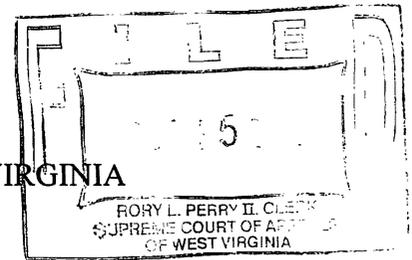


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

v.

Supreme Court No. 11-1271

Circuit Court No. 99-F-137-O
(Logan County)

WILLIAM ADKINS,

Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. Trial Counsel's Performance Was Objectively Unreasonable Where Counsel Effectively Deprived His Client Of A Meaningful Defense By Failing To Request A Habitation Instruction When The Only Defense At Trial Was That Mr. Adkins Was Justified In Using Deadly Force Against A Violent, Uninvited Intruder In His Dwelling.

- II. Appellate Counsel's Performance Was Objectively Unreasonable Where Counsel Attempted To Appeal A Denied Suppression Motion Yet Failed To Request A Transcript Of The Suppression Hearing Or Otherwise Investigate What Appears To Be A Meritorious Search And Seizure Violation.

STATEMENT OF THE CASE

This is an appeal from William Adkins' denied habeas petition, stemming from his March, 2000 conviction of first-degree murder, with mercy. (A.R. 3-5, 11-12). As shown below, the habeas court erred in denying relief on the basis of ineffective assistance of trial and appellate counsel. Trial counsel's sole theory of defense at trial was that Mr. Adkins was justified in using deadly force because he was defending himself against a violent intruder in his dwelling. (A.R. 288-91). However, trial counsel failed to request a defense of habitation instruction, depriving the jury of a legal "hook" to justify an acquittal if it credited Mr. Adkins' testimony. (A.R. 678-79). Appellate counsel was likewise ineffective for failing to adequately investigate the issue of suppression before raising it as an assignment of error for appeal. (A.R. 806-08). Appellate counsel argued the trial court erred in allowing the admission of evidence seized from Mr. Adkins' home without a warrant, yet did not request a copy of the suppression hearing transcript, which is now unavailable, save an excerpt reproducing Mr. Adkins' testimony, but nothing else. (A.R. 166-219). As a result, appellate counsel's petition was grossly inadequate on an issue that actually appears to have been meritorious, had it been sufficiently investigated and competently raised.

Mr. Adkins has never denied shooting and killing his ex-girlfriend's son, Shawn Dingess. (A.R. 289). The shooting occurred on September 3, 1999, and shortly afterward, Mr. Adkins was in police custody. (A.R. 279, 371). He put up no resistance, turned over his clothing for lab analysis, submitted to a paraffin test, and with his father he directed the police to his firearm, all without incident (A.R. 387-88, 396-397, 456). As far as he was concerned, he had nothing to hide – he shot a violent, uninvited intruder in his home in self-defense. (A.R. 288-91). Yet because Mr. Adkins' trial and appellate lawyers' were ineffective, he is currently serving a life

with mercy sentence. (A.R. 4).

Trial counsel's sole theory of defense was that Mr. Adkins could use deadly force to defend himself in his own home. (A.R. 288-91). Counsel's opening statement set the stage for the defense case that Mr. Dingess was a violent man, who came from a violent family. *Id.* He presented evidence that Mr. Dingess abused his wives (he was married three times), girlfriends, and some of his children. (A.R. 601-03). A local bowling alley had banned Mr. Dingess for repeatedly starting fights, including using the steel-end of a pool cue to put the owner in the hospital. (A.R. 653-57). Mr. Dingess sometimes ran into trouble with the law because of his temper, too. (A.R. 599-600, 658). This was Mr. Dingess' reputation, but it was also what Mr. Adkins had seen personally, and been the victim of himself. (A.R. 595-96, 603-05). On more than one occasion, Mr. Dingess, 27, physically assaulted Mr. Adkins, who was almost twice his age and had a bad back. (A.R. 279, 595-96, 603-04). Sometimes these odds were not even to Mr. Dingess' liking, so he would recruit his brother to help him, or he would use weapons like brass knuckles. (A.R. 596, 603).

This was the man that Mr. Adkins came home to find on the afternoon of September 3, 1999. (A.R. 586). Mr. Dingess had evidently broken into Mr. Adkins' home, because just weeks earlier Mr. Adkins put up no trespassing signs and changed the locks to try and keep Mr. Dingess and Christine (Mr. Adkins' ex-girlfriend, Mr. Dingess' mother) away from him. (A.R. 573-74, 585-86). Not only had he broken in, but Mr. Dingess was helping himself to beer from Mr. Adkins' refrigerator, and Mr. Adkins' cousin testified that Mr. Dingess was a danger to himself and others when he drank. (A.R. 586-87, 567). Mr. Adkins confronted him and told him to leave, but Mr. Dingess refused. (A.R. 587). Mr. Dingess believed that Mr. Adkins owed Christine on a loan, and he refused to leave the house until Mr. Adkins turned over his money. (A.R. 586-88,

592). He also refused to leave Mr. Adkins alone, and at one point followed him through the house to the bathroom, continuously berating him for money. (A.R. 592). Mr. Adkins gave up. He was not going to be driven from his own home, but he was not going to hand over his wallet to Mr. Dingess, either. (A.R. 587-88, 612). So, he sat down in the living room and had a beer. (A.R. 588).

