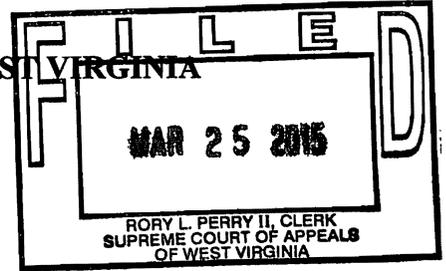


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent

v.

Supreme Court No. 14-1023
Court Case No. 08-C-139 & 04-F-48
(Nicholas County)

ERIC FOSTER,

Petitioner.

PETITIONER'S REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

A Rule 19 argument is necessary in this case as it presents an important constitutional issue involving a defendant's right to the effective assistance of counsel during plea bargaining. This case presents the Court with the opportunity to decide what the obligations of trial counsel are during plea bargaining. In addition, the decisional process would be significantly aided by oral argument. Finally, Mr. Foster should not be penalized by counsel's regrettable failure to request oral argument in his initial brief.

REPLY ARGUMENT

- I. The State incorrectly asserts that Mr. Foster was not prejudiced by Hurley's ineffective assistance of counsel during plea bargaining. *Reply to State's brief 13-14.*

The State argues that Mr. Foster's refusal of the second, more advantageous plea offer, demonstrates that Hurley's failure to communicate the initial plea offer did not prejudice Mr. Foster. *State's Brief 13.* This assertion is incorrect for several reasons. First, the State's assertion does not meet the test announced by the United States Supreme Court in *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). The test announced in *Lafler* is intended measure what, if any, prejudice an individual suffered due to counsel's ineffective assistance during plea bargaining. Notably, the State failed to address or distinguish this controlling precedent Mr. Foster relied upon in his initial brief. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). *Petitioner's Brief 16-21, State's brief 11-14.*¹

The *Lafler* Court held that “[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.” *Lafler*, 132 S. Ct. at 1387. In Mr. Foster's case, the State's initial plea offer would have allowed Mr. Foster to plead to one count of second degree murder and one count of voluntary manslaughter which would have resulted in a shorter sentence than the current sentence Mr. Foster is serving. At the conclusion

¹ The habeas court also failed to discuss or distinguish this precedent in its order denying Mr. Foster's petition for habeas corpus. *Petitioner's brief 16, See generally Habeas Court Order denying relief A.R. Vol. 1 261-273.*

of Mr. Foster's trial, he was convicted of two counts of second degree murder and the court ordered that those sentences be served consecutively. The second offer the State made to Mr. Foster would have allowed him to plea to one count of second degree murder. This plea would have resulted in a sentence that is one half the current sentence Mr. Foster is serving. Therefore, under *Lafler*, Mr. Foster was in fact prejudiced and is entitled to relief based on Hurley's failure to provide effective assistance of counsel, as guaranteed to every criminal defendant during plea bargaining, in regards to both plea offers.

Greg Campbell, an experienced criminal trial lawyer, served as Mr. Foster's expert during the omnibus hearing. Campbell testified that if Hurley had assisted Mr. Foster as he was obligated to do from the time of appointment up until the time the State made the first plea offer, there is a good possibility there would not have been a second offer or a trial. Campbell testified that Mr. Foster's right to effective assistance of counsel started on December 31, 2003, the date of Mr. Foster's arrest. *A.R. Vol. I 405*. The State concedes that Mr. Foster asserted at his habeas hearing he was not aware of the State's ability to convict him at trial. *State's Brief at 3, A.R. Vol. I 328*. In fact, due to Hurley's failure to effectively represent Mr. Foster from the date of appointment until the first day of trial, Mr. Foster believed it was impossible for him to be convicted of murder because his only involvement in the incident was driving his truck to and from Mike Murphy's residence. This belief was a repeated theme throughout the omnibus hearing. *A.R. Vol. I 328-329,394,396,453*.

Campbell testified this demonstrated Hurley failed to provide effective assistance of counsel during plea bargaining. He explained that Hurley should have advised Mr. Foster early on that "it doesn't make a difference that you did not have a gun, and---and it doesn't make a difference that you did not shoot anyone. Your problem is the little flare-up beforehand. You

drove the truck. You had two other guys with you.” *A.R. Vol. I 404*. However, based on Hurley’s testimony and official jail records, Hurley did not meet with Mr. Foster for three months after his appointment. *A.R. Vol. I 293, 461*. A time period Hurley admitted was unacceptable. *A.R. Vol. I 461*. And while Hurley represented that he discussed Mr. Foster’s case with him before or after the hearings, Hurley also admitted these meetings were not in ideal locations because many of these discussions occurred in settings where others could hear. *A.R. Vol. I 447-448*.

