IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO.: 14-2087

STEVEN MYKIEL BAILEY,

Applicant-Appellant,

versus

ROBERT B. STEWART, and the
ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
11-CV-1020
LISA LUPO LENIHAN, C.M.J.

APPLICANT-APPELLANT'S BRIEF IN SUPPORT OF HIS MOTION FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

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ORAL ARGUMENT REQUESTED

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PRIOR RELATED APPEALS

There are no prior related appeals filed in this Court. All prior appeals were filed in Pennsylvania state courts.

STATEMENT CONCERNING ORAL ARGUMENT

Applicant-Appellant respectfully requests oral argument concerning the issues raised herein in the event this Court should grant a Certificate of Appealability. The issues raised herein present important questions of a Constitutional dimension and Applicant-Appellant believes this Court would be aided in its deliberations by the presence of counsel before the Court to comment upon the issues and respond to inquiries from the Court.

JURISDICTIONAL STATEMENT

Federal Rule of Appellate Procedure 22 prevents Applicant-Petitioner Steven Mykiel Bailey ("Mr. Bailey") from appealing the denial of his petition for a writ of habeas corpus, brought under 28 U.S.C. § 2254, "unless a circuit justice or a circuit or district judge issues a certificate of appealability ("COA") under 28 U.S.C. § 2253(c)." *See* Fed. R. App. P. 22. The District Court for the Western District of Pennsylvania, which denied Mr. Bailey a COA, possessed jurisdiction under 28 U.S.C. §§ 2254(a) and (b)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291. *See* 28 U.S.C. §§ 2253(a), (c)(1)(A) (2012). Mr. Bailey exhausted his state court remedies, pursuant to 28 U.S.C. § 2254(b)(1)(A). Mr. Bailey filed a timely

notice of appeal on April 4, 2014. The District Court denied Mr. Bailey's petition by Order dated March 7, 2014.

ISSUES PRESENTED FOR REVIEW

Mr. Bailey seeks this Court's leave to appeal the following issues:

1. Whether Mr. Bailey received constitutionally deficient assistance of counsel in violation of his Sixth Amendment right to counsel where trial counsel failed to properly communicate a plea offer to Mr. Bailey, had no reasonable basis to excuse this failure, and Mr. Bailey was prejudiced as a result?
2. Whether the Commonwealth adduced sufficient evidence at trial of Mr. Bailey's intent to kill to support a conviction for first-degree murder?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania charged Mr. Bailey with one count of criminal homicide, one count of carrying a firearm without a license, and four counts of recklessly endangering another person.[1] Mark Lancaster, Esquire, represented Mr. Bailey at trial. A jury convicted Mr. Bailey after a three-day trial. On March 14, 2005, Mr. Bailey was sentenced to a mandatory sentence of life without the possibility of parole on the first-degree criminal homicide charge and five one- to two-year sentences on the remaining counts, to be served concurrently.

[1] Pa.C.S.A. § 2501; Pa.C.S.A. § 6106; Pa.C.S.A. § 2705, respectively.

Mr. Bailey timely appealed the judgment and sentence. The Pennsylvania Supreme Court ultimately denied relief on December 20, 2007. Mr. Bailey also timely pursued relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 et seq. This relief was denied following a hearing on January 29, 2009. Mr. Bailey appealed to the Pennsylvania Superior Court and to the Pennsylvania Supreme Court, which denied relief on March 30, 2011.

Mr. Bailey, *pro se*, filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Pennsylvania. Mr. Bailey retained undersigned counsel after the Commonwealth had submitted its answer. Relief was denied by opinion and order dated March 7, 2014. The instant application now follows.

