
No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JASON ANDREW WRIGHT,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony Bornstein
Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTION PRESENTED

Did the Court of Appeals err in denying a certificate of appealability on the petitioner's claim which was brought pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984)?

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Contents	ii
Index to Appendices.....	vi
Opinions Below.....	2
Jurisdictional Statement	2
Constitutional and Statutory Provisions.....	2
Statement of the Case.....	3
A. State criminal case	3
B. State post-conviction proceedings	5
C. Federal habeas corpus case	6
Reasons for Granting the Petition for Certiorari.....	6
The issue of whether Mr. Wright was denied effective assistance of trial counsel was debatable by jurists of reason and, accordingly, a COA should issue.....	6
A. Trial counsel’s performance fell below objective standards of reasonableness when he failed to object to the testimony of Ms. Hill and Ms. Ham.....	7
1. Admissibility of character evidence and prior bad acts evidence under Oregon law.	7
2. Ms. Hills’s and Ms. Ham’s testimony was not admissible to prove Mr. Wright’s intent.....	9
3. The testimony of Ms. Ham was not admissible to rebut Mr. Wright’s argument that he lacked the strength to forcefully confine Ms. Henes.	13
4. Trial counsel’s failure to object was not an informed strategic choice.	14

B. Mr. Wright was prejudiced by trial counsel's failure to object.	14
Conclusion	15

Table of Authorities

Page(s)

Federal Cases

<i>Correll v. Ryan</i> , 539 F.3d 938 (9th Cir. 2008)	14
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980)	7
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	7
<i>Lockhart v. Fretwell</i> , 506 U.S. 364 (1993)	6
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	15
<i>Strickland v. Washington</i> 466 U.S. 668 (1984)	6, 14, 15

State Cases

<i>State v. Bracken</i> , 174 Or. App. 294, 23 P.3d 417 (2001)	9
<i>State v. Dibala</i> , 161 Or. App. 99, 984 P.2d 302 (1999)	10
<i>State v. Hampton</i> , 317 Or. 251, 855 P.2d 621–23 (1993)	8, 13
<i>State v. Johns</i> , 301 Or. 535, 725 P.2d 312 (1986)	8, 9, 10, 11, 12, 13
<i>State v. Johnson</i> , 313 Or. 189, 832 P.2d 443 (1992)	8
<i>State v. Sheets</i> , 160 Or. App. 326, 981 P.2d 815 (1999)	11

<i>State v. Turnidge</i> , 359 Or. 364, 374 P.3d 853 (2016)	9
<i>State v. Williams</i> , 357 Or. 1, 346 P.3d 455 (2015)	9
<i>State v. Wright</i> , 264 Or. App. 329, 336 P.3d 1 (2014)	6

Constitutional Provisions

U.S. Const. amend. VI	2
U.S. Const. amend. XIV	2

Federal Statutes

28 U.S.C. § 1254(1)	2
28 U.S.C. § 2253(c)(2)	2, 16
28 U.S.C. § 2254(d)	2

State Statutes

Or. Rev. Stat. § 40.170	8
-------------------------------	---

Miscellaneous Authorities

Wright and Graham, 22 FEDERAL PRACTICE AND PROCEDURE § 5239 (1992 Supp.)	8
Kirkpatrick, OREGON EVIDENCE § 404.06 (6th Ed. 2013)	8

Rules of Evidence

Federal Rule of Evidence 403	8
Oregon Rule of Evidence 403	8, 9
Oregon Rule of Evidence 404	7
Oregon Rule of Evidence 404(3)	7, 8, 11

INDEX TO APPENDICES

Appendix A	Order of Denial of Certificate of Appealability issued by the United States Court of Appeals for the Ninth Circuit
Appendix B	Opinion and Order of the United States District Court; Judgment
Appendix C	United States Magistrate Judge’s Findings and Recommendation

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

JASON ANDREW WRIGHT,

Petitioner,

v.

STATE OF OREGON,

Respondent.

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

The petitioner, Jason Wright, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 21, 2018.

Opinions Below

The United States District Court for the District of Oregon adopted the Magistrate Judge's Findings and Recommendation and denied Mr. Wright's petition for writ of habeas corpus. The Court also denied a Certificate of Appealability. (Appendices B and C). The United States Court of Appeals for the Ninth Circuit denied Mr. Wright's request for a Certificate of Appealability. (Appendix A).

Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Fourteenth Amendment provides that "No state shall . . . deprive any person of life . . . [or] liberty without due process of law. . . ." The Sixth Amendment provides that criminal defendants "enjoy the right . . . to have the Assistance of Counsel" for their defense.

28 U.S.C. § 2253(c)(2) provides that: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

28 U.S.C. § 2254(d) provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) 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. . . .

Statement of the Case

A. State criminal case

The State of Oregon charged Jason Wright with using physical force to confine Katie Henes in a motel room, during which time he allegedly tried to convince her to have sex with him. Although Mr. Wright and Ms. Henes did not know each other, Wright was identified due to his physical disability. Wright describes his disability as “missing my forearms from my elbow. My elbow is attached to my hands and I have like about half the size of a normal hand. I have little fingers. And it’s called thrombocytopenia.”

19-year-old Ms. Henes testified that she was in Baker City for a friend’s wedding. At the reception, she became very intoxicated. Henes and her friends then walked around Baker City. At some point, she got in a disagreement with her friends and abandoned them. She sat down in an alleyway and the next thing she remembered was waking up in a motel room. Henes was frightened and tried to leave the room.

When Ms. Henes approached the door, she said that Mr. Wright shoved her against the wall and put his hands around her throat. When Henes stopped resisting, Wright released her. He then told her that she had said she would have sex with him, and he would not let her leave until she did. Ms. Henes refused. Henes and Wright spent the next three to four hours talking in the room. Henes made two or more attempts to leave, and each time Wright would physically prevent her from leaving.

Eventually, Henes convinced Wright that she would go out to breakfast with him and would not run or report him to the police. When Wright unlocked the door, Henes ran

across the street to a gas station. She did not report the incident until her mother took her to the police station the next day. Ms. Henes agreed that she had been embarrassed that she had ended up in a motel room with Mr. Wright.

Mr. Wright was charged with kidnapping in the first degree and attempted rape in the first degree.

In his opening statement, trial counsel focused on how the evidence would show that Mr. Wright's disability meant that Ms. Henes would have had to willingly come with him to the motel room. The prosecutor pointed out that the language used in the indictment was that Mr. Wright had "secretly confined" Ms. Henes, not that he had "taken" her. Trial counsel then stated that the intent elements would not be met, because: "*There was no force for sex, there was force for retention.*" Tr. 28 (emphasis added).

The State presented the testimony of two women, Jessica Hill and Kimberly Ham, who had interacted with Mr. Wright earlier on the night of his encounter with Ms. Henes. The women testified that they had been sitting outside of a bar when they were approached by Mr. Wright. Wright made crass sexual advances towards the women, asking if he could "eat" Ms. Ham in a sexual way and commenting on Ms. Hill's breast size. Wright then asked if they would pay for a motel room for the three of them because he did not have any money to pay for one.

When the women started to go back inside the bar, Wright grabbed Ham's arm. She testified that when Wright grabbed her, it was "surprising that he was so strong" because

of his disability. Ham pulled away with no resistance from Wright. Trial counsel made no objections to the testimony of Hill and Ham.

The defense called two witnesses: a housekeeper at the motel and a physical therapist. The housekeeper testified that the walls of the motel were thin and not very soundproof. The physical therapist testified about his evaluation of Wright's functional strength. In his evaluation, the therapist found that Wright had very low grip and lifting strength. Wright's gripping strength was measured at twelve pounds in his right hand and five pounds in his left hand. In contrast, typical males in the same age group usually have grip strengths of 90–140 pounds. The physical therapist attributed this to the likelihood that Wright's lack of forearms meant that he was missing, or had very short, extrinsic muscles, which are the primary gripping muscles. The therapist agreed that Wright could put his hands around someone's neck if they were shorter than him, and also that Wright could push his body weight onto someone against a wall.

The jury found Mr. Wright guilty of both charges. The court sentenced him to 90 months in prison and sex offender registration.¹

B. State post-conviction proceedings

Mr. Wright petitioned for post-conviction relief. In one claim, he asserted that trial counsel rendered ineffective assistance by failing to object to the “irrelevant and prejudicial” testimony of Ms. Hill and Ms. Ham. Respondent argued that the testimony

¹ The opinion of the Magistrate Judge contains extensive excerpts from the decision of the Oregon Court of Appeals, which summarizes the trial testimony at length. (App. A).

was admissible because it corroborated the State’s timeline of events and established Mr. Wright’s “intent, opportunity and plan.”

