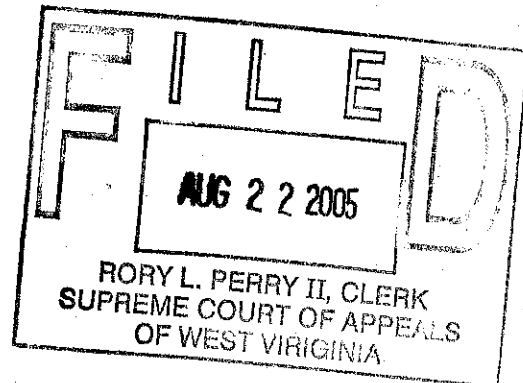


IN THE
SUPREME COURT OF APPEALS

OF
WEST VIRGINIA

CHARLESTON

Docket No. 042177



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

v.

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

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

REPLY 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
(304) 558-3905

Counsel for Appellant

TABLE OF AUTHORITIES

Cases

<i>Kandies v. Polk</i> , 385 F.3d 457 (4 th Cir., N.C., 2004).....	3
<i>O'Dell v. Miller</i> , 211 W.Va. 285, 565 S.E.2d 407 (W.Va., 2002).....	6, 7
<i>State v. Miller</i> , 197 W.Va. 588, 476 S.E.2d 535 (1996)	7
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<i>State v. Schermerhorn</i> , 211 W.Va.376, 566 S.E.2d 263 (2002).....	7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	5
<i>Wiggins v. Smith</i> , 123 S.Ct. 2537, 156 L.Ed.2d 471(2003).....	5

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FACTS OF THE CASE

Appellee's brief suggests that Appellant was an equal participant in selling drugs to Reardon and in causing his death. The record shows otherwise; Mr. Quinones, a juvenile at the time, arrived in West Virginia only a short time prior to the death of Mr. Reardon. Bagut testified that Reardon asked him to sell cocaine on credit, and when he refused, Reardon then grabbed a gun off a table "and that's when I pulled out my gun." Reardon raised the gun and Bagut shot him once. Quinones came into the room and Reardon grabbed him, so Bagut shot Reardon again. Bagut said Quinones didn't have a gun (V3: pp. 50-52).

The State's Argument

I. Appellant did not prove Ineffective Assistance of Counsel. During *voir dire*, Mr. Keenan asked prospective juror Dale Wagner if evidence that the victim had cocaine in his blood and urine would prejudice him *as to the victim*, Wagner said: "No, if he had alcohol and he had cocaine in there, to me they would be equal, one *is guilty* of putting the same thing in their body." (V1: pp. 30-31). There was no follow-up, no attempt to correct him self. This was not a strategic decision. While this apparent slip of the tongue probably did not have a major impact upon the outcome, it is evidence of a pattern that runs throughout this trial.

Appellee's defense of Trial Counsel is "Mr. Keenan is an attorney with twenty-three years of experience, who has tried hundreds of criminal cases . . .

He spent approximately ninety hours of trial preparation.” (Br. 5)* Appellant does not contend that Trial Counsel lacked experience; he does challenge the claim of time spent in preparation. “When considering an ineffective assistance of counsel claim, the attorney’s actual performance is examined, rather than his or her experience, which is an indicator of the attorney’s likely performance.” *Kandies v. Polk*, 385 F.3d 457 (4th Cir., N.C., 2004). Footnote 7. Appellee argues, “Mr. Keenan was unable to find Mr. Gonzalez.” (Br. 7) Appellee concedes, however, that Keenan did not personally interview the State’s witnesses (Br. 12).

While Appellant contends that Keenan did not discuss the facts of the case or his own testimony, Appellee argues that “[T]he Trial Court found otherwise.” (Br. 13) Appellant asserts that the *Habeas* Court erred. Keenan conceded that his time records for visits with Appellant included his travel of “35 or 40 minutes per direction.” (HC pp. 11-12) By his own estimate, that means he spent only five hours with Appellant prior to trial, and some of that must have included discussions about a plea offer.

Appellant contends that there were no discussions about whether he would testify and, if so, what he would say. The trial transcripts (as excerpted in Appellant’s primary brief) certainly suggest that is true. In fact, Appellant filed a *pro se* “Motion for Status Hearing” on March 1, 2000, alleging that since Mr.

* References are consistent with Appellant’s primary brief; references to Appellee’s brief are designated “Br.”

Keenan was appointed to represent him on December 3, 1999, he had seen Appellant only on January 7, 2000 and that he had had no communication from Trial Counsel since that date. A copy of the motion is attached, marked "EXHIBIT 1."

