

In The Supreme Court Of Ohio

State Of Ohio, :
 Appellee, :
 -Vs- : Case No.: 2010-2198
 Calvin McKelton, :
 Appellant. : **This Is A Capital Case.**

On Appeal From The Court Of
 Common Pleas Of Butler County
 Case No. CR 2010-02-0189

RESPONSE TO STATE’S SUR-REPLY

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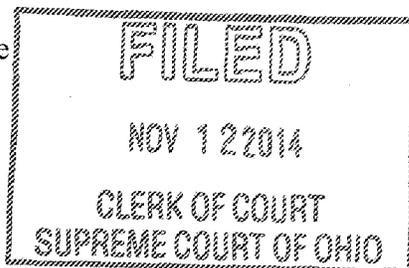


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Preface

Calvin McKelton replies to the State's Sur-Reply to Propositions of Law No. XV. The absence of a reply by McKelton on other claims is to avoid reargument of the merit brief.

Proposition of Law No. XV

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

A. Defense counsel was ineffective during plea negotiations and not adequately prepared to defend McKelton at trial.

The State in its sur-reply argued that McKelton's case falls outside of the holdings of *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012) two cases which provide Sixth Amendment guarantees to effective assistance of counsel during plea negotiations. Contrary to the State's argument, the United States Supreme Court specifically included cases such as McKelton's, where counsel's deficient performance led a defendant to reject a plea which would have resulted in a lesser sentence than what resulted from trial. *See Lafler*, 132 S. Ct. at 1385. The State asserts McKelton's argument fails because McKelton was "aware of the terms of the plea deal, discussed the deal with all three of his counsel, and against counsel's unanimous advice, [] rejected the potential plea offer." State Sur-Reply at p. 2. The State further argues that McKelton had numerous opportunities to meet with his counsel. The State assertions are incorrect and are merely speculation, as reflected by the lack of citation to the record.

The record reflects that the weeks leading up McKelton's trial were marred by problems concerning McKelton's counsel. McKelton had in fact retained his own attorney, Richard Goldberg, yet because Attorney Goldberg did not specialize in capital cases, the trial court also appointed Greg Howard and Melynda Cook. (2/16/10 Hrg. Tr. 7-8; 9/17/2010 Hrg. Tr. 4-5). Despite the fact that McKelton had three attorneys, McKelton was essentially without a conflict-free advocate during the crucial time period at which the plea offer was discussed. And,

importantly, when Cook and Howard tried to get McKelton to plead guilty, their efforts to persuade him were in the presence of a police officer. (9/17/10 hrng, p. 18.)

In September, just weeks before the trial began, all three attorneys alerted the court to the conflicts they had in representing McKelton. Goldberg was simultaneously representing one of the jailhouse informants set to testify against McKelton, and the State had just informed Goldberg that he had a conflict because at least one of his clients was on its witness list. (9/1/10 hrng, p. 8-9; 9/17/10 hrng, p. 3-4.) Howard and Cook wanted to withdraw because of a breakdown in their relationship with McKelton, and because the State had informed them that McKelton made threats toward them. (*See* 9-17-10 hrng, p. 6, 22, 24.)

The trial court allowed Goldberg to withdraw. (*Id.* at 4.) However, it was not before Goldberg expressed concerns about withdrawing, telling the court that he had done a “considerable amount of work” himself, and he was not sure that co-counsel could “pick up the slack” if he were to withdraw. (*Id.* at 17.) He stated that he believed his withdrawal might deprive McKelton of effective assistance of counsel. (*Id.*)

Around that same time, Howard and Cook filed a motion for a continuance and moved to withdraw from representation. (Dkt. 156). They told the court that the breakdown in the relationship had made it so that they were not able to effectively do their job. (*See* 9-17-10 hrng, p. 6, 22.) Counsel also indicated to the court that they feared their client. (*Id.* at 24). Howard told the court that, because of what the prosecutors told him, “I’m only going to assume that [Calvin’s] made threats to me and threats to Ms. Cook and possibly Mr. Goldberg over the phone to various people. So I don’t know that I can – that either one of us can sit here and continue to represent him on this case.” (*Id.*) Although this was not true, the damage was done.

McKelton was wary of the representation he was receiving. He had difficulty accepting that Goldberg's client could have been cooperating with the State supposedly without Goldberg's knowledge. (*Id.* at 13.) McKelton informed the court that he, too, wanted the attorneys to withdraw from representing him. (9/17/10 hrg. tr. 20, 22). McKelton told the Court that his attorneys had only visited him twice, that they had tried to force him to take a plea bargain in front of a police officer, and that they had not made sufficient use of experts. (*Id.* at 12-4).

McKelton detailed the trial counsels' discussions with him regarding a deal. McKelton's undisputed account of the meetings, along with counsels' conflicts in representing him, demonstrate that trial counsel were ineffective in representing McKelton in order to facilitate a deal:

And as for Melynda and Greg, I only met with them privately twice. And I had no problem with that, because at the beginning of my case, my attorney Richard Goldberg, told me he only needed them to handle all the necessary motions pertaining to the death penalty part of my case. He said he just didn't like doing all the paperwork...