Mr. Dingess, who was still helping himself, then went to the kitchen and Mr. Adkins noticed a gun in his waistband. (A.R. 589). While Mr. Dingess was out of the room, Mr. Adkins retrieved his revolver and hid it under a pillow where he was sitting. (A.R. 590-591). At some point, what had primarily been verbal and emotional harassment started to turn violent. When Mr. Adkins got up to go to the kitchen, Mr. Dingess knocked him to the ground and jabbed him in the thigh with a screwdriver. (A.R. 591). Later, Mr. Adkins got up to adjust the TV and Mr. Dingess came from behind and kicked him in the groin as Mr. Adkins turned around. (A.R. 592). Mr. Dingess then hit Mr. Adkins in the shoulder. *Id.* Mr. Adkins looked back up and saw Mr. Dingess' gun. (A.R. 592). Mr. Adkins kicked him, and Mr. Dingess lost control of the gun, which slid across the room¹. *Id.* Mr. Dingess went for it, but Mr. Adkins got to his hidden revolver first and shot him in the leg. *Id.* Mr. Dingess continued going for his gun, and Mr. Adkins fired four more times to stop him. (A.R.592-93). He then went to his parents' house nearby, told his father that Mr. Dingess had been "jumping on him" again, and what had happened. (A.R. 148). Trial counsel's closing statement explicitly argued that under these circumstances, Mr. Adkins was justified in using deadly force because he was in his own home. (A.R. 722).

However, despite all of this evidence and argument presented by trial counsel, he failed to request a defense of habitation instruction – the crux of the entire defense case. (A.R. 678-79).

¹ Neither the gun nor the screwdriver were ever recovered. (A.R. 446, 611) It is worth pointing out that Mr. Dingess' friends and family had unfettered access to the crime scene prior to the police arriving. *Id.*

Specifically, consistent with the defense, trial counsel should have requested instructions informing the jury of the following law:

“1. 'A man attacked in his own home by an intruder may invoke the law of self-defense without retreating.' Syllabus Point 4, *State v. Preece*, 116 W.Va. 176, 179 S.E. 524 (1935).

2. The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.”

Syllabus Points 1 and 2, *State v. W. J. B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981). In fact, trial counsel did not request any jury instructions, explaining that he was unprepared because he expected the judge to handle all of that. (A.R. 678-79).

The State's case was very different. Since the State had no witnesses in the house itself, it had to rely on a variety of accounts from Mr. Dingess' friends and family who came upon the scene just after the fact, and someone who may have overheard the homicide on the phone. (A.R. 293, 309, 334, 351). Despite the history between these two, Christine testified that they were actually good friends and Mr. Dingess had never been violent with Mr. Adkins. (A.R. 669, 671). Mr. Dingess' wife testified that Mr. Dingess was over fixing Mr. Adkins' toilet. (A.R. 295). Thomas Nord testified that he was on the phone that afternoon with Mr. Dingess, and that in the middle of complaining about a door not opening he heard loud bangs, followed by a moan, and an intoxicated voice saying “I told you I'd get you, you son of a bitch.” (A.R. 352-54). The State called many other witnesses, both to narrate the subsequent investigation and to point out alleged inconsistencies in Mr. Adkins' testimony, but this was the primary testimony the State had to establish a narrative of what happened in the home at the time of the shooting. (A.R. 279-88).

To establish its theory that this was a premeditated killing without provocation or apparent motive, the State also relied on physical evidence. (A.R. 712). The State argued that

apparent injuries to Mr. Dingess and blood on the gun and Mr. Adkins' clothing indicated a more physical struggle, and an expert opined that at least one of the bullet wounds was inflicted from only about half a foot away. (A.R. 704, 712-13). The police also relied on a box of bullets seized from Mr. Adkins' bedroom on the second floor. (A.R. 427). It was the police's theory that this box of ammunition proved that Mr. Adkins had not hastily retrieved his gun from a downstairs drawer as he claimed. (A.R. 64-65, 590-91). Instead, the State argued, he must have walked upstairs, methodically filled each chamber to make sure the gun was fully loaded before coming back downstairs and shooting Mr. Dingess – his friend, according to Mr. Dingess' mother – for no apparent reason. (A.R. 64-65; 669, 671).

The jury heard both stories, deliberated without the benefit of an instruction vital to the defense theory, and found Mr. Adkins guilty of first-degree murder, but granted mercy. (A.R. 3-5, 678-79).

Following the trial, appellate counsel raised numerous assignments of error in his petition. (A.R. 785-86). In particular, his fourth assignment of error directly challenged the trial court's denial of a pretrial motion to suppress, *inter alia*, the ammunition box and bullets seized from Mr. Adkins' bedroom. *Id.* This evidence went to the State's theory of premeditation and deliberation, and before trial the court held a suppression hearing to discuss this and the other evidence the defense wanted excluded. (A.R. 166). However, despite actually arguing that the suppression hearing was incorrectly decided, appellate counsel failed to request a transcript of this hearing. (A.R. 1141). Because of appellate counsel's failure to request this transcript, it is now unavailable in large part. (A.R. 166, 888). All that remains is Mr. Adkins' testimony – there is no testimony from the police, nor arguments from counsel, or the court's ruling. (A.R. 166-219).

