IN THE

Supreme Court Of Virginia

RECORD NO. 121282

DERRICK EDWARD LASTER,

Appellant,

v.

BOBBY RUSSELL, SUPERINTENDENT OF WESTERN VIRGINIA REGIONAL JAIL,

Appellee.

OPENING BRIEF OF APPELLANT

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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 (4) months active time in jail. Issue preserved for Appeal by Objection "in its entirety" to Order entered May 17, 2012 at p. 14, See J.A. p. #314; "Objection to all adverse rulings" stated in Transcript of Proceedings on April 17, 2012 at p.80:6-9, See J.A. p. #298.

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 The Circuit Court erred by abusing its discretion in determining that the plea offer may have been withdrawn or allowed to be withdrawn by the Commonwealth. Issue preserved for Appeal by Objection "in its entirety" to Order entered May 17, 2012 at p. 14, See J.A. p. #314; "Objection to all adverse rulings" stated in Transcript of Proceedings on April 17, 2012 at p.80:6-9 , See J.A. p. #298.

III. The Circuit Court erred by abusing its discretion in determining that the Trial Court would not have accepted the plea offer of four (4) months. Issue preserved for Appeal by Objection "in its entirety" to Order entered May 17, 2012 at p. 14, See J.A. p. #314; "Objection to all adverse rulings" stated in Transcript of Proceedings on April 17, 2012 at p.80:6-9, See J.A. p. #298.

QUESTIONS PRESENTED

I. Whether a circuit court presiding over a Petition for Writ of Habeas Corpus has jurisdiction and discretionary power to reinstate a plea offer from the Commonwealth that was not conveyed to the criminal defendant where the failure to convey said plea offer is the basis for a claim of ineffective assistance of counsel and where it is within a circuit court's discretion to award such relief?

II. Whether a circuit court presiding over a Petition for Writ of Habeas Corpus may determine that the Commonwealth would have withdrawn a plea offer of four (4) months by subjectively analyzing whether a specific Commonwealth Attorney would have withdrawn the plea offer rather than analyzing the issue objectively or determining whether the Commonwealth was allowed to withdraw the plea offer?

III. Whether a circuit court presiding over a Petition for Writ of Habeas Corpus may determine that the trial court would not have accepted a plea offer of four (4) months by subjectively analyzing whether a specific judge, and whether the same judge that is presiding over the Petition for Writ of Habeas Corpus, would have accepted the plea offer rather than analyzing the issue objectively as to whether a Virginia trial court would accept the plea offer?

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This case arose after the Appellant, Derrick Edward Laster, (hereinafter "Laster") was indicted for animate object penetration on December 11, 2009. A trial was held on April 29, 2010 resulting in Laster being convicted of animate object penetration. Laster hired a new attorney after the trial. A hearing was held on July 30, 2012 to address the issue of whether a plea offer was conveyed to Laster by his first attorney prior to trial. The First Trial Court (hereinafter "Doherty Court") ordered the issue to be briefed by counsel and held another hearing on September 9, 2010. The Honorable Robert P. Doherty presided at the first trial and both subsequent hearings. The Doherty Court declared a mistrial because it was unable to determine whether the plea offer was conveyed. Judge Doherty also recused himself from further proceedings.

The Honorable Charles N. Dorsey presided over the remaining proceedings.[1] Laster entered a plea of *nolo contender* at the second trial on November 4, 2010. The Second Trial Court (hereinafter "Dorsey Court"[2]) convicted Laster of animate object penetration. A sentencing

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[1] Judge Dorsey also presided over Laster's Petition for Writ of Habeas Corpus.

hearing was held on January 3, 2011 where the Dorsey Court sentenced Laster to thirty (30) years in prison with all but ten (10) years suspended.

