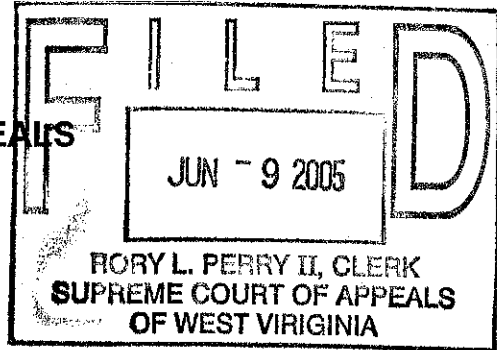


IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA  
CHARLESTON



Docket No. 32661

STATE OF WEST VIRGINIA *ex rel.*  
Miguel A. Quinones,  
Plaintiff below, Appellant,

v.

Underlying proceedings  
Civil Action No. 02-CV-03,  
*Habeas Corpus*  
Underlying Criminal No.: 98-F-03  
Charles M. Vickers, Judge

JAMES RUBENSTEIN, COMMISSIONER,  
West Virginia Dept. of Corrections,  
Appellee.

BRIEF ON BEHALF OF APPELLANT

J. L. Hickok  
Appellate Advocacy Division  
Public Defender Services  
Building 3, Room 330  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0730  
(304) 558-3905

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	1
INTRODUCTION .....	1
I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW .....	2
II. STATEMENT OF FACTS .....	3
<i>Biographical Facts</i> .....	3
<i>Facts from the underlying crime</i> .....	3
<i>Trial Facts</i> .....	5
II. ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED .....	8
IV. POINTS AND AUTHORITIES .....	9
V. ARGUMENT .....	12
A. <i>Counsel provided ineffective assistance to Petitioner in the     following ways</i> .....	12
1. <i>Counsel failed to conduct an adequate investigation</i> .....	12
2. <i>Counsel did not adequately advise Petitioner and did not         prepare him to testify</i> .....	16
3. <i>Counsel failed to subject the State's case to meaningful         adversarial testing</i> .....	19
4. <i>But for counsel's deficient performance of his duties to Petitioner,         it is probable that the outcome of the prosecution would have been         a lesser sentence</i> .....	20
B. <i>The cumulative effect of all of counsel's deficiencies was that he     received ineffective assistance of counsel, with the result that he     did not receive due process of law</i> .....	21
C. <i>The Court erred in refusing to strike jurors Browning and Wagner,     for cause</i> .....	22
CONCLUSION .....	24

## TABLE OF AUTHORITIES

### Cases

<i>Evitts v. Lucey</i> , 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).....	10
<i>O'Dell v. Miller</i> , 211 W.Va. 285, 565 S.E.2d 407 (2002) .....	11, 22, 24
<i>State ex rel. Bess v. Legursky</i> , 195 W.Va. 435, 465 S.E.2d 892 (1995) .....	9, 10, 20
<i>State ex rel. Daniel v. Legursky</i> , 195 W.Va. 465 S.E.2d 416 (1995) .....	10
<i>State ex rel. Myers v. Painter</i> , 213 W.Va. 32, 576 S.E.2d 277 (W.Va., 2002) .....	10
<i>State ex rel. Strogan v. Trent</i> , 196 W.Va. 148, 469 S.E.2d 7 (1996) .....	10
<i>State v. Cooper</i> , 172 W.Va. 266, 304 S.E.2d 851 (1983) .....	11, 22
<i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995).....	9, 20
<i>State v. Mills</i> , 211 W.Va. 532, 566 S.E.2d 891 (W.Va., 2002) .....	11, 22, 24
<i>State v. Schermerhorn</i> , 211 W.Va. 376, 566 S.E.2d 263 (W.Va., 2002) .....	11, 22, 24
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	9, 10, 20
<i>U.S. v. Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	11, 19
<i>Wiggins v. Smith</i> , 123 S.Ct. 2537, 156 L.Ed.2d 471(2003).....	10, 12, 13, 14
<i>Williams v. Washington</i> , 59 F.3d 673, 682 (7 <sup>th</sup> Cir. 1995) .....	10
<b>Constitutional Provisions</b>	
<i>United States Constitution</i> , Amendment VI .....	9, 10, 12, 14
<i>West Virginia Constitution</i> , Article III, § 14 .....	9

IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA

Docket No. 042177

STATE OF WEST VIRGINIA *ex rel.*  
Miguel A. Quinones,  
Plaintiff below, Appellant,

v.

