

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

NO. _____

STATE OF WEST VIRGINIA, EX REL.,
CHARLES L. MITTER,
PETITIONER,

v.

DAVID BALLARD, WARDEN
RESPONDENT.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA
//Preston County Circuit Court
Case No. 10-C-10 (Habeas Corpus)

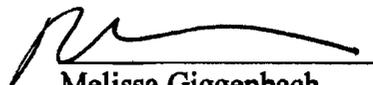
PETITION FOR APPEAL

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Counsel for Petitioner,



Melissa Giggenbach
State Bar No. 8036
P.O. Box 4206
Morgantown, WV 26504
(304)599-7674

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AT CHARLESTON
NO. _____

STATE OF WEST VIRGINIA, EX REL.,
CHARLES L. MITTER,
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v.

// Preston County Circuit Court
Case No. 10-C-10 (Habeas Corpus)

DAVID BALLARD, WARDEN
RESPONDENT.

PETITION FOR APPEAL

I. PROCEEDINGS AND OPINIONS BELOW

The Petitioner was convicted in case 91-F-79 on January 20, 1992. He was sentenced to forty-five to seventy-five years in the state penitentiary.¹ After an initial Petition for Appeal was denied January 1993, Tim Sigwart was appointed to represent him for his initial habeas in 1993 following the filing of a *pro se* petition in case number 93-C-191. Tim Sigwart filed an amended Petition in February 1994. In February 1995, Joe Moses replaced Tim Sigwart. In October 1995, Ed Rollo replaced Joe Moses. The Petitioner filed a motion to remove Ed Rollo as counsel and James Flanigan was appointed to replace him in June 2000. James Flanigan filed another Habeas (or amended Petition) in November 2000. The Omnibus hearing was held in May 2001 and in October 2002, the Habeas was denied. In December 2002, James Flanigan was replaced by John Brooks who missed the appeal deadline. In July 2003, the court re-filed the denial of the

¹ The Petitioner was sentenced on March 13, 1992 to the following: fifteen to twenty-five years for count one of the indictment; fifteen to twenty-five years for count four of the indictment, to run consecutively to the sentence imposed in count one; fifteen to twenty-five years for count six of the indictment to run consecutively to the sentence imposed in count four of the indictment; and five to ten years for count thirteen of the indictment to run concurrently with the sentence imposed in count six of the indictment.

Habeas to restart the appeal deadline. John Brooks filed the Petition for Appeal January 2004 and it was denied September 2004.²

In March 2005 the second Habeas, 05-C-56 was filed *pro se* claiming two issues: ineffective assistance of Habeas counsel at the Omnibus hearing and ineffective assistance of trial and appellate counsel. The second issue was denied outright by the Court in June 2005 and the Preston County Circuit Court appointed Tim Houston. In August 2005 Mr. Houston filed an amended Petition claiming ineffective assistance of Habeas counsel. The Omnibus hearing was held January 2007 and in April 2007 the Habeas was denied. Present counsel was appointed September 2008 to act as attorney for the Petitioner in all post-conviction matters. Petitioner filed a Petition for a Writ of Habeas Corpus on January 14, 2010 in case 10-C-10. An Omnibus Hearing was held on April 27, 2010 and an Order Denying Petition for A Writ of Habeas Corpus was entered on July 27, 2010. Petitioner filed a Motion Under Rules of Civil Procedure 59 and 60/Alteration of Judgment which was denied, without hearing on August 27, 2010. It is following the denial of the Petition for a Writ of Habeas Corpus that this Petition for Appeal is filed.

² It is worth noting, to underscore the difficulty the Petitioner has had receiving adequate legal help, that his initial Habeas Counsel was Tim Sigwart who the Petitioner requested be removed from his case due to "lamentable execution of his legal and moral duties of Public Defender (sic)" and who had his license to practice law indefinitely suspended in 2003. Mr. Sigwart was followed by Joe Moses who had an apparent personality conflict with the Petitioner when, after being requested to send the draft habeas to the Petitioner on disk, wrote in a letter dated August 20, 1995 that "[I]f we are to continue to work together, cut the crap." After that breakdown in communication, Ed Rollo was appointed in October of 1995. Following a motion to remove counsel for failure to communicate, Ed Rollo moved to withdraw as counsel in July 1997. James Flanigan was then appointed to represent the Petitioner in June 2000. Mr. Flanigan's ineffective representation was the basis for the second Writ of Habeas Corpus filed by Mr. Houston, who is the subject of the current Writ of Habeas Corpus' claim of Ineffective Assistance of Counsel.

