



**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

**MARVIN PLUMLEY, Warden, Huttonsville
Correctional Center, Respondent Below,
Petitioner,**

v.

Supreme Court Docket No.: 14-1202

**SHANE DODSON, Petitioner Below,
Respondent.**

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

PETITION FOR APPEAL

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ALLEGED ASSIGNMENTS OF ERROR

- A. The Circuit Court incorrectly applied the correct standard of law.**
- B. The Circuit Court improperly made findings of fact which contradicted the plain preponderance of the evidence.**

STATEMENT OF CASE

This is an appeal filed by the warden of the Huttonsville Correctional Center, Marvin Plumley, challenging the writ of habeas corpus granted by the Circuit Court of Jefferson County. The Respondent, Shane Dodson, is currently incarcerated in the Eastern Regional Jail, serving a one-year sentence for domestic battery. Prior to the lower court's issuance of the writ of habeas corpus, the Respondent, Mr. Dodson, served a period of incarceration in the penitentiary pursuant to his conviction for daytime burglary. The Respondent was convicted of the felony of daytime burglary and the misdemeanor of domestic battery at trial on April 6, 2011. Following his conviction, the State filed an information alleging that the Respondent had at least twice previously been convicted of qualifying offenses which made him eligible for incarceration for life pursuant to the provisions of West Virginia Code § 61-11-18. Accordingly, the Circuit Court sentenced Mr. Dodson to incarceration in the penitentiary for his natural life with parole eligibility after 15 years.

The underlying daytime burglary and domestic battery offenses resulted from an incident which occurred on September 20, 2010 when Mr. Dodson went to the home of his girlfriend, Brittany Carrigan, who refused to answer her door. Shortly thereafter Mr. Dodson gained entry to the home and an altercation occurred which resulted in Mr. Dodson striking Ms. Carrigan several times. A.R. 3.

At trial Mr. Dodson's defense to the burglary charge was that he was invited to Ms. Carrigan's home to obtain a car title. His defense to the domestic battery charge was that the alleged battery never occurred. Ms. Carrigan, the alleged victim, testified for the defense that no battery occurred and further, that she invited Mr. Dodson to her home to give him a car title. However, on the date of the incident Ms. Carrigan gave a contrary statement to investigating officers that the domestic battery did occur, with the further detail that Mr. Dodson pushed the door open, came inside and started hitting her. A.R. 3. At trial Ms. Carrigan explained that her prior inconsistent statement was caused by her intoxication and anger at Mr. Dodson on September 20, 2010.

Prior to trial a plea offer was extended by the State to permit the Respondent to enter a guilty plea to daytime burglary and domestic battery as charged in the indictment, and to an additional domestic battery charge then pending in magistrate court, with the proviso that the State would refrain from filing a recidivist information. A.R. 75. Pursuant to the plea offer the Respondent would be sentenced to not less than one nor more than ten years for daytime burglary, and to one year for each of the domestic battery charges, with all of these sentences to be served concurrently, for a single aggregate one to ten year sentence. A.R. 3.

The Respondent rejected that offer after discussing it with his counsel. A.R. 4; 197:20 – 199: 8; 269 – 270; 276 - 278. Counsel did not memorialize that discussion by notes or a letter to his client. A.R. 4; 283. However, the Respondent confirmed his rejection of the plea on the record at his March 7, 2011 pre-trial hearing. A.R. 276 – 278. The Respondent also acknowledged at that time that he was aware he was facing a life sentence as a third-time recidivist if he were convicted of burglary or the lesser included offense of daytime burglary at trial. A.R. 4; 276. On April 6, after a two-day trial the Respondent was convicted of the lesser

included felony of daytime burglary and the misdemeanor of domestic battery. On April 7, 2011,¹the State filed an Information seeking an enhancement of Mr. Dodson's sentence to life imprisonment. A.R. 6; 330 – 333.

On April 11, 2011, Mr. Dodson was arraigned on Information 11-F-37, advised the court that he wished to contest the Information, and the Court entered a plea of not guilty on his behalf. A.R. 374 – 380. Thereafter pre-trial and trial dates were set on the Information. On May 23, 2011, at a pre-trial hearing in 11-F-37, Mr. Dodson admitted to being the same person who was previously convicted of: (1) Possession of a Stolen Vehicle in Jefferson County, West Virginia criminal action number 00-F-18; (2) Grand Larceny in Berkeley County, West Virginia criminal action number 01-F-92; and (3) Malicious Assault and Attempted Murder in Berkeley County, West Virginia criminal action number 04-F-5. A.R. 335 – 337.

