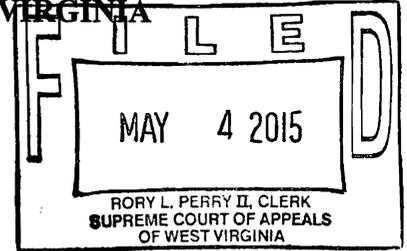


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0780



RICKY VON RAINES,

Petitioner Below, Petitioner,

vs.

**DAVID BALLARD, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,**

Respondent Below, Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

COMES NOW, Respondent, David Ballard, Warden, Mount Olive Correctional Complex, by counsel, David A. Stackpole, Assistant Attorney General and responds to Appellant's Brief. This Court should affirm the *Habeas* Court's denial of Petitioner's claims.

I.

STATEMENT OF THE CASE

On January 13, 2009, Petitioner was indicted, along with Timothy Lambert and Jessica Raines, on four (4) counts: [1] Robbery in the First Degree, [2] Malicious Assault, [3] Nighttime Burglary; and [4] Conspiracy. (Supp. App. at 2-4.)

Petitioner admitted that he and "Timmy Lambert and Darrell Lambert" "picked a part of the night that was the latest, where [they] figured that everybody in the surrounding community was asleep" and then went to the Goble residence to obtain drugs and guns. (Supp. App. at 24-9.) The plan included using zip-ties to tie up anyone who was in the house. (Supp. App. at 27.)

They took a “BB gun pistol” so that anyone in the residence would think it was a gun because it “looked like a regular firearm.” (Supp. App. at 28.) They waited until Mr. Goble left and then Timmy Lambert and Darrell Lambert went into the home for the drugs and guns. (Supp. App. at 24-9.) Mr. Goble “was supposed to have a safe in the back bedroom that he always left open where he kept all his drugs and prescription medication.” (Supp. App. at 28.) Petitioner was the driver and watched the residence. (Supp. App. at 25.) Petitioner confessed that he “was part of it,” “knew about it,” “did participate in it,” and drove “the boys up there to commit the robbery.” (Supp. App. at 28.) Petitioner stated that he is “man enough to admit that I am responsible for anything that did occur that night.” (Supp. App. at 29.)

Petitioner’s prior felony convictions included: [1] conviction in Logan County, West Virginia, on May 7, 2009, for Aggravated Robbery, Nighttime Burglary, and Conspiracy; [2] conviction in Boone County, West Virginia, on August 14, 2007, for Attempted Burglary; and [3] conviction in Logan County, West Virginia, on January 27, 2003 for Forgery and Burglary. (App. at 74-5.)

Prior to trial, Petitioner submitted a notice, pursuant to Rule 12.1 of the West Virginia Rules of Criminal Procedure, that he would deny any involvement and seek to establish an alibi at trial. (App. at 216.) Petitioner told his trial counsel that he was innocent both prior to trial and on the day trial started. (App. at 114-15.)

The State gave Petitioner a plea offer, the day before trial, on May 4, 2009 (hereinafter “First Plea Offer”). (App. at 3.) The next day, at a Hearing prior to trial, Petitioner’s trial counsel brought to the Trial Court’s attention the First Plea Offer. *Id.* Petitioner’s trial counsel informed the Trial Court that the State made the First Plea Offer to his client, that he informed his client about the First Plea Offer, that he recommended that his client take the First Plea Offer,

and that his client rejected the First Plea Offer. (App. at 3-4.) The Prosecuting Attorney informed the Trial Court that the First Plea Offer was to “reduce the charge of burglary to breaking and entering which would carry a one to ten year sentence” and to “plead guilty to the conspiracy which carries a possible sentence of one to five years.” *Id.* The decision regarding whether the sentence would be concurrent or consecutive would be left to the Trial Court. *Id.* “The most time in prison faced by Petitioner on the offered plea was not less than two (2) nor more than fifteen (15) years.” (App. at 211.)

The Prosecuting Attorney informed the Trial Court that the State intended to file a recidivist in the matter based on prior felonies. (App. at 5-6.) The First Plea Offer would not have included the recidivist charge. (App. at 7-8.) Petitioner’s trial counsel discussed the recidivist issue with his client:

I’ll be the first to tell you, Judge, I discussed the possibility of recidivist with my client, but either I overlooked or didn’t listen, but I was thinking all his felonies were non-violent, and I know burglary at least for purposes of parole is characterized as a violent crime. So I know that if there is a second violent crime conviction, that would present a possible factual basis for the recidivist to the life sentence rather than doubling the minimum.

Id. Petitioner was asked directly by the Court if he was made aware of the First Plea Offer, if he understood that the State would forego filing any recidivist action if he took the First Plea Offer, and if he instructed his trial counsel to decline the First Plea Offer and Petitioner answered “[y]es” to all three (3) questions. (App. at 4, 8.)

