

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

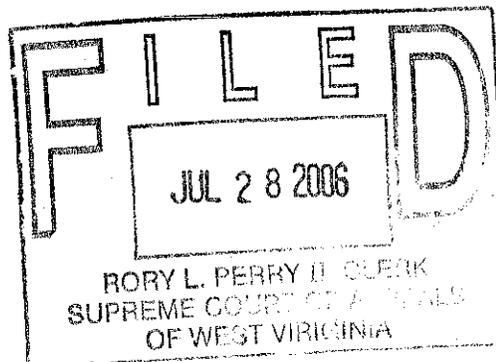
DOCKET NO. 33103

**STATE OF WEST VIRGINIA, ex rel.
CARROLL EUGENE HUMPHRIES**
Appellant,

v.

**THOMAS MCBRIDE, Warden,
West Virginia State Penitentiary,**

Appellee.



BRIEF ON BEHALF OF APPELLANT

**WILLIAM C. FORBES, Esquire
FORBES LAW OFFICES, PLLC
28 OHIO AVENUE
CHARLESTON, WV 25302
Phone 304-343-4050
Fax 304-343-7450
STATE BAR NO. 1238**

Counsel for Appellant.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
KIND OF PROCEEDING AND NATURE OF RULING BELOW	2
STATEMENT OF FACTS	3
ASSIGNMENTS OF ERROR	6
I. THE HABEAS COURT ERRED IN ITS CONCLUSION THAT THE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT VIOLATED IN THIS CASE, DUE TO APPELLANT'S TRIAL COUNSEL'S CONFLICT OF INTEREST AND POSITION AS A NECESSARY WITNESS IN THE CASE; AND TRIAL COUNSEL'S DEFICIENT CONDUCT WHICH RESULTED IN THE INTRODUCTION OF CO-DEFENDANT CONVICTIONS, INTRODUCTION OF HEARSAY IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS, FAILURE TO IMPEACH WITNESSES AND INTRODUCE EVIDENCE; AND DUE TO TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE THE CASE.	8
i. Trial Counsel Paul S. Detch's Conflict of Interest and Position as a Necessary Witness in the Trial Precluded the Appellant From Receiving the Effective Assistance of Counsel.	12
ii. Improper Introduction of Co-Defendant Convictions	18
iii. Trial Counsel Failed to Reasonably Address the Violation of Appellant's Sixth Amendment Right to Confront the Witnesses Against Him.	19
iv. Failure to Impeach FBI Agent Baxter With Earlier Reports, and Failure to Introduce Such Reports at Trial.	20
v. Trial Counsel's Failure to Investigate the Case.	24
vi. Appellant's Fifth Amendment Rights	27
vii. Cumulative Effect	36

II. THE HABEAS COURT ERRED IN ITS CONCLUSION THAT THE PRE-INDICTMENT DELAY OF TWENTY-TWO AND ONE-HALF (22 ½) YEARS DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS.	37
III. THE HABEAS COURT ERRED IN FAILING TO CONCLUDE THAT THE PROSECUTION'S NON-DISCLOSURE OF AVAILABLE EXCULPATORY EVIDENCE, ON THE BASIS THAT SUCH EVIDENCE HAD BEEN DESTROYED, WHEN AT TRIAL ITS EXISTENCE CAME TO LIGHT, VIOLATED APPELLANT'S RIGHTS.	42
IV. THE HABEAS COURT ERRED IN DENYING RELIEF BASED ON THE PROSECUTOR'S ELICITATION OF TESTIMONY CONCERNING THE ACCUSED'S INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT, AND THE PREJUDICIAL USE OF SUCH TESTIMONY IN CLOSING ARGUMENT, IN VIOLATION OF THE <i>SUGG</i> TEST.	43
V. THE HABEAS COURT ERRED IN ITS CONCLUSION THAT APPELLANT'S DUAL SENTENCES FOR FACTUALLY IDENTICAL CRIMES DID NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY.	45
VI. THE HABEAS COURT ERRED IN CONCLUDING THAT APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS NOT VIOLATED IN THIS CASE.	46
DISCUSSION OF LAW	7
CONCLUSION	48
RELIEF REQUESTED	50

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

Amendment V, United States Constitution	passim
Amendment VI, United States Constitution	passim
Article III, Section 3, Constitution of West Virginia	7,8
Article III, Section 4, Constitution of West Virginia	7,8
Article III, Section 5, Constitution of West Virginia	43
Article III, Section 6, Constitution of West Virginia	7,8
Article III, Section 10, Constitution of West Virginia	43
Article III, Section 14, Constitution of West Virginia	8,9

CASES

<i>Barker v. Howell</i> , 904 F.2d 889 (4th Cir. 1990).	38
<i>Blockburger v. U.S.</i> , 284 U.S. 289 (1932).	45,46
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).	42
<i>Brown v. Ohio</i> , 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed.	45
<i>Burnside v. Burnside</i> , 194 W.Va. 263, 460 S.E.2d 264 (1995).	7
<i>Cannellas v. McKenzie</i> , 160 W.Va. 431, 236 S.E.2d 327 (1977).	10
<i>Cole v. White</i> , 180 W.Va. 393 (1988).	12
<i>Dickie v. Florida</i> , 398 U.S. 30, 90 S. Ct. 1564, 2 L. Ed. 2d 26 (1970).	38
<i>Gray v. Maryland</i> , 523 U.S. 185, 194-195, 118 S.Ct. 1151, (1998).	46
<i>Hundley v. Ashworth</i> , 181 W.Va. 379, 383 (1989).	37
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990)	21,46
<i>In Interest of Anthony Ray Mc.</i> , 200 W.Va. 312, 489 S.E.2d 289 (1997)	21,46,47
<i>Jones v. Angelone</i> , 94 F.3d 900 (1996)	40
<i>Kibert v. Blankenship</i> , 611 F.2d 520 (4th Cir. 1979).	7
<i>Lawyer Disciplinary Bd. v. Allen</i> , 198 W.Va 18 (1996).	16
<i>Lilly v. Virginia</i> , 119 S. Ct. 1887 (1999).	21,46
<i>Maryland v. Craig</i> , 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990).	21,46
<i>Naum v. Halbritter</i> , 172 W.Va. 610, 309 S.E.2d 109 (1983).	21,47
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980).	21,47
<i>Phillips v. Fox</i> , 193 W.Va. 657, 458 S.E.2d 327 (1995).	7
<i>Ronnie R. v. Trent</i> , 194 W. Va. 364, 460 S.E.2d 499 (1995).	31,32
<i>Sanders v. Ratelle</i> , 21 F.3d 1446 (9th Cir.1994).	32
<i>Scott v. Boles</i> , 150 W.Va. 453, 147 S.E.2d 486 (1966)	8
<i>Smith v. Hedrick</i> , 181 W.Va. 394 (1989).	8
<i>State v. Boyd</i> , 160 W.Va. 234 (1977).	35
<i>State v. Brown</i> , 210 W.Va. 14 (2001).	33
<i>State v. Carrico</i> , 189 W.Va. 40, 427 S.E. 2d 474 (1993)	37
<i>State v. Davis</i> , 205 W.Va. 569 (1999)	37,39
<i>State v. Duell</i> , 175 W.Va. 233 (1985)	41
<i>State v. Ellis</i> , 161 W.Va. 40, 239 S.E. 2d 670 (1977)	17

<i>State v. Evans</i> , 170 W.Va. 3 (1982).	24
<i>State v. Fauber</i> , 175 W.Va. 324 (1985)	42
<i>State v. Kennedy</i> , 205 W.Va. 224 (1999)	22,47
<i>State v. James Edward S.</i> , 184 W.Va.408 (1990).	22,47
<i>State v. Jarrell</i> ,191 W.Va. 1 (1994)	22,24,47
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	passim
<i>State v. Mullens</i> , 179 W.Va. 567 (1988).	22,47
<i>State v. Reedy</i> , 177 W.Va. 406 (1986).	9
<i>State v. Richey</i> , 171 W.Va. 342	37
<i>State v. Sugg</i> , 193 W. Va. 388, 456 S.E.2d 469 (1995).	43,44
<i>State v. Thomas</i> , 203 S.E.2d 445 (1974).	10
<i>State v. Walker</i> , W.Va. Sup. Ct. No. 26657 (2000)	35,44
<i>State v. Woods</i> , 167 W.Va. 700, 280 S.E..2d 309(1981).	19
<i>State ex rel. Blake v. Hatcher</i> , Docket No. 32747 (2005).	12, 13
<i>State ex rel. Brown v. Thompson</i> , 149 W.Va. 649, 142 S.E. 2d 711 (1965).	45,46
<i>State ex rel. Daniel v. Legursky</i> , 195 W.Va. 314, (1995).	9,31,32
<i>State ex rel. Foster v. Luff</i> , 164 W.Va. 413 (1980).	33
<i>State ex rel. Kidd v. Leverette</i> , 178 W.Va. 324, 359 S.E.2d 344 (1987).	32
<i>State ex rel. Leonard v. Hey</i> , 269 S.E.2d 394 (W.Va.1980).	37, 38, 39
<i>State ex rel. McMannis v. Mohn</i> , 163 W.Va. 129 (1979).	8
<i>State ex rel. Postelwait v. Bechtold</i> , 158 W.Va. 479 (1975).	12, 13, 16
<i>State ex rel. Vernatter v. Warden</i> , 207 W.Va. 11, 528 S.E.2d 207 (1999).	9
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, (1984).	passim
<i>United States v. Dixon</i> , 509 U.S. 688, 113 S. Ct. 2849, (1993).	45
<i>United States v. Ross</i> , 33 F.2d 1507, 1523 (11 th Cir. 1994).	12
<i>Wajda v. U.S.</i> , 64 F.3d 385, 387 (8th Cir.1995).	32
<i>Wheat v. United States</i> , 486 U.S. 153, 108 S.Ct. 1692 (1988).	12
<i>Wickliffe v. House</i> , 188 W.Va. 344, 424 S.E.2d 579 (1992).	32
<i>Witte v. United States</i> , 515 U.S. 389, 115 S. Ct. 2199, (1995).	45

STATUTES

W.Va. Code § 53-4A-et seq.	7,8
W.Va. Code § 61-10-31	45
W.Va. Code § 61-11-6	45,46

RULES

W.Va. Rule of Professional Responsibility 1.9	13
W.Va. Rule of Professional Responsibility 1.10	13
W.Va. Rule of Professional Responsibility 3.7	14

INTRODUCTION

Appellant, Carroll Eugene Humphries, 75-years-old, was convicted of conspiracy to commit, and accessory before the fact to first degree murder, in 1999, twenty-two and one-half (22 ½) years after the alleged crime occurred. His location and identity had been known throughout the intervening period to federal and state authorities, who initially determined the death to be accidental. At trial, Mr. Humphries was represented by Attorney Paul S. Detch, whose conduct during the trial went beyond merely being ineffective assistance of counsel, but instead, as former Kanawha County Circuit Judge A. Andrew McQueen testified at the omnibus hearing in this matter, was enough in itself, "to have sunk the defense."

