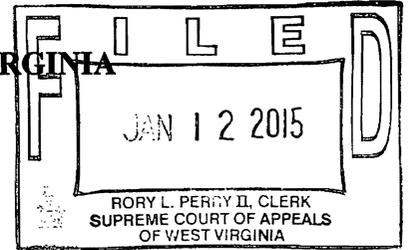


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



ERIC FOSTER,

Petitioner,

v.

Supreme Court No.: 14-1023

(Case No. 08-C-139& 04-F-48)

**DAVID BALLARD, Warden,
Mount Olive Correctional Complex,**

Respondent.

PETITIONER'S BRIEF

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SUMMARY OF THE ARGUMENT

The Habeas Court abused its discretion in denying Eric Foster's petition for writ of habeas corpus stemming from his conviction on two counts of second degree murder. The instances of ineffectiveness, the trial attorney, Hurley admitted are serious and call into question the result of Mr. Foster's trial. Mr. Foster alleged and proved three separate instances of ineffective assistance of counsel that prejudiced him during his omnibus hearing: two instances of ineffective assistance of counsel during plea bargaining, and ineffective assistance of counsel during his jury trial.

As stated above, Hurley failed to provide Mr. Foster with effective assistance of counsel on two separate occasions during plea bargaining. First, Mr. Foster demonstrated that Hurley's failure to communicate the initial plea offer prejudiced him. The first offer would have allowed Mr. Foster to resolve his case with a less severe conviction and sentence than he received at trial. Unfortunately, Mr. Foster did not even have the opportunity to consider this offer. Therefore, Mr. Foster was prejudiced by both the resulting conviction and sentence, and because he was unnecessarily forced to endure the ordeal of a double first-degree murder trial.

The second instance of ineffective assistance of counsel during plea bargaining, occurred on the first day of trial. The State offered to resolve Mr. Foster's case by allowing him to enter a plea to one count of second degree murder. Unfortunately, Hurley's failure to communicate with Mr. Foster, keep him informed regarding his case, and counsel him made it impossible for Mr. Foster to knowingly and intelligently consider the second plea offer. According to Mr. Foster, Hurley failed to discuss the pros and cons of the second offer with him. Hurley merely informed Mr. Foster what the offer was and asked him if he was interested in accepting it. Hurley explained to Mr. Foster he needed to answer quickly because his decision would determine if a

trial was necessary, and the court was awaiting his decision. Mr. Foster testified that he would have “without a doubt” accepted the second offer if Hurley had counseled him about the offer, and properly advised him of his liability due to the State’s reliance on accomplice liability. Hurley had never explained accomplice liability to Mr. Foster. Therefore, Mr. Foster incorrectly assumed he could not be held responsible for the murders committed by someone else at the time he refused the State’s final offer.

The Habeas Court improperly denied relief on both instances of ineffective assistance of counsel during plea bargaining, not by applying controlling precedent, but by ruling that Mr. Foster’s refusal of the second offer, which was more advantageous, demonstrates that Hurley’s admitted failure to communicate the initial plea offer did not result in prejudice.¹ However, this holding ignores precedent from the United States Supreme and this Court. As discussed above, when applying the controlling precedent Mr. Foster can demonstrate prejudice as to both instances of ineffective assistance of counsel that occurred during plea bargaining.

Finally, the Habeas Court incorrectly found that Mr. Foster did not demonstrate how he was prejudiced by Mr. Hurley’s ineffective assistance of counsel at trial. Mr. Foster successfully demonstrated numerous instances of ineffective assistance of counsel that impacted his trial. For instance, Hurley admitted to failing hire an investigator for a first degree murder case. He also failed to personally contact or interview the witnesses listed in the police report. Therefore, Hurley prepared for Mr. Foster’s trial by relying on the evidence as gathered by the State. Hurley did not regularly communicate with Mr. Foster in order to keep him informed regarding his case. In fact, the Regional Jail Visitation Records show Hurley visited Mr. Foster one time

¹ Hurley initially testified that he did communicate the plea offer to Mr. Foster, he then admitted he could not state with certainty that he communicated the plea, and, finally he admitted he did not communicate the plea. *A.R. Vol. I 474.*

during the 10 months he represented him. Moreover, Hurley testified that he appeared and participated in Mr. Foster's double first-degree murder trial while he was hung over.

The result of Mr. Foster's double first degree murder trial cannot be described as a reliable functioning of the judicial system that resulted in an outcome that is worthy of confidence. The outcome of Mr. Foster's trial was prejudiced by Hurley's ineffective assistance of counsel. In addition to the failures discussed above, Hurley also testified that he appeared and represented Mr. Foster during his first-degree murder trial while hung-over. Hurley admitted this did impact his performance at trial. This is neither reasonable nor acceptable behavior of trial counsel. It is for all these reasons Mr. Foster respectfully requests that this Court reverse the Habeas Court's decision and remand Mr. Foster's case for further proceedings.

