No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN WALTERS

Petitioner

v.

MICHAEL MARTIN, WARDEN

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7391

JOHN WALTERS,

Petitioner – Appellant,

v.

MICHAEL MARTIN, Warden, Huttonsville Correctional Center,

Respondent – Appellee,

and

JOHN T. MURPHY,

Respondent.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Amicus Supporting Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Frederick P. Stamp, Jr., Senior District Judge. (5:17-cv-00096-FPS)

Argued: September 23, 2021 Decided: November 18, 2021

Before WILKINSON, NIEMEYER and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Agee wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

ARGUED: Madison Mischik, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Michael Ray Williams, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee. **ON BRIEF:** Thomas V. Burch, Anna W. Howard, Sloane S. Kyrazis, Third-Year Law Student, Emily C. Snow, Third-Year Law Student, Appellate Litigation Clinic, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Patrick Morrisey, Attorney General, Lindsay S. See, Solicitor General, Thomas T. Lampman, Assistant Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee. Elizabeth A. Franklin-Best, Vice-Chair Amicus Committee, Columbia, South Carolina, David B. Smith, Vice-Chair Amicus Committee, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Alexandria, Virginia; Ruthanne M. Deutsch, Hyland Hunt, DEUTSCH HUNT PLLC, Washington, D.C., for Amicus Curiae.

AGEE, Circuit Judge:

John Walters appeals from the district court's denial of his 28 U.S.C. § 2254 petition. We granted a Certificate of Appealability ("COA") on one issue: counsel's failure to timely relay a favorable plea offer to Walters. *See* 28 U.S.C. § 2253. For the following reasons, we affirm the district court's judgment.

I.

We recite the underlying facts of this case as recounted by the Supreme Court of Appeals of West Virginia ("SCAWV") in its opinion on Walters' state habeas appeal:

> In January of 2012, [Walters] used a crowbar and knife to gain entry into his ex-girlfriend's ("victim's") home [after having allegedly caught her cheating on him]. The victim called 911 and stated that she believed someone was in her home. While the victim was on the telephone with 911 services, [Walters] entered her bedroom and demanded money and other items. [Walters] then struck the victim with a hammer he had obtained while in the home, and he left the victim's home with her cell phone and approximately $700.

Walters v. Plumley, No. 15-1062, 2017 WL 969139, at *1 (W. Va. Mar. 13, 2017). Walters was subsequently arrested and charged via information in the Circuit Court of Berkeley County, West Virginia ("state court") with first-degree robbery, in violation of West Virginia Code section 61-2-12(a); malicious assault, in violation of West Virginia Code section 61-2-9(a); and burglary, in violation of West Virginia Code section 61-3-11(a). Public defender Thomas L. Stanley was assigned to represent him.

In March 2012, the State extended a plea offer to Walters ("March plea offer"), proposing that he plead guilty to the first-degree robbery and malicious assault charges. Under the terms of the March plea offer, he would receive a twenty-year sentence on the

robbery charge, with any sentence for the malicious assault charge to run concurrently. In exchange, the State agreed to dismiss the burglary charge and to not seek a recidivist enhancement based on Walters' criminal history. Stanley's office timely received the March plea offer, which was set to expire in April 2012, but failed to communicate it to Walters until July 2012.

In the meantime, in April 2012, Walters wrote a pro se letter to the court "[r]equesting a possible bond [r]eduction," so that he could "move on with [his] [l]ife." J.A. 176. Walters did not receive a bond modification. Rather, in May 2012, a Berkeley County grand jury indicted Walters for burglary, in violation of West Virginia Code section 61-3-11(a); attempted murder, in violation of West Virginia Code sections 61-2-1 and 61-11-8; malicious assault, in violation of West Virginia Code section 61-2-9(a); domestic battery, in violation of West Virginia Code section 61-2-28(a); first-degree robbery, in violation of West Virginia Code section 61-2-12(a); and assault in the commission of a felony, in violation of West Virginia Code section 61-2-10. In June 2012, Walters again wrote to the court pro se, this time explaining that he had a conflict with Stanley and requesting a new attorney. Stanley continued to represent Walters.

In July 2012, the State extended another plea offer ("July plea offer"), proposing that Walters plead guilty to all charges in the indictment, pay restitution, and receive a twenty-eight-year sentence on the first-degree robbery charge, with any other sentences to run concurrently. Stanley did communicate this offer to Walters. In response, Walters asked him to obtain a thirty-day extension of the July plea offer and withdraw from representing him based on his perception that Stanley was ineffective. Stanley secured the

extension, but did not withdraw. The July plea offer eventually lapsed without response from Walters.

During the meeting in which Stanley communicated the July plea offer to Walters, Stanley discovered the March plea offer in Walters' file and immediately informed him of it in the presence of another assistant public defender, Joseph Whiteoak. As Stanley explained during a subsequent status hearing before the state court in August 2012, he inquired whether Walters would accept the March plea offer if Stanley could persuade the State to reinstate it. According to Stanley, Walters effectively declined to pursue that option because, at that point, he "d[idn't] want to do more than 10 years." J.A. 52.

In August 2012, Walters wrote a pro se letter to the prosecutor, essentially admitting guilt and requesting that he "please consider other options in [Walters'] punishment" and "some other avenue in this case." J.A. 316. Similarly, Walters wrote a pro se letter to the court "plead[ing] for mercy in [his] case" and explaining that "most people would have reacted the same way [he did]." J.A. 179. Finally, Walters filed a pro se motion seeking to compel Stanley to withdraw, describing communication difficulties and reiterating that Stanley failed to timely relay the March plea offer. This culminated in Walters' filing of an ethics complaint against Stanley, citing, *inter alia*, his failure to communicate the March plea offer. Stanley subsequently filed a motion to withdraw, which was granted, and Nicholas Colvin was appointed to represent Walters.

In September 2012, in response to the ethics complaint, Stanley explained the circumstances of his failure to timely relay the March plea offer. In addition to conveying how the March plea offer was discovered, as noted above, Stanley said that he could not

"provide an explanation of why a copy of the plea offer was not sent to Mr. Walters." J.A. 326. Upon finding the offer, Stanley indicated that he asked Walters to authorize him to "inform the prosecutor that he would accept the March 9 plea if offered," but that "[a]fter several evasive answers, Mr. Walters rejected the March 9 plea offer." J.A. 327. Moreover, Stanley explained that Walters refused to respond to the July plea offer, indicating instead that he wanted to discuss it with his pastor. Finally, Stanley relayed that during a meeting with investigators of the Public Defender's Office, Walters expressed a willingness on that occasion to only "plead[] guilty to a misdemeanor, serve a year in jail, and make restitution."[1] J.A. 331.

After negotiating the terms of a plea with Colvin's assistance in November 2012, Walters pleaded guilty shortly before trial in January 2013. Under the terms of this final plea agreement, Walters pleaded guilty to burglary, malicious assault, and first-degree robbery. In return, the State agreed to dismiss the remaining charges of attempted murder, domestic battery, and assault in the commission of a felony, and to not pursue a recidivist enhancement. The parties also agreed that the state court would retain complete discretion for sentencing.

In preparation for sentencing, a presentence report was prepared, which revealed Walters' lengthy criminal history, including two 1991 convictions for aggravated robbery and a 1992 conviction for grand larceny. Additionally, it indicated that his parole had been previously revoked.

[1] Finding no violations of the Rules of Professional Conduct, West Virginia's Lawyer Disciplinary Board closed Walters' complaint against Stanley.

At sentencing, the State recommended a sentence of one to fifteen years for the burglary charge, two to ten years for the malicious assault charge, and forty years for the robbery charge. Walters requested a sentence no greater than the twenty-year term provided in the March plea offer. The court adopted the State's recommendation, sentencing Walters to forty-three to sixty-five years' incarceration, citing Walters' criminal history, the seriousness of the instant offense, the danger he posed to the community, and his continuation of a violent life of crime, none of which provided a basis for leniency.

Walters appealed, arguing that his sentence was excessive and that he received ineffective assistance of counsel when Stanley failed to promptly communicate the March plea offer. The SCAWV affirmed without hearing oral argument in a memorandum opinion, as it found "no substantial question of law and no prejudicial error." *State v. Walters*, No. 13-0396, 2014 WL 211950, at *1 (W. Va. Jan. 17, 2014). In doing so, it noted that Walters' "claim of ineffective assistance of counsel would more appropriately be addressed pursuant to a petition for writ of habeas corpus." *Id.* at *3.

Walters then filed a state habeas petition pursuant to West Virginia Code section 53-4A-1, contending that Stanley was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to timely disclose the March plea offer. The State moved to dismiss. The state court conducted an evidentiary hearing, at which Stanley, Walters, and Whiteoak testified.

Stanley testified about the mail intake procedure at the Public Defender's Office. He advised that his secretary was to automatically notify clients of plea offers, and that she would then place the offer letter in his mailbox for review. Stanley stated that he did not

know why this procedure was not followed with respect to the March plea offer because it was never sent to Walters, and Stanley did not receive it in his mailbox.

When he did relay the March plea offer to Walters in July, Stanley described Walters as "upset." J.A. 245. Stanley testified that he attempted to remedy the situation:

> A. And I offered to contact [the prosecutor] immediately. I was ready to pick up the phone and call [the prosecutor] and do whatever it took to get the March plea offer reinstated. But before I called, I said it's going to be a waste of time to call if you will not accept the plea offer. There's no use getting an offer back on the table if you're not going to take it. And it was about that point he said – I recall him saying something about he needed to talk to his pastor or minister and he got up and left –
>
> Q. Okay.
>
> A. – without giving me an answer as to whether or not he would accept the offer if I can get it back.
>
> Q. All right. So it's your recollection that he didn't firmly accept or reject the offer?
>
> A. No. He would not give me an answer.
>
> Q. Okay.
>
> A. Which was a hallmark of our relationship.
>
> . . . .
>
> I never called to get the March plea offer back on the table because he wouldn't give me an answer. He neither accepted nor rejected. So I didn't see much point in calling [the prosecutor] and begging to put a plea offer back on the table that he was not going to take.

J.A. 246–48. Although Stanley did not specifically recall Walters flatly rejecting the offer to pursue reinstatement of the March plea offer, he testified that "[c]learly by his conduct, he rejected the offer." J.A. 261. Stanley elaborated, "If you ask someone do you want this

offer and they don't answer, [you] at some point consider that silence to be a rejection." *Id.* Stanley also explained that, at that time, Walters "indicated . . . that he didn't think the punishment should exceed maybe three years tops in his mind." J.A. 255.

Walters testified that he was willing to accept a plea, but had no interest in working with Stanley. Walters testified that, with Colvin's assistance, he ultimately accepted a plea agreement in January 2013 that resulted in a much higher sentence than he would have received with the March plea offer, and that he would have accepted the March plea offer had it been offered at that time. Walters also stated that Stanley neither discussed the March plea offer in-depth with him nor offered to call the prosecutor about reinstating that offer, but rather encouraged him to sign the July plea offer.

Whiteoak then testified that Walters did not expressly reject the March plea offer, but "would never get around to the point of saying he would accept the offer," as "[h]e insisted on less time which basically to [Stanley and Whiteoak] was a rejection of that offer." J.A. 285. Whiteoak also recalled Walters mentioning that the case was worth about three years' incarceration.

The state court denied Walters' habeas petition for lack of prejudice. Although the court found that Stanley's failure to timely relay the March plea offer fell below an objective standard of reasonableness under *Strickland*'s first factor, it concluded that Walters could not demonstrate prejudice under the second factor. Analyzing prejudice under *Missouri v. Frye*, 566 U.S. 134 (2012)—as is appropriate for *Strickland* claims based on counsel's failure to timely relay a favorable plea offer—the court reasoned that Walters had to demonstrate a reasonable probability that (1) he would have accepted the March

plea offer had Stanley timely presented it to him, and (2) the trial court would have accepted the terms of that plea offer. The court concluded that Walters could demonstrate neither and therefore failed to establish prejudice.

Specifically, on the first *Frye* prong, the court explained that the record did not support Walters' assertion that he would have accepted the March plea offer considering he neither agreed to Stanley's proposal to seek reopening of that offer nor accepted the subsequent July plea offer. Moreover, it cited Walters' letter to the prosecutor (wherein he requested an alternative to incarceration), which was incompatible with accepting the substantial sentence provided in the March plea offer (i.e., twenty years). The court found "compelling [Walters'] testimony that it took a while for the reality of his situation to sink in and for him to accept the seriousness of his circumstances." J.A. 363. On the second *Frye* prong, it concluded that Walters failed to demonstrate a reasonable probability that the state court would have accepted the terms of the March plea offer given his serious and lengthy criminal history. Absent succeeding on both *Frye* prongs, the court explained that Walters could not demonstrate prejudice under *Strickland* to support his claim.

On appeal, the SCAWV affirmed without hearing oral argument in a memorandum opinion, as it found "no substantial question of law and no prejudicial error." *Walters*, 2017 WL 969139, at *1. Focusing on the first *Frye* prong, the SCAWV found no error in the state court's conclusion that Walters appeared unwilling to accept any substantial term of incarceration at the time of the March plea offer. The court noted that in April 2012, Walters "sent a pro se letter to the [state] court asking to be released from jail so that he could 'move on with [his] life.'" *Id.* at *5 (second alteration in original). Moreover, it

explained that Walters "continued to seek a limited sentence by writing pro se letters to the [state] court asking for mercy in August of 2012 and to the prosecuting attorney's office in [August] of 2012 asking for alternative sentencing to avoid prison entirely." *Id.* The court further indicated that while Walters cited his willingness to accept a plea proposal he sent to the State in November 2012, "his willingness to accept such a sentence came only after six months of a pending indictment and an impending trial date of January of 2013 and after his attempts to seek a less-severe sentence failed." *Id.* Finally, the court noted that Stanley "indicated that he offered to ask the State to re-open the [March plea offer] in the summer of 2012, and [Walters] refused." *Id.* at *6. The SCAWV thus upheld the state court's determination that Walters could not establish prejudice.[2] However, Justice Ketchum filed a dissenting opinion, explaining that he would have scheduled the case for oral argument:

> Without question, [Walters'] trial counsel failed to communicate the March 9, 2012, plea offer to him before it expired. That plea offer was considerably more favorable to [Walters] than the offers he later sent to the State and the offer that he ultimately accepted. Moreover, [Walters] testified that he was willing to accept the March 9, 2012, plea offer when he learned of it in July of 2012. Understandably, [Walters] did not wish to keep his trial counsel, who barely communicated with him between January and July of 2012 and who failed to properly communicate the March 9, 2012, plea offer. Under the facts of this case, the inescapable conclusion is that [Walters'] trial counsel failed him. I firmly believe that the trial counsel's failure rendered him constitutionally ineffective. [Walters] probably would have been better off acting pro se because then, at least, he would have received the plea offer on time. I would set this case for oral argument.

[2] Resolving Walters' appeal on the first *Frye* prong, the SCAWV declined to address the second prong as to the reasonable probability that the state court would have accepted the March plea offer.

Id. (Ketchum, J., dissenting).

Walters subsequently filed a federal habeas petition pursuant to 28 U.S.C. § 2254. The State moved for summary judgment. After briefing, the magistrate judge issued a report and recommendation advising that the district court grant the State's motion. Focusing on the first *Frye* prong, the magistrate judge deemed "wholly appropriate" the state court's finding that Walters could not demonstrate a reasonable probability that he would have accepted the March plea offer had Stanley timely relayed it to him. As such, the magistrate judge recommended finding that the state court reasonably concluded that Walters failed to establish prejudice.

Walters filed objections to the magistrate judge's report and recommendation. The district court overruled them, concluding that the state court's finding that Walters failed to show the requisite prejudice based on the first *Frye* prong was reasonable. *Walters v. Martin*, No. 5:17CV96, 2019 WL 4316453, at *3–4 (N.D.W. Va. Sept. 12, 2019). Specifically, it agreed with the state court that Walters' actions did not indicate he would have accepted the March plea offer, citing that he "effectively declined his counsel's offer to seek a reopening of the March 9, 2012 plea offer" and mentioning his letters to the state court and prosecutor, wherein he sought leniency or alternative sentencing to avoid prison.[3] *Id.* at *3.

Walters timely appealed, and we granted a COA on one issue: "Whether, pursuant to *Missouri v. Frye*, 566 U.S. 134 (2012), Walters established that he was prejudiced by

[3] Neither the magistrate judge nor the district court addressed the second *Frye* prong.

counsel's failure to timely relay a favorable plea offer or to seek reopening of the plea offer." Certificate of Appealability, ECF No. 29. We therefore have jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(1)(A).

Walters moved to expand the COA to include "[w]hether, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984), prejudice should be presumed because counsel's pervasive failure to communicate with Mr. Walters—both before and after the favorable plea offer—was a constructive denial of counsel." Appellant's Mot. to Expand the Certificate of Appealability, ECF No. 18. A panel of this Court denied the motion, cabining our consideration to the single issue in the COA.

II.

On appeal, Walters asserts that he satisfies the two *Frye* prongs to establish prejudice under *Strickland*. We disagree. The state court appropriately concluded that Walters failed to show a reasonable probability that he would have accepted the March plea offer had Stanley timely communicated it to him. Therefore, Walters cannot demonstrate prejudice because his claim fails on *Frye*'s first prong. Accordingly, we affirm the district court's judgment.

A.

This Court "review[s] a district court's denial of habeas relief de novo." *Teleguz v. Pearson*, 689 F.3d 322, 327 (4th Cir. 2012). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts may "entertain" an application for a writ

of habeas corpus from an inmate who claims that he is in state custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). However, we do not "disturb[] state-court judgments . . . absent an error that lies beyond any possibility for fairminded disagreement." *Mays v. Hines*, 141 S. Ct. 1145, 1146 (2021) (per curiam) (citation and internal quotation marks omitted). Said another way, § 2254 "is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams v. Taylor*, 529 U.S. 362, 383 (2000). Federal courts, therefore, cannot grant habeas relief under § 2254 unless the state court's decision: (1) "was contrary to" clearly established Supreme Court case law; (2) "involved an unreasonable application" of the same; or (3) "was based on an unreasonable determination of the facts in light of the" record before it. 28 U.S.C. § 2254(d)(1)–(2); *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

As relevant here, factual determinations are "unreasonable" when they are "sufficiently against the weight of the evidence." *Williams v. Stirling*, 914 F.3d 302, 312 (4th Cir. 2019) (quoting *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010)). However, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Instead, a "state court's factual determinations are presumed correct, and the petitioner must rebut this presumption by clear and convincing evidence." *Bennett v. Stirling*, 842 F.3d 319, 322 (4th Cir. 2016); *accord* § 2254(e)(1). On this point, "[w]e must be 'especially' deferential to

the state court's findings on witness credibility, and we will not overturn the court's credibility judgments unless its error is 'stark and clear.'" *Elmore v. Ozmint*, 661 F.3d 783, 850 (4th Cir. 2011) (internal citations omitted).

As noted above, "claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." *Frye*, 566 U.S. at 140. To establish ineffective assistance of counsel, a petitioner must prove: (1) his counsel was deficient in his representation; and (2) he was prejudiced as a result. *Strickland*, 466 U.S at 687. For the first factor, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice in this context, petitioners must demonstrate a reasonable probability that (1) "they would have accepted the earlier plea offer had they been afforded effective assistance of counsel," and (2) "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."[4] *Frye*, 566 U.S. at 147.

B.

We perceive no error, much less an unreasonable one, in the state court's decision. Rather, as the state court determined, we too conclude that Walters cannot establish prejudice[5] because his claim fails on *Frye*'s first prong. That is to say, the state court

[4] West Virginia courts have discretion to refuse a plea bargain. *State v. Waldron*, 624 S.E.2d 887, 892 (W. Va. 2005).

[5] *Strickland*'s other factor is not at issue, as the parties acknowledge that Stanley's failure to timely relay the March plea offer fell below an objective standard of reasonableness.

appropriately determined that Walters failed to show a reasonable probability he would have accepted the March plea offer had Stanley timely communicated it to him. In fact, reviewing the "contemporaneous evidence to substantiate [Walters'] expressed preferences" at the time of the March plea offer reflects he would not have accepted such an offer.[6] *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (directing courts to look to contemporaneous evidence because they "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").

The record provides ample support for the state court's factual finding that Walters was unwilling to accept a substantial term of incarceration during the relevant timeframe. In April 2012, Walters wrote a pro se letter to the state court "[r]equesting a possible bond reduction," so that he could "move on with [his] life." J.A. 176. In August 2012, he again wrote to the state court "to plead for mercy in [his] case," stating that he thought "most people would have reacted the same way" he did after having allegedly caught the victim cheating on him. J.A. 179. And in that same month, Walters asked the prosecutor to "please consider other options in [his] punishment" and "some other [a]venue in this case." J.A.

[6] We briefly note that Walters requests that we assess his claim in light of the context provided by Stanley's cumulative performance, citing various examples of perceived ineffectiveness apart from failing to timely communicate the March plea offer. We construe this as an impermissible request to expand the scope of the COA's singular issue, and decline to do so. A panel of this Court previously denied Walters' motion to expand the COA to consider the totality of Stanley's performance under *Cronic*, and we will not consider a repackaged argument to that effect now. *See Tyler v. Hooks*, 945 F.3d 159, 165 n.3 (4th Cir. 2019) (declining to address arguments "not within the scope of the issues granted by the COA" (citing 28 U.S.C. § 2253(c)(3); 4th Cir. R. 22(a))), *cert. denied*, 140 S. Ct. 2785 (2020).

316. These letters signal that around the relevant timeframe, Walters would have been unwilling to accept any term of incarceration even close to the twenty-year sentence provided in the March plea offer.

The testimony of Stanley and Whiteoak during the evidentiary hearing, as well as Walters' reaction to the March and July plea offers, bolster this conclusion. As Stanley testified, "[Walters] didn't think the punishment should exceed maybe three years tops in his mind." J.A. 255. Whiteoak corroborated this, noting that Walters believed that "whatever happened was worth about three years at most." J.A. 286. And when Stanley conveyed the March plea offer to Walters, Walters did not request that Stanley attempt to reopen it. *See* J.A. 247 (Stanley testifying that Walters "would not give [him] an answer" as to whether he would "firmly accept or reject" the March plea offer); J.A. 285 (Whiteoak testifying that Walters "never said he wanted [Stanley to attempt to reopen the March plea offer]. I don't know if he flat out said no, but he never would get around to the point of saying he would accept that offer. He insisted on less time which basically to us was a rejection of that offer"). Finally, Walters exhibited similar disinterest in accepting a plea deal when he requested that Stanley secure a thirty-day extension for the July plea offer, but then declined to act on that offer after the extension was secured.

These examples reflect an individual unwilling to accept responsibility for his actions, which is in keeping with Walters' statement that it took time for "[t]he reality [to] sink[] in of the severity of this situation." J.A. 283. In short, "[t]he record is clear that [Walters] . . . refused to accept more than limited responsibility [at the time of the March plea offer] . . . . [He] wanted a plea deal that the government simply was not willing to

offer." *Cook v. United States*, 613 F. App'x 860, 865 (11th Cir. 2015) (per curiam); *see also Feliciano-Rodríguez v. United States*, 986 F.3d 30, 38 (1st Cir. 2021) (concluding that the state court did not err when finding that the petitioner would have declined the plea offer had he known of it because "he wanted a lower plea offer from the government and he did not get one").

Walters fails to present clear and convincing evidence to the contrary. *Bennett*, 842 F.3d at 322. As for his own post hoc testimony, he asserted that he would have accepted the March plea offer "if [he] had [had] effective counsel [so] that [he] would have been able to review the matter." J.A. 278. But his "self serving assertion that he would have accepted the plea is . . . the type of testimony . . . subject to heavy skepticism." *Merzbacher v. Shearin*, 706 F.3d 356, 367 (4th Cir. 2013) (citation and internal quotation marks omitted). And his remaining arguments do not alleviate this skepticism.

For instance, Walters points to the counteroffers he sent to the State in November 2012, asserting that "[r]epeated counteroffers, the terms of which contained additional charges and longer prison sentences, are not the actions of a man unwilling to accept a plea." Opening Br. 26–27. But Walters' actions in November 2012 do not speak to his state of mind at the time of the March plea offer. As the state court persuasively recognized, "[w]hile [Walters] did send a plea offer to the State in November showing his willingness to then engage in plea negotiations, that was three months following the expiration of the State's last plea offer, which [he] rejected." J.A. 363; *see also Walters*, 2017 WL 969139, at *5 (the SCAWV explaining that Walters "focuses on his offer in late November of 2012 . . . . However, his willingness to accept such a sentence came only after six months of a

pending indictment and an impending trial date of January of 2013 and after his attempts to seek a less-severe sentence failed"). Accordingly, Walters' interest in negotiating in November 2012 is tangential, at best, to establishing his state of mind during the time in question. *See Smith v. Cook*, 956 F.3d 377, 395 (6th Cir. 2020) ("We do not doubt that [the petitioner] wishes, in hindsight, he had taken the deal—his sentence is three times what it might have been. But absent evidence that [the petitioner] would have taken the deal *at the time*, he has not shown prejudice."), *cert. denied*, 141 S. Ct. 1111 (2021).

Walters next attempts to undermine the state court's factual determination by highlighting that the plea he ultimately took resulted in a longer sentence (forty-three to sixty-five years) than the one included in the March plea offer (twenty years). He contends that this difference shows that he would have been willing to accept the March plea offer. But, as we highlighted in *Merzbacher*—where the petitioner "argue[d] that he ha[d] demonstrated a reasonable probability that he would have accepted the plea by simply offering his own post hoc testimony that he would have done so and pointing out the disparity between the ten-year plea and the life sentences he received"—"to demonstrate a reasonable probability that he would have accepted a plea, a petitioner's testimony that he would have done so must be credible." 706 F.3d at 366–67. And here, the state court reasonably found Walters' testimony not credible, concluding that he could not establish a reasonable probability that he would have accepted the March plea offer had he timely known of it. So, just as in *Merzbacher*, which involved a much more severe sentencing disparity than the one at issue here, we defer to the state court's credibility finding because

we perceive no "stark and clear" error with it. *Id.* at 365 (quoting *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008)).

At bottom, Walters cannot meet the high bar to overcome our deferential standard of review. The state court's finding on the first *Frye* prong that Walters failed to demonstrate a reasonable probability that he would have accepted the March plea offer had Stanley timely conveyed it to him was not "an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). *See id.* at 367–68 ("The state court and the federal court reviewed the same somewhat conflicting evidence as to whether [Walters] would have accepted the plea. AEDPA requires deference to the state court's assessment of that evidence, even if the assessment is incorrect, unless it is unreasonable." (citation omitted)); *Wood*, 558 U.S. at 301 ("[E]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." (citation and internal quotation marks omitted)). Satisfied that Walters cannot demonstrate prejudice under *Strickland* based on his inability to meet the first *Frye* prong, we decline to address the second. Accordingly, we affirm.

III.

For the reasons discussed above, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN WALTERS,

Petitioner,

v. Civil Action No. 5:17CV96 (STAMP)

MICHAEL MARTIN, Warden, Huttonsville Correctional Center,[1]

Respondent.

MEMORANDUM OPINION AND ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE AND OVERRULING PETITIONER'S OBJECTIONS

I. Background

The petitioner, John Walters ("Walters"), acting pro se,[2] filed a petition (ECF No. 1) under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody. Walters is currently incarcerated in the Huttonsville Correctional Center in Huttonsville, Randolph County, West Virginia, serving consecutive terms imposed on March 25, 2013 of forty (40) years for robbery, two to ten (2-10) years for malicious assault and an additional one to fifteen (1-15) years for burglary following his January 2013

[1]Michael Martin was substituted as respondent in this action for John T. Murphy by order dated August 21, 2018. See ECF No. 43.

[2]"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1416 (10th ed. 2014).

guilty plea in the Circuit Court of Berkeley County, West Virginia. ECF No. 26-22.

This civil action was referred to the United States Magistrate Judge James E. Seibert for initial review and report and recommendation pursuant to Local Rule of Prisoner Litigation Procedure 2 and then reassigned to United States Magistrate Judge James P. Mazzone. The magistrate judge determined summary dismissal was not warranted and the respondent was directed to show cause why the petition should not be granted. ECF No. 10. On July 6, 2018, the respondent filed an amended answer which acknowledged that the petition was timely filed (ECF No. 41) and thereafter, filed a supplemental response (ECF No. 49) and a motion for summary judgment addressing the merits of the petition. ECF No. 50. A Roseboro notice was issued (ECF No. 52) and the petitioner filed a response to the motion for summary judgment. ECF No. 57. The respondent filed a reply in support of the motion (ECF No. 59), and the petitioner filed a sur-reply. ECF No. 65.

The magistrate judge then entered a report and recommendation (ECF No. 69) recommending that petitioner's § 2254 petition (ECF No. 1) be denied, the respondent's motion for summary judgment (ECF No. 50) be granted, and this matter be dismissed with prejudice. ECF No. 69 at 27. The magistrate judge determined that the Supreme Court of Appeals of West Virginia's resolution of the petitioner's state habeas claim was a reasonable application of federal law, and

the petitioner has failed to establish that he is entitled to relief. Id. at 26. Specifically, the magistrate judge found that the analysis of the Supreme Court of Appeals of West Virginia in determining Walters has not satisfied the "prejudice prong" under Strickland v. Washington, 466 U.S. 668 (1984), like the analysis of the Circuit Court of Berkeley County, was wholly appropriate. Id.

Following two orders granting extensions of time (ECF Nos. 72 and 75), the petitioner filed his objections to the report and recommendation. ECF No. 77. In his objections, the petitioner reiterates the argument previously asserted in his response in opposition to the motion for summary judgment that his counsel's performance was deficient. Id. at 1. Petitioner also generally asserts that the Supreme Court of Appeals of West Virginia's application of Strickland was unreasonable and that his trial counsel's actions meet the prejudice prong of Strickland and Missouri v. Frye, 132 S. Ct. 1399 (2012). Id. at 3-4.

II. Applicable Law

Under 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. Because the petitioner filed objections to the report and recommendation, the magistrate judge's recommendation will be reviewed de novo as to those findings to which objections were made. As to those findings to which objections were not filed, those findings and recommendations will

be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

III. Discussion

This Court's review of this habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. A federal habeas court may only consider whether a person is in custody pursuant to a state court judgment "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The AEDPA requires federal courts to apply a "highly deferential standard" when conducting habeas corpus review of state court decisions and "demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L.Ed.2d 678 (2010) (internal quotation marks and citations omitted). When an issue raised in a petitioner's habeas petition has been litigated before the state court on appeal, a petitioner is entitled to habeas corpus relief only if he can show the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Section 2254 requires a federal court to presume the correctness of a state court factual findings and only overturn them when an error is "stark and clear." Cagle v. Branker, 520 F.3d. 320, 324-25 (4th Cir. 2008). A federal court may not characterize the state court factual determinations as unreasonable "merely because [it] would have reached a different conclusion in the first instance." Wood v. Allen, 588 U.S. 290, 301 (2010). Instead, § 2254(d)(2) requires that the federal courts accord the state trial court substantial deference. Brumfield v. Cain, 135 S. Ct. 2269 (2015).

In order for the petitioner to satisfy the two-prong test set forth in Strickland for claims of ineffective assistance of counsel, the petitioner must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's performance prejudiced the defendant. United States v. Basham, 789 F.3d 358, 371 (4th Cir. 2015) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

The incident giving rise to the petitioner's instant claim occurred during the course of petitioner's underlying criminal proceedings when petitioner learned that a more lenient and pre-indictment March 9, 2012 plea offer was mishandled by the public defender's office. It is not disputed that this plea offer was not conveyed to petitioner until it was discovered by petitioner's appointed counsel, Thomas L. Stanley, and disclosed to

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petitioner in July 2012 after it had expired and after the state had made a less favorable offer. This Court notes that the parties do not dispute, and the Supreme Court of Appeals of West Virginia held, that petitioner's counsel provided deficient representation by not relaying the March 9, 2012 plea offer. However, the Supreme Court of Appeals of West Virginia determined, and the respondent asserts here, that petitioner cannot satisfy the second prong of the Strickland standard as he was not prejudiced.

Thus, the sole issue before this Court is whether the Supreme Court of Appeals of West Virginia's application of the "prejudice prong" of the Strickland standard was reasonable. This Court finds that it was.

As an initial matter, this Court notes that petitioner does not specifically object to the magistrate judge's report and recommendation with respect to the procedural history or events that took place in petitioner's underlying criminal proceedings, direct appeal, state habeas proceedings, or his habeas appeal. Accordingly, under a clear error standard of review, these findings of the magistrate judge are affirmed and adopted by this Court.

