
No. 33103

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

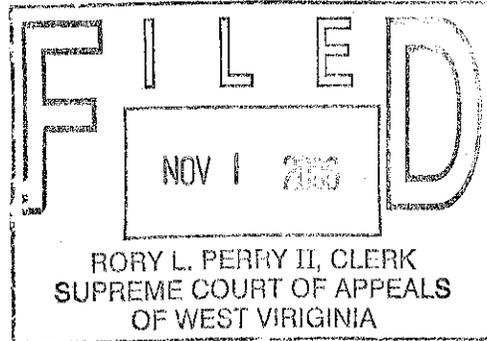
STATE OF WEST VIRGINIA ex rel.
CARROLL EUGENE HUMPHRIES,

Appellant,

v.

THOMAS MCBRIDE, Warden,
West Virginia State Penitentiary,

Appellee.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

INTRODUCTION; CONFESSION OF ERROR

Following extensive review of the record in this case and the applicable law, and for the reasons set forth in this brief, the State believes that the Appellant did not have the effective assistance of counsel and did not receive a fair trial. The decision of the habeas court should be reversed; the Appellant's petition for habeas corpus relief should be granted, his conviction on charges of conspiracy and accessory before the fact to first degree murder reversed, and this case remanded for a new trial.

II.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal from the trial court's denial of a petition for writ of habeas corpus. The petition was initially filed on March 28, 2001, pro se; thereafter, an amended petition was filed by

present habeas counsel and tried before the Honorable James J. Rowe on April 23, 2003. The trial court entered its final order on October 7, 2005, denying the petition.

In the underlying case, the Appellant was found guilty by a Putnam County jury¹ on July 30, 1999, of paying Gene Gaylor to kill Billy Ray Abshire, who at the time of these events was married to the Appellant's paramour (and soon-to-be wife), Kitty Abshire. Billy Ray Abshire died on February 5, 1976, more than twenty-two years prior to the Appellant's indictment on charges of conspiracy and accessory before the fact on July 31, 1999.

At the Appellant's trial, his counsel's so-called strategy was to "put it [all] out on the table" (T.T. III, p. 602), i.e., to let most of the prosecution's evidence in without challenge and in fact to elicit as much (if not more) damaging testimony as the prosecutor elicited.² When a witness for the State blurted out that a co-defendant had already been convicted (T.T. I, p. 147) – a body blow to the Appellant's chances in this case – counsel failed to move for a mistrial. Counsel did not retain an expert to testify for the defense, despite the fact that the mechanics of bomb-building, and the inferences to be drawn from the explosion patterns, were key to the Appellant's defenses. Finally, counsel had a conflict of interest that absolutely required him to be a witness, not a lawyer, in the Appellant's case.

¹The case was tried in Putnam County on a change of venue from Greenbrier County. This is significant to the habeas proceedings, where one prong of the Appellant's ineffective assistance of counsel claim involves his counsel's failure to move for a mistrial, or even a cautionary instruction, after a witness deliberately blurted out that one of the alleged co-conspirators had been convicted. The purpose of the change of venue had been to ensure that the fate of the co-conspirators was not known to the Appellant's jury.

²In the situation cited above, things got so bad that the prosecutor objected "... to protect this thing. . .," i.e., the integrity of the trial in a situation where defense counsel was eliciting the most damaging information against his client. The court responded by commenting to defense counsel, "I know. I don't know what you're doing." (T.T. III, p. 603.)

Although the State had one live witness who testified that he had “witnessed the contract,” so to speak, in this contract killing case, most of the State’s evidence was hearsay testimony that was admitted in violation of the principles subsequently articulated in *Crawford v. Washington*, 541 U.S. 36 (2004), and *State v. Mechling*, No. 32873 (W.Va., June 30, 2006). Although the State does not believe that *Crawford/Mechling* should be applied retroactively, the pervasiveness in this case of what would be *Crawford/Mechling* error today makes it impossible for the State to argue that any other errors in the Appellant’s case were harmless.

The Appellant was sentenced to a term of 1-5 years on the conspiracy charge and life imprisonment with mercy on the accessory before the fact charges, said terms of imprisonment to run consecutively. His petition for appeal, filed by trial counsel whose performance is one of the major issues in this habeas proceeding, was denied by this Court on October 3, 2000.

III.

