

No. 18-_____

In The Supreme Court Of The United States

GARY CLACK,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

CHRISTINE FOSTER
Assistant Public Advocate
Department Of Public Advocacy
5 Mill Creek Park, Sec. 101
Frankfort, Kentucky 40601

Counsel for Petitioner Gary Clack

QUESTION PRESENTED

Clack's trial counsel failed to investigate and present testimony of witness Brandon Clack at his criminal trial, despite his client requesting that he do so. The victim stated that Brandon Clack was present at the time of some of the alleged criminal conduct. At a state post-conviction hearing, new counsel presented testimony from Brandon who stated he had never witnessed any criminal conduct between Clack and the victim. The trial court found that trial counsel for Clack was ineffective for failing to investigate and present the witness, but that Clack was not prejudiced because the jury returned a unanimous verdict. The Kentucky Court of Appeals denied relief, again finding that trial counsel was ineffective, but that Clack was not prejudiced.

This result presents the following question:

Whether the Kentucky Court of Appeals properly applied the *Strickland* prejudice prong when it held that trial counsel provided ineffective assistance of counsel by failing to investigate and present witness testimony at trial, but that Clack was not prejudiced by this deficient performance of counsel.

LIST OF PARTIES

All parties to the proceedings are named in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	7
I. The Kentucky Court of Appeals’ Application of the <i>Strickland</i> Prejudice Prong Conflicts With This Court’s Authority When It Subjectively Held That Failure to Call a Witness Was Deficient Performance of Counsel, But That Mr. Clack Was Not Prejudiced.	7
CONCLUSION.....	13
CERTIFICATE OF SERVICE	14
APPENDIX.....	16
<i>Clack v. Commonwealth</i> , Case No. 2016-CA-000015-MR (Ky. Ct. App. June 30, 2017)	Apx. 1
Order of the Kentucky Supreme Court Denying Discretionary Review, Case No. 2017-SC- 000373-D (March 14, 2018)	Apx. 13
Trial Court Post-conviction Opinion.....	Apx. 15

TABLE OF AUTHORITIES

Cases

<i>Clack v. Commonwealth</i> , Case No. 2016-CA-000015-MR (Ky. App. June 30, 2017).....	1, 3, 7, 8
<i>Clack v. Commonwealth</i> , 2010-SC-00793-MR, 2012 WL 601265 (Ky. 2012).....	3
<i>Gall v. Commonwealth</i> , 702 S.W.2d 37, 39 (Ky. 1985)	9
<i>Pudelski v. Wilson</i> , 576 F.3d 595, 607 (6th Cir.2009)	2
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	2, 3, 7, 8, 9, 10, 12

Statutes

28 U.S.C. § 1254.....	2
28 U.S.C. § 1257.....	2

Other Authorities

Fourteenth Amendment	2
Sixth Amendment	2

Rules

Sup. Ct. R. 10(c)	13
Ky. RCr 11.42	3, 6, 10

A. Procedural History

In 2010, Clack was tried by a jury and convicted of four counts of sexual abuse, rape and sodomy and received the minimum sentence of twenty years. The Kentucky Supreme Court affirmed his conviction in part, and reversed in part; vacating his sentences for four counts of sexual abuse on direct appeal. *Clack v. Commonwealth*, 2010-SC-00793-MR, 2012 WL 601265 (Ky. 2012).

Following direct appeal, Clack initiated a state collateral post-conviction proceeding pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The trial court denied the petition after conducting an evidentiary hearing. Apx.15-18. The Kentucky Court of Appeals upheld the decision. *Clack v. Commonwealth*, 2016-CA-000015-MR. Apx. 1-13.

After the submission of evidence at the evidentiary hearing, the trial court held that counsel for Clack had been ineffective for his failure to investigate and present the testimony of witness Brandon Clack, but that Clack was not prejudiced because the jury had returned a unanimous verdict. Relief was denied. Apx. 15-19. Thereafter, Clack timely appealed. The unpublished opinion of the Kentucky Court of Appeals denying Clacks's post-conviction appeal is found at Apx. 1-13.

The Kentucky Court of Appeals agreed with the lower court and found deficient performance on the part of trial counsel concerning this witness. Apx. 6-7. The Court, however, did not find that Clack was prejudiced. Apx. 7-8.

On March 14, 2018, the Kentucky Supreme Court denied Clack's request for discretionary review. Apx. 14.

