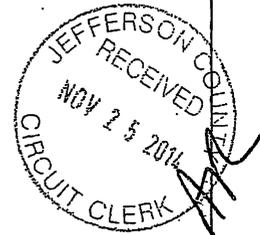


14-1202

B. SIMS

**IN THE CIRCUIT COURT OF JEFFERSON  
COUNTY, WEST VIRGINIA**



State of West Virginia, ex. rel.,  
Shane Dodson,  
Petitioner,

v.

Civil Action No. 13-C-64  
Underlying Felony No. 11-F-8

Marvin Plumley, Warden,  
Huttonsville Correctional Center,  
Respondent.

**ORDER GRANTING PETITION FOR HABEAS CORPUS RELIEF**

ON A PREVIOUS DAY the Petitioner, Shane Dodson ("Mr. Dodson"), by counsel, filed a Petition for Habeas Corpus. The Respondent, Marvin Plumley ("Respondent"), Warden of Huttonsville Correctional Center, by counsel, opposed Mr. Dodson's Petition.

ON June 18, 2014 this Court held an Omnibus Habeas Corpus Hearing ("the Omnibus Hearing"), during which testimony was provided by Mr. Dodson; Mr. Dodson's mother, Sherry Dodson; and Mr. Dodson's former counsel in the underlying felony, Sherman Lambert ("Mr. Lambert"). The Respondent continued to oppose Mr. Dodson's Petition.

UPON MATURE CONSIDERATION of Mr. Dodson's Petition, the Respondent's Response, and the Omnibus Hearing, the Court hereby GRANTS Mr. Dodson's Petition for Habeas Corpus Relief for the reasons set forth in his Petition. The Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

**I. FINDINGS OF FACT**

Mr. Dodson is currently confined in a penitentiary home for the rest of his natural life pursuant to his April 6, 2011, conviction of Daytime Burglary and Domestic Battery and his subsequent enhanced sentencing as a recidivist under West Virginia Code § 61-11-18. Mr.

Dodson will not be eligible for parole until October 1, 2025. The facts which gave rise to Mr. Dodson's imprisonment, as alleged by the State and found by the jury, are as follows:

On September 20, 2010, Mr. Dodson went to the residence of his then girlfriend, Brittany Carrigan. When Ms. Carrigan refused to answer the door, Mr. Dodson opened it himself and entered the home. Ms. Carrigan then attempted to close and lock the door, but Mr. Dodson pushed the door open and struck her multiple times. Officers from the Jefferson County Sheriff's Department responded to the Carrigan residence, gathered information and statements, and took pictures of Ms. Carrigan's injuries. In her Statement to investigators, Ms. Carrigan reported that Mr. Dodson "pushed [her door] open and came in and started hitting [her]." Ms. Carrigan's accusation was corroborated by the statements of Donna Weed, who was present in Ms. Carrigan's home during the incident, and two neighbors, Teresa McKenzie and Courtney Bledsoe, who witnessed the events from outside. Mr. Dodson was arrested that day.

Mr. Dodson thereafter retained attorney Kevin Mills to represent him, but on the day of his preliminary hearing, he dismissed Mr. Mills and instead hired Sherman Lambert as his counsel. Mr. Lambert would serve as Mr. Dodson's counsel through his trial, conviction, and appeal. On February 15, 2011, the Assistant Prosecutor, Mr. Hassan Rasheed, sent Mr. Lambert a plea offer agreement ("the Plea Offer") that offered to refrain from filing "an Information seeking to treat [Mr. Dodson] as a recidivist" if Mr. Dodson pled guilty to Burglary and Domestic Battery as charged in the Indictment and to an additional Domestic Battery misdemeanor then pending in Magistrate Court. The Plea Offer stated that the Defendant would be sentenced "to one to ten years in the penitentiary on the [Daytime] Burglary charge" and "to one year on each of the [misdemeanor] Domestic Batteries," all of which would be served concurrently. The Offer stated that it would remain open until February 28, 2011.

Mr. Lambert and Mr. Dodson both agree that they discussed the Plea Offer. At the Omnibus hearing Mr. Dodson alleged that Mr. Lambert strongly advised him to decline the Plea Offer, stating that "we are not even going to consider taking a plea bargain," and explaining that as a matter of law, the State could not convict him of Burglary because he did not break into or steal anything from Ms. Carrigan's home, and that he could not be convicted of Domestic Battery because Ms. Carrigan and he were not related or living together. Mr. Lambert denies these allegations and asserts that he advised Mr. Dodson he should accept the Plea and that it was purely Mr. Dodson's decision not to accept the plea but instead to proceed to trial. There are no writings to substantiate either version of events as Mr. Lambert did not send letters advising his client on the subject and made no notes as to any advice he may have given. Other than the testimony of Mr. Lambert and Mr. Dodson at the Omnibus hearing, the only record on the subject are the transcripts from the pre-trial, the trial and sentencing. Counsel's statements and arguments at trial can be seen to support Mr. Dodson's allegations, at least with respect to counsel's advice regarding the elements of Domestic Battery and the evidentiary rules regarding testimony pertaining to Burglary and the lesser included offense of Daytime Burglary.