Furthermore, Mr. Detch's testimony at the omnibus evidentiary hearing in this matter implicated him as being a necessary witness at the trial in which he was defending the Appellant, a fact he declined to share with the trial court or the Appellant until the omnibus hearing in this habeas action. Additionally, the Appellant's federal and state constitutional rights were violated during his trial in the following ways: 1) Mr. Detch's representation of the Appellant constituted ineffective assistance of counsel due to his conflict of interest, position as a necessary witness, failure to investigate and general deficient conduct at trial; 2) the Pre-Indictment delay of over twenty-two (22) years between the commission of the alleged crime and the indictment of the Appellant, his location and identity being known throughout the period, violated his due process rights; 3) the Prosecution's failure to disclose exculpatory evidence, claiming such evidence to be destroyed, only to learn at trial that State witnesses had relied upon it prior to trial, and

that it was in existence violated the Appellant's due process rights; 4) The Prosecutor's elicitation of testimony concerning the Appellant's invoking his Fifth Amendment right to remain silent, and the prejudicial use of such testimony in the State's closing argument violated the Appellant's right to a fair trial; 5) the Appellant was subjected to double jeopardy, in that he was convicted and sentenced of two statutory violations which have no substantive difference, and the underlying act was the same for both; and 6) Appellant's Sixth Amendment Right to Confront the Witnesses against him was violated. Despite having evidence of these clear constitutional errors before it, the Circuit Court erred in refusing to grant Mr. Humphries Habeas Corpus relief below, and the Appellant prays this Court will reverse the Circuit Court and grant him the relief requested herein.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal from a Petition for Writ of Habeas Corpus denied by the Greenbrier County Circuit Court on October 7, 2005. The Appellant, Carroll Eugene Humphries, was convicted by a jury in the Circuit Court of Putnam County on July 30, 1999, in Criminal Action No. 98-F-54, of one count of the felony offense of accessory before the fact to murder of the first degree, and one count of the felony offense of conspiracy to commit murder. Upon the convictions, on August 20, 1999, Appellant was sentenced to terms of imprisonment in the penitentiary for an indeterminate period of not less than 1 year nor more than 5 years for the conspiracy, and sentenced for the remainder of his natural life, with the possibility of parole after ten years for the accessory to murder conviction; said sentences to run consecutively. Appellant filed a Petition for Appeal with the Supreme Court of Appeals, through his trial counsel Paul S. Detch, on February

18, 2000, which the Court refused on October 3, 2000. Appellant, now 75-years-old, is currently incarcerated at Huttonsville Correctional Center, has served the first of his sentences, and is now serving the life sentence.

On March 28, 2001 Appellant filed a *pro se* Petition For Writ of Habeas Corpus, assigned Case No. 01-C-58, which the Circuit Court summarily denied. Thereafter, the Appellant retained his present counsel, William C. Forbes, and an Amended Petition for Writ of Habeas Corpus was filed, and this case was assigned Case No. 02-C-79. An Omnibus Evidentiary Hearing was held in this matter on April 23, 2003. The Greenbrier County Circuit Court entered its Final Order denying the Petition on October 7, 2005. It is from this Final Order that Appellant appeals.

STATEMENT OF FACTS

The initial investigation into this matter, conducted by the West Virginia State Police, and the Bureau of Alcohol Tobacco and Firearms (ATF) in the mid-1970s concluded that Billy Ray Abshire, the alleged victim, had been accidentally killed by a bomb of his own making. The ATF reports indicated the device was powered by an explosive with the trade name Kin-e-pak and was detonated by a Hercules Brand blasting cap. At the time of the explosion, Mr. Abshire was in the employ of American Electric Power Company, which used Kin-e-pak explosive material extensively. Additionally, a Hercules Brand blasting cap, identical to the one that detonated the fatal blast, was found by law enforcement investigators in Mr. Abshire's residence, together with wiring, and other bomb making material. Thus, immediately following his death, no one was charged with any foul play.

However, some twenty-two and one-half (22 and ½) years later the Appellant, then 68-year-old Carroll Eugene Humphries (now 75-year-old), a prominent Alleghany County, Virginia businessman, with no prior criminal record, was convicted of conspiring to commit, and being an accessory before the fact to murder in the first degree of Mr. Abshire.

At the time of Mr. Abshire's death, Mr. Humphries was involved in a relationship with Mr. Abshire's estranged wife. He knew one of the alleged co-conspirators, Gene Gaylor, through his insurance business. He admitted during the initial investigation of Mr. Abshire's death that he had attempted to help Kitty Abshire, the estranged wife, by hiring Gene Gaylor who was familiar with Las Vegas, Nevada to obtain information regarding, and possibly arrange for a divorce there. At trial, the State made a mockery of Mr. Humphries' claim of paying Gene Gaylor to assist Kitty Abshire in obtaining a Las Vegas divorce. The State went so far as to allege that the term Las Vegas divorce was a euphemism for a contract killing.

Prior to his death, in the 1970s, Mr. Abshire, the alleged victim in this case, hired defense counsel's father, an attorney practicing in Greenbrier County, West Virginia, to handle his side of the divorce case. Paul S. Detch, who was hired as defense counsel for Mr. Humphries, worked at his father's law office as a paralegal/legal assistant during the period of time of the Abshire divorce. During a pretrial hearing on the State's motion to have Mr. Detch disqualified as trial counsel for the defendant due to conflict of interest, Mr. Detch claimed that he had never worked on any matter regarding the Abshire divorce, or any matter at his father's law office that would preclude his representation of

Mr. Humphries in the trial. However, shockingly, at the omnibus habeas hearing in this proceeding, some years after the trial, Mr. Detch testified that he had in fact done research on the legal requirements for obtaining a Las Vegas divorce at the direction of his father in the 1970s, at the same time his father represented Billy Ray Abshire in a divorce proceeding. Mr. Detch further admitted, in a letter he wrote in August of 2001 to Gene Gaylor, "I probably told you that I was one of the last people to see Billy Abshire alive. I can remember him leaving my office. He of course conferred with my father and I only know what my father told me about the case."

Following the death of Billy Ray Abshire, Gene Gaylor, and his brother, Clayton Gaylor, engaged in an extortion scheme and demanded that Mr. Humphries pay them a sum of money or they would claim that Mr. Humphries was involved in a plot to kill Mr. Abshire. Mr. Humphries refused to give the Gaylors any money, and subsequently a bomb explosion went off in his front yard. After this explosion, Mr. Humphries went to the federal authorities and, as a result, Gene and Clayton Gaylor were convicted in federal court of extortion. Mr. Humphries was the federal government's star witness at the extortion trials. Some twenty-one (21) years after those events, Clayton Gaylor, whom Mr. Humphries had testified against in his extortion trial, informed a West Virginia State Trooper that he had been present at a meeting held at a specific time and place in Virginia some twenty-three (23) years earlier, where Mr. Humphries had allegedly hired Gene Gaylor to make a bomb and kill Billy Ray Abshire. During the initial investigation which ruled the death accidental, Mr. Humphries admitted paying Gene Gaylor Three Thousand Dollars (\$3,000.00) for his knowledge of, and possible

ability to obtain a Las Vegas divorce for Kitty Abshire, yet the authorities at that time chose not to bring any charges against Mr. Humphries. Ultimately, 22 ½ years later, Mr. Humphries was indicted in this matter. The authorities in the area throughout this entire period had known his location and identity. The only thing that had changed for the authorities during this vast expanse of time was Clayton Gaylor's story, which remarkably came to light after Mr. Humphries had testified against Clayton Gaylor at the extortion trial.

ASSIGNMENTS OF ERROR

- I. **THE HABEAS COURT ERRED IN ITS CONCLUSION THAT THE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT VIOLATED IN THIS CASE, DUE TO APPELLANT'S TRIAL COUNSEL'S CONFLICT OF INTEREST AND POSITION AS A NECESSARY WITNESS IN THE CASE; AND TRIAL COUNSEL'S DEFICIENT CONDUCT WHICH RESULTED IN THE INTRODUCTION OF CO-DEFENDANT CONVICTIONS, INTRODUCTION OF HEARSAY IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS, FAILURE TO IMPEACH WITNESSES AND INTRODUCE EVIDENCE; AND DUE TO TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE THE CASE.**
- II. **THE HABEAS COURT ERRED IN ITS CONCLUSION THAT THE PRE-INDICTMENT DELAY OF TWENTY-TWO AND ONE-HALF (22 ½) YEARS DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS.**
- III. **THE HABEAS COURT ERRED IN FAILING TO CONCLUDE THAT THE PROSECUTION'S NON-DISCLOSURE OF AVAILABLE EXCULPATORY EVIDENCE, ON THE BASIS THAT SUCH EVIDENCE HAD BEEN DESTROYED, WHEN AT TRIAL ITS EXISTENCE CAME TO LIGHT, VIOLATED APPELLANT'S RIGHTS.**
- IV. **THE HABEAS COURT ERRED IN DENYING RELIEF BASED ON THE PROSECUTOR'S ELICITATION OF TESTIMONY CONCERNING THE ACCUSED'S INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT, AND THE PREJUDICIAL USE OF SUCH TESTIMONY IN CLOSING ARGUMENT, IN VIOLATION OF THE *SUGG* TEST.**

- V. **THE HABEAS COURT ERRED IN ITS CONCLUSION THAT APPELLANT'S DUAL SENTENCES FOR FACTUALLY IDENTICAL CRIMES DID NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY.**
- VI. **THE HABEAS COURT ERRED IN CONCLUDING THAT APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS NOT VIOLATED IN THIS CASE.**

DISCUSSION

In reviewing challenges to the findings and conclusions of a circuit court, the West Virginia Supreme Court of Appeals applies a two-prong standard of review, as stated in *Phillips v. Fox*, 193 W.Va. 657, 458 S.E.2d 327 (1995):

We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *Id.* at 661, 458 S.E.2d at 331 (citing *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995)).

