Letter of July 27, 2010 that "there is no evidence presented showing a reasonable probability that but for Attorney Flanagan's alleged errors the result of the proceeding would have been different."

(R3, p. 86.) The court noted that following the conclusion of the first habeas proceeding, the Petitioner had objected to the substitution of attorney John Brooks to replace Mr. Flanagan in filing an appeal. (*Id.*) He further noted that attorney Brooks had filed a forty-eight page Petition for Appeal in the first habeas proceeding, raising ten substantive issues, including both ineffective assistance of counsel on the part of trial counsel, Gregory Michael, and ineffective assistance of first

habeas counsel, James Flanagan. (*Id.*; R3, Petition for Appeal, binder clipped to the back of the record.)

The Law: Attorney Flanagan (At Issue in Second Habeas Proceeding)

In order to determine whether the court's conclusions with respect to the second prong of the *Strickland/Miller* test were correct in the third habeas proceeding, with respect to attorney Houston's failure to call first habeas counsel, James Flanagan, we must look at the court's findings and conclusions in the first habeas proceeding. A review of the court's forty-one page Opinion Letter in the first proceeding demonstrates that the court's findings of fact were supported by the evidence and that its conclusions of law were correct. (R1, pp. 169-209.) Additionally, as noted above, the court's decision was appealed to this Court, where all issues were reviewed and the appeal was denied. (R3, Petition for Appeal, binder clipped to the back of the record; R1, p. 170.)

a. Inadequate Pre-trial Consultation with the Petitioner

The habeas court concluded that the proof submitted, specifically, attorney Michael's time sheets, were not sufficient to prove this claim. (R1, p. 176.) In this regard, any failure of pre-trial consultation with the client does not appear to have affected counsel's trial performance; of the sixteen counts that went to the jury, all involving victim BGO, the Petitioner was convicted on four and acquitted on twelve.

b. Failure to Interview the Alleged Victims, Witnesses or Anyone Else

The habeas court again concluded that the proof submitted, specifically, attorney Michael's time sheets, were not sufficient to prove this claim. (R1, pp. 176-77.) Further, the court concluded that the testimony of the three "missing" witnesses who testified at the habeas hearing would not

have made a difference to the outcome of the trial, as the majority of the time they spent with the child victims “was at periodic family gatherings and not on a regular and/or daily basis.” (R1, p. 177.)

c. Failure to Conduct Meaningful Plea Negotiations or to Explain the Concept of Plea Negotiations to the Petitioner

The habeas court found as a fact that no plea negotiations were offered to the Petitioner by the State, and therefore explaining the concept of plea negotiations to the Petitioner would have been a futile act. (R1, p. 178.) The court’s conclusion appears to be unassailable.

d. Failure to Move for Individual Voir Dire and Failure to Strike a Juror upon the Petitioner’s Request

The habeas court found as a fact that all of the jurors who indicated possible bias and prejudice, some as a result of their own experience with sexual assault or abuse, were excused. (R1, p. 179.) Therefore, the failure to individually voir dire those jurors was harmless.

With respect to counsel’s failure to strike a potential juror that the Petitioner directed him to strike, the court found that the decision as to strikes lies with the attorney, not with the client. Citing Rule 1.1(a) of the West Virginia Rules of Professional Conduct, the court noted that the only decisions absolutely vested with the client are whether to enter a plea, whether to waive a jury trial, and whether to testify.

e. Failure to Move to Suppress All Comments Concerning Prior Abuse/neglect Cases and DUI Conviction

The habeas court found that the Petitioner failed to specify the alleged illegal evidence and failed to show how he was prejudiced thereby. (R1, p. 180.) It is difficult to fathom how calling trial counsel as a witness would have had any effect on this ruling. This is a classic issue to be decided on the trial record, not on the basis of after-the-fact testimony.

f. Failure to Suppress Any Reference Concerning Petitioner's Incarceration in Jail

The habeas court clearly considered this to be a “throwaway” issue, noting that the entirety of this argument was contained in one sentence in the otherwise lengthy and comprehensive Petition for Writ of Habeas Corpus. (R1, pp. 180-81.) Again, it is difficult to fathom how calling trial counsel as a witness would have had any effect on this ruling. This is a classic issue to be decided on the trial record, not on the basis of after-the-fact testimony.

g. Failure to Object at Trial to the State's Presentation of Evidence on the Charges Involving the Second Victim, ADM, Even Though the State Knew or Should Have Known That the Charges Were Going to Be Dismissed

