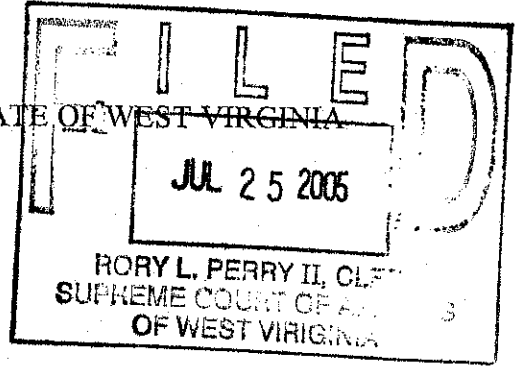


IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA  
AT CHARLESTON

No. 32567



STATE OF WEST VIRGINIA, EX REL.  
JAMES MICHAEL WENSELL  
Appellant,

VS.

Monongalia County Habeas Case No: 01-C-511  
(Underlying Criminal Case 96-F-22)

GEORGE TRENT, WARDEN, MOUNT  
OLIVE CORRECTIONAL COMPLEX  
Appellee.

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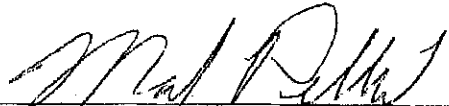
APPELLANT'S REPLY BRIEF

APPEAL FROM ORDER DENYING HABEAS CORPUS RELIEF FOLLOWING  
OMNIBUS HEARING

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**MEMORANDUM OF PARTIES**

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APPELLEE :                    STATE OF WEST VIRGINIA

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ARGUMENT AND DISCUSSION OF LAW IN REPLY TO BRIEF OF APPELLEE:

Mr. Wensell contended in his Brief that his appointed counsel was Ineffective. Specifically, Appellant stated his trial counsel "failed to properly investigate the case, failed to retain an investigator, failed to retain an expert to help him cross-examine State experts, failed to meet with his client and help prepare his client for trial, failed to object to numerous instances of hearsay and improper statements by the prosecutor."

Appellee addressed each of these contentions individually in his brief. Regarding the "Failure to Meet With Client" contention, Appellee dismisses Appellant's argument by stating "the Appellant has alleged a claim better addressed to the State Bar's Office of Disciplinary Counsel" (Point 7, page 26 of Appellee's brief) than to an argument concerning Ineffective Assistance of Counsel. Appellee also essentially dismisses Appellant's claim that trial counsel only met with the defendant twice prior to trial. Appellant would simply urge the Court to read trial counsel's testimony at the August 23, 2002 Habeas hearing ( transcript pages 118-143). Mr. Higgins testified under cross-examination thusly:

Q: As far as your time sheet is concerned, let me show you what has been marked as Petitioner's no. 8 and ask you if you could point out in there the times and dates that you met personally with my client during your representation in this case?

A: I think there were three. December 6<sup>th</sup>, we met for I think an hour and half. July 8<sup>th</sup> of 96.

Q: July 8<sup>th</sup> ?

A: July 8<sup>th</sup> of 1996, a little more than an hour and a half. And there was a conference July 19<sup>th</sup>?

Q: That's after the trial starts though?

A: '96, after the trial. And the other conference that's on here is October 25<sup>th</sup> of '96.

Q: Prior to trial you met with him twice?

A: That's what it appears like on my sheet, that's correct.

Q: So you basically met with him two days after he was arraigned and you didn't meet with him again until one week prior to the beginning of the trial and that was after a motion to continue was denied, is that correct?

A: That's what it looks like.

(See Habeas transcript, pages 129-130)

Mr. Wensell was charged in cases 99-F-383 and 99-F-389 on November 22 1995 ; On November 28, 1995, Howard Higgins was appointed to represent Mr. Wensell. On January 4 1996, Mr. Wensell was Indicted on 13 counts of felony sex crimes: eight counts of first degree sexual assault, three counts of sexual abuse and two counts of sexual abuse by a custodian of a child. On Monday, July 8, 1996, eight days prior to trial, Mr. Higgin's requested a continuance, stating among other things:

"I am here asking for a continuance because I don't think that it's fair to Mr. Wensell, due to his luck of the draw in receiving somebody who has had those kinds of obligations fall upon them in such a short period of time. I know we all have obligations and we all have to try to keep those balls juggled and the cases moving as it is, but the Court needs to take into consideration, also that I am a sole practitioner."

