IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 121282

DERRICK EDWARD LASTER

Appellant

v.

BOBBY D. RUSSELL, SUPERINTENDENT OF WESTERN VIRGINIA REGIONAL JAIL

Appellee

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS 3

ARGUMENT 6

I. Standard of review as to all claims. 6

II. THE CIRCUIT COURT CORRECTLY RULED THAT IT DID NOT HAVE JURISDICTION TO GRANT PETITIONER THE RELIEF HE HAD REQUESTED WHERE HE COMPLAINED ABOUT ALLEGED ERRORS THAT OCCURRED IN THE FIRST TRIAL BUT WAS NOT DETAINED AS THE RESULT OF THE FIRST TRIAL. (ASSIGNMENT OF ERROR I) 8

II. THE CIRCUIT COURT WAS NOT PLAINLY WRONG IN DETERMINING THE COMMONWEALTH'S ATTORNEY WOULD NOT HAVE EXTENDED THE PLEA OFFER AND THAT THE COURT WOULD NOT HAVE ACCEPTED THE OFFER. (ASSIGNMENTS OF ERROR II AND III). 13

A. This Court should not reach petitioner's argument that the trial court erred in applying a subjective analysis because he never raised that objection during the habeas hearing or in a written objection 13

B. The Court did not err by finding that petitioner failed to prove *Strickland* prejudice. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Warden, 222 Va. 511,
281 S.E.2d 885 (1981) 12

Carroll v. Johnson, 278 Va. 683,
685 S.E.2d 647 (2009) 9

Commonwealth v. Diaz, 266 Va. 260,
585 S.E. 2d 552 (2003) 9

Commonwealth v. Sandy, 257 Va. 87,
509 S.E.2d 492 (1999) 15

Curo v. Becker, 254 Va. 486,
493 S.E.2d 368 (1997) 6

Green v. Young, 264 Va. 604,
531 S.E.2d 135 (2002) 6

Harrington v. Richter, 562 U.S. ___,
131 S. Ct. 770 (2011) 7

Hedrick v. Warden, 264 Va. 486,
570 S.E.2d 840 (2002) 6

Jerman v. Director of the Department of Corrections,
267 Va. 432 593 S.E.2d 255 (2004) 7

Lafler v. Cooper, 132 S. Ct. 1376 (2012) 5, 9, 10, 11, 13, 14

Lewis v. Warden of Fluvanna Correctional Center,
274 Va. 93, 645 S.E.2d 492 (2007) 6

Lovitt v. Warden, 266 Va. 216,
585 S.E.2d 801(2003) 6, 8

Mabry v. Johnson, 467 U.S. 504 (1984) 15

McClenny v. Murray, 246 Va. 132,
431 S.E.2d 330 (1993) 8

Missouri v. Frye, ___ U.S. ___ (2012) ..... passim

Missouri v. Frye, 132 S. Ct. 1399 (2012) 10

Peyton v. King, 210 Va. 194,
169 S.E.2d 569 (1969) 11

Savino v. Commonwealth, 239 Va. 534,
391 S.E.2d 276 (1990) 11

Slayton v. Parrigan, 215 Va. 27,
205 S.E.2d 680 (1974) 11, 12

Smith v. Spisak, 558 U.S. __,
130 S. Ct. 676 (2010) 7

Strickland v. Washington, 466 U.S. 668 (1984) ..... passim

Tollett, Warden v. Henderson, 411 U.S. 258, 267 (1973) 12

United States v. Akers, 702 F.2d 1145
(D.C. Cir. 1983) 9

Warden v. Henderson, 411 U.S. 258 (1973) 12

OTHER AUTHORITIES

Rule 5:25 ..... 11, 13

Section 8.01-654(A)(1), Code of Virginia 8

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 121282

DERRICK EDWARD LASTER

Petitioner

v.

BOBBY D. RUSSELL, SUPERINTENDENT OF WESTERN VIRGINIA REGIONAL JAIL

Respondent

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The petitioner is confined pursuant to a final judgment of the Circuit Court for the City of Salem of January 3, 2011, wherein the court convicted him, after a plea of nolo contendre, of animate object penetration. The court sentenced petitioner to 30 years in prison, with 20 years suspended. (Case No. CR09000492-01).

The petitioner did not appeal his conviction.

On October 20, 2011, the petitioner, by counsel, filed a habeas petition in the circuit court alleging, "Counsel [Richard 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." (App. 164). After hearing argument, the court dismissed the petition for habeas corpus on May 17, 2012. (App. 301-314).

ASSIGNMENTS OF ERROR

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 MONTHS ACTIVE TIME IN JAIL.