II. STATEMENT OF FACTS

Timothy Houston was appointed to represent the Petitioner in June of 2005 and filed an Amended Petition (05-C-56) in August of 2005. The only issue in the Amended Petition (05-C-56) was that prior habeas counsel, Mr. Flanigan, failed to call trial attorney Michael to the stand to testify during the Omnibus Hearing. In the initial Petition for Writ of Habeas Corpus (93-C-191) following the criminal trial, habeas counsel James Flanigan named ten specific errors committed by trial counsel including 22 specific errors contained under the ineffective assistance of trial counsel claim. Included in the ineffective assistance of counsel claim were arguments that trial counsel failed to interview the alleged victims, trial counsel failed to conduct meaningful plea negotiations, trial counsel failed to suppress evidence that the Petitioner was incarcerated at the Preston County Jail, and trial counsel failed to move for a directed verdict or file and argue any post-trial motions including a motion for a new trial and judgment of acquittal. Further issues argued by Mr. Flanigan surrounded trial counsel's failure to adequately object to the admission of evidence regarding other crimes against the victims which were not the subject of indictment, trial counsel's failure to adequately object to hearsay testimony regarding the alleged crimes against the victims, and to allow testimony regarding child abuse syndrome without questioning the scientific reliability of this theory. Also, ten additional issues identified in the Petition included arguments pertaining to insufficient indictment, improper prosecutorial comments and actions, verdict contrary to the evidence, reversible error, violation of Due Process by failing to give specific instruction to jury and limiting instructions to the jury, failure to properly

instruct Petitioner prior to testifying, and cumulative error. In October 2002, the Habeas was denied. The Petitioner filed a *pro se* Writ of Habeas Corpus in March 2005 and Mr. Houston was appointed in June 2005. He filed an Amended Writ of Habeas Corpus on August 15, 2005 in case 05-C-56. In that amended Petition, Mr. Houston claimed ineffective assistance of Habeas counsel, alleging that Mr. Flanigan's representation fell below that which is guaranteed under the United States and West Virginia Constitutions. His only argument against Mr. Flanigan was that he failed to call the trial counsel, Mr. Michael, to the stand to prove his claims. At the Omnibus Hearing for Habeas 05-C-56 in January 2007, Mr. Houston proffered to the Court that he could not find Mr. Flanigan despite searching for him by calling Mr. Flanigan's wife, possibly contacting the State Bar and the Office of Disciplinary Counsel, and doing online "people searches". (2010 Omnibus Tr. Pgs. 11-12.) When Mr. Houston could not find Mr. Flanigan he failed to hire an investigator to aid him in his search. (2010 Omnibus Tr. Pg. 12) At the 2007 Omnibus Hearing, Mr. Houston relied on the argument that Mr. Flanigan was ineffective as a matter of law, yet failed to provide legal support for his position. (2010 Omnibus Tr. Pg. 11) Testimony by the Petitioner at the 2010 Omnibus hearing revealed that Mr. Houston failed to notify the Petitioner that his Habeas Petition was denied, Mr. Houston failed to notify the Petitioner of his right to file a Petition for Appeal, and Mr. Houston failed to properly terminate his representation of the Petitioner. (2010 Omnibus Tr. pgs. 21-22) Also, Mr. Houston never visited the Petitioner at Mt. Olive Correctional Complex. (2010 Omnibus Tr. Pg. 21) The Petitioner was under the impression that his Habeas was still ongoing until notified by current counsel that the Habeas had, in fact,

been denied. This notification came in December 2008. (2010 Omnibus TR. Pg. 26). By that time, the appeal period had expired. During the period of the denial of the Habeas, Mr. Houston closed his office and is now working part-time from home. (2010 Omnibus Tr. Pg. 5)

III. ASSIGNMENTS OF ERROR

1. The habeas court erred in denying the Petitioner's Petition for a Writ of Habeas Corpus.
 - A. The Petitioner received ineffective assistance of habeas counsel when second habeas counsel failed to call initial habeas counsel to testify at the Omnibus hearing.
 - B. The Petitioner received ineffective assistance of counsel when second habeas counsel failed to notify Petitioner of the denial of his second habeas.
 - C. The Petitioner received ineffective assistance of counsel when second habeas counsel failed to notify Petitioner of his right to petition for appeal.
2. The habeas court erred in denying the Petitioner's Motion Under Rules of Civil Procedure 59 and 60/Alteration of Judgment/Relief From Judgment.

IV. ARGUMENT

1. The Habeas Court Erred in Denying The Petitioner's Petition for a Writ of Habeas Corpus By Failing to Find that the Petitioner's Second Habeas Counsel Provided Ineffective Assistance of Counsel.

