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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF SALEM

DERRICK EDWARD LASTER,

Petitioner,

v. Case No. 11-439

BOBBY D. RUSSELL, SUPERINTENDENT OF WESTERN VIRGINIA REGIONAL JAIL,

Respondent.

Final Order

Upon mature consideration of the pleadings and controlling legal authority and a review of the record in the case of Commonwealth of Virginia v. Derrick Edward Laster, (CR09000492), which are hereby made a part of the record in this habeas corpus matter, and upon consideration of the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

The petitioner is confined pursuant to a final judgment of this Court entered on January 3, 2011, wherein the Court convicted him, after plea of *nolo contendre*, of animate object penetration. The Court

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sentenced petitioner to 30 years in prison with 20 years suspended. (Case No. CR09000492-01).

On September 16, 2011, the petitioner, by counsel, filed the instant habeas petition. He raises the following allegation:

(A) Counsel [Lawrence] was ineffective for not communicating the Commonwealth's plea offer of four months imprisonment, amounting to a violation of the Sixth and Fourteenth Amendment to the Constitution.

Procedural History

The First Trial

The petitioner originally was charged with animate object penetration, and a preliminary hearing was held on October 5, 2009. And indictment was issued for that charge. Several days before the scheduled trial date of April 29, 2010, the Deputy Commonwealth's Attorney for the City of Salem, Anne Marshal Deaton Harrell, communicated a plea offer to petitioner's counsel, Richard Lawrence, to plead guilty to felony aggravated sexual battery with a sentence of three years with all but four months suspended, in order to protect the minor victim from the trauma of having to testify at trial. The next day, Lawrence called Harrell and said the petitioner would not accept a felony offer, and that he was still maintaining his innocence.

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Lawrence asked Harrell to consider a misdemeanor offer and she refused. Thereafter, petitioner was tried by the Court and convicted of animate object penetration.

After trial, but before sentencing, the Court held a hearing at the request of newly retained defense counsel, L. Richard Padgett, Jr., because Padgett alleged that Lawrence had failed to communicate the plea offer to petitioner. Judge Robert P. Doherty presided at the trial and at the hearing regarding the plea offer. At that hearing, Lawrence testified that in his 40 years of practice, he had always communicated any offer that was made to a criminal defendant, but acknowledged that he could not specifically recall such a conversation involving the offer at issue in this case. Lawrence testified that throughout plea negotiations in the case, the petitioner had repeatedly "maintained his innocence" and had told Lawrence that he would not "take a felony."

At that hearing the petitioner testified that prior to trial "I said [to Lawrence] I didn't want to take a felony charge." He also acknowledged that he told counsel prior to trial that he did not want any jail time. Petitioner testified that Lawrence did not communicate the plea offer to him, and if he had, petitioner would have accepted it "in a heartbeat."

AND

After hearing the argument of counsel, Judge Doherty found that he "was not sure whether to believe the defendant and his evidence" that the plea offer was not communicated to him. However, Judge Doherty gave the petitioner the "benefit of the doubt," declared a mistrial and ordered a new trial.

The petitioner did not appeal that ruling.

Judge Doherty thereafter recused himself from hearing the new trial, stating that he did not believe that the petitioner's testimony at trial was credible.

The Second Trial

On November 4, 2010, the new trial date, and represented by L. Richard Padgett, Jr., petitioner entered a plea of *nolo contendre*. During his plea colloquy the petitioner represented that he was pleading no contest freely and voluntarily, that no one had forced, coerced or tricked him into entering his plea and that no one had made him any promises in exchange for his plea. He represented that there was nothing Padgett had failed to do that he wanted him to do, he had no criticisms or complaints about Padgett's representation and he was completely satisfied with Padgett's legal services. He also told the Court that he did not believe he had any plea agreement. Petitioner

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acknowledged to the Court that he understood that the maximum possible penalty was a life sentence. The Court convicted petitioner and sentenced him to serve 30 years in prison with 20 years suspended.

Petitioner did not appeal his conviction.

Habeas Proceedings

After filing his habeas petition, petitioner filed a motion to recuse the Court from hearing this matter. After receiving petitioner's petition for writ of habeas corpus and respondent's motion to dismiss, petitioner's motion for recusal and the respondent's responsive pleading, the Court heard oral argument on March 8, 2012. Thereafter, the Court granted respondent's motion to dismiss and denied petitioner's motion for recusal.