STATEMENT OF THE FACTS

Eric Foster was arrested on two counts of first-degree murder and numerous other serious felonies in Nicholas County, West Virginia on December 31, 2003. He was never released from jail and is now serving a prison sentence in connection with these charges. Greg Hurley was appointed to represent Mr. Foster on these high-profile murder charges on January 6, 2004. *A.R. Vol. I 447*. During his testimony at Mr. Foster's omnibus hearing, Hurley remorsefully admitted to several instances of ineffective assistance of counsel.² Some of the more serious issues Mr. Foster established are: Hurley's failure to hire an investigator or to attempt to personally contact or interview witnesses listed in the police report, Hurley's failure to keep Mr. Foster informed by

² The omnibus hearing was held on September 12, 2013, before the Honorable Gary Johnson, in Nicholas County Circuit Court.

visiting and consulting with him regularly, and that Hurley's failure to communicate a written plea offer to Mr. Foster. *A.R. Vol. I 441, 456, 463-464, 474.*

Hurley courageously admitted to his failures during Mr. Foster's omnibus hearing. Hurley explained that he was at a very low point in his life at the time he was appointed to represent Mr. Foster. He testified that he was a struggling alcoholic, who was drinking heavily, and he had not realized his addiction was impacting every aspect of his life, including the representation of his clients. *A.R. Vol. I 444-445.* 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 impacted his ability to represent Mr. Foster. *A.R. Vol. I 350, 476.* Hurley's testimony also provided a logical explanation for the many short comings that occurred during his representation of Mr. Foster. The prejudice to Mr. Foster began shortly after Hurley's appointment and continued through plea bargaining and trial. The instances of ineffectiveness to which Hurley admitted are serious and call into question his entire representation of Mr. Foster, and, therefore, call into question the result of Mr. Foster's trial. Mr. Foster alleged and proved three separate instances of ineffective assistance of counsel during his omnibus hearing: two instances of ineffective assistance of counsel during plea bargaining, and ineffective assistance of counsel during his jury trial.

On December, 30, 2003, Eric Foster, Jeffrey Stewart, and Matthew Bush got into Mr. Foster's truck and drove to Mike Murphy's residence. This visit was prompted by Travis Painter inviting Mr. Foster and his co-defendants up to Murphy's residence to talk out some differences the men were having. In his statement to police, Jeremy Hanna verified that he and his girlfriend were at Murphy's residence hanging out with Murphy and Painter when Mr. Foster and his co-

defendants arrived. *A.R. Vol. II 11.* Hanna told police the four of them had just got high minutes before they heard Mr. Foster's truck approaching. *A.R. Vol. I 423.* Hanna explained that both Murphy and Painter retrieved loaded weapons based on nothing more than the sound of an approaching vehicle. *A.R. Vol. II 13.* This reaction caused Hanna to ask Murphy if there was any need for concern. Murphy assured Hanna there was nothing to worry about. *Id., A.R. Vol. II 31.* Despite this assertion, Murphy exited the trailer with a loaded assault rifle, and Painter had a loaded pistol. *A.R. Vol. II 13-14, 26-27.*

Hanna stated that immediately upon exiting the trailer, without any discussion, Murphy approached the driver's side window and pointed the loaded assault rifle at Foster.³ *A.R. Vol. II 14, 25.* Next, Hanna heard a shot and could tell that it came from the inside of the truck. *Id.* He instructed his girlfriend to get on the floor, he grabbed a shotgun, and exited the trailer. He responded in this manner to keep the people in the truck from coming inside the trailer to harm his girlfriend. *Id.* He armed himself because he knew the occupants in the truck would assume he was with Murphy and Painter. He was correct in this assumption and gun fire erupted between Hanna and the individuals in the truck. *A.R. Vol. II 18.*

Once the people in the truck left, Hanna yelled for his girlfriend to check on Murphy and Painter. They determined that both were dead and unsuccessfully attempted to use a phone at Murphy's trailer. *A.R. Vol. II 22.* Hanna then decided to go to his friend Matt Bush's house to call for help. When he arrived at Matt's house no one opened the door. Due to the circumstances, Hanna decided to crawl through the window. Upon entering Bush's house, Hanna was met with a 30-06 rifle. *Id.* That is when Hanna realized it was Mr. Foster and his co-defendants that had just been in the confrontation with Murphy and Painter. *A.R. Vol. II 34.*

³ Hanna explained he saw what occurred outside because he was standing in the doorway of the trailer. *A.R. Vol. II 20.*

After agreeing not to call the police, Hanna and his girlfriend were allowed to leave. *A.R. Vol. II 483.*

While Hanna was at Matt Bush's house, Mr. Foster left Bush's house to return to his home. *A.R. Vol. II 34.* Once Mr. Foster arrived at his house, he called the police to report the incident at Murphy's trailer. *A.R. Vol. II 84.* The police responded, took his statement, took pictures of his truck, and left. Later the next day, after someone, who intended to visit Murphy, found Murphy and Painter's bodies Mr. Foster and his co-defendants were arrested for murder. On January 6, 2004, the date of his preliminary hearing, Greg Hurley was appointed to represent Mr. Foster.

