IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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DAVID BALLARD, WARDEN, MT. OLIVE CORRECTIONAL COMPLEX,
Petitioner and Respondent-below,

v.

JOHNNY RAY MILLER,

Respondent and Petitioner-below.

Appeal from a final order of the Circuit Court of Raleigh County, West Virginia

(Civil Action No. 12-C-360)

Respondent Johnny Ray Miller's Response to Petitioner's Brief

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STATEMENT OF THE CASE

Respondent Johnny Ray Miller hired Warren A. Thornhill, III, to represent him in regard to the charge of first degree murder of his girlfriend Lorelei Reed. Early in the criminal proceedings the State represented by Kristen L. Keller, Chief Deputy Prosecuting Attorney, offered a very advantageous plea offer of second degree murder with a sentence of 5-18 years imprisonment. Mr. Thornhill advised Mr. Miller that this was not a good deal and that he believed the State could not prove the essential elements required in obtaining a conviction for first degree murder.

Ms. Keller personally delivered to Mr. Thornhill the State's discovery and counter motions etc., enclosed therein was a letter dated April 20, 1989, offering a very advantageous plea offer. The last paragraph of said letter stated the following:

> "We [the State] will offer the defendant a plea to second degree murder by the use of a firearm. This offer will expire on May 15, with a condition that his plea be entered at your convenience prior to the 1st of June." Emphasis added. (Appendix at 430)

Thereafter, Mr. Thornhill advised Respondent, per letter dated April 21, 1989, of the above mentioned plea bargain offer. However, Mr. Thornhill stated to Mr. Miller that: … "it is my belief that this is not a particularly good offer for us. I think we should discuss it and would appreciate your calling in to make an appointment for that purpose." (Appendix at 431)

Mr. Miller, who was out on pre-trial bond, called Mr. Thornhill and set up an appointment to discuss the proposed plea bargain offer. At this meeting, Mr. Miller was specifically advised by Mr. Thornhill that:

- the offer was not a good deal;
- the sentence for second degree murder was five to eighteen years
- that the state did not have good cause 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."

Furthermore, Mr. Thornhill advised Respondent that he could gain an acquittal or a jury verdict of involuntary manslaughter. Respondent, who was free on a pre-trial bond, was convinced by Thornhill, who was a well-respected attorney in the area, and rejected the plea offer and went to trial, and was convicted of first degree murder and sentenced to life without the possibility of parole.

The advice given to Mr. Miller by Mr. Thornhill was that he would be either acquitted or convicted merely of involuntary manslaughter, a misdemeanor. This was the decisive factor in determining to accept Mr. Thornhill's advice in rejecting the advantageous plea bargain.

Mr. Miller was tried and convicted of first degree murder and sentenced to life in prison without the possibility of parole. The letter from trial counsel, pre-trial transcripts, and trial transcripts are fraught with information and evidence showing trial counsel did not act reasonably during the pre-trial plea negotiations which caused Mr. Miller to be subject to trial.

SUMMARY OF ARGUMENT

The Circuit Court of Raleigh County was correct in granting Respondent's Johnny Ray Miller's Petition for Habeaus Corpus because Mr. Miller 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. Respondent's trial counsel, Warren Thornhill, advised him that the advantageous plea offer of second degree murder was not a good plea deal. Mr. Thornhill advised Mr. Miller that the state did not have enough evidence to convict him of second degree murder and that he was too intoxicated to form the deliberate intention to kill. Mr. Thornhill further advised Mr. Miller that he would be either

acquitted or convicted merely of involuntary manslaughter, a misdemeanor. This was the decisive factor in determining to accept Mr. Thornhill's advice in rejecting the advantageous plea bargain. However, it was evident from the pre-trial transcripts and the trial transcripts that trial counsel did not do any investigation into this matter before he told Mr. Miller not to take the plea to second degree murder. Mr. Thornhill's advice was unreasonable and the decision of the lower court should be affirmed.

The lower court correctly held that *res judicata* does not apply to Mr. Miller's claims because *Lafler v. Cooper,* 132 S.Ct. 1376 (2012) was a change in law favorable to Mr. Miller. The lower court also correctly held that Mr. Miller's prior habeas counsel was also ineffective which can give rise to successive petitions.