Now, the first time I met privately with Greg and Melynda, I don't recall if they was together or only one showed up. All I remember about that meeting is it was only for an introduction. My second meeting with Melynda and Greg was last when they showed up with Richard trying to con me into taking a plea deal. How can Melynda and Greg feel comfortable giving me legal opinion when they haven't seen me to go over my case...

I had a meeting last week with my attorney. And at this meeting, I was told that it would be in my best interest to take a plea deal. We haven't even received all the prosecutor's evidence. So I didn't understand why my attorneys were trying to talk me into taking a pleas deal. I asked them what evidence the prosecutor have that would find me guilty beyond a reasonable doubt, and they weren't able to give me legitimate answer. So instead, they began to pressure me to take the plea deal using scare tactics such as telling me how my life will be on death row.

(9/17/10 hrg. pp 13-15).

After McKelton spoke to the court, Cook candidly added her own admission that she was unable to ethically represent McKelton, because of the "breakdown in the attorney-client

relationship.” (*Id.* at 22.) Cook explained to the court, “I cannot continue to represent him under my ethical duties to represent him and I would continue to do so, but I believe that based upon his own feelings that he said here in addition to what he said to us.” *Id.* Still, the trial court ordered Cook and Howard to remain as McKelton’s attorneys. (*Id.* at 33-34.)

The record demonstrates that McKelton was not provided with sufficient information to properly inform him of the appropriateness of a plea bargain in this case. “[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate.” *United States v. Cronin*, 466 U.S. 648, 656 (1984) (internal citations omitted).

Moreover, McKelton’s attorneys only met with him once before trying to get him to take a deal and did not go over his case and the evidence against him before presenting the deal. And despite the court’s explicit funding of experts, no cap on the experts’ expense, and counsel’s previous assurances that they’d hired an “investigator, a forensic scientist, and a mitigation expert,” counsel had in fact retained no experts other than an investigator. (3/4/10 hrng, p. 9; 9/17/10 hrng, p. 22).

Other facts substantiate McKelton’s claims that his counsel were deficient during the plea bargaining stage. Counsel presented McKelton with the plea bargain in front of one of the officers guarding the room and then counsel forced McKelton to sign an unnecessary legal pleading stating that he was offered a deal. (9/17/10 at p. 17-18). Counsel presented him with this decision as they were being called back to court. “It’s very simple Calvin, if you sign the plea deal, you will live. If you sign the paper I wrote up, you will die.” (*Id.* at 17).

Finally, only an investigator had been hired despite the fact that the Court was under the impression that a mitigation expert, psychologist and forensic experts had been retained.

(9/17/10 at p. 22). Apparently as support for its position that counsel was effective, the State pointed to the hearing on October 15, 2010, when counsel acknowledged that the trial court had given them the “opportunity” to explore mitigation experts, mental health experts, investigators, and everything necessary to present mitigation. (10/15/10 at 16-17). The problem is not the lack of opportunity provided to counsel; rather, it is counsel’s failure to take advantage of those opportunities and represent their client in the manner required by the Constitution.

The facts in this case are directly on point with those found in *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1385 (2012), where the United States Supreme Court held a violation of the right to effective assistance of counsel occurs when a client rejects a plea offer due to counsel’s ineffectiveness in providing legal advice on a plea. The manner in which McKelton’s counsel presented him with a plea bargain was not an effective or acceptable way of presenting a plea to a client. This is particularly true when the client has barely met with you on a one on one basis and even more so when you are presenting such important issues and asking for decisions in front of an outside party.

McKelton was prejudiced by counsels’ failure to properly present him with the plea bargain. To succeed in such a claim, McKelton must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the defendant would have accepted a plea which would have been less severe than the sentence that was in fact imposed. (*Id.* at 1384-85). Any deal that McKelton would have made would have put him in a better position than the death sentence he is now facing. The State in its sur-reply argues that the reason McKelton rejected the State’s plea offer was because he believed himself to be innocent. State Sur-Reply at p. 4. Although at times McKelton alluded to wanting to demonstrate his innocence, he also stressed that he wanted to know “evidence the prosecutor have (sic) that would find me guilty beyond a

reasonable doubt.” (9/17/10 at p.15). McKelton was not a client wholly opposed to accepting a deal, but instead was a client who wanted to make an informed decision. He wanted to understand the evidence the State would produce and wanted to know what evidence the defense had developed to protect his interests. McKelton had no reason to trust his counsel’s advice regarding a plea bargain where his attorneys had not conducted an adequate investigation in his case.

McKelton’s counsel were deficient in presenting a plea bargain to him. The result was overwhelming prejudice to McKelton. He ended up with a the harshest sentence available under Ohio law. McKelton’s Sixth Amendment right to effective counsel was violated, and he is entitled to a new trial or alternatively a new penalty phase under O.R.C. § 2929.06(B).

Respectfully submitted,

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I hereby certify that a true copy of the foregoing **RESPONSE TO STATE'S SUR-
REPLY** was forwarded by regular U.S. Mail to Michael Gmoser, Butler County Prosecutor, 315
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