At the jury trial in the matter, Petitioner chose to testify. (App. at 62-3.) The Trial Court inquired of Petitioner whether his trial counsel reviewed the “Advice of Defendant’s Right to Testify” form with him and Petitioner confirmed that he did. (App. at 62.) The Trial Court asked Petitioner if he had any questions regarding his right to testify or his right to remain silent and Petitioner said, “[n]o, I do not.” *Id.* The Trial Court directly asked if Petitioner understood

“that if you give up your right to remain silent and testify, then anything you say here today can be used against you” and Petitioner responded, “[y]es, sir.” *Id.* Prior to his testimony, Petitioner was required to swear an oath to testify truthfully. (App. at 63.)

At trial, “Petitioner denied any role in the offenses charged and denied being present.” (App. at 113-14, 213.) Instead, Petitioner claimed “that he was at home with his girlfriend at the time of the crimes.” *Id.* Petitioner’s girlfriend even testified in an attempt “to partially corroborate” Petitioner’s story and to provide him an alibi. *Id.* However, she admitted that “she was asleep during the time of the crimes.” *Id.*

“The jury convicted Petitioner of Robbery in the First Degree, Nighttime Burglary, and Conspiracy.” (App. at 214.) The jury acquitted Petitioner of Malicious Assault. *Id.*

Following trial, the State gave Petitioner another plea offer on June 23, 2009 (hereinafter “Second Plea Offer”) prior to the recidivist trial. (App. at 43-4.) The Prosecuting Attorney informed the Trial Court that the Second Plea Offer would require Petitioner to: [1] “acknowledge in open Court today that he committed the offenses for which he was convicted;” [2] plead guilty to Perjury and be sentenced to a term of one (1) to five (5) years; [3] be sentenced to a term of one (1) to five (5) years on the Conspiracy conviction; [4] be sentenced to a term of one (1) to fifteen (15) years on the Burglary conviction; [5] be sentenced to not less than thirty (30) years on the Aggravated Robbery conviction; [6] “acknowledge in open Court he’s the same person that was convicted of burglary in Case No. 03-F-42-O” for recidivist purposes and be sentenced to an additional five (5) years on that basis; and [7] run all the sentences concurrently.” (App. at 44-5.)

Petitioner’s trial counsel conveyed the offer to Petitioner and Petitioner rejected the offer, but tried to make a counter-offer. (App. at 45-6.) The counter-offer was that Petitioner be

sentenced to forty (40) years, with discharge at twenty (20) years and eligible for parole in ten (10) years. (App. at 46.) The basis for his counter-offer was that Petitioner “knew that he would not be paroled, more than likely, the first time around” and was “more concerned with discharge dates than he was with parole eligibility dates.” *Id.* The Prosecutor rejected the counter-offer and was going to seek the maximum penalty under the law. (App. at 45.) Petitioner was asked directly if he understood what the Second Plea Offer was, if he understood that his trial counsel attempted to make a counter-offer, if he understood that the State rejected the counter-offer, and if he understood that if he was “found to be the same person that’s been twice previously convicted” that he could be sentenced to life on the recidivist with individual sentencing on the other counts. (App. at 48-9.) Petitioner informed the Trial Court that he understood each of the issues. *Id.*

During the explanation to the Trial Court regarding the Second Plea Offer and the counter-offer, Petitioner’s counsel argued that “even if he’s convicted tomorrow is for a three time convicted felon, that the sentence is just life.” (App. at 47.) The Prosecuting Attorney argued that the life sentence is “just an additional sentence he’s going to get” and that he would “ask for 80 years.” *Id.* That is when Petitioner’s trial counsel stated, “Judge, if that’s correct law, I’ve told my client wrong and I want that to be right up front, because I told him that the only sentence tomorrow would be if he’s convicted, that he would be sentenced to life and be eligible after 15 years.” *Id.*

Petitioner’s trial counsel informed the Trial Court that he did not take a position regarding the Second Plea Offer with his client, either recommending that he take it or that he decline it. (App. at 49.) However, he expressly stated in the Hearing that “[i]f the Court is inclined to think that it can sentence on the underlying crimes, I do recommend this offer.” *Id.*

The Trial Court explained that with “multiple convictions occurring on the same day, arising from separate acts” meant that “there can only be one enhancement.” (App. at 50.) The Prosecutor informed the Trial Court that the State would seek the enhancement on the Burglary with separate sentencing on the other convictions and requesting consecutive sentencing. (App. at 50-1.)

Petitioner’s trial counsel informed the Trial Court that Second Plea Offer was rejected on “erroneous advice” if Petitioner could still be sentenced on the underlying offenses:

Judge, if the Court is inclined to think that they can still sentence under the underlying offense, then this offer was basically rejected because of erroneous advice. He asked me “what’s the worst that could happen,” and I said the worst that could happen is a life sentence with an eligibility, which I checked the Code again, a parole eligibility date of 15 years.