Making do with the remainder of the record, it appears that the police entered Mr. Adkins' home and seized these items without a warrant. (A.R. 7). When they arrived at the scene, the police learned from Mr. Dingess' family and friends that Mr. Adkins had shot Mr. Dingess, and he was now at his parents' house. (A.R. 46). While one officer went to find and arrest Mr. Adkins, another conducted a protective sweep of Mr. Adkins' house. (A.R. 46-47). That officer concluded his search, secured the premises, and left the home without taking anything. (A.R. 47-49). Later, the police went back into the home to process the crime scene. (A.R. 50). Again, the officer conducting the search left the crime scene, and returned a third time. (A.R. 52). In grand jury testimony, the police narrative indicated that during this third search the police started a more thorough search. (A.R. 52-53). They went upstairs and observed a nightstand in the master bedroom. (A.R.54). Then and only then they saw a live round of ammunition on top of the nightstand. (A.R. 54-55). There was another nightstand on the opposite side of the bed with an open drawer, and in that open drawer the police found a box of ammunition. (A.R. 55). After the suppression hearing, this story changed. The same officer from the grand jury testimony, Trooper Gunnoe, testified under oath that he conducted a protective sweep to ensure there was no one hiding in any rooms or closets. (A.R. 426-27). During this search, he found a stray bullet and an open box of ammunition on top of a nightstand. (A.R. 427-28). He later returned to seize this evidence after having left and secured the premises. (A.R. 428). Appellate counsel's petition makes no mention of any of this, and seems to rebut warrant exceptions upon which the trial court did not even rely. (A.R. 806-808).

This Court declined to consider on the merits of this petition, such as it was, pursuant to the then-existing rules of appellate procedure. (A.R. 1181). Mr. Adkins filed a *pro se* petition for habeas corpus in October, 2001. (A.R. 891). Counsel was appointed to assist Mr. Adkins, and in

pertinent part Mr. Adkins claimed as grounds for habeas relief that trial counsel was ineffective for failing to request a defense of habitation instruction and that appellate counsel was ineffective for failing to request the suppression hearing transcript. (A.R. 1060-62, 1075-76).

As to the effectiveness of trial counsel, the habeas court made the following findings of fact and conclusions of law: “Trial counsel did voice the argument in his closing statement to the jury therefore the Court cannot conclude that this was not the strategy of trial counsel. It should be noted that during the pendency of this Petition trial counsel died and his opportunities to comment on the expert analysis of his performance was never completed by either party to this action. This Court DOES NOT FIND that no reasonable attorney would have acted as counsel did. The Defendant’s claim for relief on this ground is DENIED.” (A.R. 1062). Regarding the ineffectiveness of appellate counsel for appealing an issue without requesting an essential (and now unavailable) suppression hearing transcript, the habeas court made the following findings of fact and conclusions of law: “This Court cannot find that appellate counsel failed to act reasonably in focusing on other issues for the appeal rather than pursuing issues where there was no ground for appeal or the chances for success were minimal. The Defendant further has not shown how any information that would have been in either² transcript would more than likely have changed the outcome of his trial or his appeal Therefore his claim for relief on these grounds is DENIED.” (A.R. 1076). For the reasons stated below, Mr. Adkins disputes some of these findings and conclusions, and argues that the habeas court’s ultimate disposition denying habeas relief for ineffective assistance of trial and appellate counsel was an abuse of discretion.

² Mr. Adkins challenged on habeas the missing suppression hearing as well as an alleged pretrial hearing that is also missing. (A.R. 1037). Nothing substantial is known about this pretrial hearing and this appeal only concerns the verified and vital suppression hearing.

SUMMARY OF ARGUMENT

In West Virginia, claims of ineffective assistance of counsel are governed by the following standard: “(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.” Syllabus Point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, (1984)). The habeas court below erred by not granting relief to Mr. Adkins for the objectively unreasonable and prejudicial failures of both his trial and appellate counsel.

The usual presumption that trial counsel’s choices are reasonable strategic decisions does not apply where, as here, the habeas court below found that counsel was not acting in accordance with his putative trial strategy. (See A.R. 1062). Furthermore, there can be no doubt that trial counsel’s performance is deficient under the above test. Trial counsel vigorously pursued a defense of habitation theory of the case, but failed to request a habitation instruction (or any other instructions for that matter) stating Mr. Adkins had no duty to retreat and could use deadly force if he reasonably believed it was necessary to stop an intruder threatening imminent physical violence or the commission of a felony. (A.R. 678-79); See Syllabus Points 1 and 2, *State v. W. J. B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981). Without this instruction, it was virtually impossible for the jury to acquit Mr. Adkins, prejudicing him by essentially depriving him of a meaningful defense.