II. THE CIRCUIT COURT 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 MONTHS.

STATEMENT OF FACTS

In its order denying the habeas petition, the circuit count made the following findings of facts:

The First Trial

> The petitioner originally was charged with animate object penetration, and a preliminary hearing was held on October 5, 2009. An 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. 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, Jr. 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."

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, [while] 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 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.
>
> 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.

(App. 301-309).

The circuit court found that petitioner demonstrated a reasonable probability that he would have accepted the plea had it been communicated to him, but did not show a reasonable probability that the plea would have

been entered without the prosecution withdrawing it or the court refusing to accept it. (App. 311).

ARGUMENT

I. Standard of review as to all claims.

Findings of fact cannot be reversed on appeal unless they are plainly wrong or are not supported by the evidence. *Lovitt v. Warden*, 266 Va. 216, 229, 585 S.E.2d 801, 808 (2003); *Hedrick v. Warden*, 264 Va. 486, 496, 570 S.E.2d 840, 847 (2002). A circuit court's conclusions of law, however, are subject to *de novo* review. *Lewis v. Warden of Fluvanna Correctional Center*, 274 Va. 93, 107, 645 S.E.2d 492, 500 (2007). "In a collateral attack on a judgment of conviction, a prisoner has the burden of proving by a preponderance of the evidence the claims asserted in the petition for a writ of habeas corpus." *Green v. Young*, 264 Va. 604, 608-609, 531 S.E.2d 135, 138 (2002) (citing *Curo v. Becker*, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997)) "The question whether a prisoner is entitled to habeas relief is a mixed question of law and fact." *Id.* at 489, 493 S.E.2d. at 369.

Claims of ineffective assistance of counsel are determined based on the highly demanding standard set forth for such claims in *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). "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). This two-part analysis presents a "high bar" to petitioners. *Harrington v. Richter*, 562 U.S. ___, ___, 131 S. Ct. 770, 788 (2011).

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 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. (Emphasis added).

II. THE CIRCUIT COURT CORRECTLY RULED THAT IT DID NOT HAVE JURISDICTION TO GRANT PETITIONER THE RELIEF HE HAD REQUESTED WHERE HE COMPLAINED ABOUT ALLEGED ERRORS THAT OCCURRED IN THE FIRST TRIAL BUT WAS NOT DETAINED AS THE RESULT OF THE FIRST TRIAL. (Assignment of error I).

Laster argues that the court had subject matter jurisdiction over the habeas proceedings in this case because he is in custody. (Appellant's Briief at 10). Petitioner correctly states that the circuit court has subject matter jurisdiction over habeas matters. In its order denying petitioner's habeas petition the circuit court properly held it was without jurisdiction to grant relief based an alleged ineffective assistance of counsel in the first trial. Petitioner's detention does not result from 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 trial took place after the circuit court had granted him a mistrial and a new trial. Under petitioner's reasoning he could obtain a new trial for ***any constitutional violation*** that occurred during his first trial even though a mistrial had been granted and he was not detained as a result of that proceeding.

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*, 266 Va. at 240, 585 S.E.2d at 815 (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 (guilty plea), 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 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.”).

Petitioner argues that the Supreme Court’s recent decisions in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), entitle him to a new trial and the specific performance of receiving the original plea offer from the first trial. In *Frye*, the Supreme Court held that counsel’s failure to inform a criminal defendant of a plea offer that later expired constituted deficient performance under *Strickland*. *Frye,* 132, S. Ct. at 1408.

The Court further held that in order to demonstrate *Strickland* prejudice under such circumstances the petitioner would have to show a reasonable probability that he would have accepted the offer and that the plea would have been entered without the “prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.” *Id.* at 1409.

In *Cooper*, the Court held that Cooper could establish *Strickland* prejudice where counsel’s erroneous advice about the strength of Cooper’s case led him to reject a favorable plea offer. *Cooper,* 132 S. Ct. at 1385. The Court held that the “defendant must show that, but for the ineffective assistance of counsel, there is a reasonable probability that the plea offer

would have been presented to the court (i.e. that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)." *Id*. *Cooper* further held that the proper remedy under those circumstances would be to order the State to reoffer the plea agreement. *Id.*

This case is distinguishable from *Frye* and *Cooper* because here a mistrial was granted after the Laster's first trial based upon his allegations that counsel at the first trial had failed to communicate the plea to him. Laster, however, is detained as the result of a separate proceeding which occurred after the mistrial was granted. Moreover, when the circuit court granted Laster a new trial after the first trial instead of requiring the Commonwealth to reextend the plea offer, Laster did not appeal from that ruling on the ground that the court had ordered the wrong remedy.