On de novo review of the Supreme Court of Appeals of West Virginia's application of the "prejudice prong" under the Strickland standard, this Court finds, that there was no reasonable probability that, but for petitioner's counsel error to relay the March 9, 2012 plea agreement, the result in the petitioner's case

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would have been different. To show prejudice, the petitioner must demonstrate 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. While it is true that defense counsel must relay plea offers to the defendant, the defendant still must show he was prejudiced from the ineffective assistance. Missouri v. Frye, 132 S. Ct. 1399 (2012). As the magistrate judge correctly determined, the Supreme Court of Appeals of West Virginia echoed the state circuit court's findings that the petitioner effectively declined his counsel's offer to seek a reopening of the March 9, 2012 plea offer, noting that after learning of the March 9, 2012 plea offer, the petitioner wrote letters to the circuit court and prosecutor seeking mercy or alternative sentencing, to avoid prison entirely. Walters v. Plumley, No. 15-1062, 2017 WL 969139, at *6 (W. Va. Mar. 13, 2017). Ultimately, the Supreme Court of Appeals of West Virginia found no error in the circuit court's conclusion that petitioner appeared unwilling to accept any substantial prison term at the time of the March 9, 2012 plea offer. Id. The Supreme Court of Appeals of West Virginia specifically stated, "while petitioner contends that he would have accepted the March 9, 2012, plea offer, the evidence indicates otherwise." Id. The Supreme Court of Appeals of West Virginia found that the circuit court properly exercised its function in weighing the evidence and rendering a finding that the

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petitioner would not have accepted the March 9, 2012 plea offer at the relevant time.

Upon de novo review of the underlying record, including the report and recommendation of the magistrate judge as well as the memorandum decision of the Supreme Court of Appeals of West Virginia, this Court agrees with the magistrate judge's finding that the Supreme Court of Appeals of West Virginia's resolution of the petitioner's state habeas claim was a reasonable application of federal law, and the petitioner has failed to establish that he is entitled to relief from this Court.

IV. Conclusion

Based upon a de novo review of the record for those claims that the petitioner made objections to and a determination that the findings and recommendations to which the petitioner did not object were not clearly erroneous or contrary to law, the report and recommendation of the magistrate judge is hereby AFFIRMED and ADOPTED. Accordingly, the respondent's motion for summary judgment (ECF No. 50) is GRANTED, petitioner's petition filed pursuant to 28 U.S.C. § 2254 (ECF No. 1) is DENIED and petitioner's objections (ECF No. 77) are OVERRULED. The respondent's motion for withdrawal and termination of respondent's representation by counsel (ECF No. 68) is GRANTED and Zachary A. Viglianco's representation of the respondent is withdrawn and terminated.

It is also further ORDERED this civil action be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court.

Should the petitioner choose to appeal the judgment of this Court to the United States Court of Appeals for the Fourth Circuit, he is ADVISED that he must file a notice of appeal with the Clerk of this Court within 30 days after the date of the entry of this judgment order.

This Court finds that it is inappropriate to issue a certificate of appealability in this matter. Specifically, the Court finds that the petitioner has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). Upon review of the record, this Court finds that the petitioner has not made the requisite showing. Accordingly, the petitioner is DENIED a certificate of appealability.

The petitioner may, however, request a circuit judge of the United States Court of Appeals for the Fourth Circuit to issue the certificate.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: September 12, 2019

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

John Walters,
Petitioner Below, Petitioner

vs) No. 15-1062 (Berkeley County 15-C-189)

Marvin Plumley, Warden
Huttonsville Correctional Center,
Respondent Below, Respondent

FILED
March 13, 2017
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner John Walters, by counsel Ben J. Crawley-Woods, appeals the Circuit Court of Berkeley County's October 23, 2015, order denying his petition for post-conviction habeas corpus relief. Respondent Marvin Plumley, Warden, by counsel Cheryl K. Saville, filed a response. Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in finding that his trial counsel was not constitutionally ineffective.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In January of 2012, petitioner used a crowbar and knife to gain entry into his ex-girlfriend's ("victim's") home. The victim called 911 and stated that she believed someone was in her home. While the victim was on the telephone with 911 services, petitioner entered her bedroom and demanded money and other items. Petitioner then struck the victim with a hammer he had obtained while in the home, and he left the victim's home with her cell phone and approximately $700. Thereafter, petitioner was arrested; incarcerated; and appointed an assistant public defender, Thomas L. Stanley.

On March 9, 2012, prior to petitioner's indictment for the January of 2012 incident, the State sent Mr. Stanley a plea offer to be communicated to petitioner. By its express terms, the March 9, 2012, plea offer expired on April 13, 2012, if not accepted. Under the terms of that plea offer, the State agreed that petitioner would receive a cumulative minimum prison term of twenty years if he pleaded guilty to one count of first-degree robbery and one count of malicious wounding. Further, under the plea offer, the State would dismiss a then-pending battery charge

and not seek a recidivist enhancement.[1] It is undisputed that Mr. Stanley did not timely communicate the March 9, 2012, plea offer to petitioner.

In April of 2012, petitioner, pro se, wrote a letter to the circuit court judge. In the letter, petitioner requested a bond reduction and stated his intention to "move on with my life[.]" The following month, a Berkeley County Grand Jury indicted petitioner on the following charges: one count of burglary; one count of attempted murder; one count of malicious assault; one count of domestic battery; one count of first degree robbery; and one count of assault during the commission of a felony. In June of 2012, petitioner, pro se, wrote another letter to the circuit court requesting new counsel.

On July 24, 2012, the State sent Mr. Stanley a new plea offer to be communicated to petitioner. The July 24, 2012, plea offer expired on July 31, 2012, if not accepted. Under the terms of the July 24, 2012, plea offer, if petitioner pleaded guilty to all counts in the indictment, he would be sentenced to prison for a cumulative minimum prison term of twenty-eight years. Further, the plea offer provided that the State offered not to seek a recidivist enhancement, but required petitioner to pay restitution.

On July 26, 2012, Mr. Stanley and another assistant public defender, Joseph Whiteoak, met with petitioner to review his case. During this meeting, petitioner first learned of the March 9, 2012, plea offer. Several days later, petitioner wrote a letter to Mr. Stanley asking that he (1) move to withdraw as counsel of record, and (2) get an extension of the July 24, 2012, plea offer set to expire on July 31, 2012. Petitioner's letter expressly provided that Mr. Stanley "did not discuss a plea option back in March 03-09-12[.]" Mr. Stanley and Mr. Whiteoak again met with petitioner on July 29, 2012. Mr. Stanley responded to petitioner's July 28, 2012, letter by stating that dislike for an attorney is not grounds for a motion to withdraw. Mr. Stanley further indicated that the State agreed to extend its July 24, 2012, plea offer to August 13, 2012.

In August of 2012, petitioner, pro se, filed a motion for Mr. Stanley to withdraw as counsel of record and for appointment of new counsel. Petitioner's motion stated that Mr. Stanley "never mentioned a plea deal back in March[.]" Several days after his pro se motion was filed, the circuit court held a status hearing in this matter. However, the circuit court continued the hearing because petitioner was inappropriately dressed to attend the proceedings. In mid-August of 2012, petitioner, pro se, wrote another letter to the circuit court in which he asked for mercy and admitted that he caused the victim "emotional and physical hurt[.]"

In late August of 2012, petitioner filed an ethics complaint against Mr. Stanley alleging a lack of adequate communication from January of 2012 to April of 2012. In September of 2012, Mr. Stanley filed his response to the ethics complaint. In his response, Mr. Stanley admitted that the March 9, 2012, plea offer was received in the public defender office's file in March of 2012 and should have been relayed to petitioner at that time. Mr. Stanley claimed that his "first recollection of seeing the March 9th offer was when [he] found it in the file on July 26th, 2012." In his response, Mr. Stanley further claimed that

[1]The circumstances of the then-pending battery charge are unclear from the record on appeal.

> [o]bviously, one remedy was to go to the case prosecutor and implore him to permit Mr. Walters the opportunity to accept the March 9 offer. I asked [petitioner] to authorize me to inform the prosecutor that he would accept the March 9 plea if offered. After several evasive answers, Mr. Walters rejected the March 9 plea offer.

In September of 2012, Mr. Stanley filed a motion to withdraw as petitioner's trial counsel due to the ethics complaint. The circuit court granted the motion and appointed new counsel.

In November of 2012, petitioner, pro se, wrote a letter to the prosecutor's office in which he asked for a plea agreement that included alternative sentencing so he could avoid prison time entirely. At the end of November of 2012, petitioner, by counsel, sent the State a counter plea offer. In his counter plea offer, petitioner agreed to plead guilty to one count of burglary, one count of malicious assault, one count of domestic battery, and one count of first-degree robbery if he received a cumulative minimum prison term of twenty-four years. It does not appear that the State responded to the first counter offer. Petitioner, by counsel, sent the State a second counter plea offer in which he agreed to allow the circuit court to retain discretion over sentencing. It does not appear that the State responded to the second counter offer.

On January 7, 2013, the parties entered into a plea agreement, and a plea hearing was held. Under the terms of the final agreement, petitioner pleaded guilty to one count of burglary, one count of malicious assault, and one count of first-degree robbery, and the remaining counts in the indictment were dismissed. Under the terms of the agreement, the circuit court retained discretion over sentencing. Further, the State agreed not to pursue recidivism. Thereafter, a presentence investigation report was prepared.

In March of 2013, the circuit court sentenced petitioner to prison for one to fifteen years for burglary; two to ten years for malicious assault; and forty years for first-degree robbery, said sentences to run consecutively to one another. Under his sentence, petitioner's cumulative prison term is forty-three to sixty-five years.

Petitioner appealed his conviction and sentence to this Court on the grounds of excessive sentence and ineffective assistance of counsel. By memorandum decision, this Court affirmed the conviction by finding that the sentence was not excessive and by declining to review the ineffective assistance claim on direct appeal. *See State v. John Walters*, No. 13-0396, 2014 WL 211950 (W.Va. Jan. 17, 2014) (memorandum decision).

In April of 2015, petitioner, by counsel, filed a petition for writ of habeas corpus in the circuit court with an accompanying brief in support. Petitioner's sole ground was ineffective assistance of trial counsel for failing to provide him with the March 9, 2012, plea offer.

In response, respondent argued that petitioner's contention was meritless because, although his trial counsel was deficient for failing to convey the March 9, 2012, plea offer, there was no reasonable probability that petitioner would have accepted that plea offer before it expired in April of 2012. Respondent further noted that the circuit court may have rejected the

March 9, 2012, plea offer, as evidenced by the circuit court's statement at the sentencing hearing that this case warranted a prison term of more than forty years.

In October of 2015, the circuit court held an omnibus evidentiary hearing. Three witnesses testified at that hearing: Mr. Stanley; Joseph Whiteoak; and petitioner. Mr. Stanley testified that he did not send petitioner a copy of the March 9, 2012, plea offer, and he did not believe he reviewed petitioner's file or had any contact with petitioner from March of 2012 until June or July of 2012. Mr. Stanley explained that he met with petitioner on July 26, 2012, to review the case and go over the July 24, 2012, plea offer. Around that time, Mr. Stanley discovered the March 9, 2012, plea offer, and he shared it with petitioner at their meeting on July 26, 2012. According to Mr. Stanley, petitioner was upset at learning of the March 9, 2012, plea offer. Mr. Stanley further noted that petitioner rejected his offer to ask the State to re-open the March 9, 2012, plea offer. Mr. Stanley described his relationship with petitioner as very contentious from beginning to end. A second meeting occurred on July 29, 2012. Mr. Whiteoak testified that he was present for the meetings between petitioner and Mr. Stanley in late July of 2012. Mr. Whiteoak corroborated Mr. Stanley's testimony that he offered to attempt to re-open the March 9, 2012, plea offer. Although Mr. Whiteoak did not describe petitioner's reaction upon learning of the March 9, 2012, plea offer as "upset," Mr. Whiteoak agreed that petitioner's reaction appeared to be a rejection of that plea offer or an attempt to re-open it. Mr. Whiteoak testified that petitioner stated his desire for "less time which basically to us was a rejection of that [March 9, 2012, plea] offer."

At the habeas hearing, petitioner testified that he attempted to contact Mr. Stanley in the beginning of 2012, but that his attempts failed. Petitioner claimed that he had no contact with Mr. Stanley from January of 2012 to April of 2012. Petitioner also stated that he did not learn of the March 9, 2012, plea offer until he met with Mr. Stanley in late July of 2012. According to petitioner, he and Mr. Stanley never had a detailed discussion of the March 9, 2012, plea offer. To the contrary, petitioner claimed that Mr. Stanley dismissed the March 9, 2012, plea offer and, instead, wanted petitioner to accept the July 24, 2012, plea offer. Petitioner testified that he was willing to accept the March 9, 2012, plea offer when he learned of it in July of 2012, but he explained that he did not Mr. Stanley to do anything in his case because he did not trust Mr. Stanley. Petitioner testified that he wanted a new attorney. Petitioner also raised concerns at his habeas hearing that Mr. Stanley failed to visit him to discuss a bond reduction and failed to accept a certified letter petitioner sent to him.

Following the testimony at the habeas hearing, petitioner argued that he should be able to accept the March 9, 2012, plea offer because of his trial counsel's ineffective assistance of counsel. Respondent disagreed. According to respondent, petitioner had not proven ineffective assistance of counsel because he failed to prove that there was a reasonable probability that he would have accepted the March 9, 2012, plea offer if properly communicated to him in March/April of 2012.

By order entered on October 23, 2015, the circuit court found that petitioner did not establish that there was a reasonable probability that he would have accepted the March 9, 2012, plea offer if properly conveyed to him. The circuit court noted that petitioner did not appreciate the severity of his criminal case around the time of the March 9, 2012, plea offer. As such, the

circuit court found that petitioner met only the first prong of the test for ineffective assistance of counsel (deficient performance) and not the second prong (but for that deficient performance, the outcome would have been different). By that order, the circuit court denied petitioner's habeas petition. This appeal followed.

We apply the following standard to our review of a circuit court's order denying habeas review:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009). Further, a habeas petitioner bears the burden of establishing that he is entitled to the relief sought. *See Markley v. Coleman*, 215 W.Va. 729, 734, 601 S.E.2d 49, 54 (2004); Syl. Pts. 1 and 2, *State ex rel. Scott v. Boles*, 150 W.Va. 453, 147 S.E.2d 486, 487 (1966).

On appeal, petitioner argues that the circuit court erred in finding that his trial counsel was not constitutionally ineffective for failing to communicate the March 9, 2012, plea offer to him. This Court has adopted the United States Supreme Court's two-pronged test for claims of ineffective assistance of counsel:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):(1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 6, 459 S.E.2d 114, 117 (1995). We have also held:

> In deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test.

Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 317, 465 S.E.2d 416, 419 (1995).

In support of this argument, petitioner relies heavily on this Court's holding in Syllabus Point 3 of *Becton v. Hun*, 205 W.Va. 139, 516 S.E.2d 762 (1999):

> Objective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all

> plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances.

Petitioner notes that it is undisputed that Mr. Stanley failed to communicate the March 9, 2012, plea offer to him before it expired. As such, petitioner claims that Mr. Stanley was clearly constitutionally ineffective under *Becton*. Respondent, on the other hand, argues that the circuit court correctly found that Mr. Stanley's failure to communicate the March 9, 2012, plea offer satisfied only the first prong of the *Strickland/Miller* test (deficient performance). Respondent contends that there was no reasonable probability that petitioner would have accepted the March 9, 2012, plea offer before it expired in April of 2012. Therefore, according to respondent, petitioner cannot satisfy both prongs of the *Strickland/Miller* test for ineffective assistance of counsel. We agree with respondent.

With regard to the second prong of a claim of ineffective assistance of counsel, the United States Supreme Court has provided the following guidance:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed . . . because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants 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. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, 566 U.S. 133, 147 (2012); *see Foster v. Ballard*, No. 14-1023, 2015 WL 6756866 (W.Va. Nov. 4, 2015) (memorandum decision) (affirming habeas denial where defendant failed to prove that he would have accepted plea offer not conveyed to him by trial counsel and citing *Missouri*).

In this case, while petitioner ultimately entered into a plea agreement that resulted in a prison sentence of forty-three to sixty-five years, we find no error in the circuit court's conclusion that petitioner appeared unwilling to accept any substantial prison term at the time of the March 9, 2012, plea offer. Notably, in April of 2012 (before the indictment was returned), petitioner sent a pro se letter to the circuit court asking to be released from jail so that he could "move on with [his] life." Petitioner continued to seek a limited sentence by writing pro se letters to the circuit court asking for mercy in August of 2012 and to the prosecuting attorney's office in November of 2012 asking for alternative sentencing to avoid prison entirely.

Petitioner focuses on his offer in late November of 2012 to plead guilty and receive a twenty-four year prison term. However, his willingness to accept such a sentence came only after six months of a pending indictment and an impending trial date of January of 2013 and after his attempts to seek a less-severe sentence failed.

Further, while petitioner contends that he would have accepted the March 9, 2012, plea offer, the evidence indicates otherwise. In addition to the evidence set forth above, Mr. Stanley indicated that he offered to ask the State to re-open the March 9, 2012, plea offer in the summer of 2012, and petitioner refused. We have held that "[a]n appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact." *State v. Guthrie*, 194 W.Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995). Indeed, "where there is a conflict of evidence between defense counsel and the defendant, the circuit court's findings will usually be upheld." *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 327, 465 S.E.2d 416, 429 (1995). Having reviewed the record on appeal, the parties' arguments, and pertinent authority, we find that the circuit court properly exercised its function in weighing the evidence and rendering a finding that petitioner would not have accepted the March 9, 2012, plea offer at the relevant time. Based on the circumstances of this case, we find no error in the circuit court's finding that petitioner failed to establish the second prong of the *Strickland/Miller* test. We also find no error in the circuit court's finding that the outcome of the proceedings would not have been different but for Mr. Stanley's failure to communicate the March 9, 2012, plea offer to petitioner.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 13, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Elizabeth D. Walker

DISSENTING IN WRITING:

Justice Menis E. Ketchum

Justice Ketchum, dissenting:

Without question, petitioner's trial counsel failed to communicate the March 9, 2012, plea offer to him before it expired. That plea offer was considerably more favorable to petitioner than the offers he later sent to the State and the offer that he ultimately accepted. Moreover, petitioner testified that he was willing to accept the March 9, 2012, plea offer when he learned of it in July of 2012. Understandably, petitioner did not wish to keep his trial counsel, who barely communicated with him between January and July of 2012 and who failed to properly communicate the March 9, 2012, plea offer. Under the facts of this case, the inescapable conclusion is that petitioner's trial counsel failed him. I firmly believe that the trial counsel's failure rendered him constitutionally ineffective. Petitioner probably would have been better off

acting pro se because then, at least, he would have received the plea offer on time. I would set this case for oral argument.

Based on the foregoing, I respectfully dissent.

ORIGINAL

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

JOHN WALTERS,

Petitioner,

vs.

15-C-189

MARVIN PLUMLEY, WARDEN,
Huttonsville Correctional Center,

Respondent.

TRANSCRIPT OF PROCEEDINGS

October 13, 2015

Martinsburg, West Virginia

BEFORE: THE HONORABLE MICHAEL D. LORENSEN

APPEARANCES

Counsel for the Respondent: Cheryl Saville, Esq.

Counsel for Petitioner: Nicholas F. Colvin, Esq.

Reported by:

Catherine Anne Slayden, CCR, RPR

EXHIBIT 39

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PROCEEDINGS

THE COURT: Okay. We're on the record now in the matter of Walters versus Marvin Plumley, 15-C-189. We have Mr. Walters present with counsel, Mr. Colvin. The state is here by Ms. Saville. And we set today in for an evidentiary hearing on the issue raised in Mr. Walters' petition for writ of habeas corpus.

Mr. Colvin, are you ready to proceed, sir?

MR. COLVIN: I am, Your Honor. I guess one question before we begin. We've already submitted a signed verified *Losh* list. I don't know if the Court wants us to review that any further. I think it's probably sufficient as it stands. But if the Court wants me to do an oral review with my client, I will. Outside of that, I would call Tom Stanley first to the stand. But I don't know what the Court's preference is regarding that issue.

THE COURT: Ms. Saville, do you desire to have that spelled out more fully?

MS. SAVILLE: Whatever pleases the Court. I know that other judges in the circuit have that colloquy regarding the *Losh* list, but I don't know, as Mr. Colvin, that it would necessarily be a requirement --

THE COURT: Well, it seems like he's made a very

determined choice, but that being the case -- tell you what, Mr. Colvin, if you're willing, I'm desirous of hearing that your client has made a knowing and voluntary waiver of those issues referenced.

MR. COLVIN: Certainly, Your Honor. Would you please stand, Mr. Walters.

(Complied.)

MR. COLVIN: Would you please state your name for the record.

MR. WALTERS: John Kenneth Walters.

MR. COLVIN: Mr. Walters, you're the same John Walters as listed in this matter. You're of course filing upon your writ for habeas corpus against Marvin Plumley, the warden of your facility at Huttonsville; is that correct?

MR. WALTERS: Correct, sir.

MR. COLVIN: Now, you've had an opportunity to review this matter with me including what is typically called a *Losh* list or your grounds for post-conviction habeas corpus relief; is that correct?

MR. WALTERS: I have, yes.

MR. COLVIN: Okay. Now, I'm showing you -- it's been listed and provided already in the court file -- a document that has been purportedly signed by yourself; is that correct?

MR. WALTERS: Yes.

MR. COLVIN: And that, in fact, is your signature on the third page of the *Losh* list where it says petitioner; is that correct?

MR. WALTERS: Yes, it is.

MR. COLVIN: Okay. There are a series of indicated grounds. The first page lists grounds 1 through 15, and I note that each of those grounds have been marked and have been initialed "JW"; is that correct?

MR. WALTERS: Yes.

MR. COLVIN: And those are, in fact, your initials, "JW"; right?

MR. WALTERS: Yes, it is.

MR. COLVIN: Okay. And that is your handwriting? You're the person who made that notation on this document?

MR. WALTERS: Yes, it is.

MR. COLVIN: Okay. Now, at least as far as the first 15 grounds that are listed on page one of the *Losh* list, the X's that are marked in here were typed in; is that correct?

MR. WALTERS: Yes.

MR. COLVIN: And you had a chance to review these grounds with me individually to determine what you wished to pursue; is that fair to say?

MR. WALTERS: Yes, it is.

MR. COLVIN: Okay. You understand that by initialing the same and submitting those to the Court, the Court will not consider any of these grounds as they have all been waived as evidenced by your signature and your initials; is that correct?

MR. WALTERS: Correct.

MR. COLVIN: Okay. And you wish to stand upon the waivers of those grounds; is that correct?

MR. WALTERS: Correct.

MR. COLVIN: Okay. As for page 2, I would note that as similar to page 1, similar format, is listed grounds 16 through 41 and that in particularity one ground, ground 21, ineffective assistance of counsel, has not been waived; is that correct?

MR. WALTERS: Correct.

MR. COLVIN: The remaining grounds, 16 through 20 and 22 through 41 on page 2 have all been X'd off and have been initialed by yourself; is that correct?

MR. WALTERS: Correct.

MR. COLVIN: But for ground 21, ineffective assistance of counsel, which you are not waiving, you do wish to waive the remaining grounds on page 2 of the *Losh* list; is that correct?

MR. WALTERS: Yes, correct.

MR. COLVIN: And similar to page one, that's based upon advice of counsel, discussing the matter with me, answering questions you might have about the grounds; is that correct? Fair to say?

MR. WALTERS: Yes.

MR. COLVIN: Okay. Looking over at page 3, I'd note that those are grounds 42 through 53 and that each of those have been marked as well and have also been initialed consistent with pages 1 and 2; is that correct?

MR. WALTERS: Correct.

MR. COLVIN: Again, you've had a chance to discuss those grounds with me as your attorney and that you desire to waive those grounds after consultation; is that fair to say?

MR. WALTERS: Yes, that's correct.

MR. COLVIN: Okay. For each of the grounds that you've initialed on pages one, two, and three and the signature that you placed upon the same, did anybody threaten you or force you or pressure you to make those waivers?

MR. WALTERS: No.

MR. COLVIN: Fair to say that you are waiving those knowingly, intelligently, and voluntarily?

MR. WALTERS: Yes. Correct.

MR. COLVIN: And you understand that those are

permanent waivers and you cannot assert those grounds again in the future? Do you understand that?

MR. WALTERS: Yes.

MR. COLVIN: Okay. Do you wish to stand upon your filed *Losh* list?

MR. WALTERS: Yes.

MR. COLVIN: Okay. Do you have any other questions regarding that?

MR. WALTERS: No.

MR. COLVIN: All right. Thank you, sir. No other questions.

THE COURT: And I'll find that he's made a knowing, voluntary, intentional waiver of those claims as noted on the *Losh* list.

MR. COLVIN: Thank you, sir.

THE COURT: And with that, Mr. Colvin, are we prepared to proceed?

MR. COLVIN: We certainly are. Thank you, Your Honor. And I would call Mr. Tom Stanley, Esquire, first.

(The witness was sworn in by the clerk.)

DIRECT EXAMINATION BY MR. COLVIN:

Q. Good morning, sir.

A. Good morning.

Q. Would you please state your name for the record.

A. Thomas L. Stanley.

Q. And, Mr. Stanley, you are employed by the Public Defender Corporation; is that correct?

A. That's correct.

Q. How long have you been so employed?

A. Since 1998, January 13th.

Q. Very good. Now, I have some questions to ask you of course in regards to this matter. You were, in fact, counsel of Mr. John Walters, present in the court today; is that fair to say?

A. That's correct.

Q. Okay. You were counsel -- when were you appointed as counsel to represent his interests in this matter?

A. It was at the time of his arrest prior to the preliminary hearing. And honestly I can't remember that date.

Q. Okay. Is it fair to say that you were appointed to him to represent his interests prior to March of 2012? Is that fair to say?

A. That sounds correct.

Q. Okay. At the preliminary hearing stage, were you the only attorney to represent his interests or was there any other person in your office associated with his defense?

A. I think Mr. Whiteoak appeared for me once, maybe twice. I believe I was in trial then or about that period. And I do recall Mr. Whiteoak made an appearance. At least one.

Q. All right. Now, back in that timeframe, do you recall at least generally in this matter -- I don't know if you had a chance to review your file prior to today's hearing.

A. I have.

Q. Very good. Thank you. As listed, did you or I should say at least your office receive a potential pre-indictment plea agreement from the state of West Virginia in regards to Mr. Walters' matter on or about March 9th of 2012?

A. That could be about right. Is that the plea offer letter from Stephanie Saunders?

Q. I believe we're talking about the initial pre-indictment offer that was for the 20-year concurrency count to my understanding.

A. You mean the aggravated robbery 20 year cap on that?

Q. Yes, sir. That's the one.

A. And I think perhaps plead to one or two more felonies concurrent?

Q. That is correct.
A. Yes.
Q. Very good. Now, as far as with the receipt of the plea agreement, when -- you were of course -- you're not a sole practitioner. You work in an office with a number of attorneys. Is that fair to say?
A. That's correct.
Q. Okay. Whenever this plea agreement was sent to your office, was it actually received by yourself at that time?
A. No.
Q. Okay.
A. You want me to explain how it works in our office?
Q. Yes, please. Thank you.
A. If it's mailed to us, once the secretary gets the mail, opens all the mail, any legal documents have to be scanned into our computer system and stored on the server. After the document is scanned, then it's placed in the lawyer's mailbox. And that would be the first time I see it. And it's supposed to go from scanning to my mailbox. That's the usual procedure. That's the one that hopefully everybody follows.
Q. Okay. Thank you. Now, as far as the scanning, is

this scanned to a central database or a server you can access from your own personal computer in your office?

A. They tell me I can do it, but I don't. I haven't even tried. If I want a document retrieved from the server, I call my secretary and say this is the document I'm looking for. Get it for me.

Q. Okay. Now, the -- I assume though -- do you acknowledge -- I guess I'd ask this. Do you acknowledge -- do other folks have access in your office, as far as counsel, to receive things remotely from their computer terminals on a general server if they wanted to?

A. Yeah. We're all connected through the network to the server.

Q. Okay. That's just not a resource that you particularly employ; is that fair to say?

A. I think it's fair to say that hardly any lawyer in our office uses that.

Q. Okay. Now, once it's scanned in, you said a physical copy is placed in your box; is that correct?

A. In my mailbox, yes.

Q. Okay. Now, is there a copy also placed in a physical file?

A. No. The procedure is the document is received. It's date stamped as being received on a certain date. It's

scanned into the server. The original hard copy goes in my mailbox. I'm supposed to review it. And after that, depending on what I determine needs to be done with the document, I can look at it, put it in the basket for filing, put a note on it, tell the secretary to do something with it.

With respect to plea offers, my procedure is it comes directly to me -- strike that. It goes to my secretary first, who should automatically send a copy of the plea offer with a standard letter to the client saying attached is a copy of the plea offer received in your case. Contact me to schedule an office appointment as soon as you receive this letter.

Q. Okay.

A. And then the letter ends up in my hard box or mailbox and the secretary generally makes a note somewhere on the document that it's been mailed to the client.

Q. Okay. Thank you. Well, I guess the question with that would be once the letter is placed in the mailbox -- I assume it's the central mail room so to speak; fair to say?

A. At the reception desk or just like a bookcase with slots and documents are placed in it.

Q. Essentially all the attorneys that work in the Public Defender's Office gets their mail physically at the

mailbox center; correct?

A. That's correct.

Q. Okay. Now, once it's -- I think you testified that once it's there, you then obtain it and then take it back to your office and decide what to do next with it; correct?

A. That's correct.

Q. All right. In this case, you also suggested that the secretary for you will also take that and then do the letter to the client. Is that something that is upon your direction or they do that independently of you?

A. Yes and no is the correct answer. That's my standard procedure. My secretary knows when a plea offer letter comes in, a copy goes to the client and the original ends up in my mailbox.

Q. Okay. So just to make sure I understand completely. When that mail comes in, you, as well as your assistant of course, would have access to your mailbox; fair to say?

A. Yes.

Q. And your assistant would go and take out the letter and then make a copy and send that out and replace it back in the mailbox for your inspection --

A. No.

Q. -- or would that happen after you inspected it?

A. It's supposed to go from the secretary that does the scanning to my secretary's desk, who will draft the -- pull up the letter --

Q. Uh-huh.

A. We have a separate file on the server with form letters. So she would pull up the letter, put the correct name and case number in, update the date, and have -- make a copy of the plea offer letter and attach the copy to the letter. She has the authority to affix my signature stamp and places the letter in the mail to the client.

Q. Okay.

A. Then she would put the original plea offer letter in my box.

Q. Okay. Thank you. So at that point, once it's back in your box, you should be able to have access to it of course and take it out and put that in your file or do whatever else you see fit with it at that point?

A. Yes, that's correct.

Q. Okay. Did that happen in this case?

A. No.

Q. Okay. Why not?

A. I don't know.

Q. Have you had other occasions whereby this system has not been followed or similar issues have occurred or is this the first time this has happened?

A. Between today and going back to 1998, I'm sure there have been other occasions when a document has ended up in the file without passing across my desk. But to tell you how many times, I can't do that. It's not often.

Q. Okay.

A. Very few.

Q. All right. So that's unusual; fair to say?

A. Yeah, unusual.

Q. Okay. Now, in this case, if a letter was sent out for the plea agreement, the assistant would have scanned it, put it on the server, had a physical copy in your box, your assistant would have taken it out of the box in theory or typically, and then gone ahead and sent that to the client with a cover letter with your signature stamp on it, and then replace the original plea copy with the letter into your box for your records. That's typically how it would have gone?

A. That's correct.

Q. Okay. And we agree that did not happen here; correct?

A. That's correct.

Q. All right. If the document is taken and scanned in by the initial intake person -- who is not your secretary; correct?

A. That's correct.

Q. At that point, they would place it in the box. If your assistant did not make a copy and provide a letter to the client -- and I think that's not disputed. That did not happen in this case; correct?

A. As far as I can tell, no letter was sent out. No cover letter with it.

Q. Okay.

A. To be honest about it, what appears to have happened is that somebody took the plea offer letter and put it in the file --

Q. Okay.

A. -- without my knowledge. That's the best explanation I can give you.

Q. Okay. And we'll get to that. Thank you for that. We'll get to that too. So as far as it was taken out, then it was placed directly in the file as opposed to your ability to access it independently. So for you, it would be as if it was never in the box to begin with; is that fair?