With regards to appellate counsel, “the fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation[.]” Syllabus Point 3, *State ex. rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). For purposes of appeal, this investigation concerns an adequate review of the transcripts. However, appellate counsel did not even request

a copy of the suppression hearing transcript, and now all but a small portion of it is unavailable. (A.R. 888). This prejudiced Mr. Adkins because appellate counsel actually did attempt to challenge the denied suppression motion – this was not a merely theoretical ground. (A.R. 806-08). Furthermore, from what cursory review of that motion is possible with the limited record it appears that there is a “probability of actual injury” in so far as Mr. Adkins’ Fourth Amendment challenge to the seizure and admission of evidence appears to be meritorious. *Cf.* Syllabus Point 4, *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E.2d 136 (1977). This, combined with the inability to effectively re-prosecute the original appeal, entitles Mr. Adkins to a new trial and suppression hearing, if not a full discharge of his sentence. *See id.*

STATEMENT REGARDING ORAL ARGUMENT

Mr. Adkins believes this Court has never had an opportunity to review on the merits whether it is ineffective assistance of counsel for a lawyer to fail to request a jury instruction essential to the resolution of the only defense raised at trial. Likewise, Mr. Adkins has not located any decision by this court pertaining to the effectiveness of appellate counsel for failing to request a transcript pertinent to an assignment of error raised on appeal. He therefore respectfully requests a Rule 20 argument to thoroughly present these issues of first impression.

ARGUMENT

I. Trial Counsel's Performance Was Objectively Unreasonable Where Counsel Failed To Request A Habitation Instruction Even Though His Sole Defense Strategy At Trial Was That Mr. Adkins Was Justified In Using Deadly Force To Defend Himself In His Home.

Mr. Adkins alleged in his habeas petition that trial counsel was ineffective for pursuing a defense of habitation theory of the case yet failed to request a habitation instruction consistent with this Court's holding in *State v. W. J. B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981). The habeas court found that it was in fact trial counsel's strategy to pursue a defense of habitation theory, but nonetheless concluded that a lawyer pursuing such a defense could reasonably fail to request the necessary jury instruction. (A.R. 1062). Mr. Adkins now argues that this conclusion is inconsistent with the finding regarding trial counsel's strategy and that he satisfies this Court's test for ineffective assistance of counsel: "(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." Syllabus Point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (*quoting Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)). The habeas court therefore abused its discretion in denying habeas relief, and Mr. Adkins is entitled to a new trial with competent counsel. *See* Syllabus Point 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006) ("We review the final order and the ultimate disposition [of a denied habeas petition] under an abuse of discretion standard.").

The habeas court correctly found that "trial counsel did voice the argument in his closing statement to the jury therefore the Court cannot conclude that this was not the strategy of trial counsel." (A.R. 1062). Necessarily implied by this finding is that had his counsel requested it, Mr. Adkins would have been entitled to an instruction that he had no duty to retreat and that he

could be justified in using deadly force even if it was not strictly necessary³. See *State v. Phelps*, 172 W. Va. 797, 802-03, 310 S.E.2d 863, 869 (1983) (Per Curiam) (*ruling* error to not give habitation instruction where it was a correct statement of the law and applied to the defense theory of the case). However, the habeas court then incorrectly ruled that it could not conclude that “no reasonable attorney would have acted as trial counsel did,” and denied relief (A.R. 1062). This is inconsistent. If trial counsel’s failure to request the instruction was not a legitimate trial tactic given his strategy, then it was unreasonable and the habeas court’s denial of relief was an abuse of discretion. See Syllabus Point 1, *Haines*, 219 W. Va. 417, 633 S.E.2d 771. The failure to request a jury instruction necessary for the determination of the sole defense raised at trial falls below the minimum threshold of professional competence and prejudices Mr. Adkins by essentially depriving him of a defense.

“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, (1984).” Syllabus Point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The first prong requires a showing that counsel’s performance was objectively unreasonable. *Id.* There is a strong presumption that counsel’s choices arising out of strategy are reasonable. See *Coleman v. Painter*, 215 W. Va. 592, 596, 600 S.E.2d 304, 308 (2004). However, this presumption does not apply here. Consistent with the habeas court’s findings, the failure to request the instruction was not strategic. (A.R. 1062). Trial counsel argued that Mr. Adkins’ use of deadly force was justified because he was in his home. (A.R. 291). The defense established at

3 1. “A man attacked in his own home by an intruder may invoke the law of self-defense without retreating.” Syllabus Point 4, *State v. Preece*, 116 W.Va. 176, 179 S.E. 524 (1935).

2. The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary. *W. J. B.*, 166 W. Va. 602, 276 S.E.2d 550, at Syllabus Points 1 and 2.

trial that Mr. Dingess was a violent intruder in Mr. Adkins' dwelling who refused to leave unless he surrendered his money. (A.R. 592). At the close of the evidence, trial counsel did not request this or any other specific jury instruction, and told the trial court that the reason he was unprepared for the first degree murder trial was because the last time he had a jury trial, the court took care of all the instructions. (A.R. 678). Therefore, consistent with the habeas court's findings, no deference should be due this failure since it resulted from dereliction, rather than strategy or tactics.