At a June 6, 2011 hearing regarding post-trial motions and sentencing, the trial court denied Mr. Dodson's post-trial motions, then proceeding to sentencing. *Id.* Pursuant to West Virginia Code § 61-11-18, the court then sentenced Mr. Dodson to the penitentiary house for the rest of his natural life, based upon his conviction by jury in 11-F-8 and his admissions to the Information filed in 11-F-37. *Id.* He was also sentenced to one year upon his conviction for domestic battery. These sentences were to be served consecutively.

Mr. Dodson filed a petition for appeal on April 20, 2012. A.R. 24 – 63. The State filed its response and the Supreme Court of Appeals of West Virginia issued a memorandum decision denying the petition for appeal on February 11, 2013. A.R. 6; 61 – 64.

Mr. Dodson, *pro se*, filed his Petition for a Writ of Habeas Corpus on November 9, 2012 seeking his release from the custody of Warden Marvin Plumley² at the Huttonsville

¹ The Court's Order Granting Petition for Habeas Corpus Relief indicates that the Information was filed April 6, 2011, however, both the Certificate of Service for the Information of the Prosecuting Attorney and the Circuit Clerk's file indicate the Information was actually filed on April 7, 2011.

Correctional Center. A.R. 65 – 75. On December 23, 2013, Mr. Dodson by counsel, filed his Amended Petition for Writ of Habeas Corpus Ad Subjiciendum. A.R. 76 – 123. An evidentiary hearing was held on June 18, 2014. A.R. 7; 176 - 325. The Circuit Court issued its “Order Granting Petition for Habeas Corpus Relief” on November 25, 2014. A.R. 2 – 23. That order denied relief on two grounds, but granted relief on a third ground. It is from this order that the Petitioner seeks relief.

SUMMARY OF ARGUMENT

First, the Court improperly determined that trial counsel’s performance was deficient under an objective standard of reasonableness. However, the testimony of both the Respondent and his trial counsel contradict the court’s findings in this regard. Trial counsel testified that the defense advanced at trial would have completely exonerated the Respondent had the jury believed the defense witnesses. Likewise, the Respondent agreed with this assessment. Moreover, the Petitioner also conceded that the defense presented to the burglary charge would have been a complete defense which could have led to acquittal if accepted by the jury. Thus, the Court improperly applied the first prong of the Strickland v. Washington test to assess ineffective assistance of counsel.

Second, the Court found that the result of the proceedings would have been different but for trial counsel’s alleged unprofessional errors. However, because the Court improperly based its determination that trial counsel was ineffective upon an argument made at mid trial motions on a misdemeanor offense, the conviction for which would not have had any impact on the Respondent’s recidivism proceedings. Thus, the Court improperly found that the Respondent

² Mr. Dodson was later housed at Mt. Olive Correctional Center, Mt. Olive, West Virginia, where David Ballard is the warden, and is currently incarcerated at the Eastern Regional Jail, however, the Petitioner in this case remains Warden Plumley.

met his burden on the second prong of the Strickland v. Washington analysis when it found that the results of the proceeding would have been different based on trial counsel's performance.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner affirmatively states that oral argument is not necessary unless the Court, in its discretion and pursuant to Rule 19, determines that oral argument is necessary and shall be held.

ARGUMENT

The Circuit Court's grant of the writ of habeas corpus should be reversed because the Circuit Court's findings of fact were clearly wrong and the Circuit Court improperly applied the two-part test of Strickland v. Washington. "In West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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." *Syllabus Point 5, State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The Circuit Court improperly applied both factors of the test in regard to Mr. Dodson's trial counsel.

"In reviewing counsel's performance, courts must 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. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." *Syllabus Point 6, State v. Miller*, 194 W.Va. 3, 459 S.E.2d

114 (1995). Moreover, counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984).