Underlying proceedings  
Civil Action No. 02-CV-03,  
*Habeas Corpus*  
Underlying Criminal No.: 98-F-03  
Charles M. Vickers, Judge

JAMES RUBENSTEIN, COMMISSIONER,  
West Virginia Dept. of Corrections,  
Appellee.

APPELLANT'S BRIEF

INTRODUCTION

Miguel Quinones came to Fayette County, West Virginia, seeking a better life than he could have expected on the streets of New York City. He didn't know that his hosts were drug dealers, and he didn't know that a local man would come into his new home, start a fight and be killed. He didn't know that failing to report the crime would brand him as a criminal. He didn't know that a young woman would mistake his voice for that of the killer, and he didn't know that his court appointed lawyer would make insufficient efforts to defend him. He now stands convicted of a murder in a case where the Court ruled that the State could not argue for Felony murder, and where his co-defendants exculpated him from the fatal act.

## I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

The Grand Jury of Fayette County, West Virginia, in January, 1999 indicted Miguel A. Quinones for the murder of Christopher D. Reardon. On December 13, 1999 the Court relieved Attorney Travis D. Harrington as counsel and appointed James W. Keenan as his counsel. On August 11, 2000 a petit jury found Appellant guilty of murder in the second degree. On September 11, 2000 the Court denied Appellant's motion for probation and sentenced him to a definite term of twenty-five years. Attorney Keenan petitioned for appeal, but this Court refused on November 9, 2001.

Appellant filed a *pro se* petition for a writ of *Habeas Corpus*, and the Court appointed Attorney James W. Blankenship as Counsel. Counsel then filed an amended petition, and an evidentiary hearing was held on May 29, 2003 before the Honorable Charles M. Vickers. By its Order of August 5, 2004 the Court adopted the findings and conclusions proposed by counsel for the respondent and denied the relief sought. It is from this Order that this appeal is prosecuted.

*Appellant filed a pro se petition for appeal, but since this case was accepted to an argument docket he has asked that the undersigned appellate counsel represent him. Attached hereto is a supplemental pro se brief, as edited by counsel. We urge this Court to consider both this brief and the attachment. Lack of time to research and argue the grounds so raised prevent the full development in this brief of the grounds contained in the attachment.*

## II. STATEMENT OF FACTS

### ***Biographical Facts:***

Miguel Quinones came to West Virginia with Miguel Gonzalez because his mother died in 1991, his father disappeared when Appellant was seven years old, he had no permanent home and he had no high school education (V3<sup>1</sup> p. 86). His age, at the time, was sixteen and Gonzalez was younger (V3: p. 88). Gonzalez said he had a house and Quinones could stay with him. Soon after he arrived, Quinones determined that drug dealing took place in the house (V3: p. 89). Appellant denied owning guns and said he brought none with him. Married to Aida Rosado, since the offense, Appellant has become the father of a child, Miguel Quinones, Jr. Since his arrest he has rehabilitated himself through counseling and education (he has earned a GED and diplomas in Life Skills and Employability). He has completed a number of college classes (HC: Appellant's proposed "Findings of Fact").

### ***Facts from the underlying crime:***

On June 19, 1995, he was asleep when Mr. Reardon arrived (V3: p. 90). He awakened to the sound of a gunshot, and went toward the sound. He saw Damien Angel Bagut and Reardon holding guns. Reardon lunged toward Quinones and dropped his gun. Appellant turned to run but Reardon grabbed

---

<sup>1</sup> The trial is reported in four volumes, designated V1 through V4. The Habeas Corpus hearing transcript is designated HC.

him. Quinones heard another shot; Reardon released him and fell to the floor. Appellant watched in shock as Bagut shot Reardon a third time and picked up the gun Reardon had dropped. Bagut admitted being the shooter; he said Reardon had attempted to rob him (V3: pp. 91-94). Quinones denied shooting Reardon (V3: p. 100).