STATEMENT OF THE FACTS

The facts of the underlying case were summarized by the District Court as follows:

> "On the afternoon of June 8, 2004, Derrick Steele, the victim, accosted Tammy Brown, [Petitioner's] fiancée, while she was walking with her girlfriend, Kelly Shipton, and three children on Perrysville Avenue in the city of Pittsburgh. As Ms. Brown walked down the street carrying her and [Petitioner's] one-year-old daughter, the victim began yelling at Ms. Brown, threatening to kill [Petitioner] and demanding to speak with him concerning a long-standing argument between the two men. As the confrontation escalated, Ms. Brown became hysterical and had Ms. Shipton call [Petitioner] on Ms. Brown's cell phone. When he answered the phone, [Petitioner] could hear the victim shouting, "Where is your man? Get your man[!] Tell that mother fucker he's dead," could hear his fiancée yelling "get off me, stop hitting me," and heard his daughter crying. . . . A neighborhood fire station captain observed this "heated argument" and watched the victim walk away from Ms. Brown as a police car approached. Ms. Brown walked to a nearby pharmacy with Ms. Shipton and the children.
>
> Within a few minutes, [Petitioner] arrived at the pharmacy, picked up Ms. Brown, Ms. Shipton and the three children and drove them to Ms. Brown's house. [Petitioner] then drove a short distance to Mr. Bill's Tap & Grill Bar, where he pulled up parallel to the front entrance, put his foot on the brake, and saw the victim outside with two other men. [Petitioner] then reached across the front passenger seat of his car, aimed his gun in the direction of the men, and fired two shots. As the victim retreated into the bar, [Petitioner] fired two more shots after him into the glass in the door to the bar. One of these bullets penetrated the victim's head, killing him instantly.
>
> As a result of this incident, [Petitioner] was charged with one count each of criminal homicide and carrying a firearm without a license, and four counts of recklessly endangering another

> person. The Honorable Lester G. Nauhaus presided over [Petitioner's] five-day jury trial in January 2005. The Commonwealth presented the testimony of several witnesses, including that of the victim's girlfriend, Charmaine Holloway. Ms. Halloway [sic] related an incident which had occurred seven months earlier when [Petitioner] had pulled a gun and threatened the victim.
>
> In his defense, [Petitioner] testified that he had been threatened by the victim several times over the last few months, that he was scared of the victim, and that he had been shot at by the victim in March 2004. In addition, [Petitioner] testified that on the day of the shooting, as he pulled up in front of the bar, he saw the victim reach under his shirt for a shiny object that [Petitioner] thought might be a nickel-plated gun based upon previous confrontations with the victim. Finally, both Ms. Brown and Ms. Shipton testified on [Petitioner's] behalf and provided their account of events concerning [Petitioner] and the victim.

(Memorandum Opinion, pgs. 2-3).

STANDARD OF REVIEW

To show that a Certificate of Appealability should issue under 28 U.S.C. §2253(c), Mr. Bailey need only make a substantial showing that jurists of reason could disagree with the district court's resolution of his constitutional claims. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). Courts of Appeal ask only if the district court's decision was debatable. *Id.*; *see also Bradshaw v. Estelle*, 463 U.S. 880, 893 n.4 (1983). A determination related to a certificate of appealability is a separate proceeding, one distinct from the underlying merits." *See Miller-El*, 537 U.S. at 342, *citing Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

Mr. Bailey need not show that his "appeal will succeed," and the Court here should not deny him a Certificate of Appealability just because this Court might believe he will not show he is entitled to relief under §2254. *See Miller-El*, 537 U.S. at 337. Mr. Bailey must simply demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

ARGUMENT

I. A CERTIFICATE OF APPEALABILITY SHOULD HAVE ISSUED BECAUSE IT IS DEBATABLE WHETHER OR NOT MR. BAILEY RECEIVED CONSTITUTIONALLY DEFICIENT ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO COMMUNICATE A PLEA OFFER.

It is axiomatic that both the United States and Pennsylvania constitutions guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. U.S. Const. Amend. VI, §1; Art. I, §9, Pa. Constit. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive due process of law in an adversarial system of justice. *See United States v. Cronic*, 466 U.S. 648, 658 (1984); *see also Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993).

Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012); *see also Padilla* v. *Kentucky*, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010). During plea negotiations, defendants are "entitled to the effective assistance of competent

counsel." *See McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

The Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). Additionally, the Court has held that the same two-part test applies to claims of ineffective assistance of counsel arising out of the plea process. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

Under the *Strickland* standard, ineffective assistance of counsel is established when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id.* at 687. Specifically, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A convicted defendant making a claim of ineffective assistance must identify the particular acts or omissions of counsel that are alleged not to have been

the result of reasonable professional judgment. In turn, a court deciding a claim of ineffective assistance of counsel must then judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *See Strickland*, 466 U.S. at 690.

> The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Id. (emphasis added).

To establish *Strickland* prejudice in the context of plea negotiations, a defendant must show the outcome of the *plea process* would have been different with competent advice. *See Missouri v. Frye*, 132 S.Ct. at 1399 (emphasis added) (noting that *Strickland* 's inquiry, as applied to advice with respect to plea bargains, turns on "whether 'the result of the proceeding would have been different.'" (quoting *Strickland, supra,* at 694, 104 S.Ct. 2052)); *see also Hill,* 474 U.S. at 59 ("The ... 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*")(emphasis added).

Here, Mr. Bailey claimed his trial counsel failed to fully and properly convey a plea offer from the Commonwealth and that had trial counsel done so,

accurately and completely, Mr. Bailey would have accepted that offer. Specifically, there were substantive discussions concering a plea bargain in which Mr. Bailey, through his trial counsel, offered to plead guilty to third-degree murder in exchange for a fixed sentence of ten years' imprisonment. (Memorandum Order, pg. 15). The Commonwealth rejected Mr. Bailey's offer but suggested the possibility of a plea to third-degree murder with a sentence of 20 to 40 years, the statutory maximum. Trial counsel rejected the offer without ever consulting Mr. Bailey. In explaining his decision, trial counsel said the most Mr. Bailey could be convicted of was involuntary manslaughter and the resulting sentence was anywhere from three to ten years "and I'm going to get you less time than that."

The District Court, in reviewing the record below, concluded there was no formal plea agreement and therefore trial counsel was not ineffective for failing to convey a plea offer that was never made. However, the existence of a formal plea offer is not the shibboleth that a claim of ineffective assistance of counsel must speak before finding error. Recent Supreme Court precedent suggests it is the plea bargaining *process* and not necessarily the end result, *i.e.*, a formal plea agreement, that must be examined in determining if trial counsel was ineffective for failing to communicate to the criminal defendant.

The Supreme Court has made it clear that "the *negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to

effective assistance of counsel." *See Frye*, 132 S.Ct. at 1406 (emphasis added) (citing *Padilla v. Kentucky*, 559 U.S. 356, 373). The reality is that plea bargains have become "so central to the administration of the criminal justice system that defense counsel have responsibilities in the *plea bargain process*, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *See Frye*, 132 S.Ct. at 1407 (emphasis added).

The plea bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. *See Frye*, 132 S.Ct. at 1407. Defense counsel has a duty to "communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused" however left open to further review possible "exceptions to the rule." *Id.* at 1408.

In *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the defendant was informed of a plea offer but, on the inadequate advice of counsel, rejected it and a later trial resulted in a far less favorable outcome. In *Lafler*, "it was assumed that counsel's advice was constitutionally ineffective during the plea negotiation process." *Id.* at 1386.

The present case is distinguishable in that here, trial counsel never communicated anything from the plea negotiation process to Mr. Bailey and as a

result, he was denied his recognized constitutional right to consider a plea. *See Lafler*, 132 S.Ct. at 1387 ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in *considering* whether to accept it." (emphasis added). The plain meaning of *Lafler's* conclusion is that no formal agreement must be reached prior to the right to effective assistance of counsel attaching.

Formal written plea agreements memorialize the negotiations that took place during the plea bargaining process so that disputes later on can be resolved by examining the written offer. Notably, the negotiations taking place prior to a formal offer are just as important, if not more important, because it is only through this legal horse-trading that a formal agreement is reached. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney." ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a)(3d ed. 1999), a standard adopted by numerous state and federal courts. This standard includes not only communication but also consultation.