When considering whether a petition requesting post-conviction habeas corpus relief has stated grounds warranting the issuance of the writ, courts typically are afforded broad discretion. State ex rel. Valentine v. Watkins, 208 W.Va. 26, 31, 537 S.E.2d 647, 652 (2000). However, there are limits to such discretion. “Findings of fact made by a trial court in a post-conviction habeas corpus proceedings will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” *Syllabus Point 1*, State ex rel. Postelwaite v. Bechtold, 158 W.Va. 479, 212 S.E.2d 69 (1975); *See also* Ballard v. Ferguson, 232 W.Va. 196, 751 S.E.2d 716 (2013), and David W. v. Rubenstein, 2014 WL 2782130. Further, in *Syllabus Point 5* of Postelwaite, *supra*, this Court held that “When the findings of fact of a trial court in a post-conviction habeas corpus evidentiary hearing are against the plain preponderance of the evidence, are not supported by the evidence, are clearly wrong, or are the result of a mistaken view of the evidence, such findings will be set aside or reversed by this Court on review.”

A. The Circuit Court incorrectly applied the correct standard of law.

The Circuit Court properly used the two-part test articulated in Strickland v. Washington and adopted by this Court in State v. Miller, *supra*, however, the Circuit Court improperly applied that standard of law. The Circuit Court was required to find both that counsel’s performance was deficient under an objective standard of reasonableness, **and** that there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings

would have been different. However, the evidence presented to the court clearly did not support the court's findings on either count.

The Respondent was accused of committing two crimes, only one of which—burglary—would have had the effect of changing a sentence into a life sentence based upon a recidivist information. Ultimately, the Respondent was convicted of daytime burglary, a lesser included offense of that charged in the indictment, however, that lesser felony was still sufficient to seek enhancement pursuant to the West Virginia recidivist statute. However, the Circuit Court justified its issuance of the writ of habeas corpus based upon actions related to the misdemeanor of domestic battery, a charge which it was impossible to use to enhance a sentence pursuant to the recidivist statute. When applying an objective standard of reasonableness to the performance of trial counsel, it is clear that the acts complained of were within the broad range of professionally competent assistance, and that the Circuit Court erred in finding to the contrary.

1. The presented defense of invitation was a complete defense to burglary.

The defense presented at trial, if believed, was a complete defense to the charge of burglary. West Virginia Code § 61-3-11 defines burglary as follows:

(a) Burglary shall be a felony and any person convicted thereof shall be confined in the penitentiary not less than one nor more than fifteen years. If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of burglary.

(b) If any person shall, in the daytime, enter without breaking a dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years.

At trial defense counsel present a case, the crux of which was that Mr. Dodson was *invited* to the Carrigan residence for a *legitimate, non-criminal purpose*. That defense was in complete contrast to the State's theory of the case that Mr. Dodson broke and entered into the residence to commit a domestic battery. The defense of invitation was a credible and complete defense to the charge of burglary. The defense was supported by the sole defense witness, Ms. Carrigan, who gave a prior inconsistent statement but who later recanted that statement and claimed that she invited Mr. Dodson to her home to transfer a car title to him, and further that no battery took place. The defense also challenged the credibility of the State's witnesses based on their ability to observe events to which they testified, and on their motive to lie.

Trial counsel properly advised the defendant that if the jury believed that the Respondent was invited to the Carrigan residence, and that he entered that residence *with the intent to collect a car title*, and *without the intent to commit a crime* therein, those facts constituted a defense to the charge of burglary. That assertion constituted the defense that was presented at trial, and which proved in part to be successful; Mr. Dodson was acquitted on the greater offense of burglary but convicted of the lesser offense of daytime burglary, meaning that the jury found he did not break and enter the residence. Mr. Dodson conceded that he was acquitted of the burglary which required the element of breaking and entering. A.R. 235:3 – 6.

It was undisputed that the Respondent entered the Carrigan residence. The *intent to commit a crime* within the Carrigan residence *prior to entering* that dwelling was the critical element of the charge. More importantly, proof that Mr. Dodson entered the residence with the intent to commit a crime was the determining factor of whether he would be convicted of burglary and thus subject to life imprisonment based on his three prior felonies.