Bagut saw Reardon earlier on the day he was killed (V3: pp. 46-49). Reardon had previously "pulled a gun" on Bagut. Reardon asked Bagut to "front" him some cocaine, and Bagut refused. Reardon then grabbed a gun off a table in Bagut's home and said: "You're going to give me what I want." (V3: p. 50) Reardon started getting aggressive "and that's when I pulled out my gun." Reardon raised the gun and Bagut shot him once. "And when he kind of ran towards like the living room, that's when Mr. Quinones had woke up, and [Reardon] grabbed Mr. Quinones on the wrist and like put a real hard lock on him. And I was trying to protect Mr. Quinones, and I shot [Reardon] again." Bagut said Quinones didn't have a gun (V3: pp. 51-52). Appellant had a cast on his right hand (Exhibit 8) and had no use of the hand. He is right-handed. (V3: pp. 95-97)

Gonzalez was asked whether Damien Bagut had later threatened Gonzalez and Quinones. He replied: "He suggested to me that we was all in it together, and . . . if anything happened, we was all going to go down." He never heard Quinones say he participated in the killing of Reardon.

Bagut put a plastic bag over Reardon's head, and, along with Gonzalez, dragged the body to the van. Bagut drove the van away (V3: p. 97). Quinones and Gonzalez stayed behind. When Bagut returned, they said, "We've got to get out of here." They gathered their belongings and Bagut drove them all to Beckley.

Heather Taylor drove Appellant, Damien Bagut and Miguel Gonzalez to New York City. She was accompanied by her son and Diane Green (V1: p. 178). She overheard conversations among the three young males who rode in the back seat. She says they spoke Spanish, at first, and said the man was heavy. (V1: pp. 179-180) She says Damien said Quinones "shot him in the face." When Damien asked, "What if he isn't dead?" she *believes* it was Appellant who answered that the bag he tied around his head or the rope that he tied around his neck would have killed him if the shots hadn't (V1, p. 180).

Quinones denied that he said anything regarding killing Reardon, and Taylor and Green were confused in what they heard (V3: p. 99). This was only the second time Taylor had seen Quinones or Gonzalez, and she agreed that they sound alike (V2: p. 15). Diane Green says she heard Damien say that when he shot Reardon, Quinones started running the other way (V2: p. 97).

***Trial Facts:***

Trial commenced Tuesday, August 8, 2000 with voir dire. The Court advised Appellant with regard to his right to testify and his right to remain silent.

Thereafter, counsel asked the Court's indulgence so that he might further discuss the issue of testimony by Appellant. The Court responded: "What do you mean? You can address that anytime that you want to. I'm sure we're all waiting, why discuss it now? You can do it this evening, any break you want to."

(V1: pp. 52-54)

The State's first witnesses testified on August 8, and resumed on the morning of August 9, with Diane Green. The Court then recessed until 2:30 p.m. because the State's final witness was delayed. The witness had no sooner taken the witness stand when the courtroom lost electrical power. The Court then recessed until 9 a.m. on the following day, Thursday, August 10, 2000. At 9:01 a.m., power had not been restored, so the Court recessed until 1:00 p.m. A trial scheduled to begin on August 7 had been delayed three times, granting counsel several reprieves.

Following completion of the State's evidence, Appellant moved for a judgment of acquittal on the charges of first degree murder. The Court ruled that the State could not argue the Felony Murder theory to the jury because the indictment referred only to premeditation and there was insufficient evidence of any underlying felony (V4: p. 19).

In the case for Appellant, Keenan called Mitch Canterbury, Fayette County Deputy Sheriff. Canterbury testified that he took a statement from Miguel Gonzalez in 1997. The State objected to the introduction of the statement,

Gonzalez not being present. The Court sustained the objection (V3: pp. 26-28).

In an *in camera* hearing, Keenan asserted that Gonzalez was unavailable (the State agreed). In a statement that reveals exasperation with counsel, the Court said he tried to hold a hearing to get something done, "but we left with the understanding that whatever was going to be done would be done at the trial and, really, nothing was accomplished because no motions were made, nothing was done, and the Court made no ruling."

The Court permitted Keenan to read into the record a portion of a transcript from a Transfer hearing for Appellant, specifically the testimony of Miguel Gonzalez. Following the reading from the transcript, Keenan announced that he wanted "the balance of the afternoon" to properly warn Appellant and to counsel him with regard to the waiver of the privilege against self-incrimination, and he requested a continuance of the trial until the following morning. The Court responded: "Why wasn't that done prior to now?"(V3: p. 81) "Can you do it in 20 minutes?" Keenan said he could not, but the Court gave him only twenty minutes. (V3: p. 82)

The Court then addressed Appellant's rights, and recessed. When Court re-convened, Keenan asked: "May I confer with my client, Your Honor? I apologize." Another recess was taken. The Court then inquired: "Is counsel ready to bring the jury in?" Keenan: "No, Your Honor . . ."

