
No. ---

IN THE
SUPREME COURT OF THE UNITED STATES
2018

CHARLES WAYNE BUSSELL, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
KENTUCKY COURT OF APPEALS**

/s/ Dennis J. Burke

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November 6, 2018

QUESTIONS PRESENTED

After Petitioner was convicted of robbery and murder, the state court decided that Defense counsel's cross-examination of two critical witnesses was ineffective and vacated the convictions and sentence. Was defense counsel ineffective in the re-trial when he failed to object to the introduction of the tainted testimony from the first trial and when he failed to introduce testimony from the same witnesses in a post-conviction hearing that seriously impeached the trial testimony?

LIST OF PARTIES

1. Charles Wayne Bussell, Inmate Number 032856, Green River Correctional Complex, 1200 River Rd, Central City, KY 42330. Represented by Dennis J. Burke, 2202 Commerce Pkwy., Suite D, LaGrange, Kentucky 40031.
2. Commonwealth of Kentucky, Respondent. Represented by Hon. Jason Moore, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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PETITION FOR WRIT OF CERTIORARI

Charles Bussell respectfully petitions for a writ of certiorari to review a decision of the Kentucky Court of Appeals.

OPINIONS BELOW

The unpublished decision of the Kentucky Court of Appeals affirming the denial of state post-conviction relief is *Bussell v. Commonwealth*, 2016-CA-000251-MR, 2018 WL 300458 (Ky. App. January 5, 2018) and appended at Appendix A. The Order of the Supreme Court of Kentucky denying discretionary review of that decision is appended at Appendix B. The Decision of the Supreme Court of Kentucky affirming Petitioner's 2011 conviction on direct appeal, *Bussell v. Commonwealth*, No. 2009-SC-000647-MR, 2011 WL 3793151 (Ky. Aug. 25, 2011) (unpublished) is appended at Appendix C.

The decision of the Supreme Court of Kentucky vacating Petitioner's 1991 conviction due to ineffective assistance of counsel is reported at *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007) and appended as Appendix D. The decision of the Supreme Court of Kentucky affirming Petitioner's 1994 conviction on direct appeal is reported at *Bussell v. Commonwealth*, 882 S.W.2d 111 (Ky. 1994).

JURISDICTION

This Court's jurisdiction has jurisdiction under 28 U.S.C. § 1254(1). The Supreme Court of Kentucky denied discretionary review of the Kentucky Court of Appeals decision in 2016-CA-000251 on August 8, 2018. This petition is timely filed under this Court's Rule 13(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Sixth and Fourteenth Amendment of the Constitution of the United States.

The 6th Amendment to the United States Constitution provides, in pertinent part, as follows:

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The 14th Amendment to the United States Constitution provides, in pertinent part, as follows:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1991, after a brief trial, a jury found Charles Bussell guilty of murder and robbery and sentenced him to death. *BusseII v. Commonwealth*, 882 S.W.2d 111 (Ky. 1994). Two key fact witnesses at the 1991 trial were Robert Joiner and Kaye Bobbett. As the Supreme Court of Kentucky explained, "Joiner's testimony was critical to the prosecution's case. Joiner was the only witness to place [the victim's] diamond and sapphire ring in Bussell's hand after her disappearance, which served as the basis for the robbery charge as well as damning evidence of the murder. Bobbett's testimony, to a certain extent, corroborated Joiner's, insofar as she testified that Joiner obtained the ring from Bussell." *BusseII*, No. 2009-SC-000647-MR, 2011 WL 3793151, at *5, Appendix C.

In 2004, Petitioner successfully claimed he was denied effective assistance of trial counsel based in part upon counsel's failure to adequately investigate and cross-examine Joiner and Bobbett. The trial court conducted an evidentiary hearing at which both Joiner and Bobbett testified. In its order finding counsel ineffective and granting Bussell a new trial, the trial court called Bobbett and Joiner "the two most important witnesses for the Commonwealth." Circuit Court Findings of Fact, Conclusions of Law and Order. The Supreme Court of Kentucky affirmed. *Commonwealth v. BusseII*, 226 S.W.3d 96 (Ky. 2007), Appendix D.

Petitioner was tried again in 2008 but by then, both Joiner and Bobbitt were dead. The trial judge decided that the 1991 trial testimony was inadmissible because the cross-examination was ineffective. *Id.* Nevertheless, over Petitioner's

objection, the judge ruled that the post-conviction hearing direct examination testimony would "sufficiently augment the 1991 cross-examinations so as to cure this deficiency. Accordingly, the 2008 jury heard the 1991 trial testimony and the 2005 post-conviction hearing testimony of both Joiner and Bobbett. The 2008 trial ended in a mistrial after the jury deadlocked on guilt-innocence. See *Bussell*, 2011 WL 3793151 *2, Appendix C.

