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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

IN THE MATTER OF VERNON H. DUNLAP, SR.

APPELLANT

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
HONORABLE THOMAS W. STEPTOE, JR., JUDGE
CASE NO. 06-C-257
APPEAL NO. 34808

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Designation of the Record 2

I. The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal 3

II. Statement of the Facts of the Case 4

III. Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal 8

III. Points and Authorities Relied Upon, Discussion of the Law 9

V. Conclusion and Relief Requested 35

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
VERNON H. DUNLAP, SR.,

Petitioner,

vs. **Docket No. 34808**

THOMAS MCBRIDE, Acting Warden,
MOUNT OLIVE CORRECTIONAL CENTER,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
HONORABLE THOMAS W. STEPTOE, JR., JUDGE

DESIGNATION OF THE RECORD

Now comes the Petitioner, Vernon H. Dunlap, Sr., pursuant to Rule 4 of the West Virginia Rules of Appellate Procedure, to designate the entirety of the record to enable the West Virginia Supreme Court to decide the matters arising in this Petition.

I.

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is an Appeal from an Order entered by the Circuit Court of Jefferson County on the 1st day of October, 2008, denying Petitioner's Amended Petition for Writ of Habeas Corpus.

Petitioner Vernon Dunlap was indicted by a Jefferson County Grand Jury in the 2004 Term of Court for the offense of first degree murder. The indictment stemmed from the death of Jennifer Leigh Dodson on February 19, 2004. Petitioner entered a not guilty plea at the time of his arraignment.

Following various pre-trial proceedings, Petitioner's jury trial commenced on April 5, 2005. The Jury returned a verdict finding Petitioner guilty of Ms. Dodson's murder, and refused to add a recommendation of mercy. The Court ultimately sentenced Petitioner to life imprisonment without the possibility of parole.

Petitioner filed a Petition for Appeal and the same was refused by the Supreme Court of Appeals on the 10th day of May, 2006.

Petitioner filed a *pro se* Petition for Writ of Habeas Corpus on July 20, 2006. He was subsequently appointed counsel, and counsel filed an Amended Petition for Writ of Habeas Corpus on May 1, 2007. An omnibus habeas corpus evidentiary hearing was conducted on April 3, 2008. The Circuit Court of Jefferson County entered an Order Denying Petitioner's

Amended Petition for Writ of Habeas Corpus on the 1st day of October, 2008.

It is from the Court's Order Denying Petitioner's Amended Petition for Writ of Habeas Corpus that Petitioner now appeals.

II.

STATEMENT OF FACTS

Petitioner Vernon Dunlap was indicted by a Jefferson County Grand Jury in the 2004 Term of Court for the offense of first degree murder. The Indictment stemmed from the death of Jennifer Leigh Dodson on February 19, 2004.

Jennifer Dodson was found dead on the living room floor of her apartment at 308 New Oak Tree Court, Charles Town, West Virginia. Ms. Dodson's throat had been sliced and she died from massive blood loss. She was found in the apartment by Crystal Dodson (her sister), Kenny Robinson (her sister's boyfriend), and Jamie Sisk. Ms. Dodson's daughter and Ms. Sisk's child were found unharmed in the apartment.

A short time earlier on February 19, 2004, Vernon Dunlap, Sr. (hereinafter "the Petitioner") was found unconscious in a truck at the Potomac River boat ramp in Shepherdstown, West Virginia. Petitioner was believed to have suffered a drug overdose and was transported to City Hospital in Martinsburg, West Virginia. The responding officer (Deputy Michael Dumer) noticed two kitchen style knives in plain view inside the truck. After learning Petitioner may be a suspect in Ms. Dodson's murder, Deputy Dumer seized the truck for later processing.

Petitioner spent several days in City Hospital with a police guard outside of his room. Petitioner was heavily medicated and housed in the intensive care unit. While stationed

outside of Petitioner's room, Deputy Dumer was advised by Petitioner's daughter (Tabitha Sanders) that her father admitted that he killed Jennifer Dodson.

After his arrest, the Public Defender's Office was appointed to represent Petitioner. After the Public Defender withdrew because of a conflict, the firm of Kratovil & Amore was appointed to represent Petitioner. Mr. Kratovil moved to withdraw as counsel when it became apparent that a client of his (Scott Marshall) was going to testify for the State that Petitioner had confessed to him. After granting Mr. Kratovil's motion, the Court appointed Byron Craig Manford to represent Petitioner.

A pre-trial hearing was held on March 31, 2005. The Court conducted a *McGinnis* hearing based upon the State's notice of intent to use Rule 404(b) evidence. Specifically, the State sought to introduce the testimony of Petitioner's ex-wife (Betty Yates). In 1994, Ms. Yates was attacked by Petitioner, who attempted to cut her throat. Petitioner purportedly stabbed Ms. Yates after the unsuccessful attempt to cut her throat. Petitioner pled guilty to malicious wounding and was paroled after serving 2 ½ years in the penitentiary. The State sought to introduce Ms. Yates' testimony to show modus operandi, motive and intent. Petitioner argued the offenses were not sufficiently similar, and the probative value was substantially outweighed by the potential for unfair prejudice. The Court ruled the evidence was admissible under Rule 404(b) as modus operandi evidence.

A jury trial commenced on April 5, 2005. Prior to the taking of evidence, the parties entered into a stipulation that there was no physical evidence linking Petitioner or anyone else to Ms. Dodson's murder. Due to the lack of incriminating physical evidence, the State put forth a largely circumstantial case.

The State offered the testimony of Crystal Dodson and Kenny Robertson. Each testified that when they arrived at Ms. Dodson's apartment, they found her lying face down in a pool of blood. Each also testified that Petitioner was the last person known to be with Ms. Dodson on the previous evening.

The State offered numerous other witnesses who testified that Ms. Dodson attempted to end her relationship with the Petitioner, but Petitioner would continually follow and call her. Additionally, the State offered the testimony of Tabitha Sanders, Danielle Kelican, Scott Marshall, and Troy Kelican. Each testified that Petitioner admitted his involvement in the murder to them in one form or another.

Various witnesses were called regarding the physical evidence obtained and tested during the police investigation. Petitioner's shoes, pants, shirt, and coat had been seized and tested at the West Virginia State Police Laboratory. No blood or other trace evidence was found on said items. Additionally, a bloody hand print was found near the victim, blood stains were found on the stairs, blood was found in the bathroom sink, and two knives retrieved from the Petitioner's truck. The evidence indicated that only one knife had been tested, the hand print was not sent to the lab for testing, and there was no follow-up on the various blood stains found in the victim's apartment.

