

**IN THE SUPREME COURT OF WEST VIRGINIA, AT CHARLESTON**

State ex rel. Ross Gray

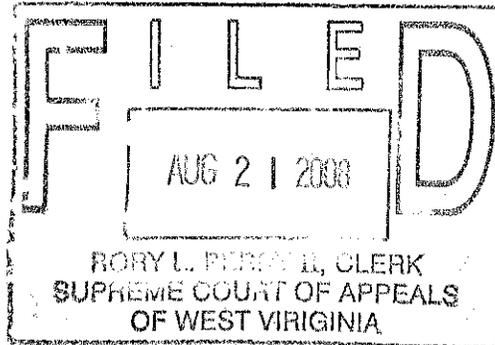
*Petitioner,*

v.

Docket No. \_\_\_\_\_

David Ballard, Warden  
Mount Olive Correctional Complex

Indictment No. 05-F-002



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**ORIGINAL JURISDICTION PETITION  
FOR WRIT OF HABEAS CORPUS**

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Ross Gray  
#30325 Pine-104  
Mount Olive Correctional Complex  
One Mountainside Way  
Mount Olive, W. Va. 25185  
[*Pro Se Petitioner*]

and one (1) count of attempted unlawful assault. Five of these counts were cited under a code section which charged that Petitioner had inappropriate sexual contact with a eleven (11) year old girl.

4. On September 8, 2005, Petitioner was tried on three (3) counts of first degree sexual abuse, and two (2) counts of second degree sexual assault. The State did not prosecute Petitioner on the remaining counts of breaking and entering, sexual abuse, and attempted unlawful assault, nor did the Court dismiss the aforesaid remaining counts against Petitioner.

5. On September 12, 2005, the jury returned guilty verdicts on two (2) counts of sexual assault in the second degree, and three (3) counts of sexual abuse in the first degree.

6. On September 12, 2005, [same day as above] directly after trial, the State filed a recidivist information under W.Va. Code 61-11-18 & 19, in order to enhance Petitioner's conviction of count five (5), first degree sexual abuse to life.

7. On October 19, 2005, trial attorneys David Barnabei, and Michael J. Olejasz, previous motions to withdraw were granted.

8. On October 19, 2005, [same day as above] attorney Andrew Mendelson, Esq., was appointed to continue the proceedings.

9. On January 31, 2006, the Circuit Court of Ohio County sentenced Petitioner to ten to twenty five (10-25) years on count one (1) sexual assault in the second degree, to ten to twenty five (10-25) years on count two (2) sexual assault in the second degree, to one to five (1-5) years for his conviction of sexual abuse in the first degree count three (3), to one to five (1-5) years for his conviction of sexual abuse in the first degree count four (4), and for his conviction of count five (5) sexual abuse in the first degree his sentence to this offense was enhanced to life under West Virginia Code 61-11-18 and & 19, with the proviso that the life sentence would be served first, followed by an aggregate sentence of twenty two to sixty (22-60) years on counts one through four. All sentences

were ordered to be served consecutively. The court also recommended that Petitioner not be paroled.

10. On February 15, 2006, Petitioner sent a letter to Judge James P. Mazzone concerning appointed counsel, Andrew Mendelson's failure to communicate with Petitioner pursuant to filing an appeal on his behalf.

11. On February 22, 2006, Judge James P. Mazzone sent a letter to attorney Andrew Mendelson asking him to respond to Petitioner's letters. [See, Appendix-A]

12. On March 15, 2006, counsel for Petitioner filed a *Notice of Intent to Appeal* Petitioner's conviction and sentence.

13. On April 28, 2006, the court on its own motion, appointed Attorney Kevin Neiswonger to act as appellant co-counsel to assist Andrew Mendelson in filing an appeal on Petitioner's behalf.

14. On July 20, 2006, the Circuit Court of Ohio County re-sentenced Petitioner to restore his time for appeal. Re-sentencing number one.

15. On August 31, 2006, Petitioner filed a pro se motion to "Terminate Counsel," in the Circuit Court of Ohio County requesting competent counsel to file an appeal on his behalf. The court subsequently denied Petitioner's motion to "Terminate Counsel." [see, Addendum of Exhibits (attachment-A)]

16. On January 3, 2007, because counsel failed, again, to meet the appeal deadline, the court re-sentenced Petitioner in order to restore his appeal time. Re-sentence number two.

17. On January 9, 2007, Judge James M. Mazzone sent both Attorneys Neiswonger and Mendelson letters ordering the attorney's to respond to Petitioner's letters concerning his appeal. [See, Appendix-B]

18. On May 5, 2007, because counsel, again, failed to meet the appeal deadline, the court re-sentenced Petitioner in order to restore his appeal time. Re-sentence number three.