The closest this Court has come to addressing whether it is objectively unreasonable to not request a vital jury instruction is *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In *Miller*, defense counsel developed a theory of self-defense at trial, yet failed to request a self-defense jury instruction. *Id.* at 15, 459 S.E.2d at 126. This Court expressed grave concern, stating that "it would be unusual" for counsel to do so. *Id.* "Such a maneuver is indicative of the lack of a trial strategy and 'no competent defense attorney would go to trial without first formulating an overall strategy.'" *Id.* at 15-16, 126-27. In the end, this Court could not rule in Ms. Miller's favor only because she raised ineffective assistance on direct appeal, and there was no habeas record for this Court to review. *Id.* at 16, 127. This is not the case here. Mr. Adkins has had his omnibus habeas hearing, and the record is reconstructed as best as could be accomplished.⁴ (A.R. 880-88).

As the habeas court also found, trial counsel passed away prior to the habeas, and so he was unavailable to testify at the omnibus hearing. (A.R. 1062). However, the standard for reasonable competence is objective, and while certainly useful, trial counsel's testimony is not essential to ruling on a claim of ineffective assistance. *See Miller*, 194 W. Va. 3, 459 S.E.2d 114,

⁴ Evidently, it is the court reporter's policy not to maintain original recordings after a transcript has been prepared. Unfortunately, the only transcript of the omnibus habeas hearing went missing from the court file, and no copy is known to exist. Prior to the filing of this brief present counsel negotiated a "Notice of Agreement" with the habeas prosecutor, memorializing to the extent possible the evidence and argument from the hearing. (A.R. 880).

at Syllabus Point 5. Furthermore, to the extent that a lawyer's subjective intent can inform the objective analysis, it is clear from the trial transcript that counsel did not make an intentional tactical choice – he admitted to being unprepared and did not have *any* jury instructions to offer. (A.R. 678-79); *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 384-85, 106 S. Ct. 2574, 2588 (1986) (*holding* ineffective assistance where failure to move for suppression was due to lack of preparation rather than actual tactic.). Nor could his testimony have provided a reasonable explanation for what is on its face blatantly incompetent performance. Objectively, there is no tactical explanation for this behavior. It is important that self-defense in his dwelling was the actual defense at trial – it was not a possible strategy that counsel rejected. *See State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 327, 465 S.E.2d 416, 429 (1995). It was not one of several defenses raised that counsel decided to drop. Nor was it a mere limiting or cautionary instruction that counsel could soundly reject. *See Ronnie R. v. Trent*, 194 W. Va. 364, 369, 460 S.E.2d 499, 504 (1995) (Per Curiam). Without the defense of habitation instruction, there was no real defense, and the trial was at best a formality.

Because of the obvious harm that trial counsel's failure had on Mr. Adkins, there is likewise little doubt that he satisfies the second *Strickland* prong, that counsel's deficient performance prejudiced the outcome of his case. *See Miller*, 194 W. Va. 3, 459 S.E.2d 114, at Syllabus Point 5. The entire purpose of conducting trials is so that the accused can put forth a meaningful defense. *See, e.g., State v. Jenkins*, 195 W. Va. 620, 628, 466 S.E.2d 471, 479 (1995) (*quoting Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146-67 (1986)). That includes the right to marshal evidence in one's favor, *see, id.*, but also entitles the defendant to instructions of law enabling the jury to render a not guilty verdict if it credits that evidence. *See State v. Shingleton*, 222 W. Va. 647, 650, 671 S.E.2d 478, 481 (2008) (Per Curiam). Without both

a factual predicate and a legal theory, a defendant essentially has no defense at all. *See Miller*, 194 W. Va. 3, 459 S.E.2d 114, at Footnote 20 (“Without instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts.”). Such was the case here. When it came time for the jury to deliberate, it only had half a defense to consider. The jurors heard Mr. Adkins’ testimony and evidence, but without the defense of habitation instruction that a person in his home can use deadly force more broadly, they could not deliver a “not guilty” verdict unless they found that Mr. Adkins had responded with no more force than was necessary to avoid serious bodily injury or losing his life. (A.R. 701-02). This is a much higher burden than he should have shouldered under *W. J. B. and Phelps*. *See, e.g., Phelps*, 172 W. Va. 797, 310 S.E.2d 863, at Syllabus Points 4 and 5.

Although this Court has never had an opportunity to rule on the merits of the specific issue of whether it is ineffective to not request an instruction central to the defense case, other courts have. *See, e.g., Commonwealth v. Gelpi*, 625 N.E.2d 543 (Mass. 1994). These courts conclude that such failure is objectively unreasonable and prejudices the defendant because the jury could have given a different verdict had it been properly instructed. *See, e.g., Brunson v. State*, 477 S.E.2d 711, 713 (S.C. 1996). The Fourth Circuit ruled that defense counsel’s failure to request an instruction was ineffective assistance in *Luchenburg v. Smith*, 79 F.3d 388, 393 (4th Cir. 1996) (Per Curiam). In that case, the prosecution charged several crimes including using a handgun to commit a crime a violence. *Id.* 390-91. The jury convicted him of the handgun offense and another felony, but not one considered a “crime of violence.” *Id.* at 391. The Fourth Circuit found trial counsel ineffective for failing to request a more specific instruction about which of the charged felonies could be a predicate for the handgun violation. *Id.* at 393. The court easily concluded that the defendant was prejudiced since the jury actually acquitted him of

the only charge that could have been a predicate for the handgun offense. *Id.*

Other courts have had little difficulty finding prejudice even without the idiosyncrasies of *Luchenburg*. In *Commonwealth v. Gelpi*, 625 N.E.2d 543 (Mass. 1994), the Massachusetts Supreme Judicial Court ruled that it was ineffective assistance of counsel to not request a “mistake of fact” jury instruction where counsel had adduced such evidence at the defendant’s trial for armed robbery. *Id.* The court did not mince any words, and ruled that the defendant was entitled to relief because “if [the jurors] had been properly instructed, and if they believed the evidence of his honest belief, they would have found him not guilty of armed robbery[.]” *Id.* 544.