Moreover, the Fourth Circuit Court of Appeals has held that the findings of a trial court are entitled to great weight, but they are never conclusive. *Kibert v. Blankenship*, 611 F.2d 520 (4th Cir. 1979) *rev'g* 454 F.Supp. 400 (W.D.Va. 1978). The *Kibert* court continued, a finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

Post-conviction remedies involving the Writ of Habeas Corpus are provided for in West Virginia Code § 53-4A-1 et seq., which is constitutionally guaranteed by the West Virginia Constitution Article III, § 4. As noted in West Virginia Constitution Article III, § 3, 6, the West Virginia Supreme Court of Appeals and the circuit courts have concurrent original jurisdiction over habeas proceedings. The West Virginia Supreme

Court of Appeals has made clear that only constitutional or jurisdictional defects are cognizable grounds in post-conviction habeas corpus proceedings, upon which to grant relief. Syl. pt. 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129 (1979), *cert. denied*, 464 U.S. 831 (1983). Although claims that have been “previously and finally adjudicated,” either on direct appeal or in a previous post-conviction habeas proceeding, may not form the basis for habeas relief, claims that were merely raised in a petition for appeal that was refused are not precluded. *Smith v. Hedrick*, 181 W.Va. 394 (1989); W.Va. Code § 53-4A-1(b). As noted by the Court in Syllabus Point 1 of *Scott v. Boles*, 150 W.Va. 453, 147 S.E.2d 486 (1966), a appellant need only prove by a preponderance of the evidence that the allegations contained in his petition or affidavit would warrant his release. *Id.*

With these general standards in mind, the Appellant will now address each assignment of error individually.

I. Ineffective Assistance of Counsel

Article III, Section 14 of the Constitution of West Virginia, and the Sixth Amendment to the Constitution of the United States guarantee the right to the assistance of counsel. The right of one accused of a crime to the assistance of counsel is a fundamental right, essential to a fair trial. *Id.* Under both the United States Constitution and the Constitution of West Virginia, the right of a criminal defendant to assistance of counsel is a right to effective assistance of counsel. *State v. Reedy*, 177 W.Va. 406 (1986).

That the right to assistance of counsel in criminal cases includes the right to effective assistance of counsel was articulated by the United States Supreme Court in the leading case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, a two-pronged test was established for the review of claims of ineffective assistance of counsel. Generally, the first prong requires that a criminal defendant show that counsel's performance was deficient, and the second prong requires a showing that the deficient performance prejudiced the defense. The *Strickland* test was expressly recognized by the West Virginia Supreme Court of Appeals in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Describing the test in detail, Syllabus Point 5 of *Miller* holds:

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

The West Virginia Supreme Court of Appeals further held in Syllabus Point 1 of *State ex rel. Vernatter v. Warden*, 207 W.Va. 11, 528 S.E.2d 207 (1999), as follows:

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

The first prong of the *Strickland* test requires the court to review counsel's performance and determine whether it was deficient. In doing so, Syllabus Point 6 of *Miller*, 459 S.E.2d 114 (W.Va.1995) holds that,

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

Additionally, as noted by the Court in Syllabus Point 21, of *State v. Thomas*, 203 S.E.2d 445 (1974), where a counsel's performance arises from occurrences involving strategy or tactics, his conduct will be deemed effective assistance of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused. Although a presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance, such presumption may be overcome where counsel's conduct was clearly outside the range of professionally competent standards. *Strickland; Miller, supra*.

Following the showing that counsel's conduct fails to meet this standard, a court then must determine whether there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Strickland; Miller, supra. Moreover, *Cannellas v. McKenzie*, 160 W.Va. 431, 236 S.E.2d 327 (1977), provides: "In determining appropriate relief in habeas corpus for ineffective assistance of counsel at the appellate stage, the court should consider whether there is a probability of actual injury as a result of such ineffective assistance or

alternatively, whether the injury is entirely speculative or theoretical, and where there is a probability of actual injury, the appropriate relief is discharge of the appellant from custody.”

In the instant proceeding, former Kanawha County Circuit Judge, A. Andrew McQueen, testifying at the omnibus hearing in this matter summed up the ineffectiveness of the Appellant’s trial counsel, Paul S. Detch, as follows,

I don’t enjoy having to castigate a fellow attorney. I believe that there are cumulative errors in this case ah---and a couple of specific errors that ah---would prompt me to believe that Mr. Detch did not exhibit an ordinary, reasonable standard of an attorney defending a significant criminal case.

April 23, 2003 hearing at pg 7.

The habeas court noted, in its *Final Order* in this matter, that it was Mr. Detch’s trial strategy, as testified to at the omnibus hearing by Mr. Detch himself, to “put it all on the table and let it all out.” Here, Judge McQueen, an expert in the field of criminal law, testified at the omnibus hearing that the errors of Mr. Detch in this case went beyond merely being poor strategic decisions but instead that they were gross errors that caused Mr. Detch’s representation of the Appellant to be deficient under an objective standard of reasonableness.

Trial Counsel Detch conducted himself in such an incompetent manner in this case as to deprive the Appellant of the effective assistance of counsel. Detch’s serious conflict of interest and position as a necessary witness in the case; his elicitation and failure to address the introduction of co-defendant convictions; his elicitation and failure to address hearsay statements in violation of Appellant’s Sixth Amendment Rights; his failure to

investigate; numerous other errors, both cumulatively and individually, were so egregious as to be beyond any realm of objectively reasonable conduct of a criminal defense attorney. Judge McQueen, summing up the unprofessional conduct of Mr. Detch at the omnibus hearing, stated that, "The errors and examining witnesses were enough to have sunk the defense." *April 23, 2003 Omnibus Evidentiary Hearing Transcript* at 72.

i. Trial Counsel Paul S. Detch's Conflict of Interest and Position as a Necessary Witness in the Trial Precluded the Appellant From Receiving the Effective Assistance of Counsel.

Where a constitutional right to counsel exists, there is a correlative right to representation that is free from conflicts of interest. *Cole v. White*, 180 W.Va. 393 (1988); *State v. Kirk N.*, 214 W.Va. 730 (2003). Moreover, as noted by the Court in Syllabus Point 3 of *State ex rel. Postelwait v. Bechtold*, 158 W.Va. 479 (1975), "[...O]nce an actual conflict is found which affects the adequacy of representation, ineffective assistance of counsel is deemed to occur and the defendant need not demonstrate prejudice."

Recently, in *State of West Virginia ex rel. Blake v. Hatcher*, Docket No. 32747 (Decided November 18, 2005) the Court noted that, "the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (quoting, *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988))., The *Blake* Court cited to *United States v. Ross*, 33 F.2d 1507, 1523 (11th Cir. 1994), which noted, "The need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict

of interest, such as when he has previously represented a person who will be called as a witness against a current client at a criminal trial.”; and to *State v. Needham*, 688 A.2d 1135, 1136 (N.J. Super. Ct. Law Div. 1996), which stated, “while defendant is entitled to retain qualified counsel of his own choice, he has no right to demand to be represented by an attorney disqualified because of an ethical requirement.” The *Blake* Court concluded, “Where representation is affected by an actual conflict of interest, the defendant can not be said to have received effective assistance of counsel as required by the Sixth Amendment.” *Blake, supra*. Additionally, in Syllabus Point 6 of *Blake*, the Court held that in reviewing a motion to disqualify counsel due to a conflict, “The circuit court **shall** set forth the findings in a manner adequate for review.” (Emphasis Added).

With regard to the ethical problems an attorney faces in regard to conflicts, and situations where he could possibly be a witness, the following West Virginia Rules of Professional Responsibility state,

Rule 1.9. Conflict of interest: Former client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Rule 1.10. Imputed disqualification: General rule.

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had

previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7. (Amended by order entered April 20, 1994, effective May 1, 1994.)

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

In the instant case, Attorney Paul S. Detch was retained by the Appellant, Mr. Humphries, to represent him in this matter. Mr. Detch had been in the employ of his father's law office in the mid 1970s, during which time his father had represented Billy Ray Abshire, the alleged victim herein, in a divorce proceeding. The State moved prior to trial to disqualify Mr. Detch on the basis of a conflict of interest. Mr. Detch, during a hearing on the issue, stated to the trial court that he had not worked on the Abshire divorce matter, and that he had not worked in any capacity that would preclude his involvement in this case. Mr. Detch suggested to the trial court that he had discussed the

matter with his client, Mr. Humphries, and that Mr. Humphries did not have a problem with the representation.

However, at the omnibus hearing in this proceeding it came to light that Mr. Detch had in fact done research at the direction of his father on the legal requirements of a Las Vegas divorce in the mid 1970s at the time his father represented the alleged victim, Mr. Abshire. Furthermore, in his letter to Gene Gaylor, Mr. Detch suggested that he remembered Mr. Abshire well, and may have been one of the last persons to see him alive. None of these revelations were disclosed to the Appellant prior to trial, nor were they disclosed to the trial court at the hearing directly on this issue.

The habeas court noted, in its *Final Order*, at page 31, that the trial court “found that Mr. Detch’s representation of Defendant was a technical violation of Rule 1.9 and 1.10 of the West Virginia Rules of Professional Conduct because Mr. Detch was an employee of his father’s law firm in 1976 when it represented the alleged murder victim, Billy Ray Abshire, in a divorce case that was substantially related to this case.” Pg. 31, *Final Order of the Circuit Court of Greenbrier County*, Entered October 7, 2005. The Habeas Court went on to determine that the Appellant had waived any such conflict prior to trial.

However, Mr. Detch’s revelation on the stand during the omnibus evidentiary hearing, conducted in this proceeding, that he in fact had done research for his father on a “Las Vegas divorce”, and the requirements of getting such a divorce, placed Mr. Detch, not only in a position, as the original trial court noted, where he was in technical violation of Rules 1.9 and 1.10 of the Rules of Professional Conduct, but also in the position of

being in violation of Rule 3.7 of the Rules of Professional Conduct. Moreover, Rule 3.7 explicitly prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. (See Rule 3.7's language that a lawyer "shall not" do so). Thus, waiver in such a situation would be irrelevant, even if the client were fully informed. *See Lawyer Disciplinary Bd. v. Allen*, 198 W.Va 18 (1996). The fact, admitted by Mr. Detch, at the omnibus hearing that he had knowledge relevant to the case presented Mr. Detch with an actual conflict in engaging in the representation. Therefore, under the holding of *Postelwait*, "ineffective assistance of counsel is deemed to occur and the defendant need not demonstrate prejudice." Syl. Pt. 3, *Postelwait, supra*.