B. Facts Related to Ineffectiveness Claim.

Eleven (11) year old A.W. accused her mother's friend, Gary Clack, of committing numerous sexual violations against her on four separate occasions. With the exception of one occurrence, A.W. stated witnesses were present at each of the alleged rapes, including her sister who was two (2) years older. However, none of the eyewitness were ever interviewed by police or by defense counsel. At trial, the Commonwealth guided A.W.'s testimony through a long series of leading questions and the use of a demonstrative aid, without any objection by defense counsel.

The first alleged sexual assault occurred on Cherry Street in Mr. Clack's home. A.W. said fourteen (14) people stayed in this home with her at the time. On the day in question, A.W. was with her older sister and Mr. Clack in his bedroom watching the movie "Saw." Her sister was awake. When asked what Mr. Clack did to her on this occasion, A.W. first stated that he only rubbed her back and denied any other touching. The Commonwealth then pushed for more detail, but A.W. did not provide it. After a recess, A.W. returned and, using the terms "front" and "back" to describe her body, stated that Mr. Clack vaginally and anally raped her while her sister lay sleeping next to her in the bed. When asked by the Commonwealth how the sexual assault felt, A.W. stated she did not remember. The Commonwealth tried to elicit a better answer by rephrasing, "Do you remember how it felt when he was finished?" A.W. still responded, "No."

A.W. claimed the second assault occurred at her home on Front Street. A.W., her older sister, Mr. Clack, and his two sons Brandon and Michael were watching the movie "Norbit" in the living room. A.W. said, through a series of leading questions, that Mr. Clack told her to sit on his lap and then touched her "front" and "back" with his "private." She stated everyone was

awake at the time, and that Mr. Clack was sitting in the middle of the children. The Commonwealth continued to resort to leading questions, attempting to draw out details from A.W. concerning how this could have happened with other people in the room and no one notice. A.W. responded, "I don't know." After additional leading, she stated that it was because he used his hand to move himself around.

Through the use of continuous and uninterrupted leading, A.W. told of another sexual assault that occurred at her Front Street home. A.W. was listening to music in her bedroom when Mr. Clack allegedly entered the room and touched her "front" and "back" with his hand and "private". A.W. claimed that another vaginal and anal sexual assault occurred at Mr. Clack's home while she watched the television show "Family Guy" in Mr. Clack's bedroom with his two sons Brandon and Michael. A.W. stated she fell asleep on the bed next to his sons, then awoke to Mr. Clack raping her vaginally and anally, which she described as her "front and back".

The Commonwealth also called medical expert Dr. Travis Calhoun of the Children's Advocacy Center. Dr. Calhoun testified that he found A.W. to have a large vaginal opening and a "small irregularity at the seven o'clock position, although not a complete tear, of the hymen." He explained these variations could be completely normal and unrelated to sexual abuse or rape, but he was concerned because of her allegations. When asked whether a finding of an intact hymen could be consistent with vaginal rape, Dr. Calhoun shockingly testified, "It turns out that actually in one third of cases, and there are medical studies to back this, that in one-third of documented cases of pregnancy from penetration, obvious penetration with pregnancy, there are normal findings of the hymen." A.W. admitted she did not tell Dr. Calhoun that she was anally penetrated.

Mr. Clack took the stand and denied that he ever touched A.W. inappropriately. His sons were never interviewed by trial counsel, although A.W. had given statements that they were present at the time of two sexual assaults.

The jury appeared to be on the edge of acquittal when it relayed questions during deliberations asking if a lack of unanimity defaulted to a not guilty verdict. The jury also asked the trial court to clarify the instructional statement “[i]f upon the whole case you have reasonable doubt that he is guilty, you shall find him not guilty.”

The jury deliberated an additional day and then convicted Mr. Clack of four counts of first-degree rape, four counts of first-degree sodomy, and four counts of first-degree sexual abuse. He was sentenced to the minimum possible term of imprisonment of twenty years. The Supreme Court of Kentucky reversed the four convictions for first-degree sexual abuse based on palpable error, but affirmed the remaining convictions.

Following his direct appeal, Mr. Clack filed a *pro se* RCr 11.42 motion in Todd Circuit Court on September 17, 2014. Appointed Counsel’s Supplement of Law to Movant’s Motion Pursuant to RCr 11.42 was filed on or about February 24, 2015. On April 22, 2015, the Court filed a Non-Final Order Denying RCr 11.42 Motion, wherein it held that an evidentiary hearing would be limited to whether trial counsel had failed to investigate and subpoena eyewitness Brandon Clack to testify. Mr. Clack’s other arguments were denied without a hearing. On August 14, 2015, the Circuit Court held an evidentiary hearing where trial counsel, Mr. Clack, and his son, Brandon Clack, testified.