The State further offered the Rule 404(b) testimony of Betty Yates. At a sidebar prior to her testimony, the State provided notice of its intent to inquire about other prior bad acts not raised at the pretrial *McGinnis* hearing. The State sought to present the evidence because it was a unified trial with no bifurcated "mercy" phase. The State then orally moved to bifurcate the trial and penalty phase. Defendant argued the State's motion was untimely. The

Court denied the State's bifurcation motion.

The State renewed its motion to bifurcate and the Court granted the same over the Petitioner's objection. After closing arguments and jury instructions, the jury returned a verdict finding Petitioner guilty of Ms. Dodson's murder.

The State called Betty Yates as its first witness during the penalty phase. Ms. Yates testified about numerous other prior bad acts beyond those covered at the pretrial *McGinnis* hearing.

The defense called Dr. Bernard Lewis as its primary witness during the mercy phase. Dr. Lewis is a clinical and forensic psychologist from Winchester, Virginia. Dr. Lewis testified that, due to a severe head injury and seizure disorder, Petitioner was at greater risk for poor impulse control, poor judgment, and loss of temper.

After deliberating, the jury refused to add a recommendation of mercy to its prior verdict of guilty. The Court ultimately sentenced Petitioner to life imprisonment without the possibility of parole.

Defendant's post-trial motions were denied by the Court on May 23, 2005. Petitioner filed a Petition for Appeal and the same was refused by the West Virginia Supreme Court on May 10, 2006. Petitioner filed a *pro se* Petitioner Under W.Va. Code §53-4A-1 For Writ of Habeas Corpus on July 20, 2006. Petitioner was subsequently appointed counsel, and counsel filed an Amended Petition for Writ of Habeas Corpus on May 1, 2007.

The Circuit Court of Jefferson County held an omnibus habeas corpus evidentiary

hearing on April 3, 2008.[1] Petitioner's trial counsel, B. Craig Manford, Esquire was the sole witness to testify at the evidentiary hearing.

III.

ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

1. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE III OF THE WEST VIRGINIA CONSTITUTION.

2. THE TRIAL COURT ERRED IN GRANTING THE STATE'S UNTIMELY MOTION TO BIFURCATE THE GUILT/INNOCENCE PHASE FROM THE MERCY/PENALTY PHASE.

3. THE TRIAL COURT ERRED IN ADMITTING ADDITIONAL RULE 404(b) EVIDENCE WITHOUT HOLDING A *McGINNIS* HEARING TO DETERMINE THE ADMISSBILITY OF SUCH EVIDENCE, AND WITHOUT MAKING A FINDING THAT SUCH EVIDENCE IS ADMISSIBLE PURSUANT TO RULE 403 OF THE WEST VIRGINIA RULES OF EVIDENCE.

4. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED, AND HIS TRIAL PROCEEDINGS COMPROMISED, BY A SUBSTANTIAL CONFLICT OF INTEREST RELATED TO HIS INTIAL COURT APPOINTED ATTORNEYS.

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[1] A copy of the habeas corpus evidentiary hearing transcript is appended hereto as Exhibit #1.

IV.

POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF THE LAW

A. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE III OF THE WEST VIRGINIA CONSTITUTION.

1. Trial Counsel's Failure to Conduct Independent Forensic Testing on Various Items of Physical Evidence Constitutes Ineffective Assistance of Counsel.

As part of its investigation into the death of Jennifer Dodson, the Jefferson County Sheriff's Department observed and seized various items of physical evidence from the Petitioner and the crime scene.

Sgt. Samuel Harmon responded to the crime scene and was the lead investigating officer in the case. Sgt. Harmon testified at trial there was a bloody hand print near the victim on the carpet, there were blood stains on the stairs and in an adjoining room, there was blood in the bathroom sink, and there were bloody footprints on the kitchen floor. In addition to this evidence, knives and other items of physical evidence were seized from the victim's apartment.[2]

Although the State sent several items to the Laboratory for testing, the hand print evidence was not sent to the State Police Laboratory for forensic testing, and there was no follow-up regarding the source/cause of the blood found on the stairs, the blood found in the room, or the blood found on the kitchen floor. Additionally, a necklace obtained from the

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[2] A copy of the State's Amended List of Exhibits is appended hereto as Exhibit #2. Said list contains the numerous items of physical evidence that was seized by the State.

victim by the medical examiner was not preserved or tested for DNA or fingerprint analysis despite the medical examiner's testimony that the victim was strangled during the attack when someone pulled her necklace against her throat from behind.

In addition to the crime scene evidence, Deputy Dumer seized various items of evidence from the Petitioner's truck. Deputy Dumer seized one knife with a serrated blade and wooden handle, one stainless steel knife blade, and one black plastic knife handle. Only one of the knives was sent to the State Police Laboratory for forensic testing. No further testing was conducted on the knives seized from Petitioner's truck or the knives seized from the victim's residence.

The defense raised at trial asserted that someone other than Petitioner Vernon Dunlap murdered Jennifer Dodson on February 19, 2004. Petitioner's trial counsel, B. Craig Manford, Esquire, testified as follows during Petitioner's habeas corpus evidentiary hearing:

> Q: What defense did you want to mount against the allegations made by the state in this case?
>
> A: Well, Vernon's defense from the beginning was he didn't do this and so that was our defense just put the state to the test. (Hab. Evid. Hrg. Trans., at pg. 7)

In addition to denying that Petitioner was responsible for Ms. Dodson's death, the defense suggested and argued that Ms. Dodson's estranged boyfriend (Steven Fogle) or another man who had previously broken into her apartment may have been the perpetrator. Despite this claim, Petitioner's trial counsel apparently never took any steps to obtain independent forensic DNA testing of the physical evidence in the State's possession. Although the State agreed to a stipulation that there was no physical evidence linking

Petitioner or anyone else to the crime, Petitioner's trial counsel had an obligation to request and facilitate additional, independent forensic testing which may have been exculpatory or may have implicated another perpetrator.