"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Harris v. Nelson, 394 U.S. 286 (1969) as cited in Gibson v. Dale, 319 S.E.2d 806 (W.Va. 1984). Meticulous

consideration of the claims for relief in a petition is mandated so that no violation of the petitioner's due process rights could escape the attention of the trial court or the Supreme Court of Appeals. Mugnano v. Painter, 575 S.E.2d 590, 594 (W.Va. 2002) as cited in Markley v. Coleman, 601 S.E.2d 49, 54 (2004)(per curium). With these guiding principles in mind, in reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, this Court has held that it must apply a three-prong standard of review. The final order and the ultimate disposition are reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law are reviewed de novo. Syl. Pt. 1, Mathena v. Haines, 633 S.E.2d 771 (W.Va. 2006). Further, "[f]indings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong." Syl. Pt. 1, State ex Rel. Postelwaite v. Bechhtold, 212 S.E.2d 69 (W.Va. 1975).

The W.Va. Supreme Court has recognized that both the Sixth Amendment to the United States Constitution and Article III, Section 14 of the W.Va. Constitution not only assures assistance of counsel to a criminal Petitioner, but also assures that the Petitioner receives competent and effective counsel. State ex. Rel. Myers v. Painter, 576 S.E.2d 277, 280 (W.Va. 2002). "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries'. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail' as this court has recognized repeatedly." U.S. v.

Cronic, 466 U.S. 648, 653 (1984)(quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963) and Powell v. Alabama, 287 U.S. 45 (1932)) “The special value of the right to the assistance of counsel explains why ‘[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.’” U.S. v. Cronic, 466 U.S. at 654 (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970)).

Ineffective assistance of counsel claims are evaluated using the two-pronged standard from Strickland v. Washington, 466 U.S. 668 (1984). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. For the first prong, the Petitioner must demonstrate that counsel’s performance was deficient by committing errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment to the United States Constitution. Further, one must ask whether counsel’s assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. “[The] Sixth Amendment counsel requirement in the U.S. Constitution. . . relies . . . on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.” State ex rel. Shelton v. Painter, 655 S.E.2d 794, 800 (W.Va. 2007)(citing Strickland, 466 U.S. at 688.)

To meet the second prong of Strickland, the Petitioner must show that counsel’s deficient performance prejudiced the Petitioner to the point that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings

would have been different. The Strickland Court further held that “every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective, at the time.” Strickland, 466 U.S. at 688. The evaluating court must use a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance and that the action complained of may have been sound trial strategy. Strickland, 466 U.S. at 688. Finally, “[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Strickland, 466 U.S. at 696. The West Virginia Supreme Court adopted the Strickland standard in State v. Miller, 459 S.E.2d 114 (W.Va. 1995). “[O]ur decisions teach that a determination of whether counsel’s performance is constitutionally deficient depends on the totality of the circumstances when viewed through a lens shaped by the rules and presumptions set down in Strickland and its progeny.” Miller, 459 S.E. 2d at 127. This Court further held that the test is whether a reasonable lawyer would have acted the same as defense counsel acted in the case at issue, under the same circumstances. The W.Va. Supreme Court is interested in whether the adversarial process at the time, in fact, worked adequately. Miller, 459 S.E. 2d at 128.

- A. The Petitioner received ineffective assistance of habeas counsel when second habeas counsel failed to call initial habeas counsel to testify at the omnibus hearing.

Since the beginning of his criminal case, the Petitioner has been appointed

attorneys who have not performed to the standard guaranteed under the United States and West Virginia Constitutions. In the initial Petition for Writ of Habeas Corpus (93-C-191) following the criminal trial, habeas counsel James Flanigan named ten specific errors committed by trial counsel including 22 specific errors contained under the ineffective assistance of trial counsel claim. Included in the ineffective assistance of counsel claim were arguments that trial counsel failed to interview the alleged victims, trial counsel failed to conduct meaningful plea negotiations, trial counsel failed to suppress evidence that the Petitioner was incarcerated at the Preston County Jail, and trial counsel failed to move for a directed verdict or file and argue any post-trial motions including a motion for a new trial and judgment of acquittal. However, by far, the most egregious issues argued by Mr. Flanigan surrounded trial counsel's failure to adequately object to the admission of evidence regarding other crimes against the victims which were not the subject of indictment, trial counsel's failure to adequately object to hearsay testimony regarding the alleged crimes against the victims, and to allow testimony regarding child abuse syndrome without questioning the scientific reliability of this theory. Further, ten additional issues identified in the Petition included arguments pertaining to insufficient indictment, improper prosecutorial comments and actions, verdict contrary to the evidence, reversible error, violation of Due Process by failing to give specific instruction to jury and limiting instructions to the jury, failure to properly instruct Petitioner prior to testifying, and cumulative error. Yet, despite this overwhelming support in his written brief, Mr. Flanigan failed to call the trial counsel to the stand during the Omnibus hearing

held in May 2001.³ Consequently, in October 2002, the initial Habeas was denied. In the Opinion Letter, written by the Honorable Lawrence Miller dated October 18, 2002, the Court found again and again that the “Petitioner presented no testimonial evidence from trial counsel. . . .” and “[w]ithout sufficient evidence presented to the Court either in the Petition or in the omnibus evidentiary hearing, the Court cannot rule that this alleged error rises to the level of ineffective assistance of counsel.” Opinion Letter pg. 8, pg. 12. (Attached as Exhibit A)