Understandably, Mr. Foster testified that he did not consider these rushed discussions on the date of the hearings to be an attorney client meetings. *A.R. Vol. I 355*. Additionally, according to official jail records, the only attorney client meeting occurred before Hurley received discovery from the State. This fact corroborates Mr. Foster’s testimony that he did not have an opportunity to review the police report with Hurley in an attorney client setting. *A.R. Vol. I 452, 284, 293*. Mr. Foster further testified that if Hurley would have been acting in his role as counsel from the time of appointment, there is no doubt he would have accepted the initial offer made by the State. *A.R. Vol. I 334*. Therefore, it is no surprise that Mr. Foster testified that he would have, without a doubt, accepted the final offer made on the first day of trial. *A.R. Vol. I 328*.

Second, based on the evidence adduced at the omnibus hearing, it is virtually impossible for the State to assert that Mr. Foster had the benefit of effective assistance of counsel which would have allowed him to knowingly and intelligently consider the second plea offer that Hurley did in fact discuss with him on the first day of trial. As discussed above, Mr. Foster proved through the introduction of the official jail records and the testimony of Franklin Hamrick, an employee of the regional jail, that Hurley visited him one time during his entire

representation and this meeting occurred before Hurley had the State's discovery. *A.R. Vol. I 284, 293*. Moreover, this single visit occurred three months after his appointment and six months before trial. According to Hurley's testimony, his preparation for Mr. Foster's case was limited to discussions with the prosecutor, counsel for the co-defendant's, and the investigating officers. *A.R. Vol. I 441*. Hurley admitted there were no notes in Mr. Foster's file because he decided early in his career notes were a waste of time because he never reviewed them before trial. Hurley testified that he prepared all his cases from memory, including Mr. Foster's double first degree murder case. *A.R. Vol. I 463*.

Hurley also verified that he did not conduct any independent interviews nor did he hire an investigator. *A.R. Vol. I 441*. This acknowledgement included a specific admission by Hurley that he did not even attempt to speak to Hanna, an eyewitness, who was listed in the police report, even though he could have provided critical testimony regarding the night of the incident. *A.R. Vol. I 442*. Hanna testified at the omnibus hearing that he had just used illegal drugs with Murphy and Painter when Mr. Foster and his co-defendants arrived at Murphy's residence. *A.R. Vol. I 423*. Hanna further explained that Murphy and Painter exited the residence with loaded weapons based on nothing more than the sound of an approaching vehicle. *A.R. Vol. I 423, A.R. Vol. II 13-14, 26-27*. Hanna then witnessed Murphy put his assault rifle loaded with a banana clip in the truck pointing it at the occupants. *A.R. Vol. II 14, 25*. This statement refutes the State's assertion that Hanna did not personally witness Murphy or Painter pull weapons on anyone. *State's brief 4, A.R. Vol. I 424, 431*.

Hurley testified that he determined Hanna would not be beneficial to Mr. Foster's case because Hanna would verify shooting occurred. *A.R. Vol. I 469*. Hurley made this decision based solely on his discussion with the co-defendants' counsel. *A.R. Vol. I 441*. Therefore,

according to this Court's precedent, Hurley's decision not to call Hanna was made without adequate investigation. *See Ballard v. Ferguson*, 232 W.Va. 196, 201, 751 S.E.2d 716, 721 (2013). Ironically, at trial, the only witness Hurley called on Mr. Foster's behalf established one fact that on the night of the incident the shooting was so intense, it sound like a roar of gunfire making Hurley's excuse for not calling Hanna inexplicable. *A.R. Vol. II 633*.

When asked if Hurley's preparation was sufficient for a double first degree murder case, Campbell testified that it was not. Campbell explained that an attorney cannot offer competent advice regarding a plea agreement if they have not completed a proper investigation. *A.R. 391*. Campbell's opinion is supported by this Court's assertion that: "[c]ertainly, an investigation of the case must precede the making of decisions with regard to the representation of a defendant in a criminal case." *State ex. Rel. Daniel v. Legursky*, 195 W. Va. 314, 320, 465 S.E. 2d 416, 422 (1995). *See Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984). "([C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances.)"

During the omnibus hearing, Mr. Foster established that Hurley failed: to properly investigate the case, to adequately advise Mr. Foster of all the applicable legal principals involved in his case, and to keep Mr. Foster informed. Therefore, according to this Court and the United States Supreme Court, Hurley was not in a position to effectively advise Mr. Foster regarding the plea offer made by the State.

