
IN THE
SUPREME COURT OF APPEALS
WEST VIRGINIA

No. 34713

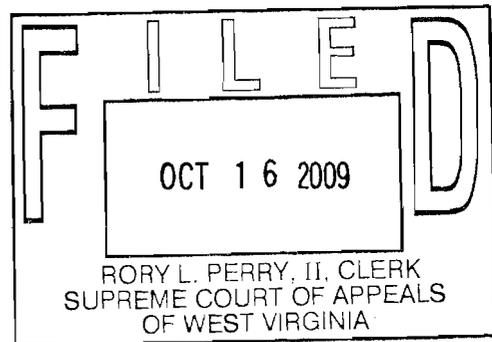
**STATE OF WEST VIRGINIA ex rel
MAX PAUL KITCHEN,**

Appellant,

v.

**HOWARD PAINTER, Warden
MT. OLIVE CORRECTIONAL COMPLEX,**

Appellee.



REPLY BRIEF OF APPELLANT

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I.

INTRODUCTION

In the interest of brevity, the following reply will focus on assertions and arguments made by the Appellee in its legal brief. However, to the extent practicable, the Appellant incorporates by reference his own legal brief which substantially refers to the underlying record in this matter and incorporates supporting case law and other legal authority.

II.

ARGUMENT

A. **THE HABEAS COURT'S FINDINGS EXPLICITLY CONCLUDE THAT DEFENSE COUNSEL'S ACTIONS WERE NOT OBJECTIVELY REASONABLE.**

The Habeas Court clearly delineated those findings it found indicative of defense counsel's

deficient legal performance.

The Court finds that the petitioner met the first prong of the analysis. The Court **finds defense counsel's performance** in failing to make a motion to *bifurcate guilty and mercy stages* of trial, failing to *call character witnesses* in mitigation, failing to *argue for mercy*, and failing to *object to state's argument for no mercy* was **deficient** under an objective standard of reasonableness *since no reasonable explanation for the failures were tendered during the habeas proceedings.*

See Final Order Denying Habeas Relief (emphasis added). In doing so, the habeas court followed and appropriately applied the legal standard set forth in Strickland (citations omitted). For Appellee to suggest that the court did not apply it correctly or was required to follow a modified or contrived standard is simply wrong.

Appellee essentially argues that defense counsel's performance was not deficient because

her collective decisions to not do what the habeas court thought she should was “reasonable strategy” based upon an “adequate investigation” that supposedly revealed “potential” damaging evidence that the State could offer against the Appellant in rebuttal.

That argument is specious at best and grossly distorted at worst. First, the underlying record lacks credible evidence to support Appellee’s assertion that any incriminating evidence existed at all, and to describe what potentially existed as “damaging” is subjective exaggeration. While testimony from Appellant and his mother clearly disputes and contradicts many of defense counsel’s assertions about her attorney-client relationship with the Appellant (i.e. she testified that she communicated with client about everything, while he maintains she did not communicate with him about anything), what appears to be largely undisputed is that the Appellant did not have a criminal history. Had he committed previous crimes or other bad acts, as suggested by Appellee in his brief, they would have been the subject of pretrial motions and other discussions that would have been reflected in the trial record. Further, the prosecutor testified at the Appellant’s first habeas evidentiary hearing and did not offer any evidence to the contrary.

Appellee unpersuasively argues that trial counsel’s decision not to bifurcate was “sound trial strategy...” because she was concerned that damaging evidence would come in the form of rebuttal. The absurdity of this argument is that there is absolutely no evidence that defense counsel ever considered bifurcation or discussed with her client. In fact, she did not appear knowledgeable about *State v LeRock*, the supreme court case about unitary vs. bifurcated trial. (citations omitted) The only time defense counsel even acknowledged the issue (and presumable option) of bifurcation was when she as asked during a second evidentiary hearing why she had not considered bifurcation of the trial for sentencing purposes. She said she would have had she

not learned something she believed could be damaging against her client several days before the trial.