Hurley's failure to provide effective assistance of counsel began early in Mr. Foster's case. It took Mr. Hurley three months to go see Mr. Foster after being appointed to represent him in a capital case. *A.R. Vol. I 293.* That was the only time Hurley met with Foster at the jail before his trial. *A.R. Vol. I 291-293.* Moreover, Hurley did not accept collect calls, or respond to Mr. Foster's letters. *A.R. Vol. I 465.* This lack of communication was harmful to Mr. Foster because he maintained his innocence, and, as a lay person, he did not believe the state could obtain a murder conviction against him because his only involvement in the incident was driving his truck to Murphy's residence. *A.R. Vol. I 466.* He still held this belief on the first day of trial because Hurley failed to counsel Mr. Foster regarding his case. *A.R. Vol. I 351, 352, 466.* Mr. Foster, did not realize he could be held responsible for his co-defendant's actions. Importantly, Mr. Foster had no prior criminal record and therefore was not familiar with the legal system. *A.R. Vol. I 329.*

Mr. Foster testified that on the first day of trial he did not even know if Hurley had subpoenaed witnesses to call in his defense. *A.R. Vol. I 330.* In fact, Mr. Foster did not know if

he was going to testify at his own trial. The decision to call him as a witness occurred at counsel's table, moments before he was called to the stand. *A.R. Vol. I 451*. Hurley did not prepare Mr. Foster to testify prior to trial, including failing to prepare Mr. Foster for cross examination by the State. *A.R. Vol. I 325*. This assertion by Mr. Foster is supported by the fact that the only visit Hurley made to the regional jail occurred six months before Mr. Foster's trial and two months before Hurley was provided discovery in Mr. Foster's case. *A.R. Vol. I 293, 284*. Mr. Foster became desperate and began having his sister try to communicate his need to speak with Hurley. *A.R. Vol. I 465*. This effort by Mr. Foster, to communicate with Hurley also failed.

On the first day of trial, the State made Mr. Foster a second plea offer: plea to one count of second degree murder with the remaining charges to be dismissed. This was the only offer Hurley ever discussed with Mr. Foster.⁴ Hurley communicated this offer to Mr. Foster by coming into the holding room, telling Mr. Foster what the offer was and then asking him if he wanted to accept it. Hurley made no effort to explain the effect of accepting the offer and how that would influence the amount of time Mr. Foster would spend in prison. Further, Mr. Foster, a lay-person with no experience in the legal field, held steadfast to his faulty assumption that as the driver, he could not be held liable for either murder. *A.R. Vol. I 328*. In his mind, he was rightfully refusing to plead guilty to a crime he did not commit. Mr. Foster had no reason to think otherwise and, this was due to Hurley's complete failure to counsel his client.

At trial, Hurley called two witnesses, Mr. Foster and Arnold Nichols. Nichols was a neighbor to Murphy. Nichols testified that it was common to hear shooting at Murphy's trailer. *A.R. Vol. II 632*. However, he testified the night of the incident was different. He testified

⁴ The initial plea offer made by the State was in writing and delivered to counsel prior to trial. The offer would have resolved the case by allowing Mr. Foster to plea to one count of second degree murder and one count of involuntary manslaughter. This offer was better than the ultimate outcome of Mr. Foster's trial. *A.R. Vol. II 283*.

“...when I came awake, all you could hear was gunfire. It was a roar of gunfire...” *A.R. Vol. II 633*. Then he verified the intensity of the gunfire on that night was much different than normal. *Id.* Nichols testimony was not helpful to Mr. Foster’s case in anyway. In fact, all his testimony did was verify, a gun fight did erupt on Murphy’s property.

At the conclusion of trial, Mr. Foster was found guilty of two counts of second degree murder. The trial court sentenced Mr. Foster to the maximum sentence of 40 years in prison on each count, and it further ordered that the sentences be served consecutively. *A.R. Vol. II 8-9*. Mr. Foster’s decision to refuse the State’s offer and go to trial resulted in both a more severe conviction and sentence than he would have been subjected to had he accepted the final plea offer. After being sentenced, Mr. Foster filed a petition for habeas corpus, counsel was appointed, and a hearing was held in September 2013. On September 10, 2014, the Habeas Court issued an order denying relief and dismissing Mr. Foster’s case. *A.R. Vol. II 241*.

In denying habeas relief, the Habeas Court ruled Mr. Foster was not prejudiced by Hurley’s admitted, ineffective assistance of counsel that occurred throughout his representation. Hurley testified that he was a struggling alcoholic during Mr. Foster’s jury trial. *A.R. Vol. I 444*. He testified his drinking was so out of control that it was impacting his entire life, but, unfortunately, he did not recognize the full impact it was having on him and his clients. *A.R. Vol. I 444-445, 471*. Hurley’s testimony verified his investigation and preparation for Mr. Foster’s case was constitutionally deficient.

He testified that he did not hire an investigator. *A.R. Vol. I 441*. He also admitted that he did not even attempt to speak to or interview the eyewitnesses or anyone else who gave statements to the police. Hurley explained that the entirety of his preparation for Mr. Foster’s double first-degree murder trial consisted of speaking to law enforcement officers, the

prosecutor, and counsel for the two co-defendants. *Id.* He further testified that he did not take notes to prepare for any case, including Mr. Foster's. Hurley stated that he stopped taking notes earlier in his career because it was a waste of his time as he never reviewed them. *A.R. Vol. I 463.*

Finally, Hurley testified that he failed to communicate the written plea agreement to Mr. Foster, an action he is constitutionally mandated to perform. *A.R. Vol. I 474.* The written offer made prior to trial would have allowed Mr. Foster to plead to one count of second degree murder and one count of involuntary manslaughter. Therefore, that offer included a lesser conviction and sentence than Mr. Foster is currently serving. *Id., A.R. Vol. II 8-9.*

During Mr. Foster's omnibus hearing, Hurley attempted to justify his failure to interview Jeremy Hanna, an eyewitness to the events that occurred, by stating that he did not think calling a witness who could verify all the shooting that occurred would help Mr. Foster. *A.R. Vol. I 469.* Ironically, the only witness Hurley called at trial did just that. Hurley called Nichols, a neighbor to Mike Murphy, to testify it was normal to hearing shooting at the Murphy's residence, but on the night of the incident, it sounded like a war. Nothing Nichols testified to helped Mr. Foster; in fact Nichols testimony was detrimental to Mr. Foster. The habeas court relied on this flawed after-the-fact explanation in finding that Hurley's failure to contact and call Hanna as a witness did not prejudice Mr. Foster.

