

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 10-1510

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

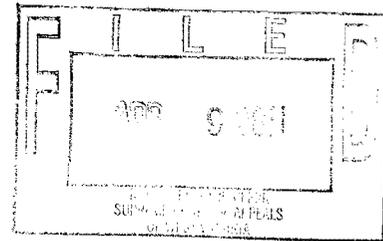
PETITIONER

vs.

Appeal from the final Order
of the Circuit Court of
Preston County (10-C-10)

DAVID BALLARD, WARDEN
MT. OLIVE CORRECTIONAL COMPLEX,

RESPONDENT.



PETITIONER'S REPLY BRIEF

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PETITIONER'S BRIEF

I. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Upon review of the case and relevant rules, the Petitioner believes this case is proper for a Rule 19 argument since it involves assignments of error in settled law and issues regarding the unsustainable exercise of discretion in cases where the law is settled.

II. ARGUMENT

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).

1. The Petitioner Did Not Receive a Full and Fair Omnibus Hearing in the Initial Petition for Writ of Habeas Corpus.

"While we do not believe that a prisoner is entitled to habeas corpus upon habeas corpus we will not invoke res judicata principles until the prisoner has had a full and fair opportunity with the assistance of counsel to litigate all issues at some stage of the proceedings." Losh v. McKenzie, 277 S.E. 2d 606 (W.Va. 1981) (internal citations omitted). As is discussed in Gentry v. Farruggia, 53 S.E. 2d 741, 742 (W.Va. 1949) the principle of res judicata is based upon a "recognized public policy to quiet litigation. It is not rigidly enforced where to do so would plainly defeat the ends of justice." *But see* State ex rel. Richey v. Hill, 603 S.E.2d 177 (W.Va. 2004) (which states that such an exception must be based upon "extraordinary circumstances" and "courts should be loathe to exercise this power." (quoting Sims v. State, 771 N.E.2d 734, 738 n. 2 (Ind.Ct.App.2002))). Petitions for writs of habeas corpus are not meant to be a throw-away right. The legal principle of res judicata, while important to quiet litigation, ties subsequent counsel's hands and subsequent counsel is often left to the mercy of the abilities of previous counsel to mine the record to find appropriate issues to put forth and to argue those issues effectively in such a way that the petitioner receives a full and fair hearing.

The Respondent is correct that the Petitioner, through Tim Houston (hereinafter "habeas counsel Houston") and present counsel, has contended that he has not received a full and fair hearing on the initial habeas petition, case 93-C-191, because habeas counsel for that proceeding,

James L. Flanigan, (hereinafter "habeas counsel Flanigan") failed to call trial counsel, (hereinafter "trial counsel Michael") to the stand to testify during the omnibus hearing. However, from a full reading of the Amended Petition filed in 05-C-56 and the transcript of the omnibus hearing held January 5, 2007, it is apparent that the Petitioner's argument goes much further due to the numerous times the lack of evidence presented in 93-C-191 is referenced. Amended Petition of Habeas Corpus Ad Subjiciendum for 05-C-56 pgs. 3-5; Omnibus Hearing for 05-C-56 Tr. pgs. 4-6. Habeas counsel Flanigan failed to present any evidence at the omnibus hearing in support of a majority of his claims. In fact, habeas counsel Flanigan told the habeas court that he would only be arguing and presenting evidence on two issues: ineffective assistance of trial counsel and improper conduct by the prosecuting attorney. R1, Tr. of 3/19/01 pgs. 15-16. For the issue of ineffective assistance of trial counsel, he focused on a lack of trial preparation. At the omnibus hearing, he called three witnesses to testify regarding what their testimony would have been had trial attorney Michael interviewed them or called them as witnesses. He further presented time sheets prepared by trial counsel Michael. R1, Tr. of 3/16 and 3/19/01 pgs. 16-18; 21-64; R1, pgs. 123-127. For the issue of prosecutorial misconduct, habeas counsel Flanigan presented no evidence and relied only on oral argument. He failed to argue or present any evidence on the remainder of the alleged habeas grounds. The lack of evidence or argument was made apparent by the Opinion Letter filed October 18, 2002, when the habeas court made finding after finding that there was a lack of evidence to support the Petitioner's arguments.¹

¹ The Respondent sets forth, beginning with page fourteen of the Brief of the Respondent, arguments made by habeas counsel Flanigan under Ground 1, Ineffective Assistance of Counsel in the Amended Petition and the habeas court's findings of fact and conclusions regarding them. While the Respondent only discusses a-r, the Opinion Letter discusses A-U. From an examination of both documents it appears the Respondent has conjoined similar arguments.