Mr. Dodson rejected the Plea Offer and confirmed that position in person and before the Court at his Pre-Trial hearing March 7, 2011. He also acknowledged at his Pre-Trial that he was aware that should he be convicted he could be facing a life sentence as a third-time recidivist. His trial began on April 5, 2011.

It is interesting to note that the State did not call the alleged victim Britany Carrigan as a witness nor move to introduce the written statement she had given the police on the date of the incident implicating Mr. Dodson. Instead the State's case depended upon the testimony of seven other witnesses. **Witness Donna Weed** testified that she went to the victim's house that

day, encountered Mr. Dodson outside and that he was frustrated that Ms. Carrigan wouldn't come outside – saying that if she didn't he would “beat the shit out of her.” Ms. Weed then went inside where Ms. Carrigan stated she didn't want to see Mr Dodson. Ms. Weed then, from another room, heard Mr. Dodson banging on Carrigan's door, heard the door open and heard a physical altercation – shortly after which she observed Ms. Carrigan to be upset and injured, with apparent rug burns from where she'd been dragged from the house.

**Witness Teresa McKenzie**, a neighbor of Ms Carrigan, testified to observing Mr Dodson driving through the neighborhood yelling threats of violence to Ms. Carrigan (that he would kill her if she didn't come outside), and to seeing him go onto the porch of her house and shove his way through a partially opened doorway. She testified that she heard sounds of a physical assault inside before observing Mr. Dodson dragging Ms. Carrigan out of her house.

**Witness Courtney Bledsoe**, Teresa McKenzie's niece, testified to seeing Mr. Dodson go onto Ms. Carrigan's front porch and bang on her door while hearing Ms. Carrigan yelling for him to go away. Ms. Bledsoe then testified that Dodson forced his way inside hitting Ms. Carrigan and grabbing her by her hair. **Witness Patty Carrigan**, Britany Carrigan's mother, who lives at the site of the incident, testified that her daughter told her that she planned to come to court and lie so that Mr. Dodson wouldn't get a life sentence for his actions. **Witness Deputy Pat Smith** testified to arriving at the victim's house, a chaotic scene with many neighbors upset and to seeing a visibly upset Britany Carrigan bearing obvious signs of a physical injury. **Witness Deputy Brandon Haynes** testified to arriving at the scene, observing a chain-smoking and visibly shaken Ms. Carrigan and of giving her a paper upon which to write a statement but applying no pressure for a statement. **Witness Deputy Scott Demory** also testified to arriving at the scene and observing an injured and upset victim and to photographing her injuries.

Once the State rested and motions were heard, Mr. Dodson was given the opportunity to testify, but declined. The defense then called its single witness, the alleged victim **Britany Carrigan**, who testified that she had invited Mr. Dodson to her house that day and otherwise recanted any earlier claim she had made that he had assaulted her or burglarized her residence.

The next day, the jury found Mr. Dodson guilty of Domestic Battery and of the lesser included offense of Daytime Burglary.

On April 6, 2011, the State filed an information alleging that Mr. Dodson had previously been convicted of two felonies and seeking an enhanced sentence under West Virginia Code § 61-11-18. Mr. Dodson thereafter acknowledged that he was the person identified in the two prior felony convictions, and on June 8, 2011, he was sentenced to life in prison with the possibility of parole after fifteen (15) years for his Daytime Burglary conviction and a consecutive one (1) year in the Eastern Regional Jail for his Domestic Battery conviction. He was given credit for time served.

On June 6, 2011, during Mr. Dodson's sentencing hearing, this Court heard evidence regarding Mr. Dodson's motion for a new trial, namely his allegations that he was entitled to a new trial because one of the State's witnesses, Donna Weed, was intoxicated during her testimony; however, this Court found that Mr. Dodson's evidence was insufficient to overturn the jury's verdict and require a new trial. This Court therefore denied Mr. Dodson's motion.

Mr. Lambert appealed Mr. Dodson's conviction and sentence, alleging that this Court erred in refusing to grant a new trial, that the verdict was unsupported by the evidence, and that the Prosecutor had committed misconduct by knowingly eliciting testimony from an intoxicated witness and keeping that fact from the defense.

On February 11, 2013, the Supreme Court of Appeals of West Virginia denied Mr. Dodson's appeal and confirmed this Court's sentencing order through a memorandum decision.