In all fairness, the record does seem to indicate that the State had a pretty good idea, right from the outset of the trial, that the counts involving ADM would end up being dismissed. According to the Petitioner's Petition for Writ of Habeas Corpus, the prosecutor told the jury in his opening statement that ADM would not be able to testify because she is a “very small child,” and that if she was unable to testify the “[c]ourt will dismiss those charges.” (Trial Transcript at p. 42.)⁹

The habeas court found, without any real analysis, that there had been no evidence to support this claim of error and that it was without merit. (R1, p. 182.) Although this is cursory, the legal conclusion is correct. Unless this Court is prepared to rule as a matter of law that the claims involving ADM should have been severed or dismissed prior to trial, the decision as to whether to proceed was a discretionary one for the trial judge. Further, there's no indication in the record that

⁹The trial transcript is not a part of the record in this appeal. The quoted language, and the specific transcript cite therefor, are in the Petitioner's first Petition for Writ of Habeas Corpus, and undersigned counsel assumes their accuracy. (R1, p. 106.)

the Petitioner was prejudiced, as all indications are that the jury carefully and conscientiously considered the remaining claims – acquitting him on twelve of the sixteen charges.

h. Failure to Object When the Prosecutor Implied That the Sexual Assaults Ended Because the Children Were Removed from His Home

The habeas court found that the evidence was insufficient to support a finding that there was any prejudice to the Petitioner, even assuming *arguendo* the prosecutor’s argument was improper. (R1, p. 182.) The Respondent believes that the prosecutor’s argument, if made (which cannot be ascertained from this record), would be a permissible inference and a fair argument. And again, it is difficult to fathom how calling trial counsel as a witness would have had any effect on this ruling. This is a classic issue to be decided on the trial record, not on the basis of after-the-fact testimony.

i. Failure to Object When the State Introduced Testimony Regarding Alleged Sexual Abuse of Another Child Not Subject to the Indictment

The habeas court found, without further analysis, that the evidence on this issue was insufficient to support a finding of ineffective assistance of counsel. (R1, p. 183.) Again, the court’s treatment of the issue was cursory, but its conclusion was correct. Such evidence would be admissible to prove lustful disposition toward children. *E.g., State v. Rash*, No. 34708 (W. Va., June 7, 2010).¹⁰

j. Failure to Object When the State Introduced Testimony Regarding the Fact That the Petitioner Was Incarcerated in the Preston County Jail

It is unclear what difference there is between this issue and Issue f, and the Respondent therefore reincorporates his discussion of Issue f.

¹⁰The record does not disclose whether a 404(b) hearing was held prior to trial.

k. Failure to Request a Cautionary or Limiting Instruction; and the Instructions as a Whole Were Woefully Inadequate

The habeas court found that the Petitioner had failed to substantiate his claim of error, let alone prejudice resulting therefrom. (R1, pp. 183-184.) The record in this appeal, even as supplemented, is inadequate for the Respondent to frame a response, other than to note that this issue was presumably a part of the Petitioner's original appeal from his conviction.

l. Failure to Move for a List of Witnesses Prior to Voir Dire

The habeas court found as a fact that defense counsel had filed a motion for discovery, which included a request for witness disclosure, and that the State had filed a witness list. (R1, p. 184.) Therefore, with respect to the allegation that Petitioner was not informed of the names of the State's witnesses, the court found the claim to be without merit. The Respondent agrees.

m. Failure to Object to the State's Introduction of Evidence Concerning the Hearsay Statements of Aretha Kees

The habeas court analyzed this issue quite extensively, noting that Ms. Kees had originally interviewed the child victims and then referred the children to Dr. Bernice Schwarzenberg and therapist Rosemary Yandura for treatment and counseling. Both Dr. Schwarzenberg and Ms. Yandura testified that they utilized Ms. Kees' reports in evaluating the children and developing their treatment plans. The court concluded that "[t]he statements now at issue were made as part of a medical history and used by Dr. Schwarzenberg for the purposes of making a medical diagnosis and prescribing treatment, and they were admissible under both Rule 803(4) and [*State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990)]." (R1, pp. 185-189.) Therefore, any failure to object to the testimony about Ms. Kees' report was harmless, in that the evidence was admissible.