If the Court is inclined to think not only can he get a life sentence, but it can go back and sentence him for the underlying aggravated robbery, my advice would be entirely different from when this offer was made. If the Court is inclined to think that it can do that, then my opinion on this offer would drastically change.

(App. at 51.) The Trial Court explained that only one (1) of the convictions could be enhanced, but that the State could seek consecutive sentencing. (App. at 52.) The Trial Court went on to explain regarding the recidivist, that if the jury concluded that only one (1) prior felony applied, then for a sentence with a definite term of years, there would be five (5) years added, but with “an indeterminate sentence, the minimum term shall be twice the number of years provided for under the sentence.” (App. at 52-3.)

In order to avoid a possible *Habeas* action, the Prosecutor put the Second Plea Offer back on the table. (App. at 53.) After Petitioner’s trial counsel conferred with Petitioner and explained the Second Plea Offer in light of the law as would be applied by the Trial Court, Petitioner decided to accept the Second Plea Offer as long as he could keep his right to appeal. (App. at 54.) The Prosecutor agreed to “reserve to [Petitioner] any right that the law would

allow him, either appeal or otherwise.” (App. at 55.) The Trial Court once again inquired of Petitioner, whether he understood the Second Plea Offer and whether he was willing to accept the Second Plea Offer if his right to appeal was preserved. (App. at 56.) Petitioner confirmed that he understood and accepted the Second Plea Offer. *Id.*

The very next day, June 24, 2009, the Trial Court held a Plea Hearing regarding the Second Plea Offer. (Supp. App. at 5-42.) At the Plea Hearing, the Prosecutor informed the Trial Court that the Second Plea Offer’s provision regarding the Perjury sentence of one (1) to five (5) years was incorrect and that the sentence would be one (1) to ten (10) years under the statute. (Supp. App. at 7.) Petitioner did not object as it was the statutory sentence and “did not really change the minimum on the one.” (Supp. App. at 8.) The Trial Court inquired of Petitioner whether he understood, whether he signed the Waiver of Indictment, and whether he spoke to his counsel regarding the issues and Petitioner answered affirmatively to each question. (Supp. App. at 8-9.) The Trial Court explained that Petitioner did not have to admit to anything and had the right to remain silent, but that if he wanted to take the Second Plea Offer, then he would have to answer questions under oath and Petitioner indicated that he understood and wanted to proceed. (Supp. App. at 9-11.) Petitioner testified that he went over all the documents regarding the Second Plea Offer, read them himself, discussed it “[t]horoughly” with his trial counsel, and “completely comprehend[ed] it.” (Supp. App. at 12.)

Petitioner testified that he met with his trial counsel between ten (10) and fifteen (15) times prior to trial and were together almost constantly during trial. (Supp. App. at 12-3.) When asked if he was satisfied with his trial counsel, Petitioner stated, “I’m more than satisfied, yes.” (Supp. App. at 13.) Petitioner testified that there was nothing that he asked his trial counsel to look into or to follow up on that his trial counsel did not do. *Id.* Petitioner testified that he has

had other attorneys and comparatively he was completely satisfied with his trial counsel. *Id.* Petitioner had been represented by his trial counsel “[n]umerous times.” (App. at 132.)

Petitioner testified that he knew he had a right to a jury trial on the recidivist issue and regarding the perjury charge, but was waiving that right and wanted to enter a plea deal. (Supp. App. at 16-8.) The Trial Court explained that if there was a recidivist trial and he “lost,” then the State intended on seeking “a life sentence on the burglary,” “at least 80 years on the robbery,” plus the conspiracy charge, all to run consecutively. (Supp. App. at 18.)

Petitioner’s trial counsel indicated that he originally “had a neutral position,” leaving the decision up to Petitioner regarding the Second Plea Offer. (Supp. App. at 20.) However, after the Trial Court interpreted the recidivist sentencing, Petitioner’s trial counsel recommended that Petitioner take the Second Plea Offer. *Id.* Thereafter, Petitioner accepted the Second Plea Offer. (Supp. App. at 20-2.)