GROUND 1: Ineffective Assistance of Counsel

A. "inadequate pre-trial consultation with the Petitioner"

The habeas court found "that neither the Petitioner's trial counsel (who is accused of being ineffective) nor the Petitioner himself, was called to testify as to the amount of time the Petitioner and his trial counsel spent together in consultation". R1, pg. 176. The habeas court also found that while time sheets completed by trial counsel Michael were submitted to show lack of preparation, the habeas court was not presented with sufficient evidence to show that inadequate consultation occurred. R1, pg. 176.

B. "failure to interview the alleged victims, witnesses or anyone else"

Again, the habeas court found that the time sheet alone, without more, was not enough to show ineffective assistance of counsel and that the Petitioner failed to present any testimonial evidence from trial counsel. R1, pgs. 176-177. Further, the witnesses presented at the omnibus hearing to present testimony the Petitioner believes should have been presented at trial were insufficient proof. R1, pg. 177.

C. "failure to call certain witnesses to testify on behalf of the Petitioner's character, including Russie Matlick, the Petitioner's sister; Kenneth Matlick, the Petitioner's brother; Dorsey Mitter, the Petitioner's deceased father; and Violet Larew, the Petitioner's deceased aunt"

Only the allegation was contained in the Amended Petition. There was no case law or argument. The habeas court held that no evidence was presented of what the above-listed deceased witnesses would have testified to had they been called to the stand. Therefore, the court could not find that the failure to call the witnesses was ineffective. As to the other witnesses who were called at the omnibus hearing, the habeas court found their testimony to be unpersuasive. R1, pg. 177.

D. "defense counsel failed to conduct meaningful plea negotiations, nor did defense counsel explain the concept of plea negotiations to the Petitioner"

The habeas court held that "no evidence of any kind, nor case law or statutory law of any kind, has been presented to [the habeas court] regarding this allegation." R1, pg.178. The habeas court further held that the State, in its response to the Petition for Writ of Habeas Corpus, denied any plea offers were made to the Petitioner. Habeas counsel Flanigan should have been aware, through adequate investigation, that no plea offers were made and omitted this ground. To include this argument only weakened the entire Petition.

E. "defense counsel failed to make a Motion for Individual Voir Dire"

While this issue was briefed with case law, habeas counsel Flanigan failed to present any evidence on this issue at the omnibus hearing or argue this issue before the habeas court at the omnibus hearing. R1, pgs. 179-180.

F. "defense counsel failed to make a Motion to Suppress All Statements of Other Charges of Abuse Not Subject of (sic) the Indictment"

Again, the habeas court found that "while [the Petitioner] goes through some of the legal authority on the topic of W.Va. Rule of Evidence 404(b) and child sexual assault, he does not tell the [habeas court] what evidence came into the [trial court] due to the alleged failure to make the specified motion, that should not have been there." R1, pg. 180. Habeas counsel Flanigan failed to present any evidence or argument at the omnibus hearing that would support this allegation.

The habeas court stated "nor was this allegation addressed at the omnibus evidentiary hearing."

R1, pg. 180

G. "defense counsel failed to make a Motion to Suppress All Comments Concerning Prior Abuse/Neglect Cases and DUI Conviction"

The habeas court again found that the Petitioner failed to state what kind of illegal

evidence came before the trial court and how he was prejudiced. Habeas counsel Flanigan failed to state with particularity in the Amended Petition or at the omnibus hearing the evidence that should have been kept out of the trial. Without this evidence, the habeas court "cannot rule that this alleged error rises to the level of ineffective assistance of counsel." R1, pg. 180.

H. "defense counsel failed to make a Motion to Suppress Any Reference Concerning Defendant's Incarceration in Jail"

Once again, the habeas court holds that there is not enough evidence presented to show error. Habeas counsel Flanigan raises this issue in one sentence in the Amended Petition and presents no evidence or argument in either the Amended Petition or during the omnibus hearing. R1, pgs. 180-181.