Finally, the atmosphere in which Mr. Foster was advised of the plea offer, and time allotted for discussions which resulted in Mr. Foster's decision was approximately fifteen

minutes. *A.R. Vol. I 327*. This was an inadequate amount of time considering Hurley's level of preparation, as discussed above, in addition to the gravity of the decision Mr. Foster was making. The United States Supreme Court described counsel's obligation to properly advise a client regarding a plea agreement as a "critical obligation ... to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010) (quoting *Libretti v. United States*, 516 U.S. 29, 50–51, 116 S. Ct. 356 (1995)). Campbell testified that based on the gravity of the decision, the lack of client contact, and the complex issues involved in Mr. Foster's case, fifteen minutes was not adequate. *A.R. Vol. I 382-383*.

This lack of sufficient time is especially true when considering Hurley was obligated to ensure that Mr. Foster was fully advised of the plea offer, the resulting sentence, the benefits of accepting the offer and the risks associated with refusing it in order to allow Mr. Foster to make a knowing and intelligent decision.² Moreover, the State misrepresented the atmosphere in which Hurley and Mr. Foster discussed the second plea offer. The State asserted "... he relayed the second plea offer and completely informed Petitioner of the effects of the offer should [Mr. Foster] choose to accept." *State's brief at 7*. Mr. Foster testified that he had no idea how strong the State's case was when he was considering the plea offer. *A.R. Vol. I 327*. Additionally, both Hurley and Mr. Foster testified the atmosphere in which the second plea offer was conveyed was not ideal and the discussions regarding the plea were rushed. *A.R. Vol. I 327, 333-334, 474-475*.

The level of assistance Mr. Foster received from Hurley to make this life changing decision did not satisfy this Court's precedent that held: "counsel's advice must be accurate to

² Mr. Foster is not conceding that Hurley was capable of providing effective assistance of counsel by making this statement. As discussed above, it is Mr. Foster's contention that Hurley was not capable of providing advice regarding the benefits and risks of the plea offer due to his lack of investigation from the beginning of his representation.

enable client to make an informed choice whether to accept plea.” *Tucker v. Holland*, 174 W.Va. 409, 327 S.E.2d 388, 394 (1985). Mr. Foster testified that he refused the plea offer because he considered a 40 year sentence a life sentence. *A.R. Vol. I 327*. Campbell testified this testimony by Mr. Foster is proof that Mr. Foster did not understand the terms of the plea agreement. *A.R. Vol. I 381*. Campbell explained that if Hurley would have discussed the plea offer with Mr. Foster so that he understood the possible sentencing, Mr. Foster would have realized he would have been eligible for parole in ten years and he would have fully discharged the sentence in twenty years. Instead, Mr. Foster incorrectly believed that if he accepted the plea offer, he was agreeing to serve 40 years in prison.

Therefore, despite the State’s assertion to the contrary, Mr. Foster did not enjoy the guarantee of competent counsel during the plea bargaining stage, and he did not knowingly and intelligently refuse the only offer that was discussed with him. It is for these reasons Mr. Foster requests that this Court reverse the Habeas Court’s order denying relief and remand his case back with directions to allow Mr. Foster to accept the State’s final offer made on the first day of trial.

- II. The State incorrectly asserts that Mr. Foster received effective assistance of counsel during his double first degree murder trial despite counsel’s admission he appeared and represented Mr. Foster while under the influence of alcohol. *Reply to State’s Brief 14-15*.

All of the reasons Mr. Foster asserted in the section regarding his denial of the right to effective assistance of counsel during plea bargaining also apply to the denial of his right to effective assistance of counsel during trial. Specifically, the obligation to make adequate investigation on behalf of the client is necessary before counsel can make an effective decision regarding the best interest of the client. This includes choosing a theory of defense at trial and what witnesses to call on behalf of a client. The United States Supreme Court held that it is

never strategic to fail to conduct a reasonable investigation before making decisions on behalf of a client. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984). The additional problems that occurred during trial which contributed to Mr. Foster's denial of the right to effective assistance of counsel at trial will be discussed below.