This assertion simply does not add up. Had she considered bifurcation, she would have looked to *State v. LeRock*, which requires her to raise it in pretrial motions because it is the judge who decides whether bifurcation or a unitary trial is appropriate. Had she ever thought about or intended to bifurcate, the record would reflect it and in its absence, it is reasonable to conclude that bifurcation was not on counsel's radar screen.

The Appellee also distorts the record with claims about the Appellant's character that are simply unsupported by the testimony in the record. Throughout the brief, the Appellee makes assertions that fly in the face of the record. For example, Appellee maintains that one reason mitigation evidence was not offered was because the Appellant had a history with baseball bats. However, upon examination of testimony contained in the evidentiary hearing transcripts, the Appellant explains that his father had been arrested once in the past and somehow along the way and perhaps during the pretrial investigation of his case, someone said it involved a baseball bat. The Appellant further explains that his father and he share the exact same name (other than the Sr./Jr. distinction) and that the State had gotten the matter cleared up. Had it been the Appellant and not his father, the State would have submitted same to defense counsel in discovery and presented to the court in the event he may wish to use it as rebuttal evidence. Again, the record does not support the assertions made by the Appellee.

The Appellee also attempts to malign the Appellant character by twisting testimony that was given by the Appellant's mother in one of the omnibus hearings regarding the difficulty her granddaughter [Appellant's child] had after her father was sent to prison. Specifically, Mrs.

Kitchen said that her granddaughter had been molested by her daughter's husband. This occurred after the Appellant was incarcerated and this testimony was offered by her to demonstrate the relationship that her granddaughter had with her dad and the horrible suffering she had undergone since her dad went to prison. The point at the hearing was to show had Appellant' trial counsel bothered to offer character testimony on Appellant' behalf at his trial, the jury would have heard either from his little girl or about his little girl and the fact that he was raising her as a single dad and they share a very close relationship.¹

It should also be pointed out, at least for purposes of rebuttal, that the Appellant was never charged with nor was it ever established that he was cultivating marijuana and certain not a "drug dealer" s asserted by Appellee. In fact, at no time did any of the witnesses actually state that a marihuana field existed at the suspected location and there was never any physical evidence of a field presented in or out of court and nor was it found on the two individuals who were riding on these four wheelers.

In assessing the reasonableness of an attorney's investigation, the court must consider not only the quantum of evidence already known to counsel, but also whether known evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 123 S.Ct. 2537, 156 L.E.2d 471 (2003). In *Wiggins* , the defendant's legal counsel made only a cursory inquiry and

¹ Throughout his brief, the Appellee repeatedly asserts unsubstantiated and inaccurate facts, makes unsound assumptions and offers unsupported conclusions that are inflammatory, prejudicial and incredulously, not even part of the appellate record before this Court. *See Appellee's brief, p. 24-25* ("Appellant was an *intermittently employed janitor* who was a single father because he had little choice and who was putting both himself and his child at risk by cultivating marijuana. The fact that he had no criminal history was of little value in ilight of his *second career cultivating marijuana* and his *past history with baseball bats ... [and] undermined all of his mitigating evidence....*)(emphasis added) *See also pp. 32, 33 et seq.*

consequently gained only rudimentary knowledge about his personal background and history. Wiggins was ultimately convicted of murder and elected to be sentenced by a jury in a death penalty state.

The *Wiggins* Court said that to overturn a conviction for ineffective assistance of counsel, there must be a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Thus, to demonstrate such prejudice requires a further determination by the Court that the probability of harm is sufficient to undermine confidence in the outcome of the trial.