I. "defense counsel failed to make a Motion for the State to Reveal its Collateral Crime Evidence and a Motion to Suppress Collateral Crime Evidence"

"Again, as with allegations (F), (G), and (H), supra, the [habeas court] cannot find that this alleged error amounts to ineffective assistance of counsel without sufficient evidence to support the allegation." R1, pg. 181. Habeas counsel Flanigan only cited case law in support of his argument and failed to present any argument or evidence at the omnibus hearing. Further, as is pointed out by the habeas court, habeas counsel Flanigan cites State v. Dolin, a case which had been overruled, on other grounds, ten years previously. R1, pg. 181 n. 3.

J. "defense counsel failed to object at trial at the State's revealing of all charges to the jury, even though the State knew, or should have known, that the charges concerning AM., an alleged victim, were going to be dismissed" (footnote omitted).

Once again, the habeas court found that with this issue it could not find that the alleged error rose to ineffective assistance of counsel without evidence being presented. R1, pgs. 181-182. In the Amended Petition, habeas counsel Flanigan merely stated the alleged error and cited to case law, but again failed to present any evidence or argument at the omnibus hearing.

K. "defense counsel failed to object at trial when the Prosecutor implied that the sexual assaults of the alleged victims terminated because the children were removed from the Petitioner's house"

In the Opinion Letter, the habeas court stated:

[t]his is the entire quoted allegation made in the Petition- one sentence; and no further evidence was presented on this allegation at the omnibus evidentiary hearing. The [habeas court], as with all of the previous allegations concerning which the Petitioner presented no evidence, is again put in the position with this allegation of having no evidence to review in support of the claim that this alleged error resulted in prejudice to the Petitioner and amounts to ineffective assistance of counsel. R1, pg. 182.

L. "defense counsel failed to object at trial when the State introduced testimony regarding alleged sexual abuse of another child not subject of the indictment"

The habeas court states that habeas counsel merely cites the allegation and case law and presents no supporting evidence which is not enough for the court to find ineffective assistance of counsel. R1, pg. 183.

M. "defense counsel failed to object at trial when the State introduced testimony regarding the fact that the Petitioner was incarcerated in the Preston County Jail"

Again, the habeas court found that the allegation is the sum total of argument or evidence as to this ground. Further, the habeas court found that no evidence was presented at the omnibus hearing. R1, pg. 183.

N. "defense counsel failed to request a cautionary or limiting instruction; the jury instructions propounded by the trial court and trial defense counsel were woefully inadequate and constituted reversible error in violation of the Petitioner's due process rights"

The habeas court found that it had no factual evidence upon which to decide this issue. R1, pg. 183. Habeas counsel Flanigan did present case law, but presented no evidence nor made any argument at the omnibus hearing.

O. "defense counsel failed to move for a list of witnesses prior to voir dire"

The habeas court finds that the State did provide trial counsel with a witness list as part of the discovery process. However, habeas counsel seems to be arguing that trial counsel should have requested a final witness list. While the habeas court states this was argued at the omnibus hearing, no witnesses were presented as to this argument. R1, pg. 184.

P. "defense counsel failed to object to the State's introduction of evidence concerning hearsay statements of Aretha Kees, who did not testify at trial"

Habeas counsel Flanigan did cite case law and argue this ground in the Amended Petition. However, he failed to argue or present evidence at the omnibus hearing. After examining the trial transcript, the habeas court found the argument unpersuasive. R1, pgs. 185-190.

Q. "both Dr. Schwarzenberg and Ms. Yandura testified with regard to 'child abuse syndrome'; the threshold question is whether these experts' testimony with regard to this syndrome had the necessary degree of scientific reliability to render it admissible; this issue was not raised at trial and therefore defense counsel was ineffective for not doing so"

The habeas court notes that the term child abuse syndrome was never used and states that no evidence, other than this bald assertion, is presented by habeas counsel Flanigan. Therefore, the habeas court finds no merit in the issue. R1, pg. 190. This issue is one in which an expert would have been helpful, yet one was not called by habeas counsel Flanigan.