THE COURT: "Well, that's all the time I'm going to give you, Mr. Keenan. You've had plenty of time to consult with your client, as far as I'm concerned. The only matter before you is whether or not he's going to testify . . . . I don't know that we can just delay this trial indefinitely to give you an opportunity to talk to your client.

(V3: pp. 83-84)

## **II. ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED**

### ***A. Counsel provided ineffective assistance to Appellant in the***

***following ways:***

- 1. Counsel failed to conduct an adequate investigation;***
- 2. Counsel did not adequately advise Appellant and did not prepare him to testify;***
- 3. Counsel failed to subject the State's case to meaningful adversarial testing;***
- 4. But for counsel's deficient performance of his duties to Appellant, it is probable that the outcome of the prosecution would have been a lesser sentence.***

***B. The cumulative effect of all of counsel's deficiencies was that he received ineffective assistance of counsel, with the result that he did not receive due process of law.***

***C. The Court erred in refusing to strike jurors Browning and Wagner, for cause.***

***D. The following assignments of error are raised in the pro se petition but not fully developed in this brief:***

- 1. The Habeas Court did not consider all grounds raised by Appellant, and did not rule upon them in his final Order;***

**2. The Habeas Court accepted false allegations from the State regarding extradition and included them as findings of fact;**

**3. There was insufficient evidence to convict Appellant of murder;**

**4. The Trial Court erred in not conducting individual voir dire of jurors concerning a highly prejudicial statement made to a television reporter by the Prosecuting Attorney or granting a motion for a mistrial due to prejudicial publicity.**

#### **IV. POINTS AND AUTHORITIES**

1. In West Virginia, claims of ineffective assistance of counsel are governed by a two-pronged test: (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 proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) Syllabus Point 5.

2. The standard of proof that the Appellant must overcome in ineffective assistance of counsel claims is that of "preponderance of the evidence." *State ex rel. Bess v. Legursky*, 195 W.Va. 435, 465 S.E.2d 892 (1995).

3. Appellant's right to competent and effective assistance of legal counsel is constitutionally guaranteed. *United States Constitution*, Amendment VI; *West Virginia Constitution*, Article III, § 14.

4. The Constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is

retained or appointed. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

5. 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, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314 at 320, 465 S.E.2d 416 at 422 (1995). *State ex rel. Bess v. Legursky*, *supra*; *State ex rel. Strogan v. Trent*, 196 W.Va. 148, 469 S.E.2d 7 (1996).

6. In assessing reasonableness of attorney's investigation, court must consider not only quantum of evidence already known to counsel, but also whether known evidence would lead reasonable attorney to investigate further. *Wiggins v. Smith*, 123 S.Ct. 2537, 156 L.Ed.2d 471 (2003) *United States Constitution*, Amendment VI.

7. In making the requisite showing of prejudice a Appellant may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland's* test. *Williams v. Washington*, 59 F.3d 673, 682 (7<sup>th</sup> Cir. 1995); See, also, *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (W.Va., 2002).

8. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then the Defendant's Sixth Amendment rights have been denied and the adversarial process is presumptively unreliable. *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

9. As far as is practicable in the selection of jurors, 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 (W.Va., 2002); *State v. Mills*, 211 W.Va. 532, 566 S.E.2d 891 (W.Va., 2002).

10. Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating a presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (W.Va., 2002) *Syllabus point #2*. See, also, *State v. Schermerhorn, supra*, and *State v. Mills, supra*.

11. As a result of the denial of due process of law, Appellant was convicted of a more serious offense than were his co-defendants, and was punished disproportionately to his involvement in the crime. Given that he was a juvenile when the offense was committed, the punishment imposed is shocking to the conscience. *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851, at 856 (1983).