Petitioner's trial counsel was questioned extensively about the lack of forensic testing during the habeas corpus evidentiary hearing:

> Q: That was going to be my next question. As I understand your testimony here today and your recollection of the evidence the state had sent these knives that were retrieved from the Dunlap vehicle to the state police lab but that was only tested for fingerprint analysis, correct?
>
> A: That's correct.
>
> Q: There was no forensic DNA testing done by the state police lab in this case, correct?
>
> A: Not that I recall or could find in my file.
>
> Q: Do, when you review your file and it speaks about there may have been blood or there may not have been blood essentially we're talking about an individual looking at it with their naked eye, correct?
>
> A: Yes.
>
> Q: Okay. Now, what other items to your knowledge—well, let me just ask you was the pillow or blanket tested by the state?
>
> A: I do not know. I'm sorry.
>
> Q: Okay. Were the knives that were—any knives retrieved from the victim's residence tested by the state for either fingerprint or DNA serology analysis?
>
> A: I don't believe they were. I know they were collected. I know there was some reference that all that evidence would be sent to the lab, but I don't recall seeing a lab submission form or test results back from the lab on those.

Q: Okay. And I believe your earlier testimony was there was a bloody handprint very close to the victim's body, is that correct?

A: That's correct.

Q: To your knowledge was a swab of the carpet or a swab of the area made and sent to the state police lab for DNA testing?

A: They actually cut the handprint out of the carpet and my recollection was it was not tested.

Q: And I believe you indicated there was also a bloody footprint that was in another room maybe the kitchen?

A: My recollection was there was some linoleum and that would normally be in the bathroom or the kitchen area and there was a tread, a footprint. If you've ever seen the bottom of Adidas basketball shoes they have a distinctive tread on them and my recollection it was that type of a tread left and it was caused by someone stepping in blood and then stepping on the linoleum, yes.

Q: Was any swab taken from the linoleum or from that sample and submitted to the state police lab for testing by the state?

A: I don't think that was done either.

Q: Okay.

A: And again, just so I'm making as truthful testimony as I can, I based that on the fact of my recollection and I don't recall when I reviewed the file again seeing any forensic case submissions to the lab or any reports on that.

Q: Sure. Well, let me—if I represented to you that in my thorough review of the file that none of those items were tested would you have any reason to disagree?

A: I would not doubt that.

Q: Okay. And I believe there may have been stains in other portions of the house, perhaps on the wall or on the steps, that we had discussed. To your knowledge were any samples or swabs taken from those and tested by the state?

A: I remember the ones on the steps. The walls I don't. No, I don't believe any of that was tested either. (Hab. Evid. Hrg. Trans., at pgs. 17-20).

The Supreme Court of Appeals has set forth a two-part standard for assessing claims of ineffective assistance of counsel:

> 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. 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 proceeding would have been different." Syl. Pt. 1, *State ex rel. Strogan v. Trent*, 196 W.Va. 148, 469 S.E.2d 7 (W.Va. 1996). See also *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

In the instant case, Jennifer Dodson was found face down in her apartment with a severe slice wound to her neck. A bloody handprint and bloody footprints were observed at the scene and swabs were taken by the investigating officers. Additionally, knives were seized from the victim's apartment and the Petitioner's truck. Only a limited amount of this evidence was tested by the State. The defense pursued a theory that any one of three people other than Mr. Dunlap may have been the perpetrator. Despite the nature of the evidence and the theory of defense pursued at trial, no independent forensic testing was sought or conducted by defense counsel. Such a failure to seek and obtain independent forensic testing amounts to ineffective assistance of counsel.

Mr. Manford confirmed the validity of Petitioner's argument as evidenced by the following testimony elicited at the evidentiary hearing:

Q: Now, you had discussed already your theory of the defense that if—well, strike that. Is it common, Craig, and I know you've defended numerous malicious wounding and/or stabbing or slicing related cases. Is it common for the perpetrator to perhaps get blood

on himself, or his clothing, or shoes, or in the surrounding area, or suffer a wound as a result of engaging in that sort of conduct?

A: Obviously, that's a common thing, yes.

Q: But in this instance I believe your testimony's been there was no evidence of any blood on Mr. Dunlap or his clothing, correct?

A: That's my recollection. Yes, sir.

Q: Do you think it would have been more important then to test some of the areas in the apartment where blood was indicated, perhaps the step, swab from the wall, the footprint on the linoleum, or the handprint next to the victim to see whether or not that was solely the victim's DNA or perhaps another potential perpetrator who may have suffered an injury in the infliction of a knife wound?

A: *Sure hindsight, you know, you always go back and look at things that could have been done. I agree with you. Yes, sir.*

Q: Okay. And the reason for engaging in that sort of testing is that perhaps if Mr. Dunlap was not the perpetrator and there was no blood on him perhaps DNA results could be extracted from that testing that may implicate another individual, correct?

A: Yes. (Hab. Evid. Hrg. Trans., at pgs. 29-30)(emphasis added).

Utilizing the *Strickland* standard, trial counsel's performance was deficient under an objective standard of reasonableness because he failed to request and obtain additional forensic DNA testing of numerous items of physical evidence seized by the State. Such additional testing may have been exculpatory and/or may have implicated another perpetrator. Additionally, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Petitioner would respectfully assert the habeas Court erred in denying Petitioner his requested relief based upon the ineffective assistance of counsel. Petitioner moves this Court to reverse the ruling of the Circuit Court of Jefferson County, vacate his conviction, and

remand the matter for a new trial.

2. Counsel's Failure to Sufficiently Prepare Petitioner's case for Trial Constitutes Ineffective Assistance of Counsel.

Given the lack of physical evidence in Petitioner's case, and counsel's failure to obtain independent forensic DNA testing, the evidence utilized by the State to convict Petitioner was almost exclusively circumstantial evidence. Essentially, the State put forth witnesses who testified to discovering the victim, witnesses who observed Petitioner following or contacting the victim, witnesses to whom Petitioner purportedly confessed, law enforcement witnesses who investigated the case, and a witness (Betty Yates) who provided Rule 404(b) evidence against the Petitioner.

Petitioner's trial counsel had a duty and obligation to thoroughly investigate all aspects of this very serious homicide case. The West Virginia Supreme Court of Appeals has held the following regarding trial counsel's duty to investigate a criminal case:

> The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation. Syl. Pt. 5, *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. 11, 528 S.E.2d 207 (1999)(quoting Syl. Pt. 3 of *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995). See also *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

In the instant case, Petitioner's trial counsel was ineffective because he failed to adequately investigate various aspects of Petitioner's case. As set forth above, Petitioner's

trial counsel failed to conduct an adequate investigation of the physical evidence and failed to procure independent DNA testing of various critical pieces of evidence.