Trial counsel properly presented the defense to the charge of burglary that the Respondent was *invited* to Brittany Carrigan's house *with the intent to pick up the title to a car*. Respondent alleges that he was improperly advised of the law of burglary and thus declined the plea offered by the State. Curiously, Respondent (and his mother) alleged in his habeas proceeding that he was told by his trial counsel that because he stole nothing from Ms. Carrigan's residence that he could not be convicted of burglary. A.R. 204:10 – 21; 183:6 – 8. However, there is not a single reference in the trial transcript to any defense regarding Mr. Dodson's lack of intent to steal anything from Ms. Carrigan's residence. At the evidentiary hearing, trial counsel was questioned regarding whether theft from the Carrigan residence was explored at trial:

- Q: You didn't ask any questions about whether anything was stolen from the house, is that correct?
- A: That's correct.
- Q: Why was it that you didn't focus on whether something was stolen from the house?
- A: I didn't think it was really necessary.

This testimony and a review of the record stand in stark contrast to Mr. Dodson's contention that the absence of an intent to steal from the Carrigan residence was a key to his defense. Moreover, the Respondent himself testified that he recalled discussing his defense with trial counsel, which was exclusively based on Brittany Carrigan's testimony that she invited the Respondent to her house for the purpose of getting a car title. A.R. 234:21 – 24. The Respondent further admitted that part of his defense rested upon his witness, Brittany Carrigan, saying that a battery never occurred. A.R. 233: 13 – 19. Respondent also testified that he discussed Ms. Carrigan's testimony with trial counsel. A.R. 234:16 – 20. All of this indicates quite clearly that Mr. Dodson was aware that his defense rested upon Ms. Carrigan's testimony that he went to her home at her invitation to obtain a car title and that no criminal act occurred

inside the home. Put another way, Mr. Dodson's defense was that he lawfully entered the residence without any unlawful intent.

Trial counsel testified that he filed jury instructions with the court prior to the Respondent's trial, and that those jury instructions included an elemental instruction for the offense of burglary which included the elements that a person had to break and enter a dwelling house with the intent to commit a crime. A.R. 315:6 – 13. That jury instruction contained a proper statement of the law. Further, that jury instruction demonstrates that trial counsel understood the elements of burglary and the applicable law thereto, and potential defenses thereto. Additionally, pursuant to Mr. Dodson's own testimony, trial counsel discussed that defense with his client and obtained Mr. Dodson's help in preparing his defense which was based entirely upon the statement of Ms. Carrigan. A.R. 232:11 – 234:19. Further, Mr. Dodson acknowledged that he spoke with his trial counsel regarding Ms. Carrigan's testimony.

- Q: So did you speak with Mr. Lambert about Brittany [Carrigan's]³ testimony on your behalf?
- A: I did.
- Q: Did you provide Mr. Lambert with Ms. [Carrigan's] contact information so he could reach her and discuss with her what her testimony would be?
- A: I do not recall. I don't know whether that was me or my mom or someone in my family. I don't recall who gave him the information.
- Q: Do you recall discussing with Mr. Lambert what Ms. [Carrigan] might testify to?
- A: I do.
- Q: Okay. And do you recall discussing with Mr. Lambert that Ms. [Carrigan] had recanted or taken back her first statement to police?
- A: Yes.
- Q: Do you recall speaking to Mr. Lambert about Ms. [Carrigan's] testimony that now not only was her first statement incorrect but now she claimed that there was no assault that had ever happened?
- A: Correct.

³ The June 18, 2014 transcript misspells Ms. Carrigan's name as "Kerrigan".

- Q: And do you recall speaking to Mr. Lambert about Ms. [Carrigan's] testimony that she had invited you to her house for the purpose of getting the car title?
- A: Correct.
- Q: And you and Mr. Lambert spoke about that?
- A: Correct.

It is clear from Mr. Dodson's own testimony that he not only knew what his defense at trial would be, but that he was instrumental in formulating that defense and spoke to his trial counsel about how that defense would be presented, including the witness who would testify in his behalf.

In fact the defense put forward at trial was not only legitimate, it was in part successful. The jury did not believe that the Respondent broke and entered the dwelling house. If the jury had found that to be the case, the Respondent would have been convicted of burglary, rather than daytime burglary. Thus, it is inescapable that the jury *did* find the defense to be credible *in part*. The jury found that the Respondent was either invited in, or permitted inside the residence, and that he did not force his way inside, or "break" inside the home. Accordingly, the jury through its verdict of the lesser included offense of daytime burglary, acquitted the Respondent of the more serious felony of burglary. This successful defense effectively limited the Respondent's sentence to one to ten years for daytime burglary instead of one to fifteen years for burglary. However, as noted above, a conviction for either felony was sufficient for the State to file an Information based upon the Respondent's three qualifying prior felony convictions.