19. On June 26, 2007, the court sent letters to both attorney Mendelson and Neiswonger ordering the attorneys to respond to Petitioner's letters concerning the status of his appeal. [see, Appendix-C].

20. On February 26, 2008, because the attorneys, again, failed to meet the appeal deadline, the court re-sentenced Petitioner in order to restore his appeal time. Subsequently, Petitioner filed a series of complaints to the Circuit Court of Ohio County, and the Lawyer Disciplinary Board, requesting appointment of new counsel to file an appeal on his behalf. [see, Addendum of Exhibits]

21. On April 14, 2008, Attorney Kevin L. Neiswonger, Esq., wrote the Lawyers Disciplinary Board a letter contending that Petitioner wrote the attorney a letter requesting more time to file an appeal. The information in the attorneys letters was false and misleading. [see, Appendix-D].

22. On May 7, 2008, do to counsel's misstatements, the Lawyer Disciplinary Board closed its interest in the matter, finding that Petitioner had requested more time to file an appeal. Which he did not.

23. At this time, the named attorneys have suspended all communication. Petitioner's time for appeal has expired, and there has been no further attempts by the attorneys to request a re-sentencing in this matter.

24. Petitioner files this habeas petition asking that this Honorable Court grant his petition for immediate and unconditional discharge, in light of court appointed counsel's extraordinary dereliction in filing his appeal. Petitioner further states that his counsel, as agents of the State of West Virginia has also failed to obtain all his transcripts in order to perfect an appeal on his behalf, albeit, counsel has abandoned their duty to protect Petitioner's constitutional right to file an appeal in this matter.

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### STATEMENT OF FACTS

Petitioner, Ross Gray, has been sentenced to a life sentence, which was imposed consecutively to a sentence of twenty two to sixty (22-60) years, for his three (3) convictions for first degree sexual abuse, and two (2) convictions for second degree sexual assault.

Petitioner was indicted on an eight count indictment. Counts one through five of his indictment alleged that he had inappropriate sexual contact with a fifteen (15) year old girl. Although, the code section cited charged inappropriate acts against an eleven (11) year old girl.

Prior to his trial, the State moved to correct the code section of the indictment charging Petitioner with inappropriate contact with an eleven year old, over defenses objections and request to dismiss as misleading and confusing. The State argued that their was a simple clerical error, and that his intent was to charge that Petitioner had inappropriate contact with a fifteen (15) year old girl, and not the eleven (11) year old the code section referred to.

After he was convicted, the State then filed an information under West Virginia Code 61-11-18 & 19 to increase his sentence to life.

On December 22, 2005, the Circuit Court of Ohio County held a recidivist trial under W.Va. Code 61-11-18 and 19, in order to proceed with enhancing Petitioner's sentence to life.

At the time of his recidivist trial proceeding, the State called Stephen D. Herdon., Esq. Petitioner's former retained counsel, without objection from Andrew Mendelson<sup>1</sup>, Mr. Herdon testified on behalf of the State that Petitioner was in fact the one and the same person he had represented in the past, and who had been before convicted. This proof was necessary for conviction

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<sup>1</sup> Andrew Mendelson is current appeal counsel in this matter. It is Petitioner's suspicion that the reason Attorney Mendelson will not obtain the transcripts of his December 22, 2005, recidivist trial, is because the errors in that proceeding were created by Mr. Mendelson. This is also an additional reason why the court should have granted Petitioner's motions to "Terminate Counsel," and Habeas Relief.

as a habitual offender under W.Va. Code 61-11-18.

Thereafter, current counsel, Andrew Mendelson, advised the recidivist jury that Petitioner's name is in fact Ross Gray, of whom he represents.

Petitioner now files the current habeas corpus petition asking this court to grant his request for an unconditional discharge based on attorney Andrew Mendelson's failure to obtain both the recidivist trial transcripts of December 22, 2005, and his Magistrate Court preliminary hearing transcripts, to effect a direct appeal on Petitioner's behalf, inasmuch as, a period of over two years has elapsed since the time of Petitioner's sentencing date of February 13, 2006, and counsel has not taken any actions to obtain the complete record and file and appeal on behalf of Petitioner, Ross Gray. Petitioner also states that the lower court has abused its discretion in failing to grant Petitioner's numerous motions and request for competent counsel to file an appeal on his behalf.