On March 31, 2012, the United States Supreme Court decided *Lafler v. Cooper*, __, U.S. __, ___, (2012) and *Missouri v. Frye*, ___, U.S. ___, ___ (2012). After reviewing those cases, the Court, on its own motion, vacated its previous order granting the motion to dismiss and asked the parties to reargue the case in light of the decisions in *Lafler* and *Frye* and to present any necessary evidence.

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On April 17, 2012, counsel for the petitioner and respondent appeared before the Court. At the April 17, hearing the Court allowed the petitioner to amend his pleading to request the remedy of specific performance, arguing that the prosecutor was required to offer him the same plea terms originally offered before the first trial. The Court granted petitioner's motion to amend his pleading and allowed the respondent to respond orally. The Court heard oral argument from both parties on the effect of the *Frye* and *Lafler* decisions on this Case.

Both counsel for the petitioner and counsel for the respondent declined to offer any evidence outside the record before the Court.

Petitioner alleges that Richard Lawrence, the trial attorney during his first trial, was ineffective for failing to communicate to him the Commonwealth's plea offer to him before his first trial.

Jurisdiction

The Court finds that it has no jurisdiction to reach this issue because the petitioner's detention is not the result of his first trial. Instead he is detained pursuant to his guilty plea (nolo contendre) entered at his second trial, where he was represented by attorney Padgett, that took place after the Court granted him a mistrial or new trial.

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The sole inquiry in a habeas corpus proceeding is "the legality of a petitioner's ***detention*** and whether the petitioner presently is ***detained*** in violation of any constitutional rights." *Lovitt v. Warden*, 266 Va. 216, 240, 585 S.E.2d 801 (2003) (emphasis added). "[T]he purpose of the writ of habeas corpus is to test the legality of a prisoner's detention." *McClenny v. Murray*, 246 Va. 132, 134, 431 S.E.2d 330, 331 (1993).

> Code § 8.01-654(A)(1) allows a petitioner to challenge the lawfulness of the entire duration of his or her detention so long as an order entered in the petitioner's favor will result in a court order that, on its face and standing alone, will directly impact the duration of the petitioner's confinement.

Carroll v. Johnson, 278 Va. 683, 693, 685 S.E.2d 647, 652 (2009).

Here, petitioner alleges ineffective assistance of counsel at his first trial, but is detained solely as the result of his second trial, where he had different counsel. When a criminal defendant is granted a new trial after a mistrial he may not thereafter be heard to complain about errors in the first trial. *See, e.g., Commonwealth v. Diaz*, 266 Va. 260, 266, 585 S.E. 2d 552, 555 (2003). ("In a trial de novo the circuit court disregards the judgment of the district court, hears the evidence anew and may consider new evidence, and makes final disposition of the case as if the case had not proceeded to judgment

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in the district court."); *see also* *United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1983) (holding that evidentiary ruling from trial which ended in a mistrial was not binding at new trial because "the previous trial is a nullity, the court in the new trial tries the case as if it were being tried for the first time as if there had been no prior trial.").

The Court finds that this case is distinguishable from *Frye* and *Lafler*, because in this case a mistrial was granted after the petitioner's first trial, and the petitioner is detained as the result of proceedings which occurred after the mistrial was granted.

Petitioner entered a guilty plea (nolo contendre) at his second trial, representing to the Court that he was entering his plea freely and voluntarily, that he was satisfied with the services of counsel and that he understood that he had no plea agreement. He has not alleged ineffective assistance of counsel by Padgett at his second trial. Given those representations, he cannot now be heard to complain about the Court's acceptance of his plea, having failed to ask the Court at that time to enforce the previous offer of a plea agreement. *See Anderson v. Warden*, 222 Va. 511, 516, 281 S.E.2d 885, 888 (1981) (petitioner bound by representations he made at his guilty plea colloquy about the voluntariness of his plea and the effectiveness of his counsel).

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Ineffective Assistance of Counsel

The Court finds in the alternative that petitioner has failed to demonstrate ineffective assistance of counsel as required by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the petitioner has the burden to show both that his attorney's performance was deficient ***and*** that he was prejudiced as a result. *See Strickland*, 466 U.S. at 687. *Accord Smith v. Spisak*, 558 U.S. __, ___, 130 S. Ct. 676, 685 (2010). The *Strickland* test applies to cases where the petitioner has entered a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

"Unless [the petitioner] establishes both prongs of the two-part test, his claims of ineffective assistance of counsel will fail." *Jerman v. Director of the Department of Corrections*, 267 Va. 432, 438, 593 S.E.2d 255, 258 (2004).