Following the hearing, the Todd Circuit Court entered an Order overruling Mr. Clack’s RCr 11.42 Motion. Apx. 15-18. The case then proceeded to the Court of Appeals, who denied

all relief in an unpublished opinion rendered on June 30, 2017. *Clack v. Commonwealth*, 2016-CA-000015-MR. Apx. 1-13.

Both the trial court and the Kentucky Court of Appeals found counsel's performance deficient. *See* Apx. 6, 16. Nevertheless the Court found no prejudice to the client because the witness was only present for two of the four alleged sexual assaults and testified that he may have been asleep during part of the night. Apx. 6-8.

REASON FOR GRANTING THE WRIT

I. The Kentucky Court of Appeals' Application of the *Strickland* Prejudice Prong Conflicts With This Court's Authority When It Subjectively Held That Failure to Call a Witness Was Deficient Performance of Counsel, But That Mr. Clack Was Not Prejudiced.

The correct standard for determining prejudice – as promulgated by this Court – states that a 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.” *Strickland v. Washington*, 466 U.S. 668; 694 (1984). By allowing relief when there is a reasonable probability of a different outcome, the proper standard recognizes the limits of the retrospective inquiry and balances the protection of the defendant’s constitutional rights with the interest in finality of judicial outcomes.

The subjective and all but impossible to satisfy burden of proving prejudice imposed by the Kentucky Court of Appeals in this case conflicts with the objective reasonable probability test mandated by *Strickland v. Washington*, 466 U.S. 668 (1984).

Kentucky’s detour from the correct standard resulted in a failure to address the proof of prejudice. In asking this Court to hear this case, Clack is not asking the Court to reweigh evidence previously addressed by a state court, but is simply asking the Court to apply the

correct constitutional standard concerning the prejudice prong that is not substantially in dispute.

A. The Kentucky Court of Appeals Decision Conflicts With Authority From This Court That Mr. Clack Was Not Prejudiced By His Trial Counsel's Deficient Performance In Failing to Investigate And Present Witness Testimony At Trial.

After conceding that no reasonable counsel would have acted as Clack's trial counsel did by failing to interview the witnesses (Apx. 7), the Kentucky Court of Appeals found that the thoroughly ineffective performance of Clack's counsel had not prejudiced him because:

We agree with the trial court that a reasonable attorney would have interviewed Brandon to determine whether he could refute A.W.'s testimony regarding one of the alleged sexual assaults. We cannot think of a reasonable basis for trial counsel not to interview Brandon, especially after learning that he could potentially corroborate Clack's insistence that the alleged offenses did not occur. The Commonwealth points out that Brandon was very young at the time of the trial. However, trial counsel could have determined whether or not Brandon was competent to testify by interviewing him. "It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." *Dickerson v. Bailey*, 453 F.3d 690, 696 (6th Cir. 2006). Trial counsel should have sufficiently investigated the cases so that he could competently form a sound strategy.

Nevertheless, we also agree with the trial court that Clack was not prejudiced by counsel's failure. Brandon testified at the evidentiary hearing that he was present at one of the alleged incidences and did not see or hear any sexual assault occur. He did not remember if he was asleep, but stated that if he was asleep and someone made movements on the air mattress, he would have woken up. However, he acknowledged that sometimes people got in and out of the bed without waking him.

While Brandon's testimony may have lent support to Clack's version of events in regards to one of the alleged incidents, it was not such that the outcome of the proceeding would have been different. Even were we to believe that Brandon's entire testimony was completely true, the incident could still have occurred without Brandon having observed it. Brandon's testimony did not contradict that of A.W., or any of the other Commonwealth witnesses, nor did it substantially affect the proof at trial. Consequently, Brandon's proposed testimony has little probative value and therefore is not sufficient to warrant reversal.

Apx. 8. The Kentucky Court of Appeals ruled that Clack's claim must fail because he cannot prove that the testimony would have substantially affected the proof at trial, despite the victim stating that Brandon was present at two of the alleged sexual assaults.

To date, no other Kentucky case has addressed what level of proof is necessary to show that the defendant was prejudiced by the inaction of trial counsel, when counsel's actions have been determined by the lower courts to be ineffective. The Court of Appeals ruled, "We cannot think of a reasonable basis for trial counsel not to interview Brandon, especially after learning that he could potentially corroborate Clack's insistence that the alleged offenses did not occur" but nevertheless held he was not prejudiced. Apx. 7.