The Petitioner filed a *pro se* Writ of Habeas Corpus in March 2005 and Mr. Houston was appointed in June 2005. He filed an Amended Writ of Habeas Corpus on August 15, 2005 in case 05-C-56. In that amended Petition, Mr. Houston claimed ineffective assistance of Habeas counsel, alleging that Mr. Flanigan’s representation fell below that which is guaranteed under the United States and West Virginia Constitutions. His only argument against Mr. Flanigan was that he failed to call trial counsel, Mr. Michael, to the stand to prove his claims. In fact, Mr. Houston claimed, in his amended Petition, that “an examination of Attorney Michael will reveal that he did not adequately prepare for trial, did not adequately interview witnesses or alleged victims, did not adequately prepare for Petitioner’s Sentencing (sic), and made numerous mistakes at trial, including the failure to call witnesses, that prejudiced the result against the Petitioner.” In the amended Petition, Mr. Houston quoted portions of the Opinion Letter in case 93-C-191 which underscored the fact that the Court could not find ineffective assistance of trial

³ Mr. Flanigan’s license to practice law was indefinitely suspended in September 2005.

counsel due to insufficient evidence presented at the Omnibus hearing, namely, not calling Mr. Michael to the stand. (See Amended Petition pgs.3-4 attached as Exhibit B).

The Petitioner's Omnibus hearing for case 05-C-56 was held January 5, 2007 and neither the Petitioner nor the Respondent called any witnesses. Instead, Mr. Houston proceeded by proffer claiming that Mr. Flanigan was under bar suspension and was not available as a witness. Mr. Houston stated that while he had been in touch with Mr. Flanigan's wife, he was alternately in a rehabilitation facility, out-of-state, or homeless somewhere in Ohio. (2007 Omnibus Tr. Pg. 4,8,9 attached as Exhibit C); 2010 Omnibus Tr. Pg. 11-12.) He further asserted that Mr. Flanigan was ineffective as a matter of law for failing to call Mr. Michael to the stand during the Omnibus hearing for the initial Habeas. Mr. Houston failed to present any legal support for this argument. (2010 Omnibus Tr. Pg. 11). Unfortunately, just like the finding in the initial Habeas, the Court found in its Opinion Letter dated April 18, 2007 that "[t]he Petitioner has not presented sufficient evidence that, from an objective standard, this Court could find that, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance." (See Exhibit D) Ironically, Mr. Houston fell into the same trap he claimed made Mr. Flanigan ineffective. He did not hire a private investigator, attempt to subpoena Mr. Flanigan, or attempt to secure a deposition. His largest attempt to reach his witness was to call Mr. Flanigan's wife.

When applying the Strickand/Miller standard of reasonableness, it becomes clear that Mr. Houston's representation falls below that which a reasonable attorney would have been expected to perform. While the habeas court held in its Findings of Fact and

Conclusions of Law contained within in its Opinion Letter dated July 27, 2010 that the Petitioner failed to prove by a preponderance of the evidence that Mr. Houston's attempts to locate Mr. Flanigan fell below that which a reasonable attorney would have been expected to perform, the Petitioner believes that this decision was clearly erroneous. Mr. Houston's attempts to secure the sole witness for the 2007 Omnibus hearing were insufficient. Phoning Mr. Flanigan's wife, even numerous times, is inadequate investigation. During the 2010 Omnibus hearing, Mr. Houston testified that he spent a great deal of time trying to locate Mr. Flanigan, that in addition to talking to his wife, he did some "people searches, on-line searches". He additionally testified that he believes he contacted the State Bar and the Office of Disciplinary Counsel. (2010 Omnibus Tr. Pg. 11-12.) (This information was not offered to the Court during his proffer at the 2007 Omnibus hearing.) However, he did not hire an investigator, someone who is trained to find missing people, in order to secure Mr. Flanigan's testimony through deposition or subpoena. If Mr. Flanigan was in fact in a rehabilitation facility, he was released at some point. Mr. Houston failed to even proffer during the 2007 Omnibus hearing or testify during the 2010 Omnibus hearing whether any attempt was made to contact the facility to find out a release date, possible whereabouts, or any other information that would have enabled him to find Mr. Flanigan. Even after knowing that he had no witnesses for the 2007 Omnibus hearing, Mr. Houston attempted to rely on a legal argument that Mr. Flanigan's representation was ineffective as a matter of law, yet made no effort to present any legal support for this argument. The habeas court makes no mention of this lack of case law in it's 2010 Opinion Letter. All this evidence taken as a whole shows that the

habeas court's decision to deny the Petition for a Writ of Habeas Corpus was clearly erroneous.