The Supreme Court of South Carolina ruled that counsel was ineffective for failing to request a “mere presence” jury instruction in a drug possession case where the defendant argued he was present, but not in possession of any drugs. *Brunson v. State*, 477 S.E.2d 711 (S.C. 1996). That court likewise seems to suggest that the defendant was prejudiced because he was entitled to the instruction and, if his testimony were believed, the jury would acquit him on that basis. *Id.* at 713. In *Commonwealth v. Chmiel*, 639 A.2d 9 (Pa. 1994), a defense lawyer failed to request an accomplice instruction despite vigorous argument that the State’s chief witness was an accomplice whose testimony ought to be distrusted. *Id.* at 14. The Pennsylvania Supreme Court ruled that “the jurors might well have concluded, under proper instructions, that [the State’s witness] was an accomplice whose testimony was of little value.” *Id.* This was sufficient prejudice to justify a new trial for the defendant. *Id.*

West Virginia should follow these courts in recognizing that the failure to request a jury instruction central to the defense theory is ineffective. Mr. Adkins’ only defense at trial was that the killing was justified because he was in his home. (A.R. 288-291). Because of trial counsel’s failure to request a defense of habitation instruction, the court essentially told the jury this was

not a legally sufficient basis to acquit. This is clearly ineffective, the habeas court abused its discretion in ruling otherwise, and Mr. Adkins is entitled to a new trial.

II. Appellate Counsel's Performance Was Objectively Unreasonable Where Counsel Attempted To Appeal A Denied Suppression Motion Yet Failed To Request A Transcript Of The Suppression Hearing Or Otherwise Investigate What Appears To Be A Meritorious Search And Seizure Violation.

Mr. Adkins also alleged in his habeas corpus petition that his appellate counsel was ineffective for not requesting a transcript of the suppression hearing despite challenging it on appeal. (A.R. 1040-41). Tracking the ineffective assistance standard in *Strickland* and *Miller*, the habeas court ostensibly found 1) that counsel's representation was not objectively unreasonable in choosing to forgo challenging the denied suppression motion and 2) Mr. Adkins was not prejudiced. (A.R. 1075-76); *See also Miller*, 194 W. Va. 3, 459 S.E.2d 114, at Syllabus Point 5. However, the habeas court was mistaken - appellate counsel indeed challenged the denied suppression motion on direct appeal, so failing to request the suppression hearing transcript represented a serious failure to investigate. (A.R. 806-08). Additionally, the habeas court applied the incorrect standard for assessing prejudice because under these circumstances, the degree of prejudice only impacts the available remedies, not whether relief should be granted. *See Rhodes v. Leverette*, 160 W. Va. 781, 792, 239 S.E.2d 136, 143 (1977). Finally, the record, such as it is, indicates that Mr. Adkins may very well have prevailed on his claimed Fourth Amendment violation had the suppression hearing transcript been available for appeal⁵. There is therefore a "probability of actual injury," and Mr. Adkins is entitled to a new trial and suppression hearing

5 The suppression motion challenged statements made to the police, Mr. Adkins' warrantless arrest, the seizure of his clothing and gun, and the re-entry into Mr. Adkins home to collect a box of ammunition and other evidence. (A.R. 13-18). For purposes of this assignment of error, Mr. Adkins is only concerned with the re-entry and seizure of the ammunition from upstairs because it could be used to infer premeditation and deliberation. (A.R. 64-65).

since the lack of a suppression hearing transcript makes a second direct appeal an ineffectual remedy. *Cf.* Syllabus Point 4, *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E.2d 136 (1977).

This Court applies the *Strickland* test for evaluating appellate counsel's adequacy as well as trial counsel's. *State v. VanHoose*, 227 W. Va. 37, 50, 705 S.E.2d 544, 557 (2010) (Per Curiam). Counsel is ineffective where “(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.” *Miller*, 194 W. Va. 3, 459 S.E.2d 114 at Syllabus Point 5. Addressing the first prong of *Strickland*, this Court has held that “the fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation ... counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption [of reasonable assistance] is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.” *Legursky*, 195 W. Va. 314, 465 S.E.2d 416, at Syllabus Point 3. In the context of appellate advocacy, that investigation centers around the transcripts.

