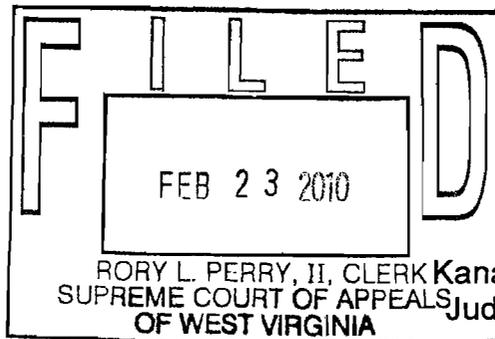


35545

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TONY CURTIS MYERS,  
Petitioner,

v.



Case Below: 07-F-569

RORY L. PERRY, II, CLERK Kanawha County Circuit Court  
SUPREME COURT OF APPEALS Judge Jennifer Bailey Walker  
OF WEST VIRGINIA

THE HONORABLE JENNIFER BAILEY WALKER,  
JUDGE, 13<sup>TH</sup> CIRCUIT,  
Respondent.

PETITION FOR A WRIT OF MANDAMUS

Comes now the Petitioner, **Tony Curtis Myers**, acting *pro se*, to petition this Honorable Court to issue a writ of mandamus, returnable to the Respondent, directing the Respondent to resentence Petitioner for appeal purposes and appoint new appellate counsel.

**HISTORY OF PROCEEDINGS**

On April 30, 2008, Petitioner was sentenced to 60 years in the penitentiary for each of three counts of first degree robbery, with all sentences running concurrently.

John Sullivan, the public defender who represented Petitioner at trial, continued as appellate attorney. Mr. Sullivan, however, failed to perfect a timely appeal. He was,

however, able to arrange for Petitioner to be resentenced on August 1, 2008, for appeal purposes. (See line 58 of docket sheet, **Exhibit A**.)

On September 30, 2008, Petitioner wrote Respondent a letter (line 61 of docket sheet, **Exhibit A**) expressing concern over his appeal and appellate counsel, since Mr. Sullivan had yet to file petition for appeal. Petitioner received no response to this letter and waited for almost a year to see if Mr. Sullivan would timely perfect Petitioner's appeal.

On September 28, 2009, Petitioner wrote a letter to Respondent, accompanied by a motion for resentencing for appeal purposes and appointment of new appellate counsel. (See **Exhibit B** and line 63 of **Exhibit A**.) To date, Petitioner has received no reply to his motion, nor has there been any indication on his docket sheet that any action has been taken to resentence him or appoint new appellate counsel.

On November 23, 2009, Petitioner wrote a letter to the chief public defender (**Exhibit C**) pleading for some action on his neglected appeal. Petitioner has heard no response to this letter.

Petitioner now petitions this Court for a writ of mandamus directing the Respondent to resentence him for appeal purposes and appoint new appellate counsel.

## ARGUMENT

"Before this Court may properly issue a writ of mandamus three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another remedy of law." Syl. Pt. 3, *Cooper v. Gwinn*, 171

W. Va. 245, 298 S. E. 2d 781 (1981). Each of these three elements are addressed below:

**(1) Existence of Clear Right.** In *Rhodes v. Leverette*, 239 S. E. 2d 136, 139 (1977), this Court held that, under the Due Process and Equal Protection clauses of the *West Virginia Constitution* (Article III, § 10 and § 17), an “indigent criminal defendant in this State has a right to appeal his conviction.” It was further held, *Id.*, that the Equal Protection provisions of the Fourteenth Amendment to the *United States Constitution* and Article III, § 17, of the *West Virginia Constitution* guaranteed that an indigent defendant must be furnished court-appointed appellate counsel. Furthermore (*Id.*, Syl. Pt. 2), the Due Process provisions of the Fourteenth Amendment to the *United States Constitution* and Article III, § 10, of the *West Virginia Constitution* guaranteed an indigent defendant “the effective assistance of court-appointed counsel on his appeal.”

From this it follows that Petitioner, an indigent, has a clear right to an appeal and the appointment of effective appellate counsel. Mr. Sullivan’s failure to perfect a timely appeal is clearly deficient performance that prejudiced Petitioner by denying Petitioner the right to petition for appeal. Mr. Sullivan was, therefore, ineffective as appellate counsel. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and *Strickland v. Washington*, 466 U.S. 668 (1984).