The big difference between Nichols and Hanna was that Hanna could have offered powerful testimony that would have helped Mr. Foster. Hanna could have testified that both Murphy and Painter exited the trailer with loaded guns based on nothing more than the sound of a vehicle approaching. *A.R. Vol. I 423, A.R. Vol. II 13.* This testimony by Hanna would have discredited the State's assertion that Mr. Foster and his co-defendants were the initial aggressors.

Additionally, Hanna could have testified that Murphy immediately approached the truck and put his loaded assault rifle through the driver's window pointing it at Mr. Foster. *A.R. Vol. II 14, 25*. Finally, Hanna could have testified that he had just got high with Murphy and Painter minutes before Mr. Foster and the other defendants arrived. *A.R. Vol. I 423*. Despite all of this useful information, which appeared in his statement to police, Mr. Hurley admitted that he did not even attempt to interview Hanna prior to trial. Hurley testified that he decided it was unnecessary to speak with Hanna or call him as a witness on Mr. Foster's behalf, based on a discussion he had with a co-defendant's lawyer who did in fact interview Hanna. ⁵ *A.R. Vol. I 469*.

Greg Campbell, an experienced trial lawyer, testified as an expert regarding ineffective assistance of counsel on Mr. Foster's behalf. Campbell testified there were numerous deficiencies in Hurley's handling of Mr. Foster's case. Campbell highlighted that Mr. Foster's right to effective assistance of counsel started on or about December 31, 2003--the day that he was arrested. *A.R. Vol. I 405*. Campbell testified that failing to conduct an independent investigation in a capital case, as Hurley admitted to, is ineffective assistance of counsel. *A.R. Vol. I 377-378*. He explained that an investigation is a necessity because counsel must have an independent understanding of the facts in a client's case before he can effectively represent them at any stage. *A.R. Vol. I 378*. Campbell testified, in his opinion, it is not possible to provide effective assistance of counsel without thoroughly investigating a case as serious as Mr. Foster's. *A. R. Vol. I 377*

Mr. Foster testified that Hurley came to see him one time at the regional jail during the entire time he represented him. He explained this visit was so short he did not get to fully explain the events of the night in question to Hurley during the visit. This single visit, on April

⁵ Mr. Stewart's lawyer, the lawyer with whom Hurley discussed Hanna, did call Mr. Hanna to testify on behalf of his client.

4, 2004, is verified by the official Regional Jail Authority visitation records. This visit was six months before trial and two months before the State provided Hurley discovery. Mr. Foster also testified that Hurley failed to prepare him to testify. Again, this assertion by Mr. Foster is corroborated by the lack of an attorney client visit close to trial. Hurley claimed he visited Mr. Foster three times at the jail, but this assertion was refuted by the jail visitation records.

Hurley suggested that his other visits may have gone undocumented because he would see multiple inmates during each trip to the jail. However, this possibility was refuted during the testimony of Franklin Hamrick, an employee of the regional jail. Mr. Hamrick testified visitation is monitored closely at the jail. *A.R. Vol. I 484*. He explained the policy in place requires every visitor to be registered and there is no reason to suspend this policy. *Id.* Mr. Hamrick further testified that when a lawyer visits multiple clients, the lawyer visit is documented on each inmate's visitation record. *A.R. Vol. I 483-484*. Hurley also asserted that he discussed Mr. Foster's case with him before and after the hearings that were scheduled in his case.

Mr. Foster disagreed with this assertion. Mr. Foster testified that on the occasions when he did get to speak with Mr. Hurley, the conversations occurred in front of guards and other prisoners, precluding any kind of confidential attorney-client discussions, and the conversations were rushed.⁶ *A.R. Vol. I 317, 341*. When questioned about the surroundings in which these conversations occurred in, Hurley admitted it was not ideal. He also agreed that many of these meetings were not private. *A.R. Vol. I 448*. Hurley testified there was a room on the second floor that was private, but he could not state how many times he met with Mr. Foster in that room.

⁶ Mr. Foster and his co-defendants were indicted in the same indictment, and many of the hearings referenced by the trial court as opportunities to have discussions with his counsel were hearings held in regards to all three defendants.

Mr. Foster also testified that Hurley did not accept his collect phone calls, and Hurley did not respond to his letters. *A.R. Vol. I 318-319*. Therefore, Mr. Foster had no way to communicate with his lawyer. Mr. Foster became desperate and began having his sister try to communicate with Hurley. *A.R. Vol. I 319*. This effort by Mr. Foster to communicate with Hurley also failed. Hurley testified that he never spoke to Mr. Foster on the phone, and he admitted that he did not address anything of substance in the letters that he sent to Mr. Foster.

