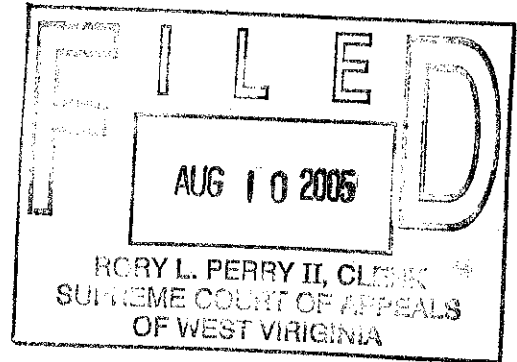


IN THE  
SUPREME COURT OF APPEALS

OF  
WEST VIRGINIA  
CHARLESTON

Docket No. 32661



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

v.

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

BRIEF ON BEHALF OF APPELLEE

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Appellee.**

**APPELLEE'S BRIEF**

**INTRODUCTION**

On June 19, 1995, Christopher Dennis Reardon, who was 49 years of age, was shot and killed by Miguel A. Quinones and Damien Bagut. Both Miguel A. Quinones and Damien Bagut were juveniles at the time of the murder. They, together with Miguel Gonzalez, were selling drugs and had sold drugs to Christopher Dennis Reardon. Mr. Reardon had spent all of his money on drugs and had transferred a vehicle and guns to Miguel A. Quinones, Damien Bagut and Miguel Gonzalez for drugs. On the morning of June 19, 1995, he tried to get drugs on credit. After his murder, the three fled the State of West Virginia for New York in the company of Heather Taylor and Diane Greene. The three were subsequently extradited from states to which they had fled back to the State of West Virginia. Each was transferred to adult status for

the purpose of trial. Miguel A. Quinones escaped from the detention center where he had been placed and was subsequently returned through the extradition process.

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

A Juvenile Petition was filed in the Circuit Court of Fayette County, West Virginia, on July 24, 1995 charging Miguel A. Quinones for the murder of Christopher D. Reardon. Upon his return to the State of West Virginia through extradition, a transfer hearing was held, pursuant to West Virginia Code § 49-5-10, and he was transferred to adult status on February 6, 1997. On July 28, 1997, he escaped from the detention center where he was being held. At the January 1998, term of the Grand Jury of Fayette County, West Virginia, Indictment No. 98-F-03 was returned charging Miguel A. Quinones with the murder of Christopher D. Reardon. Through the extradition process, on July 9, 1999, he was returned from the State of New York to the State of West Virginia. The Court had appointed Travers R. Harrington, Jr., to represent Mr. Quinones, but relieved him of that appointment and replaced him with James W. Keenan by its Order of December 13, 1999.

A petit jury found Miguel A. Quinones guilty of the murder of Christopher D. Reardon on August 11, 2000. On September 22, 2000, the Court denied Appellant's motion for probation and sentenced him to a definite term of twenty-five (25) years in the West Virginia Penitentiary. On November 9, 2001, this Court refused the Appellant's petition for appeal.

Appellant filed a pro se petition for a Writ of Habeas Corpus, and the Circuit Court of Fayette County appointed James W. Blankenship, III as Counsel to represent him. An amended petition was filed and on May 29, 2003, an evidentiary hearing was held before the Honorable Charles M. Vickers. Counsel for both sides submitted proposed findings of fact and conclusions

of law. After consideration of the matter, Judge Vickers entered an Order on August 5, 2004, denying the relief sought by the Appellant.<sup>1</sup>

## II. STATEMENT OF FACTS

While interesting, the Appellant's "Facts" contained in his "Biographical Facts" and "Facts from the underlying crime", have little to do with the matter before the Court and are merely the Appellant's versions of the facts. A Fayette County petit jury found those statements not to be the facts of the case.