STATEMENT OF FACTS

The victim, Billy Ray Abshire, was killed on February 5, 1976, when a bomb exploded in his garage. Following an initial investigation conducted by the West Virginia State Police (WVSP) and the Bureau of Alcohol Tobacco and Firearms (BATF), authorities concluded that the victim had made the bomb and that his death had been an accident. The victim, an employee of American Electric Power Company, had access to the explosive material used in the bomb; further, a blasting cap identical to the one involved in the explosion was found in the victim’s residence, together with other bomb-making material.

The Appellant was a person of interest during the initial investigation, since his affair with the victim’s wife seems to have been common knowledge and the couple married four months after

Billy Ray Abshire's death. The Appellant did not disclose that he had paid \$2,000.00 to another person of interest, Gene Gaylor, a day or two after the explosion, which may account for the authorities' failure to charge anyone in the death.

A little less than two years later, Gene Gaylor attempted to extort the Appellant for \$10,000.00; he wrote a series of letters threatening to tell all to the authorities about the Abshire killing,³ and then punctuated the correspondence by setting off a bomb in the Appellant's yard. The Appellant, after consulting with counsel, went to the authorities, who set up a sting operation that snared both Gene Gaylor and his brother Clayton Gaylor in the extortion.⁴

At this time, early 1978, during the course of the extortion investigation, the Appellant told authorities for the first time that prior to Billy Ray Abshire's death, he (the Appellant) had hired Gene Gaylor to look into the possibility of a Las Vegas divorce for Kitty Abshire, the victim's wife and the Appellant's paramour. The Appellant said that he had paid \$2,000.00 for Gaylor's services, even though the bill had come due after Mr. Abshire's death mooted the whole divorce problem.⁵ Mr. Gaylor was familiar with Las Vegas, although it is unclear just what he, a non-attorney, could have done to facilitate a divorce.

³Gaylor apparently had complete confidence that he could secure a grant of immunity in return for his testimony against the Appellant.

⁴Both Gaylors were tried and convicted of the crime, following a trial in which the Appellant testified against them. Gene Gaylor was sentenced to 20 years imprisonment, Clayton Gaylor to 15 years imprisonment.

⁵Actually, the divorce problem had been mooted the day before Billy Ray Abshire's death, when he filed for a divorce from Kitty Abshire. (T.T. I, p. 108; State's Exhibit No. 6.) It is puzzling that although Mr. Abshire's divorce complaint was introduced into evidence by the State, the State's theory of the case was that the Appellant's motive for killing Abshire was his (Abshire's) refusal to give his wife a divorce. (T.T. I, p. 44.)

After the Gaylor brothers' extortion trial, nothing more happened for twenty years until Trooper Michael Spradlin, bringing to mind the television show "Cold Case," decided to look into the 1976 death of Billy Ray Abshire.

At the Appellant's trial more than twenty years later, the State ridiculed the Appellant's testimony about a Las Vegas divorce, contending that a "Las Vegas divorce" is shorthand for a contract killing.⁶ As it turns out, however, Billy Ray Abshire was also apparently looking into the possibility of a Las Vegas divorce, or more specifically how to defeat one. At the time of his death he was represented by trial counsel's father, at a time when trial counsel worked in his dad's office and specifically researched the issue of Las Vegas divorce requirements. Unfortunately for the Appellant, although counsel disclosed the first of these facts prior to trial – that his father had represented Mr. Abshire and that he (counsel) had worked in the office at the time – he did not disclose until the day of the habeas corpus hearing four years later the following absolutely critical information:

(MR. DETCH) There was a discussion that Kitty ah – Kitty Abshire was going to go to Las Vegas and obtain a divorce so she could deprive Mr. Abshire of his children and she was making plans to go out there, maybe even went out there, for all I knew but it was discussed and ah – she was going to go out there and my father was having me research it as to whether the Las Vegas people ah – would have had the jurisdiction to made (sic) an award of custody and what that would define in terms of property and that was what I had to research in that time period and that's why Mr. Abshire was there in the office the night before he was killed.

(Habeas Transcript, p. 87.)

⁶Interestingly, although the trial court sustained defense counsel's objection to this line of questioning, on information and belief the prosecutor went on to argue it in his summation anyway. (This assertion is made on information and belief because undersigned counsel cannot locate Volume 5 of the trial transcript and therefore cannot provide a transcript cite. Her recollection is that the argument was made.)