A Petition for Writ of Habeas Corpus was filed on October 20, 2011. Respondent filed A Motion to Dismiss. A hearing was held on March 8, 2012. The Circuit Court that presided over the habeas (hereinafter "Circuit Court") granted Respondent's Motion to Dismiss. It then vacated its Order and held another hearing on March 31, 2012 after the United States Supreme Court issued two rulings that impacted the Circuit Court's ruling on the habeas. After a second oral argument, it denied and dismissed the Petition for Writ of Habeas Corpus by Order entered on May 17, 2012.

STATEMENT OF FACTS

Laster was initially charged with animate object penetration and two trials were held. J.A. pp. #301-314 (See Order entered May 17, 2012.). Before the first trial, the Deputy Commonwealth's Attorney of Salem City, Anne Marshal Deaton Harrell, communicated a plea offer to counsel for Laster, Richard Lawrence ("Lawrence"), offering a sentence of three (3) years with all but four (4) months suspended in exchange for a guilty plea to aggravated sexual battery. *Id.* Lawrence called Harrell and rejected the offer without communicating it to Laster. *Id.*; J.A. pp. # 290-291 (Transcript

of Proceedings on April 17, 2012 ("Apr. 17 Tran.") at p. 72:20 – 73:13.) Thereafter, Laster was tried and convicted of animate object sexual penetration in the Doherty Court. J.A. pp..# 301-314 (See Order entered May 17, 2012); J.A. p. # 53 (Trial Transcript dated April 29, 2010 ("First Trial Tran.") at p. 50:14.)

Before the sentencing hearing, Laster retained new counsel, L. Richard Padgett, Jr., who informed the Doherty Court that Lawrence had not conveyed the plea offer to Laster. J.A. pp. # 301-314 (See Order entered May 17, 2012.) A hearing was held on the issue on July 30, 2010 where the Doherty Court saw the situation with a degree of concern for fairness to Laster, but felt it had no ability to order the offer reinstated. J.A. p. # 84 (Transcript of Proceedings on July 30, 10 at p. 26:12-15.) The Doherty Court further said it had no other option than to order a new trial. J.A. p. # 86. The Doherty Court declared a mistrial by Order dated September 9, 2010 and Judge Doherty recused himself from further proceedings. J.A. pp. # 99-102 (Order dated September 9, 2010.) Laster later pled *nolo contender* in the Dorsey Court and was sentenced to thirty (30) years in prison with all but ten (10) years suspended. J.A. pp. # 301-314 (See Order entered May 17, 2012.)

Subsequently, Laster filed a Petition for Writ of Habeas Corpus which was denied on the grounds that the Circuit Court did not have jurisdiction because Laster's detention was the result of his plea in the Dorsey Court, not the first trial where the ineffective assistance of counsel occurred in the Doherty Court. J.A. pp. # 301-314 (See Order entered May 17, 2012.) The Circuit Court vacated its prior Order after the U.S. Supreme Court issued two rulings directly on point to the issues of this case. In ruling on the habeas, the Circuit Court specifically stated in reference to this case, "obviously, the case ought to be appealed." J.A. pp. # 286 (See Apr. 17, 2012 Tran. at p. 68:19.)

ARGUMENT AND AUTHORITIES

A. INTRODUCTION

The Circuit Court's ultimate ruling was that it did not have jurisdiction because Laster's detention was the result of his plea of *nolo contender* and not the ineffective assistance of counsel in the first trial. J.A. pp. # 301-314 (See Order entered May 17, 2012.) Nonetheless, the Circuit Court engaged in the *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) analysis incorporating the U.S. Supreme Court rulings of *Lafler v. Cooper,* 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) and *Missouri v.*

Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). This analysis led to the Circuit Court finding that certain elements of the claim for ineffective assistance of counsel were satisfied. J.A. pp. # 291-292 (See Apr. 17, 2012 Tran.) (finding deficient performance of counsel for Lawrence's failure to convey the plea offer at p.73:10-13 and finding that Laster would have accepted the plea offer had it been conveyed at p.74:19-23). The Circuit Court then explained that other elements were not satisfied. J.A. pp. # 294-295 (See Apr. 17, 2012 Tran.) (finding that the Commonwealth had a right to withdraw the plea offer and that it would not have reoffered the plea (See J.A. pp. 294-295; Tran. pp. 76:1 - 77:19) while also finding that the trial court[3] would have rejected the plea offer (See J.A. pp. #295-297; Tran: pp. 77:20 – 79:5)). Therefore, Laster proceeds with his assignments of error by first arguing the jurisdictional issue and then proceeding with the portions of the *Strickland* elements that the Circuit Court found not satisfied while not addressing those elements the Circuit Court found satisfied