n. Failure to Object to Testimony Concerning Child Abuse Syndrome

The habeas court found as a fact that the term “child abuse syndrome” had never been mentioned at the trial. (R1, pp. 190, 191.) He further found that the two witnesses, Dr. Schwarzenberg and Ms. Yandura, simply described what they were told by the children, and Ms. Yandura testified that BGO’s “knowledge of certain sexual behaviors was not typical of other children her age, without exposure to some exhibition of or participation in such behavior.” (R1, p. 190.) Therefore, any claim of failure to object to testimony that was never given is wholly without merit.

o. Failure to Object to Testimony Concerning Numerous Unrelated Sexual Acts Involving BGO and ADM

This claim of error involves statements made by the child victims to Dr. Bernice Schwarzenberg and therapist Rosemary Yandura concerning acts committed against them by the Petitioner that were not charged in the indictment. The habeas court denied the claim on the ground that there had been no evidence “to show that a reasonable lawyer, under the same circumstances, would have acted in a manner other than that by which he defense counsel acted; nor has he offered any evidence to prove that but for his trial counsel’s failure to object on this ground, the outcome of his trial would have been substantially different. This Court will not now second-guess trial counsel’s legal strategy. . . .” (R1, p. 192.)

It is difficult to envision how Mr. Michael’s testimony could have changed this finding, short of a confession on his part that he was impaired during the trial and/or was just going through the motions, not paying attention.

p. Failure to Move for a Mistrial Following Dismissal of Charges Concerning ADM

The habeas court reviewed the record to determine the veracity of the Petitioner's claim that there had been "[a] plethora of evidence concerning ADM . . .," before the charges involving her were dismissed. The court found as a fact that the only evidence presented as to ADM had been in the testimony of Dr. Schwarzenberg; Ms. Yandura did not testify about ADM, the children's mother did not testify about ADM, and the other child victim, BGO, testified only that ADM was her sister and she didn't know whether the Petitioner had ever done anything to ADM. **(R1, pp. 193-95.)** The court also found as a fact that the State made a good faith effort to put on a prima facie case as to ADM, but failed when it determined that it could not call the child to the stand. **(R1, p. 195.)** Finally, the court concluded that it would not have granted a mistrial. *(Id.)* Since the decision as to whether or not to grant a mistrial is committed to the sound discretion of the trial court, there is no basis on which to second-guess the court's ruling with respect to this claim of error.

q. Failure to Move for a Directed Verdict, and to File and Argue Any Post Trial Motions

With respect to the claim that counsel had failed to move for a directed verdict, the habeas court found as a fact that the claim was false, citing to his own statement in the transcript that "[e]ither the State can move to dismiss or I can hear Mr. Michael's motion to direct a verdict." **(R1, p. 196.)**

The Respondent concedes that the court appears to have misapprehended the Petitioner's claim, which was that his counsel failed to make a directed verdict as to the remaining BGO counts, after the State had dismissed the ADM counts and rested its case. The problem with the argument is that with respect to twelve of the BGO counts the claim is moot, since the jury acquitted; and with

respect to the remaining four counts, the evidence was certainly sufficient to go to the jury. Thus, counsel's failure to move for a directed verdict was harmless.

With respect to the claim that counsel had failed to make any post-trial motions, the habeas court found as a fact that the claim was incorrect, citing to his own statement in the transcript that “[t]he Court overrules the motion of the defendant to set aside the verdict of the jury and grant him a new trial.” (R1, p. 196.) The court went on to say that it “cannot envision a scenario in which the trial judge would have ruled on a motion that was never made . . .,” and recited numerous other post-trial motions filed by trial counsel, including a timely Notice of Intent to Appeal. (*Id.*)

r. Failure to Properly Prepare for the Sentencing Hearing

The habeas court found that there had been no evidence presented to support the Petitioner's claim that the presentence report was given to trial counsel in untimely fashion, thus denying the Petitioner the ability to call witnesses. (R1, p. 197.)

Significantly, after reviewing each of the claims of ineffective assistance of counsel at length, the trial court concluded:

Moreover, the Petitioner fails to meet the second prong of the applicable test in that he has failed to show that but for trial counsel's alleged errors, the outcome of the proceedings would have been different. In fact, all indications are that the result of the proceedings, based on available evidence, would have been the same even if trial counsel had been found to have acted in error.

As a side note, the Court would state that there were twenty-eight (28) counts alleged against the Petitioner under the indictment in the underlying felony case. Petitioner's trial counsel represented him well enough that he was acquitted on twenty-four (24) of those charges.