Under the facts and circumstances of this case, counsel's testimony on this point at trial would have been critical to his client's chance of being believed by the jury on the most important disputed issue at the trial: whether the purpose of Appellant's payment to Gene Gaylor was for Gaylor's services in looking into or arranging a Las Vegas divorce for Kitty Abshire.

IV.

ISSUES

1. The habeas court erred in its conclusion that the Appellant's right to the effective assistance of counsel was not violated.

2. The habeas court erred in its conclusion that the Appellant's rights were not violated by testimony that the Appellant had invoked his Fifth Amendment rights.⁷

3. The Appellant's rights were violated by the admission of hearsay evidence that did not fall within any recognized exception to the hearsay rules and therefore denied the Appellant his confrontation rights.

4. The errors set forth above cannot be deemed harmless, since trial counsel's deficient performance and his "put it [all]out on the table and let it all out" strategy resulted in an avalanche of inadmissible evidence that fatally infected the integrity of the trial.

⁷The Appellant's invocation of his rights was in the context of a federal investigation; thus, he invoked pursuant to U. S. Constitution, Amend. V, rather than W. Va. Const., art. III, § 5.

V.

ARGUMENT

A. THE HABEAS COURT ERRED IN ITS CONCLUSION THAT THE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT VIOLATED.

In *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), Syllabus Points 5 & 6, this Court held that:

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.

* * *

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.

As a threshold matter, defense counsel testified at the habeas hearing that his trial strategy was to "put it all on the table and let it all out," which the habeas court found to have been reasonable. (Order of 10/7/05, p. 14.) With all due respect to Judge Rowe, this is wrong as a matter both of law and common sense; no competent defense attorney would deliberately fail to object to, or affirmatively elicit, prejudicial and otherwise inadmissible evidence for the purpose of "... pursu[ing] the truth."

At the habeas hearing, defense counsel testified that "I don't think you can pursue the truth unless your (sic) willing to go after the risk of what the person would say." (Habeas Transcript,

p. 99.) Counsel further opined that evidentiary rules are “for people who have never tried cases” (*id.*), whatever that is supposed to mean, and that “I don’t think you can try a case if you’ve had to go and interview the parties as to every question that they were going to answer. I’d say it’s ridiculous.” (*Id.*) In other words, defense counsel’s strategy, adopted by the habeas court as reasonable, was not to interview witnesses, but rather to ignore the rules of evidence and ask them anything and everything, admissible or not, in order to “pursue the truth.” (*Id.*)

The habeas court was far more sanguine about trial counsel’s “put it all on the table” than the trial court was; the record is replete with admonishments by the trial court that counsel’s strategy was going to torpedo his case. For example, after counsel challenged yet another hostile witness to say something he was obviously reluctant to say,⁸ the following exchange occurred:

MR. BURNETTE: Your Honor, could I object? Could we approach?

(Counsel and the defendant approached the bench and the following proceedings were had out of the hearing of the jury.)

MR. BURNETTE: I’m in an unusual position here, because I’m objecting to protect this thing. He is getting ready – he’s already –

THE COURT: I know. I don’t know what you’re doing.

MR. DETCH: There’s nothing in his report to indicate this.

THE COURT: You’ve got this man under oath, an Assistant U.S. Attorney up there. He talked to these people [the alleged co-conspirators]. He knows what he’s talking about. I don’t know what you’re doing.

MR. BURNETTE: I don’t want to have reversible error, but my goodness –

MR. DETCH: If I had known he was going to say that, I couldn’t have done it.

⁸The witness, an Assistant United States Attorney, was obviously reluctant because he knew that a responsive answer to counsel’s cross-examination would result in the admission of improper evidence, specifically, after the fact admissions of a co-defendant that inculpated the Appellant.

THE COURT: You did it. You said, "Put it on the table."

(T.T. 3, p. 603.)

It is certainly true that a trial is a search for the truth. However, our system of criminal law has developed a structure for doing so, with all of the trial participants performing certain time-honored roles:

The witnesses are sworn to tell the truth;

The lawyers do their best to put on evidence favorable to their respective clients, and to object to evidence that is harmful to their clients and inadmissible under the constitution, the rules of procedure and/or the applicable case law; and

The trial judge applies the law to resolve disputed evidentiary issues, thus ensuring that everyone is playing by the rules and that only admissible evidence is presented to the jury.