The Trial Court made a finding that Petitioner understood his rights and options and made a knowing, intelligent, and voluntary choice to accept the Second Plea Offer. (Supp. App. at 22-3.) Petitioner pled guilty to the charges in the indictment, the recidivist charge, and the perjury charge. (Supp. App. at 24-32.) The Trial Court sentenced Petitioner to a term of: two (2) to fifteen (15) years on the Burglary charge, applying the recidivist; thirty (30) years on the Robbery charge; and one (1) to five (5) years on the Conspiracy charge. (Supp. App. at 38-9.) The Trial Court ran those sentences consecutively. (Supp. App. at 39.) The Trial Court sentenced Petitioner to a term of one (1) to ten (10) years on the Perjury charge. *Id.* The Perjury sentence was to run concurrently with the Conspiracy sentence. *Id.*

Petitioner appealed arguing that “felony convictions obtained on the same day should be treated as one conviction.” *State v. Raines*, No. 1011296 (W. Va. Apr. 18, 2011). This Court affirmed the conviction and sentence. *Id.*

Petitioner filed a Petition for *Habeas Corpus*. (App. at 65-73.) Following the Appointment of Counsel, Petitioner filed an Amended Petition for Writ of *Habeas Corpus Ad Subjicendum*. (App. at 81-84.) On October 23, 2013, the *Habeas* Court held an Omnibus Hearing regarding Petitioner’s *Habeas* claims. (App. at 93-178.)

Petitioner’s trial counsel testified at the Omnibus Hearing. (App. at 139-76.) Petitioner’s trial counsel testified that he “highly recommended” the First Plea Offer to Petitioner. (App. at 142.) Petitioner’s trial counsel testified that he spoke to Petitioner about taking the First Plea Offer and Petitioner did not want to do so. (App. at 156.) A Court Reporter, who was in the room at the time, told Petitioner that Petitioner “was not using his head for not taking this plea because to (sic) many bad things can happen with the nature of the offenses.” *Id.* Petitioner’s trial counsel also discussed the possibility of a recidivist sentence with Petitioner and inquired about nature of the previous convictions in order to “determine if a substantial portion of them were violent.” (App. at 144.) Petitioner’s trial counsel explained that the entire reason that he informed the Trial Court of the First Plea Offer is that he believed that it should have been accepted. (App. at 157-58.)

As to witness preparation, Petitioner’s trial counsel explained that he that he went to the jail the night before trial and although he does not remember specifically his witness preparation with Petitioner, his practice is “to point/counterpoint about the testimony.” (App. at 168, 171-72.) He also believes that he told Petitioner that he does not “know in recent memory that [he]

can remember a client who was acquitted that testified.” *Id.* Petitioner’s trial counsel has been practicing for about twenty-five (25) years. *Id.*

The *Habeas* Court made a factual finding that Petitioner’s claim that his trial counsel advised him prior to the First Plea Offer that “he could not be subject to consecutive sentences” was not credible. (App. at 212.) The *Habeas* Court made a factual finding that it was not until after trial that Petitioner’s trial counsel advised him that “the sentences for multiple convictions would subject him to one life sentence.” *Id.* The *Habeas* Court made a factual finding that “[t]rial counsel specifically told Petitioner that a conviction of a second violent crime could serve as the basis for a life sentence as a recidivist offender” and that “[t]here was no discussion between trial counsel and Petitioner prior to trial as to how he might be sentenced if there were multiple convictions in the jury trial.” *Id.* The *Habeas* Court made a factual finding that Petitioner rejected the First Plea Offer because he wanted to argue his innocence. (App. at 213.)

The *Habeas* Court recognized that under Petitioner’s argument, he rejected the First Plea Offer because he believed the most time he could have received at trial was life in prison, which would make him parole eligible in fifteen (15) years. (App. at 215.) The *Habeas* Court concluded that Petitioner’s current sentence makes him eligible for parole in ten and one half (10 ½) years, which is still less than what Petitioner would have gotten under his alleged understanding at the time that he passed up the First Plea Offer. *Id.* The *Habeas* Court denied Petitioner’s *Habeas* claims. This appeal followed.

II.

SUMMARY OF THE ARGUMENT

Petitioner improperly conflates the advice given by his trial counsel regarding the First Plea Offer and the Second Plea Offer. Petitioner’s trial counsel did not give any deficient advice

prior to Petitioner's rejection of the First Plea Offer. To the contrary, Petitioner's trial counsel strongly recommended that Petitioner take the First Plea Offer. Instead, Petitioner rejected the First Plea Offer in an attempt to demonstrate innocence and an alibi. As to the Second Plea Offer, Petitioner's trial counsel did give deficient advice regarding sentencing on multiple convictions. However, the Trial Court corrected Petitioner's trial counsel's legal understanding and the Prosecutor renewed the Second Plea Offer. Petitioner accepted the renewed Second Plea Offer, making any prior deficient advice moot. Moreover, Petitioner's sentence is better than he could have believed that he would have gotten under the deficient advice.