It is possible that Appellant should have accepted the offered plea; he was an accessory after the fact. Without adequate preparation, Trial Counsel could not properly evaluate his client's chances, and he was unable to adequately explain to Appellant why he should accept the offered plea. It was imperative that Keenan establish a good working relationship with his young client. Five hours is certainly not enough time to explain the case, persuade Appellant and leave time to prepare him for trial once he decided not to accept the plea. Appellant assumed he would be properly represented; had he known that Keenan would not represent him effectively he would certainly have accepted the plea and he would be free today.

In response to the assertion that Keenan did not subject the State's case to "meaningful adversarial testing," Appellee merely asserts the conclusion, "Mr. Keenan was well prepared to cross-examine the State's material witnesses." Counsel concedes that the State's case against Appellant was weak, just "not as weak as Appellant suggests . . ." He relies primarily upon the Habeas Court's judgment as to the credibility of Appellant and Keenan, respectively (Br. 14).

Appellee argues that there is no clear showing that trial counsel "did an inadequate job" and that there was no factual basis for the argument that the cumulative effect of Mr. Keenan's deficiencies resulted in a denial of due process. By implication, counsel concedes that Appellant offered *some* evidence of inadequacy; Appellant argues that the preponderance of the evidence shows clearly and unambiguously that Trial Counsel was unprepared for trial, did not properly prepare Appellant to testify, and made inadequate attempts to locate and produce an important witness. Investigator Richard Patrick's report of 12-23-99 says, "Miguel Gonzalez, who was present on the day of the alleged incident, was located in the State of New York" A copy of the investigation report is appended hereto and marked as "EXHIBIT 2."

Appellee argues that "There is no evidence that had Miguel Gonzalez testified the result of the trial would have been different." (Br. 14) Gonzalez was not an eye witness to the shooting, but he was present on the trip to New York.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations* or to make a reasonable decision that makes particular investigations unnecessary." [Emphasis supplied]

Wiggins v. Smith, 123 S.Ct. 2537, 156 L.Ed.2d 471(2003), quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is difficult

to discount the effect of the testimony of Heather Taylor who said she overheard Damien Bagut say Quinones shot Reardon and she *believes* Appellant said he tied a rope around Reardon's neck that would have killed him if the shots hadn't (V1, p. 180). Gonzalez would have testified to the contrary. Keenan made no effort to secure his attendance, and he couldn't know that his testimony would make no difference.

The Court's refusal to strike prospective jurors Wagner and Browning was prophylactic and not intended to be applied retroactively. While asserting that "the Trial Court did not abuse its discretion in not removing jurors Browning and Wagner for cause," counsel concedes that under today's standards "both jurors would likely be removed for cause." (Br. 16) It was an abuse of discretion for the Court to deny the motion to remove Mr. Wagner, who said his daughter was killed by a drunk driver and his son was also killed. He volunteered: "If the defendant had no alcohol *or no drugs or anything*, I'd have nothing against him." (V1: pp. 30-31) Although Mr. Keenan failed to discern the details of the son's death, the implication was that it was drug related: "I raise my grandson now and I sent him to a Christian school just because of that I paid for that, and I'm retired. But that's how strong my convictions are *against alcohol and drugs*" (V1: p. 29)

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). Although you did not explicitly give retroactive application to your decisions, you were essentially clarifying prior law. In *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996), this Court said in Syl. 5. "Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Mr. Wagner should have been removed under *Miller*

All that keeps Appellant from being able to show conclusively that Mr. Wagner is hopelessly biased is the failure of Mr. Keenan to make further inquiry into the cause of the son's death when he said. "I don't know this gentleman, and don't have a thing against him, *but it's hard to get something . . . like that out of your mind.*" (V1 p. 28) In response to counsel's Motion to Strike for cause, the Court said: It appears to the court that *this juror's problem with alcohol* (sic), the Court's not aware of alcohol coming in this case." Mr. Keenan made no effort to point out Wagner's references to drugs, and the motion was denied. (V1: pp. 32-33).

In *O'Dell v. Miller, supra*, you indicated that this rule is Constitutionally based: "In many West Virginia communities, prospective jurors will often know the parties and their attorneys. Nevertheless, this familiarity does not remove the trial court's obligation to empanel a fair and impartial jury as required by West Virginia's Constitution, Article 3, § 10.