A. I think, yes. If your question is if I don't know

that the letter came in, I wouldn't go to the server to look, and I wouldn't go track it down to find out where it's at.

Q. Well, to be fair, if it's not in the box, the box is empty, you have no reason to search for something that you don't know exists. That's fair to say; right?

A. That's correct. That's correct.

Q. Okay. Now, at that point, back in March of 2012, thereabouts, March 9th, the letter was there in the file. At that point, you're still representing Mr. Walters; correct?

A. That's correct.

Q. And Mr. Whitehead or no other person in your office, they weren't really dealing with Mr. Walters, to be fair, after the preliminary hearing stage; is that correct?

A. It's not Whitehead. It's Whiteoak.

Q. Whiteoak. I apologize. Thank you.

A. That's correct.

Q. Mr. Whiteoak. Thank you.

A. That's correct.

Q. Okay. So at least in this matter then, between the time of the letter being received by the office, although not perhaps by yourself, and the actual arraignment

of this defendant, which I believe was sometime around June 11th of that year -- does that sound about right? June 11th of 2012.

A. Without looking at the document, I believe we waived that preliminary hearing.

Q. Uh-huh.

A. Is that correct? For perhaps early discovery.

Q. I believe so. And just in terms of the arraignment, it was -- he was indicted that next term. That would be June. Here in Berkeley County. That would have been June when he would have been arraigned typically. Is that fair to say?

A. He would have been indicted in the October term. If we waive the preliminary hearing in June, he would not have been indicted until the October term.

Q. Well, that would be correct if however in this case the pre-indictment letter sent out in March -- he was already I believe in his bound-over status and then that proceeding, grand jury, in Berkeley County which would have occurred -- would have been then in May of 2012. He would have June -- would have been when he was arraigned. A few weeks after arraignment. Is that correct?

A. When did we waive the preliminary hearing, Mr. Colvin? Unless you want me to take the time and go

through and sort out all the documents again.

Q. We don't need to take the time for that, Mr. Stanley. I just want to make sure that we're on the same page as far as the timeframe. He was arraigned in June of 2012. You don't have any reason to dispute that; correct?

A. No. If that's what the document showed.

Q. Yeah. Between that March timeframe -- when the letter was received in June -- I'll suggest June 11 or June of 2012 -- what contact did you have with Mr. Walters?

A. I don't believe any.

Q. Okay.

A. At the arraignment, I would have told him to call the office, make an appointment, and come and see me.

Q. Okay.

A. I don't recollect hearing from him until around June 27, 2012. I believe that's when -- that's around the time he came to my office. And by that time, I had a second plea offer letter from Greg Jones which put a 28-year cap on the sentence. And that's the one I intended to discuss with Mr. Walters when he came to my office on or about June 26th, 27th of 2012.

Q. Okay. And you suggest June. Is it possible that was July 26th or 27th of 2012?

A. It could be. If he was indicted in June -- hold on.

Q. Take your time.

A. Okay. July 26th.

Q. Yes.

A. My note indicates met with Mr. Walters and Mr. Whiteoak on July 26th concerning the plea offer. And that's the plea offer from Greg Jones.

Q. That was the new plea offer that had been made post-indictment; fair to say?

A. That's correct. That was the second plea made in the case. And it was during that meeting that I found the March plea offer letter and immediately disclosed it to Mr. Walters --

Q. Uh-huh.

A. -- and discussed remedies to the situation.

Q. Okay. As far as -- thank you. And so is it fair to say then -- well, I'll back up for a second. I know there was early discovery in this case. You may or may not recall but in case you do. At the arraignment, did you receive additional discovery from the state at that point if you recall?

A. I'm not sure. Mr. Jones doesn't always give discovery on the date of arraignment. It might be a week or

ten days later.

Q. Okay.

A. Whether that happened in this case or not, without going back and looking at the envelopes that they came in, I wouldn't know whether they were date stamped in on the day of arraignment or at a later date.

Q. Okay. Thank you. So as far as this case -- and I assume that's the similar process for receiving discovery as it is for plea offers or any offers or any documents. The same kind of procedure. Intake, initially scanning, availabiity for your box then for review, and then place it in the file. Similar procedure; correct?

A. Except -- it's similar, yes. My secretary has instructions that discovery is to be copied and sent to the client. Not to wait for my review and directions. Discovery is automatically copied, mailed out to the client, or sometimes we have to hand deliver it out to the jail.

Q. Okay. And when this discovery is processed, it's then placed in your physical file; is that fair to say?

A. That goes in the mailbox and then to my desk. And after I review it, goes in my file.

Q. Okay. So given that procedure and given the March 9th plea offer in 2012 and your discussion with Mr. Walters on or about July 26th of 2012, that would be -- I guess

correct my math if I'm wrong. I'll use my fingers since I can't count that. March to April is a month. April to May. May to June. June to July. About two weeks shy of five months in between those timeframes. Is that fair to say?

A. Pretty close, yes.

Q. Okay. And you can count on your fingers too. It's okay.

A. Yeah.

Q. All right. So given for that period of time, that means that during that almost five months, give or take, that you had not looked at the physical file; is that fair to say?

A. You're asking about a file jacket that you open it up and it has papers in it?

Q. The physical file --

A. Is that the file you're talking about?

Q. The physical file where the documents would go to after they have been scanned or reviewed. Yes, sir.

A. Okay. Well, let me explain one more thing on the record unless misconstrues what's going on. After I review documents, if action needs to be taken, I put a note on it or I go directly to the secretary and say I need this. I need that. Do this. Do that. After I review the documents, I have a basket on the corner of my desk. The

documents go into that. The secretary is the one that actually takes the documents out of the basket and puts them in the file folder which is in a file cabinet in the corner of my office.

Q. Okay.

A. So I may go several months and not actually see the, quote, file --

Q. Okay.

A. -- but I have reviewed all of the documents that come across my desk.

Q. Okay. So you have access to this file I assume as well as anybody else in the office --

A. Sure.

Q. -- that is appropriate?

A. Yeah.

Q. Okay. And you testified that you review the documents that come across your desk -- that doesn't include this March 9th plea offer of course -- but generally speaking, the documents get reviewed before they go in the file?

A. Yes.

Q. Okay. But in this case, the actual physical file that would be in your office -- I assume in a filing cabinet or a drawer or something of that nature; correct?

A. That's what I just told you.

Q. Okay. During that, there was not a time between the March 9th offer and July 26th meeting of that year, 2012, where you had actually taken that file out; is that fair to say?

A. Probably not.

Q. Okay. Because if you had done that, you probably would have seen the March 9th offer before the July meeting?

A. Not necessarily.

Q. How so?

A. Well, if I had the documents in my hand, and I was beside the file cabinet, I just might open the file and drop it in. I don't review each and every page in the file every time I touch a file. I only review the file when I need to review it, Mr. Colvin.

Q. Okay.

A. So during that five months, I can't sit here today and tell you I touched that file, the overall file jacket with documents inside.

Q. Uh-huh.

A. I probably did not go through it page by page or I would have found the March plea offer letter.

Q. Uh-huh.

A. And we would have had the discussion with

Mr. Walters long before July 26th.

Q. Uh-huh. Okay. Can you describe I guess briefly the relationship at least that you had had with Mr. Walters during this timeframe. I know it eventually led to you filing a motion to withdraw. The relationship kind of broke apart; is that fair to say?

A. Very contentious.

Q. Okay. When did that contentiousness start based on just your general recollection for that?

A. Probably the first time I met him down on the third floor at one of the scheduled preliminary hearings.

Q. Okay. And that continued unabated throughout this period?

A. Pretty much.

Q. Okay. Do you recall in this meeting -- and I assume Mr. Walters of course was there and perhaps Mr. Whiteoak was there on July 26th?

A. There is no perhaps about it. Mr. Whiteoak was there.

Q. Okay.

A. I'm sitting at my desk, and Mr. Whiteoak was in a chair to my left, and Mr. Walters was in a chair directly across from me.

Q. Okay. Do you recall Mr. Walters' reaction upon

hearing about this initial plea offer?

A. He was upset about it.

Q. Okay. At that point, is it fair to say that the attorney/client relationship between you and Mr. Walters was strained to the point where you thought that withdrawing might be the best course of action?

A. No.

Q. At which point did you determine that your relationship had degraded to the point where you needed to withdraw?

A. Right about the time you got appointed. Right about the time of the -- I believe it was the pretrial hearing set in August. It was at that point that -- frankly, it was after Mr. Walters wrote a letter to Greg Jones essentially admitting guilt in the case and arguing for mitigation.

Q. Do you ever recall receiving a letter from the defendant after your July 26th meeting requesting additional time to extend the plea deadline in this matter?

A. Yes.

Q. Just one second.

A. You are referring to the letter dated July 28, 2012?

Q. Yes, sir.

A. Wherein Mr. Walters asked, please ask the prosecuting attorney for an extension of the plea deadline for at least 30 days, which I did. And Mr. Jones granted an extension to the next hearing date before Judge Wilkes. And he asked me to file a motion with the Court asking to withdraw from my case based on the reasons stated in the letter.

Q. Thank you. Was that 30-day extension, to your understanding, based upon the new plea offer from Mr. Jones or the pre-indictment plea offer from March from Ms. Saunders?

A. It had to have been the plea offer letter from Mr. Jones. When I told Mr. Walters that there was a plea offer in the file from Stephanie Saunders, and as you say dated March -- and I immediately told him when I read the letter that, oh, I've got a plea offer letter. It's dated March -- according to you -- and there was a plea offer made in your case, and I did not communicate it to you. And I wanted to talk about the possible remedies.

Q. Uh-huh.

A. And I offered to contact Greg Jones immediately. I was ready to pick up the phone and call Greg and do whatever it took to get the March plea offer reinstated. But before I called, I said it's going to be a waste of time

to call if you will not accept the plea offer. There's no use getting an offer back on the table if you're not going to take it. And it was about that point he said -- I recall him saying something about he needed to talk to his pastor or minister and got up and left --

Q. Okay.

A. -- without giving me an answer as to whether or not he would accept the offer if I can get it back.

Q. All right. So it's your recollection that he didn't firmly accept or reject the offer?

A. No. He would not give me an answer.

Q. Okay.

A. Which was a hallmark of our relationship.

Q. Okay. And this request for this 30-day extension, just from your discussion and recollection of Mr. Walters, do you believe that was based upon the March plea offer or the new Mr. Jones' plea offer?

A. I have no idea what was in his mind, Mr. Colvin.

Q. Okay.

A. He asked for -- the only plea offer in existence was the one that Mr. Jones had made because I never called to get the March plea offer back on the table because he wouldn't give me an answer. He neither accepted nor rejected. So I didn't see much point in calling Mr. Jones

and begging to put a plea offer back on the table that he was not going to take.

Q. But you did contact Mr. Jones to get the 30-day extension?

A. I did.

Q. Okay.

A. Doing my best to protect his interests. Even though he wouldn't cooperate with me or give me an answer, I was doing my best to do what I'm supposed to do as an attorney. So I got the extension for him.

Q. But that extension was not for the March 9th plea. That was for the new plea --

A. Mr. Colvin, I don't know. Ask your client what he asked an extension of. He just asked for an extension to consider a plea and that's what I did.

Q. When you had contact with the prosecutor, was it your understanding that it was going to be the March plea that was to be extended or the new plea?

A. I just said can we have an extension on the plea offer. I didn't specify. Mr. Jones didn't specify. We probably assumed it was Mr. Jones' offer because he never accepted or never told me that he would take the March offer if I can get it back.

Q. But you discussed with Mr. Jones about the issue

that he hadn't seen the March 9th offer?

A. I explained it all to Mr. Jones.

Q. And based on that discussion, your recollection is that at that time, you didn't receive anything affirmatively from your conversation with the state that they were going to extend or avail -- allow the March 9th offer to be a possibility? They were working on Mr. Jones' new offer?

A. I don't have any notes; but if you want me to speculate or try to recall something that I don't have a present recollection of, just knowing Mr. Jones and how he operates, he probably told me the March offer was dead, totally dead, and would never come back.

Q. Okay. Thank you. I just have one additional question, Mr. Stanley. Did you ever receive an additional letter, a certified letter, from Mr. Walters?

A. Certified letter. Frankly, this is one of Mr. Walters' great lies, and it was the final straw that led me to withdraw from his case. I was coming back from court one day, and there was about a 30-foot walk from my car to the office door. A woman was driving a black pickup truck. He jumps out and hands me a letter and gets back in the vehicle and leaves. I go inside. I read the letter. And there is one of these little form notes from the post office that there is a certified letter to be picked up for me.

Now, why they didn't leave it at the office but chose to leave the little slip saying come and get it is beyond me. But I read his letter, and it had on the document itself the certified number. So I looked at the number on the letter he handed me in the parking lot and saw that it was the same number on the slip from the post office. So what you want to know is did I go to the post office and get the letter? No, I didn't because I already had it.

Q. Okay.

A. He handed it to me. Now, I sent him another letter; and he's complaining about -- is it in this one? He accused me of sneaking over to his apartment and putting a letter in his mailbox that did not go through the Postal Service. And I never could figure that one out. But that was one of his sticklers that I surreptitiously mailed him a letter.

Q. Okay. But you didn't -- you received the letter at least -- you received it -- the post office received it by hand delivery, and you received it, and read it; is that correct?

A. Yes. I received hand delivery. I read the letter. I chose not to go to the post office and pick up the one sitting there for me.

Q. Okay. Thank you, Mr. Stanley.

MR. COLVIN: No other questions.

THE COURT: Ms. Saville, do you have any questions?

MS. SAVILLE: Yes, Your Honor.

CROSS EXAMINATION BY MS. SAVILLE:

Q. Mr. Stanley, you concede that you did not see the March 9th plea offer until the July meeting; is that correct?

A. That's correct.

Q. And you discussed that March 9th plea offer with Mr. Walters on July 26th; is that correct?

A. That's the first thing we talked about.

Q. And your recollection of that meeting is that Mr. Walters would not give you an answer; is that correct?

A. Absolutely would not -- he would not give me an answer. Mr. Walters, this plea offer is on the table. It's my screw up. I will call the prosecutor and explain what happened. I think I can get the offer back if you want that offer. But before I go to all that trouble, will you take it if I can get it back on the table? He would never say yes or no. He just waffled around. Then we did discuss the plea offer letter from Mr. Jones. The one with the 28-year cap. And we discussed that. And then he just got up and said I need to talk to my minister and out the door he went.

Q. Did you meet with Mr. Walters after that meeting?

A. Yes.

Q. During those meetings, did you discuss both the March 9th and July plea offers with him?

A. The second meeting came on -- was on a Friday, July 29th. And that was at the request of Mr. Walters. He wanted to come in. He wanted to go through the -- all of the discovery. We played the tapes for him. Put them in a computer. I was there. Ben Hiller, who was an intern at our office at the time, was there. I know Mike McLaughlin was there, our investigator. I'm not sure if Jack Strobridge was at that meeting or not. Mr. Whiteoak was there. And we listened to his taped statement that he gave to Deputy St. Claire after his arrest. We listened to the taped interview of the victim. And as I recall, that interview was done at the hospital. And then we put in the audio for the 911 call. And we tried to discuss a plea offer at that time.

Mr. Whiteoak asked him a question. Essentially, we were trying to figure out is there any defense in this case or not. And Mr. Whiteoak asked Mr. Walters a question, and Mr. Walters said who in the "F" are you anyway? Why are you asking me questions? And I said, Mr. Walters, I don't see a

defense. And you having a sexual relationship with this woman on a prior date is not a defense to these crimes. And at that point, he got up and left. I'm not sure I talked to him after that to be honest with you.

Q. So is it fair to say that during your meetings with Mr. Walters, you attempted to discuss his case with him, the possible defenses he had, the charges he had, and the possible resolutions for his case?

A. At every -- this is where the contention was from the outset. These are serious charges. At the preliminary hearing stage, I had not seen the evidence; but Ms. Saunders was always good about telling me what she's got. And she laid out and, in fact, one of the things she said was we have a taped statement from him where not only did he confess to what he did, he made a confession to Deputy St. Claire that when he went there that day, it was his intention to catch her and her new boyfriend in bed wherein he would kill them both.

And Mr. Walters -- you know, there's not a lot of defense here. And all he wanted to do was tell me about this sexual relationship and, you know, that in his mind that was his defense. She was my girlfriend. She was cheating on me. And we could never get beyond that.

I tried to explain to Mr. Walters these are mitigating

circumstances that might mitigate punishment at sentencing, but they're not defenses to the charges. And unless you can tell me something that I can turn into a defense at trial, you're going to get convicted. And all he ever said to me was, well, you're not on my side. You're not working for me. And I could never get beyond that point with him.

I decided to step out of the case when he started accusing me of putting things in his mailbox without going through the post office, and he called and came back and wanted a second set of discovery and asked my secretary to change the receipt to include some document that had already been provided to him to show that he didn't get it until a couple of months after the fact and things like that. And I just -- no. At that point, I had had it with him. I couldn't help him. He wouldn't talk to me. So it was time to get out.

Q. So your issues with Mr. Walters and the way he wanted to frame the circumstance of his case was like that from the beginning and even in magistrate court?

A. Absolutely.

Q. So I guess is it fair to say you were trying to stress to him how serious the charges were and what the possible consequences would be if he were convicted and he, I guess, was minimizing his behavior?

A. At one point -- it may have been the July 26th meeting or it may have been the one in the library when we listened to the recordings. At some point, he indicated to me that he didn't think the punishment should exceed maybe three years tops in his mind. That's the seriousness level of the case. He would be willing to accept a three-year sentence. You know, wait a minute, Mr. Walters. You're charged with aggravated robbery which carries a minimum of ten years. I don't know how we can get it down to a three-year sentence. Well, you're not on my side. You're not helping me. You're against me. Things like that. And he just totally ignored what I was trying tell him.

Now, everybody in this courtroom knows that I don't pull any punches with my clients. I tell them up front the way I see it. I don't sugarcoat it, and a lot of my clients don't like that. But it tends to avoid these kind of proceedings when I do that on the front end rather than wait until the judge gives you 40 years, and he looks at me and says what happened? Why did I get 40 years?

Q. So basically -- strike that. Mr. Stanley, you mentioned during your direct examination with Mr. Colvin that you received a letter from Greg Jones in the prosecutor's office that he had had some contact with Mr. Walters; is that correct?

A. That is correct.

MS. SAVILLE: Your Honor, may I approach?

THE COURT: Yes.

A. I think I have it right here. Is this it? There is a letter dated August 28, 2012 from Mr. Jones to me. Enclosed is a copy of a letter your client dropped off at our office on August 24, 2012.

Q. That's correct, Mr. Stanley. And that's dated August the 28th?

A. Yes. And attached to that there's a handwritten letter printed in block style. And it's not signed, but the printed name is John Walters. And at the top, it has case number 12-F-175. It appears to be date stamped in at the prosecutor's office, and I can't quite read that date. And along with that there was an envelope, John Walters' case number, prosecuting attorney.

Q. And were you aware of this communication that Mr. Walters had with Mr. Jones before he informed you of it?

A. No. I had no idea. In fact, I wrote a letter to -- this might be the letter that Mr. Walters accused me of putting in his mailbox in the middle of the night one night.

After I got this from Mr. Jones, I wrote Mr. Walters a

letter. In the second paragraph, I say you need to understand that as long as I am your attorney of record, neither the judge nor Mr. Jones will speak to you about this case. Like it or not, all communications must go through me.

And then the second point I wanted to make is that Mr. Jones informed me -- I think Mr. Jones called me on the phone and told me about the letter. But the information was that he considered Mr. Walter's letter to be a counter offer to his plea offer dated July 24, 2012, and he further advised me that he has rejected your counter offer. The only plea offer available to you is the offer set forth in Mr. Jones' plea offer letter dated July 24, 2012.

Finally, Mr. Jones informed me that you have until close of business on Wednesday, September 12th to accept the offer. In order to accept the offer, you must come to my office on or before September 12th and sign the plea offer letter.

And the third point I made is I can't properly represent you if you will not talk to me or my investigators. I sent you a letter dated August 21st in which I asked you to meet with Mike McLaughlin or Jack Strobridge so that you can tell us in detail your story. As of today, you have not scheduled the appointment.

That's basically the last I heard from Mr. Walters. It was either Mr. McLaughlin or Jack Strobridge that indicated to me that either he refused to come in for the appointment -- I think I told the state bar that he came in and met with them. And to be honest and transparent on the record, I went back and tried to find the memo from one of the investigators. Could not find it. And I can't sit here today and say that he came in and met with them or that he did not come in. It's a gray area right now.

Q. So you have neither recollection nor record of that?

A. That's correct.

Q. Okay.

A. I know he didn't talk to me.

Q. Okay.

MS. SAVILLE: Your Honor, I'd like to have the letter to Mr. Stanley of August 28th marked. It's respondent's exhibit one.

MR. COLVIN: No objection, Your Honor.

THE COURT: It'll be marked.

Q. (By Ms. Saville) So, Mr. Stanley, you stated that in your conversation with Mr. Jones, he indicated to you that he saw this letter from Mr. Walters as a counter offer?

A. That's correct. That's what my letter indicates.

Q. But Mr. Jones still agreed to keep open and extend the July plea offer?

A. That's correct. It was on the table. Now, it's my understanding -- and frankly I didn't know this until I reviewed Mr. Colvin's handiwork on the appeal and the plea -- that Mr. Colvin proposed a new plea offer to Mr. Jones that was accepted. And it was that plea that resulted in the 40-year sentence.

MS. SAVILLE: Your Honor, the state would move this letter to Mr. Stanley, dated August 28, 2012, into evidence.

MR. COLVIN: No objection.

THE COURT: Without objection, it's admitted.

Q. (By Ms. Saville) Now, Mr. Stanley, you also indicated just now that you mentioned saying something to the state bar. Did Mr. Walters file a disciplinary complaint against you with the Office of Disciplinary Counsel?

A. Yes, he did.

Q. And did you respond to that complaint?

A. I did.

Q. And what was the result of that action?

A. I should have pulled it out of my desk. At some point, they closed the case. There was no finding of misconduct on my part, and I believe they closed the case.

But to give you the date of when they did it, I can't do that.

Q. If I indicated to you that it was around August the 30th of 2012, shortly after your exit from the case, would you agree with that? Any reason to dispute it?

A. When I responded to them?

Q. I'm sorry. That was when the complaint was received.

A. Yeah. I --

Q. The 20th day of November of 2013.

A. I received a copy of the complaint on September 6, 2012; and I responded to that on September 28, 2012 with attachments. I believe I addressed each and every point raised by Mr. Walters in his bar complaint which is essentially the same information contained in Mr. Colvin's habeas petition.

MS. SAVILLE: I don't believe I have any further questions for Mr. Stanley.

THE COURT: Any redirect, Mr. Colvin?

REDIRECT EXAMINATION BY MR. COLVIN:

Q. Just one question in regards to the September 28th ethics response. You testified that you received that September 6, 2012 from the Office of Disciplinary Counsel, and you responded with a September 28th written submission.

Is that fair to say?

A. Yes.

Q. Okay. Now, looking at the written submission -- I don't think the pages are numbered actually, but I'm looking at the sixth page of the first paragraph, the last sentence, in regards to the March 9th plea offer. It states after several evasive answers, Mr. Walters rejected the March 9th plea offer. At least that is what's listed here in the answer at least to the complaint. Now, based upon that answer, I think we had testimony earlier today that Mr. Walters had neither accepted nor rejected the offer.

A. On the day he left my office, he had neither accepted nor rejected the March offer. Maybe he finally rejected it when I met with him on July 20 -- what was the date I met with him -- July 20 --

Q. Twenty-six.

A. Twenty-ninth. Friday the 29th when we had the meeting in the library and listened to all the evidence. He may have rejected it on that date. If you're asking me do I specifically recall him saying he rejected the offer, I can't say I have a present recollection of a past event. Clearly by his conduct, he rejected the offer. If you ask someone do you want this offer and they don't answer, I at some point consider that silence to be a rejection.

Q. But in this case, he'd asked for an extension of 30 days?

A. Yeah.

Q. And you wouldn't take that as a rejection --

A. But the only offer on the table was Mr. Jones' offer with the 28-year cap because the March offer had already expired by its own terms.

Q. Is that -- the March offer was over?

A. The March offer was dead.

Q. Thank you.

MR. COLVIN: No other questions.

A. And the only offer on the table technically was the June offer with Greg Jones. The March plea offer letter only came into play if he wanted that deal. And I told him I would do whatever it took to get him that deal. And I never got clear instructions from him to go get that deal back.

MR. COLVIN: Thank you, sir. No other questions.

THE COURT: Any further cross? Is the ODC document to be offered or is it --

MS. SAVILLE: Well, Your Honor, I was just about to do that since there's been so much discussion. Mr. Colvin did include just one or two pages of that attached to his petition. I was going to ask the Court to look at it and

consider Mr. Walters' complaint, the response of Mr. Stanley, and also the Lawyer Disciplinary Board, Chief Lawyer Disciplinary Counsel closing of that complaint.

MR. COLVIN: I have no objection to that being included, Your Honor.

THE COURT: Very good.

MR. COLVIN: I mentioned it and referenced it in my habeas to be fair so I think that's fair to include that.

THE COURT: That would be marked collectively as Respondent's 2.

MS. SAVILLE: That's fine, Your Honor.

THE COURT: Thank you. And it will be received and admitted.

Anything further, Ms. Saville, for this witness?

MS. SAVILLE: No, Your Honor, not at this time. But considering Mr. Walters has not yet testified, I think I would like to make Mr. Stanley subject to recall and apologize for that inconvenience to him.

THE COURT: All right.

MR. STANLEY: Not a problem.

THE COURT: Very well. Mr. Stanley will be excused and subject to recall. Thank you, sir.

MR. COLVIN: Thank you, Mr. Stanley.

(Witness excused.)

MR. COLVIN: Permission to call Mr. Walters, Your Honor.

(The witness was sworn in by the clerk.)

DIRECT EXAMINATION BY **MR. COLVIN**:

Q. Good morning.

A. Good morning.

Q. Will you please state your name for the record.

A. John Kenneth Walters.

Q. Mr. Walters, you are the same John Kenneth Walters as the subject of this action for this writ of habeas corpus; is that correct?

A. Yes. Correct.

Q. You are, in fact, the petitioner; correct?

A. Yes.

Q. Where are you currently housed?

A. Huttonsville Correctional Center.

Q. How long have you been at Huttonsville?

A. Since August the 27th of 2013.

Q. I guess to briefly ask you, going backwards, you were, in fact, sentenced to Huttonsville. Are you aware of what your sentence is?

A. Yes.

Q. Could you detail that for the Court?

A. There was a first-degree robbery for 40 years, a

malicious wounding 2 to 10, and a burglary 1 to 15, run consecutive.

Q. Okay. Now, of course you were here in discussion with your former counsel, Mr. Stanley; correct?

A. Yes. Correct.

Q. Now, in this matter, Mr. Stanley represented you. You worked with him back in the spring of 2012; is that correct?

A. Correct.

Q. Okay. Now, we talked a great deal about this March 9, 2012 plea offer. But just during that timeframe, do you recall -- after the events of your preliminary hearing, could you detail the contact that you had with Mr. Stanley from that period until your arraignment.

A. March the 9th -- when I got locked up in January -- I believe it was the 18th -- I did not get out on bond until early April. I don't know if it was the second or fourth. When I was in the jail, I attempted both by phone and written letter to contact **Mr. Stanley** as well as I had someone on the outside also attempt to contact him. And he did not come to the jail to see me not one time. I spoke with him one time on the phone. At that point, he had no information for me. Said he would get over here when he could.

Q. Uh-huh.

A. When I did finally make it out on bond, I spoke with him on the phone. And at that point, he didn't have anything to talk to me about. He didn't have anything to say. And I attempted to contact him on a couple of occasions, you know, to try to find out if anything that I can do because when I got out in April, I went to Shenandoah. I got enrolled in therapy for substance abuse as well as anger management. And I remember trying to convey that to him. You know, is there anything I can do on my behalf, you know. He said, no, I haven't heard anything from the courts.

So we really didn't have any contact other than he contacted me for the arraignment. I mean he made sure that I knew about the arraignment. He didn't hesitate on that, you know, to let me know that there was three more charges. Don't miss arraignment. Make sure you're there.

Q. Okay.

A. And in that period of time, I had also various -- consultations are free. I had various consultations with different attorneys, you know, about the situation because I wasn't getting any answers --

Q. Okay.

A. -- from Mr. Stanley at all. And in those

consultations -- that's how the whole situation came into play about -- well, he had wrote a letter. I had a letter. And one of his letters -- when I asked him because I'd asked him on a couple occasions about getting off of my case, and as I recall, one of his letters -- and I believe that you have the documentation also. He said the short answer is no.

During the consultations that I had, any documentation that I had, I showed it to attorneys. And they all, you know, said -- you know, every attorney that I spoke with stated that, you know, you have a right to adequate counsel.

Q. Uh-huh.

A. And him refusing to get off of my case resulted in -- and I won't -- you know, I won't say the name or where this come from. It resulted in being provided with a document and being told what to do. That this will get him off my case, the complaint, and it was a valid complaint that I was told. And that's what resulted in the Disciplinary Board when I filed a complaint. And that's when he got off of my case. Not before that. Because he had refused before that. But when I filed a complaint, he got off then. That's when he filed for a motion to withdraw.

Q. Let me interrupt you just for a second,

Mr. Walters.

A. Yes, sir.

Q. As far as -- during the timeframe then between the March 9th plea offer and the June 11th arraignment date, you'd had communications -- you said you at least had concerns about representation of Mr. Stanley; is that correct?

A. Yes, absolutely.

Q. And you communicated those not only to himself, but did you communicate that to the Court as well?

A. If I recall, I believe I wrote the judge a letter. Because at that point in time -- because like a moment of clarity when, you know, I'm starting to realize the severity of the situation that I'm in; and I'm not receiving, you know, any counsel, you know, and that's how I felt. And when I had those consultations that just confirmed what I was feeling because, you know, like I said, they pretty much when I had consultation was telling me, you know, you deserve -- you know, you have a right to adequate counsel. You're not getting that.

Q. So at that point -- and, again, we're talking about in terms of June, around the arraignment time. During these difficulties between yourself and Mr. Stanley, you were not aware whatsoever of this March 9th plea offer; is

that fair to say?

A. Oh, absolutely not.

Q. Okay.

A. It never came up.

Q. Okay. Now, when did you first hear about the March 9th plea offer?

A. When I went in for the arraignment. And I could even back up before that because when I was in the jail, I was trying to get a bond reduction; and he never got back in touch with me on that either, you know, as I recall.

Q. Okay.

A. So that was something else that when I was still in the jail, you know, bond reduction, he never got in touch with me. He never came to see, he never discussed it, he never responded back to me.

Q. Well, your testimony, Mr. Walters, is that the timeframe -- I think you indicated it was perhaps January 15th through April 5th of 2012 thereabouts -- you had not had contact with Mr. Stanley; is that correct?

A. No, not at all. Not the whole time that I was incarcerated. Again, I made attempts to both call him and wrote him letters with no response, no reply whatsoever.

Q. Okay. And you mentioned earlier, you said you heard about the March 9th plea agreement at the arraignment

on June 11th.

A. Yes.

Q. Was that true or did you hear about it later?

A. I know I went to his office. It might -- I think it might have been a little later when I had went into the office. And we were talking about that and he had both. But that's not -- the March 9th plea bargain was not the one we were discussing. We were discussing the plea bargain -- he did say that he failed to communicate that to me. But the one he wanted me to sign was the later plea bargain. Not the March the 9th.

Q. Okay. So fair to say that you had the March 9th offer, the July 24th offer when you met with him, which would have been the July 24th offer would have -- based on the date, would have been after July 24th; fair to say?

A. Yes. Correct.

Q. Okay. And you were here -- of course, we're suggesting July 26th is the day. You don't have any independent recollection that that's the day --

A. No.

Q. -- but you don't dispute that either?

A. No.

Q. Is that fair to say?

A. Yes.

Q. Okay. At that point when you had the meeting in the office with Mr. Stanley, when this offer was communicated, that is your testimony the first time you heard about the March 9th offer?

A. Yes.

Q. Okay. At that point, can you describe the attorney/client relationship you had with Mr. Stanley.

A. I mean the communication -- we didn't even really have communication. And a lot of that does go back, you know -- actually, it goes back to the jail. Because, you know, when I think about that, there wasn't even -- there wasn't even appearance of concern at all, you know, regarding -- you know, regarding the case, questions, you know, what can I do. No answers. No nothing, you know, at all.