The lower court also did not err by finding that trial counsel was ineffective. Trial Counsel's advice to Mr. Miller not to take the plea deal was deficient and fell below the objective standard of reasonableness. No reasonable attorney would have advised his client to reject an advantageous plea offer when the admissible evidence in the case was very strong if not overwhelming.

The record is also devoid of any evidence that the Circuit Court would not have accepted Mr. Miller's second degree murder plea. Furthermore, protestations of innocence do not prove that Mr. Miller would not have accepted a guilty plea.

In addition, zero evidence was put forth by Mr. Thornhill at trial indicating that this murder was an accident and that Mr. Miller was too intoxicated to form the intent to murder, yet trial counsel told Mr. Miller not to take a plea to second degree murder. If one were to rely on this defense, at least some shred of evidence should have been put forth by trial counsel at trial.

None of the witnesses who testified at the preliminary hearing, pre-trial motions or trial

testified that Mr. Miller was grossly intoxicated. As a matter of fact, the record is devoid of any evidence of gross intoxication by Mr. Miller. Furthermore, intoxication is not a complete defense to the chargers and would have only reduced his crime to second degree murder. The exact crime trial counsel stated was not a good plea deal.

It is clear from the letter from trial counsel and the trial transcripts that trial counsel gave Mr. Miller ineffective advice and the Mr. Miller relied on this advice to his detriment by being convicted of first degree murder and serving a life sentence without the possibility of parole. Mr. Thornhill was clearly ineffective during the plea process and the decision of the lower court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

It is Respondent's position that oral argument under W.Va. Rev. R.A.P. Rule 18(a) is not necessary in the case at hand, unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for argument and disposition by memorandum decision under Rule 19.

ARGUMENT

I. THE LOWER COURT DID NOT ERR BY CONSIDERING THE PRESENT CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Petitioner argues in their brief that the Circuit Court erred in granting Johnny Ray Miller's Petition for Post-Conviction Habeas Corpus by considering claims of ineffective assistance of counsel. However, the lower court correctly held that Respondent Johnny Ray Miller's claims are not barred by *res judicata* and that he did receive ineffective assistance of counsel during the plea bargaining stage.

a. The lower court correctly held that *res judicata* does not bar consideration of the present claim of ineffective assistance of counsel.

The lower court correctly concluded that *res judicata* does not apply to Mr. Miller's previous habeas petitions because *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) was a change in law favorable to Mr. Miller. It has long been held that a prior omnibus habeas corpus hearing is *res judicata* … however, applicant may still petition the court on the 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*. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), followed by *Markley v. Coleman*, 215 W.Va. 729, 601 S.E.2d 49 (2004). Mr. Miller's current habeas petition is not *res judicata* for two reasons: (1) *Lafler* is a change in law favorable to Mr. Miller and (2) Mr. Miller's previous omnibus habeas counsel was ineffective.

b. The Lower Court correctly found that *Lafler* is a change in law favorable to the applicant.

All criminal defendants enjoy a constitutional right to the assistance of counsel for their defense. U.S. CONST. amend. VI, XIV. As envisioned by the Sixth Amendment, the right to counsel protects the right to the *effective assistance* of counsel. Accordingly, 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. 688 (1984):

> (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different.

The two prongs in the test are considered the performance prong and the prejudice prong.

However, the decision in *Lafler* has reshaped *Strickland*. The lower court correctly held that *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 an conviction at trial upon which the applicant is sentenced more severely than if he had accepted the plea offer which prejudice is not cured "[e]ven if the trial itself is free of constitutional flaw." *Lafler* at 1386. (Appendix at p. 12)

The lower court also correctly found that *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* at 1391.

The modifications *Lafler* made to *Strickland* apply to Mr. Miller's case. Mr. Miller was prejudiced by his conviction at trial because his counsel advised him not to take the plea offer of second degree murder with a sentence of 5-18 years imprisonment. Mr. Miller should now be afforded the remedy of reoffering the original plea deal.

c. The Petitioner's argument that *Lafler* is not retroactive pursuant to *State v. Kennedy* (Kennedy II) is misguided.