Petitioner was not forced to testify. He chose to testify and to commit perjury in an attempt to be found innocent. Petitioner's trial counsel prepared him to testify at trial for both direct and cross-examination. There is no evidence to suggest that Petitioner was convicted based on lack of eye contact. Petitioner's issue was not the need to "appear honest," but rather his failure to actually testify honestly. Furthermore, this Court should reject Petitioner's suggestion that ineffective assistance of counsel be found to exist when defense counsel does not tell the criminal defendant to "not perjure" himself/herself.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and the Appendix. The decisional process would not be aided by oral argument. This matter is appropriate for a Memorandum Decision.

IV.
ARGUMENT

There is a two (2) prong standard of review for claims of ineffective assistance of counsel:

“An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court’s findings of historical fact for clear error and its legal conclusions *de novo*. This means that we review the ultimate legal claim of ineffective assistance of counsel *de novo* and the circuit court’s findings of underlying predicate facts more deferentially.”

Syl. Pt. 1, *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 13, 528 S.E.2d 207, 209 (1999) (quoting *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995)). “Findings of fact made by a trial court in a post-conviction *habeas corpus* proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syl. Pt. 2, *State ex rel. Vernatter*, 207 W. Va. at 13, 528 S.E.2d at 209 (quoting Syl. Pt. 1, *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975)).

Petitioner alleges two (2) assignments of error. Pet’r’s Br. at 2. Both of Petitioner’s claims are allegations of ineffective assistance of counsel. There are two (2) elements to an ineffective assistance of counsel claim:

“In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”

Syl. Pt. 3, *State ex rel. Vernatter*, 207 W. Va. at 13, 528 S.E.2d at 209 (quoting Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)). In applying the objective standard, the Court should not use hindsight:

“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."

Syl. Pt. 4, *State ex rel. Vernatter*, 207 W. Va. at 13, 528 S.E.2d at 209 (quoting Syl. Pt. 6, *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117).

Petitioner's two (2) ineffective assistance of counsel claims are that (1) his trial counsel gave him incorrect legal advice pertaining to recidivist sentencing and [2] his trial counsel did not properly prepare him to be a witness. Neither of Petitioner's claims have merit.

A. Petitioner Improperly Conflates The First Plea Deal With The Second Plea Deal In An Attempt To Suggest That He Rejected The First Plea Deal Based On Improper Advice.

Petitioner cannot make out either prong of *Strickland* regarding his claims as to the plea offer. While this Court has not directly addressed the situation where alleged ineffective assistance of trial counsel caused a criminal defendant decline a plea offer and proceed to a jury trial resulting in a less favorable outcome, the United States Supreme Court addressed the issue in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). In *Lafler*, the criminal defendant "was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender." *Id.* at 1383. "On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea." *Id.* "In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer." *Id.* "Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist." *Id.* "On the first day of trial the prosecution offered a significantly less favorable plea deal, which

respondent again rejected.” *Id.* “After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months’ imprisonment.” *Id.*

The United States Supreme Court held that criminal “[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” *Id.* at 1384 (citations omitted). “During plea negotiations defendants are ‘entitled to the effective assistance of competent counsel.’” *Id.* (citations omitted). In *Lafler*, because it was undisputed that trial counsel’s advice regarding the prosecution’s inability to establish intent was deficient under an objective standard of reasonableness, the Court focused on the second prong of *Strickland* and explained how a criminal defendant could prove prejudice:

[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 385.

Although the issue of alleged ineffective assistance of trial counsel causing a criminal defendant decline a plea offer and proceed to a jury trial resulting in a less favorable outcome has not been expressly addressed by this Court, based on this Court’s jurisprudence in other ineffective assistance of counsel regarding plea offers, Respondent believes that this Court would follow *Lafler*. See *State ex rel. Vernatter*, 207 W. Va. at 14, 528 S.E.2d at 210 (involving a situation where the criminal defendant pled guilty and claimed that but for his counsel’s deficient advice, he would have declined the plea and insisted on going to trial); *Tucker v. Holland*, 174 W. Va. 409, 417, 327 S.E.2d 388, 396 (1985) (involving a situation where the criminal defendant wanted to plead guilty but his attorney did not permit him to do so).

In this case, Petitioner attempts to conflate the issues surrounding the two (2) separate plea offers. Petitioner argues that prior to the First Plea Offer his trial counsel has given him the wrong advice regarding the application of the recidivist statute. Pet'r's Br. at 10-3. Petitioner argues that he believed that his choice was either take the First Plea Offer and be sentenced to a term of two (2) to fifteen (15) years or go to trial and risk a life sentence with a possibility of parole in fifteen (15) years. Pet'r's Br. at 12. He claims that he rejected the two (2) to fifteen (15) years and chose to risk a life sentence based on faulty legal advice regarding the application of the recidivist charge and that he would have taken the First Plea Offer had he known that he might be subject to more than a life sentence. *Id.* Petitioner's claims are meritless.