Furthermore, the Habeas Court's finding that Mr. Humphries had waived any conflict this situation presented prior to trial was clearly erroneous in light of the fact that the first time Mr. Detch ever divulged this information to Mr. Humphries, or to any court, was at the omnibus hearing in this proceeding. In fact, at the hearing on the State's Motion to Disqualify him, Mr. Detch represented to the trial court that he had not done anything at his father's law office relative to the case.

However, the issue surrounding the Las Vegas divorce was central to Mr. Humphries' defense theory. The State's case-in-chief attacked the notion that a Las Vegas divorce was anything more than a slang term for a contract killing. Mr. Humphries told the authorities during the initial investigation of Mr. Abshire's death that he had attempted to help Kitty Abshire, the estranged wife of the alleged victim, by hiring Gene Gaylor who was familiar with Las Vegas to obtain the information for a divorce, and if possible, to arrange a divorce in Las Vegas, Nevada. During his trial, the

prosecution called witnesses who testified that they believed the term "Las Vegas Divorce" to be a slang term for a contract killing. Ultimately, Mr. Detch may well have been the only living witness who could have testified to support Mr. Humphries' defense in this matter, and demonstrate that Mr. Humphries' notion at the time to attempt to secure a Las Vegas divorce, involved a legal concept, and not a contract killing. If nothing else, it would have shown that at the same time, in the same West Virginia County, a lawyer's office was researching the legal requirements of a "Las Vegas divorce," thus indicating that it was not, necessarily, a synonym for murder.

This new evidence, brought forward in Mr. Detch's testimony at the omnibus hearing in this proceeding, some years after the trial, would certainly have presented the trial court with a different situation in ruling on the conflict motion. Additionally, the trial court failed to properly "set forth the findings in a manner adequate for review," as required by the Court's holding in *Blake, supra*, in that no formal order making such findings was ever entered.

Essentially, by providing counsel in this case, Mr. Detch provided to the Appellant counsel who had an actual conflict of interest and was a necessary witness in the case. Under the holdings of *Reedy, Postelwait, and Cole, supra*, such assistance was not effective assistance of counsel, and, therefore, the Appellant was deprived of his Constitutional right to the effective assistance of counsel. Consequently, it was error for the habeas court to deny relief on this ground, and this Court should reverse.

ii. **Appellant's Fifth Amendment Rights¹**

In *State v. Boyd*, 160 W.Va. 234 (1977), this Court held that it was a violation of a criminal defendant's due process rights for the State to elicit testimony regarding the defendant's invocation of his Fifth Amendment right to remain silent at trial in his case. Furthermore, in *State v. Walker*, Sup. Ct. No. 26657 (2000), this Court held that it was reversible error for a prosecutor to make remarks regarding a defendant's utilizing of his right to remain silent under the Fifth Amendment.

In the instant case, the Prosecution, on direct examination of ATF Agent Andrew Beck, elicited testimony regarding the Appellant's invocation of his right to remain silent during the initial investigation. The Prosecutor then proceeded to comment on such silence during his closing argument in this case.²

Despite these apparent and obvious violations of the Appellant's rights, Appellant's trial counsel, Mr. Detch, did nothing. He did not object, move to strike, ask for a limiting instruction, or move for a mistrial. Such failure was deficient under an objective standard of reasonableness under prong one of *Strickland/Miller*. Moreover, under the second prong, such comment on silence would have likely had a great impact on the ultimate outcome of this case in that the theory of the defense was that Mr. Humphries had been cleared during the initial investigation and that the investigators knew of all of this in the 1970s. However, this testimony indicated, by way of

¹ Please refer to the Part IV of this Discussion regarding the Appellant's Fifth Amendment Rights being violated for a more detailed discussion of this topic. To avoid being redundant this section focuses only on the trial counsel's failure to adequately react to such violation.

² Again, for a detailed presentation of these problems see Part IV, or pages 398-400, and page 977 of the *Trial Transcript*.

slaughtering the Appellant's due process rights, that the Appellant had been less than forthright to the authorities initially.

At the omnibus hearing in this proceeding Judge McQueen testified that such clear violation of the Appellant's rights was clear grounds for a mistrial, and that it was certainly deficient conduct for an attorney to fail to object, or to do anything else, to protect his client's rights. Nonetheless, the habeas court, having all of this before it, failed to grant Appellant relief. Such failure was error and should be reversed by this Court, in order to protect the Appellant's rights.

iii. Failure to Impeach FBI Agent Baxter With Earlier Reports, and Failure to Introduce Such Reports at Trial.

In 1977, FBI agent George Baxter, the primary crime scene investigator, filed a report describing his investigation. The report contained the following observation: "All the aforementioned components were located within the trailer occupied by Abshire." (*Baxter Report*, 10/26/77). The report also contains the observation that "Authorities [in] this area were questioned and they seemed to feel that Abshire was killed as a result of an accidental explosion." The crux of this case was whether Billy Ray Abshire blew himself up, or Gene Gaylor blew him up at the instance of Appellant. In order to demonstrate that the death was an accident, a result of Mr. Abshire's construction of a bomb, the defense needed to show that Abshire had the ability to construct a bomb, and had the materials to do so. In an investigative report by the U.S. government., George Baxter, in 1977, found in Abshire's trailer all of the known components of the bomb in question in this case.

Despite seeing these observations in the report, upon Baxter's testimony during the trial to the contrary, Mr. Detch did not discuss this report, its conclusions, or the reasons therefore with Baxter, when he had him on the stand. He could have easily impeached Baxter with these prior conclusions, yet Mr. Detch made no attempt to do so.

Moreover, Mr. Detch, despite having reports available, which stated that Kin-e-pak and other bomb making materials were found in the victim's residence, and which concluded that the death was the result of the victim's own making, failed to introduce the report at trial. Such failure in and of itself is likely deficient conduct under an objective standard, meeting the first prong of *Strickland/Miller*, and, given the nature of the case, and the effect such report, clearing his client of any wrongdoing during the initial investigation, would have had on the case, likely meets the second prong as well. Judge McQueen, in his testimony during the omnibus hearing noted that an attorney trying this case would have wanted to utilize this report. Any prudent and competent trial counsel when cross examining agent Baxter about his original conclusion that Abshire blew himself up would have impeached his testimony with the report, or referred to the fact that all of the bomb-making supplies were found in Abshire's trailer, some 150 feet from the explosion. Mr. Detch failed to do so. Such failure violated both the first and second prong of the *Stickland/Miller* test, and therefore, it was error for the habeas court to conclude that such failure did not amount to ineffective assistance of counsel.

iv. Trial Counsel's Failure to Investigate the Case.

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. The West Virginia Supreme Court has held that in order to

provide effective assistance of counsel to an accused in a criminal proceeding, counsel must make a "reasonable investigation" of the case. See Syl. pts. 1 and 2, *Ronnie R. v. Trent*, 194 W. Va. 364, 460 S.E.2d 499 (1995); *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must, at a minimum, conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. *Wickline v. House*, 188 W.Va. 344, 424 S.E.2d 579 (1992) (per curiam); *State ex rel. Kidd v. Leverette*, 178 W.Va. 324, 359 S.E.2d 344 (1987). Thus, the presumption that counsel's conduct is reasonable is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation. *Wajda v. U.S.*, 64 F.3d 385, 387 (8th Cir.1995). As suggested in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. Courts applying the *Strickland* standard have found no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so. See *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir.1994).

In *Wickline, supra*, the Court found that trial counsel's failure to have an expert evaluate the defendant's neurological state at the time she waived her *Miranda* rights constituted ineffective assistance. The *Wickline* court noted, that by not properly investigating, in terms of obtaining an expert to review the defendant's mental state,

given the facts available to the trial counsel indicating a problem therewith, was not merely a strategic decision, but was deficient under *Strickland/Miller*. Furthermore, the *Wickline* court held, given that the mental state went to the defendant's ability to waive her *Miranda* rights, and confess, the second prong of *Strickland/Miller* was also satisfied.

Likewise, in the instant case, Appellant's trial counsel, Mr. Detch, failed to adequately investigate the case. Given the highly complex nature of cases involving explosive bombs, an expert witness in the area of explosives would have proved extremely beneficial to the defense. In this case, Mr. Detch had before him Federal Agent Beck and Baxter's reports from the 1970s indicating what the incendiary device that killed Abshire was composed of, and the findings in those reports that the device was likely constructed by the victim himself. However, despite having such information before him, and given the complex nature of such a case, Attorney Detch did not engage an expert witness to review the case, or testify at trial.

When questioned regarding this failure at the omnibus hearing, Detch stated that the Appellant did not have the funds available to afford such an expert. However, as noted by the Court in Syllabus Point 1 of *State ex rel. Foster v. Luff*, 164 W.Va. 413 (1980), a criminal defense attorney can make a request to the trial court for additional money to hire an expert witness. *See, e.g., State v. Brown*, 210 W.Va. 14 (2001). Thus, not having enough money to procure an expert witness is not an excuse for failing to hire one. Mr. Detch made no such motion for expert witness fees on the Appellant's behalf.

Thus, his failure to hire an expert in this case for the purposes of investigating the cause of the explosion that killed the victim, was, under the first prong of

Strickland/Miller, as explained by the Court in *Wickline*, deficient under an objective standard of reasonableness. Furthermore, given the complex nature of a bombing case, and the highly probative value to the defense's investigation of this case, the second prong is also satisfied, in that an expert, given the original reports that the victim likely blew himself up, would have been able to provide the defense with an alternate theory as to what killed the alleged victim.