The Petitioner argues *Lafler* is not retroactive pursuant to *State v. Kennedy (Kennedy II),* 229 W.Va. 756, 735 S.E.2d 905 (2012). Particularly, the Petitioner argues that *Lafler* is not a new principle of law, but instead provides a remedy for situations where counsel is ineffective during the plea negotiation process. However, this argument is misguided as the lower court correctly applied the *Blake-Kennedy* analysis to *Lafler* to certify its retroactivity.

The *Blake-Kennedy* retroactivity analysis is found in Syl. 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 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.

The lower court correctly applied each of these factors to the *Lafler* rule. For instance, the lower court correctly found that the purpose of the *Lafler* rule is to extend the *Strickland* ineffective assistance criteria to the pretrial plea negotiation stage. (Appendix at p. 13) As such, *Lafler* focuses entirely on the effectiveness of counsel during plea negotiations. (*Id*.) Moreover, a *Lafler* type ineffectiveness of counsel during plea negotiations is not cured by a trial free of constitutional error.

The lower court also found that retroactive application of the *Lafler* rule would have no discernible impact on law enforcement. (*Id*. at 14) The *Lafler* impact on trial procedure would just be a pre-trial inquiry into 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 the defendant chose to reject the offer. (*Id*.) This should not be a huge burden on law enforcement when it conducts its investigations. (*Id*.) Quite frankly, this should be performed in every criminal case from felony to misdemeanors.

Also, *Lafler* would not place a significant burden on the court system. For instance, the lower court correctly noted that the remedy of a successful *Lafler* claim is not a new trial with the necessity to locate records and witnesses from years past, but rather the rejected plea to be offered again. (*Id*.)

d. The overturning of Mr. Miller's murder conviction is not inequitable.

Petitioner also argues that overturning Mr. Miller's trial conviction would be an inequitable result. This argument is also faulty. Most criminal defendants rely heavily on their attorneys' advice when making the decision to plea, in the same way that patients rely on their doctors' advice about medical treatment. That is why it is imperative that counsel give their client's adequate and competent advice when a plea offer is made to their client.

It is not inequitable to overturn a conviction, just because a conviction is over 30 years old. The interest is a fair administration of justice. The fact of the matter is that the plea was offered to Mr. Miller and he was given ineffective advice to reject the plea offer. Denying Mr. Miller post-conviction relief would be inequitable. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. Therefore, the ruling of the lower court should be upheld.

e. Mr. Miller's habeas counsel was also ineffective which can give rise to successive petitions.

As stated before, a prior omnibus habeas corpus hearing is *res judicata* … however, an applicant may still petition court on the 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. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), followed by *Markley v. Coleman*, 215 W.Va. 729, 601 S.E.2d 49 (2004). Mr. Miller may bring this habeas petition not only because *Lafler* was a favorable change in law, but also because the lower court also found the Mr. Miller's habeas counsel was also ineffective.

An adjunct to the constitutional right to counsel on the initial appeal is the constitutional right to effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985)(right to effective

assistance of counsel applies on an appeal as of right). The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. On the performance prong, the petitioner must, "show that [appellate] counsel was objectively unreasonable, see *Strickland*, 466 U.S. at 687-691, in failing to find arguable issues to appeal-that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

On the prejudice prong, the petitioner, "must show a reasonable probability that, but for counsel's [error], he would have prevailed on his appeal." *Smith* at 285. In this matter, but for habeas counsel's errors, Mr. Miller would have prevailed in his prior habeas hearings.

For example, the lower court was correct in ruling that habeas counsel was ineffective in allowing Mr. Miller to present his habeas testimony in narrative form. (Appendix at p. 14) As noted by the Honorable Judge Robert Burnside, Jr., one of the problems with presenting evidence in narrative form is that it does not allow for an adequate telling of the situation. (*Id*. at 18) A situation which is very important to a matter. Furthermore, it results in a disorganized and unclear presentation of the testimony. Which was actually the case in Mr. Miller's previous petitions.