R. "the testimony of both Dr. Schwarzenberg and Ms. Yandura is replete with unobjected to testimony concerning numerous unrelated sexual acts involving A. and J."

In regard to this ground, habeas counsel Flanigan does cite rule 404(b) of the W.Va. Rules of Evidence, case law, and the fact that these two witnesses testified without a McGinnis 404(b) hearing. Once again, however, the habeas court held that the Petitioner failed to provide any evidence to the habeas court on this ground. Further, the habeas court found that the Petitioner failed to offer any evidence to show that the trial court abused its discretion by failing

to engage in "gate-keeping". R1, pgs. 191-192.

S. "defense counsel failed to move for a mistrial subsequent to the dismissal of the charges pertaining to the alleged sexual assault and abuse of A. [M]."

The Amended Petition contained this bare assertion. Further, habeas counsel Flanigan added no evidence or argument at the omnibus hearing. After reviewing the trial transcript, the habeas court held that it "will not and cannot engage in second guessing about trial counsel's legal strategy during the trial of the underlying case in this matter." R1, pg. 195.

T. "defense counsel failed to move for a directed verdict, file and argue any post trial motions for a new trial and judgment of acquittal"

The habeas court found the allegation regarding defense counsel failing to move for a directed verdict was false, upon a review of the transcript. R1, pg. 196. However, as pointed out by the Respondent, the habeas court appeared to be mistaken regarding the content of this ground as it cites to the transcript where, at the close of the State's case, counts in the indictment were dismissed regarding another alleged victim. Regardless of the misapprehension, the habeas court found that the Petitioner failed to present any evidence. Further, the habeas court found that the allegation regarding trial counsel failing to move for a new trial and a judgment of acquittal appeared to be incorrect based on a review of the trial transcript. R1, pgs. 195-197.

Additionally, other post-trial motions were filed by the trial counsel as enumerated by the habeas court belying the statement that no other post-trial motions were made.

U. "defense counsel failed to incorporate important issues in the Petition for Appeal filed on behalf of the Petitioner in the W.Va. Supreme Court of Appeals"

Again, the habeas court makes a finding that except for the allegation and citation to one case, the Petitioner did not present evidence in the Amended Petition or at the omnibus hearing. In fact, the Petitioner failed to state what issues he felt were excluded from his Petition for

Appeal. The habeas court states, "[w]ith little information and no evidence presented regarding this allegation, the [habeas court] finds it to be without merit." R1, pg. 197.

V. "defense counsel failed to properly prepare for the sentencing hearing"

The habeas court finds that despite citing case law, the Petitioner fails to apply the law to the facts of his case and that without any evidence, the court cannot find that the trial counsel provided ineffective assistance regarding this allegation. R1, pg. 197.

In summation, the habeas court concluded that "[a]lthough [the Petitioner] makes numerous assertions against his trial counsel, he presents insufficient evidence to convince the Court that a reasonable lawyer, under the same circumstances, would have acted in a manner other than that by which his defense counsel acted." The habeas court continued, "[m]oreover, 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." R1, pg. 198. Further, the habeas court's side note, repeated by the Respondent, that the Petitioner was acquitted of 24 out of 28 counts in the indictment is of little comfort. Eight counts, counts 17-24, were dismissed at the close of the State's case due to lack of evidence and upon the State's own motion. R1, pg. 193-194. The Petitioner was convicted of four of the remaining counts for a sentence of 45-75 years. Petition for Appeal, p. 1; R2, Opinion Letter of 4/18/07, pgs. 1-2. There is no caveat under the Constitution that ineffective assistance of counsel is permissible so long as the criminal defendant does not get convicted of all the counts.²

Additional grounds were cited by habeas counsel Flanigan, for which he also failed to

² The Respondent states that the Petitioner's original Petition for Appeal, erroneously referred to as an "appeal", was denied by this Court after all issues were reviewed. Brief of the Respondent, pg. 14. However, this review is not a decision on the merits per Smith v. Hedrick, 382 S.E.2d 588 (W.Va. 1989).