Immediately after his appeal was denied, Mr. Dodson filed a Habeas Corpus Petition which was received by this Court on February 21, 2013. Private counsel was appointed to assist Mr. Dodson in filing an amended Petition, but that first habeas counsel withdrew from the representation. Thereafter, on June 18, 2013, Mr. Dodson's current counsel was appointed. Mr. Dodson filed his Amended Habeas Corpus Petition on December 20, 2013. This Court scheduled an Omnibus Hearing to be held on March 27, 2014, but at the request of counsel for all parties, that hearing was rescheduled for May 2, 2014. However, that date was inconvenient for Mr. Lambert, so the Omnibus Hearing was again rescheduled for June 18, 2014, at 9:00 A.M., a date and time convenient to Mr. Lambert.

On June, 18, 2014, the parties came before this Court for the purpose of conducting an Omnibus Habeas Corpus Hearing. Testimony and evidence were offered by Mr. Dodson; his mother, Sherry Dodson; and Mr. Lambert.

At the close of evidence, and in consideration for this Court's pending docket, the parties requested that they be able to submit proposed orders in lieu of making closing arguments. Both parties submitted their proposed orders on July 31, 2014, and Mr. Dodson submitted his Response to the State's Proposed Order on August 7, 2014. On that date, this Court took Mr. Dodson's matter under consideration.

## **II. CONCLUSIONS OF LAW**

### **A. Standard of Review**

This Court has "broad discretion in determining whether to grant a petition for post-conviction habeas corpus relief." *State ex. Rel. Crupe v. Yardley*, 213 W.Va. 335, 337, 582 S.E.2d 782, 784 (2003). However, this discretion is not endless. Rather, our Supreme Court of Appeals has made it clear that "habeas corpus is not a substitute for an appeal," and that as such, "in order to set aside a criminal conviction in a collateral attack by writ of habeas

corpus,” a petitioner must show an “error of a constitutional dimension” that has not been “previously and finally adjudicated.” *Id.* at 338, 785; W.VA. CODE § 53-4A-1.

Mr. Dodson alleges that he was denied his right to effective assistance of counsel under Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United State Constitution and that his right to due process of law was violated under Article III, Section 14 of the West Virginia Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Because the alleged errors are of constitutional dimensions and have not been previously and finally adjudicated, they are properly before this Court.

In West Virginia, “claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984): (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.” Syl. Pt. 7, *State v. Woodson*, 222 W.Va. 607, 671 S.E.2d 438 (2008) (quoting Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)).

Based upon the pleadings before this Court and the evidence and testimony introduced at Mr. Dodson’s Omnibus Hearing, this Court finds that justice requires that it utilize its discretion to grant Mr. Dodson habeas corpus relief on the limited grounds detailed below.

**B. Mr. Dodson’s right to effective assistance of counsel was not violated during his trial when Mr. Lambert failed to admit the victim’s recantation statement at trial, nor was it violated when counsel failed to object to the Prosecutor’s allegedly improper statements.**

Mr. Dodson alleges that he did not receive effective assistance of counsel for two reasons: (1) his trial counsel failed to introduce potentially exculpatory evidence, and (2) his trial counsel failed to object to the prosecutor’s numerous improper and prejudicial statements.

(1) Failure to introduce potentially exculpatory evidence:

Following the incident that gave rise to Mr. Dodson's arrest, his victim/girlfriend Ms. Carrigan, provided a statement to police in which she accused Mr. Dodson of barging forcibly into her house and battering her. The next day, Ms. Carrigan prepared, at the instance of an investigator working for Mr. Dodson's first lawyer Kevin Mills, another statement recanting that allegation. As Mr. Lambert acknowledged at the Omnibus Hearing, this recantation was very important to Mr. Dodson's defense. *See e.g.*, Omnibus Hearing Tr. 101:20-24; 95:23-96:4; 137:21-138:19. Mr. Lambert never disclosed this recantation to the State. As a result, when the defense attempted to use this out-of-court statement to cross examine the State's investigating officer, the Court sustained the State's objection that it had been sandbagged and surprised. (The statement would most probably have been objectionable as hearsay, and, as the investigating officer was apparently unaware of it, it would have been improper.) In granting the State's objection, the Court reserved the defense's option of again attempting to admit the statement should its author appear at trial and testify inconsistently with that recantation statement. Defense counsel did call Ms. Carrigan in their case-in-chief and was able to elicit testimony consistent with her recantation, thus that evidence so important to the defense was before the jury rendering the written recantation inadmissible, as it was not a prior inconsistent statement.

The first reason that this ground for habeas relief is denied is that it is not clear whether, under the second prong of *Strickland*, Mr. Lambert's failure to disclose this statement was prejudicial to the Petitioner's case. Even the Petitioner recognizes that it is questionable whether the statement could have actually been admitted under the rules of evidence. Because of this uncertainty, as well as the fact that the content of the second statement was ultimately elicited through testimony, this Court cannot find that Mr. Dodson has met his burden of proof

of showing, under the second prong of *Strickland*, that he was prejudiced by his trial counsel's failure to disclose Ms. Carrigan's second statement in discovery.