Q. At that point -- well, can you describe the -- I know the communication you described some of the problems. But can you describe the level of trust or ability to work with Mr. Stanley at that point in July of 2012.

A. At that point, I just wanted him off of my case --

Q. Why?

A. -- even before that. Because as I said, I mean, you know, I was getting -- you know, I was getting no answers. I had more than a couple of consultations with

attorneys with the little documentation that I had. And, you know, it was evident, it was clear that, you know, he was -- he just wasn't doing, you know, anything. And I just felt that it just wasn't in my -- you know, in my best interest.

Q. Uh-huh. And do you recall after your meeting, did you send out a letter to Mr. Stanley after the July 26th meeting?

A. Yes, I did.

Q. Okay. I think this has already been --

MR. COLVIN: May I approach, Your Honor?

THE COURT: Yes.

MR. COLVIN: All right.

Q. (By Mr. Colvin) And this was already referenced, I believe, in your habeas frankly as one of our exhibits. Can you take a look at that letter. Do you recognize it?

A. Yeah. Communication problems exist. Yes. Yes.

Q. Okay. Who wrote that letter?

A. I did.

Q. Okay. Has it been tampered in any way or altered in any way?

A. No.

Q. Okay. Perhaps minus the two punch holes up here. Did you make those?

A. No, I did not.
Q. Okay. Other than that, is that the same?
A. Yes.
Q. Okay.
A. It's pretty much intact.
Q. All right.
MR. COLVIN: I'm not sure if the Court would prefer to have me mark it. It's frankly I think part of the record because it's one of the appendice exhibits already filed.
THE COURT: Yeah. What page number on the appendices? What's the date of the letter I guess is --
MR. COLVIN: July 28, 2012 letter which would be --
THE COURT: Yeah, it's item ten.
MR. COLVIN: Excellent. Thank you, Your Honor.
Q. (By Mr. Colvin) All right. Mr. Walters, I've reviewed that letter. It's a very short letter, but could you just very briefly read that out for the record.
A. Please ask the prosecuting attorney for an extension of the plea deadline 7/31/12 for at least 30 days. Please file a motion with the Court asking to withdraw from my case based on my request for a new lawyer. My reasons are as follows, and I list the six reasons.
Number one was communication problems exist between you and I. Number two, I don't believe you are working in my

best interest. Number three, you have not sat down and talked with me about all possible options in this case. Four, you did not discuss a plea option back in March, 3/9/12, which you admitted you forgot about. Five, you repeatedly refused to hear anything I have had to say up to this point. Six, you even refused to attempt to get me a bond reduction. Please ask the Court to appoint a lawyer with sufficient experience to handle the serious charges against me.

Q. All right. Thank you, Mr. Walters.

A. Yes, sir.

Q. Just for a matter of clarification, the first part you talked about asking for a 30-day extension of the plea deadline. You referenced the July 31, 2012 plea deadline which I assume is for the July 24th plea. You also though list under subparagraph 4 about the March 9, 2012 plea that wasn't provided. Can you please tell the Court as far as this deadline or this extension, were you seeking an extension of the July plea or the March plea?

A. No. It was the July plea. We were not talking about the March one. But during this time also I would like to add that's where the certified mail, the certified letter that I had sent to Mr. Stanley had came in. And the reason why I had to hand deliver that letter to the parking lot is

because when I called the postal -- it was time sensitive. It was regarding a plea deal. And I only had like an hour. And I called over and checked at the Postal Service, and he had not picked up the certified letter. And I sent that documentation to the Disciplinary Board in Charleston. So the reason I hand delivered it is because he would not or did not for whatever reason pick up that certified letter which resulted again in me hand delivering another copy of that letter.

Q. So your testimony today is if you hadn't hand delivered it, it would not have been received?

A. Absolutely.

Q. You mentioned the extension you're looking for was for the July offer and not the March offer. At the point, were you prepared to accept any plea of any kind back in July of 2012 with Mr. Stanley as your counsel?

A. With Mr. Stanley as my counsel, my main focus was I just wanted another attorney. I was not unwilling for a plea. I just didn't want to work with him. Like I said, a lot of that -- you know, a lot of that was based on the experiences that me and him had in the relationship as well as consultations from other attorneys.

Q. Do you recall your response when you discovered the March 9th offer was not communicated to you?

A. Yes, I do.
Q. Okay. What was your response?
A. I think he described it accurately. I mean I was upset. I didn't rant and rave. I do believe I asked him, you know, just be excused from the office, you know, because the relationship -- like I said, the relationship was so strained, you know, at that point. You know, I just didn't see that anything could get accomplished one way or the other.
Q. Okay.
MR. COLVIN: May I approach again, Your Honor?
THE COURT: Yes, sir.
Q. (By Mr. Colvin) I'm going to switch you out for a second and take that back. Now, I want you to take a look at what has been listed as in the appendices number 15. This is the November 27, 2012 letter that is sent over from us to Mr. Jones. Now, what I have shown you at least that's listed here, what is, in fact, the date of that document, Mr. Walters?
A. 11/27/2012.
Q. Very good. What have I just handed you?
A. That was regarding a plea.
Q. Uh-huh. A plea in your case. Is that sent to -- who is it sent to?

A. Greg Jones.

Q. Very good. Now, reviewing that plea agreement, do you recall reviewing that agreement? And, in fact, I think it has your signature; is that fair to say?

A. Yes. Correct.

Q. How many pages is the document?

A. It is two pages.

Q. Two pages. Okay. And you, in fact, have your signature on both pages; is that correct?

A. Yes, I do.

Q. Okay. Now, this agreement -- to your knowledge, the state did not accept that agreement. It's only signed off by yourself and counsel; is that fair to say?

A. Yes.

Q. Now, during that agreement, you had put forward and signed off upon an offer which in effect would have been a 24-year aggregate sentence; is that correct?

A. Yes. Correct.

Q. Okay. Which would have been 4 years less than the July 24th offer but 4 years more than the March 9th offer; fair to say?

A. Yes. Correct.

Q. Okay. And you have no dispute that you were willing to resolve the case with a plea agreement; is that

fair?

A. Yes.

Q. Okay. And, in fact, eventually you did resolve the case with a plea agreement; however, that resulted in a far more significant sentence than you would have had faced under the March 9th agreement; fair to say?

A. Absolutely. Yes.

Q. Okay. If the March 9, 2012 offer for the aggregate 20 years had been available to you in that timeframe we talked about, November of 2012, would you have accepted that lesser sentence?

A. Yes.

Q. If you had assistance -- in your mind, you believe you had ineffective assistance of counsel; is that fair to say?

A. Absolutely. Yes, I do.

Q. And you're talking about in terms of your representation prior to the removal of counsel back in August 2012; correct?

A. Yes.

Q. Is your assertion that if you had effective counsel that you would have been able to review the matter and would have accepted the March 9th plea timely?

A. Yes.

Q. Okay. Mr. Walters, is there any other matter that you believe we have not covered that you believe that His Honor would benefit from understanding from your perspective going forward with this habeas corpus action?

A. I believe everything to the best of my knowledge has been covered.

Q. Okay.

MR. COLVIN: I have no other questions. I know Ms. Saville may have some questions for you, Mr. Walters. Thank you.

CROSS EXAMINATION BY MS. SAVILLE:

Q. Hi Mr. Walters.

A. How are you doing?

Q. You stated that you had some consultations with some other attorneys.

A. Yes, ma'am.

Q. But you chose not to hire any of those attorneys?

A. No. Well, for one I couldn't afford it. It's just as a result of those consultations that's how the disciplinary -- I was given the information how -- in other words for Mr. Stanley to get off of my case.

Q. Did you, in fact, meet with Mr. Stanley in his office on a couple of occasions?

A. Two I believe.

Q. And he went over some of the evidence with you, and you listened to recordings; is that correct?

A. Yes, I do remember that. Yes.

Q. I guess what was your problem with the way that Mr. Stanley was communicating with you during those occasions?

A. One of the things -- right from the start, Mr. Stanley never asked me, not one time, what happened in this case. What was my version of what happened. He never took the initiative, not one time, to ask me what happened. And I wasn't aware really, to be honest with you, how he was actually looking at what happened in this case until I read his response to the Disciplinary Board. When I read his response to the Disciplinary Board, then that provided me with insight into how he was looking at this case.

Q. But you went over all the evidence with him and listened to recordings and things during the meetings with him?

A. Yes, ma'am.

Q. So you also had the information he had about what occurred during the event; correct?

A. Yes.

Q. And you gave a statement to the police --

A. Yes.

Q. -- following that event; correct?

A. Yes. Yes.

Q. So in that way, he heard what you had to say about what occurred; correct?

A. Yes.

Q. And you state that he did discuss both the March 9th plea offer with you and the July plea offer?

A. No. No. That's when -- I first learned about the March 9th -- we did not have a discussion, an in-depth discussion, about the March 9th. He just said I found a plea bargain in here. I forgot. I don't know why it wasn't communicated to you. But that was the extent of it. Everything from that point forward kept increasing in terms of time and sentencing. Never went back there. I can talk to him about this, and we can try. We never had that discussion.

Q. So you're saying he didn't offer to call Mr. Jones and see if he can get that March 9th --

A. Not then. He asked me to sign -- at that time, he asked me to sign not the March the 9th plea bargain but the new one.

Q. So he was recommending that you accept a plea offer from the state?

A. Yeah, but not the March the 9th.

Q. Okay. But he was recommending that you accept a plea offer?

A. Yes. Yes.

Q. And at that point, were you willing to accept a plea offer?

A. Not the one that he had in front of me, you know, because like I said, the relationship between me and Mr. Stanley was so strained at this point. There was mistrust. And like I said, I just felt that honestly I could not work with him. I could not work with him. There was mistrust there. And I was willing to take a plea bargain. I just did not want to deal with him anymore.

Q. Mr. Walters, do you recall writing a letter to Mr. Jones?

A. Yes, I do.

Q. And in that letter, do you ask Mr. Jones to consider other options other than incarceration for your punishment?

A. Yes, I do.

Q. So you admit that you did write that to Mr. Jones in August of 2012?

A. Yes.

Q. Do you recall writing a letter to the Court in August of 2013?

A. Yes, I do.

Q. Do you recall stating that basically that you were broken hearted and that you reacted as you thought most people would react, and you were sorry that you and the victim had to have that experience?

A. Yeah, I think I used the word devastated instead. But I mean when I wrote those letters, it was like one of those situations, like I said, I understood. The reality was sinking in of the severity of this situation. And in the process not having answers because I certainly -- you know, my counsel -- like I said, I didn't feel I was getting answers there. So, you know, I didn't know really -- at that point didn't really know where else to go.

MS. SAVILLE: I don't think I have any further questions.

THE COURT: Mr. Colvin, anything further?

MR. COLVIN: No, sir. Thank you, Mr. Walters.

THE COURT: Very well. Thank you, Mr. Walters.

(Witness excused.)

MR. COLVIN: Petitioner has no further witnesses, Your Honor.

MS. SAVILLE: Your Honor, the respondent would like to call Mr. Whiteoak.

THE COURT: All right.

(The witness was sworn in by the clerk.)

DIRECT EXAMINATION BY MS. SAVILLE:

Q. Mr. Whiteoak, can you please state your name, your employer, and the position in which you're employed for the record.

A. Joseph Whiteoak. I'm an assistant public defender at the Public Defender Corporation.

Q. And how long have you been an assistant public defender?

A. There since 1999.

Q. Are you familiar with Mr. Walters?

A. Yes, ma'am.

Q. And how are you familiar with Mr. Walters?

A. I was at his first scheduled preliminary hearing covering for Mr. Stanley, and then I sat in for a couple meetings at our office with him.

Q. And you know by now the major point of contention here is that March 9th plea offer; correct?

A. Yes, ma'am.

Q. Did you sit in on the July -- I believe it was the 26th meeting that Mr. Stanley had with Mr. Walters?

A. If that's the date of the one where the letter was -- the original offer was found, yes, ma'am.

Q. And did Mr. Stanley address that plea letter with

Mr. Walters?

A. Yes.

Q. How did he address that plea letter to your recollection?

A. He found the letter and told Mr. Walters that if he wanted to pursue that plea offer, he would call Mr. Jones, who was prosecuting the case for the state at that point, to see if that offer would still be extended to him since it was put in the file by error. Mr. Walters had not seen it at that point.

Q. And what was Mr. Walters' reaction?

A. He never said he wanted to do that. I don't know if he flat out said no, but he never would get around to the point of saying he would accept that offer. He insisted on less time which basically to us was a rejection of that offer.

Q. So you recall him insisting on less incarceration time?

A. Yes.

Q. Do you remember anything specific that he said or just that you recall he insisted on less incarceration time?

A. I remember hearing something about three years which I think we tried to explain would be a legal sentence

with whatever the charges carried were. And I don't recall exactly what everything was. But he said it was worth -- whatever happened was worth about three years at most.

Q. Were you also present during the subsequent meeting where you reviewed evidence in the case with Mr. Walters?

A. Yes, ma'am.

Q. And what is your recollection of that conversation with Mr. Walters regarding his response to his charges?

A. I'm not sure what you're asking. Sorry.

Q. That's okay. I guess after listening to the evidence, did you discuss with Mr. Walters what his possible defenses were?

A. I believe So. I mean we were discussing again the whole nature of the case, any defenses, what we believe the state can meet element-wise as far as what they were charged with. At that point, I guess Mr. Stanley was leading the way obviously as main counsel. And at some point, I tried to ask some question, and I was told -- I believe there was an expletive thrown in there but essentially what am I bothering doing there. You know, why am I there wasting his time.

Q. Did the discussion of the plea, of taking a plea offer of the state, come up during that meeting?

A. I believe it did, but I can't -- that one I won't say for sure about.

Q. Okay.

A. I think it was certainly in -- why else were we meeting him sort of.

Q. Do you recall at any point Mr. Walters accepting any plea agreement of the state?

A. No.

MS. SAVILLE: I have no further questions for Mr. Whiteoak, Your Honor.

THE COURT: All right.

CROSS EXAMINATION BY MR. COLVIN:

Q. Mr. Whiteoak, good morning.

A. Good morning.

Q. In this matter, you were not counsel of record for Mr. Walters; fair to say?

A. That's correct.

Q. Okay. In this matter, you were attempting to assist Mr. Stanley?

A. Yes, sir.

Q. Okay. Do you recall at the July 26th meeting was Mr. Walters upset?

A. I don't know that upset is the word. He wasn't -- actually I can't say really. I don't remember him being

upset. He wasn't yelling or screaming at the onset or anything that I recall. As I said, Mr. Stanley told him that we found this original plea offer, and we repeatedly asked if that was something he was interested in.

Q. Okay. Other than those -- other than the prelim that you covered and these other meetings, you didn't have any contact with Mr. Walters other than that though; correct?

A. Not that I recall.

Q. Okay.

MR. COLVIN: No questions. Thank you.

THE COURT: Anything further, Ms. Saville?

MS. SAVILLE: No, Your Honor.

THE COURT: All right. Thank you, Mr. Whiteoak.

(Witness excused.)

THE COURT: All right. Does the respondent have any additional evidence it wishes to call?

MS. SAVILLE: No, Your Honor.

THE COURT: All right. So have we heard all the evidence then?

MR. COLVIN: Yes, Your Honor.

THE COURT: All right. Tell you what. We've been at it for about an hour and a half. Why don't we take a brief recess and collect our thoughts, and then I'll hear argument

from you as to how you would like to proceed.

(Recess.)

THE COURT: All right. Mr. Colvin is the petitioner. We'll give you the right to open and close.

MR. COLVIN: Thank you, Your Honor. Good morning. In this matter, Your Honor, I guess the central thrust of course of this case, which was the ineffective assistance of counsel ground as we've listed and stated in our memorandum of law and support, it's in essence a *Becton* argument as to whether or not, one, did the plea offer exist and, two, was that plea offer not communicated to Mr. Walters in the timeframe that would be acceptable in this case. That is the March 9th plea. I believe that had an April 13th or thereabout deadline. That was not done. And, of course, what harm he received from that.

He had a contentious relationship as described. I don't think anyone has contested that. That relationship was strained really at the onset and continued that way. He attempted prior to the arraignment to obtain different counsel. He was unable to afford private counsel. He was seeking a different opinion from someone else. Obviously, he was looking at a serious matter that was becoming more serious by the day. He had not had communication with his counsel while he was incarcerated for a period of January

through April. I believe January 15th through April 4th or 5th if memory serves. At which point upon being out, his plea offer was never communicated to him.

At the time after arraignment, he then had an opportunity to meet with Mr. Stanley on July 26th when this plea offer was found as well as his new July 24th offer. In the interim, it was testified to between that March time and July period, which was five months, it appears at least there was never any consultation with the file or any review of the actual case matter. There was no consultation with Mr. Walters in the three months preceding that so roughly seven to eight months it seems that nothing ever happened with Mr. Walters' case.

And when the time came to discuss that offer -- which was actually the second offer. The first offer had gone I guess the proverbial way of the dinosaur. It was a dead offer as described by Mr. Stanley which sounds accurate. That it was not to be reissued or reasserted. Further with that, it was never reoffered to Mr. Walters. (Indiscernible) if there's a question about his willingness to plead outside of the agreement he pled to that led to this conviction and sentencing ultimately in January.

Prior to that, we have the November 27, 2012 offer from the defendant whereby he was agreeing to plead to the

charges, a very similar sentence, a 24-year count which was right between the 28 years in the July 24th offer and the 20 years in the March 9th offer but certainly showed his willingness to accept an offer in that range.

This isn't a case where Mr. Walters was so calcitrate that he wouldn't accept anything. I think it was suggested that he was looking at three years, and this is what he wanted. Well, when it actually came time to review everything and examine it, which he finally had a opportunity to, his response was the response that was considerate and in line with the state's offer.

So when you look at those factors, you look at the laws laid out in *Becton*. And in *Becton* of course the difference was in that case the attorney did not recall if they had not given the offer or not. In this case, it has clearly been stated. It's been placed I think in the ODC, Office of Disciplinary Counsel, response as well as in the brief that they knew about it at that point and had not communicated it. It was not a question mark or a gray area as to whether or not he knew about it or didn't. He didn't know about it. And upon receiving it, to suggest that he should immediately take it -- and he has no trust whatsoever with his attorney at that point. Hasn't seen him, hasn't talked to him, hasn't worked for him, hasn't provided anything to him and

spent most of the time based on Mr. Walters' testimony discussing the July plea offer and not the March plea offer that would be, at that point, eight years less time than the other.

So understandably, Mr. Walters was not in a position to work with counsel, but he was still willing to consider plea offers by way of his request from his July letter where he wanted an extension of time to consider the plea offer, actually review discovery, try to have a different lawyer to assist him. At which point, a complaint was filed. It was withdrawn when he had an opportunity to review everything.

At that time, he was able to move forward and have a plea offer that he had put forward and eventually settled upon another offer. Well, his other offer resulted in him having 1 to 15, a 2 to 10, 40 years run consecutive, one after the other, after the other. More than double, more than triple of what his sentence would have been if he had heard about the March 9th plea offer and had effective assistance of counsel.

So I think the law is clear in this case, Your Honor, as listed under the *Becton* case. We have to tell him what the offer is. We go through every pretrial. We're required -- and of course to have the *Neuman* dialogue, the right to testify, is a sacrosanct area of *Becton*. We must

tell them. Benji Becton was the guy that came off from this hearing from Berkeley when he was not told what had occurred. And that was, of course, overturned after his trial, and he received a lesser sentence.

Mr. Walters is not asking for a pass or a walk. He's asking as listed in the memorandum to have specific performance of the plea offer that he would have signed on if he had known it existed. That is a 20-year sentence. It's a substantial sentence, but of course substantially less than what he received otherwise of course not knowing without the agreement.

So I think it's fairly clearly laid out. Understanding that mistakes occur, I don't think it's something intentionally withheld from him. I don't think we heard that. I don't think that matters whatsoever. The end result is that he didn't hear about the offer. He couldn't have accepted it. It violates *Becton*. And, therefore, we'd ask for specific performance of the original March 9th plea offer. Thank you.

THE COURT: Ms. Saville.

MS. SAVILLE: Thank you, Your Honor. As Mr. Colvin sort of laid out, while there is no question of actual guilt in this case, the Supreme Court has already upheld his sentence of 40 years as a constitutionally acceptable

punishment for the crimes of conviction. The only allegation we have here today is that Mr. Stanley failed to show Mr. Walters this plea agreement before it expired in March. And there is really no contest to that, Your Honor. But that's not where the Court's inquiries should end.

Becton does state that it is a violation of prong one of *Strickland*. His counsel's performance was deficient under an objective standard of reasonableness for not showing him that plea offer prior to its expiration.

As we have with Mr. -- as Mr. Colvin pointed out, we don't have any purposeful intent on the part of Mr. Stanley. It seems that this was just a piece of paper, a document that was lost in the public defender's paper trail.

So we still have to look, however, at the second prong about reasonable probabilities. That but for counsel's unprofessional errors, the result of the proceedings would have been different. Before I get to that though, just looking at *Becton* itself, it states that the failure of defense counsel to communicate plea bargain proposals constitutes ineffective assistance of counsel as extenuating circumstances.

We have a case here that's chock full of extenuating circumstances. We have first -- many things distinguish this case from *Becton*. First being that the petitioner in

this case was shown the plea agreement prior to when he entered into a plea agreement with the state, prior to him being up for trial. He was shown this plea agreement, and the case hadn't been resolved. There was an ability to correct the error that had occurred. And Mr. Stanley, from the testimony of Mr. Stanley and Mr. Whiteoak, offered him in good faith that correction option. And Mr. Walters wouldn't take that. Also, the case did not go to trial. *Becton* went to trial and was convicted and sentenced and would have received a lesser sentence.

What happened in this case is that it was resolved by a plea agreement that was proposed by the petitioner and left sentencing at the discretion of the trial court. And I want to come back to that point in a little while as well. But even if the Court doesn't wish to view these factors in the form of extenuating circumstances, he does still fail to establish that there was prejudice under *Missouri vs. Frye*. And I mention in my brief that *Becton* doesn't deal with *Missouri vs. Frye* because *Missouri vs. Frye* is the United States Supreme Court precedent that came along later. And the West Virginia court has adopted orders where circuit courts have used *Missouri vs. Frye* in their analysis of plea bargaining.

Missouri vs. Frye states specifically that to show

prejudice from ineffective assistance of counsel where a plea offer has lapsed because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer that they had been -- had they been afforded effective assistance of counsel.

We have a few players -- a few factors of play here. First is to say that Mr. Stanley and the Public Defender's Office had no contact with the petitioner from his arrest through April is not accurate. There were, as the testimony was heard by the Court today, hearings in magistrate court for which both Mr. Whiteoak and Mr. Stanley appeared. Mr. Stanley even states in his reply to the Office of Disciplinary Counsel complaint that he met with Mr. Walters for the preliminary hearing date, and he believed he had answered all of Mr. Walters' questions he had up until that date about his case.

You also heard Mr. Walters testify that he called and talked to Mr. Stanley on the phone, and Mr. Stanley reported he didn't really have much to report. That's probably because they were still waiting on indictment. They were still waiting on discovery. So there wasn't a lot for them to discuss up until that arraignment date. And you heard all the testimony, even from Mr. Walters, that Mr. Stanley

absolutely made sure he was at that arraignment date. Called him. Said be there. There are three more charges. Started to explain things to him. Wanted to make sure he was going to be there. So there were hearings for which they appeared around which Mr. Stanley spoke to Mr. Walters. So I don't think that really establishes that Mr. Walters had a serious problem with Mr. Stanley because of lack of communication.

I think what the evidence shows here is that there is no reasonable probability that Mr. Walters would have accepted either of those plea agreements. The March 9th agreement or the July agreement. The March 9th agreement of course is the focus because it's the one that expired. But he, in fact, rejected that offer. He rejected both the 20-year offer and the 28-year offer.

It's pretty clear from the record that at this point in time when all this was happening Mr. Walters was not willing to accept really responsibility for the seriousness of his crimes. He was saying to the prosecutor, please consider other options of my punishment, which was a counter offer to the offers that the state had made up until that point. Which the state could have just said then fine, I'm closing that plea offer. But Mr. Jones allowed that July plea offer to stay open after that point. And it was not accepted

before its expiration either.

Mr. Walters wrote letters to the Court stating that breaking into a woman's house and hitting her in the head with a hammer was how most people would have reacted after having their heart broken. And that he didn't feel that long-term incarceration was good for him and that he was sorry that both he and the victim had to go through this experience. Well, the reason they had to go through the experience was because of Mr. Walters' criminal behavior.

So it's clear during this period of time -- and you heard the testimony about Mr. Walters saying, oh, that's too much time. This is worth about three years. What I did I can see maybe three years. And it's just completely clear from the record Mr. Walters was not looking to be incarcerated for any lengthy period of time whether that be 20 years, 24 years, 28 years, however many years. He felt he should have gotten a very minimal sentence out of what happened because after all, his heart was broken.

Plea agreements are contracts, and I have been through this. The state received this letter from Mr. Walters that was in essence a counter offer which rejected their previous offers. Mr. Stanley asked if he could open that March plea offer, and Mr. Walters wasn't going to hear any of it. And I would point to you the testimony of Mr. Whiteoak when he

states that we talked about both the March plea offer and the July plea offer. And Mr. Walters' statements were I would do about three years. To them he said that was a rejection of the plea. So it's hard for the petitioner to make a showing that there was reasonable probability that he would have accepted that March 9th offer if he had seen it before it expired.

The petitioner's complaint and Mr. Stanley's response also demonstrate that it seems like the main conflict between the two was that Mr. Stanley wanted him to accept a plea and ironically Mr. Walters didn't want to take one. And that goes to the heart of what he has to show in this case to prevail. Aside from that, *Missouri vs. Frye* goes on to state that in order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier offer must also show that if the prosecution had discretion to cancel or the trial court had discretion to refuse to accept it, there is no reasonable probability that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

The petitioner also fails to show in this case that the trial court would have accepted and implemented the March plea offer. The Court made a very clean and clear record at

sentencing that all but said that it would not impose a sentence of less than 40 years for what the circumstances of Mr. Walters' case was and his criminal history. Mr. Walters had previously been convicted and sentenced of an aggravated robbery I believe in Mercer County for which he was given a sentence of 20 years. And he had been convicted and sentenced in Kanawha County for an aggravated robbery for which he received 30 years. The Court made a very lengthy record of how those convictions and how the fact that his parole had been revoked on those factored into the Court's consideration at sentencing. And the Court ultimately entered a sentence of 40 years for Mr. Walters given those factors.

The other thing that's important to consider is the plea that was ultimately entered into by the parties was not binding on the Court. So if the Court felt that 20 years was an appropriate sentence for Mr. Walters, the Court could have imposed that, but it chose not to. It imposed 40 years instead. So we don't have any showing of prejudice for the petitioner under the factor of *Missouri vs. Frye*, and for those reasons, the state would ask the Court to enter an order denying the writ.

THE COURT: All right. Mr. Colvin, if you wish to reply.

MR. COLVIN: Yes. Thank you, Your Honor. Part of the discussion I think with the respondent's closing, I think it's first talking about *Becton* as far as its extenuating circumstances. Those don't appear to exist really at all. There is consideration about this rejection, and I had asked about that and particularly the response I was given from Mr. Stanley in the Office Disciplinary Counsel complaint whereby there was discussion I think rejecting or not rejecting. From the testimony today, clearly he had not rejected or accepted the plea. He had asked, in fact, even for an extension of the same to have time to consider it.

There is no question we have, based on the testimony today, that the March 9th offer was gone. Mr. Stanley testified on multiple occasions this morning it was dead. It was gone. It was not going to be reissued or reoffered to him. As far as any concern about *Missouri vs. Frye*, reasonable probability would he have accepted it, I think certainly the November 27, 2012 plea offer that was signed by Mr. Walters for that 24-year sentence, which was right between the two offers that the state has suggested he would not have accepted, of course he would have. He did. It was not accepted by the state. It would not reoffer him the offer that had been previously given to him based on his own expiration on his terms. So we know clearly that doesn't

apply either.

The only remaining question that comes out and for the Court what they would accept or put forward, what he had and what he lost obviously from that plea is it was a binding plea. It was a plea that was set out for the 20 years based on its own terms whereby these additional felony convictions with their own sentences would all be served concurrently. That was the same landscape for the July plea offer. It was the same landscape for the November plea offer. Each of them, all three of them, have the same features to it. It was going to be binding each time and only became nonbinding after which there was no other opportunity for him to do that. So I think it suggests that, well, he wouldn't have accepted that. It's not true. Of course he would have.

The Court could have sentenced him to that based on the binding plea. As the Court knows, the Court can accept it or reject it. We won't know what that would have been. He never had the opportunity to do so, and we can't presume based upon the sentencing that ultimately was afforded to Mr. Walters that the Court would not have gone and accepted the plea as presented by both the prosecutor and the defendant.

At that point, of course, timewise -- this was a March 9, 2012 plea. He doesn't actually effectuate a plea until

January of 2013. Totally different timeframe involvement. I think that it can be noticed that almost a year had passed between that first time and the time he was sentenced. That's a significant period of time. You know, certainly that was lost to him as well. So there is no doubt that he had lost significantly based upon this. That it has, in essence, greatly increased his sentencing into what has been a de facto life sentence based on his age.

They didn't share the offer with him. It's clearly ineffective assistance of counsel. There is a laundry list of course of cases that I cited out in the brief. All the same for that proposition. And *Becton* of course, the seminal case for that, says it is unless there's an extenuating circumstance. We don't have one. What would be an example of that? We don't have one to show for Mr. Walters other than it was just something we (indiscernible) and filed, and we didn't look at the file.

They had so much time to correct it. They could have looked at the file in April or May or June or July. And finally at the end of July, they see this new offer. And only because of that did they see the March offer to go and present that at which point Mr. Walters has absolutely no trust or faith in his counsel who says sign this, sign that. Why would he do that for folks who have given him so little

effort and consideration in his case that they can't even share with him what they're absolutely required to do. One of the few things the defendant gets to pick -- they don't get very many. Counsel gets most of them. They get two. Do they testify or not or do they plead or not? That's about it. And he was not afforded that, and he should have been. Thank you.

THE COURT: All right. Upon a review of the petition and the response filed by the state and from the hearing today, I believe we do have information necessary to finally resolve this issue.

Let me first say that the petition that Mr. Colvin filed was a particularly good petition in the sense that it picked an issue likely to give benefit to the party. In other words, this wasn't one where you shotgunned it, and out of the 50-some-odd *Losh* list items, you picked 23 of them to settle on as your final and last demand for relief. I think Mr. Colvin selected one that was -- well, in concert with Mr. Walters, selected one that represented a serious issue with the case -- and I don't think anybody could say it's not a serious issue with the case -- and, you know, developed it factually and presented it making the job of deciding it all the more difficult I might add.

But the case falls under the *Strickland vs. Washington*

case which has two broad elements that are called into play. First, whether there was an objective breach of the standard of care expected of lawyers practicing criminal defense work; and, secondly, but for the breach the result would have been different.

In plea cases, we have the case that the counsel have cited which is *Becton vs. Hun*, decided in 1999 by the West Virginia Supreme Court of Appeals. The case is highly instructive, but there are -- with all cases they're slightly different here. *Becton vs. Hun* was a situation where the petitioner did not know of an offer until after his conviction, and he was actually preparing a habeas when he discovered the written offer proposed by the Berkeley County Prosecuting Attorney's Office. It included a recommendation as opposed to a binding plea. So *Becton* did not present a case where there was a binding plea agreement but rather was a recommendation or an offer to have the state recommend a certain sentence which as we all know doesn't bind the Court. It maybe provides the Court with a safe harbor in the event that that's the sentence they would have picked anyway. But it does not give rise to the same dynamic that a binding plea does because a binding plea typically results in a pre-plea investigation just to see if it's worth exploring for the purposes of the Court.

I believe that *Becton* is importantly changed by the more recent U.S. Supreme Court decision, *Missouri vs. Frye*. And in that case, there are elements -- in other words, that second part of the *Strickland* analysis gets explored further, and there is really three components to it.

First, the question is whether the client would accept. Would the client -- would the defendant accept the plea that's been offered and not communicated?

The second one would be is this the state where the prosecutor is duty bound to stand by the offer if a written acceptance is made or can the state withdraw the offer any time up to the time the plea is actually accepted by the Court?