Hurley's communication with Mr. Foster was so poor that on the first day of trial, Mr. Foster did not know if Hurley had plans to call any witnesses on his behalf. In fact, Mr. Foster testified that he did not know he was going to testify until the day he was called to the stand. Hurley admitted the decision to call Mr. Foster was made the day of trial. However, he initially asserted that he had prepared Mr. Foster to testify, but, he could not remember when he prepared Mr. Foster to testify. Hurley finally admitted the preparation to testify he was referring to could have occurred in the courtroom. *A.R. Vol. I 451*. Campbell testified that if Mr. Foster did not know until he was sitting at the table during trial that he was going to testify, "I don't see how that could be justified just to tell you the truth." *A.R. Vol. I 395*.

Hurley admitted that he was a struggling alcoholic during the time that he represented Mr. Foster and that his addiction did impact his ability to represent Mr. Foster. He admitted that he was drinking heavily and did in fact smell of alcohol while in court defending Mr. Foster against two counts of first degree murder before the jury. Hurley testified that he was not in a good place at that time, and he did not realize how much of an impact his drinking was having on his ability to represent his clients. Mr. Foster testified that Hurley had sweat rolling off of him every day of his trial. *A.R. Vol. I 349*. He also testified that Hurley acted as though he was just ready to get it over with so he could go home and go to bed. *A.R. Vol. I 350*. While Hurley's admission was heroic, it did not repair the damage Mr. Foster suffered due to his neglect of Mr. Foster's case.

Hurley's failure to call Hanna to testify on Mr. Foster's behalf cannot be discounted as strategy for two reasons. First, his decision not to call Hanna was made without speaking to Hanna, therefore, Hurley lacked sufficient knowledge of the content of Hanna's testimony; the decision is not reasonable and cannot be defended. Moreover, Hanna's testimony would have been powerful. He was an eyewitness who corroborated Mr. Foster's assertion that Murphy and Painter were the aggressors. Therefore, Hurley's failure to call Hanna as a witness cannot be deemed to be strategy nor can it be held to be harmless. This testimony had the potential to sway the jurors to give Mr. Foster's defense credit and find him not guilty.

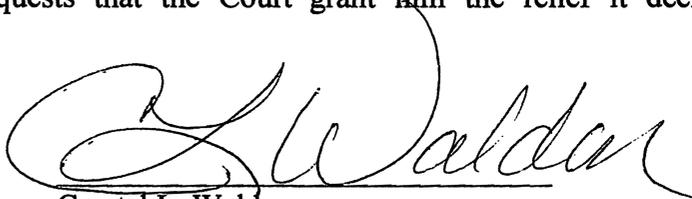
Finally, this Court found Hurley's closing was in fact inadequate on appeal, but wanted the record developed in order to pass judgment on Hurley's performance at trial. Hurley's performance on behalf of Mr. Foster can be summed up by a series of remorseful answers he provided during the omnibus hearing. He admitted that he appeared and participated in Mr. Foster's capital trial while hung over. He further admitted that it was true that he smelled of alcohol while in court. *A.R. Vol. I 332, 349, 470-471*. He agreed that his addiction greatly impacted his ability to represent Mr. Foster. *A.R. Vol. I 350, 476*. This testimony provided a logical, although unacceptable, explanation for the many short comings that occurred during his representation of Mr. Foster.

Finally, Hurley stated: "let me—let me say, you know, cut to the chase a little here, if I were to do this again, I would do it a lot differently, and I would have a lot more contact with him, and, to be completely truthful, I would have put a lot more pressure on him to plea [sic] than I did." *A.R. Vol. I 454*. Hurley admitted he was ineffective. The level of representation Mr. Foster received during his double first degree murder case is not acceptable, and Hurley's failures cannot be ignored. Hurley's representation did not meet the minimal standards required

by the Sixth Amendment to the United States Constitution and Article 3 Section 14 of the West Virginia Constitution. It is for all the above reasons Mr. Foster asserts he was denied effective assistance of counsel at trial and therefore deserves a new trial.

CONCLUSION

The Sixth Amendment to the United States Constitution and Article 3 Section 14 of the West Virginia Constitution guarantees were not met in this case. Mr. Foster deserved to have counsel who was acting as an advocate at the time of appointment all the way through trial, if he chose to proceed to trial after adequate representation during plea bargaining. Mr. Foster did not receive effective assistance of counsel at any stage. Hurley's representation fell below an acceptable standard and Mr. Foster was in fact prejudiced by his inadequate representation. Therefore, Mr. Foster respectfully requests that the Court grant him the relief it deems appropriate.



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CERTIFICATE OF SERVICE

I, Crystal L. Walden, counsel for Petitioner, Eric Foster, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *Petitioner's Reply Brief* to the following:

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By depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 25th day of March, 2015.



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