Additionally, trial counsel's failure to hire a private investigator, or to do any investigation into the story of the State's star witness Clayton Gaylor was likewise deficient conduct under the above standard. Even a cursory investigation into Gaylor's story would have turned up some serious problems with it. Appellant's current lawyer, was able, through the use of an investigator, to determine that part of Gaylor's story had serious errors. For instance, Clayton Gaylor indicated that one of the alleged meetings occurred on a Monday night at a particular lodge in Virginia. Through a few phone calls it became clear that the particular lodge Clayton Gaylor had identified was not even open on Mondays, and had not been open on the date he identified. A minimal pre-trial investigation would have identified this, and then trial counsel could have impeached Clayton Gaylor's testimony at trial. In fact, habeas counsel presented evidence and testimony from witnesses found in a few hours by his private investigator that directly impeached Clayton Gaylor's testimony at trial. This is only one small example of what might have turned up had Mr. Detch done an adequate, or even minimally competent investigation. The failure to do so indicates that trial counsel did not conduct the "reasonable investigation" required by the Court in its decisions *Ronnie R. v. Trent*, and

State ex rel. Daniel v. Legursky, supra. Therefore, under *Strickland/Miller*, the adequacy of trial counsel's investigation was deficient under an objective standard, and a different result was probable had such investigation been conducted. Therefore, it was error for the habeas court to fail to grant relief on this ground, and this Court, applying its prior decisions on this matter, should reverse.

v. Improper Introduction of Co-Defendant Convictions

Prior to the Appellant's trial, two of his co-defendants, Gene Gaylor and Robert Wayne Brown, had been tried and convicted of killing Mr. Abshire. As this Court held in *State v. Ellis*, 161 W.Va. 40, 239 S.E. 2d 670 (1977), "[T]he conviction or plea of guilty of a co-actor or conspirator is not admissible against other co-actors or co-conspirators subsequently tried to prove they committed the same offense or participated in it."

However, defense counsel Paul Detch elicited evidence of such convictions at the Appellant's trial in his cross-examination of the State's witnesses. Moreover, following this improper and prejudicial introduction, Mr. Detch failed to object, move to strike, ask for a limiting instruction, or move for a mistrial. Such failure goes beyond mere incompetence, and under the *Strickland/Miller* test is clearly deficient under an objective standard of reasonableness. Judge McQueen's testimony at the omnibus evidentiary hearing in this matter noted that no reasonably competent attorney would have done this.

By way of illustration, the following exchange occurs at Page 147 of the *Trial Transcript*,³

³ Though a multitude of examples of Mr. Detch's ineffectiveness are available, for the sake of brevity, they will not be repeated here. Instead, the Appellant asks the Court to review the Trial Transcript for additional support.

- Q. ATTORNEY DETCH: "And did he provide you any information so; you could verify that?"
- A. MICHAEL SPRADLIN: "It's been verified."
- Q. ATTORNEY DETCH: "Did you go talk to the Holiday Inn people?"
- A. MICHAEL SPRADLIN: "It was verified through another statement of a person that was there."
- Q. ATTORNEY DETCH: "If I understand it correctly, you're only talking about another codefendant."
- A. MICHAEL SPRADLIN: "Codefendant Robert Vernon Brown who was convicted."

Upon, opening up this festering can of worms, Mr. Detch failed to object to the inadmissible evidence, failed to move to strike the answers, failed to ask the Court for a cautionary instruction, and failed to move for a mistrial in order to protect Mr. Humphries right to a fair trial.⁴ Such failure to address the issue violated the Appellant's right to the effective assistance of counsel, in that an attorney with the bare minimum of professional competency would not have stood idly by as improper and inflammatory evidence regarding the conviction of a co-defendant was introduced in front of the jury. Such inaction was deficient under prong one of the *Strickland/Miller* test, and with regard to prong two, certainly there exists a reasonable probability that but for the introduction of the fact that a co-defendant in this case had been convicted a different result would of occurred. Furthermore, had defense counsel moved for a mistrial there was a reasonable probability that such motion would have been granted and, thus, a different result of this trial would have occurred. Judge McQueen testified to as much before the habeas court

⁴ Incidentally, the Trial Court had a responsibility to intervene when this happened. A cautionary instruction can limit the prejudice to the defendant. This instruction must be given in order to preserve a fair trial even if the defense lawyer caused the problem. In this case the Trial Court failed to do so. See *State v. Woods*, 167 W.Va. 700, 280 S.E.2d 309(1981).

at the omnibus hearing, yet that court incorrectly concluded that these failures did not constitute ineffective assistance.

Undaunted by his questioning of Trooper Spradlin, which led to the introduction of codefendant Robert Vernon Brown's conviction, Mr. Detch pressed on to elicit similar damaging comments on the convictions of the codefendants from other witnesses. When cross examining Clayton Gaylor, the State's star witness, whom the Appellant had testified against in the 1970s, trial counsel again solicited an answer that implied the conviction of Clayton Gaylor's brother, codefendant Gene Gaylor.

At Page 281 of the Trial Transcript the following occurred,

- Q. ATTORNEY DETCH: "this is one of the proceedings that you were involved."
A. CLAYTON GAYLOR: "What trial was that? I've got to know what trial. I don't know. I can't say something I don't know what--"

The end result of these cross-examinations was that Mr. Detch did his own client in. Even the Court observed at Page 165 of the Trial Transcript,

THE COURT: "At this point we don't know whether Mr. Humphries is going to testify. And again, you've opened it up by asking all these questions and -- I think it's -- personally, you went way beyond what this man should be testifying to."

Essentially defense counsel helped to convict his own client. He elicited the introduction of inadmissible and prejudicial evidence of co-defendant convictions. Yet Mr. Detch failed to object, move to strike, ask for a limiting instruction, or move for a mistrial. Judge McQueen, testifying at the omnibus hearing noted that his failure to do so was deficient by an objective standard of reasonableness. It is clear that the performance

of defense counsel was, by any objective standard, deficient, and therefore satisfies prong one of the *Strickland* test. Furthermore, though the habeas court did not address the second prong of *Strickland*, a review of the evidence before the trial court shows that but for the improper evidence elicited by the Appellant's trial counsel, Paul Detch, and the failure of Mr. Detch to present the Appellant's defense, a reasonable probability certainly exists that the result of the proceeding would have been different. Thus, the Appellant's federal and state constitutional rights to the effective assistance of counsel were violated, and the Court should grant him relief on this ground.

vi. Trial Counsel Failed to Reasonably Address the Violation of Appellant's Sixth Amendment Right to Confront the Witnesses Against Him.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused *shall* enjoy the right” to be confronted with the witnesses against him. *Lilly v. Virginia*, 119 S. Ct. 1887 (1999). The purpose of this right is to, “...ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). Moreover, the United States Supreme Court has held that where hearsay statements that do not fall within a “firmly rooted” exception to the hearsay rule are introduced at trial, the Confrontation Clause requires that a showing of “particularized guarantees of trustworthiness” of the statements be made, otherwise, such statements must be excluded. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56,66 (1980).

In Syllabus Point 13 of *In Interest of Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997), this Court held, "The burden [in a Confrontation Clause analysis] is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." Moreover, this Court has noted that where hearsay statements at trial likely result in a material contribution to the evidence against a criminal defendant, the trial court must engage in a detailed analysis of the statements admissibility. *See Naum v. Halbritter*, 172 W.Va. 610, 309 S.E.2d 109 (1983) (out-of-court statements by deceased prostitute that she had sexual relations with prosecuting attorney were not admissible in prosecution of prosecutor for false swearing, because of Confrontation Clause); *See, e.g., State v. Kennedy*, 205 W.Va. 224 (1999); *State v. Jarrell*, 191 W.Va. 1 (1994) ; *State v. Mullens*, 179 W.Va. 567 (1988); *State v. James Edward S.*, 184 W.Va.408 (1990).

In this case, the issue surrounding the hiring of Gene Gaylor was central to the case. The Appellant had admitted in the original investigation that he had paid Gene Gaylor money to obtain information regarding a Las Vegas divorce for Kitty Abshire. Mr. Detch, on cross examination elicited the following hearsay responses from Trooper Spradlin regarding this material issue, at page 141 of the Trial Transcript,

Q. ATTORNEY DETCH: "Did you check the airlines to determine in fact whether Mr. Gene Gaylor went to Las Vegas?"

- A. MICHAEL SPRADLIN: "No, sir, but I did contact a law enforcement in Las Vegas to determine what the procedure was for obtaining a Las Vegas Divorce in 1976."
- Q. ATTORNEY DETCH: "And what was the procedure, sir?"
- A. MICHAEL SPRADLIN: "That you had to be a resident of Las Vegas; that the only grounds for – was a no-fault divorce, is the way he characterized it, in Las Vegas. That was the only advantage to coming to Las Vegas. There wasn't a situation where I could go to Las Vegas and obtain a divorce for you."
- Q. ATTORNEY DETCH: "But the residency was only for six weeks."
- A. MICHAEL SPRADLIN: "It may have been six weeks. I was –you had to prove through records that you were a resident of Las Vegas."
- Q. ATTORNEY DETCH: "And you do that by a resident living in Nevada coming to Court, testifying under oath that you had resided there for six weeks, and you could obtain a divorce. That's correct, isn't it?"
- A. MICHAEL SPRADLIN: "I'm not sure. I'm not sure about that, what kind of testimony is required, Mr. Detch. I don't know hat kind of documentation is required."
- Q. ATTORNEY DETCH: "You checked it out' you found that people could get a divorce out there."
- A. MICHAEL SPRADLIN: "Right. But the only advantage was a no-fault divorce. I mean, that was the only grounds."
- Q. ATTORNEY DETCH: "Now then, the person that you talked to, were they an attorney?"
- A. MICHAEL SPRADLIN: "They were a detective."
- Q. ATTORNEY DETCH: "But they don't practice law, never presented a divorce and truly are not familiar with the divorce laws in the State of Nevada."
- A. MICHAEL SPRADLIN: "He seemed to know what he was talking about."

Under the West Virginia and United States Supreme Court's analysis of the Confrontation Clause, such statements clearly violated the Appellant's right to confront the witnesses against him. Nonetheless, after eliciting the above hearsay statements regarding the material issue of what Gene Gaylor was paid by the Appellant to do, Mr.

Detch failed to object, failed to move to strike, and failed to ask for a mistrial. Under the *Strickland/Miller* test such failure certainly meets prong one, in that Appellant's trial counsel did not merely stand idly by as his client's constitutional rights were butchered, but in fact, Mr. Detch, in effect, wielded the knife. And given the material nature of the statements to the case at bar, prong two of *Strickland/Miller* was also satisfied.

Mr. Detch went on to elicit the following hearsay statements regarding the Las Vegas divorce, from Trooper Spradlin, who testified as to what the Appellant's ex-wife, who was subject to spousal immunity, under this Court's holding in *State v. Evans*, 170 W.Va. 3 (1982), and *State v. Jarrell*, 191 W.Va. 1 (1994), regarding much of the supposed statements had told him,

Q. ATTORNEY DETCH: "What did you do to investigate to disprove that Gene Gaylor had not been hired, sent to Las Vegas, did the activities to obtain a divorce?"