[3] Petitioner understands the Circuit Court's analysis to mean that the Doherty Court which presided over the first trial would not have accepted the plea offer because the Circuit Court's ruling is that the second trial in the Dorsey Court prevented the Circuit Court from having jurisdiction to hear an ineffective assistance of counsel claim concerning a defense attorney, Lawrence, during the first trial in the Doherty Court. Hence, the Circuit Court did not attempt an objective analysis of whether the Dorsey Court would have accepted the plea offer.

because those factual findings were not appealed and this Court is bound unless those factual findings are plainly wrong as discussed *infra*.

B. STANDARD OF REVIEW AS TO ALL CLAIMS

On review of a petition for writ of habeas corpus, this Court is bound by a circuit court's findings of fact unless they are plainly wrong or without evidentiary support. *Hedrick v. Warden,* 264 Va. 486, 496, 570 S.E.2d 840, 847 (2002) Findings of law and conclusions that involve mixed questions of law and fact are subject to this Court's *de novo* review. *Id.* (citing *Lovitt v. Warden*, 266 Va. 216, 229, 585 S.E.2d 801, 808 (2003)). In the context of the Assignments of Error at issue, this Court should not have to engage in the analysis of ineffective assistance of counsel claims in order to determine whether the Circuit Court had jurisdiction. However, the analysis is necessary to determine whether it properly analyzed the claim (Assignments of Error II and III) even though its ultimate ruling was that the Circuit Court had no jurisdiction.

Generally, whether a criminal defendant's trial counsel was ineffective is a mixed question of law and fact subject to *de novo* review by the circuit court where the habeas petition is heard. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a

claim of ineffective assistance of counsel, the habeas petitioner must satisfy both prongs of a two-part test which is found in *Strickland v. Washington*, *supra*. The first or performance prong of the *Strickland* test requires that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." The Circuit Court presiding over the habeas petition in this case found this prong to be satisfied and the Respondent, Bobby D. Russell ("hereinafter "Russell") did not appeal that finding. J.A. pp. # 291-292 (See Apr. 17, 2012 Tran.) (finding deficient performance of counsel for Lawrence's failure to convey the plea offer at p.73:10-13 and finding that Laster would have accepted the plea offer had it been conveyed at p.74:19-23). Therefore, this Court is bound by that finding.

In the second, or prejudice prong of the *Strickland* test, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However, "'a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome' in order to establish prejudice under *Strickland,* and the probability standard is not a sufficiency of evidence test." *Weekly v Jones,* 56 F.3d 899

(8th Cir. 1995) (quoting *Strickland,* 104 S.Ct., at 2068). The *Strickland* court also held that "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland,* 104 S.Ct., at 2086. "A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* The Court in *Strickland* also held that "the ultimate focus of inquiry must be the fundamental fairness of the proceeding whose result is challenged," *Id.* at 2070.

Therefore, Laster asserts that this Court must engage in a de novo review of the second prong of *Strickland* in order to determine whether the circuit court erred in its subjective analysis and in determining it did not have jurisdiction.

C. 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 (4) months active time in jail. Issue preserved for Appeal by Objection "in its entirety" to Order entered May 17, 2012 at p. 14; "Objection to all adverse rulings" stated in Transcript of Proceedings on April 17, 2012 at p.80:6-9.