It was never made clear in his previous habeas petitions that the major issue with Mr. Miller's case was that his trial counsel gave him ineffective advice to reject the advantageous plea offer. The ineffectiveness of Mr. Miller's trial counsel at the plea stage was mainly considered an afterthought during Mr. Miller's omnibus habeas hearing. In fact, the subject was only touched on briefly. For instance, Mr. Miller's prior habeas counsel argued the following during an evidentiary hearing in front of Judge Ashworth:

> And finally, I will address this **very briefly**, Mr. Miller is alleging that counsel was ineffective when he told him not to accept the State's offer to plea to second degree murder. Mr. Miller states to me that Mr. Thornhill did not particularly discuss this at length with him, other than he just thought it was a bad deal, and Mr. Miller trusted his judgment on that. **Again, a matter of**

trial tactics, but Mr. Miller alleges that was ineffective. (See. P. 39 lines 14-21 attached hereto as Exhibit 9).

As one can analyze from habeas counsel's argument, only a brief amount of time was spent on the ineffectiveness of Mr. Thornhill during the plea bargaining stage. The pre-trial decision on whether to plead guilty is perhaps the most serious choice a defendant can make in a criminal prosecution. See *U.S. v. Gordon*, 156 F.3d 376, 380 (2nd Cir. 1998). This should have been the main focus of the omnibus habeas hearing. However, it was not given much consideration.

In addition, failure to call trial counsel as a witness also made habeas counsel ineffective. (Appendix at p. 18). This is also a very serious issue. Mr. Miller's habeas counsel should have called Mr. Thornhill to the stand during the omnibus hearing to testify about the communications between Mr. Thornhill and Mr. Miller concerning the plea offer. One question omnibus habeas counsel could have asked of Mr. Thornhill was why he told his client in a letter not to take a plea deal before even discussing it with him. This failure to call trial counsel has resulted in Petitioner being able to argue that Mr. Miller is relying on his own self-serving testimony in this habeas.

As stated before, according to *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), omnibus habeas corpus hearing decisions are final unless they address one of the following narrow exceptions, *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*. Quite frankly, if more time and argument was put into the ineffective assistance argument at the plea negotiation stage during the omnibus hearing, this issue would have already been properly ruled upon. Ineffective assistance of counsel during the plea negotiations was not properly argued before the court in Mr. Miller's prior omnibus habeas corpus hearing. In addition,

Mr. Miller's habeas counsel failed to call Mr. Thornhill to the stand to testify about his handling of the plea offer. As such, Mr. Miller's claims are not *res judicata*.

II. THE LOWER COURT DID NOT ERR BY FINDING THAT TRIAL COUNSEL WAS INEFFECTIVE.

The Petitioner argues that the lower court committed error by concluding trial counsel was ineffective. However, the lower court correctly found that Warren A. Thornhill was ineffective during plea negotiations.

First, the State argues that when applying the *Strickland* analysis, Mr. Miller failed to prove that his counsel's "performance was deficient under an objective standard of reasonableness." However, Mr. Miller avers that, he should meet this deficiency prong as a matter of law. Mr. Miller had a right to have his counsel inform him of the plea offer and provide him with *reasonable* information about the consequences of accepting or rejecting it.

a. Mr. Thornhill's advice was deficient and fell below the objective standard of reasonableness.

Early in the criminal proceedings, and sometime after the preliminary hearing, the State of West Virginia offered Mr. Miller a plea to second degree murder by use of a firearm. (Appendix at p. 430) In 1989, second degree murder carried a sentence of 5-18 years in prison.

Mr. Thornhill not only advised Mr. Miller to reject the offer based upon a misunderstanding of settled West Virginia law and the pertinent facts in the case, but also stripped Mr. Miller of his right to make the final decision of accepting or rejecting the plea offer. It was Mr. Thornhill's unreasonable opinion that the State of West Virginia did not have enough evidence for a first degree murder conviction; that the State's evidence indicated that it was an accident; and that the evidence indicated that he was too intoxicated to form deliberate intention to kill that caused Mr. Miller to

reject the plea offer. It was also unreasonable for Mr. Thornhill to state to Mr. Miller that a jury would return an acquittal or only guilty to involuntary manslaughter. At the time, involuntary manslaughter would be a misdemeanor with a sentence of one year in the county jail.