Trial counsel failed to conduct an adequate investigation in other ways. For example, the defense argued at trial that Petitioner was not the perpetrator, but the father of Ms. Dodson's child (Steve Fogle) may have been the actual perpetrator. At trial, Deputy Dumer testified that he discovered Mr. Fogle was residing in North Carolina at a Salvation Army Center. Deputy Dumer had received records from Cora Cobb of the Salvation Army Center indicating Mr. Fogle had signed in the day prior to and the day of the victim's death.

Petitioner's counsel objected to Deputy Dumer's testimony on two grounds: Defendant had never received a copy of the documents from Ms. Cobb and that no one was present from the Salvation Army to authenticate the records. The Court resolved the objection by suggesting to the State: "I think it is legitimate for you to ask him 'well, based upon contacting the Salvation Army in North Carolina, in your investigation were you able to rule out Mr. Fogle as a person of interest?'" After being posed the question, Deputy Dumer responded "in my opinion, yes."

Petitioner's trial counsel had an obligation under *Legursky* to thoroughly investigate Mr. Fogle's alleged alibi. Trial counsel could have hired an investigator to track down Mr. Fogle or to speak directly with Ms. Cobb to properly authenticate Mr. Fogle's alibi claim. Mr. Manford testified as follows regarding his investigation on this issue:

> Q: Now, we had discussed earlier Mr. Fogle. What evidence had been cultivated by either the state or the defense regarding Mr. Fogle and whether or not he was involved in this crime?
>
> A; I had searched the records locally and found the FPO or FPOs and I think I had actually used them on cross-examination of Deputy

Dumer at the time he was testifying about that. There was—we even had a side bar on it on the issue basically an alibi defense for Mr. Fogle. The alibi defense for Mr. Fogle was that he was in North Carolina immediately prior to and immediately after the homicide in question, and I have that down in my notes. It was the Salvation Army in High Point, North Carolina. There was a –he was allegedly there—let's see here looks like the 16th, 17th, 18th and 19th days of February. So what I was trying to do I was trying to cast doubt on Vernon's culpability and try to present to the jury the possibility that this gentlemen, who had a motive or possibly had a motive against the victim, might have committed the crime.

Q: Okay. Let me just stop you there. Do you recall the length of the relationship between Mr. Fogle and Ms. Dodson?

A: It was obviously long enough to have a three or five-year old child. I don't recall the age of Breanna.

Q: And you're aware, I believe—in my review of the file at least anyway—are you aware that Mr. Fogle actually resided in that very same apartment with the victim at some point and would have been familiar with the apartment?

A: I don't have a recollection of that but it wouldn't surprise me.

Q: Was a private investigator retained by the defense in this case?

A: I'm trying to recall if Larry Peterson did anything for Mr. Amore. Other then Mr. DeHaven working with me, no.

Q: Okay. So, you in your capacity as the defense attorney for Mr. Dunlap did not hire outside private investigator, correct?

A: Didn't hire an outside private investigator, no, sir.

Q: Did anyone go to North Carolina or attempt to track down Mr. Fogle and speak with him by telephone to explore his alibi claim?

A: No. Well, I didn't and no one from my office did. I don't know about the police.

Q: Okay. And so no one in your office spoke with Ms. Cora Cobb who was the lady from the Salvation Army Center?

A: Well, I spoke last time that I had recalled—I recall I called down there and tried to talk with her and I know I called down to North Carolina and tried to follow up on this. The notes from the files, the three boxes I reviewed, I didn't see any of my handwritten notes from that. I have a recollection that I called the Salvation Army down there but I cannot confirm that in writing that that happened.

Q: But no one basically—no one from your office tracked down Mr. Fogle and inquired of him about his whereabouts during that month, correct?

A: No, we didn't.

Q: Okay. Did anyone conduct a background check or run a criminal history on Mr. Fogle as part of the defense in this case?

A: I ran, you know, the magistrate court records up here locally, that's how I found the FPO, stuff of that nature. So, I mean I had whatever criminal history he had. Don't know if the state provided a criminal history for him or not. I don't recall.

Q: Regarding the other individuals that we had spoke about earlier, the second individual who had broken into the apartment, Ms. Dodson's apartment, and rearranged the furniture what investigation was conducted by the defense of that individual as to his whereabouts on the date of her death and his potential involvement?

A: Ms. Holler had stated that was—and that's if that's the same lady I'm thinking about. Anyway, the girlfriend of this gentlemen had stated that when she got home—she worked at the Opequon Lounge I believe. I think she was a dancer, I'm not sure, or a bartender, that she had got home that night approximately twelve-thirty. He was home and had been at home for some time at least, you know, according to her. Other than speaking with her we didn't do any other independent investigation of that issue.

Q: Okay. So there was no further development of that alleged alibi by either speaking with the individual himself or further investigation?

A: That I did? No, sir.

Q: Okay. And was there any further investigation done regarding the incident where someone had broken into Ms. Dodson's apartment in the days or week before her death?

A: Other than me obtaining the police report there was no other investigation that I'm aware of.

Q: Did the police, Craig, ever identify a perpetrator? What do you recall became of that incident?

A: I don't believe they did, no.

Q: Do you recall if Ms. Dodson indicated to them any potential suspects who she might have believed broke in?

A: I think she thought it might have been Mr. Fogle if I recall. (Hab. Evid. Hrg. Trans., at pgs. 30-35).

In addition to not having the physical evidence tested and not investigating Mr. Fogle's alibi, trial counsel failed to procure various witnesses at trial who may have provided favorable evidence for the defense (i.e. Brian Walls and Kerri Walls). Brian Walls was housed with Scott Marshall at the Eastern Regional Jail prior to Petitioner's trial. Brian Walls wrote a letter to Petitioner indicating that he was on Mr. Marshall's "pod" and that Mr. Marshall denied that Petitioner made any confession or admission. Through Mr. Walls, Mr. Marshall wrote a letter to Petitioner, which stated the following:

> Hey Dunlap, this is shotgun. I'm back here with Brian Walls. He said that someone told you that I was going to testify against you. You don't ever have to worry about that because I don't even know anything about you. Someone is just trying to start some rumors. Your friend, Shotgun.[3]

The letter from Scott Marshall to Petitioner, and its authentication by Mr. Walls, is impeachment/exculpatory evidence that should have been presented at Petitioner's trial. The information contained in the letter directly contradicts Mr. Marshall's trial testimony.