And third, whether or not the Court would accept that limitation upon its authority to determine whether or not the plea actually entered into was consistent with the public interest or not.

We spent our time in the hearing today talking about the first subpart introduced by *Missouri vs. Frye*, which is whether the client would accept. In looking at this issue, we have a couple things going on.

First, Mr. Stanley, who is at least with the Public Defender's Office here, I believe was a 17-year practitioner. Somewhat less at the time of the events of

this case. But he testified that he has apparently one matter of fact way of describing a person's exposure, and it is not unheard of to have folks who are -- you know, this is -- I do this fully acknowledging the trauma that a person accused of an offense is experiencing. In other words, they're sitting there in jail or perhaps facing a felony charge and this isn't really information that is pleasant to hear. You know, you've got a serious problem. This is what is going on. And Mr. Stanley has been around the block long enough to know a serious problem when he sees one.

The testimony I heard today was that he went in and told Mr. Walters he's got a serious problem. This is -- you know, the state's case is strong. I need to hear something that's going to help me defend it because what I'm hearing right now is you've got the aggravated robbery and the burglary and the malicious wounding claims which appear to be substantiated by the discovery and the information he was able to gather.

Well, Mr. Walters -- and I believe he testified to this, and I do find by a preponderance of the evidence that this is the case is that it took awhile for the reality to settle in. And, again, it's not uncommon in the experience that we have in these cases.

These cases have an arc to them. In other words, at

the beginning of the case everybody is geared up for the hot contest and that, you know, there's not a lot of interest in discussing resolution. And, you know, they're mostly posturing for the result they want to get. By the testimony of Mr. Stanley and by Mr. Whiteoak, Mr. Walters' thinking that the exposure presented by the facts giving rise to this criminal complaint was in the nature of three years as opposed to the multiple decades being discussed by the prosecuting attorney.

First, with respect to the scope of the breach of standard of care, the only breach of the standard of care that I can discern from the testimony and from the pleadings is that Mr. Stanley failed to communicate in a prompt fashion an offer -- a plea offer. And I think Mr. Colvin has established to my satisfaction and, frankly, I don't think it's reasonably contested that Mr. Stanley violated the standard of care by not promptly communicating an offer of a plea.

So really the question in this case is part B of the *Strickland* case which is would it have changed the outcome had he done what he was supposed to do? The Court reasons that the failure to communicate the plea in a more timely fashion did not result in a substantial change in the outcome of the case.

My reasoning is as follows. Mr. Stanley did promptly communicate when he discovered it was filed along with another plea of somewhat longer duration, similar committed sentence. And in discussing the matter with Mr. Walters, understandably upset, nevertheless offered to gain and seek out an extension but didn't want to do that without the assurance that the plea would be taken. He did not receive a response to that accepting it. Didn't receive one rejecting it. However, he did receive discussion along the lines of he felt it was something that should only expose him to a three-year sentence. And clearly the process of having the reality settle in had not come in the July conversation with Mr. Stanley and Mr. Whiteoak.

The proof in the pudding on that is that an extension was, in fact, obtained for the July offer and that ultimately was rejected by inaction. If he was in a frame of mind to limit his losses -- I see Mr. Walters has a prior felony conviction. He was subjected to if not a single, maybe even a double level of recidivism. So he had -- if he hadn't appreciated the seriousness of this situation, he surely should have by that point.

But the long and the short of it is, is I -- you know how these things are. If he was thinking 3 years, offered it to be assured that you're going to get 20, it wouldn't be

a very appealing offer indeed. And, in fact, he felt that this was something by his letter addressed to the Berkeley County Prosecuting Attorney's Office, he wasn't thinking a lengthy incarcerated period as of the end of August 2012, which of course is months after the March 2012 offer was extended.

So I determine by a preponderance of the evidence that Mr. Walters failed to prove that but for Mr. Stanley's failure to promptly communicate the March 9, 2012 offer that the results of this case would be substantially different.

Now, I do note -- and it is persuasive to a degree that in November of 2012, by new counsel, perhaps one that had been kinder and gentler and more to his liking, was -- he was willing to make an offer to plead and expose himself to 24 years. You know, that certainly was a prudent and wise approach. However, I have no control over the state's offers. And the state has the right to make and define its offers as it sees fit. And it simply shows that, you know, the willingness to engage in discussion where the 28 years was gone. It wasn't a request to go back to the 28-year offer, but rather, you know, he was trying to get something off that.

You know, the state at this point -- I don't know

whether the state knew about the two prior aggravated robberies at that point or not. And, you know, as to the second and third parts of the *Missouri vs. Frye* analysis, that is whether the prosecutor could withdraw it or whether the Court would accept a binding plea of 20 years. You know, having reviewed the sentencing hearing and the presentation made by Judge Wilkes, at that point, clearly had he felt that 20 years would have been the appropriate outcome -- and, of course, this was a known offer at that point -- he could have made it.

I believe that Mr. Walters did have several nice people come testify on his behalf, and I think it was an aggressively fought sentencing. But, nevertheless, he's looking at the history. And in the manner of the way these are handled in the 23rd circuit, if you've got a binding plea, you get the history, and then you figure out whether this is really an appropriate case for a 20-year limitation or not.

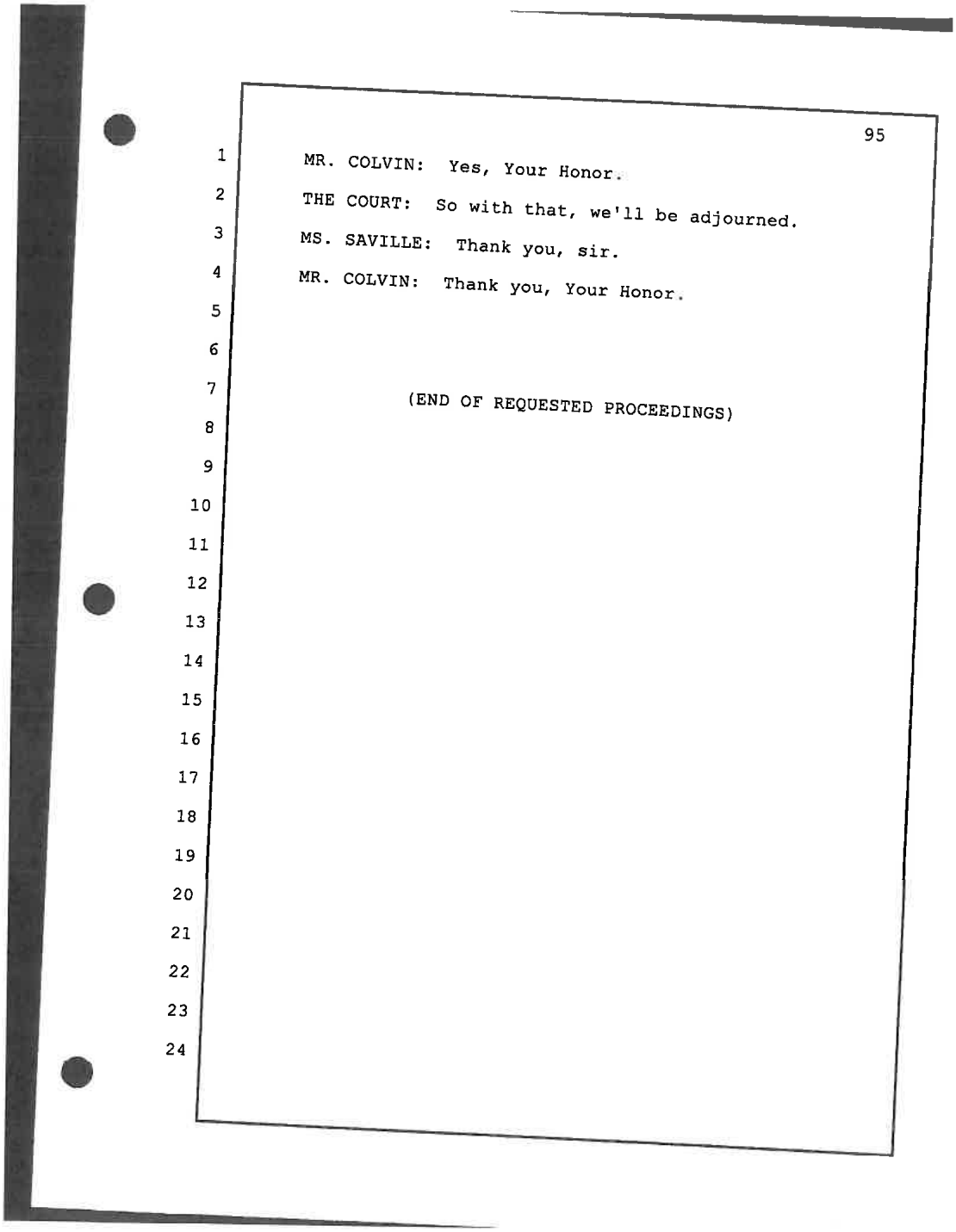
And, you know, the burden is on the petitioners. These are difficult cases to raise and prove by the petitioners by design. I think the petitioner would have to show that Judge Wilkes would have accepted a 20-year limitation on his discretion given the fact he had been twice previously convicted of aggravated robbery and that he had been revoked

on his parole for his previous sentence for aggravated robbery. If 20 years didn't do it or if 30 years didn't do it, I think Judge Wilkes is wondering, well, how much time would do it and, you know, cause this person to refrain from this conduct which the legislature has seen fit to give a very severe open-ended exposure to, which is the not less than ten years exposure, which means that the sky is the limit for whatever the judge wants to give.

So I'll find that while prevailing upon part one of the *Strickland/Washington* test that the petitioner here has failed to demonstrate the outcome-altering nature of the breach of the standard of care as to the client acceptance part and the court acceptance part. And I don't think there is anything really to go either way on the prosecution part. But that will be my resolution of the habeas, and I'll ask Ms. Saville then to prepare an order consistent with my findings. We'll certainly note your objection, Mr. Colvin.

MR. COLVIN: Thank you, Your Honor.

THE COURT: And you do have a fresh legal issue there I think to take up and discuss and that is the nature and effect of the *Missouri vs. Frye* case on our state jurisprudence. I think there is some room in there for the Court to see the case differently from me, but just from sitting where I'm sitting that's the thought that I have.



95

MR. COLVIN: Yes, Your Honor.

THE COURT: So with that, we'll be adjourned.

MS. SAVILLE: Thank you, sir.

MR. COLVIN: Thank you, Your Honor.

(END OF REQUESTED PROCEEDINGS)

Walters - 5:17cv96 - Exhibit 39 - 000095

JA at 313

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF BERKELEY, TO WIT:

I, Catherine Anne Slayden, Notary Public and Official Court Reporter for the Circuit Court of Berkeley County, West Virginia, do hereby certify that the foregoing is a true and accurate transcription of the proceedings in the matter of Case No. 15-C-189, held October 13, 2015 as reported by me.

Given under my hand this 28th day of December, 2015.

Catherine A. Slayden, CCR, RPR
My commission expires February 26, 2024

P1

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
DIVISION II

STATE OF WEST VIRGINIA

VS.

CASE NO. 12-B-64
JUDGE WILKES

JOHN WALTERS,

DEFENDANT.

ORDER REGARDING CORRESPONDENCE FROM PARTIES REPRESENTED BY COUNSEL

This matter comes on pursuant to the Court receiving correspondence from a party who is represented by counsel. It appearing to be improper for the Court to consider said correspondence, it is hereby ORDERED that the attached correspondence be forwarded to counsel for the defendant to take such action, as they deem appropriate.

The Clerk shall provide attested copies of this order to the defendant, the Prosecuting Attorney and the Public Defender.

ENTER: April 4, 2012

CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

cc: PA
PD
Def.
4-4-12

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: _____
Deputy Clerk

2012 APR -4 PM 02
BERKELEY COUNTY
CIRCUIT CLERK
VIRGINIA SINE, CLERK

Walters - 5:17cv96 - Exhibit 34 - 000079

JA at 175

You Honorable
Judge: Wilkes

I have been Requesting A possible bond Reduction, I would like to get into some programs to help myself, However, I Am unable to get Any Response And I have Asked A Number of Times, I Turned myself in Freely, And I just want help, And to move on with my Life, please modify my Bond

John Walters

BERKELEY COUNTY
CIRCUIT CLERK
2012 APR -6 PM 2:02
VIRGINIA KING CLERK

TJ 03682

PD

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
DIVISION II

STATE OF WEST VIRGINIA

VS.

CASE NO. 12-F-175
JUDGE WILKES

JOHN WALTERS,

DEFENDANT.

ORDER REGARDING CORRESPONDENCE FROM PARTIES REPRESENTED BY COUNSEL

This matter comes on pursuant to the Court receiving correspondence from a party who is represented by counsel. It appearing to be improper for the Court to consider said correspondence, it is hereby ORDERED that the attached correspondence be forwarded to counsel for the defendant to take such action, as they deem appropriate.

The Clerk shall provide attested copies of this order to the defendant, the Prosecuting Attorney and the Public Defender.

ENTER: June 12, 2012

CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: Deputy Clerk

2012 JUN 13 AM 10:52
VIRGINIA M. SINE, CLERK
BERKELEY COUNTY
CIRCUIT COURT

PA
PD
Def.
6-13-12

Walters - 5:17cv96 - Exhibit 34 - 000081

JA at 177

cc Tom Stanley
PA

06/04/12

THE HONORABLE JUDGE WILKES

I do not believe Mr. Thomas L. Stanley, his counsel, to be in my best interest.
1.) Conflict does exist.
2.) I believe his counsel ineffective.

I attempted to communicate while at Eastern Regional Jail via phone and mail without success. He refused even to address getting me a bond reduction. Mr. Stanley stated at my last preliminary hearing without explanation "Absolutely not", regarding my bond situation.

I called to meet on 05/31/12 with Mr. Stanley to discuss my case. He explained the arraignment process and a discussion took place about a motion he filed on 05/06/12 for Motion for Early Discovery. He stated, "There was an audio and I have not listened to it in its entirety and I don't know if there is any other evidence." Mr. Stanley didn't recall it took almost three months to bond out, although, I sent letters and called from the jail. He said, "I thought it was a month." Mr. Stanley stated, "I will withdraw from the case if you don't trust me or you are consulting others for advice." I called on 06/01/12 to speak with Mr. Stanley about withdrawing. He stated, "No, you're stuck with me and don't forget your arraignment on 06/11/12." Your Honor, I am requesting that you, please, appoint me another attorney.

Your Honor, I have been on bond since 03/29/12 without incident. I am currently attending counseling at Shenandoah Community Health Center for anger management and alcohol and drugs and I am actively seeking work.

John K. Walters

CASE NO. 12-F-175

THE HONORABLE JUDGE WILKES

Your Honor:

I'm writing this letter to plead for mercy in my case. Please consider the scenario and circumstances surrounding my situation. I am not trying to justify my actions. I have a two year old son that has cerebral palsy that needs his father. I was in a two year intimate relationship with the victim, Robin A. Raines. I lived with this woman. There were problems in the relationship which I was largely responsible. I caught her in bed with another man. I was devastated and consumed with anger. I made some stupid and wrong decisions. I think most people would have reacted the same way. I am not attempting to justify my actions, because there is absolutely no justification. I was wrong. She did not deserve the emotional and physical hurt I caused. I am truly sorry for my actions and can only hope and pray for mercy in Jesus Name.

Sincerely,

John Walters

John Walters

BERKELEY COUNTY
CIRCUIT CLERK
2012 AUG 16 AM 10:42
VIRGINIA M. SINE, CLERK

JA at 179

SENT CERTIFIED MAIL # 7011 2970 0002 8020 0489

07-28-12

Mr. Thomas L. Stanley:

Please ask the prosecuting attorney for an extension of the plea deadline 07-31-12 for at least 30 days.

Please file a motion with the court asking to withdraw from my case based on my request for a new lawyer. My reasons are as follows:

1. Communication problems exist between you and I.
2. I don't believe you are working in my best interest.
3. You have not sit down and talked with me about all possible options in this case.
4. You did not discuss a plea option back in March 03-09-12 which you admitted you forgot about.
5. You repeatedly refused to hear anything I have had to say to this point.
6. You even refused to attempt to get me a bond reduction.

Please ask the court to appoint a lawyer with sufficient experience to handle the serious charges against me.

Thank You,

John K. Walters

John K. Walters

Need copy of My Discovery And CD's

PUBLIC DEFENDER CORPORATION
FOR THE 23RD JUDICIAL CIRCUIT

295 MONROE STREET MARTINSBURG, WV 25404 (304) 263-8909 Fax (304) 267-0418 pubdefend@comcast.net

August 1, 2012

John K. Walters
106 E. Martin St.
Apt. #4
Martinsburg, WV 25401

Re: State vs. John Walters
Cir Case #12-F-175

Dear Mr. Walters,

I am writing in response to your hand-delivered letter, dated July 28, 2012, that you handed to me at the entrance to the Public Defender Office at approximately 2:00 p.m. on July 31, 2012.

With respect to unnumbered paragraph one of you letter, I was able to speak with Mr. Jones about extending the deadline on the State's plea offer. Mr. Jones graciously extended the deadline to the end of your status hearing on August 13, 2012. To be clear, this means that you have to accept or reject the State's offer by the end of the hearing.

With respect to your request that I file a motion to withdraw as your attorney, the short answer is NO! As I have explained to you, your dislike of me is insufficient as a ground for me to withdraw from your case. Also, I will repeat, in writing, what I have advised you to do already. If you have reasons to request a new attorney, other than your only stated ground of dislike for me, you must write a letter/motion to the court stating whatever grounds you believe you have. You cannot fire me. Only the appointing court can remove me from your case. I believe I have responded to the third non- number paragraphed as well.

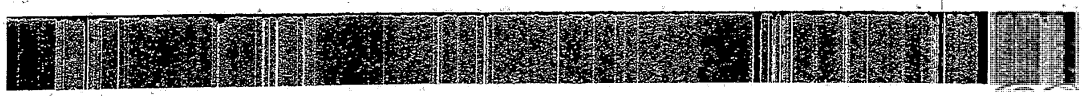
In response to your handwritten request for copies of discovery, I would remind you that you were provided a copy of all written discovery material on June 11, 2012. There is a copy of the audio recordings available for pick-up at our office. All you have to do is appear at my office and sign a receipt for the CD containing the audio recordings.

We have a status hearing scheduled for August 13, 2012 at 1:00p.m. You must be present. The State's plea offer will expire at the end of this hearing. If you want to "fire" me, you will have to write the Judge. I am not going to ask the court to permit me to withdraw.

Very truly yours,

Thomas L. Stanley

cc: Greg Jones
Assistant Prosecuting Attorney



IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

V. Criminal Action No : 12-F-175

JOHN WALTERS,
Defendant.

BEFORE: Honorable Christopher C. Wilkes
Judge of the 23rd Judicial Circuit

HELD: Berkeley County Circuit Court
Berkeley County Circuit Courtroom
Martinsburg, West Virginia
August 13, 2012

STATUS HEARING

APPEARANCES

GREGORY JONES, Martinsburg, West Virginia, Counsel for the State of West Virginia.

THOMAS STANLEY, Martinsburg, West Virginia, Counsel for the Defendant.

Tracy P. Rice, RPR
Official Court Reporter
380 W. South Street
Suite 4400
Martinsburg, WV 25401

I N D E X

PROCEEDINGS

THE COURT. Do you have Mr. Walters and you think he's --

MR. STANLEY: He showed up in shorts as well.

THE COURT: And he may have left?

MR. STANLEY: He may have. This is the gentleman that filed a motion to -- he wants a more experienced trial lawyer or his case.

THE COURT: You know, I don't get to read anything they send if they have lawyers. Darn it. All we can do is send copies to everybody with an order saying somebody is represented by counsel.

BAILIFF: He's out there. He has shorts on.

THE COURT How is the case moving on then? I can't read his pleadings so --

MR. STANLEY: The State has provided discovery I just got some more info today, but Mr Jones handed me a motion to protect the -- actually asked that the location of the victim be kept secret. I don't oppose that, Judge.

THE COURT: Do you want to do him next Monday too so we can put things on the record? If he's got a beef, you know, let's let him put his problems on the record. I think that's better.

Mr. Jones, are you available next Monday?

MR. JONES: Yes, Your Honor.

THE COURT: Maybe let him come in and --

MR. STANLEY: Bottom line I don't have grounds to withdraw, Judge, and the communication problem is willful ignorance in my opinion.

THE COURT I thought you were going to say on your part there for a minute. I was going to say --

MR. STANLEY: Sometimes --

THE COURT Sometimes it's blissful, willful ignorance too at least in my case. I like it.

Let's do it next week. Have him come in here appropriately dressed and if you would do the order

MR. STANLEY: Yes, sir.

THE COURT: We will do it next week at one o'clock.

MR STANLEY: Want me to put in the order the State's motion to protect location of the victim is granted?

THE COURT: Let's wait until next week to do all of that.

MR. STANLEY. Thank you.

(Proceeding concluded.)

STATE OF WEST VIRGINIA,
COUNTY OF BERKELEY, TO WIT

I, Tracy P. Herron-Rice, Official Court Reporter for the Circuit Court of Berkeley County, West Virginia, do hereby certify that the foregoing is a true and correct transcription of the proceedings in the matter of State of West Virginia v. John Walters, 12-F-175, held on the 13th day of August 2012 as reported by me

I further certify that the foregoing was prepared in accordance with Code 51/7/4.

Given under my hand this 22nd day of April 2013.

Official Court Reporter

4/22/13

PETITION UNDER W. VA. CODE § 53-4A-1 FOR WRIT OF HABEAS CORPUS

STATE OF WEST VIRGINIA

Name: John Walters	Prisoner No.: 17437-2	County: Berkeley Case No.: ~~15-P-~~ 15-C-189

Place of Confinement:
Huttonsville Correctional Center
P. O. Box 1, Huttonsville, WV 26273

Name of Petitioner (include name under which convicted)	Name of Respondent (authorized person having custody of petitioner)
John Walters	v. Marvin Plumley, Warden

PETITION

1. Name and location of court which entered the judgment of conviction under attack
Berkeley County Circuit Court, 380 W. South St., Martinsburg, WV 25404

2. Date of judgment of conviction January 7th, 2013

3. Length of sentence 1-15 years, 2-10 years, 40 years all to run consecutively to each other

4. Nature of offense involved (all counts) Burglary, Malicious Assault, Robbery in the 1st Degree

5. What was your plea? (Check one)
(a) Not guilty ☐
(b) Guilty ☑
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury ☐
(b) Judge Only ☐

7. Did you testify at the trial?
Yes ☐ No ☐

8. Did you file a direct appeal from the judgment of conviction in the Supreme Court of Appeals?
Yes ☑, No ☐

2015 APR -2 AM 10:28
CLERK OF COURT
BERKELEY COUNTY
WEST VIRGINIA

EXHIBIT
tabbies
31

Walters - 5:17cv-96 - Exhibit 31 - 000001

JA at 078

9. If you did appeal, answer the following:

(a) Date of filing April 10th, 2013

(b) Grounds raised 1) excessive sentence

2) violation of due process (ineffective assistance of counsel)

(c) Was the petition granted ☐ or refused ☑ ?

(d) If refused, what was date of refusal? January 17th, 2014

(e) If granted, give date and type of result and citation, if known.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☑

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result

(6) Date of result

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Nature of proceeding

3

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the circuit court, you must state grounds that have NOT been previously and finally adjudicated or waived. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

4

A. Ground one: Ineffective assistance of counsel

Supporting FACTS (state *briefly* without citing cases or law) Former Counsel, Thomas Stanley, Esq. did not provide the Defendant/Appellant/Petitioner John Walters, information pertaining to a proposed plea agreement. This failure was detrimental to Mr. Walters and in violation of Law.

B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law)

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law)

D. Ground four:

5

Supporting FACTS (state *briefly* without citing cases or law)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Thomas Stanley, Esq.
313 Monroe St., Martinsburg, WV 25404

(b) At arraignment and plea Nicholas Forrest Colvin, Esq.
310 W. Stephen St., Martinsburg, WV 25401

(c) At trial N/A

(d) At sentencing Nicholas Forrest Colvin, Esq.
310 W. Stephen St., Martinsburg, WV 25401

(e) On appeal Nicholas Forrest Colvin, Esq.
310 W. Stephen St., Martinsburg, WV 25401

(f) In any post-conviction proceeding Nicholas Forrest Colvin, Esq.
310 W. Stephen St., Martinsburg, WV 25401

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Have you, or an attorney representing you, obtained a transcript of the criminal proceedings which resulted in the conviction under attack?
Yes ☑ No ☐

17. If your answer to 16 was "no," have you submitted an Appellate Transcript Request form for transcripts to the circuit court, a court reporter, or any other tribunal or individual?
Yes ☐ No ☐

18. If your answer to 17 was "yes," attach a copy, if available, of the Appellate Transcript Request form and provide the name of the court or person to whom it was submitted and the date of submission.
(a) Copy of request is attached ☐
(b) Date ☐
(c) Name _____

19. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☑ No ☐

20. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☑
(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct.
Executed on 3-25-15 (date)

Signature of Petitioner

7

Walters - 5:17cv-96 - Exhibit 31 - 000006

JA at 083

IN THE CIRCUIT COURT OF BERKELEY COUNTY WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.
JOHN WALTERS, PETITIONER

VS.

CASE NO. ~~15-P-~~ 15-C-189

MARVIN PLUMLEY, WARDEN
HUTTONSVILLE CORRECTIONAL CENTER
RESPONDENT

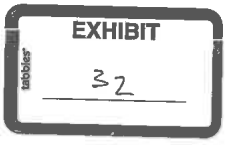
MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR POST-CONVICTION HABEAS CORPUS

Comes now the Petitioner, John Walters, by his counsel, Nicholas Forrest Colvin, Esq., pursuant to West Virginia Code § 53-4A-1, respectfully to move this Honorable Court to grant his Petition for Writ of Habeas Corpus and award him the relief requested in said Writ.

Statement of the Facts of the Case

The Petitioner, John Walters, was indicted by a Berkeley County Grand Jury for: one count of Robbery in the 1st Degree, one count of Malicious Wounding, one count of Assault in Commission of a Felony, one count of Attempted Murder, one count of Domestic Battery and one count of Burglary. After the conclusion of the discovery process, Mr. Walters agreed to accept a plea offer whereby he would enter a plea of guilty to the Robbery in the First Degree, Burglary and Malicious Wounding charges with the remaining counts dismissed. Sentencing discretion was left to the Court. On or about January 7th, 2013 the Petitioner was convicted of one count of Robbery in the First Degree, one count of Malicious Wounding and one count of Burglary.

The Court commenced Sentencing on March 25th, 2013. After considering all of the relevant information via the 23rd Judicial Circuit Probation Department's pre-sentence investigation, witnesses and the presentations of counsel, the Court sentenced the Petitioner. On



or about March 25th, 2013 the Petitioner was sentenced to forty years in the penitentiary house of this State for his conviction under Robbery in the First Degree; not less than one nor more than fifteen years for his conviction under Burglary and not less than two nor more than ten years for his conviction under Malicious Wounding. All sentences were ordered to be served consecutively in the penitentiary house of this State there to be dealt with according to Law. It is from the Sentencing Order, entered March 28th, 2013, from which the Petitioner appealed.

On or about February 18th, 2014, the Defendant/Appellant, now Petitioner's direct appeal was denied in part and abeyed in part as to the issue of ineffective assistance of counsel.

Due to numerous errors that negatively impacted the Petitioner's rights as guaranteed under the United States Constitution, West Virginia Constitution and relevant statutory authority, the Petitioner presents the following for the Court's consideration pursuant to the West Virginia Post-Conviction Habeas Corpus Act, W. Va. Code §53-4A-1 et seq.

Standard of Review

The West Virginia Supreme Court of Appeals has frequently stressed that the standard for obtaining habeas corpus relief differs markedly from that which applies to secure a reversal on direct appeal: "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. pt. 4, State ex rel. McMannis v. Mohn, 163 W. Va. 129, 254 S. E. 2d 805 (1979), cert. denied, 464 U.S. 831, 104 S.Ct. 110, 78 L. Ed. 2d 112 (1983); see also Syl. pt. 9, State ex rel. Azeez v. Mangum, 195 W. Va. 163, 465 S. E. 2d 163, (1995); State ex rel. Phillips v. Legursky, 187 W. Va. 607, 420 S. E. 2d 743, (1992).

Assignments of Error

1. **The Defendant/Appellant, John Walters, argues that his Due Process rights were violated by his original counsel's failure to appropriately inform him about the original plea offer of the State.**

Assignment I: Ineffective Assistance of Counsel

1. **The Defendant/Appellant, John Walters, argues that his Due Process rights were violated by his original counsel's failure to appropriately inform him about the original plea offer of the State.**

"In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, State v. Miller, 194 W. Va. 3, 459 S. E. 2d 114, (1995), See also Syl. Pt. 1, State v. Frye, 221 W. Va. 154, 650 S. Ed. 2d 574, (2006), Syl. Pt. 1, State ex rel. Daniel v. Legursky, 195 W. Va. 314, 465 S. E. 2d 416, (1995)

"In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." See State v. Miller, 194 W. Va. 3, 459 S. E. 2d 114, (1995)

Undersigned counsel was not the original counsel of record and, based upon information and belief, Mr. Walters was not promptly informed that the State of West Virginia had offered him a plea agreement that would have significantly lowered his sentencing exposure. Based upon information and belief, this plea would have comprised Robbery in the 1st Degree and Malicious Wounding with a flat sentence of twenty years in the penitentiary house of this State for Robbery in the 1st Degree and 2-10 years for Malicious Wounding with both sentences running concurrently to each other for an aggregate twenty year sentence. It appears that although this offer had been provided to Defense counsel, Thomas Stanley, Esq., several months prior to Arraignment, that the same had not been discussed at all until it was far beyond the plea deadline. (Based upon information and belief, the plea letter was dated on March 9th, 2012 with a plea deadline of April 13th, 2012 with the Defendant/Appellant being arraigned on June 11th, 2012.

Per the August 28th, 2012 Lawyer Disciplinary Board Complaint Form, the Petitioner noted that Mr. Thomas Stanley, Esq. did not visit him at the Eastern Regional Jail from January 15th, 2012 through April 5th, 2012. Despite numerous attempts via mail and telephone to arrange a meeting at the jail, Mr. Stanley, Esq. failed to speak to the Petitioner in the aforementioned timeframe. The Petitioner further contends that Mr. Stanley, Esq. refused to accept a certified letter from him and that the same had to be personally hand delivered to ensure receipt. The Petitioner notes that Mr. Stanley, Esq. hung up the phone on him on more than one occasion and refused to withdraw in a timely fashion from his case.[1] (August 2nd, 2012) The Petitioner alleges that Mr. Stanley, Esq. used profane language while speaking to him and conducted himself in an unprofessional manner.

[1] See Former counsel Mr. Thomas Stanley, Esq. response to ethics complaint September 28th, 2012

Per Mr. Stanley, Esq.'s response to the ethics complaint filed by the Petitioner against him, he notes that a copy of the plea offer and the Petitioner's criminal history was scanned into the Public Defenders' computer system. Further, "I cannot provide an explanation of why a copy of the plea offer was not sent to Mr. Walters. I am also unable to explain why I did not present the plea offer to Mr. Walters. My first recollection of seeing the March 9th offer was when I found it in the file on July 26th, 2012." Given this recitation of the underlying facts, it is apparent that a procedural and administrative deficiency of the first order has occurred with little to no accountability or explanation for the same.

Per the response of former counsel to Mr. Walters previously filed ethics complaint regarding this matter, no explanation was provided as to why the plea offer was not shared with Mr. Walters. Per Mr. Stanley, Esq.'s own words "admittedly, it (the March 9th, 2012 plea offer) should have been transmitted to the client in a more timely fashion". Per that response, Mr. Walters did not see the March 9th, 2012 offer until July 26th, 2012 during which the State's July 24th, 2012 plea offer was to be discussed. Per the July 24th, 2012 offer, Mr. Walters' exposure was increased to twenty-eight years in prison while pleading guilty to six charges. At this meeting, Mr. Stanley, Esq. relates in his response: "Obviously, one remedy was to go to the case prosecutor and implore him to permit Mr. Walters the opportunity to accept the March 9 offer. I asked Mr. Walters to authorize me to inform the prosecutor that he would accept the March 9 plea if offered. After several evasive answers, Mr. Walters rejected the March 9 plea offer."[2]

Despite this contention, the Defendant/Appellant argues that the attorney/client relationship had become so strained that he did not trust the representations of his counsel and, as such, was unable to have a meaningful discussion with him in regards to the advantages and disadvantages of accepting the State's plea offer. This lack of trust resulted in the filing of at

[2] See Former counsel Mr. Thomas Stanley, Esq. response to ethics complaint September 28th, 2012

least three letters to the Court sent on or about April 4th, 2012, June 4th, 2012 and August 16th, 2012. Most significantly, however, the Defendant/Appellant sent his original counsel a letter, sent certified mail, on or about July 28th, 2012. This letter was returned to sender as it was not picked up by original counsel. Accordingly, Mr. Walters, in person, delivered this letter to the 23rd Judicial Circuit Public Defenders Office to ensure that they received it. This letter, sent via mail just two days after his July 26th, 2012 meeting with counsel, requested that the plea deadline be extended by at least 30 days.