The continuance was denied and the trial took place on July 16, 1996.

*According to Mr. Higgins own testimony*, in a major felony trial, he had significant strategy meetings with his client in person only two times, before the trial: December 6<sup>th</sup> and July 8<sup>th</sup>.

Appellee rightly points out that there were indeed several *six minute* phone conversations between client and appointed counsel prior to trial. One on December 4

1995, one on July 8 1996 and one a few days before trial on July 10, 1996. Apparently, the July 10, 1996 six-minute phone conference was the last 'strategy conference' between Mr. Wensell and Mr. Higgins.

As Appellee fairly indicates the West Virginia Supreme Court has not "adopted a bright line rule requiring defense counsel to meet the defendant a specific number of times before trial. In Syl.Pt.3, in part, State rel. M.S.B. v. Lemaster, 173 W.Va. 176, 313 S.E.2d 453 (1984), this Court held, "counsel must confer with his client without delay and as often as necessary to advise him of his right and to elicit matters of defense or to ascertain that potential defenses are unavailable."

While this Court does not require defense counsel to meet with a client a specific number of times prior to trial, the Court cannot ignore the obvious fact that in this particular case, Mr. Higgins did not meet Mr. Wensell enough to effectively represent him at trial -- According to Mr. Higgins own testimony, in the six months prior to trial, Mr. Higgins met with Mr. Wensell one time to discuss strategy. One time. And that was on July 8, 1996 -- eight days before trial, and on the day his continuance motion was denied.

Appellee argues "there is no evidence that defense counsel ever refused to meet with the Appellant. The Appellant just did not try." This argument must be dismissed. An appointed defense counsel has a Constitutional duty to properly investigate a felony criminal case and to diligently prepare for such a criminal trial. If an appointed defense counsel merely meets with a Defendant one time in the six months leading up to a complex felony sexual assault trial -- this fact combined with the other lapses set forth in the Appellant's brief, amounts to Ineffective Assistance of Counsel.

In point 4 of the State's Brief, Appellee addresses the defense contention that trial counsel was ineffective because he did not hire a private investigator. Appellant also argued that trial counsel was ineffective because he did not hire a psychological expert to aid him in his cross-examination of the State's psychological experts, and Appellee addresses that issue in point 5 of his brief. Appellee notes on page 18 of his brief that the "habeas court ruled that trial counsel's failure to hire a psychological expert, a medical doctor, and a private investigator fell below the objectively reasonable prong of the Strickland test. (Order at 16.)" Judge Stone addressed these issues in his Order following the Habeas hearing:

At the omnibus hearing the petitioner's expert, Mr. Mills testified that the retention of both an investigator and a psychological expert is paramount to building a defense in a criminal case such as the underlying case at bar. He opined that the petitioner's trial counsel fell below professional standards in not retaining these individuals to assist in building a defense for Wensell.

Regarding the psychological expert, Mr. Mills testified that he did not believe a proper cross-examination of the State's psychological expert could be performed in a sexual abuse case without the retention of a psychological expert to assist the counsel for the defendant in understanding the psychological issues in play.