After his appointment to represent the Appellant, James W. Keenan received from Travers R. Harrington, Jr., the discovery provided to him by the State. (HC p. 31)<sup>2</sup> In a conversation with the Prosecutor, he was told if he needed anything else to "let me know and I will sit down with you". (HC p. 31)

Mr. Keenan is an attorney with twenty-three (23) years of experience, who has tried hundreds of criminal cases and who has represented defendants in at least a dozen murder cases. (HC pp. 29-30) He spent approximately ninety (90) hours of trial preparation, including reviewing the case with Richard Patrick, an investigator who had worked on the case with Travers Harrington. (HC p. 32)

In preparation for the trial, he met with the Appellant six (6) times at the jail. During those meetings, he discussed with the Appellant an offer made by the State, the statements of witnesses, the forensic evidence, his right to testify or not to testify, his testimony if he chose to testify, and the State's right to cross-examine him if he testified. Mr. Keenan showed and

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<sup>1</sup>Appellant has filed a pro se brief. In paragraphs I, II, III, IV, V, VI, and VII the Appellant addresses matters that are the subject of an appeal of the conviction and not properly before this Court on a Writ of Habeas Corpus. Paragraphs VII and IX are addressed by Counsel for the Appellant in his brief and will not be addressed separately for that reason.

<sup>2</sup>References to the trial transcript are herein noted as V1 through V4, and the Habeas Corpus hearing is designated as HC.

reviewed photos with the Appellant, and discussed witnesses the Appellant wanted to have at the trial. (HC 11, 12, 20, 22, 27 and 28) Mr. Keenan personally went to the crime scene, which was then four years old, and viewed the photographs of the crime scene with deputies. (HC 23 and 72) However, Mr. Keenan did not provide copies of any of the file to the Appellant. (HC 20)

Two (2) motions had been filed by Travers Harrington, one to exclude evidence of other crimes and the second to have a "line-up". Mr. Keenan discussed those motions with Mr. Harrington, but not the Appellant. (HC p. 7) Neither motion was heard by the Court. The first motion was not necessary after a discussion with the State and an agreement that the State would not use evidence of other crimes. The second motion was believed by Mr. Keenan to be "fruitless". (HC p. 8)

The only evidence of other crimes introduced during the trial was that of drug use and trafficking, which was put into evidence by the defense as part of the trial strategy, which strategy was discussed with the Appellant. (HC pp. 33, 34) That strategy was particularly evident in the cross-examination of Dr. Sabet by Mr. Keenan. (V II pp. 79 to 84)

Mr. Keenan did not personally interview witnesses for the State, but had copies of their statements and the interviews of them conducted by his and Mr. Harrington's investigator. (HC p. 72)

Upon the commencement of the trial of the Appellant, two jurors, Juror Browning and Juror Wagner were challenged for cause; Juror Wagner because of his sentiments about drugs and Juror Browning because of his past representation by Prosecutor Blake and Assistant Prosecutor Harris. Both Jurors upon questioning indicated that they could render a verdict based solely on the facts and law. (V1 pp. 31, 32, 38 and 39) Both Jurors were stricken by the Appellant and did not sit on the jury.

The Appellant wanted two (2) witnesses to testify who were not called, Mildred Crawford and Miguel Gonzales. Mildred Crawford was not present at the time the murder occurred, and Mr. Keenan was unable to locate Miguel Gonzales. (HC pp. 23, 24 and 73) A statement given by Miguel Gonzales was attempted to be introduced into evidence by Mr. Keenan, but the Trial Court denied the introduction of the statement finding that it was not trustworthy. (V III p 41) The Trial Court did permit the introduction into evidence of the transcript of the testimony of Miguel Gonzales at his transfer hearing. (V III p. 80)

Before the Appellant testified at the trial, Mr. Keenan asked for time to talk to the Appellant. The Judge gave him twenty (20) minutes. Mr. Keenan requested more time, but was denied additional time. (V III p. 82) The Appellant then testified on his own behalf. On August 11, 2000, the jury found the Appellant guilty of murder in the second degree.

On September 11, 2000, the Trial Court addressed the issues of sentencing and probation for the Appellant. West Virginia Code, Chapter 61, Article 2, Section 3, as amended, provides the punishment for murder in the second degree to be confinement in the penitentiary for a definite term of not less than ten nor more than forty (40) years. The Court heard argument of counsel, the statement of the Appellant and then continued the sentencing and agreed to receive additional written statements in behalf of the Appellant. (Sentencing p. 20) On September 22, 2000, the Trial Court proceeded to a further hearing to address the issues of sentencing and probation. The Court accepted additional written recommendations on behalf of the Appellant. (Sentencing pp. 2 and 3) The Court additionally permitted the Appellant to speak again; whereupon the Trial Court sentenced the Appellant to a definite term of 25 years in the West Virginia State Penitentiary. (Sentencing p. 9) The Trial Court reviewed the Appellant's presentence investigation and the letters it had received. In denying probation, the Court

considered the Appellant's running away from home and coming to West Virginia, his running away from West Virginia after the murder, and his escape from custody. The Trial Court concluded that the Appellant had failed to face up to the adversities he has had. The Appellant continued to deny his complicity in the murder, even after the jury found him guilty. (Sentencing p. 11 and 12).