It follows that Petitioner’s clear right has been frustrated.

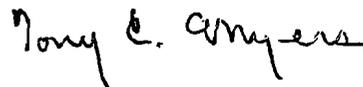
**(2) Respondent’s Legal Duty to Insure Clear Right.** Respondent, as Petitioner’s trial judge, has a legal duty to insure that Petitioner has effective appellate counsel who timely perfects a petition for appeal for Petitioner. Petitioner has tried on many occasions to persuade Respondent to perform her legal duty (see **History of Proceedings**).

**(3) Absence of Another Remedy of Law.** As shown *supra*, Petitioner has written to Respondent, made *pro se* motions for resentencing and appointment of new appellate counsel, and even written to the chief public defender of Kanawha County about Mr. Sullivan's deficient performance as appellate counsel. None of these actions resulted in any relief for Petitioner. It is clear therefore that Petitioner has no other remedy of law within the Kanawha County Circuit Court, and must rely on a writ from this Court for relief. It could be argued that habeas corpus, not mandamus, is the proper writ. If that be the case, Petitioner invites this Court to convert the instant petition to a request for the writ (habeas corpus, mandamus) that best suits the situation.

#### **SUMMARY AND PRAYER FOR RELIEF**

**W**herefore, Petitioner prays for relief in the form of a rule returnable to Respondent directing Respondent to resentence Petitioner for appeal purposes and appoint different appellate counsel to perfect Petitioner's appeal.

Respectfully Submitted,



Tony Curtis Myers, #18605  
Mount Olive Correctional Complex  
One Mountainside Way  
Mt. Olive, WV 25185

**CERTIFICATE OF SERVICE**

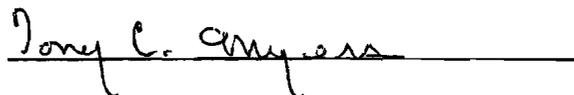
The undersigned Petitioner hereby certifies that he sent a true copy of the foregoing  
PETITION FOR A WRIT OF MANDAMUS via the United States mail to each of

The Honorable Jennifer Bailey Walker  
Judge, 13<sup>th</sup> Circuit  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, WV 25301

and

Kanawha County Prosecutor  
700 Washington Street, East - 4<sup>th</sup> Floor  
Charleston, WV 25301

on this 23 day of February, 2010.

A handwritten signature in black ink, reading "Tony C. Myers", is written over a horizontal line.

Tony Curtis Myers, #18605  
Mount Olive Correctional Complex  
One Mountainside Way  
Mt. Olive, WV 25185