(2) Failure to object to prejudicial statements by the Prosecutor at trial:

The Petitioner asserts that Mr. Lambert was ineffective by failing to object to the State's allegedly improper statements mentioning his personal opinion on matters such as witness credibility. The Petitioner claims Mr. Lambert's failure to object prejudiced his case, and because a failure to object at trial waived the Petitioner's right to raise that ground on appeal.

However, this argument relies upon finding first that trial counsel's alleged failures to object to the Prosecutor's statements were deficient under an objective standard of reasonableness. Although the Petitioner acknowledges that "[d]etermining when to object is within the discretion of trial counsel pursuant to trial strategy and tactic," *J.L. v. Ballard*, 12-0431, 2013 WL 2462197 (W.Va., June 7, 2013), the Petitioner claims that Mr. Lambert's choices regarding objections are not excusable as strategic. This Court disagrees. The decision to not object at a particular point in trial may be objectively reasonable if, for example, counsel determines that the interruption of an objection would cause the jury to "adversely view" the client. *See Id.* at 7. The Court's finding on this ground is also animated by the requirement of *Strickland* "that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

**C. Mr. Dodson's rights to due process were not violated by the exclusion of the exculpatory out-of-court recantation, the Prosecutor's failure to inform the Defense of the possible intoxication or post-intoxication disability of a State's witness, nor by the Prosecutor's allegedly improper remarks at his criminal trial.**

The Petitioner claims his due process rights were violated at his trial because the Prosecutor knew, but did not disclose that one of its witnesses, Donna Weed, had consumed a

substantial amount of alcohol the night before, and morning of, her trial testimony; that she was being coddled and given coffee by the State's victim's coordinator; and that she still smelled of alcohol (ostensibly not Listerine) when she appeared to testify. *See* Sentencing Tr. 35:1-14. The Petitioner cites the fact that Ms. Weed admitted that she was "hung over" during her testimony at trial. *See id.* at 11:21. However, after reviewing the transcript from the sentencing hearing, this Court does not find that Ms. Weed was necessarily impaired during her testimony at trial. At the sentencing hearing at which Ms. Weed ultimately testified on examination by the Defense that she had been hung over, Ms. Weed wavers on the point: when first asked by Mr. Lambert if she had been "partying the night before" the day she testified, Ms. Weed answered in the negative. *See id.* at 6:24-7:1. Ms. Weed further admitted that her memory was flawed as to when she drank during that previous time period: "I don't keep track of dates that I drink." *See id.* at 7:18. Moreover, even if this Court takes Ms. Weed's later testimony at face value (that she had been hung over at trial), the inference from the statement may be that during the trial she was merely recovering (with the assistance of the State's victim advocate) from prior alcohol consumption (perhaps battling, for instance, a headache) and not actually intoxicated. Even if this Court assumes, without deciding, that Ms. Weed was potentially intoxicated at trial, and that fact was known by the State and not shared with the Defendant, the ultimate finding on prosecutorial misconduct regarding such potential intoxication (and failure to inform the Defense) does not change for the reasons set out below.

Following the trial and before his appeal, in his motion for a new trial, Mr. Dodson argued that Ms. Weed's potential intoxication and the State's failure to share that fact with the Defendant prejudiced his trial and therefore required that he be granted a mistrial. At a post-trial hearing on that claim, where the issue was fully developed, this Court denied his motion for a new trial on this ground. Mr. Dodson now frames the Prosecutor's failure to inform him

of Ms. Weed's condition at trial as a violation of his due process rights. However, when this case was before the West Virginia Supreme Court on appeal, that Court considered the question of the State's conduct on this very issue and commented directly on this point when it affirmed the Circuit Court's denial of the Petitioner's motion for a new trial, stating: "[Mr. Dodson] further argues that the prosecuting attorney *committed conspiracy* to elicit testimony from an witness who was intoxicated during the trial...[we] find that petitioner has failed to establish that any prosecutorial misconduct occurred in regard to eliciting testimony from this witness." *State v. Dodson*, 11-1789, 2013 WL 500225 (W.Va., Feb. 11, 2013) (emphasis added). As the Supreme Court has already decided it, this Court declines to revisit the issue.

Mr. Dodson argues that in addition to his ineffective assistance claim against Mr. Lambert for not objecting to improper statements by the Prosecutor at trial, his due process rights were violated by the Prosecutor's statements. The Petitioner cites moments such as when the Prosecutor told the jury that Ms. Carrigan's stories were "completely unbelievable" and "unreasonable," but that it was "obvious" that one of the State's witnesses was simply telling the jury "what she saw" and that "you can just tell the person is telling the truth and they have no reason to lie..." See April 5, 2011 Trial Tr. p. 265:8-266:9; April 6, 2011 Trial Tr. 50:20-51:2. These statements, however, do not rise to the level of either violating the Prosecutor's "duty to set a tone of fairness and impartiality," *State v. Kendall*, 219 W.Va. 686, 691, 639 S.E.2d 778, 783 (2006), or Mr. Dodson's constitutional rights (including the right to due process under Article III, Section 14 of the West Virginia Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution or the right to a fair and impartial trial guaranteed by the Sixth Amendment to the U.S. Constitution).