At the omnibus hearing, petitioner's trial counsel did not affirmatively say why he decided not to obtain a psychological expert. He did have some vague recollection of consulting with a medical doctor regarding some of the physical findings made by the State's medical expert, Dr. Rosas. However, Mr. Higgins never set forth any reasons during his testimony why he did not hire a psychological expert. (See Order Denying Habeas Relief, p.15)

Judge Stone also noted that Trial Counsel's explanation of why he did not hire a private investigator was unconvincing:

Regarding the hiring of an investigator, Mr. Higgins did expound a bit during the omnibus hearing as to why he did not retain an investigator to help prepare a defense. Mr. Higgins noted that initially, he thought it would be good to have an investigator to follow up on leads in the case given to him by the petitioner and his mother, Nancy Sanders, regarding possible motives for the

petitioner's ex-wife, and the victim's mother, Bobbie Wensell, to make up and influence the victim's making up and reporting these allegations against the petitioner, as well as leads regarding possible other perpetrators of the sexual assault. However, Mr. Higgins said after making a few phone calls and other contacts with people who might have information, he determined that any helpful information was not first hand, but rather hearsay, and therefore would not be useful at trial. Consequently, based on his preliminary contacts with possible helpful witnesses to the petitioner's case, Higgins decided engaging the services of an investigator would not be fruitful.

Having reviewed this issue, this Court is of the opinion that the petitioner's counsel did fall below professional standards in not retaining an investigator and a psychological expert to assist with preparing the petitioner's case. This is because in light of the defendant/petitioner's defense that the victim's were making up these allegations against him at the behest of their mother, having both an investigator and a psychological expert could have led to helpful information. Having an investigator available to him would have assisted attorney Higgins to more closely follow up on some of these 'loose' leads that the petitioner and his mother gave to him. In fact, in this Court's opinion, the reasons stated by Mr. Higgins as to why he ultimately believed there was no need to retain an investigator are actually reasons why Mr. Higgins *should have* retained an investigator. The fact that Mr. Higgins' cursory investigation of contacting a few people lead only to hearsay testimony shows that an investigator might have been able to help 'track down' any people that did have first hand knowledge of exculpatory evidence. (See Order Denying Habeas Relief, p.16)

Judge Stone added that hiring a "psychological expert **would** have assisted attorney Higgins in more effectively cross-examining the victims in the underlying criminal case, as well as cross-examining the psychological experts of the State, who interviewed the two victims

Appellee argues (page 19) "Appellant's claim that a private investigator would have assisted his defense is speculative." Appellee also rightly notes that Appellant did refer to a list of witnesses provided to Mr. Higgins prior to trial. That list included among other potential witnesses, a woman named Virginia Faulkner who could have testified that Ms. Wensell had falsely accused her first husband of sexually abusing her children. This is precisely the kind of critical lead a private investigator would have investigated. This is precisely the kind of testimony that would have aided Mr. Wensell

at trial. Appellee dismisses the idea this kind of evidence would aid the Defense and calls such an idea 'patently absurd.' Not only is such evidence and testimony not absurd, it is critical in a case like this one: a case where the defense contends the alleged victims had been coached.

With regard to trial counsel's failure to hire a psychological expert to aid him in his cross-examination of the State's witnesses, Appellee concedes that the trial judge did state an expert 'would have assisted' trial counsel, however Appellee contends that is 'not the point.' "Constitutional prejudice" must be proven, according to Appellee (Page 21). Agreeing with the trial judge, Appellee argues that since Dr. Clayman (the forensic psychologist who testified for the Appellant at the Habeas Hearing) did not assert any flaws in the State experts 'ultimate opinions,' no fundamental prejudice had been proven.

But, Appellant contends fundamental prejudice was proven at the July 23, 2002 Habeas hearing. Dr. Clayman testified that several critical avenues were left unexamined by appointed counsel. For example, Dr. Clayman testified as follows:

"I think Dr. Fremouw used anatomically correct dolls. There is a great deal of controversy now in the literature and this was, I guess, seven years ago. So that may have some bearing on it, but even then, there is a great deal of controversy in literature about how to go about doing the interviews appropriately and that could have been raised, should have been raised about why you did what you do, how you do what you do, do you tape, do you not tape, other issues that were not raised. How many times the children had been questioned. Under what circumstances they had been questioned. Who had questioned them. And those things, from my reading if I remember correctly from the transcripts, were not raised as at least areas confounding." (Habeas Tr. page97)

Dr. Clayman also raised another area that appointed counsel failed to develop:

"The literature is real clear on the suggestibility of children, and I am not attesting to facts here I am just raising issues that should have been raised in my mind. That even if over coaching is not present, covert coaching can be, talk around the house, relatives, overhearing phone calls, the general gist of the way people respond to children when they are giving the answer that somebody wants versus giving the answer that people don't want. *None of those things were raised.* (Habeas Tr. Page 98)

The "impact of marital conflict" was also a critical issue that defense counsel failed to raise in his cross-examination of the State's expert witnesses, according to Dr. Clayman: "From what I understand is the Wensell's were having some marital disturbance. A number of child sexual allegations, and this was not raised as far as I remember in the court transcript, tons of cases, well a lot of the cases that come up where there are child abuse allegations there is marital discord. That at least should have been investigated and it wasn't. Those are the kinds of things at least on the surface of things were not raised in the cross." (Habeas Tr. P.98.)

Dr. Clayman also noted that "there were other issues raised that just did not seem to be pursued, other possible perpetrators of the crime.... Those are some of the kinds of things that were glaringly absent and I have never testified in a case I can think of where people didn't raise some or at least some but usually all of these issues." (Hab.Tr.P.99-100.)

When asked for his 'ultimate opinion,' Dr. Clayman testified "I think there was a lack of adequate assistance or lack of adequate advice given on cross from a psychological perspective that left people, that left this thing not fully developed. It was not a fully developed case from a psychological perspective." (Hab.Tr. P. 108.)

Clearly through expert testimony at the Habeas Hearing, Appellant demonstrated that appointed counsel failed to effectively cross-examine the State witnesses (Mr. Higgins did not even cross-examine Dr. Rosas at all.) and all reason forces one to conclude this was because he was not prepared to do so because he had failed to enlist the aid of experts who could assist him in the complex field of child psychology or forensic

psychology. Appellant also contends that in this particular case, given Mr. Higgins' weak cross-examination of the victims and State witnesses, it is obvious that Mr. Higgins' failure to seek expert aid, DID strongly and unfairly prejudice Mr. Wensell and did have a substantial effect on the outcome of the trial. The State's entire case centered on the complaining witnesses' testimony as well as the State's expert witnesses. The fact that Mr. Higgins 'would' have been assisted in his cross-examination of the State's key witnesses in this case means that Higgins' failure did indeed have a substantial effect on the trial. That is the only reasonable and fair conclusion.

Regarding the litany of other failures, omissions and errors by trial counsel that were documented in Appellant's brief and addressed in Appellee's brief, Appellant would simply point out the facts are what they are: Howard Higgins was appointed to represent Mr. Wensell in November of 1995. At that time Mr. Higgins had only tried "two or three" serious felony sexual assault cases in his career. In preparation for the felony sexual assault case against Michael Wensell, appointed attorney Howard Higgins met face to face with Mr. Wensell a total of only two times to discuss strategy. Mr. Higgins at no time attempted to find or receive any prior medical records to see if the children's 'symptoms' existed prior to the alleged incident date. Trial Counsel did not procure the assistance of a private investigator to help investigate leads in the Defendant's case; He did not retain an expert on child psychology or an expert on sexual abuse of children. He failed to interview potential witnesses involved. He failed to object to the admission of numerous instances of hearsay evidence, irrelevant evidence, opinion evidence, argumentative evidence, and evidence that was not provided by the prosecution pursuant to discovery prior to trial. He failed to adequately cross-examine and attack the

credibility and inconsistencies of the alleged victims themselves. He failed to object to the prosecution's experts rendering opinions that were not based upon a reasonable degree of medical probability or certainty and did not object to opinions given by experts that were not qualified to give in that they went beyond the witness's area of expertise. He failed to effectively cross-examine the Prosecution's experts (He failed to cross-examine Dr. Rosas, a critical State witness, at all) -- The *entire* transcript with respect to Defense Counsel's cross-examination of the State's experts' totals twenty-four pages.