STATE OF WEST VIRGINIA

vs. TONY CURTIS MYERS

LINE DATE ACTION

1 09/18/07 \*CR CASE HIST W/ATT (07-F-2012-14)  
2 09/11/07 TA O: CT APPT PDC AS C OF R/STU (S, 9/6)  
3 11/15/07 INDICIMENT RETURN  
4 11/28/07 TSC ST OF WV'S REQ FOR RECIPROCAL DISC, REQ FOR NOT OF DEF OF  
5 ALIBI, NOT OF INSANITY DEF OR OF EXPERT TEST OF D'S MENTAL COND  
6 ST OF WV'S WITHN LIST W/COS  
7 11/28/07 = ORDER HD TO PA, PD, HC; 11/28/07; LT  
8 11/28/07 + O: FLEA NG, TD 2/4/08 9AM, BCND \$50,000. PS W/COND OF HC/WAL  
9 01/15/08 + PRO SE MOTION FOR APPT OF NEW ATTY  
10 01/16/08 TA REQ & ISSUED CD DUPLICATION FOR PRO ATTY  
11 01/22/08 TA ST OF WV'S SUPPLEMENTAL DISCOVERY W/COS  
12 01/25/08 TA MOT TO SUPPRESS W/COS  
13 01/25/08 TA MOT TO SUPPRESS IDENTIFICATION TESTIMONY W/COS  
14 01/28/08 TSC O: FOR GJ TRANS, ST OF WV'S MOT FOR GJ TRANS  
15 01/30/08 + MOT TO SUPPRESS EVID OBT BY SEARCH WARRANT W/COS  
16 02/01/08 TSC SEALED GJ TRANS 11/14/07  
17 02/06/08 + MEMO TO JDG WAL FR D. HOLSTEIN IN RE: INEVITABLE DISCOV RULE  
18 02/06/08 + MEMO TO JDG WAL FR D. HOLSTEIN IN RE: SUPPRESSION ISSUES  
19 02/13/08 = ORDERS (4) HD TO PA (6 CPYS); 2/13/08; LT  
20 02/13/08 + O: GRT PET FOR OUT-OF-ST WITHN, MIKE PRICE IN KY TO APPEAR  
21 3/4/08 9AM/WAL; CERTIF OF JDG; AFD; AFD; PETITION  
22 02/13/08 + O: CERTIF TO BE ISSUED TO COMPEL ATTEND OF OUT-OF-ST WITHN/WAL  
23 02/13/08 + O: GRT PET FOR OUT-OF-ST WITHN, PEDRO TORRES IN KY TO APPEAR  
24 3/4/08 9AM/WAL; CERTIF OF JDG; AFD; AFD; PETITION  
25 02/13/08 + O: CERTIF TO BE ISSUED TO COMPEL ATTEND OF OUT-OF-ST WITHN/WAL  
26 02/21/08 = ORDER HD TO PA, PD; 2/20/08; LT  
27 02/21/08 + O: TD CONT 3/3/08 9AM/WAL (S2/20/08)  
28 02/27/08 = ORDER HD TO PA (5 CPYS); 2/27/08; LT  
29 02/27/08 + ST'S FINAL WITNESS LIST W/COS; ST'S FINAL EXHIBIT LIST W/COS;  
30 ST'S SUPPLE DISCOV RESPONSE W/COS  
31 02/27/08 + O: WR OF HAB CORP AD TESTIF DIR TO JOE BERCHETT, BOYD CO DET  
32 CTR FOR REL PEDRO TORRES TO CPD FOR TRANSP TO SCRJ & APPEAR  
33 IN CT 3/4/08 9AM/WA; PETITION; WRIT  
34 03/04/08 + SPECIAL INTERROGATORY; JURY VERDICT FORM; WITNESS LIST; EVID  
35 LOG; JURY SELECTION SHEET; JDG'S CHG TO JURY  
36 03/05/08 = ORDER HD TO PA, PD; 3/3/08; LT  
37 03/05/08 + JDG'S CHG TO JURY  
38 03/05/08 + O: IN RE PRE-TRIAL MOTIONS/WAL  
39 03/11/08 + JURY COSTS IN THE AMT OF \$1343.00  
40 03/18/08 = ORDER HD TO PA, PD; 3/10/08; ORDER HD TO PA, PD; 3/14/08; LT  
41 03/17/08 + O: JURY VERDICT: DEF GUILTY OF 1ST DEG ROBBERY IN CT 1, 2 & 3  
42 & BD IS REVOKED & DEF REMANDED TO SCRJ UNTIL DISPOS/WAL(S3/10)  
43 03/17/08 + AMD O: JURY VERDICT: DEF GUILTY OF 1ST DEG ROBBERY IN CT 1,  
44 2 & 3 & BD REVOKED & DEF REMANDED TO SCRJ UNTIL DISPOS/WAL(S3/14)  
45 03/31/08 + LTR DTD 3/27/08 TO JDG WAL FR DEF  
46 04/24/08 + DEF'S MOT FOR RETURN OF PROPERTY W/COS  
47 05/01/08 = ORDER HD TO PA, PD, SCRJ, PAROLE BD; MAILED TO DOC, MOCC;  
48 INTERPT MAIL TO KCC; 4/30/08; LT  
49 04/30/08 + O: CT 1: PENT 60 YRS W/CRED OF 239 DAYS; CT 2: PENT 60 YRS  
50 TO RUN CONCUR W/CT 1; CT 3: PENT 60 YRS TO RUN CONCUR W/CT 2/  
51 WAL (S4/30/08 NUNC PRO TUNC 4/25/08)  
52 05/01/08 + CERT COMMIT; PENT COMMIT  
53 05/01/08 + TAXATION OF CT COSTS MAILED TO DEF  
54 05/02/08 TSC CDR TO CIB