The first prong of the *Strickland* test, the "performance" inquiry, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "The petitioner must first show that 'counsel's representation fell below an objective standard of reasonableness.'" *Shaikh v. Johnson*, 276 Va. 537, 544, 666 S.E.2d 325, 328 (2008) (quoting *Strickland*, 466 U.S. at 687-88).

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The second prong of the *Strickland* test, the "prejudice" inquiry, requires showing that there is a "***reasonable probability*** that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of a guilty plea, a demonstration of prejudice requires petitioner to establish "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Determination of the existence of prejudice in cases where a guilty plea has been entered requires an *objective* analysis. *See Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). "To obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. ___, ___, 130 S. Ct. 1473, 1485 (2010) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

Finally, in *Missouri v. Frye*, the United States Supreme Court held that the failure of an attorney to communicate a plea offer is ineffective assistance of counsel. ___ U.S. at ___, slip op at 3-15. The Court held that to show prejudice under such circumstances, the

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petitioner must show that after offer has lapsed or been rejected because of counsel's deficient performance, he must demonstrate a "reasonable probability [he] would have accepted earlier plea offer . . . , a reasonable probability the plea would have been entered without the prosecution canceling it, or the trial court refusing to accept it, if the [prosecution or trial court] had that discretion under state law." *Id. at* __, slip op at 11.

In *Lafler v. Cooper*, the Supreme Court held that the appropriate remedy under such circumstances may be to require the prosecution to reoffer the plea. ___ U.S. at ___, slip op. at 12-13.

In this case, the Court finds, in the alternative, as stated above, based on the record, that counsel did not communicate the plea to the petitioner. Thus, the Court finds that the petitioner has established that counsel Lawrence rendered deficient performance.

The Court further finds that the petitioner has shown a reasonable probability that he would have accepted the plea, had it been communicated to him.

However, the Court finds that petitioner has failed to show a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. *Frye*,

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___ U.S. at ___, slip op. at 11. The petitioner has presented no evidence to support either of those findings and the Court finds, based on the circumstances of this case, that it would not have accepted such a plea.

In Virginia, "a Commonwealth's Attorney may withdraw from a proposed plea agreement at any time before the actual entry of a guilty plea by a defendant or any other change of position by the defendant resulting in prejudice to him because of reliance upon the agreement." *Commonwealth v. Sandy*, 257 Va. 87, 91, 509 S.E.2d 492, 494 (1999). Absent judicial approval, a proposed plea agreement cannot be binding on the Commonwealth because the defendant has suffered no harm. "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." *Id.* *See also Mabry v. Johnson*, 467 U.S. 504 (1984) (holding that defendant was not entitled to specific performance where agreement was reached before trial but the prosecutor withdrew offer before agreement was communicated to court).

END

Accordingly, the petitioner has failed to prove *Strickland* and *Hill* prejudice.

The Court thus is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed.

The Court is further of the opinion that recusal in this case is not required.

ADJUDGED and **ORDERED** that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed.

It is further **ORDERED** for the reasons stated in respondent's objection to petitioner's motion to recuse and for reasons stated more fully from the bench that petitioner's motion to recuse is denied.

~~It is further **ORDERED** that counsel for the petitioner's endorsement on this Order is dispensed with pursuant to Rule 1:13 of the Supreme Court of Virginia.~~

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The Clerk is directed to forward a certified copy of this Order to Joseph F. Grove, counsel for the petitioner and Rosemary V. Bourne, Assistant Attorney General, counsel for the respondent.

Entered this 17TH day of MAY, 2012.

Judge

I ask for this:

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Seen and Objected to: in its entirety

Joseph F. Grove,
Counsel for the Petitioner

A COPY TESTE:
G. CHANCE CRAWFORD, CLERK
CITY OF SALEM CIRCUIT COURT
BY: _____ DEPUTY CLERK

Derrick Edward Laster v. Bobby Russell, Superintendent of Western Virginia Regional Jail - No. 121282

The following assignments of error were granted in this case:

I. The Circuit Court erred by abusing its discretion in determining that it did not have jurisdiction to reinstate the Commonwealth's original plea offer of four (4) months active time in jail.

II. The Circuit erred by abusing its discretion in determining that the plea offer may have been withdrawn or allowed to be withdrawn by the Commonwealth.

III. The Circuit Court erred by abusing its discretion in determining that the Court would not have accepted the plea offer of four (4) months.