The Circuit Court ruled in its Order of April 17, 2012 that it "has no jurisdiction to reach this issue [unlawful detention] because Laster's detention is not the result of his first trial." J.A. p. # 306. Instead, the Circuit court ruled that his detention was solely the result of his *nolo contender* plea at the second trial in the Dorsey Court. However, the Circuit Court failed to recognize that the Doherty Court had the discretionary power to reinstate the plea offer rather than declaring a mistrial and proceeding with a second trial, and that but for the ineffective assistance of counsel in not conveying the plea offer of four (4) months, there never would have been the second trial and the thirty (30) year sentence.

A circuit court hearing a Petition for Writ of Habeas Corpus has to have subject matter or "potential" jurisdiction as well as "active" jurisdiction. *Ghameshlouy v. Commonwealth,* 279 Va. 379, 388–89, 689 S.E.2d 698, 702–03 (2010). Virginia jurisprudence has long established that jurisdiction is determined at the time the litigation is filed and remains until the end of

the litigation. As was stated in *Laing v. Commonwealth,* 205 Va. 511, 514, 137 S.E.2d 896, 899 (1964): "[I]t is axiomatic that when a court acquires jurisdiction of the subject matter and the person, it retains jurisdiction until the matter before it has been fully adjudicated." *See also Jones v. Commonwealth,* 227 Va. 425, 429, 317 S.E.2d 482, 484 (1984) (court acquired and retained jurisdiction until matter fully adjudicated); *Rochelle v. Rochelle,* 225 Va. 387, 391, 302 S.E.2d 59, 62 (1983) (same); 20 Am.Jur.2d, Courts §§ 98, 100, 101 (2011) (citing cases). Though intervening events may affect the nature of the relief available, they do not affect jurisdiction. *E.C. v. Virginia Dept. of Juvenile Justice,* 283 Va. 522, 527-30, 722 S.E.2d 827, 829-31 (2012) (holding that the habeas corpus statutes [Virginia Code § 8.01-654] vested the circuit court with subject matter jurisdiction of the proceeding and active jurisdiction arose because the petitioner was detained for purposes of habeas corpus when the petition was filed thereby reversing the circuit court's order because it erred in determining it did not have jurisdiction (citing *Ghameshlouy,* 279 Va. at 388–89, 689 S.E.2d at 702–03;. *Laing,* 205 Va. at 514, 137 S.E.2d at 899)). Similarly here, regardless of a new trial being granted to Laster in the underlying criminal proceedings, the Circuit Court had jurisdiction to hear the habeas because such events do not affect jurisdiction.

Therefore, the established precedent states that a circuit court has jurisdiction to hear a habeas once it is filed. The Circuit Court in this case engaged in a jurisdictional analysis that was completely inappropriate by determining whether Laster had already been granted the remedy of a new trial, which the Circuit Court concluded was the only remedy available. It engaged in a remedy analysis for purposes of determining jurisdiction. Though the circuit court erred when engaging in this improper analysis, it is necessary to proceed with the analysis to explain why the Circuit Court's analysis was nonetheless incorrect.

The U.S. Supreme Court stated, "An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel." *Lafler v. Cooper,* 132 S. Ct. 1376, 1390, 182 L. Ed. 2d 398 (2012); (citing *Hill v. Lockhart*, 474 U.S. 52, 57-59, 106 S. Ct. 366, 370 (1985) (applying *Strickland* to assess a claim of ineffective assistance of counsel arising out of the plea negotiation process)). The Supreme Court also stated that "This Court made clear that "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes, *Id.,* at 1392, 130 S.Ct., at 1486 and rejected the argument made by the State in this case that a knowing and voluntary plea supersedes defense counsel's errors." *Missouri v. Frye*, 132

S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (citing *Padilla v. Kentucky,* 559 U.S. ——, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); *Montejo v. Louisiana,* 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Therefore, Laster is unlawfully detained as a result of the circuit court's sentencing; thereby, giving it jurisdiction to address the Petition for Writ of Habeas Corpus and the plea of *nolo contender* does not prevent the Court from hearing the ineffective assistance of counsel claim because a new trial does not supersede defense counsel's errors.