In this case, defense counsel failed on numerous occasions to object to testimony that incriminated his client and should have been deemed inadmissible; failed to object or move for a mistrial when a witness disclosed that the Appellant had invoked his right to remain silent (T.T. 2, pp. 398-99); persisted in eliciting testimony that incriminated his client, to the point that both the prosecutor and the court expressed concern that he didn't know what he was doing; posed open-ended questions to hostile witnesses that invited them to elaborate on their already prejudicial

testimony;⁹ and failed to move for a mistrial when one such witness blurted out that a co-defendant had already been convicted in the case. (T.T. 1, p. 147.)

Interestingly, with respect to that blurring witness, defense counsel acknowledged in his testimony at the habeas hearing that he had *expected* the witness “. . . to sneak it in somehow, that they (Spradlin and the prosecutor) were going to get it in but they were gonna do it in some fashion to taint that trial . . . When I looked over after he blurted it out that Mr. Gaylor had been convicted, I could see that smile on [the prosecutor’s] face that said ‘Boy, did you buy our lie.’” (Habeas Transcript, p. 93.) Yet he didn’t move for a mistrial because neither his client nor the client’s sons requested that he do so (!), and because:

Mistrials to me just postpones something and they double your cost, so I – I, frankly, don’t favor mistrials. I’m not a person who if he got a mistrial, walks out and feels I’ve done anything more than kissed my sister, if you know what I mean.

(Habeas Transcript, pp. 94-96; 111.) Further, he didn’t ask for a cautionary instruction because it just didn’t even cross his mind; he was distracted because he “. . . saw [the prosecutor’s] smile [and] had to get the blood pressure down from behind the eyeballs.” (Habeas Transcript, p. 96.)

⁹For example, while cross-examining Trooper Spradlin, defense counsel asked: “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?” (T.T. I, p. 140.) The witness responded with a torrent of hearsay information, otherwise inadmissible for a myriad of reasons, that was damning to the Appellant but absolutely responsive to the question. (T.T. I, pp. 140-43.) Defense counsel utilized this same cross-examination technique on all of the witnesses who were or had been employed by the ATF; he would demand to know why they had come to certain conclusions, whereupon they gleefully told him. Defense counsel, in his “search for the truth,” also managed to elicit the information that the U.S. Attorney, the WVSP and the ATF all believed the primary witness against the Appellant to be truthful. (T.T. 1, pp. 145-46; Habeas Transcript, p. 121.)

Trial counsel's failure to move for a mistrial, or at least ask the court to give a cautionary instruction, is astonishing when one recalls that the case was being tried on a change of venue specifically to ensure that the jury not be aware of the convictions of the Appellant's co-defendants!

Further, defense counsel failed to retain an expert to counter the parade of ATF agents called by the State, in a case where the mechanics of bomb-building, and the inferences to be drawn from the explosion patterns, were key to the Appellant's defense that Billy Ray Abshire had accidentally blown himself up with his own bomb. Counsel testified at the habeas hearing that he didn't need an expert because he had, in preparation for trial, taught himself all he needed to know about bomb making and had actually made a bomb. (Habeas Transcript, p. 125.) The problem with this is that whether or not he was the most knowledgeable person in the courtroom, *he wasn't testifying*. Counsel further testified that although another reason for failing to retain an expert was the Appellant's dwindling resources, "[i]t never crossed [his] mind" to ask the court for funds to hire an expert witness. (*Id.*) It is well established that a defendant may seek a court order for this purpose when he or she is unable to pay for expert assistance, and counsel's decision to try this case "on the cheap" is inexplicable where the Appellant's defenses cried out for an expert witness to support them. No reasonable defense counsel would have thought that he or she could establish these defenses through the cross-examination of hostile ATF agents.

Additionally, counsel had two decent possible defenses – first, that the victim accidentally blew himself up with his own bomb, and second, that Gene Gaynor had committed the crime but not as a contract killer – but diluted the effectiveness of both by trying to convince the jury of two

diametrically opposed scenarios.¹⁰ Further, counsel compounded this problem of inconsistent defenses by constantly inviting law enforcement witnesses to explain why they didn't "buy" one or the other of the defenses, thus issuing engraved invitations to the witnesses to regale the jury with the hearsay statements of non-testifying co-defendants and other individuals.