Further, the habeas court's decision that the Petitioner did not meet the second prong of Strickland was also clearly erroneous. The Petitioner was clearly prejudiced by Mr. Houston failing to call Mr. Flanigan to the stand or to present other testimonial evidence. Having reviewed the Opinion Letter denying the initial habeas and having made the very same argument about Mr. Flanigan failing to call important witnesses, Mr. Houston knew there was slim chance that the habeas court would be able to adequately review whether Mr. Flanigan's conduct was, in fact, beneath that of a reasonable attorney. Had the habeas court heard testimony from Mr. Flanigan regarding his failure to call the trial court to the stand during the initial habeas, then the Petitioner could have had his trial counsel's conduct reviewed in an adequate manner. Instead of finally having an adequate review of his case, all his previous habeas attorneys have accomplished is to get further review of those cases barred under West Virginia Code section 53-4A-3(a) (2000) and Rule 4(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia as having been previously and finally adjudicated or waived. After the denial of the Petitioner's initial habeas, he filed a *pro se* petition for a writ of habeas corpus claiming ineffective assistance of trial and appellate counsel. These issues were summarily dismissed as *res judicata* as having been fully and finally litigated and decided. Therefore, the Petitioner sits in prison today without ever having a complete review of trial counsel or initial habeas counsel, Mr. Flanigan. Without such review, the Petitioner has been completely prejudiced. Therefore, the Petitioner respectfully submits

that the denial of this issue in his Petition for a Writ of Habeas Corpus is an abuse of discretion.

- B. The Petitioner received ineffective assistance of counsel when second habeas counsel failed to notify Petitioner of the denial of his second Habeas.

The habeas court was clearly erroneous when it held that the Petitioner did not receive ineffective assistance of counsel when Mr. Houston failed to notify the Petitioner of the denial of his second habeas. The Petitioner submits that Mr. Houston failed to follow the Rules of Professional Conduct by failing to adequately correspond with his client and failing to adequately terminate the attorney/client relationship. According to Rule 1.3 Rules of Professional Conduct “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” Further, in the comment section following the rule, it states that “[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.”

Rule 1.4 (a) of the Rules of Professional Conduct states that “[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” Further, section (b) continues that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.” Rule 1.16(d) of the Rules of Professional Conduct states, in part, that “[u]pon termination of representation, a lawyer shall take

steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client. . . .”

Conflicting evidence was presented at the 2010 Omnibus hearing. The Petitioner testified that he learned for the first time in December 2008 that his second Habeas had been denied in April 2007. The Petitioner was notified of the denial, not by Mr. Houston, but through a letter from present counsel. (2010 Omnibus Tr. Pg. 25, 26; See 2010 Omnibus Exhibit D attached as Exhibit E) The Petitioner had written to the habeas court twice complaining of Mr. Houston's failure to communicate. The Petitioner had previously written to Mr. Houston in March 2008 requesting an update. (2010 Omnibus Tr. Pg. 23; See 2010 Omnibus Exhibit A attached as Exhibit F.) He wrote to the habeas court on June 9, 2008 requesting help in having his attorney contact him. (2010 Omnibus Tr. Pg. 25; See 2010 Omnibus Exhibit B attached as Exhibit G). Still not hearing from Mr. Houston, the Petitioner wrote to the habeas court September 3, 2008 stating that he still had not heard from Mr. Houston and requesting the Court either spur some contact or replace him with another attorney. (2010 Omnibus Tr. Pg. 25; See 2010 Omnibus Exhibit C attached as Exhibit H). On the other hand, Mr. Houston testified that he did notify the Petitioner of the denial of his Habeas over the phone. He also testified that “it was [his] practice at the time to send a letter”. (2010 Omnibus Tr. Pg. 13). While he did look through his case file for the letter, he could not locate it. (2010 Omnibus Tr. Pg. 14). (Mr. Houston's files were in storage since he shut down his law practice in approximately 2007, roughly a year and a half after opening. (2010 Omnibus Tr. Pg. 17)) Mr. Houston further claims that in that same letter he would have notified the Petitioner of his right to