present evidence to the habeas court. Specifically, with the exception of ground 3, improper prosecutorial comments and actions, habeas counsel Flanigan failed to present any oral argument to the habeas court. In fact, for ground 2 (indictment based upon insufficient evidence); ground 4 (verdict contrary to the evidence); and ground 5 (trial court committed reversible error and abuse of discretion in denying Petitioner's motion for psychological or psychiatric evaluations of the child witnesses concerning competency to testify) the Petitioner presented only case law with little or no analysis of the instant facts. In ground 5, the cited case law had been overruled. R1, pgs. 198-199; 202-206. The habeas court ruled that for ground 6 (trial court committed reversible error by imposing multiple punishments after a single trial which resulted in convictions for the same acts), ground 7 (trial court violated the Petitioner's right to due process by failing to give instructions to the jury concerning a lesser included offense), and ground 8 (trial court violated the Petitioner's right to due process by failing to give limiting instructions to the jury) that there was insufficient evidence for the court to find error. The habeas court stated that for ground 7, "[t]he Petitioner, as with Ground 6, presents no evidence at all. . . and does not even tell the [habeas court] what lesser included offense instruction should have been given." The habeas court found that in ground 9 the allegation that the trial court violated the Petitioner's right to due process by failing to properly instruct him prior to his testifying is incorrect, citing to the trial transcript showing where the proper instruction was given. Ground 10, cumulative error, was found to be without merit.

Many defense attorneys have found themselves in the position of having to decide whether to include an argument they do not want to make in petitions at the insistence of clients. It is unclear from the record whether some of the above-listed issues were included at the insistence of the Petitioner. Regardless of difficulty with clients, however, counsel has a duty to

ensure that what is argued is accurate and in several instances listed above, the arguments were simply false. Since habeas counsel Flanigan was not called to testify in 05-C-56, the Amended Petition and omnibus hearing transcript must speak for themselves as a half-hearted attempt to put issues before the habeas court. The Respondent asserts that the habeas court's findings regarding trial counsel Michael's representation of the Petitioner are correct. However, there was not enough evidence presented to the habeas court for it to make an accurate determination. Therefore, the Petitioner did not receive a full and fair hearing as is contemplated under Losh and the statutes governing petitions for writs of habeas corpus.

2. The Habeas Court Erred in Finding that Habeas Counsel Houston Was Not Ineffective Because Habeas Counsel Houston Failed to Present Evidence at the Omnibus Hearing, Failed to Notify the Petitioner of the Denial of the Petition for Writ of Habeas Corpus, and Failed to Notify the Petitioner of His Right to file a Petition for Appeal.

Similar to the situation with habeas counsel Flanigan, habeas counsel Houston not only failed to call prior habeas counsel Flanigan to the stand during the omnibus hearing, but he failed to present any testimony, expert or otherwise, to explain why habeas counsel Flanigan was deficient. Omnibus Hearing for 10-C-10 Tr. pg. 19. As was stated in the Petition for Appeal for 10-C-10, because of the lack of evidence, along with the fact that habeas counsel Houston failed to notify his client of the denial of the Petition for a Writ of Habeas Corpus and failed to file a Petition for Appeal on his behalf, the habeas court erred in not finding habeas counsel Houston's representation of the Petitioner to be deficient.

The Petitioner and the Respondent are in agreement that the habeas court erred in not making a factual finding about whether habeas counsel Houston notified the Petitioner regarding the denial of 05-C-56 leading to a denial of his right to file a petition for appeal and instead ruled that this instant appeal would cure the error. This Court 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. Syl. Pt. 3, Billotti v. Doddrell, 394 S.E.2d 32 (W.Va. 1990).³ (The Petitioner acknowledges that the case is discussing petitions for appeal following criminal convictions, not denials of petitions for writs of habeas corpus. However, since the petition for a writ of habeas corpus follows the criminal conviction and the issues dealt with are constitutional issues stemming from the criminal conviction, the Petitioner asserts this is a distinction without merit.) Where the Petitioner and the Respondent differ is in the cure for the error. The Respondent presents the Court with three options: 1. assume facts in a light most favorable to the Petitioner and then determine whether a petition for appeal in the second habeas, 05-C-56, would have resulted in a different outcome in that case; 2. dismiss the instant appeal and remand for a ruling on the factual issue of whether the Petitioner was notified of the denial of his Petition for a Writ of Habeas Corpus and extend the Strickland/Miller analysis to incorporate that finding; or 3. dismiss the instant appeal and remand with instructions for the habeas court to dismiss the third habeas, 10-C-10, and re-enter the Opinion Letter for 05-C-56 reinstating the Petitioner's right to petition for appeal. Brief of the Respondent, pg. 23.