More significantly, Laster did not ever ask during his guilty plea hearing for the remedy of specific performance and now complains only about the ineffective assistance of counsel involving the lawyer at his first trial. (App. 103-116). *See Rule 5:25.*[1]

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[1] His failure to raise this issue at trial and on direct appeal bars him from raising it now. *See Slayton v. Parrigan*, 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974) ("A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction."). Moreover, to the extent

Instead, 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***. (App. 109, 301-314). He did not ask the court to enforce the previous offer during his colloquy. *Id.* Moreover, he has not alleged ineffective assistance of counsel by Padgett at his second trial. (App. 164-72). 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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petitioner now attempts to raise a substantive claim that he is entitled to specific performance his claim, he waived it by his voluntary guilty plea. (App. 103-116). Petitioner's guilty plea was a self-supplied conviction that waived any defenses other than those based upon jurisdiction. *Savino v. Commonwealth*, 239 Va. 534, 539, 391 S.E.2d 276 279 (1990); *Peyton v. King*, 210 Va. 194, 169 S.E.2d 569 (1969). *see also Tollett, Warden v. Henderson*, 411 U.S. 258, 267 (1973) (when defendant has admitted in open court that he is guilty of offense charged, he may not thereafter raise independent claims regarding deprivation of constitutional rights that occurred prior to entry of guilty plea).

Thus, the circuit court correctly found that it was without jurisdiction to require the Commonwealth to extend the plea offer and grant petitioner the relief he seeks.

II. THE CIRCUIT COURT WAS NOT PLAINLY WRONG IN DETERMINING THE COMMONWEALTH'S ATTORNEY WOULD NOT HAVE EXTENDED THE PLEA OFFER AND THAT THE COURT WOULD NOT HAVE ACCEPTED THE OFFER. (Assignments of error II and III).

A. This Court should not reach petitioner's argument that the trial court erred in applying a subjective analysis because he never raised that objection during the habeas hearing or in a written objection.

Relying on statements the habeas court made during the habeas hearing on April 17, 2012, Laster argues that the habeas court applied an incorrect analysis in finding that the prosecutor would have kept the offer open or that the circuit court would not have accepted it. Laster argues the habeas court judge was required to objectively analyze of these questions, but instead wrongly relied on his knowledge of the Commonwealth's attorney and the trial judge. Laster, however, never argued that the circuit court was improperly interpreting *Frye* or *Cooper* during the hearing or asked the circuit court to reconsider its rulings based on this argument. Moreover, Laster did not make this specific objection to the circuit court's final order. Accordingly,

he is barred from making this argument for the first time on appeal. *See* Rule 5:25.

B. The Court did not err by finding that petitioner failed to prove *Strickland* prejudice.

Even assuming, *arguendo*, that the habeas judge improperly relied on his own knowledge of the prosecutor and trial judge in making his alternative finding that Laster had failed to demonstrate prejudice, Laster cannot prevail because he presented no evidence that shows a reasonable probability the prosecutor would have kept the plea open or the court would have accepted the plea agreement. Laster presented no evidence, although he was given the opportunity to do so, that the Commonwealth would have kept the plea offer open or that the circuit court would have accepted it. (App. 226, 306). In order to demonstrate *Strickland* prejudice in the context of a *Cooper* and *Frye* claim, it is ***petitioner's burden*** to demonstrate a reasonable probability that the prosecutor would have kept the offer open and that the court would have accepted it. In addition to showing that a criminal defendant would have accepted the plea "[***d]efendants must also demonstrate a reasonable probability*** the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Frye*, 132 S. Ct. at 1410 (emphasis added). Laster has plainly failed to meet this burden.

Moreover, in its final order dismissing the habeas petition, the circuit court found that the petitioner had presented no evidence to establish a reasonable probability that the prosecutor would not have cancelled the plea agreement or that the court would have accepted it. (Order May 17, 2012 at 6, 11-12). This finding of fact is not plainly wrong or without evidence to support it and should be upheld on appeal.

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 prosecutor withdrew offer before

agreement was communicated to court). In any event, Judge Dorsey's comments reflect that he did make an assessment "as to the boundaries of acceptable plea bargains" in his jurisdiction, and found the proposed plea offer lacking. *See Frye,* 132 S. Ct. at 1410.

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

CONCLUSION

For the foregoing reasons the judgment of the Circuit Court for the City of Salem dismissing the petition for a writ of habeas corpus should be affirmed.

Respectfully submitted:

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CERTIFICATE OF TRANSMISSION AND SERVICE

On February 19, 2013, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and an electronic copy was sent to the Court at scvbriefs@courts.state.va.us. Three copies were mailed to Joseph F. Grove, Esquire, Joseph F. Grove P.C., 1900 Byrd Avenue Suite 101 Henrico, Virginia 23230, counsel for the appellant. An electronic copy of the brief was sent to counsel at his e-mail address: jgrovelaw@gmail.com.

The Commonwealth desires to present oral argument in this case.

_____

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