This is due to the fact that the aforementioned duty to set a tone of fairness and impartiality (and the Prosecutor's quasi-judicial role, as emphasized by the Petitioner) must be

viewed in tandem with the duty to “vigorously pursue the State’s case.” Syl. Pt. 2, *Kendall*, 219 W.Va. 686 (quoting Syl. Pt. 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977)). Decisions by the Supreme Court suggest that Prosecutors have some license in this regard. The finding in *State v. Moore*, 186 W.Va. 23, 409 S.E.2d 490 (1990), that the defendant was denied a right to a fair trial can be distinguished, as it did not rely exclusively on the comments of the Prosecutor, but rather, a particular set of aggravating circumstances:

Thus, considering the abrupt manner in which the trial court excused the jury when the third juvenile recanted his testimony, the prosecutor’s characterization and use of prior inconsistent statements as substantive evidence, and the prosecutor’s comments concerning his personal belief that the juveniles and Mr. Perkins were lying, it is clear that the cumulative effect of these three factors denied the appellant his constitutional right to a fair trial...

*Id.* at 28.

To underscore this point, the Court notes that in her dissenting opinion in the above case, Justice Workman cited *State v. Dietz*, 182 W.Va. 544, 390 S.E.2d 15 (1990), a case in which the Supreme Court “permitted the prosecutor to call the defendant a liar...Certainly it can’t be more egregious to argue that an ordinary witness is lying than it is to call a criminal defendant a liar.” *Moore*, 186 W.Va. at 32.

The Petitioner correctly argues that “[f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” Syl. Pt. 3, *State v. Adkins*, 209 W.Va. 212, 544 S.E.2d 914 (quoting Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995)). However, the Petitioner does not fully address each of the four factors in his argument on this point. The Petitioner argues that: a) the Prosecutor’s

statements prejudiced the accused because it led the jury to discredit the source of Mr. Dodson's sole trial defense, b) said prejudice was worsened by the fact that the statements were extensive and not isolated and c) the Prosecutor's statements bolstering Ms. Bledsoe's credibility were offered to divert the jury from determining Ms. Carrigan's credibility and fairly weighing the evidence before it, and were instead offered to lead it to consider the innocence and sympathy of a child having to testify at a criminal trial.

In his analysis, the Petitioner ignores the third factor of the test; namely, that in the underlying case, there did exist strong competent proof to establish the guilt of the accused. The Petitioner also classifies the remarks as extensive, yet only cites of handful of comments from the entire trial (this Court counted five (5) instances that were cited by the Petitioner). As for the fourth factor, it is not a given that the point of the Prosecutor's comment on the child's testimony was to draw attention to the sympathetic, prejudicial fact of a child testifying—the comment reads instead as a comparison of witness credibility. Lastly, with respect to the first factor, the comments on witness credibility do not clearly prejudice the accused, as there is no indication that the jurors were in some way hindered in determining for themselves the credibility of the witnesses whom they had watched on the stand. It is in consideration of these four factors and previous Supreme Court rulings that this Court denies habeas relief on the particular grounds of due process violations vis-à-vis prosecutorial (mis)conduct.

**D. Mr. Dodson was denied effective assistance of counsel in the plea bargaining phase of his trial because Mr. Lambert's advice to reject the State's Plea Offer was based on incorrect legal rules that clearly contradicted settled law.**

Regardless of Mr. Dodson's guilt, criminal history, or status as a "good person," he was constitutionally entitled to the effective assistance of counsel in his defense of the charges against him. "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective

assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). From the entire record available to this Court, and particularly on the issue of information and advice given to Mr. Dodson on the issue of the advisability of accepting the offered plea agreement rather than standing trial, it appears that Mr. Dodson did not receive such assistance from his trial counsel.

As discussed above, claims of ineffective assistance of counsel are governed by the two-pronged test established in *Strickland v. Washington*, which requires a court to “apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel’s strategic decisions.” *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. 11, 17, 528 S.E.2d 207, 213 (1999) (quotations omitted). Essentially, a court must ask “whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” *Miller*, 194 W.Va. at 16, 459 S.E.2d at 127.