The underlying issue regarding jurisdiction, as analyzed by the Circuit Court, concerned whether the Doherty Court provided the appropriate remedy for the plea offer not being conveyed. Declaring a mistrial was the result of the Doherty Court concluding it did not have the power to reinstate the plea offer. J.A. pp. #84-86 (See July 30, 2010 Transcript at p. 26:4-27:7 and 28:3-7); J.A. pp. # 93-94 (September 9, 2010 Transcript at p. 3:3-4:1); J.A. pp. # 99-101 (Order dated September 9, 2010.) The Circuit Court erred in ruling on the habeas that it had no jurisdiction because the Doherty Court ordering a mistrial rather than reinstating the plea offer caused the constitutional violation to carry forward to the second trial in the Dorsey Court. The Doherty Court failed at trial to recognize it had discretion to

reinstate the plea offer and then the Circuit Court erred in making the same determination on the habeas. The *Lafler* Court explained the type of discretionary power that existed in this case because it was the same situation:

> The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between. *Lafler v. Cooper,* 132 S. Ct. 1376, 1389, 182 L. Ed. 2d 398 (2012)

It is not a matter of whether specific performance is requested as Russell argued in the habeas proceedings. Rather, it is a discretionary power any court has regardless of the remedy requested. Laster had a plea offer of a lesser sentence than he received and that plea offer was not conveyed. Russell argued and the Circuit Court accepted a technicality regarding the

type of remedy requested, that does not exist causing the Circuit Court to determine it did not have jurisdiction. Laster's detention is a result of the Doherty Court and now the Circuit Court not realizing it had this discretionary power. The Doherty Court declaring a mistrial was the improper remedy. Specific performance and reinstating the plea was then and still is the proper remedy.[4] Even if a new trial was the proper remedy, it was the Doherty Court's failure to recognize that it could reinstate the plea offer that violated Laster's constitutional rights a fact of which Judge Dorsey was in doubt when he stated during the habeas proceedings that "obviously, the case ought to be appealed." J.A. p. # 286 (See Apr. 17 Tran. at p. 68:19.) The Doherty Court believed it did not have poser to reinstate the plea offer. The Circuit Court relied on this in conjunction with the grant of a second trial as a basis for concluding it did not have jurisdiction. This was an incorrect jurisdictional analysis. Even if one assumes it was a correct analysis, the Circuit Court still erred because the remedy analysis demonstrates that both the Doherty Court and the Circuit Court have the power to reinstate the plea and the ineffective assistance of

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[4] The common response to specific performance being an appropriate remedy is that it will open the floodgates to litigation by encouraging convicted defendants to overturn their conviction but this concern was addressed by the *Lafler* Court that discusses how similar precedent has not previously caused such a result. See *Lafler* at 1389-1390.

counsel was allowed to carry through to the second trial. Both the Circuit Court's jurisdictional analysis and, assuming it to be a correct analysis, its conclusion constitutes reversible error.

II: **The Circuit Court erred by abusing its discretion in determining that the plea offer was withdrawn or allowed to be withdrawn by the Commonwealth. Issue preserved for Appeal by Objection "in its entirety" to Order entered May 17, 2012 at p. 14; "Objection to all adverse rulings" stated in Transcript of Proceedings on April 17, 2012 at p.80:6-9.**

In ruling on the habeas, the Circuit Court analyzed whether the Commonwealth would have continued to offer the plea bargain and not withdrawn it by stating:

> I don't think the Commonwealth – and I'm going to find that in this case, under the facts of this case, knowing the Commonwealth attorney in Salem, who was a former Assistant Commonwealth attorney for the City of Roanoke, who appeared in front of me here, who also I know from the community, I know from the practitioners, knowing the Assistant Commonwealth attorney for the City of Salem, who also used to be an assistant attorney for the City of Roanoke, who I know from the community and otherwise...I absolutely cannot imagine that it would have been continued or not withdrawn as discussed. J.A. 294-295 (Apr. 17 Tran. at p.76:24 – 77:13).

