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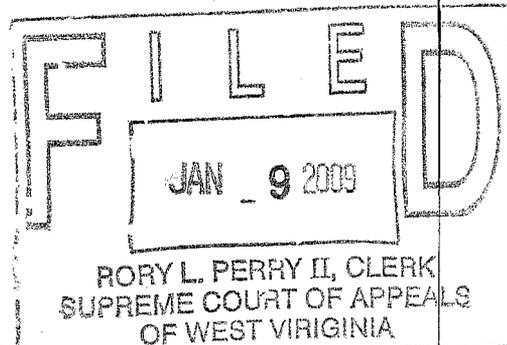
IN THE SUPREME COURT OF WEST VIRGINIA, AT CHARLESTON

State ex rel. Ross Gray,  
Petitioner,

vs.

Docket No. 34591

David Ballard, Warden  
Mount Olive Correctional Complex



COUNSEL'S RESPONSE TO PETITIONER'S  
WRIT AND COURTS RULE TO SHOW CAUSE

Now come Counsel for the Defendant, Kevin L. Neiswonger, Esq., and Andrew Mendelson, Esq. and submit the following response as it relates to why a Petition for Appeal has not yet been filed on behalf of the Defendant. In essence, counsel assert that the Defendant has engaged in a course of conduct that ultimately and repeatedly resulted in the breakdown of communications between himself and his counsel. Despite counsel's repeated efforts to complete a Petition for Appeal, the Defendant continues to engage in behavior that makes it nearly impossible to communicate with him. Such behavior, as will be more fully set forth below, consists of giving inconsistent directives, making continued allegations against counsel, and directing counsel not to work on the appeal.

In support of their response, Counsel sets forth the following facts:

1. When the Defendant was arrested and charged with multiple sex offenses, Joe Moses, Esq., was initially appointed to represent the Defendant. Mr. Moses represented the Defendant at the preliminary hearing stage.
2. Subsequent to the preliminary hearing being held, Mr. Moses did not continue representing the Defendant and, upon request of the Defendant,

agreed to have other Counsel appointed due to the fact that the Defendant was difficult to represent.

3. After the Defendant was indicted, Mr. Olejasz and Mr. Barnabei were appointed to represent the Defendant. During the course of their representation of the Defendant, they sought permission from the Court on numerous different occasions to withdraw from representing the Defendant due to a breakdown in communications with him. Furthermore, the Defendant requested on different occasions that new counsel be appointed. All of those requests were denied by Judge Mazzone.

4. In the middle of the jury trial of the Defendant, Counsel again requested to withdraw due to the fact that the Defendant had physically threatened his counsel. This request was denied again.

5. After the Defendant was convicted, Counsel again asked to withdraw from representing the Defendant. That request was granted.

6. Subsequently, Mr. Andrew Mendelson was appointed to represent the Defendant in his recidivist proceeding.

7. During Mr. Mendelson's representation of the Defendant, Mr. Mendelson asked permission to withdraw from representing the Defendant due to a breakdown in attorney/client communications. That request was denied.

8. Furthermore, the Defendant himself requested that Attorney Mendelson be discharged as counsel. That request was also denied.

9. Accordingly, at this point in time, the Defendant had four different lawyers, all of whom he attempted to discharge and all of whom requested to withdraw at some point.

10. After the Defendant was sentenced, Attorney Mendelson requested the trial transcripts. It appears that a significant amount of time passed in which Attorney Mendelson was waiting to obtain the transcripts of the Defendant's jury trial.

11. Due to the fact that Attorney Mendelson was not the Defendant's counsel at trial, it was impossible for Attorney Mendelson to have meaningful discussions with the Defendant about potential issues for appeal until such time as he received the trial transcripts. Attorney Mendelson corresponded with the Defendant and explained this fact to the Defendant.

12. This fact caused communications to further deteriorate between Attorney Mendelson and the Defendant, specifically due to the fact that the Defendant began accusing Attorney Mendelson, Judge Mazzone, and Judge Mazzone's Court Reporter of intentionally delaying the production of his transcripts. The Defendant's allegation was that production of his transcripts was being delayed due to the fact that Judge Mazzone and his Court Reporter were "changing" the transcripts to reflect testimony that never occurred so that his appeal would be sabotaged. In fact, the Defendant told Attorney Mendelson that he had a tape of the trial to prove this; however, he never produced any tape.