## V. ARGUMENT

**A. Counsel provided ineffective assistance to Appellant in the following ways:**

**1. Counsel failed to conduct an adequate investigation:** James W. Keenan was appointed to represent Appellant by Order entered December 13, 1999. Although Appellant's original attorney employed an investigator, it is apparent that Keenan lacked mastery of the information gathered by the investigator and failed to follow-up by interviewing witnesses. He made no attempt to locate Miguel Gonzalez, a vital witness for Appellant. A scheduling Order required that discovery motions be filed by June 29, 2000; Keenan filed no discovery motions (HC p. 6-7). Appellant's prior attorney, Travers R. Harrington, Jr. filed two motions: to exclude evidence (filed 10-18-99) and for identification by lineup (filed 11-1-99). Keenan said he had discussions with Harrington but could not recall discussing the motions. He neither requested a hearing upon the motions nor withdrew them. Keenan could recall no conversations with Appellant regarding the motions (HC pp. 7-8).

In assessing reasonableness of 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.Ed.2d 471(2003) *United States Constitution*, Amendment VI.

At trial, the Court refused to admit an out-of-court statement of Miguel Gonzalez (HC p. 9). Keenan did not request a continuance; he received discovery materials at a pre-trial hearing on *Monday, August 7, 2000*. Trial commenced August 8, 2000.

Appellant says they spent very little time discussing the evidence; “[T]he majority of his conferences was just to discuss the possibility of plea bargaining.” (HC p. 48) Appellant says he did not get to see or discuss the statements of Nick Barraco, Richard Mackey, Joseph Paylawick, Sheriff Saxton, Steven Dwayne Dalton, Dolly May Bailey, Diane Green, Heather Taylor or Susan Gee. He did not see the sheriff’s investigation report, the post mortem examination report, the 911 incident report, the telephone bills of Elizabeth Pankey or Damien Bagut, or the forensics report of C. R. Lane (HC pp. 48-51).

In *Wiggins v. Smith*, 123 S.Ct. 2537, 156 L.Ed.2d 471 (2003) counsel abandoned their investigation of Appellant's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. After his conviction, Wiggins elected to be sentenced by a jury, in a murder case where the death penalty was a possible sentence. The Court found that the investigation fell short of professional standards, and could not be justified as a tactical decision because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background.

An investigation was conducted, at the request of former counsel. Mr. Keenan simply did not utilize the information, nor did he follow up on motions filed or attempt to secure the key out of State witness, Miguel Gonzalez. Trial counsel for Wiggins made no attempt to claim that his lack of investigation was based on a strategic decision, but this case makes clear that counsel's obligation extended to matters that might have mitigated the punishment. The source of this requirement is the *United States Constitution*, Amendment VI.

The United States Supreme Court, in *Wiggins*, 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 of the proceeding would have been different. Demonstrating prejudice required to support a claim of ineffective assistance requires a further determination by the Court of whether the probability of harm is sufficient to undermine confidence in the outcome of the trial. In other words, had Mr. Keenan properly prepared, would Mr. Quinones likely have been acquitted, convicted of a lesser offense, or have been offered a better plea deal that he might have accepted?

The record of the actual sentencing proceedings in *Wiggins* underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Appellant asserts that inattention was the culprit in the instant case, as well.

In March, Appellant asked Keenan to move the Court to permit him to accompany Keenan to the crime scene (HC pp. 52-53). Keenan says he discussed the evidence with Appellant during his visits to the Regional Jail (HC p. 72). He says the only information Appellant had on the location of Gonzalez was, "... up around Jersey or New York City or somewhere up in the east." (HC p. 73)

Keenan spoke with police officers but did not interview any other State witnesses (HC p. 15). He relied upon discovery materials provided to him on January 11, 2000 by Harrington (HC p. 17; Appellant's exhibit #3). He did not seek an Order for Appellant to accompany him to the crime scene (HC p. 22). Keenan reviewed the crime scene photos on August 4, 2000 (HC p. 23). Appellant had received three pages of a statement made by Miguel Gonzalez, and he forwarded them to Keenan (HC p. 44). He furnished the Gonzalez statement to Keenan on July 12, 2000 (HC p. 47).

Keenan "inherited" his private investigator, Richard Patrick, from Travis Harrington, Appellant's original counsel. He first discussed the case with Patrick on January 21, 2000. Patrick had located Gonzalez, but no subpoena was ever served on him. Keenan did not speak with counsel for Miguel Gonzalez until August 7, the day of the pre-trial hearing and the day before trial commenced (HC pp. 24, 32). It was, obviously, too late to have Gonzalez testify in person. The transcript of his testimony at the transfer hearing was helpful, but in person

testimony exonerating Quinones would have been very powerful. Keenan owed it to his client to make that effort. There was no strategic benefit in failing to call Gonzalez, and the probability of harm to Quinones by failing to call Gonzalez is sufficient to undermine confidence in the outcome of the case.