The United States Supreme Court recently held that criminal defendants are constitutionally entitled to effective assistance of counsel during the plea bargaining stage of a prosecution and that the *Strickland* test therefore applies to a claim of ineffective assistance of counsel during plea bargaining. *Lafler v. Cooper*, 132 S.Ct. 1376, 1391, 182 L. Ed. 2d 398 (2012). The record before this Court shows 1) that Mr. Lambert’s assistance during Mr. Dodson’s plea bargaining was objectively ineffective under *Strickland* in clear violation of Mr. Dodson’s constitutional rights, and 2) that had Mr. Lambert’s assistance been effective, there is a reasonable probability that Mr. Dodson would have accepted the Plea Offer and received a much shorter sentence.

**1. Mr. Lambert's advice was deficient under an objective standard of reasonableness.**

The State's Plea Offer was by any reasonable standard, and by Mr. Lambert's own admission, "lenient." As shown by the fact that the Prosecutor at trial did not even call the victim Britany Carrigan as a witness, nor move to admit her statement, but rather depended upon the testimony of a number of disinterested eye-witnesses, the State's case against Mr. Dodson was very strong. In the Plea Offer the State promised to not pursue a recidivist sentence against Mr. Dodson if he pled guilty to Daytime Burglary, Misdemeanor Domestic Battery, and another pending Domestic Battery misdemeanor, and offered a one (1) to ten (10) year sentence for Daytime Burglary to be served concurrently with two one (1) year sentences for Domestic Battery, which would make Mr. Dodson eligible for parole after one (1) year in prison. Mr. Dodson was aware of the risks of a recidivism conviction, having faced such a threat before; however, he relied on counsel's advice and rejected the Plea Offer. By doing so, he risked, and ultimately received, a recidivism sentence of fifteen (15) years to life. While it is a defendant's right to decide whether to accept a plea or risk going to trial, his decision cannot be allowed to stand when it was based on deficient or erroneous advice from his counsel.

It is unclear why, prior to rejecting the Plea Offer, Mr. Lambert had failed to properly advise Mr. Dodson of the law that governed his case, but it is evident that Mr. Lambert at the very least failed to properly explain, and (judging from remarks he made at trial) potentially misunderstood the applicable law himself. West Virginia criminal law and the rules of evidence as they related to the charges against Mr. Dodson and the facts of Mr. Dodson's case at the time he rejected the Plea Offer. This failure constitutes objectively deficient performance of counsel in contravention of the first prong of the *Strickland* test.

- a. Counsel failed to properly inform the Defendant/Petitioner of the required elements of the underlying offenses.

As Mr. Lambert testified that he neither wrote any letters to Mr. Dodson on the subject of trial strategy or the advisability of accepting a plea – nor did he make notes of any communications with his client on those subjects -- we are left to faulty memories and conflicting assertions at the Omnibus hearing, coupled with representations made at trial and sentencing. From those sources it appears to the Court that Mr. Lambert either misunderstood or misrepresented the required elements of the underlying charges that Mr. Dodson faced in this case. As such it appears that counsel improperly explained the required elements of the governing offenses, and (more importantly) the lesser included offenses, to Mr. Dodson, and incorrectly assured Mr. Dodson that he could not be convicted of the charges against him. Indeed, the factual record of this case shows that counsel, even at the time of trial, misunderstood or misrepresented the elements of Burglary, the lesser included offense of Daytime Burglary, and Domestic Battery. Mr. Dodson, as a layman, relied heavily on the legal expertise of Mr. Lambert, an attorney with almost thirty years' experience, and therefore rejected the State's Plea Offer. Mr. Lambert's actions constituted objectively deficient assistance of counsel. *See Lafler*, 132 S.Ct. at 1391; *Cooper v. Lafler*, 376 Fed.Appx. 563, 570-71 (6th Cir. 2010) ("Further, counsel focused on that incorrect legal rule in advising petitioner not to accept the Plea Offer. Providing such erroneous advice in the face of settled [governing] law is obviously deficient performance."); *Vernatter*, 207 W.Va. at 17, 528 S.E.2d at 213. Mr. Lambert described Mr. Dodson as "not the kind of man to take advice from a lawyer or anyone else to his peril." Omnibus Hearing Tr. 98:23-24. Unfortunately, it appears that Mr. Dodson did exactly that here.

Mr. Lambert asserts that he properly informed Mr. Dodson of the law that governing the charge of Burglary and Daytime Burglary, and specifically that the State did not need to prove

establish a breaking and entering in order to convict him of the lesser included offense of Daytime Burglary. *See* Omnibus Hearing Tr. 130:24-133:21. Unfortunately, Mr. Lambert never took notes during his meetings with Mr. Dodson and never prepared any written correspondence to his client, and while he alleged at the Omnibus Hearing that his recollection would suffice to show what transpired in his representation of Mr. Dodson, his answers to Mr. Dodson's counsel's questions established that his recollection was less than reliable on many important matters. *See id.* at 122:5-8 ("You're asking me to go back and try to answer under oath what happened years ago I don't remember. I don't know."); 130:1-4 ("I can't go back and tell you exactly what I was thinking about what I said at that time. You're asking me something that happened a long time ago from a cold transcript."); 109:18; 123:3. As such, the most reliable indication as to the advice that Mr. Lambert provided to Mr. Dodson must be deduced from the record before this Court, and that record shows that even after receiving a life sentence for Burglary and Domestic Abuse, Mr. Dodson did not understand the charges against him.