Damien Bagut was sentenced to a definite term of twenty (20) years in the West Virginia Penitentiary for the offense of murder in the second degree, the Trial Court having been bound to that term by the plea agreement. (Appended Document 1) On April 4, 1997, Miguel Gonzales entered an admission to the lesser-included offense of being an accessory after the fact to murder, under the juvenile petition wherein he was charged with murder. (Appended Document 2) From his testimony (Defendant's Exhibit No. 2), the testimony of Damien Bagut (V III pp. 49 and 50) and the Appellant (V III p. 95), it was determined that the only crime committed by Miguel Gonzales was the crime to which he admitted, accessory after the fact. On May 9, 1997, Miguel Gonzales was placed in the custody of the Division of Corrections for a period not to exceed one year. Attested copies of both Orders are attached to this brief.

### **III. ASSIGNMENTS OF ERROR**

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.

#### IV. POINTS AND AUTHORITIES

1. 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).
2. In reviewing counsel's performance, Courts must apply an objective standard and determine whether, in light of all of the circumstances, the identified acts or omissions were outside the broad range of professional competent assistance, while at the same time refraining from engaging in hindsight or second guessing of trial counsel's strategic decisions. State v. Miller, *supra*.
3. 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).
4. 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.
5. 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, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

6. The fulcrum of any ineffective assistance of counsel claim is the adequacy of counsel's investigation. State ex rel. Daniel v. Legursky, 195 W.Va. 314, 465 S.E.2d 416 (1995). State ex rel. Bess v. Legursky, *supra*; State ex rel. Stogan v. Trent, 196 W.Va. 148, 469 S.E.2d 7 (1996).
7. In assessing reasonableness of attorney's investigation, the court must consider not only 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. 2527, 156 L.Ed.2d 471 (2003).
8. In making the requisite showing of prejudice, an Appellant may demonstrate that the cumulative effect of counsel's individual acts or omissions were substantial enough to meet the Strickland test. Williams v. Washington, 59 F.3d 673 (7<sup>th</sup> Cir. 1995); State ex rel. Myers v. Painter, 213 W.Va. 32, 576 S.E.2d 277 (2002).
9. 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).
10. As far as 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 (2002); State v. Mills, 211 W.Va.532, 566 S.E.2d 891 (2002).
11. 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 (2002)

12. Retroactivity of new case law overruling prior precedent is permitted only under very limited circumstances involving constitutionally-mandated issues. Prophylactic standards designed to safeguard the rights of every criminal defendant which are not constitutional rights are not retroactive. State v. Davisson, 209 W.Va. 303, 547 S.E.2d 241 (2001); State v. Blake, 197 W.Va. 700, 478 S.E.2d 550 (1996).

13. Co-defendants sentenced to different terms are not per se unconstitutional, and the Courts consider many factors such as who was prime mover, prior records, rehabilitative potential and lack of remorse. State v. Cooper 172 W.Va. 266, 304 S.E.2d 851 (1983).

14. There are two tests to determine whether a sentence is so disproportionate to a crime that it violates the Constitution: Is the sentence shocking to the conscience of the Court and society and is it disproportionate. State v. Cooper, *supra*.

15. A *habeas corpus* proceeding is not a substitute for an appeal absent a showing of constitutional dimension. State ex rel. Crupe v. Yardley, 213 W.Va. 335, 582 S.E. 2d 782 (2003)

16. Findings of fact by the trial court in a post-conviction habeas corpus proceeding should not be set aside or reversed unless clearly wrong. Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002).