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[3] A copy of the letter from "Shotgun" (Scott Marshall) is, as sent with a letter from Brian Walls, is appended hereto as Exhibit #3.

Petitioner's trial counsel confirmed under oath that, although he was aware of the letter from Mr. Marshall, and was further aware of Mr. Walls, he did not attempt to contact Mr. Walls, did not procure his appearance at trial, and did not confront or attempt to impeach Mr. Marshall with the contents of the letter:

> Q: Do you recognize that document?
>
> A: I recognize it to be two letters, one apparently from Mr. Marshall, whose alias is Shotgun, signed Shotgun. And the next one would be apparently from Brian Walls relaying information from Shotgun to Vernon.
>
> Q: And is it fair to say that, basically, this letter came from Brian Walls with Shotgun's letter attached to it, Mr. Marshall's letter attached to it?
>
> A: I don't recall. It would make sense.
>
> Q: Okay. But if I represented to you that I found it as part of the file materials that you had given to me then you wouldn't have any reason to dispute that it was actually part of those file materials generated by the defense, correct?
>
> A: No, I wouldn't, but you know I don't believe that I saw these when I reviewed—maybe you had them out of the files or something?
>
> Q: I think I had them in my folder.
>
> A: Yeah, I—you kind of catch me off guard with this because I did not see these when I reviewed the files, but I do remember this, yes.
>
> Q: Would you read just into the record the first paragraph of the portion that says, "Hey, Dunlap," that's signed at the end, "Your friend, Shotgun."?
>
> A: "Hey, Dunlap, this is Shotgun. I'm back here with Brian Walls. He said that someone told you that I was going to testify against you. You don't ever have to worry about that because I don't even know anything about you. Someone is just trying to start some rumors. Your friend, Shotgun."

Q: Okay. Then he goes on to give his mother's address and a place where his mother can be contacted, correct?

A: Sure. It certainly does.

Q: Okay. Was Mr. Walls—did you have any conversations or track down Mr. Walls to be a potential witness in this case for the defense?

A: Not that I recall.

Q: A Brian or Kerry Walls?

A: Not that I recall, no.

Q: Okay. Was this letter ever presented at trial to confront Mr. Marshall, aka Shotgun, regarding his allegations that he had obtained a confession from Mr. Dunlap?

A: Again, I apologize. I do not recall. I wasn't—it wasn't part of the file that I reviewed as far of my recollection goes, the transcripts, I don't believe there was but I can't say for sure.

Q: Okay. Well, did you have any reason to doubt that this was part of the defense file at the time you went to trial in this case?

A: No, I'd seen it before today. I just didn't see it when I reviewed the file in your office.

Q: Okay. I see. So, you would acknowledge then that it was part of the defense's file prior to trial in this matter?

A: It certainly seems to be, yes, sir.

Q: Did anyone from your office ever speak to Mr. Walls, or Kerry Walls, or anyone related to this letter?

A: Not that I am aware of.

Q: Okay. And they were not subpoenaed or procured as a witness for the trial in this matter, correct?

A: No. (Hab. Evid. Hrg. Trans., at pgs. 37-39).

Counsel's failure to obtain independent DNA testing, failure to investigate the crime scene, failure to investigate the witnesses disclosed by Petitioner, and his failure to properly investigate the State's case, amounts to ineffective assistance as described in *Strickland* and *Strogen*. Additionally, there is a reasonable probability that, had counsel undertook a proper investigation of the case, the outcome of the proceeding would have been different.

Petitioner would respectfully assert the habeas Court erred in denying Petitioner his requested relief based upon the ineffective assistance of counsel. Petitioner moves this Court to reverse the ruling of the Circuit Court of Jefferson County, vacate his conviction, and remand the matter for a new trial.

3. Counsel's Failure to Move the Court for A Change of Venue, or to Obtain a Community Sentiment Survey Related to Such a Motion, Constitutes Ineffective Assistance of Counsel.

Petitioner was charged with the murder of Jennifer Dodson on February 19, 2004. Petitioner's arrest and the circumstances surrounding Ms. Dodson's murder were widely covered in most of the local media outlets. News reports and newspaper articles prominently identified Vernon Dunlap, Sr. as the sole perpetrator in Ms. Dodson's murder.

Despite the significant media attention, Petitioner's trial counsel failed to move the Court for a change of venue. Trial counsel further neglected to consult any expert on possible community bias and further failed to procure a community sentiment survey to gauge the extent of any hostile sentiment in the community. Trial counsel testified as follows regarding the venue issue:

> Q: What would be the purpose—what is a change of venue motion and what would be the purpose of a change of venue motion?

A: A change of venue motion is asking to try the case somewhere other than the county in which the crime occurred and the purpose is because with the adverse pretrial publicity a jury might be tainted, might not be able to actually impanel a jury of twelve impartial people.

Q: Concern is making sure the defendant has a fair trial, correct?

A: Yeah.

Q: Okay. Was any investigation done by the defense here as to how significant or insignificant the media coverage was of Jennifer Dodson's death?

A: No.

Q: Okay. Was any change of venue motion filed by the defense in this case?

A: No, sir.

Q: Was any sociologist or other professional hired by the defense to conduct what I call a community sentiment survey to determine whether or not there's a sentiment or bias against the defendant in the community?

A: No, sir. (Hab. Evid. Hrg. Trans., at pgs. 41-42).

The Supreme Court of Appeals has set forth a two-part standard for assessing claims of ineffective assistance of counsel:

> 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. 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 proceeding would have been different." Syl. Pt. 1, *State ex rel. Strogan v. Trent*, 196 W.Va. 148, 469 S.E.2d 7 (W.Va. 1996). See also *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

In the instant case, at a minimum, Petitioner's trial counsel should have consulted an expert and obtained a community sentiment survey to determine if any hostile sentiment existed against the Petitioner in the community. Counsel should have further moved the Court to change venue based upon extensive media coverage of Ms. Dodson's murder and Petitioner's arrest for the same. Counsel's failure to do so amounts to ineffective assistance of counsel.