Trial counsel "has the duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). "[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable". *Id.*, at 690. However, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations of the investigation." *Id.*, at 691; adopted by the Supreme Court of Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

In measuring prejudice, the second prong, the inquiry is whether a reasonable probability exists that but for counsel's unprofessional errors the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability means a probability sufficient to undermine confidence in the outcome considering the totality of the evidence before the jury. *Strickland*, 466 U.S. at 694-95. Furthermore, the Supreme Court in *Strickland* made it clear that "reasonable probability" does not mean that counsel's deficient conduct more likely than not

altered the verdict. In specific, the Court stated “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694.

Regarding both the deficient performance and prejudice prongs of the *Strickland* test, “a court should keep in mind that...the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results”. *Strickland*, at 696.

Mr. Clack informed his attorney that his sons were both present at one of the alleged events and asked that trial counsel interview them, and present them as defense witnesses at trial. Brandon Clack was born on May 22, 2001 and would have been between seven (7) and eight (8) years old at the time of the events and nine (9) at the time of trial. This is just one year younger than A.W. at the time of the alleged offenses.

Brandon Clack testified at the RCr 11.42 evidentiary hearing that he remembers spending time at the house with A.W., his brother Michael, his father Gary Clack, and a large number of other people, during the relevant period of time. He has no memory of A.W. ever being sexually violated in any way in his presence, which directly contradicts her statements. He further testified to the fact that the bed in Gary Clack’s room was an air mattress. This fact is highly significant.

Anyone who has slept on an air mattress knows that inflatable air mattresses do not

testimony would have had provided vital third-party support to Mr. Clack's claims that the abuse allegations were false. This is particularly true in light of the unhelpful testimony of the medical expert, and the fact that the jury returned from deliberating to ask whether their verdict had to be unanimous. To hold otherwise renders the *Strickland* standard meaningless.

At its core, an ineffectiveness claim "is an attack on the fundamental fairness of the proceeding whose result is challenged." *Strickland*, 466 U.S. at 678. Regarding both the deficient performance and prejudice prongs of the *Strickland* test, "a court should keep in mind that...the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results". *Strickland*, at 696.

In this case, the jury never heard from eyewitness Brandon Clack simply because Clack's attorney failed to interview him. Trial counsel admitted that he would have wanted to speak to all witnesses present and that, in hindsight, interviewing the children would have been the best thing to do. Because Brandon Clack did not testify and the jury did not hear that the alleged events took place on an air mattress, making it less likely that three children could have slept through the events had they actually occurred. The circuit court held, "The evidence presented against Clack in August of 2010 was sufficient but not overwhelming. The medical evidence was not helpful and the evidence supporting conviction was primarily the victim's testimony." Apx. 16.


Trial counsel provided ineffective assistance of counsel in a manner that was both unreasonable and resulted in great prejudice to Clack when he failed to interview and call

Brandon Clack to testify. But for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. The level of proof required to establish prejudice where an eyewitness is not investigated is a matter of first impression in Kentucky. The Court of Appeals provided no case law or other judicially established means to determine how prejudice may be established when counsel's inactions are found to be unreasonable and ineffective. The standard of review cannot be that the errors did not prejudice the criminal defendant because the jury verdict was unanimous. Such a holding would turn *Strickland* on its head, making a finding of prejudice impossible for anyone convicted by a jury.

CONCLUSION

The Kentucky Court of Appeals impregnable barrier to establishing prejudice in the context of *Strickland* is simply not the law of and conflicts with the decisions of this Court. Pursuant to Sup. Ct. R. 10(c), this Court should grant Petitioner's Writ of Certiorari. Alternatively, this Court can grant, vacate, and remand to the Kentucky Supreme Court with directions to provide Clack plenary review of his claims consistent with *Strickland*.

Respectfully submitted,



CHRISTINE FOSTER

Assistant Public Advocate
Department Of Public Advocacy
5 Mill Creek Park, Sec. 101
Frankfort, Kentucky 40601
(502) 564-3948

Counsel for Petitioner Gary Clack

No. 18-_____

In The Supreme Court Of The United States

GARY CLACK,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

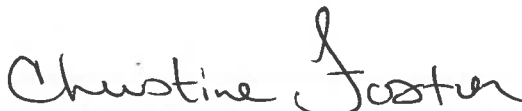
CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 12th day of June, 2018 upon:

Ms. Tami Allen Stetler
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204

All persons required to be served have been served.

Respectfully submitted,



CHRISTINE FOSTER
Assistant Public Advocate
Department Of Public Advocacy

5 Mill Creek Park, Sec. 101
Frankfort, Kentucky 40601
(502) 564-3948

Counsel for Petitioner Gary Clack