**GROUNDS RAISED**

**GROUND ONE**

**PETITIONER'S RIGHTS UNDER THE UNITED STATES CONSTITUTION TO APPEAL HIS CONVICTION HAS BEEN VIOLATED BY COUNSEL'S EXTRAORDINARY DERELICTION, IN OBTAINING ALL THE NECESSARY TRANSCRIPTS, AND TO FILE AN APPEAL ON HIS BEHALF.**

**GROUND TWO**

**THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT PETITIONER'S MOTIONS TO TERMINATE COUNSEL, AND HIS REQUEST FOR HABEAS CORPUS RELIEF BASED ON COUNSEL'S FAILURE TO FILE HIS APPEAL.**

**SUPPORTING FACTS AND DISCUSSION OF LAW**

**GROUND ONE**

***PETITIONER'S RIGHTS UNDER THE UNITED STATES  
CONSTITUTION TO APPEAL HIS CONVICTION HAS BEEN  
VIOLATED BY COUNSEL'S EXTRAORDINARY DERELICTION, IN  
OBTAINING ALL THE NECESSARY TRANSCRIPTS, AND TO FILE  
AN APPEAL ON HIS BEHALF.***

Since his sentencing date of February 13, 2006, Petitioner has been re-sentenced four times without any appeal being filed on his behalf.

During the course of the time to file an appeal, Petitioner has made numerous complaints concerning counsel's failure to communicate regularly, and counsel's failure to file an appeal within a timely manner. [see, Addendum of Exhibits]

Petitioner has written counsel, specifically requesting that counsel obtain his recidivist trial transcripts of December 22, 2005, and transcripts of his preliminary hearing in Magistrate Court, in order to raise issues for his appeal.

Thereafter, counsel explained to Petitioner that "Counsel was not aware you wanted to challenge your recidivist hearing."<sup>2</sup>

After notifying attorneys Mendelson and Neiswonger that he wanted them to obtain the December 22, 2005, recidivist hearing, and his Preliminary hearing transcripts, the aforesaid attorneys have done nothing to either obtain these transcripts or to inform Petitioner of the status of the same.

Petitioner then filed complaints both to the Lawyer Disciplinary Board, and the Circuit Court of Ohio County, asking that counsel be relieved, and that competent counsel be appointed to obtain

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<sup>2</sup> To this date, counsel had not taken any effective steps to locate and obtain Petitioner's December 22, 2005, recidivist transcripts, or his Magistrate Court preliminary hearing transcripts.

his transcripts and file an appeal in this matter.

Thereafter, Petitioner filed a writ of habeas corpus under W.Va. Code 53-4A-1, requesting unconditional discharge from confinement based on counsel's extraordinary dereliction in filing an appeal on his behalf.

On February 20, 2007, the Circuit Court of Ohio County denied Petitioner's habeas corpus as moot, based on counsel's request for re-sentencing in order to extend the time for and appeal. [see, Addendum of Exhibits(Attachment-E)]

Subsequently, the Lawyer Disciplinary Board closed interest in Petitioner's complaints, due to counsel informing the Board that Petitioner had asked for more time to file an appeal. Counsel provided the Board with false and misleading information concerning Petitioner's position in filing his appeal. [see, Appendix-D]

At this time, counsel has suspended all communication with Petitioner. Counsel has not filed an appeal or a motion to re-sentence Petitioner to re-store his appeal time; also counsel has yet to obtain Petitioner's recidivist and preliminary hearing transcripts to file issues relating to the inappropriate testimony of his former attorney, Stephen D. Herdon, Esq., and other issues relating to his underlying trial.

*I. STANDARD OF REVIEW*

In determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error

which does not effect the outcome of the case, will be regarded as harmless error. Syl pt. 19 State V. v. Thomas, 157 W.Va 640, 203 S.E.2d 445 (1974) Syl pt.1, State v. Cicil, W.Va. 311 S.E.2d 144 (1983)

VI. Counsel's performance fell far below the customary standard of reasonably effective assistance.

As previously mentioned, counsel has not obtained two crucial transcripts relating to issues Petitioner wishes to raise on appeal, his recidivist trial of December 22, 2005, and his Magistrate Court preliminary hearing transcripts before Magistrate Rose M. Humway.

Additionally, counsel's over two (2) year delay in perfecting an appeal is unreasonable, especially given that counsel has not even retrieved all the necessary documents at this time. Independent from counsel's duty to serve as counsel in this matter, counsel has a duty to stay candid, to communicate with his client, and to limit his case load in order to provide effective representation to all his clients. In these respects counsel has also failed.

Counsel has failed to keep within his obligations as appointed representative in this matter, inasmuch as, counsel has at this time, suspended communication with Petitioner, and has not maintained a respectable level of integrity, or honesty in representing Petitioner's case.

In this regard, prior in time, Petitioner had complaints filed before the Lawyer Disciplinary Board regarding counsel's failure to keep him informed of the status of the case, and counsel's failure to obtain records and file a timely appeal on Petitioner's behalf.