Finally, defense counsel had a conflict of interest, which the habeas court found to be "... 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." (Order of 10/7/05, p. 31.) First, there was nothing "technical" about the conflict of interest; whether or not Mr. Abshire was willing to give his wife a divorce, and whether or not he was going to fight her for custody of their children, was the central issue relating to the Appellant's alleged motive to kill Abshire. Second, the habeas court's conclusion that the Appellant had waived any conflict prior to trial was clearly erroneous. The record indicates that defense counsel's only disclosure to the Appellant prior to trial, and thus the only basis for a waiver, was that he had been employed in his father's firm when his father represented Billy Ray Abshire. What counsel did *not* disclose until the day of the habeas hearing was that in connection with the Abshire divorce case he had personally researched the requirements for obtaining a Las Vegas divorce. (Habeas Transcript, p. 133.) As set forth earlier in this brief, the prosecutor ridiculed the Appellant's testimony that he was exploring

¹⁰This Court has held that a defendant may not be prohibited from putting on inconsistent defenses. *State v. McCoy*, No. 32860 (W. Va., May 24, 2006). Therefore, standing alone, counsel's choice to do so, even if it ultimately backfired, should not be a basis for a charge of ineffective assistance. In this case, the State notes the inconsistent defenses as one strand in a tapestry of bad choices and bad performance.

the possibility of a Las Vegas divorce for Kitty Abshire; what might the jury have thought if it learned that Billy Ray Abshire was apparently preparing to defend against a Las Vegas divorce?

As this Court held in *State ex rel. Blake v. Hatcher*, No. 32747 (W. Va., Nov. 18, 2005), “[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.” In this case, the Appellant’s counsel had an actual conflict of interest, and the habeas court erred in concluding that the conflict had been waived because the undisputed evidence is that the Appellant did not have all the relevant information about the conflict at the time of his waiver. (Habeas Transcript, p. 133.)

At the habeas hearing in this case, Appellant’s habeas counsel put on the testimony of an expert witness, A. Andrew MacQueen, to testify as to the standard of care for criminal defense counsel and to offer opinion evidence as to the Appellant’s counsel’s deficient performance at trial. The State did not call an expert to rebut Judge MacQueen; rather, it relied on trial counsel’s evaluation of his own performance and the habeas court accepted, without providing any findings or conclusions in support, that “put it all on the table and let it all out” was a reasonable trial strategy.

After carefully reviewing both the trial transcript and the habeas transcript, the State cannot agree. Putting aside the fact that most of the hearsay testimony to which defense counsel did not object, or which he elicited himself, would today be held to violate *Crawford v. Washington, supra*, it was clearly objectionable and inadmissible even under the law as it existed prior to *Crawford*. Although the Appellant was charged with conspiracy, thus bringing W. Va. R. Crim. P. 801(d)(2) into play, it is difficult to imagine how the statements made by alleged co-conspirators years after the fact could possibly be said to be in the course of or in furtherance of the conspiracy. These

individuals were attempting to exculpate themselves and/or secure immunity for themselves by dangling the Appellant as bait; therefore, their statements do not have the indicia of reliability which this Court requires for admission of hearsay testimony under the “in furtherance of” rubric. *State v. Jarrell*, 191 W. Va. 1, 442 S.E.2d 223 (1994); *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997) (to be admissible, a conspirator’s statement made subsequent to commission of crime must further aims of concealing conspiracy); *State v. Ramsey*, 209 W. Va. 248, 545 S.E.2d 853 (2000) (are alleged conspirators still concerned with concealing their criminal conduct or their identity); *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001) (co-conspirator’s confession and co-conspirator’s cousin’s statements implicating defendant not admissible). Yet the jury in the Appellant’s trial was bombarded with hearsay statements of alleged co-conspirators Gene Gaylor, Clayton Gaylor, Robert Vernon Brown and Kitty Abshire, made during investigations and trials taking place in 1978 (two years after Billy Ray Abshire’s death) and in 1998 (twenty-two years after the death).

B. THE HABEAS COURT ERRED IN ITS CONCLUSION THAT THE APPELLANT’S RIGHTS WERE NOT VIOLATED BY TESTIMONY THAT THE APPELLANT HAD INVOKED HIS FIFTH AMENDMENT RIGHTS.

