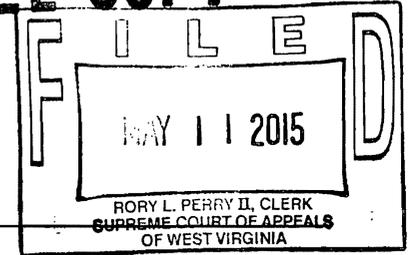


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MARVIN PLUMLEY, Warden,
Huttonsville Correctional Center,**

Respondent Below / Petitioner,

v.

SHANE DODSON,

Petitioner Below / Respondent.

BRIEF OF RESPONDENT

Counsel for Respondent:

Christopher Dulany Petersen
West Virginia State Bar Number 11926
Bowles Rice LLP
101 South Queen Street
Martinsburg, West Virginia 25401
Telephone: (304) 262-3334
Fax: (304) 267-3822
cpetersen@bowlesrice.com

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COUNTER-STATEMENT OF THE CASE

On June 8, 2011, the Respondent, Shane Dodson, (“Mr. Dodson”) received an enhanced life sentence pursuant to West Virginia Code § 61-11-18 following his April 6, 2011, convictions of Daytime Burglary and Domestic Battery. His conviction arose from a September 20, 2010, occurrence in which he was accused of pushing his way into the home of Britney Carrigan (“Ms. Carrigan”) and “hitting [her].” *See* Appendix, p. 3. Mr. Dodson retained Sherman Lambert (“Mr. Lambert”) to represent him in the defense of this matter.

On February 15, 2011, the State sent Mr. Lambert a plea offer agreement (“the Plea Offer”) that offered to refrain from treating Mr. Dodson as a recidivist if he would in exchange plead guilty to Burglary, Domestic Battery, and to a separate Domestic Battery misdemeanor that was pending in Magistrate Court and receive concurrent sentences of one to ten years for the Burglary charge and one year for each Domestic Battery charge. *See* App., p. 3; 102. After discussing the matter with Mr. Lambert, Mr. Dodson rejected the Plea Offer and took his case to trial. *See* App., pp. 3–4. At trial, the State’s case against Mr. Dodson was “very strong,” as Mr. Dodson’s only defense was provided by Ms. Carrigan, who had subsequently requested that the charges against him be dropped and at trial recanted the allegations she made against him. *See* App. pp. 16, 109. Mr. Dodson was convicted of Daytime Burglary and Domestic Battery.

After exhausting his appellate remedies, Mr. Dodson filed a Habeas Corpus Petition, and the undersigned counsel was appointed to assist him in filing an amended Petition. *See* App., p. 7. An Omnibus Hearing was held by the Circuit Court on June 18, 2014, during which testimony and evidence were offered by Mr. Dodson; his mother, Sherry Dodson; and Mr. Lambert. Most of this evidence and testimony focused on Mr. Dodson’s assertion that he had rejected the State’s Plea Offer based on the erroneous and deficient advice of Mr. Lambert. *See* App., p. 7. Mr.

Dodson specifically testified that Mr. Lambert told him that as a matter of law the State could not convict him of Burglary because he did not break into or steal anything from Ms. Carrigan's home and thus strongly advised him to decline the Plea Offer. *See App.*, pp. 4, 200:12–201:13, 202:9–12. He supported his testimony with a number of statements that were made at his trial and sentencing that showed that neither he nor Mr. Lambert understood the law governing the charges he faced. *See App.*, pp. 204:5–205:11, 182:21–183:8, 213:24–214:17, 309:10–14.

Mr. Lambert denied these allegations and testified that he had counseled Mr. Dodson regarding the charges he faced and reviewed the laws which he was accused of violating along with the potential defenses to those charges, and that it was solely Mr. Dodson's decision to deny the Plea Offer. *See App.*, pp. 268:13–269:3, 269:19–272:18, 274:16–19, 276:20–23, 304:5–10.

Recognizing the clear and uncompromising conflict between such testimony, the Circuit Court noted that because “[Mr. Lambert] neither wrote any letters to Mr. Dodson on the subject of trial strategy or the advisability of accepting a plea – nor did he make notes of any communications with his client on those subjects – we are left to faulty memories and conflicting assertions at the Omnibus hearing, coupled with representations made at trial and sentencing.” *See App.* p. 17. It further noted that because “[Mr. Lambert's] answers to Mr. Dodson's counsel's questions established that his recollection was less than reliable on many important matters, . . . the most reliable indication as to the advice that Mr. Lambert provided to Mr. Dodson must be deduced from the record before this Court.” *See App.* p. 18. The Circuit Court then carefully reviewed that record and determined that Mr. Lambert's “statements and arguments at trial can be seen to support Mr. Dodson's allegations, at least with respect to counsel's advice regarding the elements of Domestic Battery and the evidentiary rules regarding testimony pertaining to Burglary and the lesser included offense of Daytime Burglary,” and that

such evidence “belies Mr. Lambert’s claims and in fact shows that Mr. Lambert misinformed Mr. Dodson of the law and/or misunderstood it himself.” *See App. p. 4, 20.*

Indeed, the Circuit Court noted that the record showed that it was “evident that Mr. Lambert at the very least failed to properly explain, and (judging from remarks he made at trial) potentially misunderstood the applicable law himself . . . as they related to the charges against Mr. Dodson and the facts of Mr. Dodson’s case at the time he rejected the Plea Offer.” *App., p. 16.* It further found that “Mr. Lambert either misunderstood or misrepresented the required elements of the underlying charges that Mr. Dodson faced in this case. As such it appears that counsel improperly explained the required elements of the governing offenses, and (more importantly) the lesser included offenses, to Mr. Dodson, and incorrectly assured Mr. Dodson that he could not be convicted of the charges against him,” noting that “the factual record of this case shows that counsel, even at the time of trial, misunderstood or misrepresented the elements of Burglary, the lesser included offense of Daytime Burglary, and Domestic Battery” and that “Mr. Dodson, as a layman, relied heavily on the legal expertise of Mr. Lambert, an attorney with almost thirty years’ experience, and therefore rejected the State's Plea Offer.” *See App., pp. 17, 22.* Based on these findings, the Circuit Court ruled that Mr. Dodson had indeed been denied effective assistance of counsel in the plea bargaining phase of his trial to his substantial and unconstitutional prejudice. It therefore issued Mr. Dodson habeas corpus relief and ordered the State to reoffer him the Plea Offer. *See App., pp. 22–23.*

SUMMARY OF ARGUMENT

In its Petition for Appeal, the State argues that in issuing its Order Granting Petition for Habeas Corpus Relief, the Circuit Court (1) “incorrectly applied the correct standard of law” and (2) “improperly made findings of fact which contradicted the plain preponderance of the

evidence.” In essence, the State’s assignments of error allege that the Circuit Court “improperly applied” both prongs of “the *Strickland v. Washington* test to assess ineffective assistance of counsel.” *See* Petition, pp. 7–8. These arguments are meritless, as the Circuit Court’s Order shows that it correctly applied both prongs of the *Strickland v. Washington* test and that its findings that Mr. Lambert’s “performance was deficient under an objective standard of reasonableness,” and that there was a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different” were fully supported by the record before it. *See* Syl. Pt. 7, *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (quoting Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

Because there were no writings or other documentation substantiating either Mr. Dodson’s or Mr. Lambert’s conflicting versions of the advice that was given during plea bargaining, “the most reliable indication as to the advice that Mr. Lambert provided to Mr. Dodson must be deduced from the record.” *See* App. p. 18. In making this deduction, the Circuit Court carefully and thoroughly reviewed the record before it and weighed the credibility of the testimony offered at the Omnibus Hearing, and it ultimately determined that the record showed “that Mr. Lambert misinformed Mr. Dodson of the law and/or misunderstood it himself” as he had “incorrectly assured Mr. Dodson that he could not be convicted of the charges against him.” *See* App. pp. 4, 17–20. Based on this thorough, and ultimately correct, review and analysis of the evidence before it, the Circuit Court found that Mr. Dodson had sufficiently proved that “under an objective standard” and “in light of all the circumstances,” he was denied effective assistance of counsel and that he had been substantially prejudiced by this denial. *See State ex rel. Vernatter v. Warden, W Virginia Penitentiary*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213

(1999) (quotations omitted). The Circuit Court's rulings are not only fully supported by the record, but they are also correct, and they should be affirmed by this Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that oral argument is appropriate and necessary in this matter and therefore respectfully asks this Court to set this case for a Rule 19 argument on the basis that this case involves alleged assignments of error in the application of settled law as well as the application of a recent United States Supreme Court decision, *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the application of which has not yet been fully discussed by this Court. Respondent submits that this case is appropriate for a memorandum decision.

ARGUMENT

The Circuit Court correctly applied the two-prong test of *Strickland v. Washington* when it found that Mr. Dodson had been denied effective assistance of counsel during plea bargaining, and its findings that Mr. Lambert's "performance was deficient under an objective standard of reasonableness," and that there was a "reasonable probability that, but for [his] unprofessional errors, the result of the proceedings would have been different" were both supported by its credibility determinations and by the evidence before it. See Syl. Pt. 7, *Woodson*, 222 W. Va. 607, 671 S.E.2d 438. Finally, the Circuit Court properly adopted the guidance of *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), in fashioning a remedy to fix this unconstitutional violation. The Circuit Court's Order granting Mr. Dodson Habeas Corpus Relief should therefore be affirmed.

I. Standard of Review

This Court has typically afforded Circuit Courts "broad discretion in determining whether to grant a petition for post-conviction habeas corpus relief." See *State ex. rel. Crupe v. Yardley*,

213 W. Va. 335, 337, 582 S.E.2d 782, 784 (2003); *see also State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 82, 640 S.E.2d 142, 145 (2006) (finding that the Post-Conviction Habeas Corpus Act, was passed “to liberalize, rather than restrict, the exercise of the writ of habeas corpus in criminal cases” (citation omitted)). Thus, “[i]n reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action,” this Court reviews “the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. Pt. 1, *Ballard v. Thomas*, 233 W. Va. 488, 759 S.E.2d 231, 232 (2014) (quoting Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006)).

This Court has also held that it “will defer to credibility determinations made by a trial court because ‘[it] cannot assess witness credibility through a record.’” *Ware v. Howell*, 217 W. Va. 25, 28, 614 S.E.2d 464, 467 (2005) (quoting *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997)); *see also Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (noting that “a trial court’s credibility determinations are entitled to special deference”); *In re Faith C.*, 226 W. Va. 188, 195, 699 S.E.2d 730, 737 (2010) (noting that “due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses” (citing *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996))).

II. The Circuit Court correctly found that under the first prong of *Strickland v. Washington*, Mr. Dodson had received ineffective assistance of counsel, and its finding is supported by the record.

It is well established that in West Virginia, “claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of

the proceedings would have been different.” Syl. Pt. 7, *Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (quoting Syl. Pt. 5, *Miller*, 194 W. Va. 3, 459 S.E.2d 114). The United States Supreme Court recently recognized that the constitutional right to effective assistance of counsel extends to the plea bargaining stage of a criminal defendant’s trial and that a criminal defendant is therefore entitled to habeas corpus relief if he can establish that he rejected a plea offer based on the ineffective assistance of his counsel and that had he received effective assistance, he would have accepted the plea offer and received a lesser sentence. *See Cooper*, 132 S.Ct. at 1390–91. The Circuit Court correctly found that Mr. Dodson has done that here.

A. The Circuit Court’s factual finding that Mr. Lambert failed during Plea Bargaining to inform Mr. Dodson of the possibility of a Daytime Burglary conviction is both supported by the record and correct.

The Circuit Court found that it was “evident that Mr. Lambert at the very least failed to properly explain, and (judging from remarks he made at trial) potentially misunderstood the applicable law himself . . . as they related to the charges against Mr. Dodson and the facts of Mr. Dodson’s case at the time he rejected the Plea Offer,” and more specifically that at the time Mr. Dodson rejected the State’s Plea Offer, he had not been advised by Mr. Lambert that he could be convicted of Daytime Burglary in addition to Burglary. *See App.*, p. 16. It then ruled that these findings were sufficient to establish the first prong of the *Strickland* test. *See App.*, p. 16. While the State argues that these findings are clearly erroneous, the Circuit Court’s Order shows that they are strongly supported by the evidence.

In order to convict Mr. Dodson of felony Burglary, the State had to prove that he broke into and entered Ms. Carrigan’s home with the “intent to commit a crime therein.” *See W. VA. CODE* § 61-3-11(a). However, that statute also includes a lesser included felony offense of Daytime Burglary that does not require a breaking and entering. *See W. VA. CODE* § 61-3-11(b).

It was therefore imperative that Mr. Dodson be informed that the State did not need to prove that he broke into Ms. Carrigan's home in order to convict him of a felony and pursue a recidivist sentence. The Circuit Court determined, and the record shows, that he was not so informed.

At his Omnibus Hearing, Mr. Dodson testified that Mr. Lambert never told him that he could possibly be convicted of Daytime Burglary or that the State did not need to prove that he broke into Ms. Carrigan's home in order to convict him. *See App.*, pp. 204:5–205:11, 213:24–214:17. Rather, Mr. Lambert told him that “since [he] did not break in, [and] since [he] did not steal anything out of that residence, that the state cannot convict [him].” *See App.*, p. 204. Mr. Lambert made similar representations to Mr. Dodson's mother, who testified that Mr. Lambert would tell her that “there was no possible way they could have found [Mr. Dodson] guilty ‘cause he didn't go into the place to take anything out.” *See App.*, pp. 182:21–183:8. Mr. Lambert disputed these claims, testifying that he informed Mr. Dodson of the lesser included offense of Daytime Burglary and explained the charge to him. *See App.*, pp. 306:24–309:21.

In its Order, the Circuit Court addressed the inherent conflict between these testimonies and explained the rationale it employed in determining which story was more credible. It explained that because “Mr. Lambert never took notes during his meetings with Mr. Dodson and never prepared any written correspondence to his client” and because “his answers to Mr. Dodson's counsel's questions established that his recollection was less than reliable on many important” that “the most reliable indication as to the advice that Mr. Lambert provided to Mr. Dodson must be deduced from the record before this Court.” *See App.* p. 18. The Circuit Court then found that the evidence before it showed that “even after receiving a life sentence for Burglary and Domestic [Battery], Mr. Dodson did not understand the charges against him,” namely that after Mr. Dodson was convicted, he stated “I am getting life for burglary that I did not

commit. There is no door jam broken. There is no window broken. The alleged victim let me in the house.” *See* App. pp. 18–19. The Court further found that arguments made by Mr. Lambert at trial “support Mr. Dodson’s contentions that he was never informed of the possibility that he could be convicted of Daytime Burglary without the State establishing that he had broken into Ms. Carrigan’s home,” namely his opening statement, which “completely ignored the lesser included felony offense of Daytime Burglary” by arguing that “[Mr. Dodson] is not charged with a trespass here, Mr. Dodson is charged with burglary, breaking and entering. It was by invitation.” *See* App. pp. 18–19.

The Court continued to analyze the evidence before it and the credibility of both sides, noting that Mr. Dodson’s statements “inherently raise suspicion in this Court as to whether the convicted defendant was properly advised of the law, especially in a situation like that here, where Mr. Dodson has an admittedly voluminous criminal record and a real-world understanding of the law,” but recognized that it “cannot discount the fact that criminal defendants often choose to only hear the aspects of their counselors’ advice that they wish to hear.” *See* App. p. 18. It weighed this skepticism against the fact that Mr. Lambert’s “recollection was less than reliable on many important matters,” and ultimately concluded that given Mr. Dodson’s criminal history and capability of understanding the dangers of not accepting a plea, “it is unbelievable that his previous pattern of risk adverse plea bargaining would suddenly change unless he received some assurance that he could not be convicted of the charged offenses.” *See* App. pp. 18–19. The Circuit Court then concluded that “Mr. Dodson was led to believe that the State could not prove its case and rejected the Plea Offer on Mr. Lambert’s advice.” App. p. 19.

Despite the Circuit Court’s thorough discussion of how it reached these factual determinations, the State argues that its findings were clearly not supported by the record and

should be overturned. In order to establish that a trial court's findings are "clearly erroneous," the State must show that "although there is evidence to support [them,] the reviewing court on the entire evidence [should be] left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Here, these factual findings were the result of the Circuit Court's determination of the credibility of the witnesses who testified before it, and such credibility determinations are entitled to "special deference," and should be given "due regard" by this Court. *See Hinkle*, 196 W. Va. at 389, 472 S.E.2d at 835; *In re Faith C.*, 226 W. Va. at 195, 699 S.E.2d at 737 (quotations omitted); *see also Howell*, 217 W. Va. at 28, 614 S.E.2d at 467. Once the Circuit Court's credibility determinations are given due regard, there is no remaining evidence that could leave this Court with a "definite and firm conviction that a mistake has been committed" and a belief that at the time he rejected the Plea Offer, Mr. Dodson had in fact been adequately advised of the possibility of a Daytime Burglary conviction and the law that governed that charge.

Rather, the remaining evidence also supports the Circuit Court's finding that Mr. Dodson had not been properly informed of the possibility of a Daytime Burglary conviction. Just as Mr. Lambert's opening statement "completely ignored the lesser included felony offense of Daytime Burglary," *see App. pp. 18–19*, so did his midtrial motion, in which he argued for acquittal based on the fact that "there has not been any evidence to substantiate the fact that [Mr. Dodson] pushed his way into the residence of [Ms. Carrigan]." *See App. p. 309:10–14*. This shows that even at the time of trial, Mr. Lambert was still ignoring the possibility of a Daytime Burglary conviction which, like a Burglary conviction, would send his client to prison for life.

B. Mr. Lambert clearly did not present a complete defense to the charge of Burglary, and even if he had, it would not negate the fact that he provided ineffective assistance of counsel during Plea Bargaining.

The State argues that Mr. Lambert did not misadvise his client, but that he in fact presented a “complete defense to burglary” at trial. This argument is irrelevant to the findings of the Circuit Court, which granted Mr. Dodson habeas corpus relief based on its determination that he had received ineffective assistance of counsel *during the plea bargaining phase of his trial*. Thus, any effective lawyering that may have occurred during Mr. Dodson’s trial is immaterial, unless, of course, it sheds light on events that occurred, or indicates what advice was given, during the plea bargaining phase of the trial. Here, the defense that Mr. Lambert presented at trial only affirms that he had provided deficient advice to Mr. Dodson during his plea bargaining.

The crux of Mr. Lambert’s defense at trial was that “Mr. Dodson was invited to the Carrigan residence for a legitimate, non-criminal purpose.” *See* State’s Petition, p. 11. This defense was far from a “complete defense” to the charge of Burglary; rather, it was egregiously deficient. First, although the defense presented a reason why Mr. Dodson was entering Ms. Carrigan’s home, it failed to establish that this was his *only* reason and therefore did not attack the “critical element of the charge,” whether he had an intent to commit a crime when he entered Ms. Carrigan’s home. Even if a jury believed that he had driven to Ms. Carrigan’s home with the intention to peacefully acquire the car title, it would not have been precluded from finding that he had decided, immediately before stepping through Ms. Carrigan’s doorway, that he was going to strike her, and Mr. Lambert’s defense did not provide a reason why they should not find exactly that. Ms. Carrigan’s statement said that Mr. Dodson knocked on her door then opened it a little bit, but she tried to close and lock the door, so he “pushed it open and came in and started hitting [her].” *See* App. p. 101. Ms. Carrigan changed her story the next day by providing a

second statement to investigators in which she stated that she wanted to drop “all charges [against Mr. Dodson] considering he had an invitation to enter my house.” *See App. p. 109.* Interestingly, this second statement does actually recant her original allegations—it does not say that Mr. Dodson never pushed his way into the home or that he never hit her. Ms. Carrigan’s two statements therefore present a scenario where it is completely plausible for a rational trier of fact to find that although Mr. Dodson went to Ms. Carrigan’s home for a noncriminal purpose, his intent changed when he arrived at the home and Ms. Carrigan closed the door in his face and tried to lock him out; indeed, the jury seems to have found just that. Thus, at the time that Mr. Dodson was considering the Plea Offer, the evidence before him did not provide a defense to Burglary or Daytime Burglary.

Rather than provide a complete defense, Mr. Lambert’s reliance on Ms. Carrigan’s second statement to serve “the purpose of mounting [an] effective defense,” like his opening statement and mid-trial motion, shows that he failed to “properly understand . . . the governing law of Burglary prior to Mr. Dodson’s rejection of the Plea Offer.” *See App. pp. 271:23–272:9, 19.* This reliance also shows that the Circuit Court properly found as credible Mr. Dodson’s claims that he rejected the Plea Offer based on Mr. Lambert’s advice that he could not as a matter of law be convicted of Burglary and in ultimately finding that Mr. Dodson had received ineffective assistance of counsel during his plea bargaining. *See App. pp. 19, 21; 271:23–272:9.*

Even if it is assumed, *arguendo*, that Mr. Lambert had actually advised Mr. Dodson of the possibility of being convicted before he rejected the Plea Offer, he still provided ineffective assistance by advising Mr. Dodson that he had a strong, or even a potentially successful, defense. As discussed above, the defense that Mr. Lambert presented at trial did not address the critical element of the crime that Mr. Dodson was charged with having committed. Mr. Lambert

therefore erred in relying on Ms. Carrigan's statement as the keystone of "the defense strategy that [he] crafted." *See* App. p. 272:5–9. Further, in addition to not addressing the critical element of the charge against Mr. Dodson, this defense suffered from serious admissibility and credibility issues which made it extremely questionable whether Ms. Carrigan's second statement would even be heard, or whether her story would be believed. It is clear that Mr. Lambert never advised Mt. Dodson of these facts.

At trial, Mr. Lambert was unable to admit Ms. Carrigan's second statement because he failed to disclose it to the State. *See* App., p. 9. However, even if he had disclosed the statement to the State, it is questionable whether it would have been barred as inadmissible hearsay, *see* W. VA. R. EVID. 801(d)(1), a fact that Mr. Lambert acknowledged at the Omnibus Hearing. *See* App. pp. 313:21–314:19. Even if the statement was admitted, it was extremely unbelievable. Less than twenty-four hours after Ms. Carrigan accused Mr. Dodson of attacking her and provided to investigators pictures of the injuries she suffered, she made a second statement that did not even recant the first, but only said that she did not want to press charges. *Compare* App. p. 101 *with* App. p. 109. Then, at trial, she stated that despite the pictures of her injuries, Mr. Dodson had not attacked her, but that she had made up the story because she had been threatened that she would lose her child if she did not press charges, an allegation that was denied by all investigators involved in the case, and because admitting that Mr. Dodson had not attacked her would somehow expose her issues with substance abuse. *See* App. p. 109. Despite the incredible nature of this testimony, the State alleges in its Petition that Ms. Carrigan was "the most credible of witnesses." *See* Petition, p. 23. This is a stark change from the opinion it had of her during Mr. Dodson's trial, during which it categorized her as "a liar and a drug addict" and argued that her testimony was "completely unbelievable [and] unreasonable." *See* App. p. 93.

What is more unexplainable is the fact that Mr. Lambert, an experienced defense attorney with over thirty years of experience, believed not only that a jury would find this story credible, but also that it would by itself be sufficient to exonerate Mr. Dodson. *See App. pp. 271:23–272:9.*

In order to make an informed decision as to whether he should accept the Plea Offer, it was imperative that Mr. Dodson be advised of these facts regarding the admissibility and credibility of Ms. Carrigan’s statement. The record shows that he clearly was not. First, Mr. Lambert admits that he did not advise Mr. Dodson of the admittedly “important issue” of whether Ms. Carrigan’s second statement would be admitted, because he “[does not] discuss evidentiary rules with clients.” *See App. p. 314:9–14.* Further, Mr. Lambert admitted that he was “absolutely” relying on Ms. Carrigan’s statement as Mr. Dodson’s defense, and the fact that she was the only defense witness that he called shows that he did not consider her credibility to be a substantial problem. *See App. pp. 6, 271:23–272:12.* By clearly failing to properly advise Mr. Dodson of the relevant law necessary to allow him to make an informed decision as to whether to accept or reject the Plea Offer, Mr. Lambert acted as no “reasonable lawyer would have acted, under the circumstances,” and his advice was therefore unconstitutionally deficient. *See Miller, 194 W. Va. at 16, 459 S.E.2d at 127.*

In further support of its argument that Mr. Lambert’s defense was effective and that his performance was not therefore deficient, the State asserts that Mr. Dodson “knew what his defense at trial would be [and] was instrumental in formulating that defense.” *See Petition, p. 14.* Even though Mr. Dodson is not a stranger to the criminal process, he is not an attorney. He went to Mr. Lambert, and paid him a substantial amount of money, because he considered Mr. Lambert to be “a skilled criminal defense attorney”; he relied on Mr. Lambert’s experience, trusted his legal advice, and put all of his confidence in him. *See App. pp. 19, 194:3–18.* The

fact that Mr. Dodson took the advice of his attorney and acted on it to help build his defense in no way diminishes the fact that the advice was deficient; rather, it shows how detrimental and damaging such bad advice truly is.

Finally, the State argues that Mr. Lambert's performance was not deficient because "the defense put forward at trial was not only legitimate, it was in part successful." *See* Petition p. 14. Aside from being irrelevant to the Court's finding that Mr. Dodson had received ineffective assistance *during his plea bargaining* and well before he was convicted, this argument also ignores the facts of this case. Following his conviction for Daytime Burglary, Mr. Dodson was sentenced to life imprisonment under the recidivist statute, and he would have received the same sentence had he been convicted of Burglary, a fact that the State admits. *See* Petition, p. 14. Thus, its argument that Mr. Dodson's conviction of Daytime Burglary was somehow more beneficial than a conviction of Burglary is disingenuous, and Mr. Dodson was therefore justified in being "resistant to the idea that this defense was in part successful." *See* Petition, p. 14; App. pp. 235:16–236:16. In another situation, a conviction of a lesser included offense may be considered a partial acquittal or a victory, but here where the conviction carried the same sentence, such a conviction should not, and cannot, be so celebrated.

The Circuit Court found, after examining and weighing the credibility of all the evidence before it, that Mr. Lambert's "failure to properly understand or inform his client of the governing law of Burglary prior to Mr. Dodson's rejection of the Plea Offer was outside the range of professionally competent assistance" and constituted ineffective assistance of counsel. *See* App. p. 19. This determination is not clearly erroneous; it is aptly supported by the record and should be affirmed.

C. The Circuit Court correctly found that Mr. Lambert provided deficient advice regarding the charge of Domestic Battery; however, it did not use this finding as a basis for habeas corpus relief, as the error did not deny Mr. Dodson effective assistance of counsel.

During Mr. Dodson’s trial, Mr. Lambert made a mid-trial motion for dismissal, arguing that “there has been no evidence to even suggest remotely that this Defendant is a household member of the Carrigan family.” *See* App. pp. 303:20–304:2. The Circuit Court found that this argument arose from Mr. Lambert’s misreading or misunderstanding of the governing Domestic Battery statute, which on its face requires physical contact with a family or household member, but also adopts a broader definition of “family or household member” which clearly includes persons who “[a]re or were dating.” *See* App. pp. 19–20, 303:20–306:17; *see also* W. VA. CODE §§ 61-2-28; 48-27-204(4). At trial, the Circuit Court had to correct Mr. Lambert on this point.

This incident was discussed at Mr. Dodson’s Omnibus Hearing. *See* App. pp. 303:20–306:17. The State now alleges that the Circuit Court erroneously issued the writ of habeas corpus based on this error, but this is simply not true. Although the Circuit Court found that Mr. Lambert “failed to properly understand or explain the required elements of Domestic Battery to Mr. Dodson,” it clearly stated that because “the Domestic Battery charge alone was a misdemeanor . . . this Court does not find that any ineffective assistance of counsel tied to that count necessarily satisfies the second prong of the Strickland test.” App., pp. 19–20.

The Circuit Court did, however, find that Mr. Lambert’s failure to either understand or explain the elements of Domestic Battery did support Mr. Dodson’s “version of the advice he received on the more consequential felony charge elements.” App., p. 20. Because this finding was the result of the Circuit Court’s determination of the credibility of the witnesses before it, it should receive due regard by this Court. *See In re Faith C.*, 226 W. Va. at 195, 699 S.E.2d at

737. Further, the Circuit Court’s finding was well supported by the record, as it had to correct Mr. Lambert’s misrepresentation of the law and provide him with a proper understanding. Mr. Dodson was clearly misadvised on the law governing one of the charges against him, and the Circuit Court properly considered that error in weighing the credibility of the witnesses before it.

III. The Circuit Court correctly found that under the second prong of *Strickland v. Washington*, Mr. Dodson was prejudiced by the ineffective assistance of counsel he received, and its findings are fully supported by the record.

The State next attacks the Circuit Court’s finding that Mr. Dodson had satisfied the second prong of *Strickland*, arguing that it is “against the plain preponderance of the evidence” and “contradicted by the record.” The Supreme Court has recently ruled that when a petitioner alleges that ineffective assistance of counsel led him to reject a plea offer, the second prong of the *Strickland* test specifically requires him to 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.

Cooper, 132 S.Ct. at 1385. The Circuit Court determined that Mr. Dodson had substantially proven all three of these elements, finding that “Mr. Dodson has unwaveringly averred that he would have accepted the Plea Offer had counsel properly advised him of the governing law”; that he had established “that it is reasonably probable that this Court would have accepted the Plea Offer had he decided to accept it”; and that the minimum sentence he received at trial was “fifteen (15) times higher than what he would have received under the Plea Offer,” a disparity that was more than enough to establish prejudice. *See App. p. 22.*¹

¹ Because the Plea Offer stated it would remain open for thirteen days after it was extended, it is clear that the “prosecution would not have withdrawn it” before Mr. Dodson had an opportunity to accept it. *See App. p. 102.*

Although the State does not dispute that Mr. Dodson would have received a lesser sentence had he accepted the Plea Offer, it argues that “it is unclear whether the court would have accepted the plea offer.” This Court has made it clear that a Circuit Court has broad discretion to decide whether to accept a submitted plea offer. *See* Syl. Pt. 3, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995). Here, the Circuit Court determined that Mr. Dodson had proven that it is reasonably probable that it would have accepted the Plea Offer. The Circuit Court is certainly the authority on how it would have applied its own discretion, and its finding that it would have accepted the Plea Offer should be conclusive of the matter.

The State’s primary contention is that the Circuit Court’s finding that Mr. Dodson would have actually accepted the Plea Offer had he received effective assistance of counsel was against the plain preponderance of the evidence. Proof by a preponderance of the evidence is a low standard which “requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.” *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W. Va. 689, 697, n. 4, 271 S.E.2d 335, 341 (1980). Because the Circuit Court only needed to be convinced that it was “reasonably probable” that Mr. Dodson would have accepted the Plea Offer, in challenging the Court’s finding, the State must now prove that the evidence showed so substantially that Mr. Dodson would not have accepted the Plea Offer that the Court could not even find it more likely than not that it was just reasonably probable that Mr. Dodson could have proved that he would have accepted it. The Circuit Court’s finding easily satisfies this very low burden, as the record clearly shows that it was reasonably probable that Mr. Dodson would have accepted the Plea Offer had he received effective assistance from Mr. Lambert. *See* App. pp. 201:18–202:5; 202:9–23; 204:23–205:11; 209:1–12.

At the Omnibus Hearing, Mr. Dodson testified that he does not take pleas unless he is certain that he will be convicted. *See App. pp. 242:23–243: 16.* Indeed, he has demonstrated a history of weighing the State’s evidence against the sentence he faced and only accepting a plea offer when the chance of being convicted and receiving a substantial sentence was almost certain. *See App. pp. 243:7–13, 205:12–209:12.* This pattern was best demonstrated when he accepted a plea to avoid being charged as recidivist and then attempted to change his plea and take his case to trial once he discovered that the State had lost important evidence against him and would therefore have a difficult time convicting him. *See App. pp. 241:4–242:22.*

The State argues that Mr. Dodson’s approach to handling plea offers shows that he would not have accepted the Plea Offer here, regardless of the advice he received. It further argues that Mr. Dodson’s pattern of only being “afraid of a life sentence when he felt he would be convicted” shows his “unwillingness to accept criminal responsibility unless there was no other viable option” and supports Mr. Lambert’s description of him as someone who knew how to work the system. *See Petition, p. 20.* To the contrary, this pattern proves that Mr. Dodson’s determination to reject the Plea Offer here was the result of him trusting the advice of Mr. Lambert and as a result believing that a conviction was legally impossible. As the Circuit Court recognized, “it is unbelievable that his previous pattern of risk adverse plea bargaining would suddenly change unless he received some assurance that he could not be convicted of the charged offenses.” *See App. pp. 18–19.* Indeed, Mr. Dodson was not afraid of a potential life sentence or to take his case to trial because he listened to Mr. Lambert’s erroneous advice and felt that he *would not be* convicted. He repeatedly testified to this at the Omnibus Hearing and unequivocally stated that had he been properly informed of the law governing the charges against

him, he would have accepted the Plea Offer. *See* App. pp. 201:18–202:5, 202:9–23, 204:23–205:11, 209:1–12; *see also* App. pp. 103–04.

The Circuit Court weighed this evidence against the credibility of Mr. Lambert’s testimony that he had advised Mr. Dodson to accept the Plea Offer “many times” to no avail because his mindset “was clearly against the plea” based upon his belief that Ms. Carrigan’s second statement would acquit him. *See* App. pp. 276:24–277:5; 277:17–24. It determined that the evidence before it “belies Mr. Lambert’s claims” and “in fact shows that Mr. Lambert misinformed Mr. Dodson of the law and/or misunderstood it himself.” *See* App. p. 20. It then determined that “at the point Mr. Dodson rejected the Plea Offer, Mr. Lambert had categorically failed to adequately advise Mr. Dodson of the law, the strength of the State’s case against him, or of the unlikely prospect of his prevailing at trial.” *See* App. pp. 20–21. Indeed, the record undeniably shows that Mr. Lambert never advised Mr. Dodson of the credibility or admissibility issues regarding Ms. Carrigan’s statement, as he was also “absolutely” relying on the statement to mount an “effective defense.” *See* App. pp. 271:23–272:9, 314:13–19.

The Circuit Court then concluded that the record shows that “Mr. Dodson believed, because Mr. Lambert told him, that the State could not prove all of the material elements of the crimes of Burglary and Domestic Battery. Specifically, Mr. Dodson appears to have been unaware of the existence of the lesser offense of Daytime Burglary, which, as a felony, carried the same recidivism sentence as Burglary.” *See* App. pp. 20–21. The Circuit Court specifically ruled that it believed Mr. Dodson over Mr. Lambert, finding that the evidence before it “support[ed] Mr. Dodson’s assertion that Mr. Lambert’s actual advice was ‘we are not even going to consider taking a plea bargain.’” *See* App. p. 21. This well-supported credibility determination should be afforded special deference and be given due regard by this Court. *See*

In re Faith C., 226 W. Va. at 195, 699 S.E.2d at 737. Moreover, the evidence relied on by the Circuit Court is more than enough to show that it was more likely than not that it was just reasonably probable that Mr. Dodson would have accepted the Plea Offer had he received effective legal counsel. Its findings should therefore be affirmed.

Even if Mr. Dodson had been determined to not even consider accepting the Plea Offer based upon his belief that Ms. Carrigan's second statement would acquit him, Mr. Lambert still had a duty to properly advise him of all aspects of the law governing the Plea Offer so that he could make an informed decision as to whether to accept or reject it. As the Circuit Court pointed out, "[h]ad Mr. Lambert actually wished to dissuade Mr. Dodson from rejecting the Plea Offer, he would have informed Mr. Dodson [that] the State's case was a strong one and that his evidence, consisting entirely of Ms. Carrigan's recantation, was shaky at best in light of all the evidence to the contrary. The record indicates that counsel in fact did the opposite." *See App. p. 21.* As is discussed above, Mr. Lambert never advised Mr. Dodson of the credibility or admissibility issues regarding Ms. Carrigan's statement. *See App. pp. 271:23–272:9; 314:13–14.* While the State is correct that "[n]o attorney can force a client to accept a plea offer," he still must properly advise his client and provide to him the information he will need in order to make an informed decision. The record shows that Mr. Lambert clearly did not do that here, and that as a result, Mr. Dodson rejected a fair Plea Offer and suffered severe prejudice.

The record shows that when Mr. Dodson rejected the Plea Offer, he had not received proper counsel regarding the offenses he faced but that he would have accepted that Plea Offer if he had been properly counseled. Further, it is undeniable that the Circuit Court would have approved the Plea Offer had Mr. Dodson accepted it and that had he accepted it, he would have

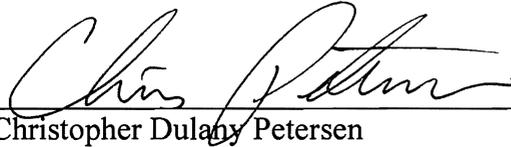
received a substantially shorter sentence. The Circuit Court's finding that Mr. Dodson had successfully established *Strickland's* second prong was not therefore erroneous; it was correct.

CONCLUSION

At the heart of this matter is the conflicting testimony of a client and his attorney. Mr. Dodson alleges that Mr. Lambert failed to properly advise him of the laws governing the charges he faced and that as such, he rejected a Plea Offer that he should have accepted and would have accepted had he been properly informed. Mr. Lambert alleges that he properly informed Mr. Dodson but that Mr. Dodson was so determined to reject the Plea Offer that his advice fell on deaf ears. Both stories cannot be true, and both parties have a lot to lose if their story is not believed. Thus, the credibility of these two parties is of the utmost importance. The Jefferson County Circuit Court had each party's story fully developed before it and had the opportunity to observe and question each party as he told his story. That Court then thoughtfully, carefully, and thoroughly combed through the record before it to determine which story was more credible. That determination must therefore receive substantial deference.

After reviewing the facts before it, the Circuit Court determined that "the most reliable indication as to the advice that Mr. Lambert provided to Mr. Dodson must be deduced from the record before this Court," and that when viewed as a whole, that record showed that Mr. Dodson had established that he had suffered ineffective assistance of counsel during the plea bargaining phase of his trial, and that this ineffective assistance had substantially prejudiced him. To cure this unconstitutional violation, the Circuit Court ordered the State to reoffer Mr. Dodson the Plea Offer, a remedy that was narrowly tailored to right the specific wrong Mr. Dodson suffered. The Circuit Court's findings and determinations are well supported by the record and should be affirmed by this Court.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Chris Petersen", is written over a horizontal line.

Christopher Dulany Petersen
West Virginia State Bar Number 11926
Counsel for Respondent Shane M. Dodson
Bowles Rice LLP
101 South Queen Street
Martinsburg, West Virginia 25401
Telephone: (304) 262-3334
Fax: (304) 267-3822
cpetersen@bowlesrice.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

**Supreme Court Docket No.: 14-1202
(Jefferson County No. 13-C-64)**

**SHANE DODSON,
Petitioner below,**

Respondent.

CERTIFICATE OF SERVICE

I, Christopher Dulany Petersen, counsel for Respondent Shane M. Dodson, do hereby certify that on this 8th day of May, 2015, I have served a true copy of the foregoing "Brief of Respondent" by electronic mail and via U.S. Mail, postage prepaid, upon:

Brandon C. H. Sims
Assistant Prosecutor
Office of the Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414



Christopher Dulany Petersen
West Virginia State Bar Number 11926
Counsel for Respondent Shane M. Dodson
Bowles Rice LLP
101 South Queen Street
Martinsburg, West Virginia 25401
Telephone: (304) 262-3334
Fax: (304) 267-3822
cpetersen@bowlesrice.com