Under cross examination Mr. Dodson was resistant to the idea that his defense was in part successful, however, he conceded that he was acquitted of the more serious felony. A.R. 235:16 – 18. Mr. Dodson also conceded that it was preferable to be convicted of a crime that

would result in two and a half years⁴ less incarceration, which was the result his trial counsel achieved, but for the recidivist information. A.R. 236:18 – 24.

Despite the partially successful defense to the felony of burglary, and despite the fact that in West Virginia only upon a conviction for a felony offense may the State seek to enhance that penalty under the recidivist statute, the Circuit Court instead based its finding of ineffective assistance of counsel upon the handling of the related misdemeanor offense of domestic battery.

The Circuit Court states in its order “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.” A.R. 17. However, that assertion is clearly not supported by the record. Prior to trial defense counsel submitted jury instructions which contained a correct statement of law. The defense mounted by trial counsel successfully acquitted Mr. Dodson of the more serious felony of burglary. Had the jury believed the defense witness’ version of events it would necessarily have acquitted Mr. Dodson of the lesser included offense of daytime burglary.

Interestingly, even if the jury believed that the Respondent committed a domestic battery *after* entering the home by invitation and with the intent to collect a car title, the Respondent might still have been acquitted of the felony of daytime burglary, because such an offense requires the element that the individual *entered* the dwelling house *with the intent to commit a crime* therein. Thus, the defense put forward by trial counsel was a valid defense, as well as a strategic one based upon the credibility questions raised by the defense regarding State witnesses.

⁴ Pursuant to the “good time” statute codified at West Virginia Code § 28-5-27, the maximum period of incarceration for a one to ten year sentence is five years, and the maximum period of incarceration for a one to fifteen year sentence is seven and one half years.

Because the defense presented constituted a complete defense to the felony charge against Mr. Dodson, the Circuit Court erred in finding that trial counsel did not understand the elements thereof. Further, because according to Mr. Dodson's own testimony he discussed this defense with his counsel prior to trial and was intimately involved with preparing the defense, which he properly understood could completely exonerate him, the Circuit Court likewise erred in finding trial counsel incorrectly advised his client regarding the elements of the offense and the likelihood of conviction upon those elements.

2. The presented defense that no domestic battery occurred was a complete defense to that charge.

It appears that the Court based its finding of trial counsel's supposed misunderstanding of the elements of domestic battery upon counsel's argument during mid-trial motions. That was the sole argument presented to the court which might be construed as a "misunderstanding" of the applicable law. Trial counsel's reference to the lack of family membership during mid-trial motions was a briefly articulated assertion that the State had not met its burden with respect to proving the family or household member status of Ms. Carrigan and Mr. Dodson. The reference was a single sentence, which was then clarified by trial counsel's acknowledgement that case law did not support his argument. A.R. 303:23 – 304: 17. Upon being questioned about the argument at the evidentiary hearing trial counsel answered, "Counsel, it's an argument. It's a portion of an argument. It doesn't necessarily mean that I did not sit down with him and read him the law. It was just an argument that I made before the Court." A.R. 305:14 – 17.

However, the defense at trial was not based in any substantive degree on the contention that Ms. Carrigan was not a family or household member of Mr. Dodson. Trial counsel did not mention in either opening statement or in argument to the jury that Ms. Carrigan was not a

family or household member of Mr. Dodson, rather, the opening and closing both focused on the credibility of witnesses, and the State's lack of proof of a breaking and entering of the Carrigan residence. In neither the opening nor closing did defense counsel mention that Mr. Dodson was not a family or household member of Ms. Carrigan. Thus Respondent's contention that he was misadvised by his counsel appears to be unsupported by the transcript of trial proceedings. Further, Mr. Dodson himself testified that his understand of his defense to the domestic battery was based upon Ms. Carrigan's statement that no battery occurred, not that she was not a family or household member.