A. MICHAEL SPRADLIN: "When I interviewed Katherine Nolf Abshire Humphries, she told me that she – that that had never been discussed with Mr. Humphries; that she never saw any literature, any brochure; there was no plane tickets, there was no arrangements being made for any Las Vegas divorce."

Q. ATTORNEY DETCH: "You would agree that that was after the indictment, that discussion."

A. MICHAEL SPRADLIN: "Yes, that's the only time I've talked to Mrs. Abshire, Mrs. Humphries."

Q. ATTORNEY DETCH: "And she's your only source dealing with that. She is your only source."

Detch, elicited further out of court statements from the Appellant's ex-wife at page 143 of the trial transcript, which should have subject to spousal immunity, and were certainly in violation of the Confrontation Clause, under the litany of *Ohio v. Roberts*, and this Court's *Naum* case.

- Q. ATTORNEY DETCH: "Do you have any evidence that would disprove that Gene Gaylor went to Las Vegas, conferred with an attorney, found information and provided it to Gene Humphries?"
- A. MICHAEL SPRADLIN: "Just that Mr. Humphries' wife told me."
- Q. ATTORNEY DETCH: "Do you know whether she was even privy to the negotiations going on between Gene Humphries and Gene Gaylor?"
- A. MICHAEL SPRADLIN: "She said it was mentioned ---the divorce was mentioned on time early in their courtship, and after that, it was never mentioned again."

Mr. Detch also failed to properly handle himself when the State brought forth testimony that likely violated the Appellant's Fifth Amendment rights. At pages 163-164 the following occurred,

- Q. ATTORNEY DETCH: "Have you been present when Mr. Humphries has testified in various matters related to this case?"
- A. MICHAEL SPRADLIN: "Yes, sir."
- Q. BURNETTE: "I'm going to hand you page 19 of a transcript, and ask you to read that to yourself and let me ask you a question about it."
- A. MICHAEL SPRADLIN: "Nodded affirmatively."
- Q. BURNETTE: "Do you recall that testimony by Mr. Humphries?"
- A. MICHAEL SPRADLIN: "Yes, sir."
- Q. BURNETTE: "In that testimony, I specifically -- I was asking the questions; is that right?" (
- A. MICHAEL SPRADLIN: "Yes, sir."
- Q. BURNETTE: "And I specifically asked Mr. Humphries, "What did you hire Gene Gaylor to do," did I not?"
- A. MICHAEL SPRADLIN: "Yes, sir."
- MR. DETCH: "Your Honor, I'm not sure this the proper means of impeachment."
- THE COURT: "Ladies and gentlemen, at this time I'm going to ask that you got the jury room for a break, and I'll -- again, do not discuss the case among yourselves at this time."

Though Mr. Detch did seem to object, no formal motion to strike, or for a limiting

instruction was made at this point. Furthermore, at page 166-167 of the *Trial Transcript* it continued,

- Q. MR. BURDETTE: "Officer, I just went to ask you a couple more questions. One is this issue that Mr. Detch asked you about, what Carrol Eugene Humphries hired Gene Gaylor to do. And you read this page 19; is that correct?"
- A. MICHAEL SPRADLIN: "Yes, sir."
- Q. MR. BURNETTE: "And did you read my specific question, whether – when I asked. "What specifically did you hire Gene Gaylor to do for you? Was he to get you information; was he to get you plane tickets? What was he to do?" What was his response?"
- A. MICHAEL SPRADLIN: "Mr. Gaylor indicated from that testimony that he –
- MR DETCH: Your Honor, let him read the statement, not interpret it.
- THE COURT: "You may read it."
- A. MICHAEL SPRADLIN: "Question: 'What specifically did you hire Gene Gaylor to do for you?' Was he to get you information, to get you plane tickets? What was he to do?' 'No, not plane tickets. He was to find out what I could do –what I would do and the procedures. That's what he was hired to do.'"
- Q. MR. BURNETTE: "Thank you. And going back to the day that you arrested Mr. Humphries – you testified that was August 27th, 1998; is that right?"
- A. MICHAEL SPRADLIN: "Correct."
- Q. MR. BURNETTE: " -- did you ask Mr. Humphries whether he had knowledge of Gene Gaylor's reputation at that time, when he hired him?"
- A. MICHAEL SPRADLIN: "Yes, I did."
- Q. MR. BURNETTE: "What did he tell you?"
- A. MICHAEL SPRADLIN: "He indicated that he knew that Mr. Gaylor was – had been convicted of murder in the State of Virginia."
- Q. MR. BURNETTE: "And he knew it when he hired him for that Las Vegas divorce, didn't he?"
- A. MICHAEL SPRADLIN: " Yes, sir."

Again nothing was done by Mr. Detch to protect the Appellant's rights under the

Fifth Amendment⁵. Moreover, Mr. Detch even inflicted some of the damage himself, at page 155-156 of the Trial Transcript,

- Q. ATTORNEY DETCH: "I'm not trying to mislead you, and I apologize for a poor question. Did you obtain the bank records of Kitty Abshire from 1976 to determine whether she had any unusual transactions, or even access to \$2,000 at that time?"
- A. MICHAEL SPRADLIN: "Just what Mr. Carrol Humphries told me, that she brought \$2,000 to him prior to the death of Billy Ray Abshire at High Acres Trailer Park."

Furthermore, at page 140 of the *Trial Transcript* Mr. Detch elicited a response from Trooper Spradling regarding hearsay from one of the ATF agents as to what that the agent knew in 1976 regarding the case, and specifically regarding the money paid from the Appellant to Gene Gaylor. Such information had not been introduced from another source, and, thus, was not merely cumulative. Furthermore, the agents he got the statements from were not available to testify at trial. The exchange went like this,

- Q. ATTORNEY DETCH: "Now -"
- A. MICHAEL SPRADLING: "But, Mr. Beck may have been retired by then. I'm not sure what his status was with ATF at the time. But he indicated to me he was not aware of any payment when he did his initial investigation in 1976."
- Q. Trans. P. 139. ATTORNEY DETCH: "And that it had been represented back in 1978 by my client in court to various officials that he had paid \$2,000 to Gene Gaylor."
- A. MICHAEL SPRADLING: "Right, but when I talked to Mr. Beck and the investigating officers, they were not aware that \$2,000 had been paid in 1976. That was one of the things that they were not aware of."
- Q. ATTORNEY DETCH: "When did they become aware of it?"
- A. MICHAEL SPRADLIN: "I think after the extortion trial in 1978 of Gene Willard Gaylor."

⁵ Such introduction may also lend credence to a substantive violation of Appellant's Fifth Amendment Rights, in addition to this ineffective assistance of counsel claim. See *United States v. Robinson*, 485 U.S. 25 (1988).

With regard to the report of Agent Beck, and others, who had determined in 1976 that the bombing was accidental, and likely caused by the victim himself, Mr. Detch elicited the following exchanges at page 131-135 of the *Trial Transcript*,

- Q. ATTORNEY DETCH: "And neither officer Kochenderfer or Officer Beck were able to recall that he had reached this conclusion and not advise you of it?"
- A. MICHAEL SPRADLIN: "Both of them talked in terms of murder of Billy Ray Abshire, not the accidental bombing of Billy Ray Abshire."
- Q. ATTORNEY DETCH: "And did you discuss with him his conclusions?"
- A. MICHAEL SPRADLIN: "Yes, I did."
- Q. ATTORNEY DETCH: "And so you learned at that time of the evidence that he had obtained and the conclusions that he had reached?"
- A. MICHAEL SPRADLIN: "No, he told me it was a homicide."
- Q. ATTORNEY DETCH: "What does the word "homicide" mean?"
- A. MICHAEL SPRADLIN: "He characterized it as a murder of Billy Ray Abshire."
- Q. ATTORNEY DETCH: "And you're telling this jury that Andrew Beck, in July when you traveled down to him, didn't tell you anything that was in that report?"
- A. MICHAEL SPRADLIN: "No, he talked in terms of the murder of Billy Ray Abshire."
- Q. ATTORNEY DETCH: "He didn't tell you about the evidence that they found of the blasting cap, the Kinepak, the safety razor that was found?"
- A. MICHAEL SPRADLIN: "No."
- Q. ATTORNEY DETCH: "Was that because his memory is bad after the years, do you think, Officer?"
- A. MICHAEL SPRADLIN: "No, I think it's because things came to light after 1976 that changed his opinion."

At page 161-162 of the *Trial Transcript*, Mr. Detch elicited more hearsay regarding the initial investigation,

- Q. ATTORNEY DETCH: "So is it your testimony that when he prepared the report, he didn't know other information that would have caused his conclusions to change."
- A. MICHAEL SPRADLIN: "He had interviewed – Mr. Humphries had been interviewed, and Mr. Humphries had failed to tell the investigation officers –"

Furthermore, Mr. Detch, during his cross examination of Trooper Spradlin elicited the introduction of grand jury matters, then failed to object, move to strike, move for a mistrial, or ask for a limiting instruction. At page 134 of the *Trial Transcript* Spradlin testified as follows,

- Q. ATTORNEY DETCH: "But you had reached that conclusion within three weeks of starting your investigation."
- A. MICHAEL SPRADLIN: "I reached it by the time the Grand Jury convened. The Grand Jury heard the evidence in this. They reached the conclusion."
- Q. ATTORNEY DETCH: "The front of this document reads, 'Transcript excerpt of proceedings had and testimony taken in the hearing of the above-styled action before the Honorable James O. Holliday, Judge, as reported by Twyla Donathan, Court Reporter, on Monday, February 22nd, 1999.'"
- A. CLAYTON GAYLOR: "What was it for, The Grand Jury or—"
THE COURT: "Just a minute. Ladies and gentlemen, at this time I'm going to ask you to have a short break, We'll be back shortly. About a ten-minute break. Do not discuss the case among yourselves."
"The jury exited the courtroom."
THE COURT: "Somehow we're going to have to get this straightened out. I can't have him referring to other trials or anything of that nature. You two join together and tell him how you're going to handle this."
MR. BURNETTE: "Your Honor, Mr. Detch's line of questioning is getting somewhere he shouldn't be going. I object to the line of questioning."

The damage was so great at this point that the trial court intervened and the Prosecuting Attorney objected in order to limit the damage. Once again nothing was done by the Court or requested by the defense lawyer to limit this damage.