In applying this reasoning that the Commonwealth would have withdrawn the offer based upon what the judge knew personally about the attorneys,

the Court failed to adhere to an objective analysis as required by the U.S. Supreme Court which stated:

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make **an objective assessment** as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework. *Missouri v. Frye*, 132 S. Ct. 1399, 1410, 182 L. Ed. 2d 379 (2012) (emphasis added)

Rather than the Circuit Court analyzing it objectively based upon assessment of the boundaries of an acceptable plea bargain, the Circuit Court chose to base its conclusion upon what it knew about the attorneys that the judge had been involved with in the community. Such an analysis directly contradicted the approach outlined by the U.S. Supreme Court and constitutes reversible error.

Had the Circuit Court engaged in an objective analysis, it would have had no choice but to find the second prong satisfied because the earlier factual finding by the Circuit Court that the plea bargain was not conveyed coupled with the factual record indicating Laster's end result

was a harsher sentence that he would have received if he had been given the opportunity to accept the plea bargain of four (4) months active jail time, required the Circuit Court to find a *per se* violation of Laster's Sixth Amendment constitutional rights. The Circuit Court was required to do so because where defense counsel has failed to inform a defendant of a plea offer, the federal courts have been unanimous in finding that such conduct constitutes a violation of the defendant's Sixth Amendment constitutional right to effective assistance of counsel. *See, e.g., Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir.1986); *United States ex rel. Caruso v. Zelinsky,* 689 F.2d 435, 438 (3d Cir.1982); *Teaster v. United States,* CIV.A. 705CV00169, 2005 WL 2671348 (W.D. Va. Oct. 19, 2005). The Supreme Court noted that the representation of a criminal defendant entails certain basic duties, which include the duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. *Strickland,* 466 U.S. at 688. A failure of counsel to advise a client of a plea bargain constitutes a gross deviation from the accepted standards of professional conduct and would deny a defendant's Sixth Amendment rights. *Zelinsky,* 689 F.2d at 438. Criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution,

and failure to do so constitutes ineffective assistance of counsel. *Johnson,* 793 F.2d at 902. A defendant must be involved in the decision-making process regarding the ultimate acceptance or rejection of a plea offer. *Id.*

The *Teaster* court expounded upon the reasons for the unanimity in the federal courts stating:

> The reason why courts have been unanimous in finding that a defendant is denied his Sixth Amendment right to counsel when defense counsel fails to inform the defendant of a plea offer is because a plea offer affords the defendant the choice of receiving a lesser punishment in exchange for pleading guilty. The failure to inform a defendant of a plea offer will, under most circumstances, render assistance of counsel as deficient because the defendant will have lost the choice whether to plead guilty and receive a less harsh sentence or to go to trial, be found guilty, and possibly receive a harsher. *Teaster v. United States,* CIV.A. 705CV00169, 2005 WL 2671348 (W.D. Va. Oct. 19, 2005).

The court went on to deny habeas relief because Teaster could not show he was prejudiced by the failure of counsel to communicate the plea offer since the sentence Teaster actually received was less than the plea offer. *Id.* In the case at bar, it is clear that Laster is currently serving a sentence of ten (10) years active jail time, much more than the four (4) months he could have served had he been made aware of the plea offer. An objective analysis would have necessarily caused the Circuit Court to find the second *Strickland* prong of prejudice

satisfied because Laster clearly would have accepted the plea, the Commonwealth offered it and there is no indication whatsoever that it would have been withdrawn other than improper subjective reasoning, and the plea was clearly less than Laster's actual sentence.