On March 31, 2008, attorney Kevin L. Neiswonger met with Petitioner at the Mount Olive Correctional Complex. During this meeting Mr. Neiswonger correctly explained to Petitioner that some of the issues he wished to raise were more appropriately raised on a writ of habeas corpus in

the future. The attorney then went on to explain to Petitioner that more time would be needed to finish his appeal on the remaining issues, but that in order to get an extension, because of Petitioner's complaints, Petitioner would have to write a letter agreeing to extend the time for appeal. Subsequently, Petitioner wrote a letter upon counsel's directions, notifying counsel that if it was absolutely necessary, than he would agree to an additional re-sentencing in order to perfect an appeal.

On April 14, 2008, Attorney Neiswonger wrote a letter to the Lawyer Disciplinary Board claiming to the Board that Petitioner "asked me to request that Judge Mazzone re-sentence him, to provide him with more time in which to perfect his appeal. He indicated in his most recent letter to me that he wants to take some more time to look at these issues himself and does not desire me to file the appeal right away, because he wants to make sure that we are including everything that he desires to be included." [see, Appendix-D]

Petitioner avers that counsel was not candid, and counsel's integrity is compromised, inasmuch as, counsel misstated the facts and circumstances surrounding Petitioner's comments concerning his appeal. This was a clear attempt by counsel to purposefully mislead both the Lawyer Disciplinary Board and the Circuit Court of Ohio County, which at this time has been very effective in that purpose.

Moreover, counsel has never obtained Petitioner's recidivist and preliminary hearing transcripts, nor has counsel motioned the court for re-sentence to restore the appeal time as he dishonestly informed the Court and the Board he would do.

For these reasons, in consideration of a comparison of counsel's performance in the present case, with reasonably accepted practices, it cannot be concluded that current counsel has exhibited

the normal and customary degree of skill possessed by attorney's who are reasonably knowledgeable of criminal law. A reasonable attorney would have, at the least, obtained all the necessary transcripts for filing the appeal, and more importantly, a reasonable attorney would have remained candid and honest at all times, without resort to malicious acts of placing false and misleading representations on the record in order to cover counsel's errors.

VII. Proved counsel errors herein effects the outcome of this case.

During the two years Petitioner awaits for his appeal to be filed, the Supreme Court was comprised of Justices Starcher, Davis, Albright, Benjamin and Maynard.

Prior rulings by this forum formed principles of law which would have favored Petitioner's positions in relation to his claims concerning (1) the propriety of his recidivist trial, where both his ex-attorney Stephen D. Herdon, and his present counsel Andrew Mendelson informed his jury that he was in fact the same Ross Gray who was once before convicted, assisting the State in its duty to prove this to the jury beyond a reasonable doubt,<sup>3</sup> (2) whether an unconditional discharge, or the granting of a subsequent appeal is the appropriate remedy available, when the State has displayed extraordinary dereliction in filing a direct appeal, (3) and whether Petitioner's with life sentences are entitled to mandatory habeas review of their criminal convictions.

Petitioner submits, that he has been greatly prejudiced, inasmuch as, the current forum of the Supreme Court will change about time an appeal is filed on his behalf.

It is common knowledge that Justice Starcher, who has fought for mandatory review, and Justice Maynard will no longer be Justices as of November of 2008.

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3

At no time did Petitioner waive his attorney-client privilege in order for these attorney to give any testimony against him.

In light of previous decisions of both these Justices, Petitioner believes it is a high probability had an appeal been filed on his behalf, it would have been granted, and he would have been given relief. Nevertheless, based on the extraordinary dereliction of counsel, agents of the State of West Virginia, to obtain his records and file an appeal on his behalf, Petitioner has been prejudiced beyond prepare. Short of an unconditional discharge from any further confinement, coupled by dismissal of his charges with prejudice against the State for retrial, this will have been a complete miscarriage of justice.

The failure of Petitioner's two lawyers to prepare and present his appeal in an effective and timely manner is a profound dereliction of their duties as court-appointed attorneys.

*GROUND TWO  
THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO  
GRANT PETITIONER'S MOTIONS TO TERMINATE COUNSEL,  
AND HIS REQUEST FOR HABEAS RELIEF BASED ON  
COUNSEL'S FAILURE TO FILE HIS APPEAL.*

Petitioner avers that the trial court abused its discretion in failing to dismiss counsel when it was clear that a breakdown had occurred in the attorney-client relationship, and when it was clear counsel could not effect an appeal in a timely manner based on reasons counsel has not disclosed to the court.

*VIII. STANDARD OF REVIEW*

The Supreme Court of West Virginia has made it clear that "Through the interpretation of Article III, Section 17 of the Constitution of West Virginia, this court has recognized a constitutional right to petition for appeal in criminal cases and has also 'constitutionalized' the criminal defendant's right to receive a free transcript, appointed counsel, and *the effective assistance of counsel in appellate proceedings.*" *Syl pt. 3 Billotti v. Dodril*, 183 W.Va. 48, 294 S.E.2d 32 (1990).