13. Ultimately, Attorney Mendelson obtained the trial transcripts and provided a full and complete set of transcripts to the Defendant. Attorney Mendelson attempted to open lines of communication with the Defendant at this point in time. However, the Defendant was not satisfied and again sought to discharge Attorney Mendelson as his counsel.

14. Due to the difficulty of providing representation to the Defendant, Judge Mazzone, on his own motion, appointed Kevin L. Neiswonger, Esq. to assist in the representation of the Defendant.

15. Again, another delay occurred for some period of time as Mr. Neiswonger was required to read the transcripts and be "brought up to speed" in the case.

16. Attorney Neiswonger corresponded with the Defendant in writing.

17. The Defendant again wrote letters to Judge Mazzone about both Attorney Mendelson and Attorney Neiswonger and requested that Judge Mazzone discharge both as Counsel in the case.

18. Judge Mazzone denied the request. Again, Attorney Mendelson had previously attempted to withdraw from representing the Defendant, and that request was denied.

19. The Defendant then filed a Complaint with the Office of Disciplinary Counsel against both Attorney Mendelson and Attorney Neiswonger. Both counsel responded to the Complaint in a timely fashion and explained the current status of the appeal.

20. While the Disciplinary Complaint was pending, Attorney Neiswonger

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scheduled an appointment at Mount Olive to meet with the Defendant personally. Attorney Neiswonger did, in fact, meet with the Defendant for several hours on March 31, 2008. Two prior appointments with the Defendant were cancelled due to a conflict with a court hearing and inclement weather.

21. At the outset of the meeting with Attorney Neiswonger and the Defendant, the Defendant was very outspoken about his distrust of counsel's representation of him, as well as his distrust of the entire system in general. The Defendant clearly made it known that he felt that all of his prior lawyers had conspired against him and had helped the State prosecute him. The Defendant also indicated that he did not trust Attorney Mendelson or Attorney Neiswonger to prepare his appeal and that people at the jail were going to help him prepare it, and then have the appeal provided to Attorney Neiswonger and Attorney Mendelson for their review and signature. However, over the course of the many hours that Attorney Neiswonger spent with the Defendant, it appeared that the Defendant started to trust Attorney Neiswonger to a certain extent. At the conclusion of the meeting, Attorney Neiswonger felt positive about the status of the appeal and a bit more positive about their attorney/client relationship. Furthermore, Attorney Neiswonger and the Defendant agreed as to what issues were going to be pursued in the appeal. Attorney Neiswonger felt confident that an Appeal could be perfected in the near future. (It is important to point out that when Attorney Mendelson was representing the

Defendant by himself, the Defendant had also sent correspondence to Mr. Mendelson indicating that he had certain people in jail that he trusted regarding his legal issues.)

22. Again, upon Attorney Neiswonger's return to his office, he felt that he and the Defendant had agreed to the specific issues that were to be presented in the Petition and that he and Mr. Mendelson were going to begin preparing the Petition. This was on March 31, 2008.

23. The Defendant appeared to be somewhat content that Attorney Neiswonger had visited him and even indicated orally to Attorney Neiswonger that he intended to inform the Disciplinary Counsel that he desired to dismiss his complaint. However, Attorney Neiswonger advised the Defendant that he did not think it was necessary for him to dismiss the complaint. Attorney Neiswonger further advised the Defendant that he and the Defendant should not discuss the status of the Disciplinary Complaint for a wide variety of reasons.

24. Shortly thereafter, the Defendant sent correspondence to Counsel pertaining to issues that he desired to pursue in his appeal. Surprisingly, the issues that he desired to pursue in the appeal were not the same issues that Attorney Neiswonger and he had discussed. In fact, the Defendant sent multiple correspondences to Counsel listing over seventeen pages of issues that he desired to pursue. Most of the issues pertained to his previous counsel and appeared to be fueled by his strongly held belief that his prior attorneys and the Judge had all conspired

against him. (See potential Exhibit #1) (Counsel will disclose exhibits if required, but wanted to disclose as little privileged material as necessary to deal with this issue. Since this very Court may hear the Defendant's Appeal, counsel wants to protect as many of the Defendant's statements as possible.)