After receiving his sentence of life imprisonment, Mr. Dodson remarked "We shouldn't be here today because this is, I mean, I am getting life for burglary that I did not commit. There is no door jam broken. There is no window broken. The alleged victim let me in the house." Sentencing Tr. 58:23-59:2. Even a cursory reading of the Burglary statute, West Virginia Code § 61-3-11, shows this to be an inaccurate understanding of the law. While such statements inherently raise suspicion in this Court as to whether the convicted defendant was properly advised of the law, especially in a situation like that here, where Mr. Dodson has an admittedly voluminous criminal record and a real-world understanding of the law, this Court cannot discount the fact that criminal defendants often choose to only hear the aspects of their counselors' advice that they wish to hear. However, counsel's arguments and statements at

trial support Mr. Dodson's contentions that he was never informed of the possibility that he could be convicted of Daytime Burglary without the State establishing that he had broken into Ms. Carrigan's home, namely counsel's opening statement, in which he stated that "[Mr. Dodson] is not charged with a trespass here, Mr. Dodson is charged with burglary, breaking and entering. It was by invitation." April 5, 2011 Trial Tr. 91:16-19. This statement completely ignored the lesser included felony offense of Daytime Burglary, a conviction of which would also result in a potential life sentence for Mr. Dodson.

It is clear to this Court that given Mr. Dodson's criminal history, he is capable of understanding the dangers of not accepting a plea, and it is unbelievable that his previous pattern of risk adverse plea bargaining would suddenly change unless he received some assurance that he could not be convicted of the charged offenses. Mr. Lambert's statements show that he was unaware that Daytime Burglary did not require a breaking and entering, and this misperception supports Mr. Dodson's contention that Mr. Lambert failed to inform him that a breaking was not required for Daytime Burglary and that theft was not a required element of either Burglary or Daytime Burglary. Enhanced by his understanding that Mr. Lambert was a skilled criminal defense attorney, Mr. Dodson was led to believe that the State could not prove its case and rejected the Plea Offer on Mr. Lambert's advice. Counsel's failure to properly understand or inform his client of the governing law of Burglary prior to Mr. Dodson's rejection of the Plea Offer was outside the range of professionally competent assistance. *See Lafler*, 132 S.Ct. at 1391, 182 L. Ed. 2d 398; *Vernatter*, 207 W.Va. at 17, 528 S.E.2d at 213.

The record similarly shows that Mr. Lambert also failed to properly understand or explain the required elements of Domestic Battery to Mr. Dodson. Counsel's midtrial motions for a directed verdict indicated a misinterpretation of what the statute meant to be a "household member" and overlooked the fact that even if the relationship between Mr. Dodson and the

victim were not as the evidence established it to be, there would still be the lesser-included offense of simple battery with the same penalty. While this Court finds the Petitioner's argument on this point convincing in light of the fact that this Court corrected counsel's misunderstanding of the elements at trial, this Court declines to delve into further analysis on this point. As the Domestic Battery charge alone was a misdemeanor, and would itself only result in a maximum period of confinement of twelve (12) months (and/or a five hundred dollar (\$500) fine), this Court does not find that any ineffective assistance of counsel tied to that count necessarily satisfies the second prong of the *Strickland* test, as the measure of prejudice (discussed in greater detail below) requires a greater discrepancy between what was offered under a plea bargain and the sentence resulting from the proceedings. (The misdemeanor, while part of a global plea offered in this case, on its own would not have resulted in a sentence post-trial of greater than the aforementioned twelve (12) months of confinement and/or five hundred dollar (\$500) fine). However, Counsel's apparent reliance upon a misreading of the elements of Domestic Battery do support Petitioner's version of the advice he received on the more consequential felony charge elements.

**2. There is a reasonable probability that, but for Mr. Lambert's unprofessional errors, the result of the proceedings would have been different.**

After declaring his expertise and experience in criminal proceedings, Mr. Lambert claimed multiple times at the Omnibus Hearing to have attempted to persuade and push Mr. Dodson to accept the Plea Offer, even reading him the law from his "law book." *See e.g.*, Omnibus Hearing Tr. 111:1-113:16; 126:13-19. The evidence before this Court, however, belies Mr. Lambert's claims and in fact shows that Mr. Lambert misinformed Mr. Dodson of the law and/or misunderstood it himself. At the point Mr. Dodson rejected the Plea Offer, Mr. Lambert had categorically failed to adequately advise Mr. Dodson of the law, the strength of

the State's case against him, or of the unlikely prospect of his prevailing at trial. Mr. Dodson believed, because Mr. Lambert told him, that the State could not prove all of the material elements of the crimes of Burglary and Domestic Battery. Specifically, Mr. Dodson appears to have been unaware of the existence of the lesser offense of Daytime Burglary, which, as a felony, carried the same recidivism sentence as Burglary.