Ultimately, the Appellant's Sixth Amendment right to confront the witnesses against him was violated in this case due to his trial counsel's conduct. Under the standards set forth above from both the United States and West Virginia Supreme Courts, where hearsay, that does not fall within a firmly rooted exception is introduced at trial, a showing must be made that such hearsay is inherently trustworthy. No such showing was made in this case. Nonetheless, Attorney Detch failed to object to its introduction, failed to move to move to strike, or for a mistrial, and failed to ask for a limiting instruction. Such failure is clearly deficient under reasonable standards, and thus, prong one of the *Strickland/Miller* test was violated. Furthermore, given the nature of the statements made, had they not come into this trial a different result is surely probable. Therefore, Attorney Detch's conduct with regard to the violations of the Appellant's Sixth Amendment rights constituted ineffective assistance of counsel.

vii. Cumulative Effect

In addition to the individual deprivations of the Constitutional right to the effective assistance of counsel, under *Strickland* and its progeny, Defense Counsel Paul Detch conducted himself in such an incompetent manner on so many levels during the trial of this case that the cumulative effect, as noted by Judge McQueen at the omnibus hearing was "enough to have sunk the defense." Detch's serious conflict of interest and position as a necessary witness in the case; his elicitation and failure to address the introduction of

co-defendant convictions; his elicitation and failure to address hearsay statements in violation of Appellant's Sixth Amendment Rights; his failure to investigate; numerous other errors, both cumulatively and individually, were so egregious as to be beyond any realm of objectively reasonable conduct of a criminal defense attorney. Therefore, under the *Strickland/Miller* test, both prongs are satisfied in this case, and the habeas court's failure to so conclude was error, and should be reversed by this Court.

II. The Pre-Indictment Delay of Over Twenty-Two and a Half (22½) Years.

Although West Virginia has no statute of limitations in felony cases, the West Virginia Supreme Court of Appeals held, in Syllabus Point 2 of *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va.1980), that an eleven-year delay between the commission of a crime and the indictment of a defendant, where the defendant's location and identity were known throughout the period is presumptively prejudicial. Additionally, in Syl. pt. 1 of *State v. Richey*, 171 W.Va. 342, the Court held that, "[t]he general rule is that where there is a delay between the commission of the crime and the return of the indictment or the arrest of the defendant, the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not *prima facie* excessive." See, e.g., *State v. Davis*, 205 W.Va. 569 (1999) (noting that where the State knows the identity and location of the alleged perpetrator, *Leonard* analysis applies). The Court further explained, in *Hundley v. Ashworth*, 181 W.Va. 379, 383 (1989), that where the State is shown "to have knowledge of the identity and location of the defendant" throughout the

period of delay, the burden of showing that the delay was not orchestrated for the purpose of gaining a tactical advantage over the defendant shifts to the State. *Id.* at 382.

In *State v. Carrico*, 189 W.Va. 40, 427 S.E. 2d 474 (1993), the Court, citing *Leonard, supra*, held that "It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify an indictment and trial, it violates this due process right." This is particularly true in a jurisdiction, as West Virginia, which has no statute of limitations on such criminal cases. In such jurisdictions, constitutional due process is the only barrier between citizens and prosecutions for crimes too old to defend. *Dickie v. Florida*, 398 U.S. 30, 90 S. Ct. 1564, 2 L. Ed. 2d 26 (1970).

Moreover, the Fourth Circuit Court of Appeals, in reviewing a similar case, held that "We cannot agree with the position taken by the State of North Carolina and those other circuits [e.g. West Virginia] which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation.....This conclusion on its face, would violate fundamental concepts of justice as well as the community's sense of fair play." *Barker v. Howell*, 904 F.2d. 889 (4th Cir. 1990) (Emphasis supplied). It should be noted that in *Barker* the Court was reviewing a delay of 28 months, not 22 years, as the Appellant herein faced. This over-reaching and oppressive trump card for law enforcement and prosecutors allows for arbitrary and delayed prosecution after a defendant's ability to defend himself is hindered, all at the expense of the rights of an accused provided by the Fifth Amendment to the United States constitution.

In *Leonard, supra*, the defendant had been involved in the robbery of a couple. He was sentenced to life without mercy upon conviction of first-degree murder of the husband. However, at the time of the murder, he had also allegedly maliciously wounded the murder victim's wife during the same incident, but that incident was not charged initially. Ultimately, Leonard's sentence was commuted by the Governor to life with mercy, and he became eligible for parole. The Prosecution, eleven years after his conviction, and, coincidentally on the eve of Leonard's parole, brought the malicious wounding charge against him. This Court held in *Leonard*, that the eleven-year delay presented a *prima facie* violation of the defendant's constitutional rights to due process.

In the instant case, the Appellant had been subject to the initial investigation of the case. His involvement in paying Gene Gaylor for information regarding the "Las Vegas divorce" was fully disclosed to the authorities in the 1970s. In fact, following the death of Mr. Abshire, the Gaylors had attempted to extort money from the Appellant, and the Appellant testified against both Gene and Clayton Gaylor at their extortion trials. Only years later, as Gene Gaylor's sentence for the extortion had nearly been completed did the authorities, in a turn of events remarkably similar to those faced by the Court in *Leonard*, resurrect this case. Ultimately Gene Gaylor, who had been in prison during the intervening years, and the Appellant, who was not charged with the crimes until 22 ½ years after they allegedly occurred, were convicted as a result. The "evidence" upon which the Appellant was convicted was fully available at the time of the victim's death and had been fully explored and examined by federal and state law enforcement officials

who, in their expert and considered opinions, concluded that the victim had died at his own hands.

This presents the Court with a factual situation that parallels that of *Leonard*, in which prosecutors attempted to prosecute a criminal defendant for a charge they declined to pursue 11 years before, only upon learning that he might soon be let out of prison. In *Leonard*, this Court found that prosecution improper, due to pre-indictment delay. In the instant matter, twice as much time, 22 years has passed, and the whereabouts of Mr. Humphries have not been a mystery.

Appellant asserts that in the instant case the prejudice he suffered was both actual and substantial, as the Fourth Circuit required in *Jones v. Angelone*, 94 F.3d 900 (1996). In fact it was likely insurmountable. The physical evidence in this case had all been destroyed by the time Appellant was indicted. Given that this case surrounds the explosion of an apparent bomb, not having the physical evidence from that device is a seriously prejudicial problem for a criminal defendant. Had it been available, or had the apparent items that were found inside Mr. Abshire's residence, been physically available, testing could have been done which could quite possibly have cleared the Appellant of any wrongdoing.

Additionally, the Appellant asserts the following as examples of actual and substantial prejudice the delay in indictment in this case caused him to suffer:

- a) Lost laboratory records – the records at the FBI laboratory are missing and records of West Virginia laboratory are missing as well; these tests formed the basis for ATF agent Baxter to conclude that the victim died at his own hands;

- b) Prosecuting Attorneys records – after the death of the victim, the Greenbrier County Prosecuting Attorney, in discussions with state investigators, advised them that he felt there was not sufficient evidence to obtain a conviction; any records of these conversations/meeting would be exculpatory, but Greenbrier County Prosecuting Attorneys Ralph Hayes and Edgar Smith are deceased;
- c) Appellant's records – Appellant was an insurance agent and kept appointment books and records until his retirement; such records would have verified his activities on dates in question; after retirement, Appellant disposed of all such records, and his recollection, given his age, after 22 years, is of no assistance;
- d) Polygraph records – the test questions are now missing; the criminal investigation report observes that one of the defendants failed the polygraph test, and the details of this test would have been most helpful to appellant's defense;
- e) Lost evidence - all materials recovered from the crime scene have been lost or discarded, although available in 1978 and used by ATF agent Beck in 1976 to determine that the death of the victim was accidental; the availability and use of such materials in the 1999 trial would have been immensely beneficial to appellant in establishing his innocence; however, given the 2 decade delay, all materials were gone;
- f) Lost memory – it is axiomatic that given the passage of 22 years memories dim and recollections are lost, including those of witnesses, the Appellant, the investigators, and others who could potentially have come forward had this indictment been brought nearer in time to the events.

Anticipating the response, to the above argument, the assertion that Clayton Gaylor's statements to Trooper Spradlin, and his subsequent testimony, are such "newly discovered" evidence to avoid the rule set forth in *Carrico, Leonard and Davis*, the Appellant contends that Clayton Gaylor's location was known by investigators during the entire time period between the alleged commission of the crime and the subsequent indictment. Failure to get the story they wanted from Clayton Gaylor until 22 years later, on the eve of his brother getting out of prison, is not an excuse. Therefore, this delay should be found by the Court to be a *prima facie* violation of the Appellant's due process

rights, the Court should grant the Appellant relief and reverse the habeas court's failure to so conclude.

III. Prosecution's Failure to Disclose Exculpatory Evidence

The West Virginia Supreme Court of Appeals, in *State v. Duell*, 175 W.Va. 233 (1985), held that when a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, nondisclosure by the prosecution is fatal to its case where such nondisclosure is prejudicial. The Court further explained that nondisclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case. *See Also, State v. Fauber*, 175 W.Va. 324 (1985); *State v. Weaver*, 181 W.Va. 274 (1989). Moreover, in the landmark case of *Brady v. Maryland*, the United States Supreme Court held that the failure of the prosecution to turn over exculpatory evidence to an accused criminal defendant violated a defendant's right to due process. *Brady*, 373 U.S. 83 (1963).

In the instant case the Appellant had been informed upon making his motion for discovery that most of the evidence in the case had been destroyed, given the more than twenty (20) year delay. However, at trial, during cross examination of Morgan Scott, an Assistant U.S. Attorney, at page 588-589 of the Trial Transcript, the following came to light,

- Q. ATTORNEY DETCH: "And the notes of those interviews are no longer in existence, to our knowledge."
- A. MORGAN SCOTT: "All of the 302s—which are the typewritten copies of the notes of the agents—would be in the case file, and I went over those with Special Agent Butler

before I came here to testify, and earlier on. But the 302s, that is, the typed up notes are available.”

Thus, evidence, in the form of the notes of the investigators, which would have given the defense the benefit of knowing what the investigation found in the 1970s, was, according to Morgan Scott, available. Yet, such evidence was never turned over to the defense, as is required under *Duell, supra*. Therefore, the Appellant’s due process rights were violated, and it was error for the habeas court to find otherwise.

IV. Fifth Amendment Violations

As noted by the West Virginia Supreme Court of Appeals, in Syl. Pt. 1 of *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977), “Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.”