Further, this letter requested that a motion to withdraw be filed based upon a myriad number of factors including: communication problems, lack of trust that original counsel was working in Mr. Walters' best interests, unwillingness to sit down with Mr. Walters and discuss possible options, no discussion of March 9th 2012 plea offer in a timely fashion, refusal to cooperate with Mr. Walters and refusal to attempt to obtain a bond reduction. Furthermore, Mr. Walters requested that another lawyer be appointed and further requested a copy of his discovery including any compact discs or electronic media. Operating in the proverbial dark, the Defendant/Appellant did not wish to give twenty years of his life away to the State without even reviewing the discovery in his case.

The seminal case in West Virginia, also originating from Berkeley County, that is directly on point and controlling in this case is Becton v. Hun, 516 S. E. 2d 762, 205 W. Va. 139, (W. Va. 1999) In Becton, William "Benji" Becton appealed from an order denying his post-conviction habeas corpus petition. Becton was sentenced in the underlying criminal proceeding to a forty-year term of imprisonment in the state penitentiary, following a jury conviction on one count of aggravated robbery. The West Virginia Supreme Court of Appeals addressed the issue of whether the Appellant's trial counsel's failure to communicate to the Appellant a plea proposal

made by the prosecution constituted ineffective assistance of counsel. Based upon a review of the parties' briefs and arguments, the record and all other matters submitted before the Court, this Honorable Court concluded that the Appellant's trial counsel's ineffectiveness in communicating a plea agreement proposal made by the prosecution to the Appellant warrants reversal and remand of this case for the sole purpose of resentencing the Appellant in conformance with the plea agreement proposal at issue.

Factually, in Becton, upon the conclusion of the presentation of all the evidence at trial, the jury convicted the Appellant on one count of aggravated robbery. The Appellant was sentenced to forty years imprisonment. In 1996, years later, while incarcerated, Becton reviewed his file that he had requested from his trial counsel, Steven M. Askin. During this review, the Appellant discovered a letter dated April 28, 1987, which was addressed to Mr. Askin, from B. Craig Manford, Assistant Prosecuting Attorney of Berkeley County. The letter communicated the offer of a plea bargain in which the Appellant would plead guilty to a single count of aggravated robbery in exchange for a recommendation of a ten-year sentence by the prosecutor to the trial court.

The only issue requiring the Court's attention, in Becton, involves whether the Appellant's trial counsel's failure to communicate to the Appellant a non-binding plea agreement to a single count of aggravated robbery, wherein the State would recommend to the trial court a sentence of ten years, constitutes ineffective assistance of counsel. Becton argued that had he known of this plea proposal, he would have accepted it.

As listed above factually in the case *sub judice*, the facts in Becton are analogous to our facts for Mr. Walters. There is no question that Mr. Stanley, Esq. failed to communicate to Mr. Walters the plea offer submitted by the State. There is no doubt that he would have accepted the

same despite trial counsel, Mr. Stanley, Esq.'s contention that Mr. Walters was "evasive" and ultimately declined the March 9th, 2012 plea offer. Given the lack of effort and professionalism in providing this information to Mr. Walters, it is no wonder that he was unwilling to sign away twenty years of his life without consulting with appropriate counsel. As listed in the November 2012 counter offer to the State of West Virginia, Mr. Walters signed his name to four more years then the original plea offer showing, in practical terms, his willingness to agree to twenty years.

In State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), this Court recently revisited what is necessary to prove ineffective assistance of counsel. In Miller, we held in syllabus points five and six that: In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

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

194 W.Va. at 6-7, 459 S.E.2d at 117-18, Syl. Pts. 5 and 6.

In order to meet the first prong of the Miller test and prove that his trial counsel's performance in failing to communicate the plea bargain offer to him was deficient under an objective standard of reasonableness, the Appellant relies upon the Standard 4-6.2 of the ABA Standards for Criminal Justice (2d ed. 1980) and the commentary thereto which was cited by this Court with approval in Tucker v. Holland, 174 W.Va. 409, 327 S.E.2d 388 (1985). Standard 4-6.2(a) provides that a defense attorney "'[i]n conducting discussions with the prosecutor ...

should keep the accused advised of developments at all times and all proposals made by the prosecutor should be communicated promptly to the accused.'" Tucker, 174 W.Va. at 415, 327 S.E.2d at 394 (quoting Standard 4-6.2(a) of the ABA Standards for Criminal Justice (2d ed. 1980)). Moreover, the commentary to that standard provides:

> Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. It is important that the accused be informed of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide on prosecution proposals, even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.' Tucker, 174 W.Va. at 415, 327 S.E.2d at 394 (quoting commentary to Standard 4-6.2(a) of the ABA Standards for Criminal Justice).

This Court was presented with this precise issue in Becton as to whether a defense counsel's failure to communicate a plea bargain proposal to a defendant constitutes ineffective assistance of counsel. It answered overwhelmingly in the affirmative citing other jurisdictions which have confronted the issue concluding the same. See United States v. Rodriguez Rodriguez, 929 F.2d 747, 752 (1st Cir.1991) ("A defendant has a right to be informed by his counsel of a plea offer. Ordinarily, counsel's failure to do so constitutes ineffective assistance of counsel."); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir.), cert. denied, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986) ("[I]n the ordinary case criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the sixth and fourteenth amendments. Apart from merely being informed about the proffered agreement, we also believe that a defendant must be involved

in the decision-making process regarding the agreement's ultimate acceptance or rejection."); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir.1982) ("It would seem that, in the ordinary case, a failure of counsel to advise his client of a plea bargain would constitute a gross deviation from accepted professional standards."); Barentine v. United States, 728 F.Supp. 1241, 1251 (W.D.N.C.), aff'd, 908 F.2d 968 (4th Cir.1990) ("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."); Larochelle v. State, 219 Ga.App. 792, 466 S.E.2d 672, 676 (1996) ("`Objective professional standards dictate that a defendant, absent extenuating circumstances, is entitled to be told that an offer to plead guilty has been made and to be advised of the consequences of the choices confronting him. For counsel to do otherwise amounts to less than reasonably professional assistance.'") (citation omitted); Gray v. State, 579 N.E.2d 605, 607-08 (Ind.1991) ("It is indeed a denial of effective assistance of counsel if in fact there is a failure to convey a plea offer from the State."); Williams v. State, 326 Md. 367, 605 A.2d 103, 109 (1992) ("Acceptance of a plea offer that would expose him to a maximum sentence of ten years was an option available to petitioner, and the failure of his attorney to advise the petitioner of his exposure of the imposition of a mandatory 25 year sentence was deficient conduct."); State v. Simmons, 65 N.C.App. 294, 309 S.E.2d 493, 497 (1983) ("[A] failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances."); Commonwealth v. Napper, 254 Pa.Super. 54, 385 A.2d 521, 524 (1978) ("Defense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial"); Harris v. State, 875 S.W.2d 662, 665 (Tenn.1994) ("There is no doubt that the prejudice suffered

by defendant was the direct result of failure on the part of defense counsel to discuss the plea bargain offer with his client and his failure to respond timely to the State's offer[,]" where defendant went to trial without knowledge of plea offer of five-year sentence and was convicted of assault with intent to commit murder and was sentence to thirty-five years); In re Wilson, 724 S.W.2d 72, 74 (Tex.Crim.App.1987) ("Courts that have considered the issue, generally agree that a defendant has a right to be informed about plea bargain offers as part of his participation in the decision-making process surrounding his defense.").

The Defendant/Appellant, Mr. John Walters, merely requests this Court to reverse the trial court's sentencing based upon the Court's holding in Becton to-wit: "We, therefore, hold that objective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances."

As the Court has previously held in syllabus point twenty-two of State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), "[o]ne who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Id. at 643, 203 S.E.2d at 449, Syl. Pt. 22. Based upon a review of the evidence in Becton, because the Appellant's trial counsel cannot even affirmatively testify whether the plea offer was communicated to his client, the benefit of the doubt must be given to the Appellant. Accordingly, the Court concluded that the preponderance of the evidence demonstrates that the Appellant's counsel rendered ineffective assistance to his client when he failed to communicate to the Appellant a plea offer made by the State.

In Becton, trial counsel did not have a direct recollection as to whether he had or had not shared the plea offer with the defendant but rather noted that it was his pattern and practice to do so. In the case sub judice, Mr. Stanley, Esq., has already acknowledged a direct, knowing failure to provide the plea offer to the Defendant/Appellant's attention resolving any potential mystery. Appellate counsel argues that the first prong of Strickland has been satisfied as sufficient evidence has been adduced that "trial counsel's performance was deficient under an objective standard of reasonableness." The only remaining question for the Court to answer turns to whether the Appellant's evidence satisfies the second prong of the ineffective assistance of counsel inquiry necessary to sustain such a claim. See Miller, 194 W.Va. at 6-7, 459 S.E.2d at 117-118, Syl. Pt. 5, in part. The second prong of the inquiry governing a claim of ineffective assistance of counsel is whether "there is a reasonable probability that, but for counsel's unprofessional error the result of the proceedings would have been different." Id.

Mr. Walters argues that he would have received a shorter sentence had the Court reviewed the previously offered plea as it was binding upon the Court for a term of twenty determinate years. Under the original March 9th, 2012 plea offer, the Defendant/Appellant would have been sentenced to not less than two nor more than ten years in the penitentiary house of this State for malicious wounding and a determinate twenty years for robbery in the first degree with both sentences running concurrently for an aggregate twenty years in the penitentiary. In contrast, the plea actually imposed called for an additional conviction for the offense of burglary and resulted in a not less than one nor more than fifteen year sentence to run consecutively to a not less than two nor more than ten year sentence for malicious assault to run consecutively to a determinate forty year sentence for robbery in the first degree. Accordingly, distinct from Becton, the outcome of the plea resulted in a different outcome than the initial plea per the

inclusion of an additional charge. However, akin to the Court's analysis in Becton, the sentencing phase may have been different based upon the plea offer of the State.[3]

As the Court held in Becton, "it is this prejudice to the Appellant which causes this Court to conclude that there is a reasonable probability that, but for trial counsel's ineffectiveness, the result of the proceedings in the sentencing phase of the Appellant's case would have been different." See Miller, 194 W.Va. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 5, in part.

In United States v. Morrison, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), the United States Supreme Court stated that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Id. at 364, 101 S.Ct. 665. As such, and consistent with the jurisprudence of this Honorable Court, per Becton, the Defendant/Appellant, seeks specific performance of the sentencing portion of the March 9th, 2012 plea agreement.[4]

Conclusion/Prayer for Relief

"A habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the petitioner an adequate opportunity to demonstrate his

[3] What the Appellee's argument ignores is that the State's recommendation of a ten-year sentence as part of a guilty plea may very well have made a difference in the sentencing phase of the Appellant's case. In other words, the State's recommendation of a ten-year sentence may have prompted the trial court to impose a lighter sentence than the forty-year sentence imposed on the Appellant.

[4] Counsel notes that the plea upon which the Appellant was sentenced included the offense of burglary not contemplated in the original plea. The Appellant would request that this offense be dismissed upon resentencing or, in the alternative, run concurrently with the other offenses.

entitlement to relief." Syl. Pt. 5, Gibson v. Dale, 173 W. Va. 681, 319 S. E. 2d 806, (1984) An evidentiary hearing should be ordered in this case to fully explore the ineffective assistance of counsel issues presented in this petition. See State v. Nazelrod, 199 W.Va. 582, 486 S.E.2d 322 (Per Curiam 1997).

In the end, John Walters would be agreeable to be sentenced to the same term of years as contemplated by the March 9th, 2012 plea agreement. This would still provide for twenty years of incarceration for the Defendant/Appellant. It would also provide for a discharge of his sentence in ten years, a stiff sentence and firm result.

As such, the Petitioner/Appellant requests that his appeal be granted, the Petitioner/Appellant's convictions vacated and new trial dates set before the lower tribunal. In the alternative, the Petitioner/Appellant requests that this matter be remanded to the trial court to effecruate new sentencing whereby the Defendant's penitentiary sentences shall be reduced. Furthermore, the Petitioner/Appellant requests any and all other relief that this Honorable Court deems fit and proper.

Respectfully Submitted,
Petitioner, by Counsel

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IN THE CIRCUIT COURT OF BERKELEY COUNTY WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.
JOHN WALTERS, PETITIONER

VS. **CASE NO. 15-P-**

MARVIN PLUMLEY, WARDEN
HUTTONSVILLE CORRECTIONAL CENTER
RESPONDENT

CERTIFICATE OF SERVICE

I, Nicholas Forrest Colvin, Esq., Attorney for the Petitioner, John Walters, in the foregoing action, hereby certify that I have served a true copy of the attached Memorandum of Law in Support of Petitioner's Writ of Habeas Corpus upon Cheryl Saville, Esq., Assistant Prosecuting Attorney for Berkeley County, West Virginia at 380 W. South St., Martinsburg, WV 25401by United States Mail, first class, postage pre-paid and/or facsimile transmission on this 2nd day of April 2015.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

John Walters, Petitioner Below,

Petitioner,

vs.

Marvin Plumley, Warden,
Huttonsville Correctional Center,
Respondent Below,

Respondent.

Docket No. 15-1062

PETITIONER'S BRIEF IN SUPPORT OF APPEAL FROM CIRCUIT COURT'S FINAL ORDER

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Table of Authorities

Assignments of Error

I. **The Circuit Court committed reversible error in denying Petitioner's habeas claim regarding ineffective assistance of counsel during the plea process.**

Statement of the Case

1. In May of 2012, Mr. Walters was indicted in underlying Berkeley County Criminal Case No. 12-F-175 on charges of *inter alia* burglary, malicious assault, and first degree robbery. Appendix "App." at pp. 44-46.
2. He ultimately entered an agreement to plead guilty to burglary, malicious assault, and first degree robbery in exchange for the State's agreement to dismiss the unproven charges of the indictment and not pursue a recidivist action Petitioner. Sentencing was left in the Circuit Court's discretion. App. 66-67.
3. At sentencing, the State recommended statutory sentences on the burglary (one to fifteen years) and malicious assault (two to ten years) convictions and recommended forty years on the first degree robbery count – all to run consecutively. App. pp. 133-135.
4. The Circuit Court followed the State's recommendation. App. pp. 41-43.
5. Mr. Walters then directly appealed to this Supreme Court, arguing unconstitutional sentence and ineffective assistance of counsel during the plea agreement process. *State v. Walters*, W.Va. Supreme Court Docket No. 13-0396 (January 17, 2014).
6. This Supreme Court declined to overturn the sentence under a deferential standard of review. *State v. Walters*, W.Va. Supreme Court Docket No. 13-0396 (January 17, 2014). However, the Court also declined to consider the ineffective assistance of counsel issue in light of its consistent holdings that such grounds should be raised in a habeas proceeding rather than direct appeal. *Id.*
7. On or about April 2, 2015, Mr. Walters filed a habeas petition in Berkeley County Civil Case No. 15-C-189, explaining that he received ineffective assistance of counsel when

trial counsel (Mr. Thomas Stanley) failed to communicate with him during the plea process, which violated his constitutional rights. App. pp. 1-38.

8. Mr. Walters averred that trial counsel did not disclose a March 9th, 2012 pre-indictment plea offer from the State until far beyond the April 13th, 2012 deadline for the offer. App. pp. 17-30. The March 9th, 2012 offer would have resulted in convictions of first degree robbery and malicious assault and proposed to bind the trial court to an aggregate twenty year, determinate sentence. App. pp. 110-111.
9. Mr. Walters also explained that trial counsel did not speak with him for months at a time, despite numerous attempts to contact counsel. App. pp. 20-22.
10. Mr. Walters explained that trial counsel refused to accept a certified letter from him, hung up the phone on him, used profane language in speaking with him, and refused to request to withdraw from the case. *Id.*
11. Mr. Walters pointed out that trial counsel admitted in an Office of Disciplinary Counsel proceeding that he did not disclose the March 9th 2012 offer to his client until July 26th, 2012, and he had no explanation for the misconduct. App. p. 21.
12. According to trial counsel's ODC response, Mr. Walters "rejected" the March 9th offer when he finally learned of it nearly five months later. App. pp. 21, 172.
13. In his habeas petition, Mr. Walters explained that the attorney/client relationship had become so strained by July 26th, 2012, that he was unable to have meaningful discussion with counsel regarding the advantages and disadvantages of accepting an offer from the State. App. pp. 21-22.
14. Mr. Walters explained that he did not trust trial counsel at that point, and thus, sent a letter to counsel on July 28th, 2012, asking that a July 24th, 2012 offer from the State

(which would have increased his sentencing exposure to twenty-eight years) be extended at least thirty days. *Id.* and see July 24th, 2012 offer at App. pp. 114-115 (requiring a plea to all six counts of the Indictment and anticipating an aggregate, twenty-eight year prison sentence).

15. Mr. Walters further requested by virtue of his July 28th, 2012 letter that trial counsel request to withdraw from the case based on: communication problems; lack of trust that trial counsel was working in Mr. Walters' best interest; unwillingness to sit down with Mr. Walters to discuss options; failure to disclose the March 9th plea offer (which was anticipated to result in two convictions and a twenty year sentence), determinate sentence; refusal to cooperate with Mr. Walters; and refusal to pursue bond reduction. App. p. 121.
16. Mr. Walters' July 28th letter also asked for a copy of the discovery in his case. *Id.*
17. It appears Mr. Walters' finally received a copy of his audio discovery on August 7, 2012. App. p. 192.
18. Based on the ineffective assistance of counsel during the plea agreement process, Mr. Walters argued that the principles enunciated in *Becton v. Hun*, 205 W.Va. 139 (1999) dictate that he be allowed to proceed under the terms of the original March 9th 2012 plea offer. App. pp. 22-30. Mr. Walters argued that he would have accepted the March 9th offer (which was anticipated to result in a twenty year, determinate sentence) but for counsel's deficient performance. *Id.*
19. Mr. Walters aptly pointed out that, once ineffective counsel (Mr. Stanley) was replaced with different counsel (Mr. Nicholas Colvin), he was willing to (and did) enter into a plea agreement that could result in *more* than twenty years in prison – making it clearly

apparent that he would have accepted a binding, twenty-year agreement had it been disclosed to him with adequate consult from counsel. App. pp. 23-24 and see Mr. Walters' November 27th, 2012 signed plea offer (aggregate 24 year sentence) at App. pp. 129-130 and January 7th, 2013 signed plea offer from Mr. Walters (Court unfettered) at App. pp. 131-132.

20. Mr. Walters' argued under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984) that there was a reasonable probability that the result of his criminal proceeding would have been different if the trial court would have considered the original March 9th 2012 plea offer, since the State was recommending a twenty-year prison sentence at the time of the original offer. App. pp. 28-29. After Mr. Walters' was stripped of his option to accept the March 9th 2012 plea offer, the State recommended an effective forty-three to sixty year prison sentence, which is exactly what the trial court imposed. App. pp. 133-135, 41-43.
21. Mr. Walters prayed for relief from his forty-three to sixty year prison sentence and requested the opportunity to proceed under the terms of the March 9th 2012 plea offer. App. pp. 29-30.
22. The State then filed a response in opposition to Mr. Walters' habeas petition, arguing that Mr. Walters could not demonstrate that he would have accepted the March 9th offer (of twenty years) because he did not accept the State's subsequent July 24th offer (of twenty-eight years). App. pp. 143-158.
23. The State also argued that Mr. Walters could not demonstrate that the trial court would have accepted the State's binding March 9th plea proposal because of Mr. Walters' prior criminal history. *Id.*

24. The matter then came before the Circuit Court for an evidentiary hearing, wherein testimony from trial counsel Mr. Stanley, Mr. Walters, and Mr. Joseph Whitecoak was presented. App. pp. 243-338.

25. Mr. Stanley testified that:

    a. He represented Mr. Walters in the underlying criminal case and his office received a pre-indictment March 9th 2012 plea offer with a twenty-year cap to resolve the case against Mr. Walters, App. pp. 250-253;

    b. Generally, his procedure was for documents to come across his desk for review and follow-up direction to staff, prior to being scanned and placed in physical file, although plea offers and discovery materials were to be automatically forwarded to clients, App. pp. 253-258, 264;

    c. He did not provide Mr. Walters a copy of the March 9th 2012 offer per standard procedure of his office, App. p. 258;

    d. He did not think he had any contact with Mr. Walters from the March 2012 timeframe until June or July of 2012, App. p. 262;

    e. He met with Mr. Walters on or about July 26, 2012, regarding a second plea offer that had been made in the case, App. pp. 262-263;

    f. There was probably not a time between March and July of 2012 that he pulled the physical file in Mr. Walters' case, App. p. 267;

    g. His relationship with Mr. Walters was "very contentious" from the "first time" he met him and that it continued unabated throughout the representation, App. pp. 268;

h. Mr. Walters was very upset upon hearing of the State's long expired March 9th, 2012 plea offer at their July 26th, 2012 meeting, App. pp. 268-269;

i. He did not believe that their relationship was strained to the point that requesting to withdraw might be the best course of action until Mr. Walters wrote a letter to the prosecutor admitting guilt and arguing for mitigation, App. pp. 269;

j. He offered to request the State re-open the March 9th offer but told Mr. Walters it would be a waste of time to re-open the offer if Mr. Walters did not agree to the March 9th offer, App. pp. 270-271;

k. At the July 26th, 2012 meeting, Mr. Walters told Mr. Stanley that he needed to talk to his pastor or minister and got up a left without giving him an answer about whether he would accept the March 9th offer if it was re-opened, App. pp. 271;

l. He never tried to get the March 9th 2012 offer re-opened, App. pp. 271-272;

m. He received Mr. Walters' July 28th, 2012 letter requesting an extension and that the prosecutor had granted an extension on the State's July 24, 2012 offer, App. pp. 269-270;

n. He received notice of a certified letter from Mr. Walters but did not go pick it up because he believed it was the same letter as one that had been hand-delivered to him, App. pp. 273-274;

o. He met with Mr. Walters again on July 29th, 2012, and went over the discovery in the case, and attempted to discuss a plea offer, but then the meeting broke down, App. pp. 276-277;

p. Mr. Walters did not believe that Mr. Stanley was on his side and was not working for him, App. p. 278;

q. He finally moved to withdraw when Mr. Walters refused to talk to him, *Id.*;

r. Mr. Walters wrote a letter directly to the prosecuting attorney dated August 28, 2012, which the prosecuting attorney considered to be a counter-offer to the July 24th offer from the State, App. pp. 280-281;

s. The State set a deadline of September 12th, 2012 for Mr. Walters to accept the July 24th offer, but Mr. Stanley did not have any further contact with him[1], App. pp. 281-282;

t. He could not recall whether Mr. Walters came in to meet with anyone else in his office after that and had no record that he did, *Id.*;

u. After he withdrew, Nicholas Colvin took over representation, and the State accepted Mr. Walters' plea proposal, App. pp. 283 (which resulted in his current 43-65 year prison sentence);

v. Mr. Walters' filed an ethics complaint against Mr. Stanley in August or September of 2012, App. pp. 283-284;

w. He told the ODC that Mr. Walters' rejected the March 9th offer and believed Mr. Walters rejected the offer by his conduct and/or silence after their July 26th, 2012 meeting, App. p. 285; and

x. Mr. Walters asked for a 30-day extension on the offer that would have resulted in a 28 year prison sentence, but that the March 9th offer was dead at that time. App. p. 286.

26. Mr. Walters then testified that:

a. He was incarcerated in January 2012 and did not get out on bond until April 2012, App. p. 289;

[1] Mr. Walters' position is that he never received notification of the extension on the July 24th 2012 plea offer.

b. When he was in jail he attempted by both phone and written letter to contact Mr. Stanley, App. pp. 289-290;

c. Mr. Stanley did not meet with him in jail at all, App. p. 289;

d. He was able to speak to Mr. Stanley one time on the phone at which point he indicated that he had no information for him but would get over to the jail when he could, *Id.*;

e. When he finally did get out of jail, he spoke with Mr. Stanley on the phone and Mr. Stanley had no information for him and did not have anything to say, App. pp. 290;

f. He attempted to contact Mr. Stanley on a couple of occasions because he got enrolled in therapy for substance abuse and anger management, *Id.*;

g. He did not really have any contact with Mr. Stanley until being notified of the arraignment, *Id.*;

h. He asked Mr. Stanley on multiple occasions to get off the case because he had the right to adequate counsel, App. pp. 290-291;

i. He wrote to the judge to express his concerns about Mr. Stanley's representation, App. p. 292;

j. He did not know about the March 9th offer during his difficulties with Mr. Stanley, App. pp. 292-293;

k. Mr. Stanley never came to see him about a bond reduction, App. p. 293;

l. He had no contact with Mr. Stanley from about January 15, 2012 to April 5, 2012, despite multiple attempts to contact him, *Id.*;

m. He did not know about the March 9th offer until his July 26th meeting with Mr. Stanley and at that time Mr. Stanley wanted him to sign the later plea offer, App. pp. 293-295;

n. He had communication problems with Mr. Stanley and wanted him off his case even before July 2012, App. pp. 295-296;

o. He sent Mr. Stanley a letter dated July 28, 2012, wherein he requested and extension on the July 2012 plea offer and asked Mr. Stanley to withdraw based on the *inter alia* the attorney/client communication problems, App. pp. 296-298;

p. He had to hand-deliver the letter to Mr. Stanley because it was time sensitive and Mr. Stanley had not picked up the certified letter from the post office, App. pp. 298-299;

q. He was not unwilling to enter a plea agreement in July 2012, but his focus was just on needing a different attorney at that time because he did not want to work with Mr. Stanley, App. pp. 299-300;

r. When he discovered the March 9th plea offer was not disclosed to him, he was upset and asked to be excused from the office because the relationship was so strained at that point that he did not see anything getting accomplished, *Id.*;

s. He sent a plea proposal (through his new counsel, Mr. Colvin) on November 27, 2012, which would have resulted in a 24 year aggregate prison sentence, App. pp. 300-302;

t. He was willing to resolve the case with a plea agreement and actually did so in January 2013, which resulted in a far more significant sentence (more than double) than he faced under the March 9th offer, App. pp. 301-302;

u. He would have accepted the March 9th offer if he had effective counsel, who would have reviewed the matter with him and timely disclosed the plea offer, App. p. 302;

v. Mr. Stanley never asked him his side of the story, App. p. 304;

w. He did not trust Mr. Stanley by the time the March 9th 2012 offer was eventually disclosed to him, App. p. 306;

x. He was willing to take a plea deal but could not work with Mr. Stanley, *Id.*;

y. He wrote a letter to the prosecutor in August of 2012, asking if he would consider other options for his punishment, App. pp. 306-307; and

z. He did not feel like was getting any answers from his counsel. App. p. 307.

27. Mr. Joseph Whiteoak, an assistant public defender who worked with Mr. Stanley, then testified that:

a. He was at the July 26th 2012 meeting when Mr. Stanley finally disclosed the long-expired March 9th, 2012 plea offer to Mr. Walters, App. pp. 308-309;

b. He interpreted Mr. Walters' response to this news to be a rejection of the March 9th offer, App. p. 309;

c. He was again present for the July 29th 2012 meeting with Mr. Walters and Mr. Walters asked him what he was doing there. App. p. 310;

d. He did not recall Mr. Walters ever accepting a plea offer from the State, App. p. 311;

e. He was not counsel of record for Mr. Walters, but was attempting to assist Mr. Stanley, *Id.*; and

f. He did not recall Mr. Walters being upset at the July 26th meeting when Mr. Stanley finally disclosed the long-expired March 9th, 2012 plea offer. App. pp. 311-312.

28. The Circuit Court then heard argument from counsel, wherein Petitioner pointed out the clear *Becton* violation from Mr. Stanley failing to disclose the March 9th, 2012 plea offer, which had an April 13, 2012 deadline. Petitioner also pointed out that there was no review of Mr. Walters' file on Mr. Stanley's part from at least March 9, 2012 to July 26, 2012, and no substantive consultation between Mr. Stanley and Mr. Walters for nearly 7 months (January 2012 through late July 2012). Petitioner further explained that he was willing to enter a plea agreement in the matter, as conclusively proven by the fact that he did enter a plea agreement in January 2013 and demonstrated by his willingness to do so even before that time once he had adequate counsel. As a result of the *Becton* violation, Petitioner ultimately received a sentence of more than double what was contemplated by the March 9th, 2012 offer. Thus, Petitioner requested that the Becton violation be remedied by allowing him to go back and proceed under the terms of the March 9th, 2012 offer. App. pp. 313- 317.

29. The State responded that it conceded that Mr. Stanley did not share the March 9th offer with Mr. Walters until after it expired and that conduct constituted deficient performance by counsel. The State argued that Mr. Walters was not entitled to relief, however, because he was not prejudiced by counsel's deficient performance and there was not a reasonable probability that he would have accepted the March 9th offer had it been disclosed to him. The State further argued that *Missouri v. Frye*, 132 S.Ct. 1399 (2012) would require Mr. Walters to prove under the circumstances of this case that – not only would he have

accepted the March 9th plea offer – but that the trial court would also have accepted it as a plea agreement. The State argued that the Petitioner could not meet such a purported proof requirement because he was ultimately sentenced to more than 40 years in prison by the sentencing court – not 20 as anticipated by the March 9, 2012 offer. App. pp. 317-324.

30. In reply, Petitioner pointed out that the State could not demonstrate that a judge would have rejected the State's March 9th 2012 proposal because a judge never even had the opportunity to consider it, and Mr. Walters was never afforded his right to have the plea considered. App. 325-328.

31. The Circuit Court believed that *Becton* was changed by the U.S. Supreme Court decision in *Missouri v. Frye*, which the Circuit Court interpreted to require the defendant show that he would have accepted the plea offer and that the trial court would have accepted the plea offer. App. pp. 328-336 and see Final Order at App. pp. 339-348.

32. The Circuit Court found the only breach of professional standards by Mr. Stanley in the case was failure to disclose the March 9th, 2012 plea offer. *Id.*

33. However, the Circuit Court found that such a failure did not result in a "substantial change in the outcome of the case." App. p. 332.

34. The Circuit Court found that because Mr. Walters did not accept the July 24th plea offer (of twenty-eight years) then he would also not have accepted the March 9th offer of twenty years, even if it had been disclosed to him. App. pp. 333-334.

35. The Circuit Court found that Mr. Walters' failed to prove that but for counsel's failure the "results of this case would be substantially different." App. pp. 334.

36. The Circuit Court further found that in order to obtain relief in this case Petitioner would have to prove that the sentencing judge (Wilkes) would have accepted the twenty year limitation pursuant to the March 9th offer. Since Judge Wilkes ultimately sentenced Mr. Walters to more than forty years under a plea agreement that left sentencing to the court's discretion, the Circuit Court found that Petitioner could not meet this purported proof requirement. App. pp. 334-336, and Final Order at App. pp. 339-348.

37. The Circuit Court noted that this Supreme Court could see the case differently though. App. pp. 336.

38. The instant appeal followed.

Summary of the Argument

There is absolutely no doubt that Petitioner received ineffective assistance of counsel in this case. Likewise, there is no doubt that the outcome of the proceeding would have been different if Mr. Walters had received effective, adequate legal assistance from the beginning of his criminal proceeding. The Circuit Court erred in both its findings of fact and conclusions of law regarding Mr. Walters' habeas claim.

First, although the Circuit Court did find that Mr. Stanley's failure to disclose the March 9th 2012 plea offer to Mr. Walters was a violation of professional standards, the Circuit Court clearly erred in finding such conduct to be the only manner in which Mr. Stanley's performance was deficient. Failure to disclose the plea offer was just the tip of the iceberg that sunk the attorney-client relationship in this case. The relationship was not doomed from the start, however. Rather, Mr. Stanley's lack of any substantive communication to Mr. Walters for nearly seven months (despite multiple requests by Mr. Walters) and lack of any real attention to Mr. Walters for months on end eroded the attorney-client relationship to a point in July 2012 when

Mr. Walters could not reasonably be expected to put any trust into Mr. Stanley's representation of him and recommendations in the case.