(R1, p. 198.)

Reviewing the findings and conclusions in the first habeas proceeding, which were appealed to this Court, it is clear that calling trial counsel Michael as a witness would not have led to a

different result. Most of the issues raised required an analysis of the record, not an explanation of it. The issues that could not be resolved from the record, primarily, the issues of inadequate preparation and failure to call witnesses, were belied by the result of the trial, in the former instance, and the non-essential testimony of the “missing witnesses,” in the second instance.

2. **WHETHER THE COURT BELOW ERRED IN CONCLUDING THAT THE PERFORMANCE OF PETITIONER’S SECOND HABEAS COUNSEL WAS NOT INEFFECTIVE UNDER THE *STRICKLAND/MILLER* TEST, WHEN COUNSEL FAILED TO NOTIFY THE PETITIONER OF THE COURT’S ADVERSE RULING.**
3. **WHETHER THE COURT BELOW ERRED IN CONCLUDING THAT THE PERFORMANCE OF PETITIONER’S SECOND HABEAS COUNSEL WAS NOT INEFFECTIVE UNDER THE *STRICKLAND/MILLER* TEST, WHEN COUNSEL FAILED TO NOTIFY THE PETITIONER OF HIS RIGHT TO APPEAL FROM THE COURT’S ADVERSE RULING.**

The Respondent will brief these issues together, as they are two components of one question: was the Petitioner denied his right to appeal from the adverse ruling in the second habeas proceeding?

There is no question as to whether or not Mr. Houston filed an appeal from the court’s decision in the second habeas proceeding; he did not. There is a question, however, as to whether or not Houston informed the Petitioner of the decision, and as to whether or not he informed the Petitioner of his right to appeal; if he failed to do so, then the Petitioner was denied his appeal rights through no fault of his own.

In applying the *Strickland/Miller* standard to the performance of attorney Houston with respect to his failure to file an appeal from the court’s adverse decision in the second habeas proceeding, this Court’s review is complicated by the fact that the court below failed to resolve a material factual dispute.

With respect to the Petitioner's argument that he was denied the right to appeal the Court's denial of the Second Habeas Petition, there is conflicting testimony between Attorney Houston and Mr. Mitter as to whether or not Mr. Mitter was verbally informed by Attorney Houston of the denial of the second habeas petition and his right to appeal. However, Mr. Mitter does have the right to appeal this Court's denial of the Third Habeas Petition alleging ineffective assistance of Attorney Houston in failing to show the ineffectiveness of first habeas counsel Flanagan.

(R3, p. 86.)

Respondent does not understand the court's apparent belief that an appeal from the third habeas would be an effective remedy for counsel's failure to appeal from the second habeas, since the second habeas is, at this point, *res judicata* absent a finding that the Petitioner was denied his right to appeal – a finding the court declined to make.

In the absence of a finding of fact as to whether or not the Petitioner was advised of the court's decision in the second habeas proceeding, and his right to appeal from the decision, this Court is left with three options: first, assume the facts in a light most favorable to the Petitioner and then determine in the first instance whether an appeal would have affected the outcome of the second habeas; second, dismiss the instant appeal and remand for further proceedings in the third habeas, to allow the habeas judge to make a finding of fact and conclusion of law which resolves the factual dispute and extends the *Strickland/Miller* analysis to incorporate that finding; or third, dismiss the instant appeal and remand with instructions for the court below to dismiss the third habeas and then re-enter his Opinion Letter and Order of 4/18/07 in the second habeas, thus giving the Petitioner a right to appeal therefrom.

The Respondent urges this Court to proceed on the extant record, as supplemented (see fn. 1, *infra*), as it is clear that an appeal from the decision in the second habeas proceeding would not have affected the outcome of the case. The only real issue in the second habeas was whether attorney

Flanagan was ineffective as a matter of law in failing to call trial counsel as a witness in the first habeas proceeding, and whether calling trial counsel would have led to a different result in the first proceeding. As set forth above, the Respondent contends that there may be good strategic reasons for not calling trial counsel in a proceeding whose intent is to prove the latter's ineffective representation; unless there are indications that trial counsel is prepared to "take a dive" on behalf of his client, his testimony may demonstrate that his actions at trial were wholly matters of strategy. Further, putting trial counsel on the stand generally results in a waiver of attorney-client privilege, which can result in harmful facts coming into evidence.