In this case, during the direct examination of Andrew Beck, an ATF agent who investigated the case in the 1970s, the following exchange took place at page 398-400 of the *Trial Transcript*,

- Q. MR. HANSON: “Did you ever have any conversations with Mr. Humphries?”
- A. ANDREW BECK: “Wysocki and I went to his office one time. Of course by the time we got through advising him of his constitutional rights against self-incrimination, he essentially didn’t tell us anything.”

The problem was then compounded by the prosecutor, during his closing argument, where he stated, at page 977 of the *Trial Transcript*, “On August the

16th, ATF Agent Jack Beck—you heard his testimony—he closed his investigation after exhausting all possible leads. He didn't have anything to go on. He didn't know about Gene Gaylor. *Mr. Humphries hadn't told him anything about Gene Gaylor.*”

In Syllabus point 6 of *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995), the Court outlined the four part test to be used in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. Moreover, in *State v. Walker*, Sup Ct. No. 26657 (2000), this Court found reversible error where a prosecutor made similar remarks during his closing argument. The *Walker* court stated, “In view of the *Sugg* factors, we have little difficulty in finding reversible error in the State's closing argument remarks concerning Mr. Walker's post-*Miranda* silence. Not only was the State's attack on Mr. Walker's post-*Miranda* silence improper, the attack was highly prejudicial.” *Id.*

Even in light of the above standard, the habeas court failed to grant relief on this ground. That court had before it the testimony at the omnibus hearing of Judge McQueen who remarked that such commentary on a defendant's right to silence was improper and likely grounds for a mistrial. Despite this, the habeas

court improperly concluded that such violation of the Appellant's Fifth Amendment rights did not warrant relief. However, given the prejudicial nature in this case of bringing forth evidence of the defendant invoking his constitutional rights to silence, and then commenting on such rights, reversal, similar to the reversal granted by the Court in *Walker, supra*, is warranted, and this Court should reverse the decision of the habeas court on this ground.

V. **Double Jeopardy Violations**

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits successive prosecution or multiple punishment for 'the same offense.'" *Witte v. United States*, 515 U.S. 389, 391, 115 S. Ct. 2199, 2202, 132 L. Ed. 2d 351 (1995); West Virginia Constitution, Art. III, Section 5; United States Constitution, Amendment V. Thus, the "Double Jeopardy Clause 'protects against a second prosecution for the same offense. And it protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969) (footnote omitted)). "Where consecutive sentences are imposed in a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Id.* The rule for determining "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment" is "whether each provision requires proof of an additional fact which the other does not." *Id.* at 166, 97 S. Ct at 2225 (internal citation omitted). *See also United States v. Dixon*,

509 U.S. 688, 696, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556 (1993).

It is clear from a review of the statutes under which appellant was convicted, 61-11-6 and 61-10-31, that these statutes have no substantive difference in elements. The accessory statute, 61-11-6 merely adopts the language of the common law, and as further delineated by case law, and describes as one who is not present at the crime itself, but who counseled, procured or commanded another to commit it. *State ex rel. Brown v. Thompson*, 149 W.Va. 649, 142 S.E. 2d 711 (1965). See also, *Blockburger v. U.S.*, 284 U.S. 289 (1932). The conspiracy statute, 61-10-31 provides that it shall be unlawful for two or more persons to conspire to commit an offense against the State. Any practical difference between these statutes is a “difference without a distinction”, and punishment under both statutes in the instant case is violative of appellant’s rights under both federal and state constitutions. Thus, this Court should find that the habeas court erred, and should grant the Appellant relief on this ground as well.

VI. Appellant’s Sixth Amendment Right to Confront the Witnesses Against Him

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right” to be confronted with the witnesses against him. *Lilly v. Virginia*, 119 S. Ct. 1887 (1999). The purpose of this right is to, “...ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). Moreover, the United States Supreme Court has held that where hearsay statements that do not fall within a “firmly rooted” exception to the hearsay rule are introduced at trial, the

Confrontation Clause requires that a showing of “particularized guarantees of trustworthiness” of the statements be made, otherwise, such statements must be excluded. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56,66 (1980).

Additionally, in *Gray v. Maryland*, the United States Supreme Court held that the use of an accomplice’s confession “creates a special and vital need for cross-examination.” 523 U.S. 185, 194-195, 118 S.Ct. 1151, 140 L.Ed. 2d 294 (1998).

In Syllabus Point 13 of *In Interest of Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997), this Court held, “The burden [in a Confrontation Clause analysis] is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.” Furthermore, this Court has noted that where hearsay statements at trial likely result in a material contribution to the evidence against a criminal defendant, the trial court must engage in a detailed analysis of the statements admissibility. *See Naum v. Halbritter*, 172 W.Va. 610, 309 S.E.2d 109 (1983) (out-of-court statements by deceased prostitute that she had sexual relations with prosecuting attorney were not admissible in prosecution of prosecutor for false swearing, because of Confrontation Clause). *See, e.g., State v. Kennedy*, 205 W.Va. 224 (1999); *State v. Jarrell*, 191 W.Va. 1 (1994); *State v. Mullens*, 179 W.Va. 567 (1988); *State v. James Edward S.*, 184 W.Va.408 (1990).

In the instant case, hearsay statements regarding material issues were introduced at the Appellant's trial.⁶ Such statements were not firmly rooted hearsay exceptions, and therefore under the United States Supreme Court's decision in *Idaho v. Wright, supra*, it is necessary to demonstrate that such statements were inherently trustworthy. However, no such showing was made at the trial in this matter.

Essentially, the hearsay statements at issue presented assertions of truth regarding material facts at issue in the case. One such exchange included testimony that another person had believed Abshire's death to be a murder.⁷ The purpose of the Confrontation Clause, as noted by the Court in *Craig, supra*, is to provide a criminal defendant with the ability to confront the witnesses against him, and test their statements through the adversarial process of cross examination. In the instant case, the trial court allowed statements that tended to support the guilt of the Appellant to come into the trial for their truth without this Constitutionally required process. Therefore, the introduction of such statements into this trial did not comport with United States Supreme Court precedent on this issue, and, thus, violated the Appellant's rights under the Sixth Amendment's Confrontation Clause. Consequently, the decision of the habeas court that this ground did not warrant relief was error and should be reversed by this Court.

CONCLUSION

As explained in detail above, the Appellant's federal and state constitutional rights were violated during his trial in the following ways: 1) Mr. Detch's representation of the

⁶ See Ineffective Assistance of Counsel Argument above for specific examples where statements of out of court declarants were offered for their truth. Additionally, for a detailed look please refer to the trial transcript in this matter.

⁷ Again see above discussion under the ineffective assistance of counsel claim.

Appellant constituted ineffective assistance of counsel due to his conflict of interest, position as a necessary witness, failure to investigate and general deficient conduct at trial; 2) the Pre-Indictment delay of over twenty-two (22) years between the commission of the alleged crime and the indictment of the Appellant, his location and identity being known throughout the period, violated his due process rights; 3) the Prosecution's failure to disclose exculpatory evidence, claiming such evidence to be destroyed, only to learn at trial that State witnesses had relied upon it prior to trial, and that it was in existence violated the Appellant's due process rights; 4) The Prosecutor's elicitation of testimony concerning the Appellant's invoking his Fifth Amendment right to remain silent, and the prejudicial use of such testimony in the State's closing argument violated the Appellant's right to a fair trial; 5) the Appellant was subjected to double jeopardy, in that he was convicted and sentenced of two statutory violations which have no substantive difference, and the underlying act was the same for both; and 6) Appellant's Sixth Amendment Right to Confront the Witnesses against him was violated.

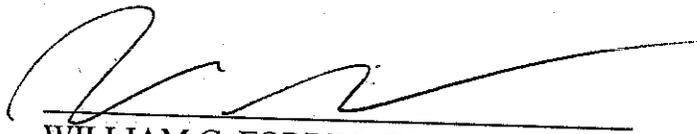
The Habeas Court's refusal to grant the Appellant, Carroll Eugene Humphries, relief for these numerous and highly prejudicial constitutional violations was error, in light of the testimony presented at the omnibus hearing, and a review of the record in this case. Such error constituted an abuse of discretion, and in order for justice to be done this case must be reversed by this Honorable Court. For these reasons the Circuit Court erred in refusing to grant Mr. Humphries Habeas Corpus relief below, and the Appellant prays this Court will reverse the Circuit Court and grant him relief.

RELIEF REQUESTED

The Appellant, 75-year-old Carroll Eugene Humphries respectfully prays that this Honorable Court will, for the foregoing reasons, set aside his convictions on the crimes of conspiracy to commit and accessory before the fact to murder in the first degree and enter judgment of acquittal, or, in the alternative, to grant him a new trial on those charges and order his release on bail pending such trial, or to remand his case for re-sentencing. The Appellant further prays that this Honorable Court grant any and all additional relief it deems appropriate.

Respectfully submitted,
CARROLL EUGENE HUMPHRIES,
Appellant.

By Counsel,



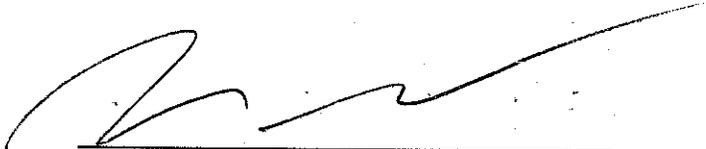
WILLIAM C. FORBES, ESQUIRE
FORBES LAW OFFICES, PLLC
28 OHIO AVENUE
CHARLESTON, WV 25302
304-343-4050
STATE BAR NO. 1238
Counsel for Appellant.

CERTIFICATE OF SERVICE

I, WILLIAM C. FORBES, counsel for Appellant, do hereby certify that I served the foregoing "BRIEF ON BEHALF OF APPELLANT" on counsel for the Appellee by depositing true copies thereof in the regular United States mail, postage prepaid, this 27 day of July, 2006, addressed as follows:

**STEPHEN R. DOLLY,
ASSISTANT GREENBRIER COUNTY
PROSECUTING ATTORNEY
P O BOX 911
LEWISBURG, WV 24901**

**DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
STATE CAPITOL, ROOM 26E
CHARLESTON, WV 25305**



**WILLIAM C. FORBES, ESQUIRE
FORBES LAW OFFICES, PLLC
28 OHIO AVENUE
CHARLESTON, WV 25302
304-343-4050
STATE BAR NO. 1238**