The Circuit Court also erred in finding Mr. Walters would not have accepted the March 9th 2012 plea offer, even if he had been effectively counseled. Mr. Walters was clearly willing to plead guilty, because once Mr. Walters was appointed effective counsel (Mr. Colvin) the result of the case was a plea agreement. If Mr. Walters would have had effective counsel from the start of his case, then he would have been adequately counseled, been advised of the March 9th plea offer, and would have had the opportunity to present such an agreement to the trial court for its consideration.

The Circuit Court further erred in imposing a legal requirement on Mr. Walters to prove that the trial court would have accepted the binding March 9th plea proposal. Such a burden would be impossible to meet in this case because the March 9th plea offer was *pre-indictment* and thus was not even assigned to a circuit judge yet. Although the Circuit Court analyzed how the assigned judge (Wilkes) handled sentencing in the case after indictment, there is no guarantee that Judge Wilkes would have been assigned to the case if it had proceeded by way of information pursuant to the March 9th proposal. And there are other judges in the 23rd Judicial Circuit that routinely accept binding plea agreements, exactly as proposed by the State. In fact, Judge Wilkes did follow the State's eventual sentencing recommendation of more than forty years, so it is probable that the State's twenty year recommendation per the March 9th offer would have been given significant weight by any sentencing judge.

Ultimately, the Circuit Court erred in concluding the second *Strickland* prong was not satisfied in this case, apparently believing that Mr. Walters' had to prove that he would have received a twenty year sentence but for Mr. Stanley's ineffective assistance. But Mr. Walters

does not need to meet such a burden. He simply needs to demonstrate that the result of his proceeding would have been *different* – not *substantially* different as required by the Circuit Court. Even if the sentencing judge rejected the State's twenty year proposal per the March 9th offer, Mr. Walters's case would have been in an entirely different posture at that point than where it eventually ended up. For example, Mr. Walters would likely still have been able to secure a twenty-five, thirty, thirty-five, or forty year recommendation from the State, rather than the eventual forty-three to sixty-five year sentence that the State requested and the trial court imposed.

The constitutional violation in this case is clear and the remedy is simple. Let Mr. Walters proceed under the March 9th plea agreement that he would have secured but for the deficient assistance from counsel.

Statement Regarding Oral Argument and Decision

Petitioner's counsel believes oral argument is necessary and requests the same under Rule 20 because, although the appeal is on a narrow topic, this case presents a legal issue of constitutional significance and presents a unique question, regarding whether *Missouri v. Frye* somehow abrogated *Becton* and increased the proof standard under the second *Strickland* prong.

Argument

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syllabus Point 1, *Mathena v. Haines*, 633 S.E.2d 771, 219 W.Va. 417 (W.Va. 2006).

I. The Circuit Court committed reversible error in denying Petitioner's habeas claim regarding ineffective assistance of counsel during the plea process.

In Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), the Court held:

> "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel' unprofessional errors, the result of the proceedings would have been different."

In addressing failures defense counsel to communicate plea offer from the State, the United States Supreme Court has provided guidance in this regard:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed . . . because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants 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. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.
>
> *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

Similarly, this Supreme Court has held that:

> [o]bjective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances.
>
> Syl. Pt. 3, *Becton v. Hun*, 205 W.Va. 139 (1999)

a. Petitioner's trial counsel was even more ineffective than the Circuit Court found.

The Circuit Court correctly and easily found that Mr. Stanley breached his duty by failing to disclose the March 9th, 2012 plea offer to Mr. Walters. But the Circuit Court incorrectly found that this is "the only breach of duty . . . on the part of Mr. Stanley." App. pp. 345-346.

There were obviously no "extenuating circumstances" that led to the failure of Mr. Stanley to disclose the plea agreement. Rather, it appears Mr. Stanley simply failed to substantively review the file in Mr. Walters' case from at least March 9th, 2012 to July 26th, 2012. When he did finally review the file for the July 26th meeting with Mr. Walters, he found the offer, which had long expired on April 13th, 2012. See March 9th Offer at App. p. 110. Failure to substantively review a file in an ongoing criminal case for nearly five months clearly falls below the objective standard of reasonableness for a criminal defense attorney and is just one example of the lack of care/attention that M. Stanley gave to Mr. Walters' case. Correspondingly, and as Mr. Walters explained, Mr. Stanley also failed to have any substantive consultation with him from the time he was incarcerated in January 2012 until late July 2012. App. pp. 289-307.

As early as June 4, 2012, Mr. Walters wrote directly to the trial court, explaining that there was a conflict with Mr. Stanley; that he had attempted to substantively communicate with Mr. Stanley while incarcerated without success; that Mr. Stanley refused to try to get a bond reduction; that Mr. Stanley did explain the arraignment process in a May 31, 2012 telephone call, and mentioned a motion for early discovery, but nothing else; and that he asked Mr. Stanley to withdraw on June 1, 2012 but Mr. Stanley indicating he was stuck with him. App. p. 119.

Per Mr. Walters' ODC complaint, Mr. Stanley failed to confer with Mr. Walters in jail while he was incarcerated from January to April of 2012; failed to retrieve a certified letter from

Mr. Walters; repeatedly refused to hear anything Mr. Walters had to say regarding his side of the story and hung up the phone on him; failed to provide discovery materials to Mr. Walters until long after the June 2012 arraignment; used profanity with him when they did talk; refused to withdraw from the case, despite the obvious communication problems; and told the indigent Mr. Walters to hire a different lawyer if he did not want Mr. Stanley on the case. Mr. Stanley also refused to pursue a bond reduction on Mr. Walters' behalf. App. pp. 205-208.

The Circuit Court perceived the failure of defense counsel to disclose the March 9th plea offer as an isolated, innocent mistake by Mr. Stanley, which Mr. Walters should have just been able to brush off at the July 26th meeting and try to proceed with effective consultation with counsel. But the repeated instances of Mr. Stanley's misconduct considered as a whole show a more accurate picture of the fractured (or practically non-existent) attorney-client relationship between Mr. Stanley and Mr. Walters by the time of the July 26th meeting. The Circuit Court found Mr. Stanley's failures fell into the proverbial "water under the bridge" but ignored the fact the undisclosed plea offer was merely the pinnacle of a logjam within the torrent of counsel's neglect that rushed downstream, demolishing the bridge of trust between Mr. Walters and Mr. Stanley.

Under these circumstances, Mr. Walters should not even have the burden to prove that he would have been willing to take the March 9th plea offer had he known about it because he effectively had no counsel at the time. If a defendant does not have adequate legal counsel, then they really have no counsel at all.

b. It is highly likely that the result of Mr. Walters' criminal proceeding would have been different and more favorable if he had adequate representation.

Even if this Supreme Court requires proof that Mr. Walters would have accepted the March 9th offer (had he known about it), Mr. Walters has met such a burden. The Circuit Court's finding to the contrary is clearly erroneous.

Mr. Walters was quite obviously willing to plead guilty in this case. The most compelling proof that he was willing to plead guilty is the fact that he did plead guilty. App. pp. 39-40, 64-90. Once he had effective counsel (Mr. Colvin), he actually plead guilty to one additional charge (*i.e.* burglary) than the March 9th 2012 offer would have required him to plead to and exposed himself to a life prison sentence (whereas the March 9th offer would have resulted in pleas to 1st degree robbery and malicious assault and capped his prison time at 20 years). See March 9th offer at App. pp. 110-11, and Sentencing Order at pp. 41-43. Thus, it is illogical to find Mr. Walters would not have accepted the March 9th offer if he had known about it and had effective counsel at the time.

It is also unfair to analyze whether Mr. Walters would have accepted the March 9th, 2012 offer with Mr. Stanley still as his counsel because he had no real assistance from Mr. Stanley. As evidenced by the misconduct outlined above (exasperated by the failure to convey the March 9th plea offer), Mr. Walters was justified in not trusting Mr. Stanley's representation.

And even before Mr. Walters was able to obtain effective counsel from Mr. Colvin he demonstrated his willingness to plead to the charges. First, on April 4th, 2012, Mr. Walters wrote a letter directly to the trial court, explaining "I would like to get into some programs to help myself, however, I am unable to get any response and I have asked a number of times, I turned myself in freely, and I just want help." App. pp. 116-117. In another letter to the trial court on June 4th, 2012, Mr. Walters explained he was attending counseling at Shenandoah

Community Health Center for anger management and alcohol and drugs." App. pp. 119. These are not the actions of a man unwilling to accept responsibility.

On July 28th, 2012, Mr. Walters wrote his letter to Mr. Stanley, asking for an extension on the July 24th, 2012 deadline. App. p. 121. Requesting an extension of a deadline on a plea offer is not evidence of a rejection or unwillingness – quite the opposite. It is clear evidence that Mr. Walters wanted to consider the plea offer (but wanted more time so that he could obtain effective counsel to evaluate his options). Second, feeling like he had no real counsel at all, Mr. Walters wrote a letter directly to the prosecutor in August 2012, explaining that he knew he was wrong and could not justify his actions, but wondered if the prosecutor would consider other options for punishment. App. pp. 202-203. The State perceived this letter to be a rejection of the July 24th offer, but the words of the letter were clearly those of a man who was accepting responsibility. *Id.*

Once Mr. Colvin took over the case, Mr. Walters again demonstrated his willingness to plead by virtue of two plea proposals to the State - one on November 27, 2012, which would have resulted in a twenty-four year sentence, App. pp. 129-130, and the other on January 3, 2013, which could result in an effective life sentence, App. pp. 131-132. Under these circumstances, it borders on absurdity to believe that Mr. Walters would not have accepted a twenty year offer if he had effective counsel on March 9th, 2012. The Circuit Court's finding to that effect is clearly erroneous and amounts to an abuse of discretion.

It was also clear legal error and an abuse of discretion for the Circuit Court to require that Mr. Walters prove that the trial court would have accepted the March 9th 2012 offer of twenty years. Neither the *Becton*, *Missouri*, *Miller*, nor *Strickland* cases *supra* require that a defendant whose counsel has failed to disclose a plea agreement must prove that a court would have

actually accepted the offer. Rather, Mr. Walters must only show that there is "a reasonable probability that the end result of the criminal process would have been *more favorable* by reason of a plea to a lesser charge or a sentence of less prison time." *Missouri v. Frye*, 132 S.Ct. 1399 (2012). In other words, a defendant must not show that he actually would have received the time contemplated by the undisclosed offer – he must only show that he probably would have received less prison time/convictions than he ultimately did receive – if the undisclosed plea offer had been conveyed by adequate counsel and accepted. *Id.*

Even if there is such a requirement to prove a trial court would have accepted the plea, Mr. Walters' argues that the facts of this case in particular call for the lifting of any such burden. The March 9th, 2012 offer was made *pre-indictment*, and thus, there was no circuit judge assigned to the case at the time. See March 9th, 2012 offer at App. pp. 110-111, and May 2012 Indictment, App. pp. 44-46. So how do you prove that a particular judge would have accepted the plea when you do not even know which judge would have been considering plea? It calls for impossible speculation. Certain judges routinely defer to the State's proposal in binding plea agreements and others are known to reject a binding plea from time to time. But it cannot be the state of the law that Mr. Walters' entitlement to relief in this case is be dictated by – and rise and falls on – such a random factor as which 23rd Judicial Circuit judge happened to be assigned to his case.

Assuming *arguendo* that such an impossible burden is present in this case, it is likely a judge would have accepted the State's March 9th proposal and followed the State's recommendation because that is exactly what the trial court did at sentencing (*i.e.* abided by the State's recommendation). See State's Recommendation at App. pp. 133-135, and Sentencing Order at App. pp. 41-43.

The Circuit Court's conclusion that the sentencing court would have rejected the State's March 9th, 2012 proposal of twenty years, also incorrectly assumed that any such rejection would have been the end of the plea negotiation story at that point, and the case would have magically fast-forwarded to the time Mr. Walters' ultimately entered the plea that resulted in the forty-three to sixty-five year prison sentence. But that finding is entirely unrealistic. Even if the trial court would have rejected the State's March 9th, 2012 offer, Mr. Walters would have been in a much different negotiation posture to go back to the plea agreement drawing board with the State and come up with a heavier prison sentence resolution (*e.g.* a binding plea to twenty, thirty, thirty or even forty years) for the court's consideration, which would have still been less severe than the ultimate agreement he reached and disposition he received. And it is likely that any judge would have accepted a binding plea to forty years in this case.

The plain fact in this matter is that if Mr. Walters had been represented by effective counsel from the beginning of his criminal case (*e.g.* Colvin), he would not be imprisoned under the same sentence that he is right now. Even if he were subjected to a forty years prison sentence, that result would still be more favorable than the forty-three to sixty-five year sentence he received, and thus, the matter warrants reversal under Syl. Pt. 3, *Becton v. Hun*, 205 W.Va. 139 (1999) ("The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances") and *Missouri v. Frye*, 132 S.Ct. 1399 (2012) ("To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.") (Emphasis added.)

Conclusion

For all of these reasons, Mr. Walter's requests this Supreme Court reverse the Circuit Court's denial of his habeas petition, vacate his convictions, and permitted him to proceed under the terms of the March 9th, 2012 offer.

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CERTIFICATE OF SERVICE

I, Ben Crawley-Woods, counsel for Petitioner did serve the foregoing Petitioner's brief along with Appendix by hand-delivering a copy of the same, to the following persons at the following address, on the 25th day of April, 2016:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

John Walters, Petitioner Below,

Petitioner,

vs. **Docket No. 15-1062**

Marvin Plumley, Warden,
Huttonsville Correctional Center,
Respondent Below,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF APPEAL FROM CIRCUIT COURT'S FINAL ORDER

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1. The State's Response does not justify denial of relief to Petitioner in this case.
2. Petitioner wishes to re-direct this Supreme Court's attention to the fact that lack of communication from defense counsel (and the resulting harm to Petitioner) is a core and key issue in this case, exemplified by the complete failure of counsel to convey basic - but incredibly material - information (*i.e.* the March 2012 plea offer from the State.)
3. This key misstep was compounded by defense counsel's general lack of communication with Pctitioner and lack of attention to his case, which created an adversarial environment surrounding Petitioner and counsel. Under these circumstances, Petitioner could not be reasonably expected to trust or rely on counsel's advice when the March offer was eventually disclosed.
4. There are no "extenuating circumstances" here; rather, counsel simply did not pay enough attention to Petitioner's case.
5. On page 15 of the State's Response, it avers Petitioner "chose to reject both plea offers" (including the March 2012 plea offer and subsequent July 2012 plea offer when Mr. Stanley still was representing Petitioner). But this assertion is plainly untrue. Petitioner *never even saw* the March 2012 offer until months after the deadline expired, so how could he have *chosen* to reject it?
6. Additionally, the July 2012 offer was made while Mr. Stanley still represented Petitioner, so Petitioner did not have counsel he trusted at the time. Under the circumstances, he could not have made a fully informed and fair decision about the offer. The State's argument that Petitioner should have somehow handled the situation differently in July 2012 presupposes that Petitioner had adequate counsel at that time -- but he clearly did not.

7. Likewise, the State's argument that Petitioner should have to show (but cannot show) a "reasonable probability that he would have accepted the earlier plea offer had it been shown to him prior to its expiration" posits a non-existent, counter-factual world, wherein the offer was timely shown to him by competent counsel. But it was not!
8. If Petitioner had been represented by adequate counsel in March 2012 (who would have shown him the offer and appropriately communicated with him), he clearly would have accepted it – because he ultimately did enter into a less favorable plea once he was appointed adequate counsel. Contrary to the State's suggestion, the time that elapsed between when Petitioner was appointed adequate counsel and when he ultimately enter a plea agreement is irrelevant to the question of whether Petitioner would have accepted the March 2012 offer if he had competent counsel from the start of the case (who would have timely communicated the March 2012 offer to him).

For all these reasons and those discussed in his initial brief, Petitioner is entitled to relief, and requests this Supreme Court reverse the Circuit Court's denial of his habeas petition, vacate his convictions, and permit him to proceed under the terms of the State's March 9th, 2012 offer.

Petitioner, by counsel:

Ben J. Crawley-Woods, Esq.
126 East Burke Street
Martinsburg, WV 25401
(304) 267-1020
WV State Bar No.: 11122
attorneycrawleywoods@gmail.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

John Walters, Petitioner Below,

Petitioner,

vs.

Docket No. 15-1062

Marvin Plumley, Warden,
Huttonsville Correctional Center,
Respondent Below,

Respondent.

CERTIFICATE OF SERVICE

I, Ben Crawley-Woods, counsel for Petitioner did serve the foregoing Petitioner's Reply Brief by mailing a copy of the same first class, to the following persons at the following address, on this 29th day of June, 2016:

Berkeley County Prosecuting Attorney's Office
(C. Saville)
380 West South Street, Suite 1100
Martinsburg, WV 25401
Counsel for Respondent

Ben J. Crawley-Woods, Esq.
Counsel for Petitioner
126 East Burke Street
Martinsburg, WV 25401
(304) 267-1020
WV State Bar No.: 11122
attorneycrawleywoods@gmail.com

AO 241
(Rev. 10/07)

Attachment A

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	Northern District of West Virginia
Name (under which you were convicted): John Walters	Criminal Case No.: 12-F-175
Place of Confinement: Huttonsville Correcrtional Center	D.O.C. Prisoner No.: 3510491
Petitioner (the name under which you were convicted) John Walters v. John T. Murphy Respondent (authorized person having custody of you)	5:17 cv 96 Stamp Seibert Blalock
The Attorney General of the State of West Virginia	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Berkeley County Circuit Court
Martinsburg, West Virginia

   (b) Criminal case number (if you know): 12-F-175

2. (a) Date of the judgment of conviction (if you know): March 28, 2013

   (b) Date of sentencing: March 25, 2013

3. Length of sentence: thirteen to sixty-five years

4. In this case, were you convicted on more than one count or of more than one crime? ☒ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
Robbery (1st Degree), Burgluary, Malicious Wounding

6. (a) What was your plea? (Check one)
☐ (1) Not guilty ☐ (3) Nolo contendere (no contest)
☒ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty pleas to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have: (Check one)
☐ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?
☐ Yes ☒ No

8. Did you appeal from the judgment of conviction? ☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: West Virginia Supreme Court
(b) Case number (if you know): 13-0396
(c) Result: Appeal Denied
(d) Date of result (if you know): January 17, 2014
(e) Grounds raised:
impermissibly excessive sentence

(f) Did you seek further review by a higher state court? ☐ Yes ☒ No

If yes, answer the following:

(1) Name of court: _____

(2) Case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Grounds raised: _____

_____

_____

_____

(g) Did you file a petition for certiorari in the United States Supreme Court?
☐ Yes ☒ No

If yes, answer the following:

(1) Case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Berkeley County Circuit Court

(2) Case number (if you know): 12-F-175, 14-C-651, 15-C-189

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: Habeas Corpus

(5) Grounds raised: Ineffective Assistance of Counsel

(6) Did you receive a hearing where evidence was given on your petition, application, or motions? ☒ Yes ☐ No

(7) Result: Petition denied

(8) Date of result (if you know): October 23, 2015

(b) If you filed a second petition, application, or motion give the same information:

(1) Name of court: _____

(2) Case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motions? ☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed a third petition, application, or motion give the same information:

(1) Name of court: _____

(2) Case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motions? ☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application or motion?

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

_____

_____

_____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach no more than 5 typed or 10 neatly printed additional pages total for all grounds if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Ineffective Assistance of Trial Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

Please See ATTACHMENT

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

ATTACHMENT

§ 2254 Petition For Writ of Habeas Corpus

GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting Facts:

I was arrested in Berkeley County West Virginia and indicted, among other things, for burglary, malicious assault, and first degree robbery. The state offered me a plea deal on March 9, 2012, for a flat twenty determinate sentence for my pleading guilty to first degree robbery and malicious wounding. The plea agreement was to have expired on April 13, 2012.

However my attorney, Thomas Stanley, did not apprise me of the above detailed offer until July 26, 2012, which was one hundred and four days passed the deadline for me accepting the plea. Had I known about the plea offer for twenty years in exchange for a plea of guilty to first degree robbery and malicious wounding I would have certainly entered into the agreement with the state.

In the end, because my attorney did not relay the March 9, 2012 plea agreement to me in the proper timeframe I was forced to accept a plea offer from the state that exposed me to a term of thirteen to sixty-five years which is the sentence I did receive after pleading guilty to first degree robbery, malicious assault and burglary.

Therefore, my attorney was ineffective for failing to timely relay the plea offer to me and I was prejudiced by said failure.

John Walters

John Walters

6-22-17

Date

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings (filed after conviction other than direct appeals):**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ Yes ☐ No

(2) If your answer to Question (d) (1) is "Yes," state:

Type of motion or petition: Habeas Corpus

Name and location of the court where the motion or petition was filed:

Berkeley County Circuit Court Martinsburg, West Virginia

Case number (if you know): 12-f-175, 14-C-651, 15-C-189

Date of the Court's decision: October 23, 2015

Result (attach a copy of the court's opinion or order, if available):

Denied

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Questions (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the motion or petition was filed: West Virginia Supreme Court Charleston, West Virginia

Case number (if you know): 15-1062

Date of the Court's decision: March 13, 2017

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

_____

_____

_____

_____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

_____

_____

(d) **Post-Conviction Proceedings (filed after conviction other than direct appeals):**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ Yes ☐ No

(2) If your answer to Question (d) (1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

_____

Case number (if you know): _____

Date of the Court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Questions (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the motion or petition was filed:

_____

_____

Case number (if you know): _____

Date of the Court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

_____

_____

_____

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

_____

_____

_____

_____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

_____

_____

(d) **Post-Conviction Proceedings (filed after conviction other than direct appeals):**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ Yes ☐ No

(2) If your answer to Question (d) (1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

_____

Case number (if you know): _____

Date of the Court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Questions (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the motion or petition was filed:

Case number (if you know): _____

Date of the Court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings (filed after conviction other than direct appeals):**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ Yes ☐ No

(2) If your answer to Question (d) (1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

_____

Case number (if you know): _____

Date of the Court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Questions (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the motion or petition was filed:

_____

_____

Case number (if you know): _____

Date of the Court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

_____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the West Virginia Supreme Court of Appeals?

☐ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reasons(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion

or order, if available. _____

_____

_____

_____

_____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging:

☐ Yes ☒ No

If "Yes," state the name and location of the court, the case number, the type of proceeding, the issues raised. _____

_____

_____

_____

_____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Thomas Stanley

_____

(b) At arraignment and plea: Thomas Stanley

_____

(c) At trial: Thomas Stanley

(d) At sentencing: Nicholas Forrest Colvin

(e) On appeal: Nicholas Forrest Colvin

(f) In any post-conviction (filed after conviction other than a direct appeal) proceeding: Nicholas Forrest Colvin

(g) On appeal from any ruling against you in a post-conviction proceeding: Ben J. Crawley-Woods

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging: ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

Attachment A

18. TIMELINESS OF PETITION: If your judgment of conviction became final more than one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.[1]

I was sentenced under Case No. 12-F-175 on March 28, 2013. On April 10, 2013 my attorney filed a timely Notice of Appeal with the West Virginia Supreme Court. That court denied my appeal on January 17, 2014. On February 11, 2014 the circuit court appointed counsel to represent me in a habeas proceeding. The circuit court denied my habeas petition on October 23, 2015. On October 27, 2015 a timely Notice of Appeal was filed with the West Virginia Supreme Court and that court denied my appeal on March 13, 2017. As of that date, the entire one year time period had been tolled. Therefore, the filing of this petition on this date, _____, is well within the statute of limitations.

---

[1] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C § 2255 paragraph 6, provides in part that:

(1) A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

(A) the date on which the judgment of conviction became final;
(B) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
(C) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court, if applicable to cases on collateral review; or
(D) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be toward any period of limitation under this subsection.

✎AO 241
(Rev. 10/07)

Attachment A

Therefore, you ask that the Court for the following relief:

That I be allowed to withdraw my plea of guilty in the Berkeley County Circuit Court and that I be allowed to accept the March 9, 2012 plea offer for twenty years for a plea of guilty to malicious wounding and first degree robbery and that the state not pursue a recidivist.

and any other relief to which you may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on June 22, 2017 (month, day, year).

Executed (signed) on 6-22-17 (date).

John Walters
Your Signature

If the person signing is not you, state the relationship to you and explain why you are not signing this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN WALTERS,

PETITIONER,

v.

Civil Action No. 5:17cv96
(Honorable Fredrick P. Stamp)
(Honorable James E. Seibert)

MICHAEL MARTIN,

RESPONDENT.

PETITIONER'S RESPONSE TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS/CASE

Arrest to Mr. Stanley's Removal as Trial Counsel

1. The Petitioner was arrested on January 15, 2012 and charged with breaking and entering, robbery, and malicious wounding. Mr. Stanley was appointed to represent him.
2. During his three months of incarceration (from January, 2012 to April, 2012) the Petitioner tried to call Mr. Stanley numerous times and wrote to him at least three times, but only talked to Mr. Stanley once on the phone in January, 2012, at which time he told me he had no information to give the Petitioner.
3. The Petitioner saw Mr. Stanley for the first time at my preliminary hearing on March 6, 2012 at which time he gave his case scant attention and briefly counseled me to waive his preliminary hearing.

4. On March 9, 2012, the State of West Virginia extended to the Petitioner a plea offer (See Exhibit 34 of Rsp.'s Mot. Sum. Judg.) that in exchange for his pleading to first degree robbery, malicious wounding, and breaking and entering he would receive a guaranteed sentence of twenty years with the state agree to not seek a recidivist information. (As detailed later, this plea was not communicated to the Petitioner until July 26, 2012)

5. After trying several times to get Mr. Stanley to seek a bond reduction the Petitioner sent, on April 4, 2012, a letter (See No. (7.) of Exhibit 34 of Rsp.'s Mot. Sum. Judg.) to the judge in his case about the Petitioner and Mr. Stanley and the bond reduction.

6. The Petitioner remained in jail until April 5, 2012 when he was able to make bond. After being released from jail on bond he immediately called Mr. Stanley on the phone and again, he told the Petitioner he had no information to give him at the time. (If Mr. Stanley, had reviewed the Petitioner's file in a timely fashion, he could have communicated the March 9, 2012 plea deal to the Petitioner as he had the opportunity to relay between March 9, 2012 and the time of the Petitioner's bond on April 5, 2012 since the Petitioner tried to contact Mr. Stanley several times from Eastern Regional Jail)

7. In May, 2012, the Petitioner was indicted in the Berkeley County Circuit Court for the three initial charges of breaking and entering, first degree robbery, and malicious assault. Additionally, three additional charges of domestic battery, attempted murder and assault during the commission of a felony were charged to the Petitioner in the indictment. (See Exhibit 24 of Rsp.'s Mot. Sum. Judg.)

8. On June 24, 2012, the Petitioner wrote to Berkeley County Circuit Court asking to have Mr. Stanley replaced with another attorney because a conflict of interest existed and the Petitioner believed Mr. Stanley to be ineffective and not operating in his best interest. (See Exhibit 5 of Rsp.'s Mot. Sum. Judg.)
9. On July 26, 2012, the Petitioner went to a meeting at Mr. Stanley's office to discuss a plea offer of July 24, 2012 that would have put a cap of twenty-eight years on the Petitioner's sentence for the indicted charges.
10. At the meeting of July 26, 2012, Mr. Stanley informed the Petitioner that he had found, in his file, a plea offer from March 9, 2012 entitling him to a guaranteed sentence of twenty years in exchange for his pleading guilty to first degree robbery and malicious assault.
11. At this point, the Petitioner became very frustrated, however, he did not tell Mr. Stanley that he would not accept the twenty-year deal if he could get it back on the table. The Petitioner enquired and Mr. Stanley was sarcastic. We discussed some other issues that day including Mr. Stanley filing a motion to withdraw as the Petitioner's counsel. In the end the Petitioner left the office without turning down the March 9, 2012 twenty year offer as Mr. Stanley's focus was on the July 24, 2012 plea offer.
12. On July 27, 2012, at the Petitioner's request, he again had a meeting with Mr. Stanley at his office in which in which he listened to audio recordings. During this meeting he again asked Mr. Stanley to withdraw from his case and he refused to despite the fact the Petitioner and Mr. Stanley had a very contentious working relationship. During this meeting, Mr. Stanley became very agitated and asked the

Petitioner: "How many lawyers do you need to tell you your f***ed" and also told the Petitioner that no one would give a "sh** if I was f***king the victim"? in front of a jury if the case went to trial.

13. On July 28, 2012, the Petitioner sent Mr. Stanley a certified letter (See Exhibit 41 of Resp.'s Mot. Sum. Judg.) asking him to ask the prosecutor's office for a thirty day extension of the deadline for the July 24, 2012 plea offer deadline (which was set to expire at 4:00 pm on July 31, 2012). In the letter, the Petitioner also asked Mr. Stanley to file a motion to withdraw as the Petitioner's counsel and detailed several reasons including (a) communication problem, (b) the Petitioner's belief that he was not working in my best interests, (c) that he had not sat down with the Petitioner and discussed the Petitioner's options in the case, and (d) that he did not timely disclose the plea offer of March 9, 2012, (e) his refusal to hear anything the Petitioner had to say up to that point, and (f) his refusal to attempt to get the Petitioner a bond reduction while he sat in jail from January, 2012 to April, 2102.

14. On July 31, 2012, the Petitioner checked with the postal service and found that Mr. Stanley had not signed for and received the July 28, 2012 certified letter (the Postal Service as of July 31, 2012 had attempted to deliver the letter to Mr. Stanley three times with no success). Because of the matter of attempting to get an extension of the deadline for the plea offer the Petitioner decided that he had to take a copy of the letter to the entrance of the Public Defender Office and hand-deliver it to Mr. Stanley, which the Petitioner did at 2:00 pm (the offer was set expire in two hours at 4:00 pm) of the same day, July 31, 2012.

15. The Petitioner at this time avers as fact that Mr. Stanley did not have the letter before he gave it to him and would not have had the letter in time to request the extension had he, the Petitioner, not hand-delivered the letter. (Mr. Stanley later testified (See exhibit 39, page 31-33 of Rsp.'s Mot. Sum. Judg) that he did not pick up the letter at the post office because he had a copy of it, but that was in response to a final notice of August 6, 2012) The Petitioner further avers as fact that Mr. Stanley misrepresented the matter by not testifying that it was hand-delivered to him just two hours before the 4:00 pm deadline was set to expire.
16. On August 1, 2012 Mr. Stanley responded to the Petitioner's July 28, 2012 certified letter in which he flatly refused to withdraw, stating "the short answer is NO!"
17. On August 2, 2018, the Petitioner called Mr. Stanley to talk about a letter that had been dropped off at his apartment. The Petitioner talked to him briefly trying to ascertain how the letter of August 1, 2018 ended up at his apartment door on the floor. Mr. Stanley got angry and hung up the phone.
18. On August 7, 2012, Mr. Stanley finally gave the Petitioner the discovery he claimed he had given him in the past.
19. On August 28, 2012, the Petitioner filed a Complaint with the West Virginia Lawyer Disciplinary Board (See Exhibit 41 of Rsp.'s Mot. Sum. Judg.) in which he informed the Board that Mr. Stanley had failed to communicate with him and listed seven areas of concern:

    a. Mr. Stanley did not come to see the Petitioner once while he was in jail from January, 2012 to April, 2012. (¶ 1 of complaint)
    b. Mr. Stanley's failure to timely inform the Petitioner of the March 9, 2012 plea deal. (¶ 2 of complaint)

c. Mr. Stanley's failure to pick up the certified letter (three times nonetheless) which the Petitioner had to hand deliver two hours before an important deadline was set to pass. (¶ 3 of complaint)
d. Mr. Stanley's failure to listen to anything the Petitioner had to say concerning my side of the story, his failure to withdraw from the case, and hanging up the phone on the Petitioner. (¶ 4 of complaint)
e. Mr. Stanley's somehow sent a letter to the Petitioner's apartment building manager and she put the letter in the Petitioner's door and later told him about it. (¶ 5 of Complaint)
f. Mr. Stanley's repeated use of profanity and sarcasm toward the Petitioner concerning the facts of his case. (¶ 6 of complaint)
g. Mr. Stanley's failure to disclose discovery to the Petitioner until August 7, 2012. (¶ 7 of complaint)

20. On August 13, 2012 Mr. Stanley moved to withdraw as counsel in the Petitioner's case (Exhibit 10 of Rsp.'s Mot. Sum. Judg.) and that motion was granted on September 13, 2012 with Nicholas Colvin being appointed as new defense counsel. (Exhibit 11 of Rsp.'s Mot. Sum. Judg.)