**2. Counsel did not adequately advise Appellant and did not prepare him to testify:** The record makes it very clear that there was poor communication and little rapport between Keenan and Quinones. Appellant testified that after writing several letters to Keenan, and receiving no response, he filed a *pro se* motion for a status hearing because Keenan would not discuss the evidence with him, and he had a block on his phone so that no inmates at the Southern Regional Jail could call him (HC p. 41).

The trial record supports Appellant; Keenan requested additional time to discuss the “jeopardy” he would face in taking the witness stand. Not only had Keenan been Appellant’s attorney for approximately eight months, there had been numerous breaks in the trial. Still, Keenan asked: “May I confer with my client, Your Honor? I apologize.” Another recess was taken. The Court then inquired: “Is counsel ready to bring the jury in?” Keenan: “No, Your Honor . . .” “Well, that’s all the time I’m going to give you, Mr. Keenan. You’ve had plenty of time to consult with your client, as far as I’m concerned.” (V3: pp. 83-84)

According to his own records, Keenan met with Appellant at the Southern Regional Jail on six occasions (HC pp. 10-15). His initial conference was about

an hour, "Set aside waiting time, whatever would have happened at the jail."

(HC p. 12) The dates and time entries are as follows: January 7 (2.3), March 23 (2.5), April 6 (2.0), July 12 (1.0), July 31 (1.2) and August 6 (5.5).

Keenan stated that each entry included his travel of "35 or 40 minutes per direction." (HC pp. 11-12) He also said the 5.5 hours on August 6 "... included some research of law ... I just have commencement time and conclusion time of efforts, not an itemization per effort. ... But I researched law, I had a conference with private investigator Richard Patrick, I traveled to the Southern Regional Jail at Beaver, I had a conference with Mr. Quinones, and I traveled home."

(HC p. 14) Keenan estimated that he spent an hour to and hour and a half with Appellant August 6. Giving Keenan the benefit of the doubt, that means that of the six visits he spent a total of 5.1 hours<sup>2</sup> with Quinones, rather than the 14.5 hours he billed.

Appellant alleges that the amount of time in his conferences with Keenan was significantly less than Keenan alleged. He says the first conference, on January 7, "... was probably the longest conference we had because it was an initial meeting. So that was probably within the realm of 45 minutes, maybe, to an hour." He says the March 23 conference lasted 15 to 20 minutes, that April 6 was the briefest, lasting about ten minutes (HC p. 46). He asked Keenan to have an independent forensic examination of the victim's wounds and the shell casings

---

<sup>2</sup> Time calculations of 1.1, 1.3, 0.8, 0.1, 0.3 and 1.5 hours, respectively

prior to April 6, the original trial date.

Counsel's repeated requests for delays, during trial, for the purpose of consulting with Appellant, are a tacit admission that Counsel had not prepared him for trial. It is also clear that Counsel passed up the opportunity to counsel Quinones during the lengthy recesses.

Giving Appellant the benefit of the doubt, that means that of the six visits Keenan spent 2.8 hours with Appellant, rather than 14.5 hours, but that trial preparation occurred only during the first visit of 0.9 hours. Even Keenan's estimate of 5.1 hours is minimal for a felony trial. The trial transcripts strongly suggest that trial preparation was miniscule.

Appellant's claim that Keenan spent little time preparing him for trial, but tried simply to convince him to accept a plea offer, is borne out by the events of the trial. The conduct of the trial reflects no preparation. Perhaps a plea was in Appellant's best interests, but the failure to prepare for trial put counsel and client in a position of weakness that was telegraphed to the Prosecutor. A well prepared attorney usually receives better offers of settlement, whether the case is a civil action for money damages or a criminal case involving serious penalties. Furthermore, Keenan's lack of preparation and lack of communication so strained the attorney/client relationship that Appellant had no confidence in the advice he was receiving. He could not intelligently choose to accept the plea offered to him, and counsel could not competently represent him at trial.