Petitioner faced trial for a third time in 2009. New defense counsel did not move to exclude the ineffectively cross-examined testimony of Joiner and Bobbett from the 1991 trial because he (incorrectly) thought defense counsel had properly preserved the issue for appellate review during the 2008 mistrial. He also chose not to seek introduction of the testimony of Joiner and Bobbett from the 2005 post-conviction evidentiary hearing. The third trial resulted in convictions for robbery and murder and Petitioner was sentenced to life in prison without the possibility of parole for twenty-five years. *Bussell*, 2011 WL 3793151 (Ky. Aug. 25, 2011), Appendix C. The Kentucky Supreme Court affirmed on direct appeal. *Id.*

Petitioner sought post-conviction relief once more, alleging in part, ineffective assistance of counsel for counsel's failure to move to exclude the 1991 testimony of Joiner and Bobbett. The Christian Circuit Court denied relief in an order entered on January 29, 2016. See Order, Appendix E. The Kentucky Court of Appeals affirmed. *Bussell v. Commonwealth*, 2016-CA-000251-MR, 2018 WL 300458 (Ky. App. January 5, 2018) (unpublished), Appendix A.

REASONS FOR GRANTING THE WRIT

The Sixth and Fourteenth Amendments to the United States Constitution protect the accused's right to counsel. A defendant has a right not just to counsel, but to "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court should grant review of the Kentucky Court of Appeals' decision to clarify the definition of "reasonable trial strategy" in the context of providing effective assistance of counsel. Petitioner's trial counsel made a decision to waive effective cross-examination of two important witnesses for the prosecution. One of the two witnesses was described by the Supreme Court of Kentucky as critical to the prosecution's case; the other served to corroborate the testimony of the first. *Bussell*, No. 2009-SC-000647-MR, 2011 WL 3793151, at *5¹. Yet, the Kentucky Court of Appeals determined that counsel's strategy was not unreasonable. *Bussell*, 2018 WL 300458 *5, Appendix A.

By the time of Petitioner's third trial, Robert Joiner and Kay Bobbett were unable to testify because both were dead. Nevertheless, the prosecution, without objection from defense counsel, read the transcripts of Joiner and Bobbett's 1991 trial testimony to the jury. The 1991 testimony of Joiner and Bobbett had been ruled inadmissible by itself because defense counsel's cross-examination of Joiner and

¹ A thorough summary of Joiner's and Bobbett's testimony can be found at *Bussell*, 2011 WL 3793151 *3-5, Appendix C).

Bobbitt at the 1991 trial was constitutionally ineffective. *Commonwealth v. Bussell*, 226 S.W.3d 96, 105 (Ky. 2007)². Defense counsel also declined to introduce the testimony of Joiner and Bobbitt from the 2005 post-conviction evidentiary hearing. Thus, the jury in Petitioner's 2009 trial considered the same exact ineffectively cross-examined testimony from Joiner and Bobbitt as did the jury in the 1991 trial. Petitioner was convicted of robbery and murder at both trials.

During the evidentiary hearing, Joiner was confronted with the differing stories that he had told police detectives about how Petitioner supposedly obtained the victim's ring. Joiner provided no explanation for these inconsistencies, other than his belief that he was in trouble with the police for possessing the ring. See *Bussell*, 2011 WL 3793151, at *4, Appendix ___. Joiner was also confronted about his testimony at the 1991 trial in which he claimed he was afraid of Petitioner who had threatened to kill him. At the post-conviction hearing, Joiner admitted that Bussell appeared unarmed while he had a pistol in his hand during this confrontation, and he was forced to acknowledge that he expressly told the police that Bussell never made any verbal threats against him at all. *Id.* at *4. Bobbitt's testimony in the post-conviction hearing contradicted Joiner's previous statements and damaged Bobbitt's own credibility. *Bussell*, 2011 WL 3793151, at *5. Bobbitt also provided testimony at the post-conviction hearing that pointed to Joiner as the actual culprit as Joiner told her

² In affirming the trial court's order vacating Petitioner's 1991 conviction for robbery and murder, the Supreme Court of Kentucky agreed defense counsel's cross-examination of Joiner and Bobbitt was entirely ineffectual. *Bussell*, 226 S.W.3d at 104.

that he knew where the victim's body was located before the body was actually discovered. *Id.*

A. The Kentucky Court of Appeals erroneously held that trial counsel's performance was not deficient.

Whether Petitioner's counsel provided effective representation is assessed under the two-pronged *Strickland* standard: 1) whether counsel's performance was deficient as measured by the relevant legal community and 2) whether the defendant was prejudiced by any deficiency. *Strickland v. Washington*, 466 U.S. 668, 668-89 (1984). A reviewing court must "conduct an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (quoting, *Strickland*, 466 U.S. at 688).