Mr. Stanley's Response to Disciplinary Board

21. On September 28, 2012, Mr. Stanley responded to the Petitioner's complaint with Board (Exhibit 41 of Rsp.'s Mot. Sum. Judg.) in which he presents the purported facts of the Petitioner's case to the Board in a most negative light. He also addresses the allegations against him in the following manner:

1. Mr. Stanley admits he did not meet with the Petitioner while he was incarcerated;
2. Mr. Stanley admits he did not disclose, in a timely manner, the March 9, 2012 plea offer;
3. Mr. Stanley admits he did not go to the post office to get the certified letter (See exhibit A of Exhibit 34 of Rsp.'s Mot. Sum. Judg.) and tries to use an August 6, 2012 final notice (see Exhibit B of Exhibit 34 of Rsp.'s Mot. Sum. Judg.) from the post office to justify his not picking the letter up. He further blamed his secretary for the situation;
4. Mr. Stanley denies not listening to the Petitioner;
5. Mr. Stanley denies hand delivering the August 1 letter to the Petitioner's apartment;

6. Mr. Stanley, while speaking of ¶ 6 does not deny using profanity toward the Petitioner;
7. Mr. Stanley denied not giving the Petitioner the discovery until August 7, 2012.

Petitioner's Plea Agreement and Appeal

Plea and Appeal

24. Ultimately, because of Mr. Stanley's ineffectiveness (for not timely revealing the March 9, 2012 plea offer to me) the Petitioner had to agree to a plea bargain, on January 7, 2013, that resulted in my receiving a sentence of thirteen to sixty-five years. (See Exhibit 21 of Rsp.'s Mot. Sum. Judg.)

25. On January 17, 2014, the West Virginia Supreme Court denied the Petitioner's appeal of the above sentence by ruling it was not excessive. (See Exhibit 28 of Rsp.'s Mot. Sum. Judg.)

Petitioner's Petition for Writ of Habeas Corpus and Omnibus Hearing of October 13, 2018

26. On or about May, 2015, the Petitioner filed a petition for writ of habeas corpus in Berkeley County Circuit Court (an earlier petition had been filed in September, 2014 that tolled the one year deadline under § 2244 (d)) alleging ineffective assistance of trial counsel. (See Exhibit 31 of Rsp.'s Mot. Sum. Judg.)

27. On October 13, 2015, an omnibus hearing was held in Berkeley County Circuit Court in which the Petitioner testified as follows:

Petitioner's Testimony

I. That he attempted to contact Mr. Stanley while he was in jail from January to April, 2018, by phone, by letter, and even by getting family and friends on the street to attempt to contact Mr. Stanley. (See pg. 47, lines 15-24, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

II. That he had grave concerns about the representation of his case (even before the arraignment on June 11, 2010) by Mr. Stanley and that he wrote to the trial judge and that several attorneys had

informed him that he deserved adequate counsel and "that he was not getting that." (See pg. 50, lines 21-24, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

III. That he first found out about the March 9th peal deal in a visit to Mr. Stanley's office on July 26, 2012.)The same day he was apprised of the July 24, 2012 plea offer) (See pg. 52 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

IV. That at the point of the disclosure of the March 9, 2012 plea (on July 26, 2012) a communication problem existed between him and Mr. Stanley and that he had lost trust in Mr. Stanley to the extent that he wanted him off his case. (See pg. 53-54, lines 1-5, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

V. That on July 28, 2012 he sent a letter (by certified mail) (See Exhibit A, of Exhibit 41 of Resp.'s Mot. Sum. Judg.) to Mr. Stanley concerning the extension of the July 24, 2012 plea deal (that was set to expire on July 31, 2012) and asking Mr. Stanley to withdraw from his case for six reasons he detailed in the letter and that he ended up hand delivering the letter, on July 31, 2012, to Mr. Stanley because he did not pick up the letter from the post office and that had he, the Petitioner, not hand delivered the letter to Mr. Stanley he would not had gotten the letter on time. (See pg. 55, through pg. 57, line 12, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

VI. That if he had had competent assistance, in which the March 9, 2012 plea deal was timely revealed to him, he would have accepted the plea and received twenty years instead (See pg. 60, lines 8-24, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

VII. That Mr. Stanley never wanted to hear his side of the story. That the relationship between him and the Petitioner was contentious from the very first meeting. (See pg. 26, lines 7-14, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

VIII. That Mr. Stanley never went back and had a discussion about getting the March 9, 2012 reinstated That the relationship between him and the Petitioner was contentious from the very first meeting. (See pg. 26, lines 7-14, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

IX. That Mr. Stanley did not offer to call, on July 26, 2012, Mr. Jones to get the March 9, 2012 plea deal reinstated but only tried to get him to sign the July 24, 2012 offer. That the relationship between him and the Petitioner was contentious from the very first meeting. (See pg. 26, lines 7-14, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

Mr. Stanley's Testimony

28. Also, at the omnibus hearing of October 13, 2015 Mr. Stanley testified as follows:

X. That the relationship between him and the Petitioner was contentious from the very first meeting. (See pg. 26, lines 7-14, of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

XI. That he did not go to the post office to pick the certified letter that sent to him by the Petitioner. (See pg. 32, lines 21-23, of exhibit 39 of Resp.'s Mot. Sum. Judg.)

XII. That he did not take the Petitioner's file out between the time the March 9, 2012 offer was extended and the July 26, 2012 meeting occurred. (See pg. 25, lines 2-6 of Exhibit 39 of Resp.'s Mot. Sum. Judg.) Later, Mr. Stanley testified, in a contradiction, that he decided to withdraw when the Petitioner hand delivered the certified letter of July 28, 2012 (See pg. 31, lines 16-18 of Exhibit 39 of Resp.'s Mot. Sum. Judg.) Then, in another contradiction, Mr. Stanley's states he decided to step off the case when the Petitioner accused him of putting things in his mailbox (See pg. 37, lines 7-10 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)[1]

XIII. That when he told the Petitioner about the plea hearing the Petitioner did not indicate either way as to whether he wanted the plea or not and that he left saying he needed to talk to his pastor and that the Petitioner did not firmly reject the March 9, 2012 deal when told about. (See pg. 28, lines 21-24 through pg. 29, lines 1-8 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

XIV. That he decided to withdraw from the case after the Petitioner wrote the prosecutor to try and get a better plea deal. (See pg. 27, lines 11-16 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

XV. That when he asked Mr. Jones for the extension for the July 24, 2012 plea he was not asking for an extension for the March 9, 2012 plea deal. (See pg. 30, lines 16-23 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

XVI. That he sent a letter to the Petitioner that informed him (a) of the fact that as long as he was the Petitioner's attorney, the court or prosecutor would not speak to him about the case, (b) he had until September 12, 2012 to accept the July 24, 2012 plea offer, (c) that meeting still needed to be scheduled with investigators to tell his side of the story. (See pg. 38, line 20 through pg. 39, line 24 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)[2]

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[1] In fact, Mr. Stanley did not withdraw from the case until September 13, 2013 (See Exhibit 10 of Resp.'s Mot. Sum. Judg.) after the Petitioner filed a disciplinary complaint against him on August 30, 2012. It should be noted that the proposed order submitted with the motion to withdraw (Included in Exhibit 10)list an August date which the Petitioner believes was done to shield the fact that Mr. Stanley had no intention of withdrawing before the Petitioner filed the disciplinary complaint.

[2] It is interesting to note that there is no documentation or proof that this undated letter spoken of by Mr. Stanley was ever in existence as the Petitioner certainly did not receive the letter. What is

29. Also during the above detailed omnibus hearing Thomas Whiteoak, another attorney testified (See pgs. 66-70 of exhibit 39 of Resp.'s Mot. Sum. Judg.) that he was at the July 26, 2012 meeting with the Petitioner and Mr. Stanley. Mr. Whiteoak basically mirrors Mr. Stanley's testimony (a point that will be discussed later in the argument section)

Circuit Court Denial and Appeal

30. On October 23, 2015 the Berkeley County Circuit Court denied the petition for writ of habeas corpus and the West Virginia Supreme Court denied the appeal in which Justice Ketchum dissented. (See Exhibit 42 and 51, respectively, of the Resp.'s Mot. Sum. Judg.)

ARGUMENT IN LAW

Ketchum's Dissent

Dissent by: Menis E. Ketchum

Justice Ketchum, dissenting:

> Without question, petitioner's trial counsel failed to communicate the March 9, 2012, plea offer to him before it expired. That plea offer was considerably more favorable to petitioner than the offers he later sent to the State and the offer that he ultimately accepted. Moreover, petitioner testified that he was willing to accept the March 9, 2012, plea offer when he learned of it in July of 2012. Understandably, petitioner did not wish to keep his trial counsel, who barely communicated with him between January and July of 2012 and who failed to properly communicate the March 9, 2012, plea offer. Under the facts of this case, the inescapable conclusion is that petitioner's trial counsel failed him. I firmly believe that the trial counsel's failure rendered him constitutionally ineffective. Petitioner probably would have been better off acting pro se because then, at least, he would have received the plea offer on time. I would set this case for oral argument.

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of further note is the fact that Mr. Stanley is very specific about dates of other letters he testifies to but does not have a date for this mystery letter.

Based on the foregoing, I respectfully dissent.

(See pg. 7 of Exhibit 51 of Resp.'s Mot. Sum. Judg.)

The above dissent, by Justice Ketchum, says a lot about the Petitioner's case: The Petitioner's trial counsel failed to communicate with him between January and July of 2012 and failed to properly communicate the March 9, 2012 plea deal. The most telling line in the dissent is "Petitioner probably would have been better off acting pro se because then, at least, he would receive the plea on time." In short, Justice Ketchum is saying that the Petitioner had no effective counsel at all.

A. The Combination of the Communication and Trust Issues and the Failure to Relay the March 9, 2012 Plea offer Constitute Ineffective Assistance of Counsel and had a Prejudicial Effect on the Petitioner's case

Severe Communication Problems Existed Between the Petitioner and Mr. Stanley aside from the Failure to Relay March 9, 2012 to the Petitioner in a Timely Manner

The circuit court and the WVSCA merely took Mr. Stanley's failure to disclose the plea as a simple mistake and that the Petitioner should have been able to just shrug it off. However, the repeated instances of failure to communicate and act competently by Mr. Stanley show that he did not at any time have the Petitioner's best interest at heart and that the failure to relay the March 9, 2018 offer destroyed any trust the Petitioner had in Mr. Stanley.

Additionally, as pointed out to the West Virginia Supreme Court (See pg. 18 of Exhibit 48 of Resp.'s Mot. Sum. Judg.), there was a severe miscommunication problem between the Petitioner and his attorney that affected the performance of Mr. Stanley. As noted, Mr. Stanley says at the omnibus hearing that the relationship was contentious from the very start. (See pg. 26, lines 7-14, of Exhibit 39 of Resp.'s Mot. Sum. Judg.) Now, the average person would think the contentiousness was produced by the Petitioner because it is assumed that all lawyers treat their

clients and officers of the court with respect and dignity. However, we have a record here that shows that Mr. Stanley used profanity of the grossest sort toward the Petitioner while discussing the facts of his case. (See Exhibit 41 of Rsp.'s Mot. Sum. Judg.) And, Mr. Stanley does not deny using the language when he answers the complaint. From the record, aside from the use of profanity, it would seem Mr. Stanley simply was antagonistic toward the Petitioner.

Four Significant Miscommunications

The Petitioner must point out that four significant miscommunications occurred:

1. The March 9, 2012 plea deal sitting in the file until July 26, 2012 without being communicated to the Petitioner;
2. The refusal of the certified letter, in which it must be noted that Mr. Stanley tried to manipulate his answer for at the omnibus hearing by using an August 6, 2012 *final* notice to justify his not picking up the certified letter.
3. The delivery of the letter of August 1, 2012 to the Petitioner's apartment manager who had to put it on floor at the Petitioner's door and inform him of it.
4. The July 24, 2012 plea deal deadline extension was not communicated to the Petitioner as he did not receive the undated letter that Mr. Stanley purports to send to him when he testified at the omnibus hearing (See pg. 38, line 20 through pg. 39, line 24 of Exhibit 39 of Resp.'s Mot. Sum. Judg.) (See also Note 5 on pg. 14 above)

Petitioner's Willingness to Cooperate

Also, from the start, the Petitioner demonstrated a willingness to cooperate with the court and his counsel. Contrast the letters to the court of April 4, 2012 and June 24, 2012 trying to resolve the communication problem with Mr. Stanley's sarcasm and profanity. Another

important point to bring up is the fact that the Petitioner's home and Mr. Stanley's office were only blocks apart but they were still communicating by letter instead of face to face or even telephone.

Also, the Petitioner was willing to enroll in counseling and sought out employment opportunities but talks between Mr. Stanley and the Petitioner never actually progressed to the point to where the Petitioner was able to seek advice from Mr. Stanley as to what to do to beter himself in the eyes of the prosecution and the court.

Additionally, it was the Petitioner's request and persistence that caused the meetings and consultations to occur.

Mr. Stanley's Failure to Alert trial Court that Communication/Trust Problem Existed Between Petitioner and Himself

Before moving on the Petitioner must point out that Mr. Stanley always had someone to blame for his inefficiencies whether it be his secretary or the post office or the Petitioner himself. And why, one must ask, did Mr. Stanley wait to withdraw until the Petitioner filed a disciplinary complaint against him if the Petitioner was so intransigent and hard to work with? The Petitioner would assert that Mr. Stanley was only worried about saving face with the court by averting his removal from the case. Perhaps Mr. Stanley has had other instances of ill-treatment of clients that he did not want brought to the court's attention.[3]

Mr. Stanley's Ineffectiveness Goes Farther Afield than Just Not Timely Relaying the March 9, 2012 Plea Deal to the Petitioner

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[3] There is another factor to be considered here: Mr. Stanley taught college classes at Sheppard's University where a relative of the alleged victim taught classes which could very well have created a conflict of interest.
It also appears that the Petitioner's case was discussed at the college as persons the Petitioner knew attended classes there and they informed the Petitioner that by use of innuendo the details of the Petitioner's became known to the students by Mr. Stanley.

As argued in the West Virginia Supreme Court (WVSCA) the Petitioner's trial counsel was even more ineffective that the Circuit Court found when it ruled that Mr. Stanley had breached his duty when he failed to relay the March 9, 2012 peal deal to the Petitioner. (see pg. 18 of Exhibit 48 of Resp.'s Mot. Sum. Judg.) In fact, Mr. Stanley's failure to review the Petitioner's file from March 9, 2012 to July 26, 2012, which fell below the objective standard of reasonableness:

> The Sixth Amendment guarantees a defendant the effective assistance of counsel at ``critical stages of a criminal proceeding,'' including when he enters a guilty plea. *Lafler* v. *Cooper*, 566 U. S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Hill*, 474 U. S., at 58, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation ``fell below an objective standard of reasonableness'' and that he was prejudiced as a result.

However, as noted above and in the WVSCA, the above failure to consult the Petitioner's file was just one example of Mr. Stanley's lack of care and attention to the Petitioner's case which rebuts the circuit court's finding, and the WVSCA's finding as well that the attorney's failure to relay the plea offer of March 9, 2012 was just an isolated incident. As the Petitioner explained in his complaint to the disciplinary board and his letters to the trial court Mr. Stanley failed to have any substantial consultation with him between January, 2012 to July, 2012. (See pg. 18 of Exhibit 48 and Exhibit 41 of Resp.'s Mot. Sum. Judg.)

As early as April, 2012, the Petitioner wrote to the trial court detailing a conflict that existed between the two and that Mr. Stanley had refused to try to get him a bond reduction and informing the trial court that he had ask Mr. Stanley to withdraw. (See Exhibit 5 of Resp.'s Mot. Sum. Judg.)

In the Disciplinary Complaint (Exhibit 41 of Resp.'s Mot. Sum. Judg.) the Petitioner sets forth again that Mr. Stanley did not confer with him during his time in jail, failed to retrieve the

certified letter of July 28, 2012, refused to hear anything the Petitioner had to say about his case, failed to provide discovery materials to the Petitioner, used profanity toward the Petitioner while discussing his case, refused to withdraw from the case, and the Petitioner (who was indigent) to hire a different lawyer if he wanted Mr. Stanley off the case, and Mr. Stanley's failure to ask for a bond reduction for the Petitioner. (See Exhibit 41 of Resp.'s Mot. Sum. Judg.) Mr. Stanley's overall performance as the Petitioner's trial counsel falls below the objective standards set forth in Strickland:

> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

B. Counsel's Not Relaying March 9, 2012 Offer in a Timely Manner Was, of its self, Ineffective and The Petitioner was Prejudiced Thereby

Omnibus Hearing Testimony Should be Disregarded

During the omnibus hearing of October 13, 2015, Mr. Stanley and Mr. Whiteoak testimony mirrored each others to an alarming degree. For instance, Mr. Stanley did not once put forth in his response to the disciplinary complaint (See Exhibit 41 of Resp.'s Mot. Sum. Judg) any details of the Petitioner asking for a three year sentence at the July 26, 2012 meeting. However both Mr. Stanley and Mr. Whiteoak both come up with a three year number allegedly asked for by the Petitioner during their testimony. (See pg. 37, lines 1-5 and pg. 67, lines 23-24 respectively of Exhibit 39 of Resp.'s Mot. Sum. Judg.) Whiteoak also parroted Mr. Stanley testimony that the actions of the Petitioner led them to believe that the Petitioner was rejecting the March 9, 2012 plea offer. However, their stories are so much alike that they seemed to be rehearsed.

Also Mr. Stanley's and Mr. Whiteoak's testimony at the omnibus hearing must be viewed I the light if his testimony to the Berkeley County Circuit Court on August 21, 2012 at a status hearing. Mr. Stanley makes the following statement:

> For the record judge, I did not disclose it [plea offer of March 9, 2012] until I think July 16, when I met with him and I found it in the file and immediately disclosed it. Mr. Whiteoak was in my office with me, witnessed this proceeding. Mr. Walters obliviously upset that I didn't communicate it to him so I put it to Mr. Walters that if I get this plea on the table today will you take it, and *he said* "no, I don't want to do more than ten years…" (emphasis and quotations added) (See pg. 8, lines 11-20 of Exhibit 9 of Resp.'s Mot. Sum. Judg.)

Of course, Mr. Whiteoak and Mr. Stanley testified at the Omnibus hearing that the Petitioner would not give a answer, yes or no to the plea offer, and that he wanted three years. Also, remember that Mr. Stanley testified at the omnibus hearing:

> Absolutely would not—he would not give me an answer. Mr. Walters this plea offer is on the table. It's my screw up. I will call the prosecutor and explain what happened. I think I can get the offer back if you want that offer. But before I go to all that trouble, will you take it if I can get it back on the table? He would never say yes or no. He just waffled around. Then we did discuss the plea offer from Mr. Jones. The one with the 28 year cap. And we discussed that. And he just got up and said I need to talk to my minister and out the door he went. (Pg. 33, line 14-24 of exhibit 39 of Resp.'s Mot. Sum. Judg.)
>
> and
>
> And I offered to contact Greg Jones immediately. I was ready to pick up the phone and call Greg and do whatever it took to get the plea offer reinstated. But before I called, I said its going to be a waste of time to call if you will not accept the plea offer. There's no use getting the offer back on the table if you're not going to take it. And it was about that point he said—I recall him saying something about him needing to talk to his pastor or minister and got up and left—
>
> Okay. (Mr. Colvin)
>
> Without giving me an answer as to whether or not he would accept the offer if I can get it back.
>
> All right. So, it's your recollection that he did not firmly accept or reject the offer. (Mr. Colvin)

No. He would not give me an answer.

(Pg. 28, line 21 through pg. 29, line 11 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

Somewhere, it is evident, Mr. Stanley is not telling the truth. And he did so under oath at the August 21, 2012 status hearing when he said the Petitioner said "No' I do not want the plea because he wanted ten years. All this also cast doubts on Whiteoak's testimony: how could it have been ten years (according to Mr. Stanley at the status hearing) and then all of sudden Mr. Stanley and Mr. Whiteoak both come up with three years? Therefore, the testimony of Mr. Stanley and Mr. Whiteoak, at the omnibus hearing, must be disregarded

Failure of Mr. Stanley to Contact Mr. Jones to Get Officer Back on Table

There is no question that Mr. Stanley did not timely relay the March 9, 2012 plea offer to the Petitioner and that as a result the Petitioner was not given a chance to timely accept the plea deal and that, as a further result, the Petitioner was indicted on the three original charges of breaking and entering, robbery, and malicious wounding and three additional serious charges of domestic battery, attempted murder and assault during the commission of a felony.

Mr. Stanley testified at the omnibus hearing that he did not call up Mr. Jones and try to get the March 9, 2012 plea offer back on the table.:

> He asked for – the only plea offer in existence was the one that Mr. Jones had made because I never called to get the March plea offer back on the table because he wouldn't give me an answer. He neither accepted nor rejected. So, I did see much point in calling Mr. Jones and begging to put a plea offer back on the table that he was not going to take. (See pg. 29, line 20 through pg. 31, line 2 of Exhibit 39 of Resp.'s Mot. Sum. Judg.)

The Petitioner would assert that Mr. Stanley's actions (after discovering the March 9, 2012 plea offer had not been timely disclosed to the Petitioner) fell below an objective standard of reasonableness as described in Strickland.

Mr. Stanley admits he did not call Mr. Jones to even attempt to get the plea back on the table. If so, it could have been presented to the Petitioner when he was a more receptive mood to entertain it as Mr. Stanley admits that the Petitioner did not flatly reject the offer on July 26, 2012 when it was disclosed to him.

> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.
>
> and
>
> Counsel can be ineffective in the plea negotiation process for failing to inform a defendant about the prosecution's offer of a guilty plea. *Missouri v. Frye*, 566 U.S. 134, 145, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.") As quoted from *Jones v. United States*, 2018 U.S. Dist. LEXIS 31824 D. Md., 2018. Also see U.S. v. Lingenfelter, 685 Fed. Appx. 253, 254 (4th. Cir. 2107)
>
> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel, as well as a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. Id. at 147. It is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Frye at 566 U.S. at 145. As quoted in Whitney v. United States, 2018 U.S. Dist. LEXIS 11467 (E.D. NC, 2018)

Mr. Stanley had an affirmative duty to contact Mr. Jones and get the bargain back on the table:

> While there is no constitutional right to a plea agreement, see Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977), and the decision to initiate plea negotiations is ordinarily a strategic decision within the purview of defense counsel, Hawkman v. Parratt, 661 F.2d 1161, 1171 (8th Cir. 1981),

> counsel is still required to be a "reasonably effective advocate" regarding the decision to seek a plea bargain. Brown v. Doe, 2 F.3d 1236, 1246 (2d Cir. 1993). (As quoted from U.S. v. Pender, No. 12-6806, 514 Fed. Appx. 359 (4th Cir. 2103) and U.S. v. Lopez, 13-7953, 570 Fed. Appx. 291, (4th Cir. 2014)

In this case, Mr. Stanley failed to be "reasonably effective advocate" for the Petitioner and his failure to be so caused the Petitioner to be indicted on three serious charges in June, 2012 that would not have been added had he been timely informed of the March 9, 2012 plea offer. Then, after the plea offer was discovered, Mr. Stanley did not assume the role of a reasonably effective advocate for the Petitioner when he failed to contact Mr. Jones to get the offer back on the table especially so in light of the fact that the Petitioner did not reject the offer, but instead left to go "talk to his pastor" as Mr. Stanley reports n his omnibus hearing testimony.

First Prong of Strickland Met

There can be no question that Mr. Stanley failed and acted unprofessionally when he did not reveal, for whatever excuse he uses, the March 9, 2012 in a timely manner.

Prejudice Prong of Strickland and Missouri v. Frye Met

The Petitioner asserts that his actions show that he would have accepted the plea offer had he been adequately represented by Mr. Stanley. In the end he accepted a plea offer for much more time than the March 9, 2012 plea agreement called for. (thirteen to sixty-five years (plea offer that was accepted) compared to twenty-year sentence under the March 9, 2012 offer).

Next, the Petitioner asserts that, as his appeal counsel, Ben Crawley Woods, argued in the Petitioner's habeas appeal brief to the West Virginia Supreme Court there is no way of indicating that there is not a reasonable probability that the trial court would not have accepted the plea since the March 9, 2012 offer was tendered pre-indictment and no judge had been assigned to the case. (pg. 23 of Exhibit 40 of Resp.'s Mot. Sum. Judg.)

It also must be remembered that the Petitioner had three extra charges added to the indictment (Exhibit 3 of Resp.'s Mot. Sum. Judg.) that were not part of the original charges and it has to be assumed that the additional offenses were added because the prosecutor had decided that the March 9, 2012 plea offer had been rejected by the Petitioner, when the evidence shows that Petitioner had not even saw the document.

Lastly there is not one iota of evidence that the State would have canceled the March 9, 2012 offer.

C. West Virginia Supreme Court Decision is Unreasonable Application, and Contrary to, Strickland v. Washington and Missouri v. Frye

The Petitioner put forth facts, (exhibit 48 of Resp.'s Mot. Sum. Judg.), to the West Virginia Supreme Court that showed Mr. Stanley to constitutionally defective in his handling of the March 9, 2012 plea offer and his overall performance as the Petitioner's trial counsel.

The Petitioner also set forth facts (exhibit 48 of Resp.'s Mot. Sum. Judg.), in the West Virginia Supreme Court, that showed the Petitioner was prejudiced by the ineffectiveness of Mr. Stanley.

Summation

Mr. Stanley's overall performance as the Petitioner's trial counsel falls below the objective standards set forth in Strickland:

> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Mr. Stanley, at one time during (or after) his nine months of representation of the Petitioner, did the following:

A. Failed to Communicate with the Petitioner while he incarcerated;[4]

B. Failed to seek a bond reduction during the period of incarceration;

C. Failed to reveal the March 9, 2012 plea offer until July 26, 2012;

D. Failed to contact Mr. Jones regarding getting the March 9, 2012 plea offer back on the table;

E. Cursed the Petitioner and used sarcastic belittling language toward him while discussing his case;

F. Refused to pick up the certified letter of July 28, 2012 on July 29th , July 30th and July 31st of 2012.

G. Refuse to withdraw despite the fact that a very contentious relationship existed between him and the Petitioner;

H. Gave sensitive legal material to the manager of the Petitioner's apartment building who left it outside of the Petitioner's apartment door on the floor;

I. Failed to communicate the July 24, 2012 plea offer extension to the Petitioner;

J. Lied to the circuit court at the status hearing of August 20, 2012 about the Petitioner flatly refusing the March 9, 2012 plea offer;

K. Misrepresented to the circuit court at the omnibus hearing of October 13, 2015 the circumstances of his not picking up the certified letter of July 28, 2012 by referring to a final notice, dated August 6, 2012, as his excuse for not getting the letter because, as he claims, he already had it without explaining to the court that

[4] This failure is exacerbated by the fact that had Mr. Stanley communicated with the Petitioner during his stay at Eastern Regional Jail he very possibly would have had to examine the file and made a timely disclosure to the Petitioner of the March 9, 2012 plea deal.

he refused the certified letter on July 29th, July 30, and July 31st which forced the Petitioner to have to hand-deliver the letter;

L. Contrived with Mr. Whiteoak to synchronize their testimony at the omnibus hearing of October 13 in an effort to make Mr. Stanley's failures concerning the March 9, 2012 plea deal appear to be the fault of the Petitioner;

M. Failed to fully alert the trial court as to the problematic, very contentious working relationship he had with the Petitioner;

N. Failed to fully and effectively evaluate the Petitioner's versions of the events that led to his arrest;

As a result of the above failures of Mr. Stanley the Petitioner was left with virtually no counsel at all. He had to try and conduct his own plea negotiations with the prosecution and write letters to the court practically begging for help in everything from getting a bond reduction to getting a new lawyer. He had to listen to his lawyer use profanity and sarcastic and belittling language toward him while trying to tell him his version of the events that led to his arrest. He had to eventually accept a sentence of thirteen to sixty-five years because his attorney failed to timely relay a plea offer for twenty years to him in a timely manner and his attorney further failed to try and get the plea bargain back on the table after the deficiencies were discovered. [5]Then to add insult to injury the Petitioner had to sit in court and listen to his attorney disparage him and cast all the blame for the attorney's missteps on everybody from the attorney's secretary to the post office to the Petitioner himself.

[5] Another failure of Mr. Stanley had to do with several petitions and letters of favorable reference (for the Petitioner) that could have been presented to the court at sentencing to mitigate punishment. However, when Mr. Colvin the Petitioner's new trial attorney got the Petitioner's file from Mr. Stanley the petitions and letters of favorable reference and, as such, the evidence was not submitted to the sentencing court.

All of the above, the counsel's misdeeds and the effects thereof meet squarely with Justice Ketchum's dissent[6] which lays the blame for the shape the Petitioner is in on the right doorstep, the office of the Petitioner's attorney, Mr. Stanley:

> Justice Ketchun Dissenting:
>
> Without question, petitioner's trial counsel failed to communicate the March 9, 2012, plea offer to him before it expired. That plea offer was considerably more favorable to petitioner than the offers he later sent to the State and the offer that he ultimately accepted. Moreover, petitioner testified that he was willing to accept the March 9, 2012, plea offer when he learned of it in July of 2012. Understandably, petitioner did not wish to keep his trial counsel, who barely communicated with him between January and July of 2012 and who failed to properly communicate the March 9, 2012, plea offer. Under the facts of this case, the inescapable conclusion is that petitioner's trial counsel failed him. I firmly believe that the trial counsel's failure rendered him constitutionally ineffective. *Petitioner probably would have been better off acting pro se because then, at least, he would have received the plea offer on time. I would set this case for oral argument.*
> (Emphasis added)
>
> (See pg. 7 of Exhibit 51 of Resp.'s Mot. Sum. Judg.)

Again, the Petitioner asserts that he practically had no counsel at all during the crucial time period that Mr. Stanley operated as his counsel and that the sole failure of counsel to effectively represent him as to the March 9, 2012 plea (both the failure to disclose and failure to try to get it reinstated) constitutes ineffective assistance of counsel under *Strickland* and *Frye.* Further, the Petitioner asserts that the totality of the representation of the Petitioner by Mr. Stanley that includes the circumstances discussed (lack of communication and actions that led to

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[6] It should be pointed out as well that Justice Ketchum's dissent is not the criticism of Mr. Stanley's performance as the Petitioner's counsel. The West Virginia Disciplinary Board in its decision on the Petitioner's Complaint (Exhibit 41 of Resp.'s Mot. Sum. Judg.) finds Mr. Stanley's failure to provide the March 9, 2012 plea offer to the Petitioner "concerning" and further writes Mr. Stanley is "… nonetheless, warned to regarding Rules 1.3 and 1.4 in future matters."

lack of trust and contentiousness) in Section I of this argument in combination with the handling of the March 9, 2012 plea offer constitute ineffective assistance of counsel under *Strickland*.

Therefore, the Petitioner asks this Honorable Court to remand his case back to the Berkeley County Circuit Court with instructions for the Berkeley County Prosecutor's Office to reoffer the March 9, 2012 plea offer to the Petitioner and for further proceedings thereto or to release the Petitioner forthwith.

Respectfully submitted this 8 day of November, 2018.

John Walters

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

John Walters,
Petitioner,

v.

CASE NO. 5:17cv96

Michael Martin,
Respondent.

CERTIFICATE OF SERVICE

I, John Walters (Print or type your name.), appearing *pro se*, hereby certify that I have served the foregoing Petitioner's Response to Motion for Summary Judgment (Print or type the title of the document being served.) upon the Respondent (Choose Defendant(s) *or* Respondent.) by depositing true and exact copies of the same in the United States mail, first-class postage prepaid, upon the following counsel of record on 11-9 (Insert date.), 2018.

Julianne Wisman
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, WV
25301

Signature

John Walters 350491
Print or type name and DOC No.

Huttonsville Correctional Center
Huttonsville WV 26273

Fed.R.Civ.P., Rule 5(b), (d).
N.D.W.Va. LR, Gen. Rule 5.06(e), Civ. Rule 5.01(a), PL P Rule 4.3.

JA at 525