## V. ARGUMENT

### A: Ineffective Assistance of Counsel:

#### 1. Adequate Investigation:

Mr. Keenan was appointed to represent the Appellant in December 1999, 4 ½ years after the murder of Christopher D. Reardon. It would have been impossible for any material information to be gathered from the crime scene, whether accompanied by the Appellant or not. Mr. Keenan did visit the crime scene himself, but more importantly he reviewed the investigating officers' drawings, reports and photographs, and talked with these officers. (HC 21, 22 and 23)

While he did not personally interview the State's witnesses, Mr. Keenan had Mr. Harrington's file, he talked to Mr. Harrington who had questioned these witnesses at the transfer hearing, and he went over the investigator's interviews of the witnesses. (HC 31, 72 and 73)

Mr. Keenan was unable to locate Miguel Gonzales for the trial. Miguel Gonzales would have been released from the custody of the Department of Corrections no later than May of 1998. (Appended Document 3). His whereabouts were not known and Mr. Keenan had no way of locating him. (HC 75) Appellant's statement that he was on parole in Massachusetts is not supported by any evidence thereof.

Had Miguel Gonzales testified, would the result of the trial been different? Miguel Gonzales was asleep at the time of the murder; therefore, his testimony would not have been as effective as that of Damien Bagut who testified that he did all of the shooting. The petit jury did not believe Damien Bagut or the Appellant. It is unlikely that Miguel Gonzales' testimony would have been more persuasive to that jury.

There is no evidence that any further investigation by Mr. Keenan would have been fruitful in finding evidence to submit to the petit jury. Only the Appellant, Miguel Gonzales and Damien Bagut were at the house at the time of the murder. Heather Taylor and Diane Greene were the only individuals who were with them when they fled to New York.

Mr. Keenan did not need a hearing to exclude evidence of other crimes. It was agreed upon by the State, and the State stood by that agreement, except as to the evidence of drugs introduced by the Appellant for strategic purposes. (HC p. 8) The motion for a pretrial lineup was believed by Mr. Keenan to be fruitless. (HC p. 8) This decision was made after discussion with Mr. Harrington who had filed the motions.

While the Appellant contends that Mr. Keenan did not discuss the facts of the case with him nor discuss his own testimony with him, the Trial Court found otherwise. Mr. Keenan visited the jail to converse with the Appellant on six occasions.

Mr. Keenan also spent approximately ninety (90) hours of trial preparation, certainly not an insignificant amount of time. Mr. Keenan's preparation for trial and investigation of the case was not inadequate and does not fall with the findings made in State ex rel. Daniel v. Legursky, supra; State ex rel. Bess v. Legursky, supra; State ex rel. Strogan v. Trent, supra; or Williams v. Washington, supra.

Further, there is no showing that there is a reasonable probability that the outcome of the trial would have been different as required by Strickland v. Washington and State v. Miller, supra.

## **2. Advice and preparation to testify:**

The Appellant relies heavily upon Mr. Keenan's request during the trial for time to talk to him and the Appellant's rendition of the time Mr. Keenan spent prior to the trial with him to convince this Court that he, the Appellant, had not been properly advised and prepared for his trial testimony. Mr. Keenan denied having received any letters from the Appellant (HC p.71) and stated that on each occasion that he visited the Appellant, he discussed the Appellant's right to testify or not to testify and the State's right to cross-examine him if he testified. (HC pp. 27-

28) It is not uncommon for lawyers to seek more time to talk to clients and witnesses, nor is it necessarily indicative of poor preparation. The Trial Court did not find the Appellant to be convincing. The trial transcript of the Appellant reveals a well thought out story, which he presented to the jury with the aid of his attorney. The Appellant's real problem is that the jury did not believe that story, and he wants to blame his lawyer.

### **3. Meaningful adversarial testing:**

A reading of the trial transcript itself clearly shows that Mr. Keenan was well prepared to cross-examine the State's material witnesses. His examination of Dr. Sabet and use of Dr. Sabet's expertise to his client's advantage, as well as his examination of Heather Taylor and Diane Green, show that he was not "flying by the seat of his pants" as characterized by the Appellant.

The State's case was not as weak as Appellant suggests, and he received a reasonable plea offer, but obviously believed that he and Damien Bagut could convince a jury that the Appellant was not guilty. The Appellant and Damien Bagut failed in that effort and now want this Court to second guess the efforts of Mr. Keenan and to find that the Trial Court's rulings in his Habeas Corpus hearing were clearly wrong. The Trial Court heard his testimony and that of Mr. Keenan and made findings regarding the same. Certainly, the Trial Court had the best opportunity to determine the credibility of the Appellant and Mr. Keenan, particularly since that same Court heard the underlying criminal case.