Had Mr. Lambert actually wished to dissuade Mr. Dodson from rejecting the Plea Offer, he would have informed Mr. Dodson the State's case was a strong one and that his evidence, consisting entirely of Ms. Carrigan's recantation, was shaky at best in light of all the evidence to the contrary. The record indicates that counsel in fact did the opposite, as at the Omnibus Hearing, he cavalierly admitted that Ms. Carrigan's second statement was "part of the defense strategy that [he] crafted" and that he "absolutely" determined that "using that second statement as [Mr. Dodson's] defense . . . would serve the purpose of mounting effective defense because Ms. [Carrigan] invited Mr. Dodson to her house." *See e.g.*, Omnibus Hearing Tr. 96:2-9. All of the above goes to support Mr. Dodson's assertion that Mr. Lambert's actual advice was "we are not even going to consider taking a plea bargain" and that he had explained as a matter of law that the State could not convict him of burglary because he did not break into, or steal anything from, Ms. Carrigan's home, and that he could not be convicted of domestic battery because he and Ms. Carrigan were not related or living together. Petitioner's mother Sherry Dodson testified at the Omnibus Hearing that Mr. Lambert told her, "Don't worry about it, he's got it. It's no possible way they can plead him guilty... and just don't worry about it, that's what I'm paying him for."[sic] Omnibus Hearing Tr. 7:23-8:1. Sherry Dodson also testified regarding Lambert's representations to her, "He'd just say there was no possible way they could have found Shane guilty 'cause he didn't go into the place to take anything out." Omnibus Hearing Tr. 8:6-8.

Because of Mr. Lambert's erroneous advice of the governing law, Mr. Dodson rejected the Plea Offer. Mr. Dodson has unwaveringly averred that he would have accepted the Plea Offer had counsel properly advised him of the governing law, and Mr. Dodson's criminal history and the other evidence introduced in this case sufficiently substantiates this claim. Further, Mr. Dodson has established that it is reasonably probable that this Court would have accepted the Plea Offer had he decided to accept it.

Upon his conviction, Mr. Dodson received a penitentiary sentence of fifteen (15) years to life. Had he accepted the Plea Offer, he would have received a penitentiary sentence of one (1) to ten (10) years. The United States Supreme Court has held that a minimum sentence three and half (3.5) times greater than what was offered under a plea bargain qualifies as a different result of the proceedings sufficient to establish prejudice. *Lafler*, 132 S.Ct. at 1391. In Mr. Dodson's case, the minimum sentence is fifteen (15) times higher than what he would have received under the Plea Offer. Mr. Dodson has therefore satisfied the second prong of the *Strickland* test.

### **III. REMEDY**

Having decided that Mr. Dodson was denied his right to effective assistance of counsel during plea bargaining, this Court is tasked with fashioning a proper remedy. Generally, if a petitioner successfully shows through his habeas corpus petition that his trial is plagued by ineffective assistance of counsel, the petitioner is granted a new trial, so that the taint of those errors may be erased. Here, however, a new trial is not necessary, as the constitutional rights which were violated (and must therefore be cured) were so violated months before the first day of his trial.

When a defendant rejects a plea agreement due to ineffective assistance of counsel, the State is to be compelled to reoffer the Plea Offer. "The correct remedy in these circumstances,

however, is to order the State to reoffer the plea agreement.” *Lafler*, 132 S.Ct. at 1391. The Court “can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the Plea Offer, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.” *Id.*

Mr. Dodson’s Petition for Habeas Corpus Relief is hereby GRANTED, and it is therefore ORDERED that the State reoffer Mr. Dodson the February 15, 2011, plea offer agreement.

ENTERED: 11/25/14

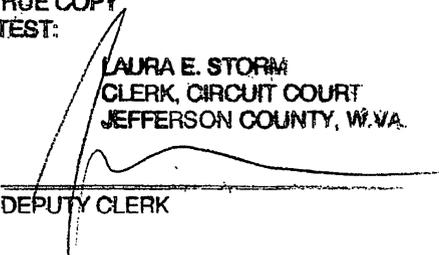
2cc's  
C. Peterson  
B. Sims  
11/26/14  
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David H. Sanders, Judge  
The 23<sup>rd</sup> Judicial Circuit, West Virginia

A TRUE COPY  
ATTEST:

LAURA E. STORM  
CLERK, CIRCUIT COURT  
JEFFERSON COUNTY, W.VA.

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DEPUTY CLERK