### **3. Counsel failed to subject the State's case to meaningful**

**adversarial testing:** Keenan filed no discovery motions. While Attorney Harrington had filed motions for exclusion of evidence and for identification by lineup; Keenan requested no hearing upon them. He was unprepared to cross-examine Heather Taylor and Diane Green, two witnesses who delivered damaging blows to the defense without being subjected to rigorous testing. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then the Defendant's Sixth Amendment rights have been denied and the adversarial process is presumptively unreliable. *U.S. v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

A review of the record shows that counsel tried, belatedly, to introduce the statement of co-defendant Miguel Gonzalez. Cross-examination of State's witnesses was usually *pro forma*. While Mr. Keenan exhibits good courtroom skills, he was often "flying by the seat of his pants." Had he made more than minimal preparation he should have been able to obtain an acquittal on the murder charge.

The State's case was weak. A well prepared, aggressive advocate could have sent the jury to their deliberations with serious doubts about the evidence. Appellant should not be confined for a term of years for merely being present when a man was killed. He is entitled to a new trial with an attorney who takes his obligations seriously.

**4. But for counsel's deficient performance of his duties to Appellant, it is probable that the outcome of the prosecution would have been a lesser sentence:** Keenan proffered the testimony of Miguel Gonzalez from a hearing on February 10, 1997 before Judge Hatcher, for the purpose of transferring Quinones from juvenile to adult status. Gonzalez was asked whether Damien Bagut had threatened Gonzalez and Quinones. He replied: "He suggested to me that we was all in it together, and . . . if anything happened, we was all going to go down." Gonzalez was on parole, in Massachusetts, at the time of Appellant's trial.

Had Gonzalez been called as a witness for the defense, it is unlikely that the jury would have found Appellant to be more culpable than his co-defendants. Had the State known that Gonzalez was available and would be called by the defense, it is probable that Appellant would have received a more favorable plea offer. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) Syllabus Point 5. The standard of proof that the Appellant must overcome in ineffective assistance of counsel claims is that of "preponderance of the evidence." *State ex rel. Bess v. Legursky*, 195 W.Va. 435, 465 S.E.2d 892 (1995). Adequate preparation could hardly have resulted in a worse outcome.

***B. The cumulative effect of all of counsel's deficiencies was that he received ineffective assistance of counsel, with the result that he did not receive due process of law:*** The right to counsel is not satisfied merely by appointing a licensed attorney, even if he shows up at trial, makes objections and questions witnesses. Counsel's inadequate investigation and lack of legal research caused him to be unable to properly counsel Appellant.

By failing to file any pre-trial motions or to request a hearing upon those filed by Mr. Harrington, he could not properly judge the strength of the State's case nor could he prepare adequately to cross examine State witnesses. By prematurely committing his efforts to plea negotiations, Keenan lost the confidence of his client, a young, mixed race, Hispanic male.<sup>3</sup> He also permitted the State to negotiate from a superior position, knowing that counsel was ill prepared for trial.

Further, counsel did not take advantage of the delays in the trial, neither doing legal research, nor finishing his investigation, nor preparing Appellant to testify. The multiple deficits add up to a denial of due process of law. Counsel's performance was deficient under an objective standard of reasonableness. As a result of the denial of due process, Appellant was convicted of a more serious offense than were his co-defendants, and was punished disproportionately to his

---

<sup>3</sup> Based on current rates of first incarceration, 17% of Hispanic males will be incarcerated during their lifetimes, compared to 5.9% of white males (Bureau of Prisons, USDOJ Statistics).

involvement in the crime. Given that disproportionality and given that he was a member of a racial minority<sup>4</sup> and a juvenile at the time of the offense, the punishment imposed is shocking to the conscience. *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851, at 856 (1983).

**C. The Court erred in refusing to strike jurors Browning and Wagner, for cause:** Since the underlying criminal case was tried, this Court decided *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (W.Va., 2002), *State v. Schermerhorn*, 211, W.Va.376, 566 S.E.2d 263 (2002) and *State v. Mills*, 211 W.Va. 532, 566 S.E.2d 891 (2002).

Both *Schermerhorn* and *Mills* were reversed for failure to remove a biased juror for cause. In *Schermerhorn*, the juror had a relationship with several assistant prosecutors. The State tried to rehabilitate her, and she assured the Court that she could be fair. See *O'Dell v. Miller*, 211W.Va. 285, 565 S.E.2d 407 (2002) *Syllabus point #2*. See, also, *State v. Mills, supra*. Two jurors in Appellant's criminal trial exhibited clear biases, but the Trial Court refused to remove them for cause.