In light of these facts, it cannot be said that there is "a reasonable probability that, but for counsel's [failure to file an appeal], the result of the proceedings would have been different." Syl. Pt. 5, *State v Miller, supra*.

4. WHETHER THE COURT BELOW ERRED IN DENYING THE PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND/OR RELIEF FROM JUDGMENT.

The standard of review for Issue 4 depends on whether the Petitioner's motion is characterized as a Rule 59 motion or a Rule 60 motion. The standard of review applicable to an appeal from a motion to alter or amend a judgment is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal is filed. *Carpenter v. Luke*, 225 W. Va. 35, 689 S.E.2d 247 (2009). The standard of review applicable to an appeal from a motion for relief from judgment is abuse of discretion. *Delapp v. Delapp*, 213 W. Va. 757, 584 S.E.2d 899 (2003).

The Petitioner's motion does not fit neatly into either category, and the Respondent will therefore assume that the more rigorous Rule 59 standard of review applies.

As noted earlier, by Opinion Letter and Order both dated July 27, 2010, the court denied relief in the Petitioner's third habeas proceeding. (**R3, pp. 78, 92.**) On August 9, 2010, Petitioner filed a motion to alter or amend judgment, arguing that counsel had not put on any evidence concerning the performance of trial counsel or first habeas counsel on the good faith belief that the court had already ruled those issues to be res judicata. (**R3, p. 94.**) The motion was denied without a hearing, the court noting that "it was the intent of the Court . . . to find and conclude that the Petitioner failed to meet the second ground of the *Strickland* test [with respect to the performance of Mr. Houston, second habeas counsel]." (**R3, p. 98.**)

The court below was correct, both in its initial opinion and its order denying the Motion to Alter or Amend and/or Relief from Judgment, in its *Strickland/Miller* analysis. If Mr. Houston had hired an investigator (recalling that his failure to do so is the sole basis for the ineffective assistance claim), and if the investigator had found Mr. Flanagan, first habeas counsel (which is pure speculation given the circumstances of Mr. Flanagan's life), and if Mr. Flanagan had testified at the second habeas hearing, the ultimate result would have been the same.

This is so because Mr. Flanagan's performance at the first habeas hearing may have been, and probably was, less than stellar. Peeling back another lawyer of the onion, Mr. Michael's performance at the trial may have been, and probably was, less than stellar. The bottom line, however, as set forth in the court's lengthy analysis of the issues following the first habeas hearing, is that the Petitioner received a fair trial and none of counsel's alleged errors would have resulted in a different outcome. (**R1, pp. 169-209.**) The court's decision in the first habeas case was amply supported by the law and the facts, and the Petitioner's appeal therefrom was denied by this Court.

IV.

CONCLUSION AND RELIEF SOUGHT

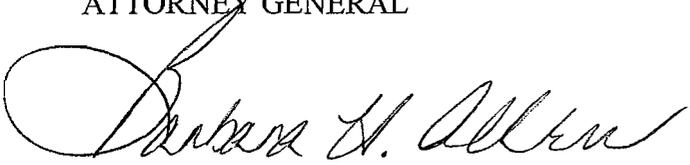
For the reasons herein stated, the Respondent respectfully requests that the Court affirm the judgment of the Circuit Court of Preston County, West Virginia, denying the Petitioner's third petition for habeas corpus relief. In the alternative, the Respondent respectfully requests that the Court dismiss the instant appeal and remand for further proceedings in the third habeas, to allow the habeas judge to make a finding of fact and conclusion of law which resolves the factual dispute and extends the *Strickland/Miller* analysis to incorporate that finding. In the alternative, the Respondent respectfully requests that the Court dismiss the instant appeal and remand with instructions for the court below to dismiss the third habeas and then re-enter his Opinion Letter and Order of 4/18/07 in the second habeas, thus giving the Petitioner a right to appeal therefrom.

Respectfully submitted,

DAVID BALLARD, WARDEN
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



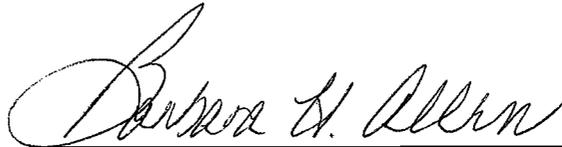
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CERTIFICATE OF SERVICE

I, Barbara H. Allen, do hereby certify that copies of the within "Brief of the Respondent" were served on the individuals below by United States mail, first-class postage prepaid, on the 11th day of April, 2011, addressed as follows:

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