Throughout these proceedings, Mr. Foster has maintained he did not understand the theory of acting in concert which allowed him to be convicted of murder based on the actions of his co-defendants. He has consistently asserted that he did not shoot anyone and, therefore, he was not guilty of murder. The theory of defense that Hurley asserted at trial was Mr. Foster was not involved in the shootings and therefore, he was not guilty. Unfortunately, this theory of defense only perpetuated Mr. Foster's belief that because he did not shoot anyone on the night of the incident, he could not be convicted of murder.

The second offer, which was more advantageous to Mr. Foster than the first offer, was made moments before his trial was to start. Both Mr. Foster and Hurley testified the entire conversation regarding the State's offer and Mr. Foster's decision regarding the plea occurred in a matter of ten to fifteen minutes. *A.R. Vol. I 474-475*. Hurley testified this amount of time was inadequate considering the gravity of the decision involved. *Id.* Given, the short amount of time Mr. Foster had, to make a life changing decision, Hurley's handling of the plea offer is even more unacceptable when considering the lack of adequate communication between Hurley and Mr. Foster leading up to trial.

Mr. Foster demonstrated his refusal of the State's second offer was not knowing and intelligent. In fact, it is fair to state Mr. Foster made this decision without the assistance of

counsel due to Hurley's complete abandonment of his responsibilities to Mr. Foster. Mr. Foster testified he would have accepted this offer if Hurley would have properly counseled him regarding his case. *A.R. Vol. I 327-328*. This offer would have decreased Mr. Foster's conviction to a single offense, and it would have cut his current sentence in half.

The Habeas Court incorrectly found that Mr. Foster failed to demonstrate Hurley's ineffective assistance of counsel prejudiced him during plea bargaining and at trial. *A. R. Vol. I 281* Hurley's reckless abandonment of his obligations to Mr. Foster, from the date of his appointment through the trial, calls into question the result of Mr. Foster's case. Therefore, this Court should reverse the Habeas Court's denial of relief and remand Mr. Foster's case back to the Habeas Court.

ARGUMENT

I. The Habeas Court's holding that Mr. Foster failed to demonstrate he was prejudiced by Hurley's admitted ineffective assistance of counsel is inconsistent with precedent from both the United States Supreme Court and this Honorable Court and therefore is erroneous.

Standard of Review:

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *State v. Miller*: (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. 5, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)

Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices.

Syl. pt.4, in-part, State ex. Daniel v. Legursky, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995).

As stated above, Hurley testified he was a struggling alcoholic who was drinking heavily when he was appointed to represent Eric Foster. He appeared at Mr. Foster's trial hung over and smelling of alcohol. Most, if not all, of his shortcomings appear to be the result of this struggle. His preparation for Mr. Foster's trial was limited to the use of the State's discovery. Hurley also failed to regularly visit or communicate with Mr. Foster. Further, Hurley admitted he failed to communicate a plea offer to Mr. Foster. This performance is not reasonable or acceptable behavior of trial counsel in a double first-degree murder trial. The result of Mr. Foster's trial cannot be described as a reliable functioning of the judicial system that resulted in an outcome that is worthy of confidence.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversary system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063(1984). Therefore, "[l]awyers in criminal cases are 'necessities, not luxuries.'" *United States v. Cronin*, 466 U.S. 648, 653, 104 S.Ct. 2039, 80 L.Ed.2d 657, 664 (1984) (citation omitted). In fact, the United States Supreme Court acknowledged this necessity when it explained that of all the rights a defendant enjoys, the right to be represented by counsel is the most critical because it is key to the assertion of all of a defendant's other guaranteed rights. *Penson v. Ohio*, 488 U.S. 75, 84, 109 S.Ct. 346, 352 (1988). The appointment of counsel is not enough to satisfy a defendant's right to counsel. In order to satisfy the requirements of the Sixth Amendment, a criminal defendant must have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S.738, 743, 87 S.Ct. 1396, 1399 (1967).

- A. Hurley's failure to communicate the written plea offer to Mr. Foster was ineffective assistance of counsel and did prejudice Mr. Foster.

Both this court and the United States Supreme Court hold that the failure to communicate a plea offer constitutes ineffective assistance of counsel. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012), *Syl. Pt. 3, Becton v. Hun*, 205 W.Va. 139, 516 S.E.2d 762 (1999). The Habeas Court erred by holding that Mr. Foster failed to demonstrate prejudice based on Hurley's failure to communicate the initial plea offer made by the State. The Court reasoned that Mr. Foster's refusal of the second, more advantageous offer, demonstrates that Hurley's failure to communicate the initial offer did not prejudice him. This assertion by the Court is incorrect because it fails to follow controlling precedent when determining if Mr. Foster was in fact prejudiced by Hurley's failure to communicate the State's plea offer. Additionally, had Hurley properly counseled Mr. Foster from the beginning of his representation, Mr. Foster likely would have fully understood his potential criminal exposure and would have been better able to make an intelligent decision regarding either plea.