Moreover, the Supreme Court has also found that “In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, the underlying factual findings under a clearly erroneous standard, and questions of law are subject to de nova review.” Syl pt.1 *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006)

Petitioner avers that the trial court abused its discretion when the court denied his August 31, 2006, “Motion to Terminate Counsel,” and later his February 20, 2007, petition for writ of habeas corpus. [see, Addendum of Exhibits]

In the aforementioned actions, Petitioner argued that his appeal attorneys had not taken any reasonable action to locate necessary records and to effect an appeal on his behalf.

Without responding to any of Petitioners’s allegations or complaints about counsel, the court entered orders, without a hearing or conclusions of law as to counsel’s conduct, denying both Petitioner’s “Motion to Terminate Counsel,” and his habeas corpus.

Clearly, in the present case appeal counsel has not exhibited reasonable knowledge and understanding of criminal law, appellate procedure<sup>4</sup> in the handling of Petitioner’s appeal. Competent counsel would have known to obtain both the recidivist hearing and preliminary hearing transcripts in order to complete and adequate appeal on Petitioner’s behalf.

Moreover, it is unreasonable that any attorney would need more than two years to effect an appeal. Counsel’s extraordinary dereliction in effecting Petitioner’s appeal, also suggest that counsel has difficulty in organizing and maintaining his case load. Whatever the case, counsel is not

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<sup>4</sup> At no time in this case has counsel requested for a extension of the appeal period. Counsel simply allowed the time to run out on numerous occasions, then asked the court for re-sentencing. At this time, Petitioner’s time for appeal has yet again expired.

competent in matters of filing appeals.

The Circuit Court of Ohio County therefore abused its discretion in failing to dismiss counsel based on the clear breakdown in the attorney-client relationship, and given the obvious nature of counsel's incompetence in performing there required duty of filing an appeal within a reasonably timely manner.

For the reasons stated in this petition, Petitioner asks this Honorable Court to grant him relief in the form of an unconditional discharge, coupled by an injunction against the State of West Virginia from bringing any further proceedings against him.

**WHEREFORE**, Petitioner prays that relief will be granted as the law and justice allows.

Ross Gray  
Signature of Applicant

8-18-08  
Date

**CERTIFICATE OF SERVICE**

I, Ross Gray, do hereby swear that the foregoing *Original Jurisdiction Petition for a Writ of Habeas Corpus under West Virginia Code 53-4A-1*, has been served, First Class Prepaid Mail, on this the 18<sup>th</sup>, day of August, 2008, addressed to the following parties:

Andrew Mendelson, Esq.  
41 5<sup>th</sup> Street  
Wheeling, W.Va. 26003

Rory L. Perry, Clerk  
West Virginia Supreme Court of Appeals  
Charleston, W.Va. 25301

Darrell V. McGraw, Jr.  
Attorney General of West Virginia  
Charleston, W.Va. 25301

Kevin L. Neiswonger, Esq.  
409 Mort Avenue  
Moundsville, W.Va. 26041



FIRST JUDICIAL CIRCUIT  
OHIO, BROOKE AND HANCOCK COUNTIES

JAMES P. MAZZONE, CHIEF JUDGE  
OHIO COUNTY COURTHOUSE  
WHEELING, WEST VIRGINIA  
26003

February 22, 2006

TELEPHONE  
304 / 234-3620  
FAX: 304 / 234-6402

Andrew Mendelson, Esq.  
41 15<sup>th</sup> Street  
Wheeling WV 26003

**RE: State of WV v. Rossi Gray**  
**Ohio County Case No. 05-F-2**

Dear Mr. Mendelson:

I am in receipt of a letter from Mr. Gray regarding the above styled case. Please address the matters in the letter at your earliest convenience. For your convenience, I have enclosed Mr. Gray's letter.

Thank you for your attention.