The criminal defendant, as a party to the negotiations, must be informed of the discussions that take place, be advised of counter-offers and provided the opportunity to participate in this critical stage of the litigation process. When trial counsel fails to consult with his client and fails to advise the client of potential

counter-offers or other potential avenues for resolution short of trial, trial counsel has provided constitutionally ineffective assistance.

Prejudice, under *Strickland*, is shown where the defendant, had he been fully and completely advised of the negotiations and offers, would have accepted a plea instead of going to trial. If the right to effective assistance is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence. *See Lafler*, 132 S.Ct. at 1387.

Here, Mr. Bailey was denied his right to consider the full breadth of the Commonwealth's position because his trial counsel never communicated that position to him. Had Mr. Bailey been properly advised of the plea negotiations, including the offer, unrefuted in the record, that the Commonwealth would have agreed to a plea with a sentence range of 20 to 40 years (which trial counsel rejected without consulting Mr. Bailey), he would have accepted it. Instead, denied basic knowledge by his ineffective trial counsel, Mr. Bailey went to trial, was convicted of first-degree murder, and now serves a life sentence without the possibility of parole.

The District Court misapplied federal law in finding Mr. Bailey did not sustain his burden of showing ineffective assistance and prejudice. The record is undisputed that substantive plea negotiations took place, Mr. Bailey's trial counsel

did not communicate fully with his client about a reasonable counter-offer proposed by the Commonwealth, and as a result, Mr. Bailey was denied his right to consider this alternative, went to trial, was convicted, and was sentenced to life without the possibility of parole. Mr. Bailey's petition, in further detail, sets out the facts and the circumstances such that there was a substantial showing of a denial of his Sixth Amendment right to counsel. At the very least, reasonable jurists can disagree and as a result, a Certificate of Appealability should have issued on this claim.

II. A CERTIFICATE OF APPEALABILITY SHOULD HAVE ISSUED BECAUSE IT IS DEBATABLE WHETHER OR NOT THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A FIRST-DEGREE MURDER CONVICTION.

In a habeas corpus proceeding pursuant to 28 U.S.C. §2254, where a Petitioner claims his conviction in state court was based upon insufficient evidence, such a claim rests on the Due Process guarantee "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Federal courts have consistently held that a defendant's conviction is constitutionally infirm, and must be vacated if attacked on a federal habeas corpus petition where no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *See Bowen v. Kemp*, 832 F.2d 546

(11th Cir. 1987) (insufficient evidence of *mens rea* to support petitioner's conviction for murder); *see also Joseph v. Coyle*, 469 F.3d 441 (6th Cir. 2006) (evidence was insufficient to establish that defendant personally inflicted victim's fatal stab wound to sustain conviction for aggravated murder).

The state law at issue is section 18 Pa.C.S. §2501, Pennsylvania Code, which states in pertinent part:

> A person is guilty of criminal homicide if he intentionally, knowingly, recklessly, or negligently causes the death of another human being. 18 Pa.C.S. §2501 (a).
>
> A criminal homicide constitutes murder in the first degree when it is committed by an intentional killing. 18 Pa.C.S. §2502 (a).
>
> An "intentional killing" is defined as killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. 18 Pa.C.S. §2502 (d).

The willful, deliberate and premeditated intent to kill is the element that distinguishes first-degree murder from other degrees of murder. *See Commonwealth v. Ockenhouse*, 562 Pa. 481, 490, 756 A.2d 1130 (Pa. 2000). Further, the use of a deadly weapon on a vital part of the victim's body may constitute circumstantial evidence of a specific intent to kill. *Id.*, at 491, *citing Commonwealth v. Bond*, 539 Pa. 299, 652 A.2d 308, 311 (1995).

The evidence at trial demonstrated that Mr. Bailey did not seek out the victim with the specific intent to kill him, but rather to confront the victim about the threats the victim made to Mr. Bailey's girlfriend. The evidence also showed that Mr. Bailey fired shots in response to his seeing the victim reach for a weapon. Mr. Bailey never exited his vehicle.