In *Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012), The United States Supreme 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." Likewise, in *Becton v. Hun*, 205 W.Va. 139,145, 516 S.E.2d, 762,768(1999), this Court reversed the denial of habeas relief because defense counsel could not state with certainty that he communicated the plea offer that was more favorable to his client than the resulting sentence the trial court imposed at the conclusion of the trial.⁷

⁷ The *Becton* Court, held that because counsel could not affirmatively testify that he communicated the offer to his client the benefit of the doubt must be given to the Appellant. *Id.*

Mr. Foster's proof of ineffectiveness is stronger and the prejudice that he can demonstrate is also greater than that in *Becton*. In *Becton*, defense counsel testified that he could only assert that it was his pattern and practice to inform his clients of plea offers made by the State. This Court found that was not sufficient. Therefore, relying on the assertions of the Appellant, this Court found the offer was not communicated. *Becton*, was convicted of the same offense offered in the plea agreement. However, because the trial court imposed a more severe sentence at the conclusion of the trial than was offered in the plea agreement, this Court held the defendant successfully demonstrated counsel's ineffectiveness did result in prejudice. *Id.*

Mr. Foster's expert on ineffective assistance of counsel, Greg Campbell (hereinafter Campbell), testified that Hurley's representation fell below a professionally acceptable standard according to both the United States Supreme Court and this Honorable Court's precedent. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), *Syl. Pt. 5*, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Campbell further testified that Mr. Foster did in fact suffer prejudice due to Hurley's failure to communicate the written plea offer, and the prejudice Mr. Foster suffered is measurable. *A. R. Vol. I 91, 93, 118*. Notably, the Habeas Court did not mention nor refute Mr. Campbell's testimony. See *Generally A. R. Vol. I 261-266*. Relying on *Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012), Campbell testified that Hurley's admitted failure to communicate a plea offer made by the State in September of 2004 satisfied both prongs of *Strickland* and *Miller*, as applied to the facts of Mr. Foster's case. *A. R. Vol. I 94*. The Habeas Court failed to discuss why *Lafler*, a United States Supreme Court decision binding on all courts, was not controlling in Mr. Foster's case.

Campbell testified that Mr. Foster can demonstrate Hurley's failure to communicate the written plea offer resulted in a more serious conviction and a more severe sentence. *A. R. Vol. I*

93. The plea offer would have allowed Mr. Foster to resolve his case by pleading guilty to one count of second degree murder, and one count of involuntary manslaughter. Mr. Foster was convicted of two counts of second degree murder and sentenced to serve forty years on each count. The court further ordered that the sentences were to be served consecutively. Despite the Habeas Court's holding to the contrary, Mr. Foster suffered measurable prejudice due to Hurley's failure to communicate the written plea offer made to him prior to trial, and this Court should reverse the Habeas Court's denial of relief. *A. R. Vol. I 279*.

- B. The Habeas Court erred by holding that Hurley's failure to act as an advocate on Mr. Foster's behalf and keep him informed about his case did not result in prejudice during plea bargaining. Hurley's abandonment of his obligations to Mr. Foster made it impossible for Mr. Foster to intelligently consider and knowingly refuse the state's second plea offer made on the first day of trial.

Mr. Foster had lost all confidence and trust in Hurley by October 5, 2004, the first day of his jury trial. Mr. Foster believed Hurley had both abandoned and failed him. Due to no fault of his own, Mr. Foster made the decision to refuse the State's plea offer to resolve his case by pleading to one count of second degree murder, without having an understanding of his case and his potential criminal liability, how strong or weak the State's case was, and most importantly, in his case, without any knowledge of the applicable legal standards involved--- Mr. Foster was incapable of knowingly and intelligently considering the second offer because Hurley failed to act as an advocate from the time of appointment up to the first day of trial.

Quite possibly the most important and strategic choice a person charged with a crime will make is whether or not to plead guilty. Therefore, in order for the benefits and guarantees a criminal defendant has to be realized, a criminal defendant must have effective counsel during plea negotiations. "Anything less ... might deny a defendant 'effective

representation by counsel at the only stage when legal aid and advice would help him.’ ” *Massiah v. U.S.*, 377 U.S. 201, 204, 84 S.Ct. 1199,1202 (1964) (quoting *Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)). The United States Supreme Court recently emphasized that the Constitution of the United States guarantees that all defendants shall make that decision under the advisement of competent counsel. *Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012), *Missouri v. Frye*, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

Mr. Foster demonstrated he did not have the benefit of competent counsel acting in the role of an advocate. It was simply not possible for Mr. Foster to receive adequate representation from a lawyer, suffering from alcohol abuse, who visited him one time during his entire representation to discuss his case. *A.R. Vol. I 293, 315-316*. This need for competent counsel is especially true when considering Mr. Foster was facing the most serious punishment in this state: life in prison without the possibility of parole. There is no way a single meeting lasting no more than forty-five (45) minutes was adequate.

Hurley admitted the other meetings he held out as attorney-client meetings were short hurried instances occurring before or after scheduled hearings, not during separate, planned visits when time would not be rushed and discussions would be confidential. Mr. Foster testified that typically, on the day of a hearing, there was little, if any, substantive communication between him and Mr. Hurley. *A.R. Vol. I 345, 355*. Both Mr. Foster and Hurley testified these meetings were rarely in a setting that would be considered an attorney client setting and lacked the privacy necessary to maintain attorney-client privilege. *Id.* This lack of privacy existed is because there were always others

around, including guards, other inmates, and court personnel. Mr. Foster testified he never consider these fleeting conversations to be attorney- client meetings.