25. Attorney Neiswonger sent correspondence to the Defendant explaining that he thought they had reached an agreement as to the issues that were going to be pursued in the appeal. Furthermore, Attorney Neiswonger, in the correspondence, explained to the Defendant that ineffective assistance of counsel arguments are not pursued in direct appeals. The correspondence was lengthy and explained to the Defendant the reasons that ineffective assistance of counsel could not be pursued in a direct appeal – most specifically due to a lack of record. Attorney Neiswonger explained to the Defendant that these types of claims should be pursued in a Petition for Writ of Habeas Corpus so that the record could be more fully developed. Attorney Neiswonger also provided the Defendant with case law supporting this proposition with the pertinent part of the case highlighted. (See potential attached Exhibit #2.)

26. Attorney Neiswonger then began receiving more correspondence from the Defendant; wherein, the Defendant stated that the people who were helping him at the jail were essentially advising him that Attorney Neiswonger was incorrect and that all of these issues should be included in his direct appeal.

27. Despite the progress made at the meeting, communications between Counsel and Mr. Gray began to quickly deteriorate.

28. During this time frame, Counsel for the Defendant had kept the Disciplinary Counsel advised as to the status of the Defendant's appeal. Attorney Neiswonger had advised the Disciplinary Counsel that he thought an appeal could be filed within 30 to 45 days. However, when counsel began receiving correspondence from the Defendant, it became apparent that the 45 day period of time was clearly not feasible. While it once appeared that an agreement had been reached as to the issues to appeal, that was obviously no longer the case.

29. In April 2008, Attorney Neiswonger received a letter from the Defendant; wherein, the Defendant specifically requested that Attorney Mendelson have the Defendant re-sentenced, because he did not want to "rush" the filing of his petition. This letter was received in April 2008. (See potential Exhibit #3.)

30. Attorney Neiswonger wrote a letter to the Defendant and advised the Defendant that he would be required to advise the Disciplinary Counsel of this fact, because he had already advised the Disciplinary Counsel that he anticipated the appeal being perfected in 45 days. Furthermore, Attorney Neiswonger sent a copy of a letter to the Defendant that he provided to the Disciplinary Counsel. (See potential Exhibit #4.)

31. Furthermore, in the April 2008 letter, which requested more time to

perfect the appeal, the Defendant again suggested his desire to have his helpers at the jail essentially prepare his appeal.

32. Furthermore, the Defendant brought up issues that related to his preliminary hearing, as well as issues pertaining to jury selection in his recidivist trial. Counsel did not have the transcripts of the recidivist trial jury selection and did not have the record of the preliminary hearing inasmuch as they had not been issues until that point in time. This letter was sent to Counsel *after* the meeting at Mount Olive, and was not written under the directions of Mr. Neiswonger as stated in the Writ.

33. Nonetheless, again, the Defendant specifically requested delaying his appeal and essentially suggested that he desired for someone at the jail to help him with the appeal. Specifically, the Defendant's April 2008 letter states as follows:

"and I think you should ask Mendelson if he could ask to have me resentenced to allow for a timely appeal because I'm not going to rush over this appeal just to get it filed. I won't do it. I want someone to look over it with me and help me on it. If not, I won't sign it for you to file it. Kevin I'm not trying to a (sic) asshole. I just don't trust anyone anymore."

34. When counsel updated the Disciplinary Counsel as to the fact that Defendant was requesting a delay in filing his Appeal, the Disciplinary Counsel dismissed the Defendant's complaint against both Attorney Neiswonger and Attorney Mendelson.

35. While the Defendant had previously suggested his desire to dismiss the disciplinary complaint against his Attorneys, his communications to the

disciplinary counsel stated otherwise. In fact, the Defendant subsequently filed an Appeal of the Disciplinary Counsel's decision. It should be noted that, since the dismissal of the Disciplinary action, Counsel has received *no* further correspondence or communication from the Defendant whatsoever. In essence, the Defendant has completely ceased communicating with Counsel.

36. Furthermore, to further complicate the relationship between Counsel and the Defendant, the Defendant claimed in his appeal of the disciplinary counsel's decision that Attorney Neiswonger had lied in order to request delay in the appeal or that he had somehow coerced the Defendant into sending a letter. In fact, the Defendant has made a similar allegation in the instant proceeding before this Honorable Court. The Defendant made this allegation despite the fact he sent this letter to Attorney Neiswonger himself in his own handwriting *after* their meeting. The letter in Mr. Gray's handwriting asks Counsel that the Appeal be delayed. (See potential Exhibit #5.)