The Petitioner puts forth an additional option for this Court: reverse the habeas court and find that habeas counsel Houston's representation of the Petitioner deficient. Then grant the Petitioner a new omnibus hearing for 05-C-56. Adequate argument has been made that habeas counsel Houston's representation of the Petitioner fell below that which is reasonable and further, that the Petitioner was prejudiced by that inadequate representation. Any error that occurred in 05-C-56 would be cured since testimony from trial counsel Michael and habeas counsel Flanigan

³ The Petitioner acknowledges that this holding is affected by the passage and implementation of the Revised Rules of Appellate Procedure December, 2010. However, as the error complained of happened before the new rules came into effect, this case is still good law.

could be elicited, other evidence could be presented and, if an adverse ruling is entered, the Petitioner could file an appeal. Further, in response to the suggestion that this Court simply review the underlying record to determine what this Court may have done had it been presented with a Petition for Appeal in 05-C-56 following the denial of the Petition for a Writ of Habeas Corpus on April 18, 2007, the Petitioner asserts that, while expedient, this would fail to cure the error. Due to the fact that habeas counsel Flanigan failed to adequately present evidence at the omnibus hearing for 93-C-191 and habeas counsel Houston failed to adequately present evidence at the omnibus hearing for 05-C-56 the record is simply too thin for this Court to make a determination regarding a Petition for Appeal for 05-C-56.

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

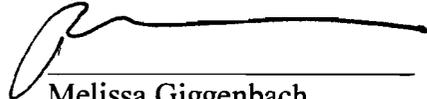
The Petitioner disagrees with the analysis of the Respondent in Brief of the Respondent when stating that the habeas court was correct in denying the Motion Under Rules of Civil Procedure 59 and 60/Alteration of Judgment/Relief From Judgment using the Strickland/Miller analysis. pg. 25. The sole basis for the ineffective assistance of counsel claim was not that habeas counsel Houston failed to hire an investigator to find habeas counsel Flanigan. The basis for the ineffective assistance of counsel claim was that habeas counsel Houston failed to present any evidence at the omnibus hearing for case 05-C-56. Certainly, testimony from habeas counsel Flanigan would not have been the only way to show that he was in fact ineffective in representing the Petitioner. A blanket statement that had habeas counsel Flanigan testified at the 05-C-56 omnibus hearing the result would have been the same is unsupportable. The fact is the result of that hearing without evidence is clear. The result of that hearing with adequate evidence is unknowable. It is for that reason, the Petitioner filed the above-mentioned motion.

III. CONCLUSION

WHEREFORE, for these and other errors which are apparent upon a fair reading of the transcript and the record, and may be more fully briefed in the previously filed Petition for Appeal, your Petitioner, Charles L. Mitter, respectfully prays that this Honorable Court reverse the judgment of the Circuit Court of Preston County, West Virginia, denying the Petitioner's Petition for a Writ of Habeas Corpus and remand for further proceedings to allow for a full and fair omnibus hearing in case 05-C-56 which would cure the errors set forth herein. In the alternative, the Petitioner respectfully requests that this Honorable Court reverse the judgment of the Circuit Court of Preston County, West Virginia, denying the Petitioner's Motion Under Rules of Civil Procedure 59 and 60/Alteration of Judgment/Relief From Judgment and allow the Petitioner to present further evidence in support of the Petition for a Writ of Habeas Corpus in case 10-C-10.

Respectfully submitted,

Charles L. Mitter,
Petitioner,
By Counsel.

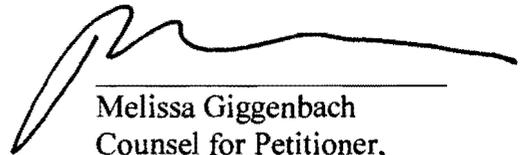


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Certificate of Service

I, Melissa Giggenbach, certify that I served a true and accurate copy of the foregoing Petitioner's Reply Brief via First Class Mail, postage pre-paid, on April 28, 2011 upon the following:

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