Very truly yours,

JAMES P. MAZZONE  
Chief Judge

JPM/jc  
enclosure

cc: Rossi Gray

Stephen Vogrin, Esq. and Shawn Turak, Esq. w/enclosure  
Ohio County Circuit Clerk w/original

Appendix-A



FIRST JUDICIAL CIRCUIT  
OHIO, BROOKE AND HANCOCK COUNTIES

JAMES P. MAZZONE, JUDGE  
OHIO COUNTY COURTHOUSE  
WHEELING, WEST VIRGINIA  
26003

TELEPHONE  
804 / 234-3620  
FAX: 804 / 234-6402

January 9, 2007

Andrew D. Mendelson, Esq.  
MENDELSON LAW OFFICE  
51 15th Street  
Wheeling WV 26003

Kevin L. Neiswonger, Esq.  
NEISWONGER & WHITE LAW OFFICE  
409 Morton Avenue  
Moundsville WV 26041

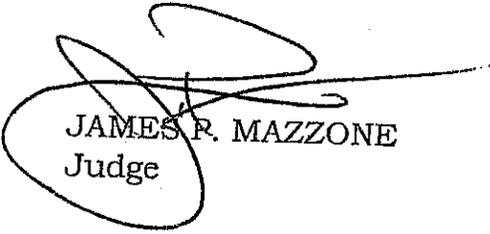
**RE: State of WV v. Rossi Gray**  
**Ohio County Case No. 05-F-2**

Counselors:

I am in receipt of a letter from Mr. Gray dated January 4, 2006 (sic) regarding the above styled case. Please respond to Mr. Gray at once regarding his appeal. For your convenience, I have enclosed the letter.

Thank you for your attention.

Very truly yours,

  
JAMES P. MAZZONE  
Judge

JPM/jc  
enclosure

cc: ✓ Ross Gray  
Steven L. Vogrin, Esq. w/enclosure  
Ohio County Circuit Clerk w/original

Appendix - B



FIRST JUDICIAL CIRCUIT  
OHIO, BROOKE AND HANCOCK COUNTIES

JAMES P. MAZZONE, JUDGE  
OHIO COUNTY COURTHOUSE  
WHEELING, WEST VIRGINIA  
26003

June 26, 2007

TELEPHONE  
304 / 234-8620  
FAX: 304 / 234-6402

Andrew D. Mendelson, Esq.  
MENDELSON LAW OFFICE  
51 15th Street  
Wheeling WV 26003

Kevin L. Neiswonger, Esq.  
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409 Morton Avenue  
Moundsville WV 26041

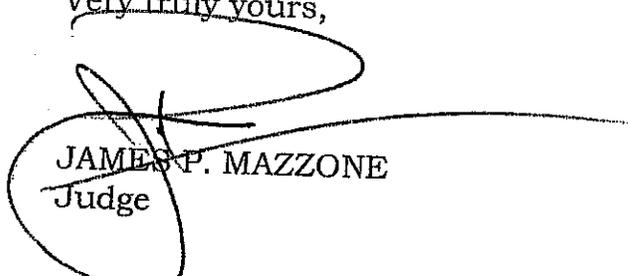
**RE: State of WV v. Rossi Gray**  
**Ohio County Case No. 05-F-2**

Counselors:

I am in receipt of a letter from Mr. Gray dated June 21, 2007 regarding the above styled case. Please contact Mr. Gray as soon as possible to update him of the status of his appeal. For your convenience, I have enclosed the letter.

Thank you for your attention.

Very truly yours,

  
JAMES P. MAZZONE  
Judge

JPM/jc  
enclosure

cc: Ross Gray  
Steven L. Vogrin, Esq. w/enclosure  
Ohio County Circuit Clerk w/original

Appendix-C

Kevin L. Neiswonger, Esq.

409 Morton Avenue, Moundsville, WV 26041



David C. White, Esq.

Telephone: 304.843.1714 Fax: 304.843.1837

COPY

April 14, 2008

Appendix-D

ATTN: Rachel Fletcher Cipoletti  
State of West Virginia  
Office of Disciplinary Counsel  
2008 Kanawha Boulevard, East  
Charleston, WV 25311

**RE: Rossi Gray**

Dear Ms. Cilopetti:

I am again writing to update you on the status of Mr. Rossi Gray's appeal. As you know, I scheduled a visit with Mr. Gray on March 31, 2008. The visit went quite well. I spent several hours with Mr. Gray discussing the issues for his appeal. The major focal point of our discussions was that many of the issues that he desired to pursue were ineffective assistance of counsel arguments. I explained to him that those issues were best pursued in a writ of habeas corpus as opposed to a direct appeal. This is pursuant to the West Virginia Supreme Court of Appeals' directives in State v. Triplett 421 S.E.2d 511(1992). We were in agreement when I left Mt. Olive.

Upon my return to the office, I received a letter from Mr. Gray that indicated that he was no longer positive that he wanted to pursue these issues in a writ of habeas corpus. He asked me to request that Judge Mazzone "re-sentence him" to provide him with more time in which to perfect his appeal. He indicated in his most recent letter to me that he wants to take some more time to look at these issues himself and does not desire me to file the appeal right away, because he wants to make sure that we are including everything that he desires to be included. Accordingly, I am simply writing this letter to let you know that he has requested that we take more time in filing his appeal. This request was made of me in a letter from him dated April 2, 2008, which was mailed to me three days after my visit with him on March 31, 2008. You certainly can feel free to confirm this fact with Mr. Gray.