Hurley's abandonment of his responsibilities owed to Mr. Foster is understandable since he disclosed he was a struggling alcoholic at the time that he was appointed to represent Mr. Foster. However, while his behavior may be understandable, the prejudice Mr. Foster suffered as a result is inexcusable. Mr. Campbell testified Hurley was ineffective due to Mr. Foster's complete lack of information and knowledge on the first day of his trial. Campbell further testified there is no way that Mr. Foster made a knowledgeable and intelligent decision regarding the second plea offer if he did not have an understanding of acting in concert with, and how it applied to him. *A. R. Vol. I 396*.

Because Mr. Foster was denied the expert advice of a lawyer during the entire pendency of his case, he did not have the ability to understand or consider the final plea offer. Both this Court and the United States Supreme Court have discussed counsel's obligation to ensure his client understands the specifics of a plea offer. The United States Supreme Court explained 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)). This Court stated: "counsel's advice must be accurate to 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).

As a lay-person with no experience in the legal field, Mr. Foster held steadfast to the fact that he was the driver and nothing more, he did not have a gun, and therefore, he was not guilty of killing anyone. In his mind, he was rightfully refusing the State's offer because it required

him to plead guilty to a crime he did not commit. In addition to his lack of understanding of the strength of the State's case against him, Hurley failed to successfully communicate the amount of time the plea agreement would require Mr. Foster to serve in prison. Based on Hurley's explanation of the plea offer, Mr. Foster believed that if he would accept this offer, he was agreeing to serve the full 40 years in prison, which he rightfully considered an effective life sentence. Therefore, he really saw no benefit in pleading to an offense he was not guilty of and agreeing to serve what he considered a life sentence. Mr. Foster had no reason to think otherwise due to Hurley's complete failure to counsel him.

Mr. Foster testified that if he had counsel acting as an advocate from the time of appointment up to the first day of trial he could have intelligently considered the plea offer and he would have accepted the offer. He did not know of or understand "acting in concert with," because the first day of trial was only the second time he spoke to Hurley in a true attorney-client setting regarding his case. Sadly, this meeting was rushed and hectic because the offer was made on the first day of trial. Hurley explained the State's offer and expected an answer quickly from Mr. Foster because everyone involved in the trial was outside waiting on a final answer, and Mr. Foster's answer would determine if a trial was necessary. Hurley did not counsel Mr. Foster regarding the benefits of accepting the offer or why it was in his best interest to accept the offer.

It is important for this Court to note that even if a defendant goes on to have a fair trial, a point counsel is not conceding in Mr. Foster's case, that does not remedy the ineffectiveness of counsel during the plea bargaining stage. *Tucker v. Holland*, 174 W.Va. 409, 327 S.E.2d 388, 394-96 (1985). Additionally, a new trial is not the proper remedy when it has been determined a Sixth Amendment violation has occurred. The United States Supreme Court held the remedy for

a Sixth Amendment violation “should be tailored to the injury suffered and should not unnecessarily infringe on competing interests,” *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668 (1981). In *Tucker*, the Supreme Court of Appeals of West Virginia essentially followed *Morrison* after it determined a Sixth Amendment violation had occurred. The *Tucker* Court reversed the conviction and issued an order requiring the trial court to consider the guilty plea originally offered; however, the Court did not require specific performance of the original plea. There are numerous variations as to how the remedy should be fashioned once it has been determined a Sixth Amendment violation has occurred. If this Court finds Mr. Foster is entitled to relief, as to either instance of ineffective assistance of counsel during plea bargaining, Mr. Foster requests that this Court order plea negotiations to resume with the final plea offer made being made available to him.

II. The Habeas Court incorrectly found that Hurley’s preparation for trial and his performance during trial did not constitute ineffective assistance of counsel.

A. Hurley’s failure to conduct an investigation and prepare witnesses to testify did constitute ineffective assistance of counsel.

Hurley testified that he did not hire an investigator and he did not even attempt to contact witnesses or interview them on Mr. Foster’s behalf. He relied on discovery, and discussions with the prosecutor, law enforcement officers, and lawyers representing the co-defendants to prepare for trial. As described above, Mr. Foster only had one visit with his counsel prior to trial. That visit occurred six months before trial and prior to receipt of discovery.

During the six months leading up to trial, Hurley was provided with discovery, and a plea offer that was not shared with Mr. Foster. On the first day of trial, Mr. Foster did not know what evidence the state had against him, nor did he know what theory of defense

had been devised on his behalf. He did not know if there were witnesses prepared on his behalf. He was not prepared to testify, nor was he prepared for cross-examination by the state.

In *Strickland*, the United States Supreme Court held that effective assistance includes the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* 466 U.S. at 691, 104 S.Ct. at 2006. Additionally, the Supreme Court of Appeals of West Virginia has similarly held “[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). “A lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation. . .” *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.1998).

The Habeas Court attempts to justify Hurley’s failure to interview eyewitness Hanna by stating: “Hurley did not interview Jeremy Hanna because he was confident in what he would say at trial.” *A.R. Vol. I 271*. This approach is the exact behavior that resulted in this Court reversing the habeas court in *Ballard v. Ferguson*, 232 W. Va. 196, 201 751 S.E2d. 716, 721 (2013). Specifically the *Ferguson* Court held it was not interested in what the investigation may or may not have uncovered. *Ballard v. Ferguson*, 232 W.Va. 196,201 751 S.E2d. 716, 721 (2013). The "sole issue is whether [defense counsel] acted as reasonable defense attorney in failing to attempt to interview [known witnesses]." The *Ferguson* court held that it was objectively unreasonable to rely on the police report and fail to interview potential witnesses on behalf of a client. *Id* Specifically the court stated "[n]eglect even to interview available eyewitnesses to a crime simply cannot be ascribed to trial strategy and tactics." *Id.* The *Ferguson Court* made clear it was not interested in what the interview with the

witnesses would have uncovered or whether the information would have been helpful or hurtful. What the court focused on was whether a reasonable defense attorney would have investigated these witnesses instead of simply relying on the police report. The Habeas Court incorrectly found this behavior was acceptable. *A.R. Vol. I 469*.