Juror Wagner's daughter "was killed by a drunk driver." His son was also killed, but the circumstances are not explained.<sup>5</sup> He volunteered: "To me, if someone's drunk and killing with a car, he murdered him." (V1: p. 26) "I don't

---

<sup>4</sup> Sixty-four percent of prison inmates belonged to racial or ethnic minorities in 2001. An estimated 57% of inmates were under age 35 in 2001.

know this gentleman, and don't have a thing against him, but it's hard to get something, when you lose both your children, like that out of your mind."

Keenan asked if he would have similar sentiments about "other drugs."

Wagner replied: "Well, I'm a Christian man, you know . . . . I'm not on alcohol or drugs, I never took any of them to take care of my problems." (V1: pp. 27-28) "I raise my grandson now and I sent him to a Christian school just because of that, I know he will not be exposed to that. I paid for that, and I'm retired. But that's how strong my convictions are against alcohol and drugs." (V1: pp. 28-29) "*[I]f the defendant had no alcohol or no drugs or anything, I'd have nothing against him.*" (V1: pp. 30-31) [Emphasis supplied] The Court incorrectly assumed that Juror Wagner's problems were just with abusers of alcohol or driving under the influence. Clearly, he had a more broadly based prejudice. It is understandable that he has it, but he admits ". . . it's hard to get something . . . like that out of your mind."

Juror John Browning had been represented by Prosecutor Paul Blake and by Assistant Prosecutor Carl Harris "For the last ten years." He indicated that he had employed Harris twice in the prior year (V1: p. 37). Based on the juror's statement that he would "absolutely not" be prejudiced in favor of the State, the Court denied counsel's motion to strike for cause (V1: pp. 38-39). Counsel used two of his peremptory challenges to strike Wagner and Browning (V1: p. 47).

---

<sup>5</sup> Keenan should have inquired; the suggestion is that his son's death was drug related.

While this case was tried before this Court clearly delineated the standards for rehabilitating biased prospective jurors, it is clear that Wagner would be stricken under the provisions of *O'Dell, Mills and Schermerhorn*. Browning would certainly receive greater scrutiny under current standards. Appellant was entitled to twenty jurors "free from cause," and he did not have them.

### CONCLUSION

Attorney Keenan seems to have written this case off from the beginning. Although he denies it, he seems to have concluded that he could plea bargain effectively without adequately preparing for trial. Either he had preliminary negotiations with Mr. Harris, or he was confident he could convince Appellant to accept a plea to second degree murder, and he put no effort into obtaining a better offer. When he was unable to persuade Quinones to accept the offered plea, he was unprepared for trial. The trial court record bears the unmistakable marks of a trial by an attorney who is trying to get by on his wits and prior experience, rather than on painstaking preparation. The cumulative effect was a denial of effective representation and, as a direct result of his deficiencies, a denial of Appellant's rights under the *Constitution of the United States, Amendment VI and the Constitution of the State of West Virginia*.

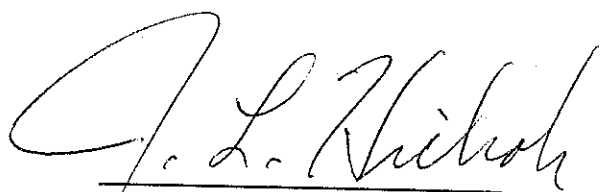
*The Court should also consider the grounds raised by appellant in his attached pro se brief but not delineated in detail, herein.*

The jury panel contained two members whose impartiality can be seriously questioned. While counsel's questioning was not particularly thorough, he succeeded in exposing biases. The State subsequently "rehabilitated" both, although the nature of Mr. Wagner's prejudices was still not completely resolved. Keenan should not have had to use two preemptive challenges to remove them.

Finally, Mr. Quinones, who has been incarcerated for most of a decade, received the most severe punishment among the three co-defendants, despite evidence that his culpability was after the fact. His relative youth and other factors that call for leniency suggest that his sentence is too severe for the nature of his offense. Therefore, Appellant respectfully prays that his conviction on the charge of murder in the second degree be set aside, or in the alternative, that he be remanded to the Circuit Court of Fayette County for the entry of a reduced sentence.

Respectfully submitted,

Miguel A. Quinones,  
By Counsel



J. L. Hickok, Bar #1704  
West Virginia Public Defender Services  
Building 3, Room 330  
1900 Kanawha Boulevard, E.  
Charleston, WV 25305-0730  
Telephone (304)558-3905

Counsel for Appellant