Petition for Appeal and also that, should he not do so, Mr. Houston's representation of him would end. (2010 Omnibus Tr. Pg. 14-15.) Testimony was also in conflict regarding the amount of time spent on the case and amount of time spent keeping the Petitioner up-to-date on the case's status. The Petitioner testified that Mr. Houston did not notify him for any of the hearings, did not speak to Mr. Houston on the phone as many times as Mr. Houston thought they spoke, was not prepared for the 2007 Omnibus hearing, and was not kept up-to-date on the search for Mr. Flanigan. (2010 Omnibus Tr. Pg. 20-21). Mr. Houston, on the other hand, testified that he met with the Petitioner for fifteen minutes before the 2007 Omnibus hearing and that they spoke on the phone several times (2010 Omnibus hearing Tr. Pg. 15.) The one thing both the Petitioner and Mr. Houston agreed on was that Mr. Houston never visited the Petitioner at Mt. Olive Correctional Complex. (2010 Omnibus hearing Tr. Pgs. 15, 21)

The habeas court's findings that Mr. Houston was not ineffective were clearly erroneous. From the Petitioner's testimony and from the letters admitted into evidence Mr. Houston certainly violated Rules 1.3, 1.4(a) and (b), and 1.16(d) of the Rules of Professional Conduct by failing to contact the Petitioner, failing to keep him updated on the status of his case, and failing to adequately notify him of the termination of the attorney/client relationship. It is clear from his letters that the Petitioner was under the misapprehension that Mr. Houston still represented him until September 2008 and that his Habeas was still active until December 2008, a full twenty months after this Court filed the Opinion Letter and Order denying the Habeas. This failure to communicate clearly demonstrates that Mr. Houston acted below the standard for legal counsel required

by Strickland/Miller. Clearly, Mr. Houston failed to act in the same manner a reasonable lawyer would have acted in the case at issue, under the same circumstances. Upon receiving the denial of the Habeas, a reasonable attorney would have notified his client, sent him a copy of the Opinion Letter, and informed him of his right to file a Petition for Appeal. It is clear from the Order entered April 18, 2007 that Mr. Houston's appointment was continued for a possible Petition for Appeal. (See Exhibit I). If the attorney did not wish to continue the representation, a reasonable attorney would have filed a motion to withdraw as counsel and notified his client in writing of the termination of the attorney/client relationship.

The habeas court was also clearly erroneous in finding and concluding that the Petitioner failed to meet the second prong of the Strickland test. The Petitioner was clearly prejudiced by Mr. Houston's failure to communicate because not only was he denied the right to Petition to the W.Va. Supreme Court of Appeals for a review of the denial of the Habeas, but also he was left to languish in prison for *almost two years* before asking for and receiving another attorney to review Mr. Houston's actions. A prompt notification of the denial would have allowed the Petitioner to file a Petition for Appeal, as well as initiate the present Habeas in a more expeditious manner. Therefore, the Petitioner respectfully submits that the denial of this issue in his Petition for a Writ of Habeas Corpus is an abuse of discretion.

- C. The Petitioner received ineffective assistance of counsel when second Habeas counsel failed to notify Petitioner of his right to petition for Appeal.

What followed from the failure to notify the Petitioner of the denial of the second

Habeas is that Mr. Houston failed to notify the Petitioner of the right to file a Petition for Appeal before the W.Va. Supreme Court of Appeals. At the time of the denial of the Habeas, there was no statutory or constitutional right of first appeal in West Virginia. Syl. Pt. 4, Billotti v. Doddrell, 349 S.E.2d 32 (W.Va. 1990)(cited in State v. Rogers, 434 S.E.2d 402 (W.Va. 1993)). However, the W.Va. Supreme Court of Appeals has found, through interpreting Article III, Sections 10 and 17 of the W.Va. Constitution that there is a constitutional right to petition for appeal in criminal cases. Further, there is a right to effective counsel. Syl. Pt. 3, Billotti v. Doddrell, 349 S.E.2d at 32 (as cited in State v. Rogers, 434 S.E.2d at 405). Additionally, if the petition for appeal is not filed within the prescribed amount of time, the defendant may lose that right. State v. Rogers, 434 S.E.2d at 405 (citing State v. Legg, 151 S.E.2d 215 (W.Va. 1966)).