The first shots fired were in a completely different direction than where the victim was and the two shots that followed were directed at the building after the victim had already retreated into the bar.[2] Mr. Bailey could not see the victim at the time of the shooting, could not determine where the victim was at the time of the shooting and as a result, there could be no reasonable finding by the jury that Mr. Bailey intended to shoot the victim.

The Commonwealth's evidence on the critical element of intent was entirely circumstantial. The most it could prove was that Mr. Bailey fired a weapon, which he never denied, and that the shots were directed at the building. There was no evidence that Mr. Bailey could see the victim or that the victim was even in close proximity to the gun shots. Mr. Bailey had no intent to kill the victim and, in fact, was responding to a perceived threat that the victim was about to pull a gun on him, the same thing the victim had done previously.

[2] The testimony at trial was that the victim had made it all the way into the bar and was approximately 10 feet from the door vestibule at the time he was struck.

In every criminal case, the prosecution is required to prove beyond a reasonable doubt each specific element of the charged offense. The trial court, in considering Mr. Bailey's motion for judgment of acquittal, rejected this argument finding the jury could have believed he killed the victim and that the jury was free to infer the specific intent to kill justifying its verdict. Here, the evidence was insufficient to prove intent to kill as defined by Pennsylvania law. The Commonwealth did not prove Mr. Bailey willfully, intentionally, and with premeditation killed the victim.

Admittedly, sufficiency-of-the-evidence challenges pose difficulties, especially in the §2254 context. The constitutional infirmity with the evidence at trial in the Pennsylvania state court was this: although evidence came forth that Mr. Bailey fired shots at the victim, there was no evidence that Mr. Bailey ever formed any "malice aforethought." Yet the state courts and the federal district court concluded that, the evidence, viewed "in the light most favorable to the prosecution" and supported a "rational trier of fact . . . [finding] the essential elements of the crime beyond a reasonable doubt."

The problem with this conclusion is that the record does not bespeak an intentional, pre-meditated crime. Rather, Mr. Bailey went to confront the victim about threats the victim had made against Mr. Bailey's girlfriend and children and then, when he saw the victim reach for what he thought was a gun, Mr. Bailey fired

in fear of imminent harm. The victim then quickly retreated into the bar and there was no evidence Mr. Bailey ever saw the victim or could have seen the victim. There simply was no evidence that, even in an instant, Mr. Bailey formed an intent to kill the victim.

Here, it is debatable whether the District Court's conclusion was such that no reasonable jurist could disagree. A determination concerning a COA requires only "a general assessment of the claim" and does not require "full consideration of the factual or legal bases adduced in support of the claim." *See Miller-El*, 537 U.S. at 337. For these reasons, a Certificate of Appealability should issue so this Court may determine whether the evidence was sufficient to sustain a conviction of first-degree murder.

CONCLUSION

The District Court erred in denying Mr. Bailey a Certificate of Appealability on any of his claims presented in his habeas petition. As held in *Slack*, an applicant for a certificate of appealability need not show the appeal will succeed on the merits and the District Court should not have denied the issuance of a COA "merely because it believes the applicant will not demonstrate an entitlement to relief." *See Miller El*, 537 U.S. at 337. Based upon the record, and upon consideration of the foregoing, a Certificate of Appealability should issue to consider the merits of Mr. Bailey's claims.

Dated: Winter Park, Florida
May 21, 2014

Respectfully Submitted,

/s/ Mark K. McCulloch, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the CM/ECF system.

/s/ Mark K. McCulloch, Esq.
Mark K. McCulloch, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman Font. Excluding those portions proscribed by rule, this brief in support contains 4,196 words.

/s/ Mark K. McCulloch, Esq.
Mark K. McCulloch, Esq.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I HEREBY CERTIFY that, in accordance with Third Circuit Rules, all required privacy redactions have been made, any required paper copies to be submitted to the court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free from viruses.

/s/ Mark K. McCulloch, Esq.
Mark K. McCulloch, Esq.