First, Petitioner's actual sentence that he pled to in the Second Plea Offer makes him eligible for parole in ten and one half (10 ½) years, which is still less than what Petitioner would have gotten under his alleged understanding at the time that he passed up the First Plea Offer, which was a life sentence with eligibility for parole in fifteen (15) years. (App. at 215.) Petitioner chose to risk going to trial on the belief that in the worst case scenario, he would do at least fifteen (15) years and possibly life in prison. *Id.* His actual outcome is eligibility for parole in ten and a half (10 ½) years with a maximum of fifty (50) years in prison. *Id.*

Second, Petitioner passed up the First Plea Offer on the strategy that he would be found not guilty. His pre-trial notice denying involvement and claiming an alibi, his assertions to his trial counsel that he was innocent, and his actual testimony that he had no involvement demonstrate his strategy was to seek a not-guilty verdict instead of accepting the First Plea Offer. (App. 113-15, 213, 216.) In fact, the *Habeas* Court made a factual finding that Petitioner rejected the First Plea Offer because he wanted to argue his innocence. (App. at 213.)

Third, Petitioner's trial counsel strongly urged Petitioner to take the First Plea Offer. (App. at 142, 156.) Petitioner's trial counsel saw Petitioner's rejection as a bad decision warranting his informing the Trial Court of the rejection. (App. at 157-58.) Petitioner's trial counsel gave appropriate advice regarding the First Plea Offer, but Petitioner rejected the advice.

Fourth, Petitioner's trial counsel did not give Petitioner advice regarding how Petitioner might be sentenced if there were multiple convictions in the jury trial prior to the First Plea Offer. (App. at 212.) To the extent that Petitioner's trial counsel advised Petitioner regarding the application of the recidivist statute prior to the First Plea Offer, the advice centered around an attempt to determine which prior felonies were violent and informing Petitioner that "a conviction of a second violent crime could serve as the basis for a life sentence as a recidivist offender." *Id.*

It was not until the Second Plea Offer that the issue of sentences based upon multiple convictions was raised. (App. at 49-53.) Petitioner's trial counsel's defective advice regarding multiple sentences occurred after Petitioner had rejected the First Plea Offer and after the jury trial. *Id.* The issue came up in response to the Second Plea Offer and the Prosecuting Attorney specifically renewed the Second Plea Offer in order to allow Petitioner a chance to take the deal after being informed of the law from the Trial Court that was different than his trial counsel had provided because the Prosecutor wanted to avoid a Habeas proceeding. (App. at 53.) Petitioner accepted the Second Plea Offer.

Petitioner cannot make out the first *Strickland* element because his trial counsel did not give any deficient advice prior to the First Plea Offer that Petitioner chose to reject. Petitioner rejected the offer in an attempt to claim innocence based upon an alibi. It was not until the Second Plea Offer that his trial counsel provided deficient advice regarding sentencing based

upon multiple convictions. However, the Trial Court explained how sentencing would work with multiple convictions, the Prosecutor renewed the Second Plea Offer, and Petitioner accepted the Second Plea Offer, rendering any deficient advice from Petitioner's trial counsel moot.

Petitioner cannot make out the second *Strickland* element because Petitioner's trial counsel's error was corrected by the Trial Court and the Second Plea Offer was renewed. The outcome would be no different absent Petitioner's trial counsel's error in advising his client because the Trial Court corrected the deficient advice, the Prosecutor renewed the Second Plea Offer, and Petitioner accepted it.

Therefore, because Petitioner's trial counsel did not give any deficient advice prior to Petitioner's rejection of the First Plea Offer, because Petitioner's trial counsel strongly recommended that Petitioner take the First Plea Offer, because Petitioner rejected the First Plea Offer in an attempt to demonstrate innocence and an alibi, because Petitioner's trial counsel's deficient advice prior to the Second Plea Offer was corrected by the Trial Court, because the Prosecutor renewed the Second Plea Offer when it became known that Petitioner's counsel had offered deficient advice, because Petitioner accepted the Second Plea Offer, and because Petitioner's sentence is better than he could have believed that he would have gotten under the deficient advice, this Court should affirm the *Habeas* Court's denial of Petitioner's claims.

B. The Facts Demonstrate That Petitioner's Trial Counsel Prepared Him To Testify And This Court Should Refuse To Extend The Law Regarding Ineffective Assistance To Include A Requirement That Trial Counsel Specifically Inform Criminal Defendants To Not Commit Perjury.