The Kentucky Court of Appeals concluded that defense counsel's trial strategy of not wanting the jury to hear that Joiner remained frightened of Bussell fourteen years after the Lail murder, was objectively reasonable under all of the circumstances. *Bussell*, 2018 WL 300458 *6, Appendix A. Like Petitioner's trial counsel, the Court's analysis fails to account for the powerful incriminating evidence provided by Joiner and Bobbett at the 1991 trial.

Petitioner's trial counsel testified that he deliberately chose not to impeach the credibility of Joiner and Bobbett through their own 2004 testimony. As a matter of strategy, he did not want the jury to hear, for a second time, testimony from Joiner

that he was scared of Mr. Bussell, or testimony from Ms. Bobbett that she overheard Bussell "threaten to blow Joiner's brains out or something to that effect." Post-conviction hearing video record, 9/25/15, at 9:13:30.

While decisions constituting "reasonable trial strategy" are not typically deficient, *Strickland v. Washington*, 466 U.S. 668, 691 (1984), the presumption of reasonableness has limits. For example, if counsel's strategy is the result of a mistake about the law, the presumption of reasonableness evaporates. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Here, the presumption of reasonableness evaporates because counsel's strategy completely ignores that the testimony from Joiner and Bobbett in the post-conviction hearing is the only evidence that directly impeaches the substance of their 1991 testimony. And, as numerous state courts observed, the 1991 testimony was critical to prosecution's case. "Joiner was the only witness to place Lail's diamond and sapphire ring in Bussell's hand after her disappearance, which served as the basis for the robbery charge as well as damning evidence of the murder. Bobbett's testimony, to a certain extent, corroborated Joiner's, insofar as she testified that Joiner obtained the ring from Bussell." See *Bussell*, No. 2009-SC-000647-MR, 2011 WL 3793151, at *5. Furthermore, it was not reasonable to omit the 2004 testimony, as this was the very testimony that led to the overturning of Mr. Bussell's conviction.

Although at trial Joiner testified Bussell verbally threatened him, **on two separate occasions in the transcript** Joiner stated that Bussell did not say anything. **This directly impeaches Joiner's testimony as well as Bobbett's testimony that while talking to Joiner on the phone she heard Bussell threaten Joiner.** At trial the defense

failed to elicit these inconsistencies.

Order, granting post-conviction relief, TR3, Vol. XI, 1718-19. Thus, the jury *once again*, as in 1991, did not hear critical evidence of inconsistent testimony by key witnesses. This is particularly troubling in light of the fact that trial counsel's "strategy" for excluding the 2004 testimony was because Joiner and Bobbett said for a second time (the first being at the 1991 trial) that they feared Mr. Bussell. In that very same testimony, however, it is clear, as found by the Christian Circuit Court, that post-conviction counsel impeached that "fear" with transcripts of their statements to the police **made at the time of the crime**. So while trial counsel claimed he did not want the jury to hear twice (1991 and 2004) that Bobbett and Joiner feared Bussell, he instead allowed the jury to hear the testimony but without any effective impeachment of it. If trial counsel had taken into account the critical significance of Joiner and Bobbett's testimony both at the 1991 trial and in the 2004 post-conviction hearing, then the danger and absurdity of foregoing the use of the 2004 testimony would have been clear.

While decisions constituting "reasonable trial strategy" are not typically deficient, *Strickland v. Washington*, 466 U.S. 668, 691 (1984), the presumption of reasonableness has limits. For example, if counsel's strategy is the result of a mistake about the law, the presumption of reasonableness evaporates. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Furthermore, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Defense counsel's

strategic decision, at least as to the 2004 testimony of Joiner, falls short of a reasoned professional judgment because it was made without a thorough review of the record, which required nothing more than a careful listening and/or reading of the evidentiary hearing testimony.