STATE OF WEST VIRGINIA

vs. TONY CURTIS MYERS

LINE DATE ACTION

55 05/16/08 + TAXATION OF CT COSTS MAILED TO DEF RET - UNABLE TO FORWARD  
56 08/04/08 = ORDER HD TO PA, PD, SCRJ, PAROLE BD; MAILED TO DOC, MOCC;  
57 8/1/08; LT  
58 08/01/08 + RE-SENTENCING O: CT 1: PENT 60 YRS; CT 2: PENT 60 YRS TO RUN  
59 CONCUR W/CT 1; CT 3: PENT 60 YRS TO RUN CONCUR W/CT 2 W/CRED  
60 FR 8/30/07 OF 336 DAYS/WAL  
61 09/30/08 + LTR DTD 9/14/08 TO JDG WAL FR DEF  
62 09/15/09 + LTR DTD 9/14/09 REQ CPY OF DOCKET SHEET (MAILED THIS DATE)  
63 10/01/09 + LTR DTD 9/28/09 TO JDG BAIL FR DEF

September 28, 2009

Dear Judge Walker

My name is Tony C. Myers #18605. My address is as follows:

Tony C. Myers #18605

MOUNT OLIVE CORRECTIONAL COMPLEX

ONE MOUNTAINSIDE WAY

MOUNT OLIVE, W.VA 25185

Enclosed is motion for appointment of course for direct appeal and motion requesting re-sentencing to reinstate direct appeal rights. The attorney who represented me at trial told me he would file a appeal of my case and failed to do so. I feel my direct appeal rights are being denied. Judge Walker would you please correct this situation.

Respectfully,

Tony C. Myers

EXHIBIT B

In the Circuit Court of Kanawha County, West Virginia

State of West Virginia

07-F-69

Judge - Bailey Walker

V

Tony Curtis Myers

September 28, 2009

Motion For Appointment Of Counsel For Direct Appeal

AND

Motion Requesting Re-Sentencing To Reinstate Direct Appeal Rights

Come now Tony Curtis Myers, case number 07-F-69 and moves this honorable court for appointment of counsel for direct appeal on re-sentencing to reinstate direct appeal rights.

Public defender John Sullivan the attorney who represented me on this case told me he would contact you for the purpose of having you do another re-sentencing order for the purpose of filing a appeal of this case and the appointment of a appeal attorney.

See Enclosed Docket Sheet Listing

Docket sheet listing on line 52 shows a

resentencing order was done.  
Docket sheet listing on line 61 shows I  
wrote you a letter in regards to the appeal  
of my case and the appointment of a  
appeal attorney.

John Sullivan the attorney who represent  
me has failed to file a appeal for my case  
I was found guilty back in March of 200  
and I feel my direct appeal rights are being  
denied.

I respectfully request from this honorable  
court the appointment of counsel for  
direct appeal of my case and re-sentencing  
to reinstate direct appeal rights.

Respectfully Submitted,

Tommy E. Myers

November 23, 2009

Dear Mr. Castelle

My name is Tony C. Myers. My address here is as follows.

Tony C. MYERS # 18605  
MOUNT OLIVE CORRECTIONAL COMPLEX  
ONE MOUNTAIN SIDE WAY  
MOUNT OLIVE, W.VA 25185

Back in August of 2007 I was arrested and charged with 1<sup>ST</sup> degree robbery. Attorney John Sullivan from your office was appointed to represent me on my case. My case number is 07-F-569.

On March 4, 2008 I was found guilty on my case. I told John Sullivan I wanted to file a appeal of my case. Sullivan told me he would file a appeal of my case, he did not do so.

He later told me he would contact Judge

Walker for the purpose of having her do a RE-sentencing order for the purpose of filing a appeal of my case.

See Enclosed Docket Sheet Listing

Docket sheet listing on Line 58 shows a RE-sentencing order was done by Judge Walker.

As of this date John Sullivan the attorney who represented me, has Failed to File a appeal a my case.

MR. Castelle would you please have a talk wit MR. Sullivan and have a appeal of my case filed.

Would you please have someone from your office contact me as to what is being done in regards to my appeal.

Would it be possible for me to call your office from this institution and would my call be accepted.

I would appreciate a prompt response from your office sir.

Respectfully,

Tom D. Mc...