It appears that the Circuit Court used this briefly articulated mid-trial argument as the basis for its finding that the Respondent's received ineffective assistance from his trial counsel, even though trial counsel obtained a partial acquittal for the Respondent as to the felony offense, and mounted a clear defense to the domestic battery by presenting the alleged victim who testified that the alleged battery did not occur. The Circuit Court erred in finding trial counsel did not provide effective assistance in the defense of this misdemeanor charge. Further, the Circuit Court erred when it attempted to extrapolate the possibility of improper advice on the misdemeanor charge to improper advice on the felony offense. Trial counsel's action at mid-trial appear to be clearly within the bounds of reasonable representation by counsel, when viewed under an objective standard of reasonableness. Counsel made an argument to the court that the State had not met its burden of proof, conceded that the law did not support his brief argument, and moved on to address other issues. Further, even if this Court were to find that the brief argument of counsel at mid-trial constituted ineffective assistance of counsel in regard to the domestic battery charge, that result of the proceeding with regard to the burglary would not have been different.

B. The Circuit Court improperly made findings of fact which contradicted the plain preponderance of the evidence.

The Circuit Court also erred in finding that the Respondent had ineffective assistance of counsel during plea negotiations. In Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), the United States Supreme Court reiterated its holding in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), that the two-part test for ineffective assistance of counsel articulated in Strickland v. Washington applies to both plea negotiations and plea entries. Here, the Circuit Court’s order found that had trial counsel’s “assistance been effective, there is a reasonable probability that Mr. Dodson would have accepted the Plea Offer and received a much shorter sentence.” A.R. 15. However, the Court’s finding is contradicted by the testimony of both Mr. Dodson and his trial counsel, both of whom testified that Mr. Dodson would not accept a plea unless he was sure he would be convicted by a jury.

Mr. Dodson, on direct examination by his habeas counsel, testified as follows:

- Q: So, correct me if I’m wrong, is it your belief you wouldn’t take a plea unless you were a hundred percent sure that you can’t be convicted?
- A: Yes, sir.
- Q: And do you feel like that’s what you’ve done in the past?
- A: Yes.
- Q: Thank you.
- MS. SIMS: Can I ask the court reporter to read back that last question again, sir.

The wording of habeas counsel’s question with the double negative is somewhat confusing—as suggested by opposing counsel’s request to have the court reporter read the question and answer back—however, a re-reading of the question and answer suggests that the only clear reading is that Mr. Dodson would not enter a guilty plea unless he was certain he would be convicted, as he had done in the past.

Supporting this reading, immediately prior to this exchange, the Respondent testified regarding his criminal history and history of plea entries. Mr. Dodson testified that he had previously entered a plea to malicious assault and attempted murder in an unrelated case in Berkeley County Criminal Action Number 04-F-5, but upon finding that the forensic evidence had by the state was not as strong as he originally understood it to be, Mr. Dodson attempted to withdraw his guilty plea to attempted murder and malicious wounding. A.R. 241:4 – 242:22. Mr. Dodson admitted that in that case prior to the entry of his plea the State filed a notice of intent to treat him as a habitual offender. A.R. 219:4 – 10. Mr. Dodson testified that the State’s filing of that notice of intent to treat him as a habitual offender is what motivated him to enter a guilty plea to the charges. However, he also conceded that following his guilty plea in that case that he *attempted to withdraw the plea*, as reflected in the Sentencing Order admitted as Petitioner’s Exhibit 10. A.R. 206:17 – 20; 219: 15 – 220:8. Under questioning from his own counsel Mr. Dodson testified that he attempted to withdraw his plea because after his plea entry he learned that the forensic evidence was not as strong as he originally thought it to be. Such actions demonstrate that Mr. Dodson was attempting to evade criminal responsibility upon learning that the State’s case might have a previously unforeseen weakness. However, Mr. Dodson attempts to simultaneously claim that he originally accepted a plea in that case because he was afraid of the recidivist statute. A.R. 219:15 – 18. Those positions are completely contradictory to one another.