“In habeas corpus proceedings involving a claim of ineffective assistance of counsel because of the failure to prosecute a timely appeal, we have held that where there has been extraordinary dereliction on the part of the State the appropriate remedy is unconditional discharge.” Carter v. Bordenkircher, 226 S.E.2d 711, (W.Va. 1976). If the court determines that there is not extraordinary dereliction of duty and the denial of a timely appeal was probably harmless, the appropriate remedy is such remedial steps as will permit the effective prosecution of an appeal. Syl. Pt. 2, Carter v. Bordenkircher, 226 S.E.2d at 711. The Court mandated, in 1976, that the same defense counsel appointed to represent the accused at trial should, immediately after defendant’s conviction and disposition of post-trial motions, be reappointed to prosecute such appeal as the circumstances may warrant. Carter v. Bordenkircher, 226 S.E.2d at 727.

Extraordinary dereliction of duty will largely depend on the facts of the individual case. Factors to be considered are: the clarity and diligence with which the relator has moved to assert his appeal right; length of time that has been served on the underlying sentence measured against remaining time; whether prior writs have been filed or granted involving the right of appeal; and the related question of whether re-sentencing has occurred to extend the appeal period. Malice and ill will is not required, but would be a significant factor if shown. Syl. Pt. 6, Rhodes v. Leverette, 239 S.E.2d 136 (W.Va. 1977).

In the case at hand, the Petitioner had not asserted his appeal right because he was still under the misapprehension that his Habeas was on-going. (2010 Omnibus Tr. Pg. 25, 26; See 2010 Omnibus Exhibit D attached as Exhibit E). He attempted on numerous occasions to contact his attorney, but received no response. (See Exhibits F, G, and H) The Petitioner then wrote to the Circuit Court requesting help in contacting his attorney. When even a letter from the Court did not spur his attorney to contact him, he then did the only thing left to him which was to request a new attorney. At present, the Petitioner has served seventeen years of a forty-five to seventy-five year sentence. Prior counsel has filed two Petitions for Appeal, one following his initial conviction and the second following the denial of his first Habeas. In the latter instance, the Petitioner's attorney missed the appeal deadline so the denial of the Habeas was re-filed to restart the appeal period. There has not been a re-filing of the denial following the second Habeas. Certainly, the Petitioner could not have requested a re-filing of the denial of the second Habeas until he was informed of the dismissal of his case.

If the Court does not believe there has been extraordinary dereliction of duty, then the appropriate remedy is such remedial steps as will permit the effective prosecution of an appeal. The Petitioner requested, at the very least, that the denial of the second Habeas be re-filed, with credit for time served, to permit him to file his Petition for Appeal within the prescribed appeal period. At issue would be the habeas court's dismissal of the issues pertaining to trial counsel and his initial appellate counsel. Instead of granting the Petition at least on this ground to allow the filing of the Petition for Appeal, the habeas court states that there was conflicting testimony about whether the Petitioner was in fact notified of his right to Petition for Appeal and that "[the Petitioner] 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 Flanigan." With this statement, the habeas court dismisses the very injury that it should have striven to avoid, namely the violation of the Petitioner's right to due process according to Shamblin v. Hey, 256 S.E.2d 435, 437 (1979). The Petitioner is now filing his petition for appeal with this Court, but a vital step in the appeal process, getting to file the previous Petition for Appeal, was missed violating the Petitioner's Constitutional rights.

The Petitioner received ineffective assistance of counsel following Mr. Houston's failure to notify the Petitioner of his right to petition for appeal. A reasonable attorney would have been aware of his obligation to notify the Petitioner of his right to file a Petition for Appeal following the holding in Carter v. Bordenkircher and also the explicit directive contained in the Order following the denial of the second Habeas. ". . . [O]rdered that this Order constitutes a final judgment, and the Petitioner has the right to

appeal the Court's ruling to the West Virginia Supreme Court of Appeals. In the event the Petitioner does appeal this matter, the Court continues his present counsel's appointment for such appeal." (See Exhibit I).

Further, the Petitioner was prejudiced by Mr. Houston's failure to act because he waited in prison twenty additional months. He never had the opportunity to have the appellate court potentially review the denial of the Circuit Court to allow him to revisit the alleged ineffective assistance counsel charges of the initial trial counsel and initial appeal counsel. This is important because the Petitioner, through multiple ineffective attorneys, has never had the issues with his trial counsel adequately reviewed. Therefore, the habeas court abused its discretion in denying this issue in the Petition for a Writ of Habeas Corpus.

2. The Habeas Court Erred in Denying the Petitioner's Motion Under Rules of Civil Procedure 59 and 60/Alteration of Judgment/Relief From Judgment.