Petitioner would respectfully assert the habeas Court erred in denying Petitioner his requested relief based upon the ineffective assistance of counsel. Petitioner moves this Court to reverse the ruling of the Circuit Court of Jefferson County, vacate his conviction, and remand the matter for a new trial.

4. Counsel's Failure to Sufficiently Meet With Petitioner and Prepare His Case for Trial Constitutes Ineffective Assistance of Counsel.

Although counsel had several meetings with Petitioner, Petitioner would assert that counsel failed to sufficiently meet with him, failed to address the evidentiary issues with him, and failed to properly advise Petitioner of his various defense options.

Petitioner alleges that counsel failed to address the evidentiary issues with him, and failed to address him in a professional and productive manner. Petitioner would assert that counsel failed to take time to address the full range of issues necessary to the preparation of a defense. Counsel spent insufficient time meeting with Petitioner outside of the courtroom to discuss the evidence, discuss possible defense strategies, or discuss meaningful plea bargaining opportunities.

As a result of the foregoing, Petitioner was unable to make knowing and meaningful

decisions regarding various trial strategies. Petitioner would assert that, had counsel properly met with him and prepared the case for trial, Petitioner would have been in a better position to vindicate his rights at a petit jury trial.

The Supreme Court of Appeals has set forth a two-part standard for assessing claims of ineffective assistance of counsel:

> 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. 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 proceeding would have been different." Syl. Pt. 1, *State ex rel. Strogan v. Trent*, 196 W.Va. 148, 469 S.E.2d 7 (W.Va. 1996). See also *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

Counsel's failure to timely and properly meet with Petitioner, and counsel's failure to review the evidence with Petitioner, amounts to ineffective assistance as described in *Strickland* and *Strogen*. Additionally, there is a reasonable probability that, had counsel undertook to meet with Petitioner and discuss the evidence, the outcome of the proceeding would have been different.

Petitioner would respectfully assert the habeas Court erred in denying Petitioner his requested relief based upon the ineffective assistance of counsel. Petitioner moves this Court to reverse the ruling of the Circuit Court of Jefferson County, vacate his conviction, and remand the matter for a new trial.

B. THE TRIAL COURT ERRED IN GRANTING THE STATE'S UNTIMELY MOTION TO BIFURCATE THE GUILT/INNOCENCE PHASE FROM THE MERCY/PENALTY PHASE.

A pre-trial hearing was held in Petitioner's case on March 31, 2005. The primary issue at said hearing revolved around the State's previous disclosure that it intended to introduce Rule 404(b) evidence against the Petitioner in its case-in-chief.

Specifically, the State advised that it intended to offer the testimony of Petitioner's ex-wife (Betty Yates) regarding a stabbing incident that occurred in 1994. In 1994, Ms. Yates was attacked by Petitioner, who attempted to cut her throat. Petitioner purportedly stabbed Ms. Yates after the unsuccessful attempt to cut her throat. Petitioner pled guilty to malicious wounding and was paroled after serving 2 ½ years in the penitentiary. The State sought to introduce Ms. Yates' testimony to show modus operandi, motive and intent. Petitioner argued the offenses were not sufficiently similar, and the probative value was substantially outweighed by the potential for unfair prejudice. The Court ruled the evidence was admissible under Rule 404(b) as modus operandi evidence. The State apparently advised that it had no intention to use any other purported Rule 404(b) evidence against the Petitioner.

At trial, toward the end of its case, the State requested a sidebar conference and noticed its intention to call Betty Yates to testify to the Rule 404(b) evidence she provided at the pre-trial hearing. The State further advised that it intended to inquire about other prior bad acts not raised at the pretrial *McGinnis* hearing. The State sought to present the evidence because it was a unified trial with no bifurcated "mercy" phase. The State then orally moved to bifurcate the trial and penalty phase. Defendant objected and argued the State's motion was untimely and unfairly surprised the defense. The Court found the State's motion untimely and

denied the request for bifurcation at such a late stage.

Ms. Yates proceeded to testify about the 1994 incident as she did during the pre-trial hearing. The State then proceeded to ask Ms. Yates questions which elicited other Rule 404(b) evidence, to which the defense objected. The Court ruled the State could not inquire about the new 404(b) evidence in its case-in-chief, but the Court may allow such evidence during the State's rebuttal case. Following the Court's ruling, the State renewed its motion to bifurcate the proceedings. The Court took the issue under advisement.

After the defense presented its case, the State called several witnesses in its rebuttal case. The State eventually requested a sidebar conference and announced its intention to recall Betty Yates to offer other Rule 404(b) evidence. After the Petitioner objected, the State renewed its motion for bifurcation. The Court reserved ruling on the motion and stated, "well, my major concern would be whether the Supreme Court would think that the defense has been ambushed." The Court ultimately granted the State's motion to bifurcate the proceedings. After the jury returned with a guilty verdict, Ms. Yates testified during the mercy phase to numerous prior bad acts allegedly perpetrated by the Petitioner.

Petitioner would respectfully assert and aver that the trial court committed error by granting the State's belated motion for bifurcation. Clearly, the State's motion was not timely made and inflicted substantial prejudice by requiring the defense to abandon its original trial strategy and pursue an alternative strategy it sought to avoid by seeking a unified trial.

The defense presented at trial was largely based upon the results of the pre-trial hearing held on March 31, 2005. After discovering that only a limited amount of Rule 404(b) evidence would be admitted at trial, the defense made a conscious decision not to request a

bifurcation of the guilt/innocence phase from the mercy phase. The aim of such a decision was to limit the amount of Rule 404(b) evidence the jury would hear.

The State did not announce its intention to utilize additional Rule 404(b) evidence until the end of its case-in-chief. After considering the Petitioner's objection to the additional evidence, the State orally move to bifurcate the trial. The Court found the motion untimely and denied the same. After the State rested its rebuttal case, the Court called a sidebar conference at which time it granted the State's bifurcation motion over Petitioner's objection.

Petitioner was substantially prejudiced by the Court's ruling because he was "ambushed" by the State and had to remodel his defense to mitigate damaging Rule 404(b) evidence that he believed would not be a part of the case evidence. Additionally, Petitioner had only two business days to obtain the appearance of defense witnesses and prepare for a penalty/mercy phase that he never believed would occur.

