/s/ Robert A. Burnside, Jr.
Circuit Court Judge
Ref. Code: 22OM4LPLX

E-FILED | 8/31/2022 2:31 PM
CC-41-2012-C-360
Raleigh County Circuit Clerk
Paul H. Flanagan

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

Johnny Ray Miller,

Petitioner

v.

Civil Action No. 12-C-360
Underlying Case No. 89-F-268
Judge: Robert A. Burnside, Jr.

David Ballard,
Warden,
Mount Olive Correctional
Complex
Respondent

ORDER
Granting petition for post-conviction habeas corpus

1. Summary of the petition and related procedural history

Petitioner was indicted by the January 1989 term of the grand jury of Raleigh County on Count I, charging first degree murder and Count II, charging the commission of the felony identified in Count I by the use of a firearm. Petitioner was convicted upon trial by jury without a recommendation of mercy and was sentenced to life in prison without the possibility of parole by order entered on or about November 14, 1989. The conviction was affirmed in part and remanded[1] in part in *State v. Miller*, 401 S.E.2d 237 (1990).

Petitioner filed a self-represented a petition for post-conviction habeas corpus on May 3, 2012, which was accompanied by the petitioner's "Memorandum in Support…" thereof, dated April 30, 2012, and a number of exhibits.

The text of the Petitioner's "Memorandum in Support…" functions as Petitioner's initial statement of two claims: (1) a claim grounded on *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) that his privately retained trial counsel, Warren Thornhill, was ineffective with respect to advice given to Petitioner following the State's offer to accept a plea to second degree murder with the use of a firearm and (2) that previous habeas counsel was ineffective.

---

[1] The remand arose from a finding of trial court error in ruling that a police report was not a statement producible under *W.Va.R.Crim*. 26.2. The trial court was directed on remand to determine whether the report was subject to production under Rule 26.2, and if so, to "determine whether its failure to allow inspection of the report at trial constituted reversible error." The Supreme Court subsequently declined to review the trial court's disposition of the remanded issue.

The petition discloses that pre-*Lafler* claims of ineffective assistance of trial counsel on similar grounds had been presented and rejected in two prior habeas petitions. The first was Miller v. Trent, Case No. 93-HC-64-C, filed August 24, 1994. The second was in Miller v. Coleman, Case No. 02-C-973-H, filed September 25, 2002, which added a claim of ineffective assistance of previous habeas counsel.[2]

The Rule 4(b) order in the present proceeding recognized that "by those two proceedings the petitioner should not ordinarily be afforded additional habeas relief," but that it was "necessary to determine whether the principles stated in *Lafler* apply to the issues raised in the present petition" and if so, to determine what, if any, relief should be granted. Upon that finding this court appointed counsel and directed counsel to file an amended petition within a time period stated therein.

The scheduling order was amended several times due to substitutions of counsel and requests for extensions of time. The most recent order was entered December 16, 2015, appointing present counsel. The present amended petition was timely filed by present counsel on or about February 25, 2016, which presented claims of ineffective assistance of trial counsel and a claim of ineffective assistance of habeas counsel in the first habeas proceeding.

The response was filed on January 3, 2017. Petitioner filed a reply to the response on February 14, 2017. The evidentiary hearing was conducted on October 30, 2017. At the close of the hearing the court invited additional briefing on specific issues, pursuant to which the petitioner filed a supplemental memorandum on November 17, 2017, followed by a timely filed response and reply.

In *Lafler* a "favorable plea offer was reported to the client but, on advice of counsel, was rejected." The case came to the United States Supreme Court "with the concession that counsel's advice…fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment…" (*Lafler*, 1383)

Lafler applied the two-prong *Strickland*[3] inquiry that requires a showing that ineffective performance by counsel resulted in prejudice to the petitioner. The performance prong in *Strickland* was satisfied because had been stipulated that counsel was "deficient when he advised respondent to reject the plea offer on the grounds that he could not be convicted at trial." *Lafler* held that the prejudice that results from the rejection of an offer to plea was "having to stand trial, [rather than] not choosing to waive it." Specifically, "a

---

[2] In addition, Miller v. McBride, Case No. 06-C-632-H, was filed July 12, 2006. The subject matter of this petition was limited to matters associated with investigations of the State Police crime laboratory and is not pertinent here.

[3] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), made applicable in West Virginia in *State v. [Susan] Miller* 194 W.Va. 3 (1995)

defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the…defendant would have accepted the plea…[that] the prosecutor would not have withdrawn it…and that the court would have accepted it…and that the…sentence…under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (*Lafler*, 1385)

In a factual pattern similar to the claim in the present matter, the prosecution in *Lafler* "offered to dismiss some charges and to recommend a sentence of 51 to 85 months." The accused rejected the offer on the advice of counsel.

2. Previous habeas petitions.

The Petitioner's first habeas petition, Case No. 93-HC-64-C, was rejected following an evidentiary hearing. The second petition, Case No. 02-C-973-H, was rejected without a hearing on the general grounds that *res judicata* barred further consideration of the claim of ineffective assistance of trial counsel and on the merits of the new claim of ineffective assistance of habeas counsel.

a. The first habeas petition – Case No. 93-HC-64-C

Petitioner's first habeas petition was filed in August 1994. Section IV of the petition made a number of claims of ineffective assistance of counsel including in Section IV(n) a claim that "Defense counsel failed to advise Petitioner to accept plea of second degree murder offered by the State," and presented similar factual and theoretical grounds as the present petition.

The first habeas court, the Hon. John C. Ashworth presiding, summarily rejected the Petitioner's first habeas petition but subsequently granted a motion for reconsideration, conducted an evidentiary hearing, and rejected the petition in a second order.

b. The second habeas petition - Case No. 02-HC-873-H

Petitioner, proceeding *pro se*, filed in his second petition the same claim of ineffective assistance of trial counsel as in the first petition and a new claim of ineffective assistance of habeas counsel. The second habeas court, the Hon. John Hutchison presiding, refused both claims without a hearing by order entered September 13, 2002.

The second habeas court found that the claim of ineffective assistance of trial counsel was barred by *res judicata* arising from the first habeas petition. The court presented an alternative analysis which applied *Miller-Strickland* to the issues that had been presented in the first habeas petition and concluded on the merits that petitioner's trial counsel was not ineffective with respect to the management of the plea offer.

The second habeas court also analyzed the new claim of ineffective assistance of habeas counsel and rejected it on its merits.

3. *Res judicata* does not bar consideration of the present claim of ineffective assistance of trial counsel

The dispositions of the two previous petitions would constitute *res judicata* which bars consideration of the present claim of ineffective assistance of trial unless an exception applies:

> A prior omnibus habeas corpus hearing is *res judicata*...however, applicant may still petition court on following grounds: ineffective assistance of counsel at omnibus habeas corpus hearing; newly-discovered evidence; *or, change in law, favorable to applicant, which may be applied retroactively* [italics added] *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), followed in *Markley*[4] *v. Coleman*, 215 W.Va. 729, 601 S.E.2d 49 (2004).

The exceptions are stated in the disjunctive and so if any of them is present the *Losh* exception applies. The present claim of ineffective assistance of trial counsel is within the scope of the third *Losh* exception.

The third *Losh* exception requires the presence of three elements: "[1] change in the law, [2] favorable to the applicant, [3] which may be applied retroactively." If all these elements are present, *res judicata* would not bar this court from applying *Lafler* to the petitioner's claims of ineffective assistance of trial counsel with respect to the management of the plea offer as claimed in the first and second habeas petitions.

a. *Lafler* is a change in the law favorable to the applicant.

Lafler modified both the performance and prejudice prongs of *Strickland* in its finding that the right to effective assistance of counsel extended to the pre-trial plea negotiation process and that the resulting prejudice consists of a conviction at trial upon which the applicant is sentenced more severely than had he accepted the plea offer which prejudice is not cured "[e]ven if the trial itself is free of constitutional flaw." *Lafler,* 1386.

Lafler authorizes a new remedy by which the State is ordered to "reoffer the plea agreement." If accepted, "the state trial court can...[determine] whether to vacate the convictions and resentence the respondent according to the plea agreement..." and other plea-related alternatives. This remedy benefits the applicant because it allows him to accept the plea offer rather than risk a new conviction on retrial. *Lafler*, 1391.

The favorable nature of *Lafler* is illustrated in *Buffey v. Ballard,* 236 W.Va. 509, 782 S.E.2d 204 (2015), discussed below in more detail, in which the Supreme Court of Appeals cited to *Lafler* in its holding that the State has the duty to disclose *Brady* material during plea negotiations:

---

[4] The case name is spelled "Marley" in the index of cases reported in Vol. 215 and in the margins of the opinion. The spelling (Markley) adopted in the heading and text of the opinion, which suggests that the latter spelling is correct.

> The critical nature of plea negotiations was recently addressed by the United States Supreme Court in the context of effective client assistance during the pre-plea stage. *See Lafler v. Cooper,* [citation omitted]. The Court held that defendants possess a Sixth Amendment right to counsel that extends to the plea bargaining process. *Id.*

b. *Lafler* qualifies for retroactive application under present West Virginia retroactivity principles

A new rule must be determined to be retroactive if it is to be applied in a post-conviction habeas corpus examination of a conviction that has become final.

In *State v. Kennedy* (*Kennedy* II), 229 W.Va. 756, 735 S.E.2d 905 (2012)[5] the Court declined to give retroactive effect to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), "which bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness." *Kennedy II, fn.* 3

Kennedy II applied the retroactivity analysis approved in Syll. Pt. 5, *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996):

> The criteria to be used in deciding the retroactivity of new constitutional rules of criminal procedure are: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Thus, a judicial decision in a criminal case is to be given prospective application only if: (a) It established a new principle of law; (b) its retroactive application would retard its operation; and (c) its retroactive application would produce inequitable results. *Kennedy II,* 775.

Applying now the *Blake-Kennedy* retroactivity factors to the *Lafler* rule, as guided by the application of these factors in the *Kennedy II* treatment of the *Crawford* rule:

> (a) The purpose of the *Lafler* rule is to extend the *Strickland* ineffective assistance criteria to the pretrial plea negotiation stage. In contrast to *Crawford*, the subject matter of *Lafler* is not the fact-finding process of the trial. *Lafler* focuses entirely on the effectiveness of counsel during plea negotiations. A *Lafler*-type

---

[5] As recited in *Kennedy II,* Kennedy's conviction had been affirmed in an earlier opinion, *State v. Kennedy,* 205 W.Va. 224, 517 S.E.2d 457(1999) (*Kennedy* I), on a hearsay/confrontation issue. *Crawford* was subsequently adopted in *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006) in which *Kennedy* I was overruled. Kennedy subsequently filed a motion for a new trial pursuant to Rule 33, *Rules of Criminal Procedure*, which the Court in *State v. Kennedy*, 229 W.Va. 756, 735 S.E.2d 905 (2012) (*Kennedy* II) treated as post-conviction habeas corpus upon its determination that the use of Rule 33 was an effort to avoid the limited retroactivity analysis applicable in a collateral habeas petition.

ineffectiveness of counsel during plea negotiations is not cured by a trial free of constitutional error. *Lafler,* 1386.

(b) The retroactive application of the *Lafler* rule would have no discernible impact on law enforcement. As *Kennedy II* points out, pre-*Crawford* law enforcement and prosecutors had relied on exceptions to the right of confrontation which were sharply reduced by *Crawford.* The *Lafler* impact on trial procedure is typically a pre-trial inquiry into the terms of the plea offer, if any, made by the prosecution and the confirmation that the offer had been communicated by counsel to the defendant and that defendant chose to reject the offer. This effect on trial procedure has little impact on the duty of law enforcement to conduct its investigations in a way that produces evidence admissible at pre- or post-*Lafler* trials.

(c) Unlike *Kennedy II*'s assessment of a retroactive *Crawford*, the effect of the retroactive application of *Lafler* would not be "devastating." *Crawford* held that a number of well-established evidentiary exceptions to the hearsay rule were constitutionally impermissible under the confrontation clause. *Kennedy* reasonably predicted that giving *Crawford* retroactive effect would result in a burdensome number of challenges to final convictions. The summary presented below of West Virginia opinions that consider *Lafler* claims indicates that *Lafler* has not placed a significant burden on our court system and has resulted in few overturned convictions. In addition, unlike many other habeas claims, the remedy upon a successful *Lafler* claim is not new trial with the necessity to locate records and witnesses from years past, but rather that the rejected plea offer be offered again.

(d) Upon these considerations, this court concludes that the criteria for retroactive application articulated in *State v Blake* and as applied in *State v. Kennedy II* support the retroactive application of *Lafler* in West Virginia. [6]

West Virginia claims of ineffective assistance of counsel must be presented in a collateral review by a post-conviction habeas corpus petition and may not be presented on direct appeal. *State v. [Angela] Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996). As a result, a claim of ineffective assistance under *Lafler* can be asserted only in a collateral attack and not in the direct appeal.

---

[6] As noted in *Kennedy II* at 773-774 the present federal retroactivity standard applicable to federal collateral review of state convictions evolved from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989) which provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague,* 310.

Teague identifies two exceptions to the "general rule of nonretroactivity for cases on collateral review," *Teague*, 306, which need not be examined here. The scope of the *Teague* exceptions to nonretroactivity in federal collateral review of state cases was substantially narrowed in *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021).

However, as also noted in *Kennedy* II at 774, federal retroactivity jurisprudence recognizes that each state court has the power to determine whether a new rule that is not federally retroactive may be applied retroactively within the state. *Danforth v Minnesota*, 552 U.S. 264 (2008).

Several West Virginia opinions have applied *Lafler* retroactively to convictions that had become final before *Lafler* was announced.

In *Buffey v. Ballard*, 236 W.Va. 509 (2015), briefly referenced above on page 5, Buffey was sentenced on May 21, 2002, upon his plea of guilty to a sexual assault committed during a home invasion robbery. Buffey filed his first petition for a writ of habeas corpus on November 14, 2002. Appointed habeas counsel discovered during her investigation that an exculpatory DNA test report had not been produced prior to the plea and filed an amended habeas petition on those grounds. The petition was denied by the circuit court and the appeal was refused.

In 2010, Buffey filed a motion for post-conviction DNA testing as permitted by *W.Va. Code* §15-2B-14, which produced a report that the petitioner was conclusively excluded as the source of DNA recovered during the investigation of the crime. Despite this development, the circuit court refused the second habeas petition following an omnibus hearing in 2013.

Buffey's third petition was grounded on a claim that the state had violated *Brady v. Maryland* by failing to provide "an exculpatory DNA report that it had possessed more than six weeks prior to the final plea hearing." The Supreme Court of Appeals reversed the circuit court's refusal of the petition, holding in Section B of the opinion that the prosecution has a duty to disclose exculpatory evidence at the plea bargaining stage, citing to *Lafler* and its companion case *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

The *Brady* claim in *Buffey* had been rejected in two previous habeas proceedings and appeal had been refused on both. Although the Court addressed the State's *res judicata* argument on the application of the second *Losh* exception, that of newly discovered evidence, *Buffey*, fn 32, the newly discovered evidence was pertinent to plea negotiations and not to a trial (which did not occur). The Court's disposition of Buffey's third habeas petition emerged from a retroactive application of *Lafler* and *Frye* that supported its finding that *Brady* applied to the plea negotiation stage.

The earliest[7] West Virginia opinion to cite *Lafler* is *Minda v. Ballard*, 2013 WL 1632129 (unreported, April 16, 2013), in which the Court remanded a post-conviction habeas corpus proceeding to circuit court for an omnibus hearing "to *reexamine* [italics added] petitioner's claim of ineffective assistance of counsel in light of the … opinion in *Lafler*… " with respect to a trial had been conducted in 2003.

On appeal following the remand the Court affirmed the habeas court's refusal to grant relief following that reexamination. *Minda v. Ballard*, 2015 WL 1235229, (unreported, March 16, 2015), in an opinion that adopted and incorporated the circuit court

[7] The identification and chronology of West Virginia opinions that discuss *Lafler* is derived from a Westlaw search for opinions that contain the word "Lafler."

opinion. Although that opinion refused relief, it cited to and applied *Lafler* in its examination of a trial conducted in 2003 without questioning that *Lafler* governed the issue.

In *Ballard v. Ferguson*, 232 W.Va. 196 (2013), the Court, in reviewing counsel's conduct that had occurred before and during a 2002 trial, affirmed the circuit court's grant of post-conviction habeas relief on a finding of deficient preparation for trial by defense counsel. "The United States Supreme Court has stated that '[t]he benchmark for judging any claim of ineffective [assistance of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," *Ballard*, at 232 W.Va., 208, citing to *Lafler*. Although there were two dissents grounded on the facts of the case, the retroactive applicability of *Lafler* to this pre-*Lafler* conviction was not questioned.

In *Raines v. Ballard*, 236 W.Va. 588 (2016) the Court affirmed the circuit court's denial of a post-conviction habeas corpus petition that was grounded on a claim that trial counsel had given erroneous advice in preparation for a recidivist proceeding that had occurred in 2009. The opinion discusses at footnote 12 the history of the application of *Lafler* and related cases to such issues. While the court declined to grant relief on the facts of *Raines*, its analysis applied *Lafler* retroactively in a collateral attack on a conviction that had become final before *Lafler* was announced.

Although none of these opinions engaged the *Blake-Kennedy* retroactivity analysis that had been applied to the *Crawford* rule, the Court has consistently applied *Lafler* retroactively in collateral reviews of convictions that had become final before *Lafler* was announced.

Upon this history, this court concludes that all the conditions stated in *Losh* are satisfied as to the present claim of ineffective assistance of counsel with the result that the present claim of ineffective assistance of trial counsel is not barred by *res judicata* arising from the dispositions of the first and second habeas petitions. Upon that conclusion, the merits of the claim of ineffective assistance of trial counsel are addressed in Section 5, below.

4. Ineffective assistance of previous habeas counsel.

a. *Res judicata* bars consideration of the present claim of ineffective assistance of previous babeas counsel.

A claim that habeas counsel was ineffective in the first habeas proceeding was presented and rejected in the second habeas proceeding (02-HC-873). Petitioner now presents that claim in the present petition. None of the *Losh* exceptions to *res judicata* apply to this claim.

If the second habeas court had found ineffective assistance of habeas counsel in the first habeas proceeding, the first *Losh* exception would have removed the *res judicata* bar

that prohibited that court's examination of the merits of the Petitioner's first habeas. The second habeas court's determination, however, that habeas counsel was not ineffective is consistent with its conclusion that *res judicata* barred its consideration of the claims against trial counsel.

Although the first *Losh* exception removes the general *res judicata* bar against the consideration of a subsequent petition if habeas counsel in the previous hearing was ineffective, that exception does not support successive habeas re-examinations of a claim of ineffective assistance of habeas counsel.

The third *Losh* exception does not apply to the present claim of ineffective assistance of prior habeas counsel. The issues presented as to previous habeas counsel are summarized on page 5 of the second habeas court's order of September 13, 2002, in which the court applied the *Miller-Strickland* analysis.

Lafler is a change in the law subsequent to the second habeas disposition that requires the *Strickland* two-pronged test to be applied to the pretrial plea negotiation stage. The logic of *Lafler* would appear to apply with equal force to the disposition of a habeas petition. It is observed, however, that no claim was made in the second habeas petition or in the present petition that a pre-hearing offer for an agreed disposition of the first habeas petition was rejected by the petitioner on advice of previous habeas counsel. *Lafler* did not, therefore, constitute a change in the law that removes the *res judicata* effect of the rejection by the second habeas court of the claim of ineffective assistance of previous habeas counsel.

This determination that none of the *Losh* exceptions apply to the disposition of the claim by the 2002 habeas court supports the finding that *res judicata* bars this court from considering the claim of ineffective assistance of previous habeas counsel.

b. Alternative examination of the claim of ineffective assistance of previous habeas counsel

If on appellate review it is determined that this court is in error in the determination that *res judicata* bars consideration of the present claim of ineffective assistance of previous habeas counsel, it is this court's opinion in the alternative that the claim should be granted in part.

i. Habeas counsel was ineffective in allowing petitioner to present his habeas testimony in narrative form.

An excerpt from the transcript of the 1994 hearing on the first habeas petition was admitted as an exhibit in the 2017 hearing on the present petition. On page 41 of the 1994 transcript, habeas counsel stated that the petitioner indicated he would "like to proceed in narrative form." Petitioner's narrative testimony consisted primarily of reading excerpts from the trial transcript that dealt with evidentiary matters, defenses, and instructions to the

jury. Petitioner's narrative omitted the subject of trial counsel's letter and advice pertinent to the plea offer.

At the close of the narrative, it was the habeas judge, and not counsel for petitioner, who directed petitioner's attention to the letter sent by trial counsel to petitioner on the subject of the plea offer. The management of the plea offer was the only subject on which the State cross-examined the petitioner and habeas counsel conducted no redirect examination.

The presentation of evidence by question-and-answer is essential to the orderly presentation of the evidence pertinent to the subject areas of the petition. Counsel's election to allow petitioner to offer testimony in narrative form is likely to result, and here did result, in the omission of significant evidence that supported the claim pertaining to trial counsel's management of the plea offer. The habeas court's inquiry into that subject was not as an advocate, but for the judicial necessity to identify the issues presented. It was not a substitute for an effective and orderly presentation of the petitioner's claim by petitioner's counsel.

The general risks associated with the presentation of a habeas petitioner's testimony in narrative form so substantially outweigh any benefit that the election to do so constitutes ineffective assistance of habeas counsel that is not within the general principle of deference to counsel's judgments. That choice resulted in a disorganized and unclear presentation of the testimony and constituted the ineffective assistance of habeas counsel.

ii. The failure to call trial counsel as a witness.

Petitioner argues that habeas counsel was ineffective in the failure to call trial counsel as a witness in the habeas proceedings. There exist tactical alternatives in the presentation of a habeas claim that are within the range of effective advocacy. The decision whether to call trial counsel to testify in a claim of ineffective assistance is one such alternative. The spectrum of risks and benefits associated with the presentation of testimony of trial counsel is such that this court must defer to habeas counsel on this point.

iii. Previous habeas counsel's reference to trial tactics

Previous habeas counsel used the phrase "trial tactics" during the evidentiary hearing. Although Petitioner is correct that the management of a plea offer is antecedent to the trial and thereby not a matter of "trial tactics," there is no indication in the record that the use of that phrase resulted in the application of an incorrect standard to the court's disposition of that claim.[8]

---

[8] The legal standard applied by the first habeas court is difficult to ascertain. The first habeas court entered two orders. The first order was issued without a hearing. The second and final order recites that reconsideration was granted "because of the plain error… in dismissing that writ because [the order] recited … that an evidentiary hearing…had been held…when it had not been held."

5. Ineffective assistance of trial counsel

The present petition presents a *Lafler* claim that Petitioner's trial counsel, Warren Thornhill, was ineffective as to advice given with respect to a plea offer.

In *Plumley v. Dodson*, 2016 WL 1412247 (not reported, 2016) the Court observed that in *Lafler* it was not disputed that trial counsel was ineffective, but in *Plumley*, "the determinative issue before this Court is the performance prong of *Strickland,* not the prejudice prong." In considering that issue, *Plumley* requires this court to "presume strongly that defense counsel's performance was reasonable." For the reasons stated herein, this Court concludes that the *Plumley* presumption as to the performance prong of *Strickland* has been overcome and that Petitioner's trial counsel was ineffective.

The indictment charged Petitioner with first degree murder of Lorelei Reed by the use of a firearm, on which he was convicted and sentenced to life without parole. Petitioner's conviction was affirmed in *State v. Miller*, 184 W.Va. 492, 401 S.E.2d 237 (1990). The trial evidence summarized in that opinion supports the conclusion that the conviction was grounded on satisfactory evidence of malice, intent, premeditation, and motive:

> "...on October 25, 1988, the victim, Lorelei Reed, was shot and killed when a bullet from a .44 magnum, owned by the appellant, entered her body

---

The final order was filed on February 23, 1995. *Strickland* was shortly thereafter incorporated into West Virginia law by *State v. [Susan] Miller*, 194 W.Va. 3 (1995) which recites that principles equivalent to *Strickland* had been adopted earlier in *Wickline v House,* 188 W.Va. 344 (1992), which had cited to *Marano v. Holland*, 179 W.Va. 156, 188 W.Va. 344 (1988):

> Our cases thus hold that a defendant who asserts a claim of ineffective assistance of counsel must prove (1) that his legal representation was inadequate, and (2) that such inadequacy prejudiced his case. Much the same standards are found in *Strickland v. Washington* [citation omitted] ...*Marano,* at 172.

The two-part *Wickline-Marano* analysis required of a claim of ineffective assistance of counsel was required in 1995 when the first habeas court entered its final order. However, the first habeas court did not employ that analysis but relied instead on judge's general evaluation of the skills of trial counsel:

> *Without the need to reconsider* [italics added] the court's previous ruling ... this court, having read the entire record and blessed with the substantial knowledge that petitioner's trial counsel is, and was, the most experienced, effective and zealous defense counsel that practices as the bar of this court, this ground has no merit whatsoever. *Second Order*, page 3

It appearing that the dominant factor in the first habeas court's rejection of the petition was the judge's personal admiration of trial counsel rather than the application of the law to the evidence, previous habeas counsel's misplaced use of the phrase "trial tactics" is unlikely to have affected the disposition of the petition.

at the back of her neck at close range. Testimony from the sheriff's deputy indicated that when he arrived at the crime scene, the victim was sitting in a living room chair in "perfect posture" in the trailer where she resided with the appellant. The deputy also testified that fistfuls of hair lined the path from the front door of the trailer to the chair where the victim was located. The hair was identified by a Criminal Investigations Bureau serologist at trial as being consistent with the victim's hair, but not the appellant's hair. The appellant confessed to the shooting prior to trial.

The evidence at trial further indicated that prior to the shooting, both the victim and the appellant were involved in a rather turbulent relationship. This was reflected through the testimony of the victim's seven-year old son from a previous marriage who stated that during his visits with his mother, he witnessed the appellant pull the phone out of the wall, that the appellant had chased his mother throughout the house, and on one occasion the appellant had attempted to strangle his mother.

Additionally, the victim's mother testified that on one occasion during the summer prior to the shooting, the victim had told her, while crying and visibly upset that "Mommy, I'm just tired of fighting him; I can't take it anymore." There was also the testimony from one of the victim's friends, who had previously witnessed an incident in which the appellant had fired his gun while the victim was trying to gather some of her infant child's belongings from the trailer.

Finally, a state police dispatcher who was related to Reed testified that one month prior to the murder, the victim had telephoned the state police detachment attempting to gather information about "what she could do ... [a]bout him (the appellant) ... beating her up." Reed later went to the detachment where, according to the dispatcher's testimony, she was observed as having a bruised face and stated that she was scared of the appellant and that he would kill her if she obtained a warrant against him." *Miller*, 494

Evidence was also presented that on the day before the shooting, the victim had telephoned a deputy sheriff to report that "her boyfriend, the appellant, was dealing and using drugs," and that she would come in the next day to file a formal complaint but did not appear, *Miller*, 494-495, and that the victim had told her sister, Debra Dunkley, "that 'if she reported Johnny [the petitioner]…he would find her and kill her." Ms. Dunkley also testified that "two weeks prior to the shooting" the petitioner had "expressed knowledge that his girlfriend [the victim] had reported him to the authorities…"

The *Miller* opinion summarized the evidence presented on the issues of accidental shooting and the intoxication of the petitioner:

The appellant at trial claimed that he was intoxicated at the time of the shooting and that the shooting was accidental. In support of his defense, the appellant relied upon a statement given to police prior to trial in which he stated that earlier on the day of the shooting, the appellant and the victim had undergone blood tests as a prerequisite to obtaining a marriage license. (A copy of the results of the blood work dated October 21, 1988, was also submitted in evidence.) The appellant's statement further revealed that there was a struggle between him and the victim and that he was uncertain of who actually pulled the trigger. Further evidence was introduced on behalf of the appellant which attempted to establish that the appellant was not always the instigator or the abusive one in the couple's altercations.

Throughout the appellant's cross-examination of the state's witnesses who observed the appellant at or near the time of the shooting, the appellant's attorney attempted to establish that the appellant was intoxicated when the shooting occurred. While several witnesses' testimony indicated that he had been drinking and smoking marijuana, no one, including the appellant in his statement, believed that he was totally intoxicated. The appellant introduced evidence through the medical examiner that the victim's blood alcohol level was .187 at the time of autopsy, the inference being that this would be indicative of the appellant's blood alcohol level since the evidence was that they had been drinking together prior to the incident. The sheriff, however, testified that the appellant did not appear to be "incoherent or out of control" when he arrived at the crime scene and, therefore, no field sobriety test or breathalyzer test was administered

The exhibits attached to the petition include the following:

- Exhibit 1 - a copy of a letter dated April 20, 1989, from the prosecuting attorney offering to accept a plea to second degree murder, which would expire on May 15, conditioned on entry of the plea by June 1.
- Exhibit 2 - a copy of a letter dated April 21, 1989, in which trial counsel advised him that the offer "was not a particularly good offer" and suggested a meeting to discuss it.
- Exhibit 3 - a copy of a letter dated April 25, 1989, from trial counsel to the prosecuting attorney that rejected the plea offer.

The petition alleges that when petitioner met with counsel to discuss the offer, counsel advised him, among other things, that

- the offer was not a good deal;
- the sentence for second degree murder was five to eighteen years;
- the state did not have a good case for first degree murder because the evidence was insufficient to prove premeditation,

- the Petitioner was "too intoxicated to form deliberation to kill;"
- the "evidence clearly indicated that the shooting was an accident;" and
- the jury would "return an acquittal or involuntary manslaughter" and that counsel "told the Petitioner to reject… the offer and go to trial."

Trial counsel's performance may not be evaluated by hindsight derived from the result of the trial. Counsel's evaluation of the plea offer and his advice to the petitioner must be viewed in the context of the information known to him when he advised the Petitioner to reject the plea offer or that would have become available to him upon reasonable investigation upon that information.

Trial counsel was not presented as a witness at the hearing on the first habeas petition and the second habeas was disposed of without a hearing. The testimony of trial counsel was not available in the present matter due to his death in January, 2013.

The record supports the conclusion that counsel's advice to Petitioner was shaped by an insufficient assessment of the degree of petitioner's voluntary intoxication as it relates to the distinction between first-and second-degree murder and his evaluation of the defense of accident; that his evaluation of these issues was grounded on an insufficient analysis of the information known to trial counsel upon the State's discovery disclosures and insufficient investigation thereof; and that his rejection of the plea offer was premature and precipitous.

Trial counsel was present during the Petitioner's preliminary hearing on November 7, 1988. Testimony was presented by Deputy Leslie Ray Bailey and Detective Gordon Gregory that neither of the officers observed that Petitioner was grossly or extremely intoxicated on the night of the murder. Upon examination by trial counsel, Deputy Bailey testified that Petitioner walked from the vehicle to the courthouse "very good." Deputy Bailey also testified at the preliminary hearing that his investigation revealed that the Petitioner had previously shot at the victim during a party.

By letter of April 20, 1989, (Exhibit 1, referenced above) the prosecuting attorney offered to accept a plea to second degree murder with an acceptance deadline of May 15, and conditioned on entry of the plea by June 1, 1989. The trial record indicates that on the same day, April 20, 1989, the State filed its "Disclosure of Discovery" which displays the Circuit Clerk's stamp showing tbat it had been filed that date.

The State's disclosure attached a transcription of the Petitioner's statement to the police on the night of the crime, identified Petitioner's "res gestae" statements made to Deputy Booth at the murder scene, and his "admissions to his sister, Vickie Miller…that he "had 'hurt' Lorelei Reed [the victim] and thought she was dead." The disclosure also gave notice of the intent to offer evidence of Petitioner's prior threats to the victim, his prior shooting at the victim approximately one month prior to the murder, his prior statements of intent to kill the victim, and "habitual arguments between the defendant and the victim."

Petitioner's statement to the police was somewhat disjointed but its general effect is that the Petitioner admitted that he had shot the victim during an argument at their home. Petitioner volunteered the statement, not in response to a question, that he did not "kill her on purpose," that he and the victim had been arguing "about her doing things and stuff" which he did not specify. Petitioner said he kept the gun in the living room and "I guess I grabbed a hold of it" and "I guess I shot the trigger" but claimed he did not "mean to."

All of this information was in possession of trial counsel at the time he advised the Petitioner by letter of April 20, 1989, that the offer of second-degree murder was "not a particularly good offer," when Petitioner and counsel met on April 21, 1989, and when trial counsel refused the offer by letter of April 25, 1989.

Counsel had participated in the preliminary hearing on November 7, 1988, was in possession of the petitioner's statement to the police and was on notice of evidence of past threats and firing a weapon near the victim as disclosed by the State. The immediate context of the homicide and the evidence of their generally volatile relationship should have been sufficient to signal competent and effective counsel that there existed a substantial possibility of a conviction for first degree murder.

At the time the plea offer was rejected by the letter of April 25, 1989, the only evidentiary basis for a possible reduction from first- to second-degree murder was voluntary intoxication, and there existed only a remote possibility for acquittal on the defense of accident. Counsel could derive from the information then available a reasonable understanding of the degree of petitioner's intoxication at the time of the shooting and the probative effect of evidence that might support the defense of accident.

The state of the law in 1989 was that "[v]oluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree..." *State v. Keeton,* 166 W.Va. 77 (1980). There are no indicators in Petitioner's statement to the police, or in the evidence presented at the preliminary hearing, or elsewhere in the record that the petitioner's degree of intoxication was such that he was "incapable of deliberating and premeditating" which is necessary to reduce first degree murder to second degree murder.

Likewise, there is little in those sources to support a successful claim of accident because of direct evidence the shooting occurred in the context of an argument between the Petitioner and the victim and the disclosed evidence of past shooting attempts and threats stood a reasonable chance of being admitted as proof of "lack of accident" under Rule 404(b)(2), *WVRE.*

Under these circumstances, and upon examination of the information available to trial counsel as of April 25, 1989, the state's plea offer of second degree murder was an opportunity for a favorable result that was only remotely possible at trial.

As noted above, by letter of April 20, 1989, the plea offer expired on May 15, 1989, and was conditioned on entry of the plea by June 1, 1989. Despite the fact that trial counsel had the period April 20 to May 15 to evaluate the offer, counsel and the petitioner immediately met on April 21, 1989, to discuss the offer, and trial counsel immediately afterward rejected the offer by letter of April 25, 1989, which was approximately twenty days before the deadline.

The testimony presented by Petitioner in the 1994 and 2017 habeas hearings supports the conclusion that the Petitioner's decision to reject the plea offer, and his authorization that trial counsel do so, was upon advice of trial counsel.

As discussed in Section 4(b), above, Petitioner's 1994 habeas counsel elected to permit Petitioner to present his testimony in narrative form. At the close of Petitioner's narrative the presiding judge asked about the letter pertaining to the plea offer, which although referenced in the first petition was not mentioned in his narrative testimony. Upon inquiry by the court, Petitioner testified that counsel sent him a letter that notified him of the offer and that stated that it was not a particularly good offer, and that they subsequently discussed it in counsel's office. (1994 *T.* 49)

The habeas court asked whether he "then desired to take the offer or ...now on second thought you wish you would have taken that offer?" Petitioner's answer, although not well articulated, was to the effect that information necessary to an informed decision whether to accept or reject the offer became known to him and to his counsel shortly before the trial: "I'd say a week before trial...that this person was turning me in...and I never heard nothing about it...and Mr. Thornhill never had known nothing about it..." (1994 *T.* 50.)

On cross examination the prosecuting attorney asked whether, as the trial date approached and he learned more about what the witnesses were going to say, he asked counsel to "see if we can still get that second degree?" Petitioner responded that he did not because "from the letter, he (trial counsel) told me that the second degree [offer] had a time limit on it." (1994 *T.* 55)

The hearing on the present petition was conducted in 2017. Petitioner's testimony at that hearing included additional details of his meeting with trial counsel immediately after receipt of the plea offer. Petitioner testified in 2017 that counsel "told him the plea offer was not a good deal because it was clear to him that he was too intoxicated to form deliberation." (2017 *T.* 29).

Petitioner testified that he expressed concerns to trial counsel about the effect of evidence then known to him.

> I had to ask Mr. Thornhill some questions ...I said, **what about me shooting her and killing her, ... he said did you wake up that morning and say I'm going to kill Lori today?** I said, no, sir. He said, who all was

> in the trailer that night? I said Lori and Lori Ann and me. He said where was the baby? I said in the bedroom. He said, you sure your sisters wasn't looking in the windows, and I said, no, sir, there was nobody there.
>
> And then I asked him **what about me telling the cops that I shot her and killed her, and he said just because you said you done something don't make it murder**. And then I asked him about **the drugs**, what about the drugs, because I'd been hearing rumors ...people and stuff saying this and that **about Lori doing this and that, and he said they'll never be able to get that in,** and I said, okay, and **he said, reject the State's plea and go to trial, and I said, yes, sir**. (2017 *T*, p 31-32, boldface added)

The omission of these details from Petitioner's testimony at the first habeas hearing in 1994 requires the court, as the trier of fact, to measure the impact of those omissions on the weight and credibility of his 2017 testimony. It is observed that in the 1994 hearing Petitioner's habeas counsel allowed Petitioner to testify in narrative form, thereby depriving the Petitioner of habeas counsel's guidance toward the details pertinent to his claim.[9]

In contrast, present habeas counsel developed the 2017 record in question-and-answer format which resulted in a more thorough presentation of the evidence on which the Petitioner relies. Upon these observations the court concludes that the more detailed recollection in Petitioner's 2017 testimony is of sufficient weight and credibility upon which to proceed.

Petitioner's trial counsel should have known that premeditation is not determined by the question whether Petitioner woke up that morning with the intent to kill the victim. Trial counsel downplayed the impact of Petitioner's admission to the police that he had killed the victim. Trial counsel, without further inquiry or analysis as to its substance, expressed the conclusion that the prosecution "would never be able to...get in" evidence of drug involvement and the victim having done "this and that." Acting under those deficiencies, trial counsel told the Petitioner "to reject the plea" (2017 *T.* 34) upon which Petitioner "agreed with him to reject the State's plea." (2017 *T.* 37)

The evidence supports the conclusion the Petitioner's authorization that counsel reject the plea offer arose from trial counsel's ineffective assistance in evaluating the state's disclosures, insufficient investigation of those disclosures, and an incorrect understanding of the degree of intoxication required to reduce first-degree murder to second-degree.

The *Lafler* issue is whether the advice upon which Petitioner relied constituted deficient performance that satisfies the first *Strickland* prong. While *Lafler* cautions that

---

[9] As noted above, it is this court's opinion that *res judicata* bars this court from considering the merits of the claim that previous habeas counsel was ineffective. Irrespective of the merits of the claim of ineffective assistance of previous habeas counsel the fact that previous counsel presented Petitioner's 1994 testimony in narrative form is independently relevant and admissible on the issue of the weight and credibility Petitioner's 2017 testimony.

"[A]n erroneous strategic prediction about the trial is not necessarily deficient performance." (*Lafler,* 1391), an examination of the trial evidence is relevant to the question whether trial counsel failed to conduct a satisfactory evaluation or investigation of the information known to him before advising the Petitioner to reject the plea offer.

The State's evidence included the witnesses who had been disclosed to defense counsel and were known to him at the time he rejected the plea offer. In addition to the disclosure by the State, Petitioner testified in the 2017 hearing that during the April 21, 1989, meeting he told trial counsel about witnesses Audrcy Meadows, Rick Hamby, and Rebecca Snuffer. (2017 *T.* 21)

- Rebecca Snuffer, who had been identified in the state's discovery disclosure, testified to an incident in which the Petitioner stated to Ms. Snuffer that he would "kill that bitch," referring to the victim, and fired a weapon at which time the victim ran to her car. She testified that the victim stayed with Ms. Snuffer for a few days afterward. *Trial Transcript, 288*, attached as Exhibit M to Petitioner's reply filed January 3, 2018.

- Richard Hamby, who had been identified in State's discovery, was called to testify to a statement made by the Petitioner on the night of the homicide. When Petitioner's counsel objected that the statement had not been produced, the State demonstrated to the satisfaction of the trial court that the statement had been timely produced by the State, which supports the conclusion that counsel had not examined the statement when he rejected the plea offer. Mr. Hamby testified that while he was present in at the Petitioner's residence on the night of October 24, 1988 (the shooting occurred during the night of October 24-25) the Petitioner said that "if anybody messed with him he would blow them away." *Trial Transcript, 330,* attached as Exhibit N to Petitioner's reply filed January 3, 2018.

- Audrey Meadows, who had been identified in State's discovery, testified that she was also present in the residence during the night of the shooting and that at about 10:00 p.m. the Petitioner instructed the victim to get the gun from the truck and bring it into the residence. *Trial Transcript, 357*, attached as Exhibit O to Petitioner's reply filed January 3, 2018. The *Miller* opinion's summary of her testimony reports that she testified that the petitioner accused the victim of "setting me up." *Miller*, 495

- Detective Bailey, who had testified at the prelimmary hearing (see p. 15, above), testified at trial (1) to his observations of the Petitioner's degree of intoxication when he gave his statement immediately after the homicide, and (2) to a phone call from the victim prior to her death in which she reported that the Petitioner "was having a party and smoking dope" and that she wanted Detective Bailey to "bust him," which was presented as evidence of premeditation. *Trial Transcript, 451 and 457*, attached as Exhibit P to Petitioner's reply filed January 3, 2018

It should have been clear to trial counsel at the time he advised Petitioner to reject the offer that neither the statement to the police nor the testimony at the preliminary hearing produced evidence of intoxication to a degree that he was "too drunk to be capable of deliberating and premeditating," as required by *Keeton*, cited above at p.16. That information and the State's discovery disclosure should have placed counsel on notice that a jury verdict of second-degree murder on the grounds of intoxication was unlikely. However, that is precisely what the state offered.

If counsel had conducted a reasonable evaluation of or investigation into the State's discovery disclosures and the information provided to him by Petitioner while the plea offer was pending, rather than quickly rejecting the offer, there is a reasonable likelihood that counsel would have become aware of the evidence of premeditation and malice that the disclosed witnesses would provide. With that information a reasonable and competent attorney would conclude that there existed a substantial probability of a conviction for first degree murder, with a remote and unlikely possibility of reduction to second degree murder, and negligible prospect of acquittal on the defense of accident.

Upon these considerations, the court concludes that the advice of trial counsel that the offer to accept a plea to second degree murder was "not a very good offer," and counsel's evaluation of the plea offer which induced Petitioner to authorize counsel to reject the plea offer, and the immediate communication of that rejection, constituted deficient performance of trial counsel within the meaning of the first prong of *Strickland* as applied through *Lafler*.

The prejudice prong of *Strickland* as shaped by *Lafler* is satisfied by Petitioner's conviction at trial on a charge more serious than the disposition which could have been achieved if trial counsel had competently advised Petitioner with respect to the plea offer.

The affirming of the Petitioner's conviction upon the evidentiary and procedural summary recited in the opinion at *State v. Miller*, 184 W.Va. 492, 401 S.E.2d 237 (1990) requires the conclusion that the trial was free of reversible error and that the Petitioner is factually guilty of the first-degree murder of Loreli Reed.

However, the constitutional rights and protections of the Petitioner require that this matter be examined through the lens of *Lafler*:

> "The constitutional rights of criminal defendants…are granted to the innocent and the guilty alike… The fact that [petitioner] is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining. *Lafler,* 1388

ORDER

Upon these considerations, this court finds that the Petitioner received ineffective assistance of trial counsel which induced him to reject a favorable plea offer which was followed by a trial that produced a less favorable result than would have been obtained had

he accepted the plea offer.

In accordance with the remedy developed in the *Lafler* (See *Lafler,* 1391), the Prosecuting Attorney of Raleigh County should be and is hereby directed to reoffer to the Petitioner the plea agreement that was communicated to trial counsel by the letter of April 20, 1989, referenced above.

If Petitioner accepts the offer, the trial court assigned to the criminal proceedings can then exercise its discretion in determining whether to vacate the conviction and resentence respondent pursuant to the plea agreement, or take such other action supported by the record and consistent with the *Lafler* opinion.

The implementation of this order should be and is hereby stayed pending the expiration of the time for the appeal or the final disposition thereof.

The Circuit Clerk is directed to transmit this opinion to counsel for Petitioner and to the Prosecuting Attorney of Raleigh County.

ENTER: August 31, 2022

/s/Robert A. Burnside, Jr.
Circuit Judge