Here, like in *Wiggins*, defense counsel's failure to thoroughly investigate her client's history and background in the present case resulted from inattention rather than reasoned strategic judgment that the State suggests was the motivating factor and reason that Appellant's legal counsel failed to offer any mitigating evidence or develop the issue of mercy in a case where her client was facing life in prison. However, as presented in Appellant's legal brief and through the record, there is simply no reasonable or plausible reason why Appellant's counsel wholly failed to present offer mitigating evidence on her client's behalf or do any of the other things that the habeas court that she should have.

The record and corresponding pleadings reflect what defense counsel did and did not do before her client's trial, during her client's trial and after her client's trial. In the instances where there is contradictory testimony between defense counsel and the Appellant, the court should consider the totality of their testimony and other circumstances in determining which version is the most credible. In doing so, the court should conclude that the Appellant's version is most consistent with the events that transpired during the course of the trial, including his lack of

knowledge about waiver of his opening, bifurcation of trial and mercy stage, etc. The list goes on and on and on. Unless defense counsel did not believe her client could or may be convicted of first degree murder (Appellant does say in evidentiary testimony that in discussing his plea, he recalls counsel stating that she could not imagine a conviction for more than manslaughter) how could she reasonably conclude that there was not a reasonable strategic advantage or adverse risk in introducing some of the family testimony that could have been offered and mitigating the harsh outcome.

The Fourth Circuit has considered cases involving this issue. It has said that in determining whether counsel was ineffective for failing to a present sufficient mitigation case the inquiry is not whether counsel should have presented a mitigation case but whether the investigation supported counsel's decision not to introduce mitigating evidence was itself reasonable. *See Powell v. Kelly*, 562 F.3d 656 (4th Cir. 2009). It has also held that a capital murder defendant has a constitutionally protected right to provide jury with mitigating evidence that may affect jury's assessment of whether sentence is just and appropriate. *See Gardner v. Ozmint*, 511 F.3d 420 (4th Cir 2007). Thus, defense counsel is obligated to conduct thorough investigation of defendant's background in order to identify and produce mitigation evidence. Failure to do so renders attorney's performance deficient.

Appellee suggests that defense counsel conducted an independent investigation when the record bears out or other wise supports inference that she learned what she did along the way, in a happenstance like manner. Mrs. Kitchen testified that the investigator that visited her and other witnesses focused strictly on the underlying facts and did not ask questions about her son's personal life or other matters that could have developed mitigation evidence.

Our present case is factually distinguishable from *Vinson v. True*, 436 F.3d 412 (4th Cir 2006). In *Vinson*, the court found that counsel was not ineffective because he requested defendant and his family to provide mitigation information, which they failed to do. Counsel independently discovered mitigation evidence that included school records, and counsel presented favorable testimony from defendant's mother, step-father, two court-appointed expert witnesses, a parole officer and a church leader (holding that defense counsel must adequately investigate and present evidence in mitigation of guilt in death penalty cases). See also *Spencer v. Murray*, 18 F.3d 229 (4th Cir 1994)(finding that defense counsel adequately investigated client's background to uncover mitigating evidence in capital murder case where counsel or their private investigator interviewed family members, neighbors, teachers, employers and halfway house personnel, and had observed mitigation witnesses at defendant's first trial.).

B. THE APPELLANT WAS CONSTITUTIONALLY ENTITLED TO A FAIR TRIAL THAT SHOULD HAVE INCLUDED INTRODUCTION OF COMPELLING MITIGATION EVIDENCE THAT HIS TRIAL COUNSEL SHOULD HAVE INVESTIGATED, DEVELOPED AND PRESENTED TO THE JURY FOR CONSIDERATION IN THE PENALTY PHASE OF TRIAL

The facts and evidence that have been developed in this lengthy record should lead the court to the unescapable conclusion that the outcome of this case could have easily been different. As horrible as this particular crime was, there have been equally and even worse crimes committed and by far worse human beings, some of which have certainly received life with recommendation of mercy. What would prompt a jury to convict a person of first degree

murder to then be eligible for parole has to depend on who that person is, his background, the type of person he was or has become or has the potential to be. That can only be known or discovered through evidence that was not available to this jury. In fact, this was one trial where a jury learned absolutely nothing about the person accused of committing the crime other than what he did on the day the act occurred. Appellant was isolated from this jury.