On the one hand, Mr. Dodson claims that he entered a plea to attempted murder and malicious assault because he was afraid of the possibility of being treated as a habitual offender and sentenced to life in the penitentiary. However, on the other hand, Mr. Dodson was not afraid to accept the possibility of a life sentence when he learned that the evidence was more favorable

to him. Either Mr. Dodson entered his plea to attempted murder and malicious wounding—two of this State’s most serious felonies—because of his fear of being convicted and receiving a life sentence, or he was determined to fight the charges and risk being treated as a habitual offender sentenced to life imprisonment. It seems that Mr. Dodson was only afraid of a life sentence when he felt he would be convicted. When he believed “the state couldn’t possibly convict [him]”, Mr. Dodson was no longer afraid of being treated as a habitual offender and attempted to withdraw his plea. This past action seems entirely consistent with his instant trial counsel’s characterization of Mr. Dodson as a man who had his mind set against accepting any plea, and who refused to authorize his counsel to make a counter offer to the State after being offered a plea which would have resulted in a sentence of one to ten years without the filing of a recidivist information. A.R. 278:4 – 18. It is also consistent with Mr. Dodson’s own concession that he did not want to enter a plea unless he was “sure” he would be convicted, which concession immediately followed his testimony regarding his entry and attempted withdrawal of his plea in Berkeley County. A.R. 243:7 – 16.

This unwillingness to accept criminal responsibility unless there was no other viable option matches exactly with trial counsel’s characterization of the Respondent that, “He’s the kind of person who knows, he knows the system and that’s exactly why he did not accept the plea offer. It had nothing to do with me. It had to do with he and Ms. [Carrigan] providing the court with this [recantation] letter.” A.R. 270:16 – 19. Trial counsel testified that, “It was [Mr. Dodson’s] position that Ms. Brittany [Carrigan’s] letter would exonerate him.” A.R. 271:21 – 22. When trial counsel was asked if he advised Mr. Dodson that it was in his interest to accept the plea terms, counsel testified that, “Not only did I advise him I asked him are you sure this is

what you want to do and he said yes. His mind set was clearly against the plea it was based upon the defense of Brittany [Carrigan's] recantation letter.”

Mr. Dodson now insists that he would have accepted the State's proffered plea but for his trial counsel's advice. However, trial counsel testified that the Respondent was unwilling to listen to his advice. “His entire demeanor was based upon not accepting the plea that was his decision and his decision alone. Mr. Dodson is not the kind of person who's told what to do.” A.R. 270:5 – 8. “He's not the kind of man to take advice from a lawyer or anyone else to his peril. He tells you what he wants done that's exactly what happened.” A.R. 274:23 – 275:1. Under cross examination trial counsel further testified, “The recantation letter from Ms. [Carrigan] was his idea that he didn't need to plea[d], that he was going to be acquitted at trial.” A.R. 286:12 – 14. Trial counsel further testified that he had limited influence on his client who was extremely experienced with the criminal justice system, “Mr. Dodson he knew what he wanted to do. I gave him my advice on numerous occasions. This was his call.” A.R.288: 10 – 12.

Trial counsel also testified that the Respondent was experienced with the criminal justice system, was concerned about avoiding a recidivist penalty, and that he discussed that possibility with the Respondent. A.R. 268:19 – 23; 270:12 – 17. Trial counsel testified that he transmitted the State's February 15, 2011 plea offer to the Petitioner and further, that he discussed that plea offer with the Respondent “at depths.” A.R. 269:8 – 22. However, trial counsel testified that Mr. Dodson's decision to “not accept[] the plea that was his decision and his decision alone.” A.R. 270: 6 – 7; 276:20 – 23. Trial counsel testified that the Respondent's “mind set was clearly against the plea it was based upon the defense of Brittany [Carrigan's] recantation letter.” A.R. 277:3 – 5. Further, trial counsel testified that he advised the Respondent to accept the State's

plea offer “many times”, but that the Respondent rejected Mr. Lambert’s advice and rejected the plea, “based upon the recantation letter that he thought would be successful at trial from Ms. [Carrigan]. A.R. 277:17 – 24.

Viewed under an objective standard of reasonableness trial counsel demonstrated his proficiency as counsel during plea negotiations by repeatedly discussing the proffered plea to the Respondent. No attorney can force a client to accept a plea offer by the State. As with all plea entries, the decision whether to accept or reject such an offer is entirely the decision of the client who may heed or disregard the advice of counsel. Here trial counsel testified regarding his repeated meetings with Mr. Dodson, but both counsel and Mr. Dodson testified that Mr. Dodson was reluctant, if not completely hostile to the concept of entering any plea unless he was certain that by going to trial he would be convicted.