This Court has held that an indigent person cannot be denied transcripts due to inability to pay, largely because the right to file an appeal means little without counsel and the transcript. *See Leverette*, 160 W. Va. at 784, 239 S.E.2d at 139. Further, it is a violation of due process to deprive a defendant of timely requested transcripts for any reason. *Id.* (citing *State ex. Rel. Johnson v. McKenzie*, 159 W.Va. 795, 226 S.E.2d 721 (1976)). “While the law of this State does not require a transcript of trial proceedings as a condition precedent to the right of appeal, as a practical matter an appeal cannot be effectively prosecuted without one.” *McKenzie*, 159 W. Va. at 799, 226 S.E.2d at 724 (citing *Boles v. Kershner*, 320 F.2d 284 (4th Cir. 1963); *Linger v.*

Jennings, 143 W.Va. 57, 99 S.E.2d 740 (1957)). In extraordinary cases where a transcript cannot be provided, a defendant may be entitled to a new trial, or even unconditional discharge. *Leverette*, 160 W. Va. 781, 226 S.E.2d 136, at Syllabus Points 4 and 5. Therefore, the importance of transcripts to an adequate appeal cannot be understated, and counsel's failure to request and review them is no different from a lawyer showing up at trial having never interviewed any of the witnesses.

However, it does not follow from this that counsel must undertake all possible investigation, no matter how speculative. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *State ex rel. Vernatter v. Warden, W. Virginia Penitentiary*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999). Presumably relying on this principle, the habeas court ruled that it could not find "that appellate counsel failed to act reasonably in focusing on other issues for the appeal rather than pursuing issues where there was no ground for appeal or the chances for success were minimal." (A.R. 1076). However, the record indicates that the habeas court is plainly wrong. Appellate counsel actually did challenge the denied suppression motion on direct appeal in his fourth assignment of error, and so the court's finding is clearly erroneous. (A.R. 806); *See also* Syllabus point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975) ("Findings 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.").

Since it actually was appellate counsel's strategy to challenge the denied suppression motion, there is no excuse for failing to adequately investigate that assignment of error. The record reveals that someone other than appellate counsel did request a portion of this transcript that is now available. (A.R. 166). However, this portion only includes Mr. Adkins' testimony.

(A.R. 168). This partial transcript contains none of the police officers' testimony, none of the lawyers' arguments, nor, importantly, the trial court's ruling. *Id.* No written order memorialized the denied suppression motion until after trial. (A.R. 6-9). In this April 24, 2000, order the court states in regards to the warrantless seizure at issue, “circumstances existed at the time the officers arrived and further that that the facts were such as to permit officers to examine the scene of the crime without first obtaining a search warrant.” *Id.* There was therefore no way for appellate counsel to adequately investigate this assignment of error without requesting the complete transcript.

Furthermore, from reviewing the quality of appellate counsel's work, it is clear that counsel in fact had not made any sort of investigation, adequate or otherwise. Conspicuously absent from appellate counsel's petition is a specific description of the challenged search. (A.R. 784-810). Appellate counsel's argument assumes the exigent circumstance doctrine was the justification for the warrantless search, instead of the fictitious “crime scene exception” nebulously invoked by the April 24, 2000 order, (A.R. 6-9), or the plain sight and inevitable discovery exceptions the habeas court indicated in its Opinion Denying Habeas Corpus Relief. (A.R. 1061-62). Most glaring of all is that appellate counsel seems to have completely overlooked the most salient facts of this search. Whatever the pretext, it lost all credibility the moment the police terminated the “protective sweep” search without seizing any evidence – the police later *re-entered* the secured scene with the elected prosecutor for a more thorough search, apparently without so much as a second thought about whether they should try to get a warrant. (A.R. 50, 426-28). Of particular note is that the police officer who conducted the searches, Trooper Gunnoe, appears to have changed his testimony between the grand jury and trial, originally indicating that on a third search the ammunition was found inside an open drawer, but

then later saying that this evidence was on top of the nightstand and plainly visible on the first search. *Compare* (A.R. 46-55) *with* (A.R. 426-28). Because appellate counsel did not request the suppression hearing transcript, we cannot know whether Troop Gunnoe's testimony matched what he said to the grand jury, to the trial jury, or if there is an explanation that reconciles the apparent differences, and none of this information appears anywhere in the entire direct appeal petition. (A.R. 784-810). From all of this, it is painfully obvious that appellate counsel failed to undertake even a nominal investigation. This falls far short of an acceptable level of appellate performance, and so the habeas court abused its discretion in concluding that Mr. Adkins had not met the first prong of *Strickland*.

The second *Strickland* prong requires that Mr. Adkins show prejudice. *Miller*, 194 W. Va. 3, 459 S.E.2d 114, at Syllabus Point 5. This Court has held that "omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal." Syllabus Point 8, *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000). In *Graham*, the defendant did have the bulk of the transcripts, but in some places, the court reporter had indicated "unclear" instead of transcribing what was said. *Id.* At 471, 349. The Court seemed to find that this was troublesome, but not prejudicial since the instances were relatively few and minor compared with the rest of the record. *Id.* As such, the Court had no difficulty reviewing the petition for appeal. *Id.* This is not the case here. As explained above, appellate counsel's petition was uncommonly poor. (A.R. 784-810). The vast majority of the suppression hearing transcript is missing and cannot be reconstructed. (A.R. 166, 888). Under these circumstances, prejudice only affects the available remedy, it does not preclude relief. *See Leverette*, 160 W. Va. at 792, 239 S.E.2d at 143. In the rare case where the transcript is missing (or in this case, almost completely missing) and cannot be reproduced, this Court all but

dispenses with a prejudice analysis entirely, though it will not presume actual trial or constitutional error occurred. *See State ex rel. Kisner v. Fox*, 165 W. Va. 123, 127-28, 267 S.E.2d 451, 454 (1980).