Under your de novo review, this Court should conclude, based upon the underlying record, that the habeas court's legal conclusion was improper. How can a court who finds so many deficiencies in trial court's counsel for failures to act on behalf of her client to mitigate his guilt or argue for mercy in a first degree murder case then conclude the outcome would have not been different. Only a jury could know if it would have been and they did not get to hear that evidence. With the amount of available character evidence and the relatively low risk of other damaging evidence that the State could offer in rebuttal, how is it reasonable to conclude that the outcome would not have been different. Once the jury heard what we have heard from the record and would like hear more had there been an adequate inquiry and investigation, it seems probably that he was the rare the of individual who would deserve the mercy of a jury would had found him guilty of a violent act. Sometimes violent acts are committed by individuals who do not have a violent past or propensity for violence. The jury did not get to learn whether the Appellant was any different than the crime he was accused of committing; therefore the jury concluded that he was violent and unworthy of redemption because the jurors heard no evidence to give them reason to think or do otherwise.

C. THIS COURT HAS RESOUNDINGLY HELD AND REPEATEDLY AFFIRMED THAT A JURY SHOULD BE FREE FROM PREJUDICE AND BIAS THAT

COULD COMPROMISE A DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Inherent in a constitutional right to a fair trial is to have a jury that is free from prejudice and bias. For the Appellant to suggest that habeas relief is not available if this constitutional right is violated is absurd.

Trial courts should strive to secure jurors who are not only free from prejudice or bias, but who also are not even subject to any well grounded suspicion of prejudice or bias. *State v. Schermerhorn*, 211 W.Va. 376, 566 S.E.2d 263 (2002); *State v. Mills*, 211 W.Va. 532, 566 S.E.2d 891 (2002). *Schermerhorn* and *Mills* were both reversed by this Court for the respective trial court's failure to remove a biased juror for cause. In *Schermerhorn*, the juror had a relationship with several assistant prosecutors. When the State tried to rehabilitate her during voir dire, the juror assured the Court that she could be fair.² See Syl. Pt. 2, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (202).

The Appellant's brief fully discusses the relationship that the prospective and ultimate jurors had to the prosecutor and his investigator who was actively involved in the case. The Appellant was forced to use to peremptory strikes because the trial court believed, based on their rehabilitative responses, that they could be. This Court should follow its reasoning in *Schermerhorn* and *Mills* and reverse the Appellant's conviction and give him a new trial with an untainted jury.

² *State v Mills* is discussed in Appellant's legal brief.

III.

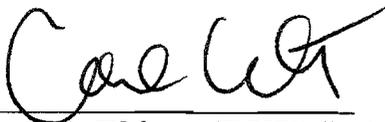
CONCLUSION AND RELIEF REQUESTED

Despite finding that counsel's deficient performance centered on her failure to mitigate her client's sentence in a capital murder case, the Court concluded that he could not demonstrate that "...there is a reasonable probability ... that the results of the trial would have been different ... in the absence of these failures..." *Id.*, at 3. It is the habeas court's conclusion, based on the facts she relied upon, and others she did not reference or apparently consider, which is legally flawed, and pursuant to this Court's *de novo* review, should be reversed.

Thus, for these reasons and those contained in the Appellant' brief, the Appellant urges and prays that this Court will grant his habeas petition and a new unitary trial. To do otherwise would not serve justice because the jury who hears the guilt phase should be the one who hears evidence to determine what the appropriate penalty should be. The Appellant deserves to have both heard by one jury, not two.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Carrie L. Webster, do hereby certify that I have served a true and correct copy of the foregoing "APPELLANT'S REPLY BRIEF" on the following individual, via United States mail, postage prepaid, on this 16th day of October, 2009:

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