During his testimony at the habeas corpus evidentiary hearing, Petitioner's trial counsel rendered a first-hand account of the nature and impact of the prejudice which resulted from the Court's granting of the State's belated motion to bifurcate:

> Q: And I'll test your recollection here a little bit here, Craig, regarding—and I would sort of be making the offer of proof on this regarding the defense strategy of the case and how it played out at trial. And more specifically I'll be asking there was some dispute at trial over the state belatedly moving to bifurcate this procedure, the murder trial, the trial from the penalty phase. Would you please describe how you approached the trial and why you didn't yourself file a motion to bifurcate for the defense?
>
> A: Well, one of the reasons at least I felt as the attorney in case not asking to bifurcate the trial was because there was a lot of other evidence that would probably not come in in the trial, 404(b), could come in in the bifurcation situation, particularly, that was Ms. Yates. Not, at pretrial we had to hold a 404(b) McGinnis hearing as to

whether or not the allegations against Ms. Yates ten years ago when she was stabbed in the throat, apparently, and Vernon was convicted for that, whether that was going to come into evidence or not. The Court ruled under modis (sic) operandi that was basically a signature.

Q: Okay. That was one incident that the trial court ruled admissible based on Rule 404b as modis (sic) operandi, correct?

A: Exactly. Exactly.

Q: However, as I read the file, and we'll get to it in a minute, there was a whole panoply of other 404b evidence that ultimately came in that was different from that one incident, correct?

A: Oh, yes, most definitely.

Q: What I'm trying to get after here is what—tell me what your recollection is regarding the state's motion, the side bars, and your objections about being sandbagged, and things like that that are in the record.

A: Oh. I don't mean any offense to anybody, but you asked and here's what I—my recollections of what occurred. Ms. Yates after she came for that 404b hearing I believe she then spilled the beans, or her guts, or told a lot more of prior bad acts that Vernon was involved, that during the trial there were acts of he would intimidate the children with hammers. He held a child over an open flame on a –in a stove. I mean it was just egregious things.

Q: Phonebooks on fire on a kid's head.

A: Yeah, on top of a child. Phonebook on fire on top a child, and that he treated her terribly. Made her quit McDonald's because she was talking to some man. It might have been a black gentlemen if I recall, but anyway this was all stuff I sort of knew about in my conversation with Vernon. You know I knew generally about them but I didn't know all the specifics, but I knew we wanted to keep them out of the trial. So we had not asked for a bifurcate trial. We had a 404b—

Q: Okay. Can I just stop you there to make a little bit of a record because I've been in that position before. When you—what's your understanding of the law regarding evidence that comes in when you have a unified non-bifurcated trial?

A: Well, unless you're going to you're not going to be able to get all that prior bad act evidence in unless the Court has a McGinnis hearing and rules the 404b. You're going to have to show a need for it if it was relevant at all. The factors in the McGinnis I don't think this stuff would have come under 404b.

Q: And if you have a unified trial essentially you don't get into all the mitigating and aggravating and other evidence not directly related to the case, correct?

A: That's correct.

Q: Okay. The state would have been confined to asking the jury to give Mr. Dunlap life without mercy based on the direct evidence in their case-in-chief and through cross-examination of your defense, correct?

A: That's correct. (Hab. Evid. Hrg. Trans., at pgs. 45-49).

During his testimony, Mr. Manford further confirmed the prejudicial impact the trial Court's decision had on the presentation of evidence as part of Mr. Dunlap's defense. Mr. Manford testified as follows:

Q: Okay. Ultimately the judge granted the state's motion to bifurcate, correct?

A: That's correct.

Q: So, you were compelled essentially to go forward with the mercy phase of the proceeding, correct, that you did not anticipate going forward with?

A: Right. A separate proceeding, yes.

Q: And what happened at that proceeding regarding Ms. Yates and some of the information that came in during the mercy phase?

A: Well, she testified that all these things we just mentioned about these egregious acts between her and Vernon they were—I believe they were married eight or ten years prior to the incident in question when he was convicted of maliciously assaulting her. She told about horrific types of behavior that she said Vernon engaged in, cruel things he did toward family members and toward her.

Q: What was the affect of the bifurcated proceeding, and I understand that you don't want to certainly offend anyone in Court here today and—but I have to make record from Mr. Dunlap for Judge Steptoe to review and perhaps further review if necessary. What was the affect on the defense of basically having to change your trial strategy at the end of the state's case-in chief?

A: Well, first of all it was a scramble to get any witness we could together on it. We had talked to family members and some family members were going to come in and told me they would come in and didn't show, okay, some family members did come in. I didn't have an opportunity to really-well, prepare them as I'd like to and by that I mean go over all their testimony, all the good and bad, and make decisions about whether we could ask certain areas of inquiry or not. We had to put—I remember driving from that hearing on the phone to Bernie Lewis trying to get a hold of him to get him over there and told him, begging him, I need you here, Doc, we've got to have this. What else, I forgot what you asked me?

Q: Well, let me ask you this and I'll just—because I took this from the appellate brief and I'll read this to you and then please comment. It says you would indicate petitioner's counsel would have prepared his entire defense differently knowing the penalty phase was bifurcated and that he would have elicited testimony of the other coworkers and friends not called at trial to testify to favorable work habits and character traits. He would have obtained parole records from the DOC showing the defendant was of good behavior while in prison. He would have attempted to garner additional rebuttal evidence from the defendant's divorce proceedings and he would attempted to obtain work records for the defendant. Are all those things you would have done had you knew you were going to a bifurcated proceeding with a mercy phase?

A: That certainly is what I said in the brief and that's what I would attempt to do, yes, sir.

Q: Do you believe, Craig, that the state's belated motion and the ultimate granting of that motion impaired your ability to put forth the best defense for Vernon by having to switch trial strategy in the middle of the trial and not being able to generate and make present for the jury this evidence that I just read about?

A: Well, it certainly made it more difficult to say the least and obviously

> you don't like to be surprised in the middle of the trial with something. I would say it did have an effect. Yes, sir. (Hab. Evid. Hrg. Trans., at pgs. 49-52).

Petitioner was denied due process in violation of the Fifth and Fourteenth Amendments to the United State Constitution as a result of the Court's decision to grant the State's belated motion to bifurcate the trial. As evidenced by trial counsel's testimony, the Court's ruling was prejudicial because it substantially impaired his ability to present an appropriate defense.[4]

Petitioner would respectfully assert the habeas Court erred in denying Petitioner his requested relief based upon the belated and prejudicial bifurcation of the trial proceedings. Petitioner moves this Court to reverse the ruling of the Circuit Court of Jefferson County, vacate his conviction, and remand the matter for a new trial.