Hurley testified that he did not interview Hanna. He testified that he relied on the police report and a discussion he had with an attorney who did interview Hanna to determine it was not necessary to interview or call Hanna as a witness. Despite the Habeas Court's finding to the contrary, the failure to call Hanna was prejudicial and did make a difference. Hanna could have corroborated Foster's testimony that Murphy and Painter were the initial aggressors. They exited the trailer with loaded weapons based on nothing more than the sound of an approaching vehicle. Additionally, Hanna would have testified that Murphy immediately put his loaded assault rifle in Mr. Foster's truck, without any discussions, and he would have verified that Murphy and Painter had just got high minutes before this incident occurred. *A.R. Vol. I 14, 25*.

Hurley was correct that Hanna would have testified to the shooting that occurred. However, no one denied that shooting occurred. Ironically, that is the only thing Hurley's sole witness established at trial. Hurley called Nichols, Murphy's neighbor, to testify at trial. Nichols did not see anything that night, and the only thing he testified to was that it was normal to hear shooting at Murphy's residence, but on the night of the incident, the shooting was much more intense. He testified it was a "roar of gun fire." *A.R. Vol. II 633*

As to failing to prepare Mr. Foster to testify, Hurley did not visit the jail anytime around the time of trial. Mr. Foster explained that he did not even know if he was going to testify until moments before he took the stand. The Fourth Circuit has made clear that "[t]horough preparation demands that an attorney interview and prepare witnesses before they testify,"

specifically recognizing that “[n]o competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion.” *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir.2000).

The *Rhynes* Court further noted: “more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses.” *Id.* Important to Mr. Foster’s case, the *Rhynes* court stated “of course, counsel's pretrial preparation of a witness is even more crucial where, as here, the testifying witness at issue is the defendant on trial.” *Id.* Mr. Foster did not even know he was going to testify until moments before he took the stand. Hurley admitted the decision to call Mr. Foster was made in this manner.

Additionally, Hurley’s closing argument was seriously deficient during Mr. Foster’s trial. Mr. Foster’s appellate counsel referred to Hurley’s closing as an “argument that was substandard as a matter of law in that it cannot be deemed to have passed even minimal standards for effective persuasion or elucidation of the issues, both with regard to quantity and substance.” Appellate counsel asserted that Hurley failed to argue the issues of intent, malice, and concerted action during closing, the last and one of the most important opportunities Hurley had to advocate Mr. Foster’s case to the jury. This Honorable Court Supreme Court agreed with appellate counsel that Hurley’s closing was deficient but declined to grant relief on that basis.

B. Hurley’s alcoholism did significantly impact his performance at trial.

Hurley’s admitted battle with alcoholism had spiraled out of control at the time that he was appointed to Mr. Foster’s case. Hurley remorsefully testified that Mr. Foster’s testimony was true --verifying that he did smell of alcohol during Mr. Foster’s double first-degree murder

trial. *A.R. 444* Hurley further admitted that he was under the influence of alcohol during Mr. Foster's jury trial "if you consider being hung-over under the influence." *A.R. 471*. He admitted his hang over's impacted his performance on Mr. Foster's behalf because he was not functioning at his best during the trial. *A.R. 476*. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Powell v. Alabama*, 287 U.S. 45, 68, 53 S. Ct. 55, 63, 64 (1932). Moreover, in order to satisfy the requirements of the Sixth Amendment, a criminal defendant must have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 1397 (1967). This is the only way to ensure that all of a defendant's guaranteed constitutional rights are properly asserted. Hurley admitted that due to his addiction he was not capable of bringing the skills necessary to ensure Mr. Foster's rights were asserted.

CONCLUSION

Mr. Foster successfully demonstrated, during his omnibus hearing, that he did not have counsel acting as an advocate during his double first-degree murder trial, and that he was prejudiced due to Hurley's ineffective assistance of counsel. In fact, Hurley remorsefully testified that he was ineffective, and if he had it to do over again, he would handle Mr. Foster's case in a different manner. Hurley's admitted battle with alcoholism is the logical explanation behind most, if not all, of these shortcomings that ultimately denied Mr. Foster the right to effective assistance of counsel. The Habeas Court abused its discretion when it denied Mr. Foster relief. Therefore, Mr. Foster respectfully requests this Court reverse the Habeas Court's final order and remand his case to the Circuit Court for further proceedings.

Respectfully submitted,

ERIC FOSTER,

By counsel,

A handwritten signature in black ink, appearing to read "C. L. Walden". The signature is fluid and cursive, with a long horizontal stroke at the end.

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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 Brief* to the following:

Shannon Kiser
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812 Quarrier Street, 6th Floor
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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 12th day of January, 2015.



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