Defense Counsel admitted at the pretrial hearing of July 8, 1996 that he was totally unprepared for trial: "I am here asking for a continuance because I don't think its fair to Mr. Wensell, due to his lack of the draw in receiving somebody who has those kinds of obligations fall upon him in such a short period of time." (T.Pg. 5)

Appellant strongly contends that given the all the aforementioned facts, appointed counsel Howard Higgins rendered Ineffective Assistance in this case. Higgin's performance was deficient under an objective standard of reasonableness and, there is a reasonable probability that, but for counsel's deficient conduct, the result of the proceeding may have been different. Michael Wensell did not receive a fair trial because Howard Higgins was not prepared to defend Mr. Wensell.

Regarding Appellant's contention that the Trial Court erred in admitting evidence of other wrongs allegedly committed by Mr. Wensell, Appellant stands by the argument set forth in Appellant's brief -- Namely, that the Trial Court's 404(b) rulings violated the fundamental principles set forth in State v Edward Charles L. 183 W. Va. 641, 398

S.E.2d 123 (1990), State v McGhee, 193, W.Va. 164, 455 S.E.2d 533 (1995) and State v McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

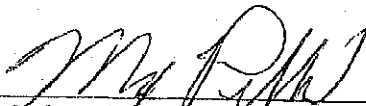
As reflected in the trial transcripts the Prosecution was allowed to introduce numerous instances of other wrongdoing by the Defendant in the sexual crimes case. The following 'wrongs' were referenced by the prosecution: (1) The Defendant punished his children by spanking them with a paddle board. (2) The Defendant smacked his stepdaughter, Tricia Ellifritz with an open hand in 1992 causing her facial bruises, (3) The Defendant assaulted his wife in a domestic dispute in 1994. (4) The Defendant disciplined his children extensively in a non-physical manner such as sending them to their room, etc.

The Prosecution and Trial Court's reliance on State v Edward Charles L., in allowing the pedophilia testimony is misplaced. Although State v Edward Charles L. recognized the admissibility of collateral acts evidence and circumstances in which the State was attempting to prove lustful disposition toward children, the rule announced by the Court was limited to sexual crimes against children. When one reads the Charles case it is apparent that the Court is limited the lustful disposition section to those circumstances in which the base offense is child molestation and to collateral acts that relate to the same conduct. The Court specifically commented that other acts of deviant sexual behavior present in Edward Charles, were not probative and should not have been introduced for consideration of the jury. The trial court here, was inherently wrong in its assessment that all the evidence it allowed to come in relating to the Defendant's discipline or physical conduct against his stepdaughters and his wife was probative on whether he had sexually abused and assaulted Amy and Tricia Ellifritz.

**CONCLUSION AND RELIEF REQUESTED**

The Appellant has clearly demonstrated that the Michael Wensell's trial counsel Howard Higgins rendered Ineffective Assistance and that the Trial Judge erred in allowing the Jury to hear unfairly prejudicial 'bad acts' that the Defendant allegedly committed. Therefore, the Appellant urges this Court to grant him a new trial and remand this case back to the Circuit Court of Monongalia County.

Michael Wensell,  
Appellant by Counsel.

  
\_\_\_\_\_  
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STATE OF WEST VIRGINIA, EX REL.  
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GEORGE TRENT, WARDEN, MOUNT  
OLIVE CORRECTIONAL COMPLEX  
Respondent.

CERTIFICATE OF SERVICE

I, Mark Pellegrin, hereby certify that I served a true and accurate copy of the attached, "APPELLANT'S REPLY BRIEF" upon Marsha Ashdown, by hand delivering an accurate copy of said document to the office of the Prosecuting Attorney of Monongalia County West Virginia, at the Monongalia County Court House, in Morgantown WV on July 25, 2005; Moreover, I mailed (and Faxed) a copy to the Office of the Attorney General at the following address: State of West Virginia, Office of Attorney General, Bldng. 1, Room E26, Charleston WV 25305 ; I also certify that I transmitted an original and nine accurate copies to the West Virginia Supreme Court (Fax no: (304) 558-3815) on July 25, 2005.



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