CONCLUSION

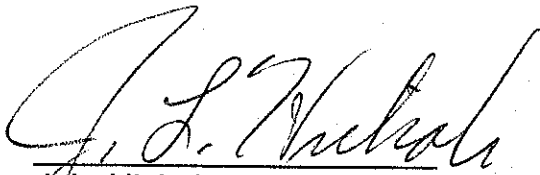
As stated in the Brief of the Appellant, the trial court record bears the unmistakable marks of a trial by an attorney who is trying to get by on his wits and prior experience, rather than on painstaking preparation. The cumulative effect was a denial of effective representation and, as a direct result of his deficiencies, a denial of Appellant's due process rights

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. Appellant has argued additional grounds in his *pro se* brief. Some of the grounds were raised on appeal, but Appellant has never had a hearing on the merits of his appeal. Therefore, Appellant asserts that all of said grounds are properly before this Court.

Accordingly, Appellant respectfully prays that his conviction on the charge of murder in the second degree be set aside and that he be granted a new trial, or in the alternative, that this Court direct the entry of a verdict of guilty of being an accessory after the fact to murder and his case be remanded to the Circuit Court of Fayette County for the entry of an appropriate sentence, with credit for time served.

Respectfully submitted,

Miguel A. Quinones,
By Counsel



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Charleston, WV 25305-0730
Telephone (304)558-3905

Counsel for Appellant

THE TWELFTH JUDICIAL CIRCUIT COURT OF WEST VIRGINIA

STATE OF WEST VIRGINIA	X	
PAUL BLAKE	X	
PROSECUTING ATT.	X	
<u> V </u>	X	-----INDICTMENT NO.98-F-3
MIGUEL QUINONES	X	
PRO-SE	X	
	X	

MOTION FOR STATUS HEARING

NOW COMES MIGUEL QUINONES, PROSE, TO FILE MOTION FOR A HEARING TO INQUIRE INTO THE STATUS OF THE ABOVE MENTIONED MATTER.

Reason for motion

ON DECEMBER 3, 1999, DEFENDANTS MOTION FOR APPOINTMENT OF NEW COUNCIL WAS GRANTED BY THE HONORABLE CHARLES M. VICKERS. ON THE SAME DATE JAMES W. KEENAN WAS APPOINTED TO REPRESENT THE DEFENDANT ON PENDING INDICTMENT.

ON JANUARY 7, 2000, DEFENDANT AND NEWLY ASSIGNED COUNCIL MET FOR THE FIRST TIME SINCE COUNCIL WAS APPOINTED.

SINCE JANUARY 7, 2000, THERE HAS BEEN NO COMMUNICATION FROM COUNCIL REGARDING FACTS, STATUS, OR ANY COURT DATES OF ABOVE MENTIONED MATTER.

DEFENDANT IS UNCERTAIN WHY THERE HAS BEEN NO COMMUNICATION FROM COUNCIL. COINCIDING WITH THE ABOVE REASONS DEFENDANT RESPECTFULLY REQUESTS A HEARING BE HELD TO INQUIRE INTO THE STATUS OF ALL ABOVE MENTIONED MATTERS.

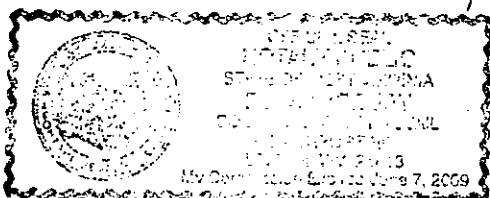
RESPECTELY

[Handwritten Signature]

MARCH 1 2000

This instrument was signed by Miguel Quinones this 1st day of March 2000.

Becky Ashbury
Notary Public



Richard L Patrick Investigations

PO Box 41, Lookout, WV 25868

10-14-99

Data Base Research for Nichole Brock
Full Name Nichole L Brock SS 236-11-0104
DOB 3/26/76

EXHIBIT 2

Address: PO Box 219 Oak Hill, WV
Deepwater, WV
Robson, WV

Data Base Cost \$60.00

Located her parents in Robson, WV. They said she is living somewhere in Huntington and she calls every now and then. They did not have a phone number nor address for her. They did say that she is attending Marshal University. Returned and contacted the college. Her number is (304) 522-4165. I spoke with her and she said that she only met the defendant one time. Her friends had gone there to use the restroom and ran off and left her. She is willing to testify, as to what gentlemen they all were.

Total time 4 hours @ 35 per \$ 140.00 50 miles @ .18 9.00 \$ 149.00

10-18-99

Contacted the Federal Bureau of Prisons Regarding Anthony Miguel Gonzalez, as well as, the State of New York Parole Board, and State of New York Prison Board. Gave all recipients the address and phone number for counsel.

Total time 3 hours @ 35 per \$ 105.00 \$ 105.00
Parole Officer Later Contacted Counsel

10-18-99

Data Base Searches for Miguel Gonzalez

No findings for the New York of Masseurchutes area.