No reasonably competent attorney would have advised his client to reject an advantageous plea offer as Mr. Thornhill did in Mr. Miller's case as the admissible evidence in this case was very strong if not overwhelming. The evidence provided to Mr. Thornhill at the time of the plea offer and before trial was sufficient to show Mr. Thornhill's advice to Mr. Miller to reject this plea offer on the grounds that he could not be convicted at trial of first degree murder was deficient performance.

In 1989 W.Va. Code § 61-2-1, defined first degree murder as follows: "Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, sexual assault, robbery or burglary, is murder in the first." As the lower court accurately noted, on the same day the State of West Virginia offered the second degree murder plea, the State of West Virginia also provided its "Disclosure of Discovery." (Appendix at p. 22) This disclosure had attached a transcription of Mr. Miller's statement to the police on the night of the crime. Mr. Miller's "res gestae" statements made to a deputy sheriff at the crime scene, and Mr. Miller's admission to his sister, Vickie Miller … that he "had 'hurt' Lorelei Reed [the victim] and thought that she was dead." (*Id.*). As the lower court noted, this disclosure also gave notice of the intent to offer evidence of Mr. Miller'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." (*Id.*) All of this information was in the possession of Mr. Thornhill at the time he unreasonably told Mr. Miller that the plea to second degree murder was not a "good deal."

Mr. Thornhill had a professional duty to accurately inform Mr. Miller of the law and fully explain how extensively his facts fit the elements of first degree murder. The Model Rules of Professional Conduct provide that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." When a plea offer is made, "knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision to plead guilty." Accordingly, the lawyer "should usually inform the defendant of the strengths and weakness of the case against him, as well as the alternative sentences to which he will most likely be exposed." *See* Model Rules of the Professional Code of Conduct. Rather than blindly believing that the plea offer was not "a particularly good offer" and that the state did not have enough evidence for a first degree murder conviction, Mr. Thornhill bore the duty to at least acknowledge to Mr. Miller that a rational jury *could* have inferred intent to kill under the circumstances. Instead, he adhered to a one-sided view of the case and unreasonably advised Mr. Miller that the state's offer was not a good deal.

Mr. Miller also maintains that absent Mr. Thornhill's deficient performance, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The favorable sentence that eluded Mr. Miller in this "criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel." (See Bibas, Regulation the Plea Bargaining Market; From Caveat Emptor to Consumer Protection, 99 Cal. L. Rev. 117, 1138 (2011)). Deficient performance should be presumed in this case.

b. The record is devoid of any evidence that the Circuit Court would not have accepted Mr. Miller's second to degree murder plea.

The Petitioner also argues that Mr. Miller "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 Redd." Furthermore, the Petitioner argues that the plea offer from the state was not a "Kennedy" plea.

However, the lower court's record is devoid of any evidence that Mr. Miller would not have pled to second degree murder had he been given competent and effective legal advice by his trial counsel Warren Thornhill. Moreover, the record is devoid of any evidence that Mr. Thornhill stated to the court or the prosecutor that Mr. Miller would not take the plea because Mr. Miller proclaimed his innocence.

There is no evidence on the record which would indicate that Mr. Miller told Mr. Thornhill that he would not accept any guilty plea because he is innocent. The *Raines v. Ballard*, supra at 784 case cited by the Petitioner is clearly distinguishable from Mr. Miller's case. As the Petitioner cited, the *Raines* court found 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.

It should be noted that Mr. Miller's case is distinguishable from the *Raines* case because *Raines*' trial counsel was called to the stand to testify about his interactions with his client, whereas in this matter, Mr. Thornhill was never called to the stand to testify about why he talked Mr. Miller out of taking a plea deal. It should be noted that this is evidence of ineffective assistance of habeas counsel and therefore Mr. Miller's claims are not *res judicata*. Furthermore, there is no evidence on

the record which indicated that Mr. Miller told Mr. Thornhill that he did not want to take the second degree murder plea because he was innocent of the charges.

c. Protestations of innocence do not prove that Mr. Miller would not have accepted a guilty plea.

In *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2006), a case almost directly on point when it comes to proclamations of innocence, the United State Court of Appeals for the Sixth Circuit noted that Defendant Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea. See also *North Carolina v. Alford*, 400 U.S. 25, 33, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970) (reasons other than the fact that he is guilty may induce a defendant to so plead, … and he must be permitted to judge for himself in this respect" quoting *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, 276 (Iowa 1879)).