C. THE TRIAL COURT ERRED IN ADMITTING ADDITIONAL RULE 404(b) EVIDENCE WITHOUT HOLDING A *McGINNIS* HEARING TO DETERMINE THE ADMISSBILITY OF SUCH EVIDENCE, AND WITHOUT MAKING A FINDING THAT SUCH EVIDENCE IS ADMISSIBLE PURSUANT TO RULE 403 OF THE WEST VIRGINIA RULES OF EVIDENCE.

The Court held a *McGinnis* hearing on March 31, 2005, and determined that the 1994 stabbing incident involving Ms. Yates was admissible *modus operandi* evidence. Defendant proceeded to trial under the assumption this would be the only Rule 404(b) evidence presented

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[4] As noted in his appellate brief, Petitioner's counsel "would have prepared his entire defense differently knowing the penalty phase was bifurcated in that he would have elicited testimony of the other co-workers and friends not called at trial to testify to favorable work habits and character traits; he would have obtained parole records from the D.O.C. showing the Defendant was of good behavior while in prison; he would have attempted to garner additional rebuttal evidence from the Defendant's divorce proceedings; he would have attempted to obtain work records for the Defendant, etc." (Pet. for App., at pg. 49).

at trial.

After the Court granted the State's belated bifurcation motion, the State put on additional Rule 404(b) evidence through Betty Yates. Ms. Yates testified about countless disparaging incidents from her marriage to Petitioner, to-wit: that Petitioner choked her in front of the children, that Petitioner dumped a drawer of knives in her lap and told the children she would be dead before they got back, that Petitioner placed a telephone book on his son's head and lit it on fire, that he held his son over an electric stove with the burners on, that she saw Petitioner stab his brother in the leg with a knife, that Petitioner threatened to kill the children, and various other alleged prior bad acts.

In *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), the Supreme Court of Appeals stated the following regarding the protocol to be followed by a court when considering whether to admit potential Rule 404(b) evidence:

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin,* 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence. *Id.* at Syl. Pt. 2.

In the instant case, the trial Court failed to conduct an *in camera* hearing prior to admitting the 404(b) evidence. Additionally, the Court apparently made no finding by a

preponderance of the evidence that each alleged prior bad act occurred. The Court failed to determine the relevancy of such evidence under Rules 401 and 401 of the West Virginia Rules of Evidence. Finally, the Court failed to conduct the balancing test required under Rule 403 of the West Virginia Rules of Evidence.

Petitioner was denied due process in violation of the United States and West Virginia Constitutions because the Court failed to conduct a proper *McGinnis* hearing prior to permitting the jury to hear the additional Rule 404(b) evidence.

Petitioner would respectfully assert the habeas Court erred in denying Petitioner his requested relief based upon the prejudicial admission of Rule 404(b) evidence. Petitioner moves this Court to reverse the ruling of the Circuit Court of Jefferson County, vacate his conviction, and remand the matter for a new trial.

D. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED, AND HIS TRIAL PROCEEDINGS COMPROMISED, BY A SUBSTANTIAL CONFLICT OF INTEREST RELATED TO HIS INTIAL COURT APPOINTED ATTORNEYS.

After his arrest for his alleged murder of Jennifer Dodson, the Public Defender's Office was appointed to represent Petitioner. After the Public Defender withdrew because of a conflict of interest, Aaron Amore of the law firm of Kratovil & Amore was appointed to represent Petitioner. Mr. Amore was appointed by the Court on or about April 8, 2004. His partner, James Kratovil, was subsequently appointed as co-counsel in the matter.

At some point, it came to Mr. Amore's attention that he represented two of the State's witnesses in Mr. Dunlap's case: he represented Jamie Sisk (a witness who discovered the victim's body) and Scott Marshall ("Shotgun" as referenced herein). Mr. Amore moved to

withdraw from the case, but his partner Mr. Kratovil continued to represent Mr. Marshall.

Although there is some dispute in the record as to how it came about, the prosecuting attorney's office took a statement from Mr. Marshall regarding Petitioner's alleged jailhouse confession while Mr. Marshall was represented by James Kratovil. Mr. Marshall went on to provide substantially unfavorable testimony against Petitioner at the trial on the merits. The testimony was based on Petitioner's alleged jailhouse confession to Mr. Marshall while both were apparently being represented by Mr. Kratovil's office.

Petitioner ultimately filed an ethics complaint with the West Virginia State Bar against Mr. Kratovil and Mr. Amore.[5] The Disciplinary Board formally issued a public admonishment of both Mr. Kratovil and Mr. Amore pursuant to Rule 1.10 of the West Virginia Rules of Professional Conduct: "Pursuant to Rule 1.10, the continued representation of Mr. Marshall and Respondent Kratovil's testimony is a violation of Rule 1.9 of the Rules of Professional Conduct by both Respondent Amore and Respondent Kratovil."

Petitioner would respectfully assert that he was prejudiced by the Kratovil/Amore conflict of interest in that sensitive information related to Petitioner's case may have been shared with a critical state witness, Scott Marshall. The sharing of any such information, and the conflict created by dual representation for which Mr. Kratovil/Mr. Amore were admonished amounts to a violation of Petitioner's Due Process and related constitutional rights.

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[5] A copy of the Lawyer Disciplinary Board Investigative Panel Closing, dated November 29, 2006, is appended hereto as Exhibit #4.

V.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted, that the judgment of the Circuit Court of Jefferson County be reversed, that Petitioner's conviction be vacated, and that the matter be remanded for a new trial.

Respectfully submitted,
Vernon H. Dunlap, Sr.,

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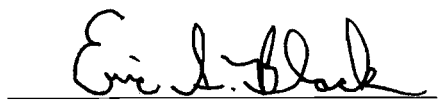
(304) 258-2931

CERTIFICATE OF SERVICE

I, Eric S. Black, Esquire, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing BRIEF OF APPELLANT, upon Dawn E. Warfield, Deputy Attorney General, at her address of State Capitol Complex Bldg. 1 Room E-26, Charleston, West Virginia 25305, by U.S. Mail, postage prepaid, on this 25th day of September, 2009.



Eric S. Black, Esq.

EXHIBITS

ON

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