III: <u>The Circuit Court erred by abusing its discretion in determining that the Court would not have accepted the plea offer of four (4) months. Issue preserved for Appeal by Objection "in its entirety" to Order entered May 17, 2012 at p. 14; "Objection to all adverse rulings" stated in Transcript of Proceedings on April 17, 2012 at p.80:6-9.</u>

The Circuit Court also subjectively analyzed whether the Court would accept the plea offer stating:

> I wouldn't have accepted for the reasons I stated when I sentenced Mr. Laster...And none of us have the insight or the power to examine with certainty and predict with any respectable degree of accuracy the thought process of another human being, but Judge Dougherty,[*sic*] having been on the bench two full terms in Virginia...We've been colleagues at least during the time that I've been on the bench. We practiced together prior...and we had cases together, and I was familiar with him...but I cannot imagine that Judge Dougherty [*sic*] would have accepted...J.A. 295-296 (Apr. 17 Tran. at p.77:24-78:23).

Just as the Circuit Court did in analyzing whether the Commonwealth would have withdrawn the plea offer, it considered personal relationships and experiences with individual members of the bar when analyzing the

likelihood of whether the underlying Doherty Court would have accepted a plea offer. This was not an objective analysis as required by the U.S. Supreme Court. *See Missouri v. Frye, supra.*

Additionally, the Circuit Court analyzed whether Judge Doherty would have accepted the plea without considering the fact that Judge Doherty was inclined to accept the plea but felt the Doherty Court did not have the power to reinstate it causing Judge Doherty to declare a mistrial. J.A. pp. # 84-86 (See July 30, 2010 Transcript at p. 26:4-27:7 and 28:3-7); J.A. pp. # 93-94 (September 9, 2010 Transcript at p. 3:3-4:1); J.A. pp. # 99-101 (Order dated September 9, 2010.) The Circuit Court's failure to consider the statements of Judge Doherty in trying to find the authority to reinstate the plea offer was further error because it was direct evidence that the Doherty Court would have likely accepted the plea. Judge Dorsey sitting in the Circuit Court presiding over the habeas essentially determined that the Doherty Court and the Dorsey Court[5] would not have accepted the plea simply because the judges personally would not have accepted the plea which is not an objective analysis.[6] Such an analysis directly contradicted

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[5] The referenced circuit courts are both the Salem Circuit Court.

[6] Even assuming it was an objective analysis, Judge Dorsey failed to consider Judge Doherty's comments that he was inclined to accept the plea as discussed *supra*.

the approach outlined by the U.S. Supreme Court and constitutes reversible error for the same reasons discussed *supra* regarding the second assignment of error.

D. CONCLUSION

Laster requests this Court to reverse the ruling on the Petition for Writ of Habeas Corpus, declare that the Salem Circuit Court had jurisdiction to hear the Petition, grant habeas relief by vacating Laster's sentence and remanding the case to Salem Circuit Court with an Order to reinstate the plea offer of three (3) years with all but four (4) months suspended, deem the plea offer accepted, and Order the immediate unconditional release of Laster because he has actively served more than two (2) years in jail which more than suffices the spirit of the original plea offer that was never conveyed to Laster.

Respectfully submitted,

DERRICK LASTER
By Counsel

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CERTIFICATE

The undersigned certifies that the foregoing complies with Rule 5:6 and 5:26 and further certifies as follows:

(1) The name and address of appellant is:

Derrick E. Laster #1428442
Pocahontas Correctional Facility
920 Old River Rd. , P.O. Box 518
Pocahontas, Virginia 24635

(2) The name, address, and telephone number of counsel for appellant is:

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(3) The names and addresses of the appellee are:

Bobby D. Russell, Superintendent of Western Virginia Regional Jail
5885 West River Road
Salem, Virginia 24153

(4) The name, address, and telephone number of counsel for the appellee is:

Rosemary V. Bourne, Esquire
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Facsimile: (804) 786-1991

(5) On this 22nd day of January 2013, ten (10) copies of the Joint Appendix with ten (10) electronic copies and fifteen (15) copies of the Opening Brief of Appellant were hand delivered to the Clerk's Office of the Supreme Court of Virginia.

(6) On this 22nd day of January 2013, one (1) copy of the Joint Appendix with one (1) electronic copy and three (3) copies of the Opening Brief of Appellant with one (1) electronic copy were hand delivered to counsel for the Appellees at the above address.

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