It is well established in this Court’s jurisprudence that the State may not put on evidence to show that a criminal defendant withheld certain information from investigating authorities, either by asserting of his right to remain silent or by giving an incomplete statement. In *State v. Walker*, 207 W. Va. 415, 533 S.E.2d 48 (2000), the defendant had given some information to detectives, but had omitted any information – the basis for his subsequent defense – that the victim had pulled a knife on him. Relying in part on *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996), Syl. Pt. 2, the Court held that “. . . a witness who testifies to certain matters cannot be impeached by showing

his or her failure on a prior occasion to disclose a material fact unless the disclosure was omitted under circumstances rendering it incumbent or natural for the witness to state it." 207 W. Va. at 420, 533 S.E.2d at 53.

In this case, both the State and defense counsel elicited evidence that violated the Appellant's rights. For example, the prosecutor questioned retired ATF agent Jack Beck about his 1976 interview of the Appellant as follows:

BY MR. BURNETTE:

Q: Did you ever have any conversations with Mr. Humphries?

A: Wysocki and I went to his office one time. Of course, course, by the time we got through advising him of his constitutional rights against self-incrimination, he essentially didn't tell us anything.

Q: Did Mr. Humphries ever tell you that he paid Gene Gaylor \$2,000 two or three days after Billy Ray Abshire's death?

A: No, sir.

(T.T. 2, p. 398-99.)

Defense counsel did not object, even though he had earlier objected to similar testimony given by another witness, Trooper Michael Spradlin:

BY MR. DETCH:

Q: 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: He had interviewed – Mr. Humphries had been interviewed, and Mr. Humphries had failed to tell the investigating officers –¹¹

¹¹Defense counsel had to know this was coming but led with his chin anyway. Trooper Spradlin had telegraphed his intentions in an earlier exchange when he explained that ATF agents had revised their earlier accident theory "... because things came to light after 1976 that changed
(continued...)

MR. DETCH: Objection, your honor.

(T.T. 1, pp. 161-62.) The objection was sustained.

Suffice it to say, a review of the transcript of trial reveals that the jury was apprised numerous times, both directly and indirectly, that the Appellant invoked his rights and withheld some material information from investigating authorities. As in *Walker*, this was highly prejudicial to the Appellant's case. His defense was that he had paid \$2,000.00 to Gene Gaylor for innocent purposes; had this been true, the State implied, the Appellant would have so advised the police at the earliest opportunity. "To permit the State to do what occurred in this case, would effectively make Miranda warnings meaningless." *State v. Walker, supra*, 207 W. Va. at 421, 533 S.E.2d at 54.

Compounding the error, the prosecutor drove the point home in his closing argument that "[the ATF] didn't know about Gene Gaylor. Mr. Humphries hadn't told him anything about Gene Gaylor." (T.T. 5, p. 977.) Under the facts and circumstances of this case, the argument violated *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995) and *State v. Walker, supra*.

C. THE APPELLANT'S RIGHTS WERE VIOLATED BY THE ADMISSION OF HEARSAY EVIDENCE THAT DID NOT FALL WITHIN ANY RECOGNIZED EXCEPTION TO THE HEARSAY RULES AND THEREFORE DENIED THE APPELLANT HIS CONFRONTATION RIGHTS.

As set forth earlier in this brief, had this case been tried subsequent to the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and this Court's decision in *State v. Mechling*, No. 32873 (W. Va., June 30, 2006), there is no question that the Appellant's

¹¹(...continued)
[their] opinion." (T.T. 1, p. 135.)

conviction could not stand. A substantial amount of the evidence incriminating the Appellant consisted of the out-of-court statements of his alleged co-conspirators made either to investigating authorities or in trial, or both – precisely the type of “testimonial evidence” condemned in *Crawford/Mechling*.

Since the case was tried prior to *Crawford/Mechling*, the question becomes whether the hearsay statements were admissible under some recognized exception to the hearsay rules. The State concludes that they were not. Although the trial court admitted them as statements against penal interest, W. Va. R. Crim. P. 801(d)(2), they simply don’t meet the test of *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995), Syl. Pt. 9, and *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001), Syl. Pt. 12:

Absent a showing of particularized guarantees of trustworthiness, the admission of a third-party confession implicating a defendant violates the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of the Article III of the West Virginia Constitution. The burden is squarely on 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.