### **4. Probability of a lesser sentence:**

There is no evidence that had Miguel Gonzales testified the result of the trial would have been different. It is just as likely that a jury would have considered his testimony as unreliable as it considered the testimony of Damien Bagut and the Appellant.

The Appellant was convicted of the same offense as the offense to which Damien Bagut pled. Damien Bagut received a sentence of twenty (20) years by a binding plea agreement. Damien Bagut had not escaped custody and fled the State of West Virginia as had the Appellant. The Court, in imposing a sentence of twenty-five (25) years, indicated its reasons, and a sentence of five (5) years more than Damien Bagut is not excessive, offensive, nor shocking.

**B: Cumulative effect of counsel's representation:**

Appellant makes numerous assumptions without any factual basis presented to this Court to substantiate the same. There is no clear showing that Mr. Keenan did an inadequate investigation nor that he failed to properly research the law.

The pretrial motions requesting "line-up" and "exclusion of evidence" would not have changed the State's opinion of its case nor is there anything to suggest that they would have better prepared Mr. Keenan to cross examine the State's witnesses. Counsel for the State had been in numerous cases with Mr. Keenan over the years and knew him to be an excellent trial technician. That is the reason the State negotiated with Mr. Keenan for a plea rather than a trial.

Appellant is clearly wrong in contending that co-defendants were convicted of lesser offenses and that he was punished disproportionately. Miguel Gonzales admitted, as a juvenile, to the only offense for which he could have been adjudicated to be a delinquent; Damien Bagut pled to murder in the second degree and was sentenced to twenty (20) years, hardly disproportionate to the Appellant under the circumstances.

**C. Jurors Browning and Wagner not removed for cause:**

Under the law in existence at the time of the trial, the Trial Court did not abuse its discretion in not removing jurors Browning and Wagner for cause. This Court's decision in O'Dell v. Miller, *supra*, was not made retroactive. That decision was prophylactic in nature and

should not be applied retroactively. State v. Davisson, *supra*. Under today's standards both jurors would likely be removed for cause, however, that was not the standard at the time of the Appellant's trial.

### CONCLUSION

James Keenan's trial preparation and his trial advocacy should not be judged upon the outcome of the trial. There is an ever-increasing tendency for Monday morning quarterbacking. Trial preparation involves much more than just the interview of a client and going over his rights and testimony. Mr. Keenan could not have tried the criminal case for which the Appellant now cries foul had he not been prepared. His questioning of the State's witnesses bear out his preparation. The Appellant was entitled to adequate representation, and he certainly had that in the underlying criminal case.

Jury selection is always a difficult process. It was no less difficult in the Appellant's case. Upon *voir dire*, a juror indicated that he had a problem with people taking drugs and drinking alcohol. Another juror indicated that he had been represented in the past by the Prosecuting Attorney and the Assistant Prosecuting Attorney trying the case. Both of these jurors upon questioning indicated their respective ability to give the Appellant and the State a fair and impartial trial basing any decision they would make upon the law and evidence given them. That was prior to this Court's direction that Trial Courts should not rehabilitate a juror if there was suspected prejudice from answers to questions. This direction to trial courts should not be made retroactively.

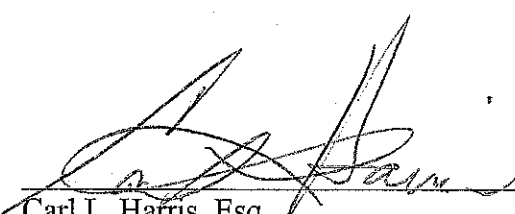
Lastly, much has been made of the inequity of sentencing. Again, Mr. Bagut received a twenty year sentence for murder in the second degree and the Appellant a twenty-five year sentence for the same offense. A distinct difference between the two cases is the Appellant's

escape and absence from the State of West Virginia until extradition and his escape from the detention center in which he was housed.

Upon consideration of all of these matters, the Appellee respectfully requests that the relief requested by the Appellant be denied.

Respectfully submitted,

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