The Sixth Circuit Court of appeals reasoned that protestations of innocence are not dispositive on the question of reasonable probability because:

> "Defendants must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government. It does not make sense to say that a defendant must admit guilt prior to accepting a deal on a guilty plea. It therefore does not make sense to say that a defendant's protestations of innocence belie his latter claim that he would have accepted a guilty plea. Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the 5th Amendment." See *Id*.

As such, any declaration of innocence is therefore not dispositive on the question of whether Mr. Miller would have accepted the State's offer of second degree murder. Moreover, the record is devoid of any evidence Mr. Miller told trial counsel that he would not have accepted any plea deals because he was innocent. As such, any proclamation of innocence made by Mr. Miller other than to his attorney should not be considered by this Court.

Furthermore, the United States Supreme Court reasoned that "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Jae Lee v. United States*, 137 S.Ct. 1958 (June 23, 2017). However, a petitioner need not prove with absolute certainty that he would have pleaded guilty. See *U.S. v. Day*, 969 F.2d 39 (3rd Cir. 1992). *Strickland v. Washington*, does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only "reasonable probability" that that is the case. *See* 466 U.S. at 693-94, 104 S.Ct. at 2067-68.

d. Mr. Thornhill advised Mr. Miller to go to trial even though Mr. Thornhill did not have any evidence that this shooting was accidental nor was there any evidence that Mr. Miller was intoxicated at the time of the crime.

The Petitioner argues in its brief that it was Mr. Miller's goal to convince the jury that the shooting of Lorelei Reed was an accident and that Mr. Miller was grossly intoxicated at the time of the shooting. However, the record is devoid of any evidence showing that it was Mr. Miller's idea to argue that the shooting was accidental. Nor is there any evidence in the record indicating that it was Mr. Miller's idea to argue before a jury that he was grossly intoxicated at the time of the shooting. In fact, the record is full of evidence indicating that it was Mr. Thornhill's decision to forgo any plea deals and to go to trial.

For instance, the lower court noted that when Mr. Miller met with Mr. Thornhill to discuss the plea offer, Mr. Thornhill advised Mr. Miller that:

- the offer was not a good deal;
- the sentence for second degree murder was five to eighteen years
- that the state did not have good cause 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." (Appendix at p. 21-22)

Mr. Miller also testified about this plea offer meeting at his habeas hearing in 2017. Mr. Miller testified to the following:

> 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 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. (Appendix at 24-25)

As one can analyze, it was Mr. Thornhill who advised Mr. Miller that the State of West Virginia did not have enough evidence to convict him of first degree murder. It was Mr. Thornhill who told Mr. Miller that he would either be acquitted or only convicted of involuntary manslaughter. Furthermore, it was Mr. Thornhill who stated that Mr. Miller was too intoxicated to commit murder.

It should also be noted that, Mr. Thornhill's evaluation of the intoxication defense with respect to first degree murder was totally misguided. This Honorable Court has consistently stated "that a defendant must show that he was "so drunk," "too drunk," or grossly intoxicated," to negate the deliberation and premeditation elements of first degree murder. A reading of the State of West Virginia's relevant case law indicates that for a defendant to rely on this defense, he must show that his level of intoxication was gross or extreme. "*State v. Skidmore*, 228 W.Va. 166, 172, 718 S.E.2d 516, 522 (2011). In Mr. Miller's case, there was no evidence to show "gross" or "extreme"

intoxication. Mr. Miller's blood alcohol level was never taken and none of the witnesses testified in any stage of his case that the Mr. Miller was grossly or extremely intoxicated. In fact, all of the witnesses testified that he was coherent and understood what was going on the whole time. Yet, trial counsel advised Mr. Miller that he was too drunk to form intent to murder and was therefore not guilty of first degree murder or second degree murder.