Mr. Dodson’s unwillingness to accept responsibility for his criminal activity unless there was no viable alternative is clear from the record from his prior brush with the recidivist statute. Mr. Dodson was afraid to be treated as a habitual offender only when he believed the State’s evidence was overwhelming. When he later learned that the evidence was not as strong, he was prepared to face the consequences of a trial which might have led to his imprisonment for life. Likewise, here, Mr. Dodson believed that by presenting the testimony of Ms. Carrigan which recanted her prior statement and, if believed, would have provided him a complete defense to the indictment, that he would avoid any criminal conviction and recidivist treatment. Mr. Lambert testified that the Respondent expressed confidence that Brittany Carrigan’s recantation both in writing and by her testimony would be sufficient to exonerate him from any criminal activity. A.R. 268:23 – 269:3; 269:22 – 270:5; 271: 21 – 22; 274:20 - 22. Only upon his conviction did Mr. Dodson claim that he would have accepted the more lenient offer previously made by the

State, even though his counsel testified that Mr. Dodson not only rejected the State's offer but even refused to authorize a counter-offer to resolve the case short of a trial.

Accordingly, here, where a valid and complete defense was present—if not supported by the most credible of witnesses—Mr. Dodson was unwilling to risk the certainty of imprisonment, when he believed that he might experience complete acquittal. Mr. Dodson's unwillingness to heed the advice of counsel did not constitute ineffective assistance in providing legal assistance.

Although this court has not established a test to determine prejudice at the plea bargaining stage, federal courts have. In United States v. Day, 969 F.2d 39, 43-5 (3rd Cir. 1992), the Court held that to demonstrate prejudice in this context, the movant must establish the following three components: (1) a plea offer was extended by the government; (2) there was a reasonable probability that he would have accepted the plea offer and that the court would have approved the agreement; and (3) there was a reasonable probability he would have received a lesser sentence. *See Huggins v. United States*, __ F.Supp.3d __ (2014).

Here, clearly a plea offer was extended by the State. However, based upon his history of failure to accept responsibility absent any other option, it is equally clear that Mr. Dodson would not have accepted the plea offer, as further evidenced by the fact that although he acknowledged that he was aware of the plea offer, he did not even authorize a counter-offer to that plea. Additionally, it is unclear whether the court would have accepted the plea offer. Mr. Dodson had three prior felony convictions in the same judicial circuit, including for possession of a stolen vehicle, grand larceny, malicious wounding and attempted murder. The instant case would have included a plea to daytime burglary. Mr. Dodson's criminal activity spanned the range of property and violent crime that suggests incarceration for a substantial period is appropriate. The

fact that the instant felony was committed at a time when Mr. Dodson was on parole for malicious wounding and attempted murder further suggests that the trial court might have refused the state's binding plea offer. Had the court accepted the plea, the sentence would have been lessened by the State's agreement to forego filing a recidivist information, but the underlying sentence would have been identical to the one offered by the State in its plea offer.

CONCLUSION

In presenting his petition for a writ of habeas corpus to the Circuit Court, the Respondent did not meet either part of the two-prong Strickland v. Washington test for ineffectual assistance of counsel, that counsel's performance was deficient under an objective standard of reasonableness, and that but for counsel's errors the result of the proceedings would have been different. The Circuit Court's finding that he met both prongs was clear error and should be reversed pursuant to this Court's holding in Syllabus Point 5 of Posteltwaite, supra, which provides that, "When the findings of fact of a trial court in a post-conviction habeas corpus evidentiary hearing are against the plain preponderance of the evidence, are not supported by the evidence, are clearly wrong, or are the result of a mistaken view of the evidence, such findings will be set aside or reversed by this Court on review." The Circuit Court's findings of fact are against the plain preponderance of the evidence, notably even against the testimony of the Respondent Mr. Dodson. Accordingly, because the Circuit Court's findings are clearly wrong and the result of a mistaken view of the evidence, the Petitioner requests that the findings be set aside and reversed.

Respectfully submitted,



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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

**MARVIN PLUMLEY, Warden, Huttonsville
Correctional Center, Respondent Below,
Petitioner,**

v.

Supreme Court Docket No.: 14-1202

**SHANE DODSON, Petitioner Below,
Respondent.**

CERTIFICATE OF SERVICE

I, Brandon C. H. Sims, Assistant Prosecuting Attorney for Jefferson County, West Virginia, and counsel for the Petitioner do hereby certify that on this 26th day of March, 2015, I have served a true copy of the foregoing, "Petition for Appeal" by electronic mail and United States Mail upon:

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