Petitioner cannot make out either prong of *Strickland* regarding his claims as to his preparation to testify. As recognized by Petitioner, this Court has not held that a "trial counsel's failure to prepare a litigant for trial testimony is ineffective." *See* Pet'r's Br. at 14. However, in *State ex rel. Quinones v. Rubenstein*, 218 W. Va. 388, 624 S.E.2d 825 (2005), there was a claim

of ineffective assistance of counsel based on allegations that trial counsel failed to “properly advise or prepare him regarding his testimony.” *State ex rel. Quinones*, 218 W. Va. at 395, 624 S.E.2d at 832. This Court affirmed the *Habeas* Court’s denial of the claim because of the failure “to specifically indicate what further information or direction he needed from counsel.” *Id.*

In this case, Petitioner’s second ineffective assistance of counsel argument is that his trial counsel failed to prepare him to testify. Pet’r’s Br. at 14-5. In his Brief, Petitioner alleges the following claims that his trial counsel was ineffective: [1] advising petitioner that he “must testify;” [2] failing to provide “any preparation whatsoever;” [3] advise “what questions are going to be asked on direct;” [4] advise “what to expect on cross-examination;” [5] advise “how to comport oneself on the witness stand” including “appear to be honest and forthcoming” and “[e]ye contact with the jury;” and [6] advise “do not commit perjury.” *Id.*

1. Petitioner cannot make out either *Strickland* element regarding his claim that he was advised that he “must testify.”

Petitioner’s assertion that his trial counsel told him that he “must testify” and that such advice was ineffective assistance of counsel is incorrect. “Where a counsel’s performance, attacked as ineffective, arises from occurrences involving strategy, tactics or arguable courses of action, his conduct will be deemed effectively assistive of his client’s interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.” Syl. Pt. 4, *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 479, 212 S.E.2d 69, 70 (1975) (quoting Syl. Pt. 21, *State v. Thomas*, 203 S.E.2d 445 (1974)).

In this case, Petitioner was not forced to testify against his rights, the decision was strategic. Petitioner states in his brief that “to turn to a criminal defendant while a trial is ongoing and advise them that they must testify, without any preparation whatsoever rises to ineffective assistance of counsel.” Pet’r’s Br. at 14. At the Omnibus Hearing, Petitioner claimed

that his trial counsel told him that “the direct evidence is putting you at the crime” and “[n]ow you have to take the stand.” (App. at 134.) Even under Petitioner’s assertion, the point of Petitioner testifying was a strategic maneuver to counter the direct evidence. Such a strategic maneuver was not deficient performance, but rather a keen trial strategy to refute evidence suggesting a conviction. It was reasonable and not deficient for Petitioner’s trial counsel to suggest that Petitioner testify. As such, Petitioner cannot make out the first *Strickland* element.

Even before trial, Petitioner submitted a notice denying his involvement and establishing an alibi, suggesting that he had already contemplated the possibility of testifying to support his claim that he was not involved. (App. at 216.) Petitioner’s insistence on his innocence supported the strategy. (App. at 114-15.) Moreover, Petitioner’s claim is not credible as he told the Trial Court that his trial counsel reviewed the “Advice of Defendant’s Right to Testify” form with him and told the Trial Court that he had no questions regarding his right to remain silent or his right to testify. (App. at 62.) Additionally, the Trial Court directly asked if Petitioner understood “that if you give up your right to remain silent and testify, then anything you say here today can be used against you” and Petitioner responded, “[y]es, sir.” *Id.*

Petitioner cannot make out the second *Strickland* element because if Petitioner had not testified, then the direct evidence would not have been refuted and the result of the trial would still have been convictions, possibly convictions on all four (4) charges in the Indictment rather than just on three (3) of the four (4) as it is possible that Petitioner’s decision to testify actually worked to prevent him from being convicted of Malicious Assault.

Therefore, because Petitioner maintained his innocence to his trial counsel, because the direct evidence suggested conviction, because Petitioner had his rights regarding remaining silent and regarding testifying explained to him by his trial counsel and by the Trial Court, because

Petitioner wanted to deny his involvement and seek to establish an alibi, and because the outcome at trial would have been either the same or worse if Petitioner had not testified, this Court should affirm the *Habeas* Court's denial of Petitioner's claims.

2. **Petitioner's assertions that his trial counsel failed to provide any preparation whatsoever, failed to advise regarding questions to be asked on direct examination, and failed to advise regarding what to expect on cross-examination are factually incorrect.**

Petitioner's trial counsel did prepare him to testify. Petitioner's trial counsel went to the jail the night before trial and prepared him. (App. at 171-72.) Although he does not remember specifically his witness preparation with Petitioner, his practice is "to point/counterpoint about the testimony." (App. at 168, 171-72.) Petitioner's trial counsel also believes that he told Petitioner that he does not "know in recent memory that [he] can remember a client who was acquitted that testified." *Id.* As such it is clear that Petitioner's trial counsel did prepare him to testify. Petitioner was prepared to testify on direct (point) and on cross-examination (counterpoint). Such preparation is not deficient under an objective standard of reasonableness.