In Syl Pt. 5 of Toler v. Shelton, 204 S.E.2d 85 (W.Va. 1974), this Court stated that review of Rule 60(b), W.Va.R.C.P. ruling, is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion. Further, the Toler Court stated that "[a] court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W.Va.R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits." "The standard of review applicable to an

appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Wickland v. American Travelers Life Insurance Company, 513 S.E.2d 657 (W.Va. 1998).⁴

By Order entered July 27, 2010, the habeas court denied the Petitioner's Third Petition for a Writ of Habeas Corpus. On or about August 9, 2010, the Petitioner filed a Motion for Alteration of Judgment or Relief from Judgment Under Rules 59 and 60 of the Rules of Civil Procedure. On August 27th, 2010 the habeas court denied the Motion in a one-page order stating that "it was the intent of the Court, in its Opinion Letter to find and conclude that the Petitioner failed to meet the second ground of the Strickland Test." At issue is language in the above-mentioned Opinion Letter which led the Petitioner to believe that the Court denied the habeas petition because there was no evidence presented of what the "substance of Attorney Flanigan's testimony would have been if he had testified or how his testimony would have altered the Court's decision in denying the First Habeas Petition." Since Mr. Flanigan did not testify at the Omnibus Hearing for the second Habeas Petition, the only way to present this evidence would be in the form of testimony either in person or through affidavit. It should also be noted that evidence of Mr. Flanigan's actions and inactions were presented to the Court in the present proceeding as part of the Memorandum of Law provided in support of the present Petition, and this evidence was verified by Petitioner's signature. Similarly, there has

⁴ The Petition for Appeal will be filed within the original four-month appeal period tabulated from the date of the original denial of the Petition for a Writ of Habeas Corpus, namely July 27, 2010. Therefore, there is no need for the Court to consider whether this issue was filed timely under Rule 59 or Rule 60.

been no prior evidence presented as to the testimony of Mr. Michael (other than that evidence presented in the Memorandum of Law) who was not called during the Omnibus Hearing for the initial Habeas Petition. Upon due consideration and legal research, present counsel made the professional decision not to present evidence on Mr. Michael (trial counsel) and Mr. Flanigan (initial Habeas counsel) under the belief such evidence was barred as *res judicata*. To make this decision, present counsel relied on Rule 4(c) of the W.Va. Rules Governing Habeas Proceedings and Losh v. McKenzie, 277 S.E.2d 606 (1981) which sets forth the legal principal of *res judicata* as it pertains to Habeas Corpus Petitions.

“A judgment denying relief in post-conviction habeas corpus is *res judicata* on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared *pro se* having knowingly and intelligently waived his right to counsel.” Syl. Pt. 2, Losh at 608.

Further, the Losh Court held that

“A prior omnibus habeas corpus hearing is *res 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. Syl. Pt. 4, Losh at 608.

Additionally, present counsel made the determination not to present evidence pertaining to Mr. Michael and Mr. Flanigan based on the Court’s previous ruling after the Petitioner filed, *pro se*, his second Habeas petition wherein the Court dismissed his arguments that trial counsel and appellate counsel were ineffective as *res judicata*, having

been fully and finally litigated and decided. (See Exhibit J) Further, the Losh case refers to “ineffective assistance of counsel at the omnibus habeas corpus hearing,” and the word “hearing” is stated in the singular as opposed to the plural form of “hearings.” A fair reading of this language leads one to the reasonable conclusion that in a third Habeas proceeding, such as the case at bar, the petitioner is limited to the ineffectiveness of the second Habeas counsel, being the prior “hearing” singular, and not the prior “hearings” involving first Habeas counsel or, for that matter, trial counsel.

The Petitioner believes that the habeas court abused its discretion in not permitting the Petitioner to call Mr. Michael and Mr. Flanigan to the stand in light of the language of the Opinion Letter. If the Petitioner’s present attorney did in fact commit error, then the obvious correction to the error would be to allow the admission of this evidence. The issues outlined in the Habeas are constitutional in nature and therefore every effort should be made to cure any errors that may have occurred.

V. CONCLUSION

The habeas court abused its discretion when it failed to grant the Petitioner’s request for a Writ of Habeas Corpus after erroneously concluding that the Petitioner failed to meet either prong of Strickland when arguing that the Petitioner received ineffective assistance of habeas counsel. Further, the habeas court abused its discretion when it failed to grant the Petitioner’s Motion Under Rules of Civil Procedure 59 and 60/Alteration of Judgment/Relief From Judgment.

VI. PRAYER FOR RELIEF

WHEREFORE, for these and other errors which are apparent upon a fair reading of the transcript and the record, your Petitioner, Charles L. Mitter, respectfully prays that this Petition for Appeal be granted unto him and the record of the Petition for a Writ of Habeas Corpus be caused to come before this Honorable Court to the end that said errors may be reviewed.



**Melissa Giggenbach
Counsel for Petitioner,
Charles L. Mitter
W.Va. State Bar No. 8036
P.O. Box 4206
Morgantown, WV 26504**

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE