SUPREME COURT OF APPEALS OF WEST VIRGINIA

David Ballard, Warden, Mt. Olive Correctional Comples,
Respondent Below, Petitioner

vs.) No. 22-720

Johnny Ray Miller,
Petitioner Below, Respondent

PETITIONER'S BRIEF

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Johnny Ray Miller was indicted in January of 1989 on Count 1: first degree murder of his girlfriend Lorelei Reed and Count 2: commission of Count 1 by the use of a firearm. Johnny Ray Miller was convicted of both counts, without a recommendation of mercy, on August 4, 1989 following a jury trial. Thereafter, Johnny Ray Miller was sentenced to life in prison without the possibility of parole by an order entered on November 14, 1989. Following his conviction, there was an appeal of the conviction and multiple petitions for writ of habeas corpus in different jurisdictions. The conviction was appealed, and following a remand on a discovery issue, the Supreme Court upheld the conviction. A number of petitions for writ of habeas corpus followed, including Raleigh County cases 93-HC-64-C, 02-HC-873, 06-C-632-H, and 12-C-360-B. Mr. Miller also pursued federal habeas relief (denied by Order entered on July 24, 2997), which he unsuccessfully appealed, and an action directly with the Supreme Court of Appeals of West Virginia. All of these petitions resulted in denials and confirmation of the Mr. Miller's conviction and incarceration.

The most recent petition for writ of habeas corpus, numbered 12-C-360-B, was granted by the Honorable Robert A. Burnside, Jr., by an order entered on August 31, 2022, over thirty years after Johnny Miller was convicted. That order found that trial counsel was ineffective, which induced Mr. Miller to reject a favorable plea offer, and ordered the State to re-offer the April 1989

offer of second-degree murder. The execution of that order was suspended pending the closure of the appellate window.

The State of West Virginia is seeking relief in the form of a reversal of the August 31, 2022 order granting petition for post-conviction habeas corpus, denial of the petition for post-conviction habeas corpus, and dismissal of 12-C-360.

IV. SUMMARY OF ARGUMENT

Issue: The Circuit Court committed error by considering the present claims of ineffective assistance of counsel.

The doctrine of r*es judicata* precludes the Circuit Court from considering the issue of ineffective assistance of counsel. The Defendant had an initial petition for writ of habeas corpus, filed August 24, 1994, that was denied following an omnibus hearing. Any subsequent claim of ineffective assistance of trial counsel is barred from consideration. The Circuit Court found that *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) constitutes a change in law that qualifies as an exception to *Res judicata* that allows the Court to hear the ineffective assistance of counsel claim.

First, the State argues that *Lafler* is not a change in law because the right to effective counsel in pre-trial plea negotiations was in place prior to *Lafler*. Second, the State argues that *Lafler* is not retroactive pursuant to *State v. Kennedy* (*Kennedy II*), 229 W.Va. 756, 735 S.E.2d 905 (2012).

The Supreme Court should hear this issue because it undermines the doctrine of *Res judicata* and the importance of having finality in cases for all parties, including the families of the murder victim in this case.

Issue: The Circuit Court committed error by concluding that trial counsel was ineffective.

The Circuit Court, after finding that r*es judicata* did not bar consideration of ineffective assistance of trial counsel, proceeded to conclude that trial counsel was ineffective pursuant to

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The State argues that this conclusion is in error because (1) there is no deficiency in counsel's performance and (2) there is insufficient evidence to conclude that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. The State argues that these conclusions were made based upon speculation and insufficient evidence.

The Supreme Court should hear this issue because it will result in a major alteration of plea negotiations. The State of West Virginia will be unable to achieve finality in cases, even through plea negotiations, because the specter of a claim of ineffective assistance of counsel will always linger. Furthermore, this issue cannot be remedied through a normal plea of guilty colloquy because the evidence of potential ineffective assistance is protected by attorney-client privilege.

The ruling by the Circuit Court has far-reaching implications that, if affirmed, will result in the erosion of plea negotiations and timely resolution of criminal cases. Therefore, the State of West Virginia is respectfully asking the Supreme Court to overturn the Circuit Court's August 31, 2022 ruling.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) Rules of Appellate Procedure, the Petitioner believes that the four items listed in Rule 18 do not apply and, therefore, oral argument is necessary. Furthermore, that oral argument would be pursuant to Rule 19 of the Rules of Appellate Procedure because the Court below improperly applied *res judicata*, a settled area of law. Also, the primary issue before the Court is a narrow issue of law. Specifically, the issue is whether *Lafler* constitutes a change in law sufficient to constitute an exception to *res judicata*. Due to the narrow area of law, the Petitioner believes a memorandum decision would be appropriate should the Court so desire.

VI. ARGUMENT

Issue: The Circuit Court committed error by considering the present claims of ineffective assistance of counsel.

The doctrine of *res judicata* precludes the Circuit Court from considering the issue of ineffective assistance of counsel. The Defendant had an initial petition for writ of habeas corpus, Case No. 93-HC-64, that was denied by an order entered on February 23, 1995, following an omnibus hearing. The omnibus hearing held on August 19, 1994, which included the claim of ineffective assistance of counsel, discussed the very issue that the Court in this case considered.

> THE PETITIONER: No, sir. And I thank you for this opportunity to – and my habeas petition being heard, and to be able to go forward in the Court.
> THE COURT: Thank you very much. Well, you're entitled to that, sir. You don't need to thank me. Let me ask you one question.
> THE PETITIONER: Yes, sir.
> THE COURT: Earlier on, Mr. Watson made reference that you were offered, or that there was an offer, of a plea to second degree murder.
> THE PETITIONER: Yes, sir.
> THE COURT: In that regard, was that offer made to you through your attorney, Mr. Thornhill, or did he relate that to you.
> THE PETITIONER: Mr. Thornhill wrote me a letter, sir, and said he needed to talk to me, that the State offered me a second degree murder charge. And, when I went to his office – but he did state in his letter he didn't think it was a particular good offer.
> THE COURT: And --
> THE PETITIONER: I do have the letter over there.
> THE COURT: -- did you desire – are you telling me now you – you then desired to take that offer, or are you saying to me now, on second thought, you wish you would have taken that offer?
> THE PETITIONER: Well, sir, to be honest with you, after the State did produce some statements from people, I'd say a week before the trial, right, that this person was turning me in and stuff like that, and I never heard nothing about it, you know, and Mr. Thornhill never had known nothing about it, you know what I'm saying?
> THE COURT: Yes, sir, all right.
> THE PETITIONER: And I have that discovery, that where it was late, you know, and I just – I think every one of them come in – come in within two or three days, and it seemed like, you know, they was all – you know what I'm saying – I just can't understand why it wasn't available with that.
> THE COURT: I just wanted to be sure that I understand the significance of that. Have you anything else, sir.
> THE PETITIONER: No, sir.

Appx. Vol. 1, p. 414-415.

This conversation was followed by cross examination about the plea offer. Thereafter, the Circuit Court denied that claim. *See Appx. Vol.* 1, p. 349-364. Thus, the issue of ineffective assistance of counsel as to the issue of plea negotiations has been previously adjudicated. Any subsequent claim of ineffective assistance of trial counsel is barred from consideration.

> A prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Syl pt. 4, Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981). The Circuit Court found that *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), constitutes a change in law, favorable to the applicant, that can be applied retroactively, which qualifies as an exception to *res judicata* that allows the Court to hear the ineffective assistance of counsel claim. First, the Petitioner asserts that *Lafler* is not a change in law because the right to effective counsel in pre-trial plea negotiations was established law prior to *Lafler*.

McMann v. Richardson was a decision by the Supreme Court holding that a prisoner's plea based upon competent advice of counsel was an intelligent plea not open to collateral attack on the basis that counsel may have misjudged the admissibility of the confession. In making that decision the Supreme Court discussed the expectation of competent and effective representation during the plea negotiation process.

> That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the

> defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.
>
> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

McMann v. Richardson, 397 U.S. 759, 770-771 (1970). Following the *Strickland v. Washington* ruling, the Supreme Court made a more specific ruling that the right to effective counsel applies to the plea process in *Hill v. Lockhart.*

> Although our decision in *Strickland* v. *Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process.

Hill v. Lockhart, 474 U.S. 52, 57 (1985).

Lafler took the above-mentioned caselaw and applied it to a set of facts where a plea is rejected and then a conviction is obtained at trial. The requirement of having effective assistance in plea negotiations was already in place well before the *Lafler* decision. The ruling in *Lafler* made new law only as to the remedy. *McMann* and *Hill* show that *Lafler* did not constitute a change in law sufficient to be an exception to the *res judicata* doctrine. If *Lafler* stands for any change in law, it establishes the remedy in the event there is ineffective assistance of counsel during the plea process. That was that the State must re-offer the previously rejected offer. Thereafter, the trial

court would have a number of options available to it when deciding whether to accept the plea. Defendants have had the right to effective assistance of counsel during the plea process since at least 1970 and *Lafler* only made a change in law as to the remedy. Therefore, the conclusion by the Circuit Court that *Lafler* constitutes a change in law sufficient to satisfy the *Losh* exception to *res judicata* is incorrect and should not have been used to overcome the doctrine of *res judicata*.

Second, the Petitioner asserts that *Lafler* is not retroactive pursuant to *State v. Kennedy* (*Kennedy II*), 229 W.Va. 756, 735 S.E.2d 905 (2012). The Court below applied the *Blake-Kennedy* retroactivity factors to the *Lafler* case.

> 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.

State v. Blake, 197 W. Va. 700, 702, 478 S.E.2d 550, 552 (1996). The Court below committed error by concluding that *Lafler* is retroactive. It was incorrect to conclude that *Lafler* constitutes a new standard as required by the *Blake-Kennedy* analysis. As discussed above, *Lafler* is not a new principle of law. Instead, *Lafler* provides a remedy for situations where counsel is ineffective during the plea negotiation process. Therefore, *Lafler* is not a new constitutional rule of criminal procedure, which should prohibit the Court from even evaluating the criteria listed in *Blake*.

The Petitioner also asserts that the retroactive application of *Lafler* as performed by the lower Court would produce an inequitable result. The application by the Circuit Court undermines the doctrine of *res judicata* and is functionally setting aside a murder conviction that is over thirty (30) years old. The conviction has been reviewed on appeal and multiple petitions for writ of habeas corpus, at least one of which included the same issue raised in this petition. This case is a

perfect example of the importance of *res judicata*. This matter was previously adjudicated and is now being re-examined. This re-examination is being attempted after the death of defense counsel and has re-opened old wounds that the family of the victim has worked to heal over the last thirty years. The family of the victim has been retraumatized by the Circuit Court's ruling that could possibly result in the release of Mr. Miller from the Division of Corrections, if upheld. This cannot be deemed an equitable result as it is essentially rewarding Mr. Miller for continuously filing petitions on issues that have already been adjudicated.

Issue: The Circuit Court committed error by concluding that trial counsel was ineffective.

The standard of review for ineffective assistance of counsel has been established in Syl. Pts. 5 and 6, *State v. Miller*, 459 S.E.2d 114, 117–18 (W.Va. 1995), applying *Strickland v. Washington*, 466 U.S. 668 (1984):

> 5. In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.
> 6. In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

"Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to the general requirement that defendant affirmatively prove prejudice," and the burden of proving this prejudice lies squarely on the petitioner. *Strickland* at 693. Recognizing that "[r]epresentation is an art," the *Strickland* Court held that "[i]t is not enough for the [petitioner] to show that the [alleged] errors had some conceivable effect on the outcome of the proceeding," and even errors

that may have some effect on the proceeding do not necessarily undermine "the reliability of the result of the proceeding." *Id.*

Here, Miller fails to meet his burden of proving each of the two prongs of the test for determining claims of ineffective assistance of counsel. First, he fails to prove that counsel's "performance was deficient under an objective standard of reasonableness" and secondly, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *Miller*, citing *Strickland*, supra. Furthermore, this standard must be applied objectively to

> determine whether, in light of all of the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Tex S. v. Pszczolkowski, 778 S.E.2d 694, 704 (W.Va. 2015); citing *State v. Miller*, 459 S.E.2d at 117–18; see also Syl. Pt. 19, *State v. Thomas*, 203 S.E.2d 445, 449 (W.Va. 1974). Thus, as addressed in *Thomas*, counsel's conduct will not be deemed ineffective "unless no reasonably qualified defense attorney would have so acted" in defending Miller. In sum, this high standard leads to West Virginia courts to "*presume strongly that counsel's performance was reasonable and adequate.*" *Pszczolkowski* at 705; citing *Miller* at 127 (emphasis in original).

To connect the first prong of *Strickland* with the test of whether that alleged deficiency of performance changed the outcome of the proceeding, the Court in *State v. LaRock*, 470 S.E.2d 613, 628, n. 22 (W.Va. 1996) held that "[c]ounsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise probably would have won." In other words, "the determinative issue is not whether the defendant's

counsel was ineffective, hut whether he was thoroughly ineffective so that defeat was 'snatched from the jaws of victory.'" *Id.*

In this case, the evidence is insufficient to conclude that the trial counsel was ineffective by advising Mr. Miller to not accept the plea offer from the state. First, the letter from counsel to Mr. Miller simply says that the offer is "not a particularly good offer." Appx. Vol. 1, p. 0431. It does not advise Mr. Miller to reject the offer. Thereafter the only evidence is the self-serving statement of Mr. Miller at the haheas hearing. The Court's conclusion that he was credible in remembering counsel's statements is in error due to the time that had passed and the failure to focus on the statements by Mr. Miller at the 1994 hearing due to their narrative form.

Even if counsel was ineffective, that ineffectiveness did not affect the outcome of the proceedings under the second prong of *Strickland.* Miller still had the opportunity to fully address the Court about the issue and continued to pursue that issue with assistance of appellate counsel in the refused 1996 appeal, as well as in subsequent denied petitions for writ of habeas corpus. Furthermore, the *Lafler* argument would not have been persuasive, as discussed below.

Miller has failed to prove that there was a reasonable probability that the State's pre-trial plea offer of a plea to second degree murder—an intentional, malicious homicide—would have been accepted by the Circuit Court, given his unwillingness to admit that he intentionally and maliciously shot and killed Lorelei Reed. The plea offer from the State was not a "*Kennedy*" plea offer. *Kennedy v. Frazier*, 357 S.E.2d 43 (W.Va. 1987). Thus, to accept the plea, Miller would have had to admit guilt, not just confess that he committed various acts. As stated in *United States v. Broce*, 109 S.Ct. 757, 762 (1989), "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." Throughout the many years from his 1989 trial, his direct appeal, his successive petitions

and appeals of the denials of such petitions, Miller has refused to admit that he intentionally and maliciously murdered his victim.

In *Raines v. Ballard*, 782 S.E.2d 775, 784 (2016), the Court found that despite that petitioner's contentions, and despite the fact counsel had even been legally incorrect in his advice to his client, the actual record rendered his argument "untenable." With that, the *Raines* Court upheld the habeas court's finding that "[i]t is clear from petitioner's own testimony, and that of trial counsel, that petitioner, contrary to advice of counsel, proceeded to trial because he believed that the State could not meet its burden of proof that he was guilty of the crimes charged, rather than any threat of punishment." *Id.* In the instant case, it can be extrapolated from Miller's unwillingness to admit that he intentionally and maliciously shot Lorelei Reed that his decision to not accept the State's pre-trial offer came from Miller's belief that the State would not be able to prove the case beyond a reasonable doubt. Having now been convicted by a jury of his peers of first degree murder without mercy and accordingly sentenced to life imprisonment without the possibility of parole, Miller would only accept a revived plea offer for the sake of the penalty, not because he would admit he is guilty of even second degree murder.

As further indication of his unwillingness to admit intention and malice, the defense at trial was that of accidental killing. Even though Miller did not testify during the trial of 1989, trial counsel characterized the murder of Lorelei Reed as "an accident [that] happened early that morning," and "the very accident that Johnny Miller said over and over again" in his initial statements to law enforcement. *Appx. Vol.* 2, p. .1352-1353. When addressing both the element of premeditation and the element of deliberation, trial counsel argued the absence of those elements and stated, "That does not make it first degree murder; *that does not even make it second degree murder.*" *Id.* at 1353 (emphasis added). As noted throughout the trial record, Miller's initial

statements to investigating officers were that Lorelei Reed's homicide was an accident. *Id.* at 1353. Lastly, months after the jury convicted Miller of first degree murder, he still maintained his claim of innocence. At Miller's sentencing hearing of October 20, 1989, he repeatedly stated "I plead innocent of the charge." *Appx. Vol.* 2, p. 1380.

The Court would not have been able to, and cannot even now accept a plea of guilty to, second degree murder from Miller. As discussed by the Court in *United States v. Broce*, 488 U.S. 563, 569 (1989), "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." Even though W.Va. Code § 61-2-1 was amended in 1991, the elements of second degree murder—a malicious, intentional homicide—have not changed since Miller's conviction. Under *Lafler*, the outcome of the plea negotiations would not be any different with differing advice from trial counsel.

However, regarding trial counsel's advice in the plea process, there is no evidence cited in this record that sustains any claim that trial counsel gave legally incorrect advice as to the plea offer. Rather the record as cited by Miller demonstrates that this claim of ineffective assistance of trial counsel is based upon the very opposite. Miller claims his trial counsel was ineffective in the plea negotiation phase for having the universal reputation of being "an experienced trial lawyer who had defended many criminal cases," and "the most experienced, effective and zealous defense counsel that practice[d] at the bar of this court."

Furthermore, "[c]ourts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion" and "an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices." The courts must employ "the rule of contemporary assessment" to determine what was reasonable strategy at

the time of trial—or in this case, at the time of the plea negotiations. Syl. Pt. 4, *Daniel v. Legursky*, 465 S.E.2d 416, 422 (W.Va. 1995). In *State ex rel. Vernatter v. Warden*, 528 S.E.2d 207 (W.Va. 1999), the WVSCA affirmed the Circuit Court's denial of the petitioner's habeas relief where the petitioner alleged ineffective assistance of counsel for failing to pursue court-ordered evaluations of the petitioner's competency and criminal responsibility. The Circuit Court denial included references to trial counsel's determination that, based upon petitioner's statements to counsel, a claim of insanity would have been false, and that "trial counsel could not perpetrate a fraud upon the Court in assisting the petitioner in offering false testimony [...] or indirectly presenting a defense based upon false representations made to law enforcement and mental health professionals." *Id.* at 212-213. Additionally, the petitioner's trial counsel had determined that "from a strategic standpoint" it was unwise to potentially make the petitioner's psychiatric history available to the State. *Id.* at 212. The *Vernatter* Court quoted from *Strickland*: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

In the instant case, the trial record, including the sentencing hearing of October 20, 1989, demonstrates that Miller's goal was to convince a jury that the shooting of Lorelei Reed was an accident. The last thirty-plus years of Miller's litigation is barren of any statement by Miller admitting that he intentionally and maliciously shot and killed his victim. These records are also devoid of any claim that Miller ever communicated to his trial counsel (or appellate counsel or either habeas counsel) a version of events different from that of an accidental shooting. Because of his persistence in his claim of innocence, any advice from trial counsel that he admit that he

was at least guilty of second degree murder would have been entirely incompatible with Miller's chosen defense of accident.

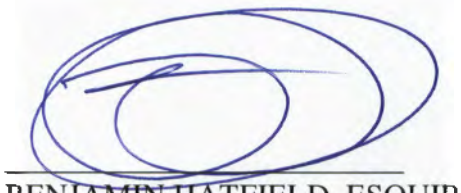
Miller makes no claim that his trial attorney provided ineffective assistance of counsel in his presentation of Miller's chosen defense. A claim of ineffective assistance of counsel "will be examined not only from the standpoint of the particular error asserted, but from the broader view of counsel's conduct of the entire trial." *State v. Watson*, 264 S.E.2d 628, 634 (W.Va. 1980). As discussed above, Miller has demonstrated that he will not admit to even the elements required for a guilty plea to second degree murder. Given his claim of accidental killing, the rejection of the plea offer was a reasonable strategic decision. Strategic decisions and judgment calls, like trial tactics, are not reviewable in habeas corpus proceedings. *Miller*, *supra* at Syl. Pt. 6 (In applying the *Strickland* test, reviewing courts must refrain "from engaging in hindsight or second-guessing of trial counsel's strategic decisions."). Therefore, the Circuit Court was incorrect in concluding that counsel was ineffective under the *Strickland* and *Lafler* analysis.

VII. CONCLUSION

The lower Court committed error by concluding that the *Lafler* constituted an exception to the doctrine of res judicata and then by concluding that trial counsel was ineffective. Therefore, the Petitioner respectfully asks this Court to overturn the ruling of the lower Court and dismiss the petition for writ of habeas corpus.

VERIFICATION OF COUNSEL

Counsel verifies that the statements contained in the within Petition are taken from the record in the proceedings below including pleadings and other documents filed therein.



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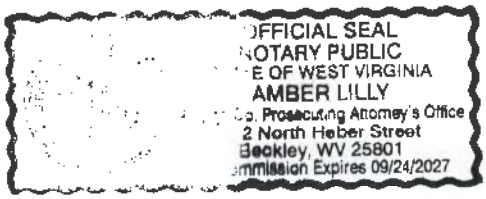
STATE OF WEST VIRGINIA:
COUNTY OF RALEIGH, TO WIT:

Taken, subscribed, and sworn to before the undersigned Notary on this 29th Day of December, 2022.

Notary Public

My Commission expires:

9-24-2027



CERTIFICATE OF SERVICE

I, BENJAMIN HATFIELD, Prosecuting Attorney for Raleigh County, West Virginia, do hereby certify that service of the foregoing Petitioner's Brief was made by E-Filing to the following on December 29, 2022.

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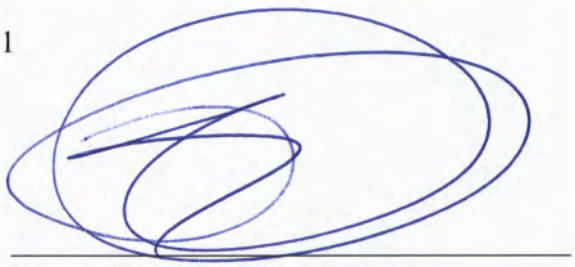

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