Again, I feel that Mr. Gray feels more comfortable with my representation of him in this matter, and I think that we can continue to work smoothly toward perfecting his appeal. He has a significant amount of distrust for lawyers. I think that he would tell you this fact as well. However, I believe that he and I removed some barriers between us with our most recent correspondence with each other, as well as my recent visit with him.

In any event, I will do what he has asked me to do, and I will ask Judge Mazzone to re-sentence him to give us more time in which to perfect an appeal. Of course, there is always the possibility that Judge Mazzone will deny such a request, and we will have to

file his appeal prior to the expiration of the current deadline to do so. I have communicated these facts with Mr. Gray under separate letter so as not to divulge any attorney/client confidential communications between us. However I have advised him that he is free to disclose anything that he and I have talked about to you if he so desires.

If you have any other questions or comments, please do not hesitate to contact me at your convenience.

Sincerely,



Kevin L. Neiswonger, Esq.

KLN/kc

cc: Andrew Mendelson, Esq.

cc: Rossi Gray

STATE OF WEST VIRGINIA  
OFFICE OF DISCIPLINARY COUNSEL  
2008 KANAWHA BOULEVARD, EAST  
CHARLESTON, WEST VIRGINIA 25311

Office: (304) 558-7999

Fax: (304) 558-4015

Interim Chief Lawyer Disciplinary Counsel

Rachael L. Fletcher Cipoletti

Lawyer Disciplinary Counsel

Andrea J. Hinerman

Charles A. Jones, III

May 7, 2008

Mr. Ross A. Gray  
Mt. Olive Correctional Complex  
One Mountainside Way  
Mt. Olive, WV 25185

**Re: *Complaint against Kevin L. Neiswonger***  
***I.D. No. 07-03-072***

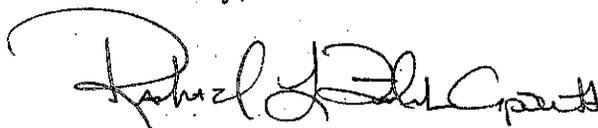
Dear Mr. Gray:

Enclosed please find a copy of the "Chief Lawyer Disciplinary Counsel Closing" with respect to your complaint against the above-referenced attorney. Under procedural rules which went into effect July 1, 1999, the Chief Lawyer Disciplinary Counsel has the authority to review and close ethics complaints instead of making a report to the Investigative Panel. It has been determined that further action is not warranted, and your complaint has been closed.

Pursuant to Rule 2.4(b)(1) of the Rules of Lawyer Disciplinary Procedure, you may file a written objection with this office within 45 days from the date of this letter, and your objection will be reviewed by the Investigative Panel.

Thank you for bringing this matter to our attention.

Sincerely,



Rachael L. Fletcher Cipoletti  
Interim Chief Lawyer Disciplinary Counsel

RLFC/mal

Enclosure

cc: Kevin L. Neiswonger, Esquire (w/enc.)

Appendix - E

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**LAWYER DISCIPLINARY BOARD  
CHIEF LAWYER DISCIPLINARY COUNSEL CLOSING**

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I.D. No.: 07-03-064

Date Complaint Received: February 12, 2007

**COMPLAINANT:** Ross A. Gray  
Mt. Olive Correctional Complex  
1 Mountainside Way  
Mt. Olive, West Virginia 25185

**RESPONDENT:** Andrew D. Mendelson, Esquire  
41 – 15<sup>th</sup> Street  
Wheeling, West Virginia 26003

Bar No.: 9138

THE MATTER HAVING BEEN REVIEWED by the Interim Chief Lawyer Disciplinary Counsel, pursuant to Rule 2.4(b) of the Rules of Lawyer Disciplinary Procedure, Counsel concludes that this Complaint should be closed for the following reasons:

**STATEMENT OF FACTS**

Complainant Ross A. Gray filed this complaint against Respondent Andrew D. Mendelson, a licensed member of the West Virginia State Bar.

Complainant states that Respondent represented him in regard to his Recidivist Trial. Complainant was sentenced on or about January 31, 2006, and Complainant stated that Respondent had until November 20, 2006, to file an appeal. Complainant alleged that as a result of the negligent behavior of Respondent, his right to file an appeal may have been lost.

Appendix-F  
COPY

Respondent filed a timely response to this complaint and attached a copy of an Order issued by Judge James P. Mazzone which indicated that Complainant's time to file an appeal has not expired and Respondent has obtained an extension of time in order to file the appeal until May 2, 2007. Respondent stated that even though he was not trial counsel for Complainant, he was appointed by the Court to act as Complainant's counsel to file the appeal and the same would be filed in a timely fashion. Respondent stated that he has repeatedly informed Complainant that the time to file the appeal has not expired. Respondent stated that Complainant had been advised he would have an opportunity to review the appeal prior to the same being filed.