In this case, most of the statements of the alleged co-conspirators were made years after the alleged conspiracy had ended (in some cases more than twenty years). None of the circumstances of the statements established trustworthiness sufficient to rebut the presumption that a hearsay statement is not worthy of reliance at trial: Gene Gaylor was attempting to secure reward money,¹²

¹²Billy Ray Abshire’s family had advertised a \$10,000.00 reward for information resulting in the conviction of his murderer. Gene Gaylor’s plan was to secure immunity for himself, then secure the reward by incriminating the Appellant.

immunity and revenge¹³ by inculpating the Appellant; Clayton Gaylor¹⁴ was attempting to exculpate his brother and minimize his own involvement; Robert Brown and Kitty Abshire Humphries were attempting to exculpate themselves.

D. THE ERRORS SET FORTH ABOVE CANNOT BE DEEMED HARMLESS, SINCE TRIAL COUNSEL'S DEFICIENT PERFORMANCE AND HIS "PUT IT [ALL]OUT ON THE TABLE AND LET IT ALL OUT" STRATEGY RESULTED IN AN AVALANCHE OF INADMISSIBLE EVIDENCE THAT FATALLY INFECTED THE INTEGRITY OF THE TRIAL.

Simply put, the State cannot make a good faith argument in this case that defense counsel's ineffective performance, and the introduction of evidence that violated the Appellant's *Miranda* rights, was harmless.

Absent the inadmissible evidence, the State had only three things going for its case: the testimony of Clayton Gaylor, a shaky witness at best; the Appellant's motive to kill Billy Ray Abshire because he wouldn't give his wife a divorce, which, as set forth above, was demolished by the State's first witness when he testified that Mr. Abshire had filed for divorce; and the Appellant's seemingly farfetched story about why he paid \$2,000.00 to Gene Gaylor, which, as also set forth above, could have been corroborated by the testimony of defense counsel had he disclosed that a Las Vegas divorce was actually somehow involved in the Abshire v. Abshire proceedings.

Although this evidence, standing alone, would have been sufficient to survive a directed verdict of acquittal, it is impossible to say that the jury's verdict in the Appellant's case was not influenced by the voluminous hearsay evidence that was improperly admitted and the disclosure that

¹³As noted earlier, the Appellant's testimony against Gaylor had resulted in Gaylor's conviction on extortion charges and a twenty year sentence of imprisonment.

¹⁴Clayton Gaylor testified at trial; this argument relates only to his out-of-court statements as related by other witnesses.

the Appellant had invoked his rights against self-incrimination. It is also impossible to say that these errors did not affect the jury's assessments of the Appellant's credibility.

In sum, it is impossible to conclude beyond a reasonable doubt that the errors in this case were harmless.

VI.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the State confesses error and joins the Appellant's prayer that the decision of the habeas court be reversed; the Appellant's petition for habeas corpus relief be granted; and the Appellant's conviction on charges of conspiracy and accessory before the fact to first degree murder be reversed.

Let it be said that the State does not agree with all of the assertions made in the Appellant's brief and does not agree with the Appellant's Assignments of Error Nos. II, III and V. Further, the State urges the Court to remand this case for a new trial, as we do not believe that the Appellant is entitled to judgment of acquittal as a matter of law. There was sufficient admissible evidence introduced at trial to submit the case to a jury.

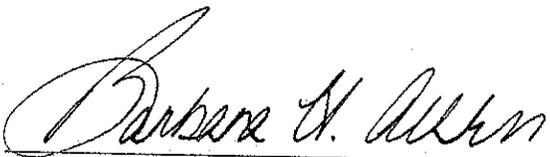
The State takes no position on the issue of bond, believing that this is a matter more properly addressed on remand by the prosecuting attorney and defense counsel.

Respectfully submitted,

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

By Counsel.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

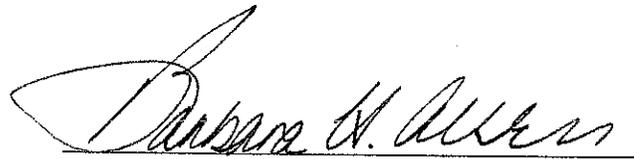


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CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for Appellee, do hereby certify that a true and accurate copy of the foregoing "Brief of Appellee State of West Virginia" was served upon counsel for Appellant by depositing the same in the United States Mail, first class postage prepaid, this 1st day of November, 2006, addressed as follows:

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BARBARA H. ALLEN