Moreover, there is nothing in the record to suggest that further preparation for questions on direct or cross-examination would have prepared Petitioner any more or would have changed the outcome of the proceeding. Petitioner's strategy was to lie on the stand and deny it all and no preparation would have changed that because Petitioner maintained his innocence to his counsel throughout that time.

Therefore, because Petitioner's trial counsel went to the jail the night before trial and prepared him to for point and counterpoint testimony, because Petitioner led his trial counsel to believe that he was innocent, and because Petitioner intended on lying on the witness stand to suggest his innocence and an alibi, this Court should affirm the *Habeas* Court's denial of Petitioner's claims.

3. Petitioner's claims regarding witness preparation to appear honest and to make eye contact is disingenuous.

Petitioner's discussion of a law student's trial advocacy class regarding appearing honest and making eye contact is mere prestidigitation to keep the Court from focusing on the real issue, which was Petitioner's perjury. Petitioner cannot cite to any portion of the record to suggest that his lack of eye contact was the basis for the conviction. In fact, there was not one (1) question regarding eye contact asked of either Petitioner or of Petitioner's trial counsel in the Omnibus Hearing. Additionally, to the extent that Petitioner's testimony was, in his view, "objectively devastating to his case,"¹ the problem was not Petitioner's failure to "appear to be honest and forthcoming," it was Petitioner's failure to be honest that was the issue. Even assuming *arguendo* that Petitioner's trial counsel did not discuss eye contact or the need to "appear to be honest," such failure does not rise to a level of deficiency under an objective standard of reasonableness. Moreover, had Petitioner testified honestly, he would have admitted his guilt. That would have resulted in a conviction. Had Petitioner not testified, the direct evidence would have resulted in a conviction. As such the result of the proceedings would not have been different.

Therefore, because Petitioner's counsel was not deficient under an objective standard of reasonableness by failing to tell Petitioner to "appear to be honest" or to make eye contact, because Petitioner choose to testify dishonestly, because the outcome would not have been any different if Petitioner had testified honestly, and because the outcome would not have been any different if Petitioner had not testified, this Court should affirm the *Habeas* Court's denial of Petitioner's claims.

¹ Respondent is of the belief that it was the evidence that was devastating to Petitioner's case.

4. This Court should reject Petitioner's assertion that failure to tell a criminal defendant to not commit perjury amounts to ineffective assistance.

Although Petitioner asserts that he “is not arguing that trial counsel specifically review the ramifications of committing perjury while testifying in Court,” that is exactly what he is asserting. *See* Pet'r's Br. at 14-5. Petitioner expressly states that “the most important instruction to be given witnesses, especially in criminal defendants testifying at their own trial, is do not commit perjury.” *Id.* Petitioner admits that it is “elementary to most people,” but claims that “he should have been given [the advice not to commit perjury] prior to testifying at his trial.” *Id.* Clearly, Petitioner is arguing that this Court should expand West Virginia's ineffective assistance of counsel jurisprudence to include a requirement that counsel has to tell criminal defendants not to commit perjury. Petitioner's assertion is farcical.

Petitioner cannot cite to any law requiring counsel to tell clients to refrain from committing perjury. *Id.* At the jury trial in the matter, Petitioner chose to testify. (App. at 62-3.) Prior to his testimony, Petitioner was required to swear an oath to testify truthfully. (App. at 63.) Nonetheless, Petitioner lied under oath and claimed that he was innocent of the charges and had an alibi. (App. at 113-14, 213.) Later, under oath at the Plea Hearing, Petitioner admitted his guilt of the charges, including the perjury charge. (Supp. App. at 24-32.) Petitioner cannot claim that he was unaware that he was required to tell the truth after swearing, in front of the judge and jury, to tell the truth. That is especially true as this is not Petitioner's first time in the criminal justice system. Even assuming *arguendo* that Petitioner's trial counsel did not specifically advise him to not commit perjury, such performance is not deficient under an objective standard of reasonableness.

Even if Petitioner had been instructed to not commit perjury, the outcome of the proceedings would not have been different. Petitioner would have testified truthfully and admitted to the crimes and he would have been convicted and sentenced.

Therefore, because Petitioner's counsel was not deficient under an objective standard of reasonableness by failing to tell Petitioner to not perjure himself, because this was not Petitioner's first time in the criminal justice system, because Petitioner took an oath to tell the truth, and because the outcome would be the same even if Petitioner told the truth at trial, this Court should affirm the *Habeas* Court's denial of Petitioner's claims.

IV.

CONCLUSION

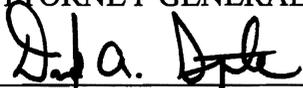
For the foregoing reasons and others apparent to this Court, this Court should affirm the *Habeas* Court's Order Denying Petitioner's Petition for *Habeas Corpus*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 4th day of May, 2015, addressed as follows:

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