The Kentucky Court of Appeals characterized Bussell's claim as one made through the distorting effects of hindsight³, but defense counsel was not in the difficult position of having to predict Joiner's testimony before examining him. The substance of Joiner's 2004 testimony was in the defense counsel's possession as he prepared for trial. All that was required was a careful review of the post-conviction hearing testimony or the transcript from the second trial in which the jury heard the post-conviction hearing testimony and subsequently deadlocked. Hindsight is not required to conclude that counsel's performance was deficient when he decided upon a trial strategy of deliberately waiving the opportunity to cross-examine witnesses critical to the prosecution's case without carefully reviewing the prior testimony of the two witnesses. The performance of Petitioner's counsel fell below an objective standard of reasonableness.

Regarding the second prong of *Strickland*, a defendant must demonstrate 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.

The Kentucky Court of Appeals determined that Petitioner was not prejudiced even if counsel's performance was deficient because "the damaging potential of the

³ *Bussell*, 2018 WL 300458 *6.

cross-examination of Joiner and Bobbett was fully realized through other means.... [D]efense counsel was able to seriously attack both Joiner's and Bobbett's credibility through the testimony of Audrey Canterbury [a friend of Joiner's mother] and Mame Bobbett, Kay Bobbett's mother." *Bussell*, 2018 WL 300458 *6, Appendix A (citing *Bussell*, 2011 WL 3793151, at *6.).

The Kentucky Court of Appeals failed to appreciate that while the testimony of Ms. Canterbury and Bobbett's mother went to Joiner's credibility and Bobbett's character, it failed to impeach or contradict any of Joiner's critical testimony to the prosecution's case⁴ related to the crimes for which Petitioner was standing trial. In contrast, at the 2004 post-conviction hearing, Joiner's and Bobbett's 2001 testimony was directly and effectively impeached:

Counsel challenged Joiner about numerous inconsistent statements he had given on the stand at the 1991 trial and to police. These inconsistent statements concerned how he had met Bussell, how long he had known Bobbett, the fact that he was romantically interested in Bobbett in 1991, and the fact that Bobbett had never repaid a \$200 loan.

More specifically related to the crimes, Joiner was confronted with the differing stories that he had told police detectives about the ring. When asked if he knew where Bussell had gotten the ring, Joiner told detectives three different versions of the story: that Bussell found it in a box somewhere; that Lail had sold the ring to Bussell; and that Bussell found it when he was cleaning out a closet. Joiner provided no explanation for these inconsistencies, other than his belief that he was in trouble with the police for possessing the ring.

At the 11.42 hearing, Joiner was also questioned about the confrontation at his home on December 3rd when Bussell appeared on

⁴ *Bussell*, 2011 WL 3793151, at *5, Appendix C.

his front porch. Joiner had testified at the 1991 trial that Bussell had threatened to kill him. At the 11.42 hearing, Joiner admitted that he had a pistol in his hand during this confrontation. He was also confronted with his statement to police at the time in which he expressly stated that Bussell never made any verbal threats at all.

Bussell, No. 2009-SC-000647-MR, 2011 WL 3793151, at *4.

With respect to Bobbett's testimony from the RCr 11.42 hearing:

Bobbett provided testimony that both contradicted Joiner's previous statements and damaged her own credibility. She was confronted with a supposed lie she had told Joiner about being in jail because of the ring, which she denied. Bobbett was also questioned about her testimony that she had only known Joiner for three months when he gave her the ring. In fact, Joiner had become Bobbett's neighbor some five years earlier. Bobbett also directly contradicted several aspects of Joiner's testimony, including Joiner's claim that Bobbett owed him \$200 and his claim that they were romantically involved.

Most importantly, Bobbett testified at the 11.42 hearing that Joiner told her that he knew where Lail's body was located, though he never identified an exact location. He supposedly told Bobbett this before Lail's body was discovered in February of 1991. Joiner denied ever making this statement to Bobbett.

Bussell, No. 2009-SC-000647-MR, 2011 WL 3793151, at *5.

Contrary to the ruling of the Kentucky Court of Appeals, there is a reasonable probability that if Petitioner's jury had considered the 2004 testimony of Robert Joiner and Kay Bobbett, at least one juror would have reached a different result. Thus, this Court should grant the Writ to clarify the meaning of reasonable trial strategy and to relieve Petitioner of his denial of effective assistance of trial counsel likely resulting in his conviction and subsequent sentence of life in prison.

PRAYER FOR RELIEF

For the reasons stated above, Charles Wayne Bussell prays that this Court grant her Petition and vacate her conviction and sentence. Alternatively, she prays this Court to vacate the Opinion of the Kentucky Court of Appeals and remand this case to that court for appropriate proceedings.

Respectfully submitted,

/s/ Dennis J. Burke _____
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