Furthermore, case law states that even if trial counsel were to prove that Mr. Miller was grossly intoxicated, then it would have just reduced the first degree murder charge to second degree murder. The exact charge Mr. Miller was offered to plea. See Syl. Pt. 1, *State v. Davis*, 52 W.Va. 224, 43 S.E.99 (1902) ("A person guilty of homicide may reduce his crime from murder in the first degree to murder in the second, by showing that he was so intoxicated at the time the offense was committed as to render him incapable of doing a willful, deliberate, and premeditated act, and that he did not voluntarily become intoxicated for the purpose of committing the offense. All this may be shown by his own and the State's evidence, and the facts and circumstances surrounding the case."); *State v. Kidwell*, 62 W.Va. 466, 471, 59 S.E. 494, 496 (1907) ("[I]f a sane man, not having voluntarily made himself drunk for the purpose of committing a crime, does, while in a state of gross intoxication as to render him incapable of deliberation, commit homicide, he is guilty of no higher offense than murder in the second degree."); *State v. Painter*, 135 W.Va. 106, 113, 63 S.E.2d 86, 92 (1950) ("In trials for homicide, evidence of gross intoxication, so as to destroy the power of deliberation and capacity to meditate, may be shown as to reduce the homicide from murder of the first degree to murder of the second degree.");(In this State voluntary intoxication … will only reduce first degree murder to second degree murder.") See *State v. Rowe*, 168 W.Va. 678, 285 S.e.2d 445 (1981). As such, intoxication, is not a complete defense to murder.

Furthermore, for intoxication to be used as a defense where a weapon is used, it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the intoxication merely brought to the forefront. *State v. Brant*, 252 S.E.2d 901, 903-904 (W.Va. 1979). Trial testimony clearly showed that Mr. Miller had engaged in anti-social conduct before the murder occurred. Something trial counsel should have been able to find out prior to trial given the discovery he had received in this case.

III. Mr. Miller's case is very similar to the *Lafler* case.

Mr. Miller's case is much like the *Lafler* case. Remember in *Lafler*, the defendant's lawyer misadvised him that because he had shot his victim below the waist, the prosecution could not prove his intent to murder. The Defendant rejected the plea deal. He was later convicted at trial and was sentenced to term with a maximum of 30 years in prison.

In Mr. Miller's case, Mr. Thornhill informed Mr. Miller that he could not be convicted of murder because he was too intoxicated. Case law in West Virginia proves that this was clearly wrong and ineffective advice. Therefore, the ruling of the lower court should be affirmed.

CONCLUSION

A lawyer must take care not to coerce a client into either accepting or rejecting a plea offer. *United States v. Pitcher*, 559 F.3d 120, 125 (2nd Cir. 2009). The Sixth Amendment is violated when a defendant forgoes a plea due to ineffective assistance of counsel and is then convicted and receives a more severe sentence than would have resulted from the plea.

There is objective evidence showing that trial counsel was ineffective in his advice to Mr. Miller to decline the plea deal. Particularly, the letter sent to Mr. Miller informing him that the plea to second degree murder was not a good deal. This ineffective advice caused Mr. Miller to go to trial

where he was convicted and given a life sentence.

It is clear from the letter from trial counsel and the trial transcripts, that trial counsel gave Mr. Miller ineffective advice and that Mr. Miller relied on this advice to his detriment by being convicted of first degree murder and serving a life sentence without the possibility of parole.

If counsel had conducted a reasonable evaluation of or investigation into the State's discovery disclosures and the information provided to him by Mr. Miller 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 or premeditation and malice that the disclosed witnesses would provide. The State had significant evidence against Mr. Miller which would lead to a first degree murder conviction. The State had evidence of premeditation and prior instances of violence by the Petitioner towards the victim, Lorelei Reed, in addition to an admission that he had shot and killed her. Mr. Miller's trial counsel was clearly ineffective and the decision of the lower court should be affirmed.

Respectfully Submitted:

/s/ Kevin J. Robinson
Kevin J. Robinson (W.Va. Bar No. 10181)

Counsel for Respondent and Petitioner-below,
Johnny Ray Miller

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendant, does hereby certify on this 9th day of February, 2023, that a true copy of the foregoing **"Respondent Johnny Ray Miller's Response to Petitioner's Brief"** was served upon opposing counsel via the E-Filing System maintained by the Intermediate Court and Supreme Court of Appeals of West Virginia, and upon the counsel of record via U.S. mail as follows:

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/s/ Kevin J. Robinson
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