Data Base Cost \$60

10-20-99

Contacted Western Union International regarding procedure for tracing the money transfer.
Findings reported to counsel, subpoena required.
Visited Greyhound Office for ticket tracking information.
Background Criminal Checks for the witnesses listed by the State in Raliegh and Fayette Counties.
The only findings were charges on file against Donald Shifflet and Tina Nabors.

Total time 5 hours @ 35 per \$ 175.00 75 miles @ .18 13.50 \$ 188.50

Copies of Court Records \$9.50

10-22-99

Visited defendant at jail. Left at 9:00 a.m. and returned at 4:30 p.m.
Interviewed the defendant. Obtained recording to accompany all notes.
He gave his history and a very detailed story of how he got here.
Transcribed everything and attached it hereto this report.

Total time 7.5 hours @ 35 per \$262.50 87 miles @ .18 15.66 \$ 278.16

05 JUN 15 AM 10:15

RECEIVED

Richard L Patrick Investigations

PO Box 41, Lookout, WV 25868

On 10-1-99 I went to Beckley and checked the obtained addresses. Finally I located a relative at 103 Brown St. she said that Heater is living somewhere in Oak Hill but does not know where. I went to Oak Hill and found that she was living on Summerlee Road.

Returned home and called her and she was willing to meet with me within one hour at her home in Summerlee and said she would have Diane Green with her.

I went to Summerlee and met with her and Diane Green. I learned that her boyfriend had recently been jailed on a drug charge. She and Diane implied that Steve Kessler had directed them to not speak with anyone on the defense side regarding the case. They also said that authorities had threatened to take their children away should they not cooperate with them. At the time, they were willing to give statements, if need be. They also said that they were not directly told by anyone, what had happened. They worked in absolute consort in answering anything. They could add nothing that would help the defendant. Heather's phone number is 465-3175.

Total time - 5 hours @ 35 per \$175 76 miles @ .18 per 13.68 \$188.68

No criminal records could be found on either person in Fayette or Raleigh Counties. Heather's boyfriend, James Loving, was charged with crack cocaine distribution and is presently doing time. Diane actually lives with her mother in an apartment in Mount Hope but is maintaining the Princeton Address for food stamp purposes. A visit was made to her mothers apartment and her mother exclaimed that she is not at home because she went to Princeton to pick up her food stamps.

Total time - 4.5 hours @ 35 per \$157.50 91 miles @ .18 per 16.38 \$173.88
9-30-99

Data Base Research to Locate Misti Aldridge
Full Name Misti L Aldridge SS 236-25-6854
DOB 1/22/77

Addresses are: 169 Riner Ave. Oak Hill WV
646 Campbells Ck. Drive Charleston WV
219 Rensford Star Rt. Charleston, WV
467 Cambells Ck. Drive Charleston WV

Data Base Cost \$60

Located Misti at the National Guard Armory in Charleston, WV where she is presently employed. She was very nervous about the entire situation. She said that she was not there at the time of the incident and does not know the defendant. She was there off and on with Damien Bagut. She did not want to re-call anything at all. She did not want me contacting her at home in Oak Hill, as she is now married to a Police Officer and wants the whole ordeal behind her. She was very scared, as she had to be escorted to Damiens hearing by the police. She cannot help at all. Her new name is Misti Todorovich and lives on Bunch St. in Oak Hill, WV. her home number is 465-3129 her work number is 346-4861.

Total time 4.5 hours @ 35 per \$157.50 175 miles @ .18 31.50 \$189.00

9-30-99

Obtained a copy of Chris Reardons' Liquor License information with any citations issued against them.

Total time 2 hours 35 per \$ 70.00 20 miles @ .18 3.60 \$ 73.60

Cost for Copies to State \$16.75

Richard L Patrick Investigations

PO Box 41, Lookout, WV 25868

regarding what he saw at the crack house on Summerlee Road in Oak Hill, WV. Up to this point, the defendant has been afraid to say anything about anybody.

Actions

The first action was a review of the file and extraction of potential witnesses. A firm understanding of the charge levied against the defendant was also gained. Then a visit with the defendant and his counsel at the correctional facility wherein he is housed. A check was made of potential witnesses. He gave as potential witnesses, Misti Aldridge, Nicole Brock, Heather Taylor, Diane Green, Damian Bagut and Miguel Gonzalez.

9-20-99

Visited the defendant at the Regional Jail facility with counsel.

Total time 4.5 hours @ 35 per \$157.50 91 miles @ .18 16.38 \$ 173.88

9-25-99

Visited Damien Bagut with Counsel for defendant at Mt. Olive Correctional facility

Total time 5 hours @ 35 per \$175.00 59 miles @ .18 10.62 \$185.62

9-27-99

Data Base Research to Locate Address for Heather Taylor.