37. His appeal of the disciplinary counsel's decision and his false allegations pertaining to Attorney Neiswonger and Attorney Mendelson continued to damage the "relationship" between Counsel and the Defendant.

38. On multiple occasions, Attorney Mendelson and Attorney Neiswonger discussed whether or not a motion to withdraw should be made. However, both counsel understood that Judge Mazzone had denied such

requests on multiple occasions. Additionally, the Defendant's numerous own requests to discharge counsel were denied.

39. It was the decision of appointed Counsel to wait until the appeal of the disciplinary counsel's decision was decided or until they received communication from the Defendant to take any further action. After all, Defendant's last communication to Counsel specifically had advised that he wanted the appeal delayed, and further expressed his that he desire to have someone in Mount Olive help him prepare the appeal. Furthermore, there was a pending allegation against Attorney Neiswonger of essentially lying to the Disciplinary Counsel.

40. It should also be noted that Attorney Mendelson, on several occasions, requested that the Defendant be resentenced in order to preserve the time frame in which to Appeal. At some point in time a decision was made to wait until the Appeal could be pursued before obtaining another "resentencing." Attorney Mendelson obtained consent from the State that such a request would not be opposed.

41. At some point in time, the investigative panel of the office of disciplinary counsel upheld the disciplinary counsel's decision and dismissed the Defendant's complaint.

42. Attorney Neiswonger scheduled another visit at the Mount Olive Correctional Complex on August 29, 2008. Attorney Neiswonger drove to Mount Olive and attempted to visit with the Defendant. When Attorney Neiswonger arrived at Mount Olive, there was an issue with admitting

visitors at that time. It appeared to be for security reasons; however, Attorney Neiswonger can not be positive of that fact. Nonetheless, Attorney Neiswonger sat in the lobby at the Mount Olive Complex for many hours waiting to visit the Defendant. When Attorney Neiswonger was told that he was now going to be permitted to visit with the Defendant, it was too late and Attorney Neiswonger had to leave and return to Moundsville for another previously scheduled engagement.

43. It was Attorney Neiswonger's intention to schedule another visit with the Defendant. However, unbeknownst to Attorney Neiswonger, the Defendant had filed the Writ of Habeas Corpus that is now pending before this Honorable Court.

44. Again, said Petition for Writ of Habeas Corpus makes allegations that Counsel have been untruthful and have conspired against him. The filing of said Petition puts the case in the same status as in the summer of 2008.

45. It now appears that the State of West Virginia may be required to respond to the Petition, which would essentially make Attorneys Neiswonger and Mendelson witnesses for the State and against the Defendant.

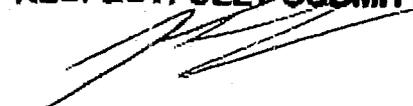
46. At this time, Counsel believes that one of two things needs to occur. It is Counsels' desire that different attorney's be appointed to represent the Defendant. If not, both Attorney Mendelson and Attorney Neiswonger are willing to continue on the Defendant's Appeal. However, it appears

that the attorney/client relationship at this point in time is so damaged, that it might be impossible. Unfortunately, both sides tried to end the relationship but have not been permitted.

47. Again, it has been a very difficult task representing the Defendant in this matter. Anytime progress was made, an event occurred at the direction of the Defendant causing further deterioration of the attorney/client relationship.

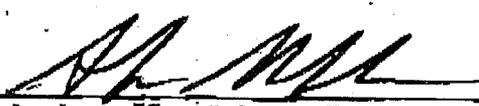
48. If not permitted to withdraw, Counsel are quite willing to pursue valid grounds for appeal on behalf of the Defendant if this Court and the Defendant permits them.

**RESPECTFULLY SUBMITTED:**



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State Bar ID# 6941



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Wheeling, WV 26003

CERTIFICATE OF SERVICE

Service of the foregoing COUNSEL'S RESPONSE TO PETITIONER'S WRIT AND COURTS RULE TO SHOW CAUSE was had upon Petitioner by mailing a true copy thereof, United States Mail, First Class, Postage prepaid, this 9<sup>TH</sup> of January 2009:

Ross Gray  
#30325 Pine-104  
Mount Olive Correctional Complex  
One Mountainside Way  
Mount Olive, WV 25185



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