In response, Complainant continued to allege that the extension of time in which to file his appeal had expired with no appeal being filed by Respondent. Complainant further stated that he believed there is a "cover-up" evidenced by the lack of his appeal by Respondent.

Respondent advised that on or about February 26, 2008, Complainant was resentenced again to preserve his appeal rights and that Respondent and his co-counsel, Kevin Neiswonger, Esquire, agreed that an appeal would be filed on or about April 26, 2008. However, on or about April 14, 2008, Attorney Neiswonger advised that Complainant requested that he be resentenced again and to delay the filing of the appeal.

### **REASON CLOSED**

There are clearly many delays in this case, but the parties appear to be dealing with the delays and communicating more effectively. The evidence in this case is insufficient to

establish a violation of the Rules of Professional Conduct and, accordingly, this matter is dismissed.

\* \* \*

Pursuant to Rule 2.4(b)(1) of the Rules of Lawyer Disciplinary Procedure, the Complainant may file a written objection to this closing within 45 days of the date of the decision, which objection shall be reviewed by the Investigative Panel of the Lawyer Disciplinary Board.

**CLOSING ORDERED** this 7<sup>th</sup> day of May, 2008.

  
**Rachael L. Fletcher Cipoletti**  
Interim Chief Lawyer Disciplinary Counsel

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**LAWYER DISCIPLINARY BOARD  
CHIEF LAWYER DISCIPLINARY COUNSEL CLOSING**

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I.D. No.: 07-03-072

Date Complaint Received: February 12, 2007

**COMPLAINANT:** Ross A. Gray  
Mt. Olive Correctional Complex  
1 Mountainside Way  
Mt. Olive, West Virginia 25185

**RESPONDENT:** Kevin L. Neiswonger, Esquire  
409 Morton Avenue  
Moundsville, West Virginia 26041

Bar No.: 6941

THE MATTER HAVING BEEN REVIEWED by the Interim Chief Lawyer Disciplinary Counsel, pursuant to Rule 2.4(b) of the Rules of Lawyer Disciplinary Procedure, Counsel concludes that this Complaint should be closed for the following reasons:

**STATEMENT OF FACTS**

Complainant Ross A. Gray filed this complaint against Respondent Kevin L. Neiswonger, a licensed member of the West Virginia State Bar.

Complainant stated that Respondent had until November 20, 2006, to file an appeal in a criminal matter for which Complainant was incarcerated after being sentenced on January 31, 2006. Complainant alleged that as a result of the negligent behavior of Respondent, his right to file an appeal may have been lost.

Appendix-G  
COPY

Respondent filed a timely response and stated that he was appointed to act as co-counsel for Complainant. Respondent goes on to state that he has met with his co-counsel, Attorney Andrew Mendelson, in regard to Complainant's case on multiple occasions. Respondent further states that during conversations with his co-counsel in this matter, he has been advised by Attorney Mendelson of the issues he [Mendelson] and Complainant have discussed. At the time of his initial response, Respondent stated that he has not personally spoken with Complainant.

Respondent further indicated that he has been advised by his co-counsel of the issues agreed upon for which the appeal was to be brought. Respondent indicated that it was his understanding from speaking with his co-counsel that Complainant indicated his desire to review the appeal prior to its filing. Respondent indicated that the work related to the filing of the appeal has been divided between him and his co-counsel and stated that the appeal deadline had not been missed as alleged by Complainant. Respondent stated that his co-counsel obtained an extension of time in order to file the appeal until May 2, 2007.

Complainant was resentenced on or about February 26, 2008, which extended his time to file an appeal. Respondent stated he met with Complainant on or about March 31, 2008, to again discuss his appeal. Respondent asserted that he later received a letter from Complainant asking him to not to file the appeal, but to have him resentenced again to extend the time frame.

**REASON CLOSED**

There are clearly many delays in this case, but the parties appear to be dealing with the delays and communicating more effectively. The evidence in this case is insufficient to establish a violation of the Rules of Professional Conduct and, accordingly, this matter is dismissed.

\* \* \*

Pursuant to Rule 2.4(b)(1) of the Rules of Lawyer Disciplinary Procedure, the Complainant may file a written objection to this closing within 45 days of the date of the decision, which objection shall be reviewed by the Investigative Panel of the Lawyer Disciplinary Board.

**CLOSING ORDERED** this 17<sup>th</sup> day of May, 2008.

  
**Rachael L. Fletcher Cipoletti**  
Interim Chief Lawyer Disciplinary Counsel