Despite these holdings, the habeas court found that “[t]he Defendant further has not shown how any information that would have been in either transcript would more than likely have changed the outcome of his trial or his appeal,” and denied relief. (A.R. 1076). This is an insurmountable standard that appears incorrect even if *Graham* were applicable. While this Court should not assume actual error occurred without the transcripts, by the same token it cannot deny all relief simply because Mr. Adkins cannot definitively show error without the transcript. *See Fox*, 165 W. Va. at 127-28, 267 S.E.2d at 454. Therefore, the habeas court erred as a matter of law by applying the incorrect legal standard. Syllabus Point 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006) (“[Q]uestions of law are subject to a de novo review.”).

Prejudice does influence what the remedy is, however. *See Leverette*, 160 W. Va. at 792, 239 S.E.2d at 143. The remainder of the record does provide some insight into the merits of Mr. Adkins’ Fourth Amendment claim. Therefore, Mr. Adkins believes there is a “probability of actual injury” resulting from his inability to meaningfully appeal the court’s suppression ruling entitled to a new trial and suppression hearing. *Cf. Leverette*, 160 W. Va., 239 S.E.2d, at Syllabus Point 4.

A thorough review of this issue is impossible without the missing transcript. However, a cursory analysis reveals that Mr. Adkins may well have been entitled to relief on direct appeal had the issue been properly investigated and raised. Based on the April 24, 2000 order, it appears that the trial court initially denied suppression based on the “crime scene exception” to the warrant requirement. (A.R. 7). There of course is no such exception, and so if this were the

justification at the suppression hearing, Mr. Adkins would be entitled to relief. *See State v. Flippo*, 212 W. Va. 560, 566, 575 S.E.2d 170, 176 (2002); *Mincey v. Arizona*, 437 U.S. 385, 395, 98 S. Ct. 2408, 2415 (1978). Appellate counsel believed that exigent circumstances did not apply either, though he missed the most important fact of that analysis – the police had secured the scene, left the building but still guarded the premises, and then re-entered Mr. Adkins’ home to collecting evidence. (A.R. 46-55). There were therefore no exigent circumstances justifying any intrusion beyond the first. *See State v. Bookheimer*, 221 W. Va. 720, 729, 656 S.E.2d 471, 480 (2007) (Per Curiam). Finally, the habeas court indicated elsewhere in its Opinion Denying Habeas Relief that the initial search of Mr. Adkins home was permissible as a “protective sweep” and that the police were justified in re-entering the secured crime scene because the evidence had been in plain sight and in any event, its discovery was inevitable. (A.R. 1061-62). However, there are clear problems with this as well. As to “plain sight,” the police may be justified in seizing evidence when “not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.” Syllabus Point 3, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). Had the police seen the bullets during the protective sweep and seized them at that time, this would likely be satisfied. However, that is not what happened – the police completed the protective sweep, left the building, and secured the area. (A.R. 46-55). At that point, the police no longer “had a lawful right of access to the object itself,” (assuming it was actually seen during the protective sweep in the first place), and therefore required a warrant to go back inside and collect the evidence. *See* Syllabus Point 3, *Julius*, 185 W. Va. 422, 408 S.E.2d 1. Lastly, in order to claim inevitable discovery, the State must show by a preponderance of the evidence “that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the

misconduct.” *Flippo*, 212 W. Va. 560, 575 S.E.2d 170, at Syllabus Point 4. The record does not indicate any attempt by the police to seek a search warrant, and so inevitable discovery does not apply, either. *See Flippo*, 212 W. Va. at 580-81, 575 S.E.2d at 190-91.

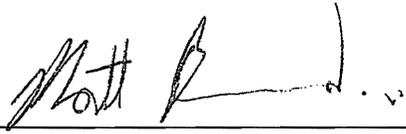
However, without the transcript from the suppression hearing, there is no way to conclusively review this issue. The transcript, were it available, might confirm or dispel these preliminary concerns. It is not, however, so even a new direct appeal is an insufficient remedy. At a minimum, the record does show a “probability of actual injury” resulting from appellate counsel's ineffective assistance. *Cf. Syllabus Point 4, Leverette*, 160 W. Va. 781, 239 S.E.2d 136. Therefore, this Court should reverse the habeas court's denial of relief and order a new trial and suppression hearing. *See, Id.*

CONCLUSION AND REQUEST FOR RELIEF

The habeas court erred by denying habeas relief. Both Mr. Adkins’ trial and appellate lawyers were fundamentally unprepared to fulfill their roles as counsel, and their conduct was objectively unreasonable and prejudicial. Accordingly, Mr. Adkins is entitled to habeas corpus relief and respectfully requests that this Court find that his counsel below were ineffective and order a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Matthew D. Brummond, do hereby certify on the 15th day of October, 2012, I served by mail the attached *Petitioner's Brief*, to Tom Rodd, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301.

A handwritten signature in black ink, appearing to read "Matt Brummond", written over a horizontal line.

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