Full Name Heather L Taylor SS 236-21-4616
DOB 3/13/96 Drivers License WV 1038649

Addresses are: 427 Old Eccles Road Beckley WV
200 Georgetown Ct. Beckley WV
103 Brown St. Beckley WV

Data Base Cost \$60

9-27-99

Data Base Research to Locate Address for Diane Green

Full Name Diane V Green SS 235-21-7178
DOB 3/77

Addresses are: RR4 POB 554 Princeton, WV (MOST RECENT AND CURRENT)
510 Ewarts AV 16 Beckley WV
523 Newport Ct Beckley WV

Data Base Cost \$60

REPORT OF INVESTIGATION

STATE V QUINONES

12-23-99

SUMMARY

The original goal of our Investigative Services in this case was to hopefully establish a defense on behalf of the defendant. However, the following circumstances are prevalent:

- 1 There were no witnesses to the incident other than Damien Bagut and Miguel Gonzalez.
- 2 Miguel Quinones had only lived in the area for a couple of weeks prior to the incident for which he was charged. This can be verified through Western Union and Greyhound.
- 3 Miguel Quinones does not know anyone living in the area that he has met for more than briefly who can serve as a character witness other than Diane Green and Heather Taylor.
- 4 The aforementioned potential witnesses have personal problems that hamper their willingness to testify on behalf of the defendant.
- 5 Nicole Brock who the defendant named as a character witness only knew the defendant on one brief encounter.
- 6 Misti Aldridge, who was named as a potential witness by the defendant, is now married to a police officer for the city of Oak Hill and would be very unlikely to appear on behalf of the defendant.
- 7 Miguel Gonzalez who was present on the day of the alleged incident was located in the State of New York and is very unwilling to appear on behalf of the defendant.
- 8 Damien Bagut, who was present on the day of the incident was interviewed at Mt. Olive Correctional Facility where he is serving time for having pleaded guilty for the alleged incident and he is mixed on appearing on behalf of the defendant. He is willing, however, he also added that he will say nothing to incriminate himself.
- 9 An interview with the defendant shows his familial situation (especially in the years just prior to the alleged incident) to be an exploitable issue. I have enclosed a Justice Department Report Preview, that was a result of my legal research, which explicitly notes Post Traumatic Stress Syndrome in Youthful Offenders (see second page of said report). A review of the attached interview with the defendant shows the possibility to having endured some very traumatic occurrences throughout his life and very-likely just prior to his coming to West Virginia. At about the age of seven, his father was convicted of murder and was sentenced to Singh to serve a life sentence. He grew up in an apparently violent home and his mother died of aids when the defendant was about 15. During the following year he lived in numerous homes with relatives. Later on a friend named Miguel Gonzalez met up with the defendant and ask if he wanted to come to West Virginia for a while to get away. Gonzalez took care of all the arrangement. They went to the Taxi Cab Office at Fitchburg, Mass. Someone wired the money (whom he thinks was Anthony Bryon). They then bought two Greyhound tickets to West Virginia. The defendant has stressed the fact that he had no idea what kind of place it was. He was, all of the sudden, trapped in West Virginia. He has provided a list of the operatives of the crack house located on Summerlee Road. Since being jailed for such a long period of time, the defendant has made strides towards turning his life around. It is sad that the defendants' life has been one traumatic situation after another. He has also stressed an interest in working with law enforcement officials

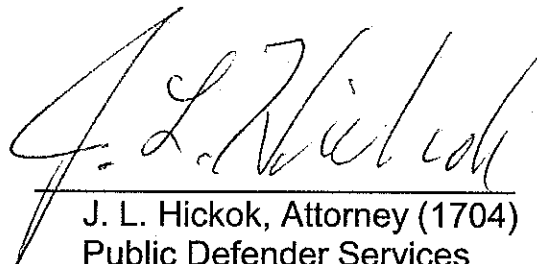
Certificate Of Service

I, the undersigned, Appellate Attorney for Petitioner, Miguel A. Quinones, do certify that on the 22nd day of August, 2005 served a copy of the foregoing Appellant's Reply Brief on the following persons at their respective addresses, via First Class US Mail, postage pre-paid:

Miguel Quinones
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV 25185

Carl L. Harris, Asst Prosecutor
Fayette County Prosecutor's Office
108 East Maple Ave
Fayetteville, WV 25840

Hon. Darrell McGraw, Attorney General
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Charleston, WV 25305-0220



J. L. Hickok, Attorney (1704)
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