Denying the petition, the court made a finding that “there was no basis for trial counsel to object to the testimony provided by Kim Ham and Jessica Hill.” The Oregon Court of Appeals affirmed, stating, in part:

Assuming, for the sake of argument, that trial counsel should have objected to evidence of petitioner’s sexual advances toward [Hill] and [Ham], we agree with the state, that in considering the totality of the circumstances, this evidence did not have a tendency to affect the result of the proceeding and, therefore, petitioner was not prejudiced by trial counsel’s failure to object to the evidence.

State v. Wright, 264 Or. App. 329, 334, 336 P.3d 1, 4 (2014). The Oregon Supreme Court denied his petition for review. (App. C, p. 4).

C. Federal habeas corpus case

Wright then sought habeas corpus relief. He again asserted that counsel had been ineffective because he failed to object to the testimony of Kim Ham and Jessica Hill. The district court denied the claim on the merits and denied a certificate of appealability. (App. B). The Ninth Circuit denied a certificate as well. (App. A).

Reasons for Granting the Petition for Certiorari

The issue of whether Mr. Wright was denied effective assistance of trial counsel was debatable by jurists of reason and, accordingly, a COA should issue.

This Court’s “decisions have emphasized that the Sixth Amendment right to counsel exists ‘in order to protect the defendant’s fundamental right to a fair trial.’” *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684

(1984)). Ineffective assistance may be found where counsel's failure to make a crucial motion or objection is not based on a plausible trial strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

A. Trial counsel's performance fell below objective standards of reasonableness when he failed to object to the testimony of Ms. Hill and Ms. Ham.

At the time of Mr. Wright's trial, a reasonable defense attorney would have objected to the testimony of Ms. Hill and Ms. Ham as inadmissible character evidence of prior bad acts. The testimony would likely have been excluded had counsel objected. Hill's and Ham's testimony was not admissible for a permissible non-character purpose. The failure to object was also not a strategic choice. Consequently, counsel's failure to object fell below the professional standard of care and constituted deficient performance.

1. Admissibility of character evidence and prior bad acts evidence under Oregon law.

The admissibility of character evidence in Oregon is governed by Oregon Evidence Code (OEC) 404. Under OEC 404(3), evidence of other crimes or acts is admissible if it is offered for a purpose other than to show a defendant's propensity or disposition to commit a crime or act. Kirkpatrick, OREGON EVIDENCE § 404.06 (6th Ed. 2013). Other

purposes include “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Or. Rev. Stat. § 40.170 (OEC 404(3)).

In *State v. Hampton*, the Oregon Supreme Court established a three-prong test for determining whether evidence of other crimes, wrongs, or acts is admissible for “other purposes” under OEC 404(3):

(1) The evidence must be independently relevant for a non-character purpose[]; (2) the proponent of the evidence must offer sufficient proof that the uncharged misconduct was committed and that defendant committed it; and (3) the probative value of the uncharged misconduct evidence must not be substantially outweighed by the dangers or considerations set forth in OEC 403.²

317 Or. 251, 254, 855 P.2d 621, 622–23 (1993).

To determine the admissibility of prior acts evidence, the court must decide “whether [the evidence] proves a material issue without requiring any inference to the defendant’s criminal disposition.” *State v. Johnson*, 313 Or. 189, 195 n.6, 832 P.2d 443, 446 (1992) (citing Wright and Graham, 22 FEDERAL PRACTICE AND PROCEDURE 385, § 5239 (1992 Supp.)). Depending on what non-character purpose the evidence is being offered for, the relevancy prongs of *Hampton* will incorporate additional factors. *See, e.g., State v. Johns*, 301 Or. 535, 555–56, 725 P.2d 312 (1986) (explaining factors for evaluating uncharged misconduct evidence used to prove intent).

Even if the evidence is deemed to be relevant to the non-character purpose for which it is offered, courts may still exclude it where the probative value of the evidence is

² OEC 403 largely mirrors Federal Rule of Evidence 403.

substantially outweighed by the danger of unfair prejudice. OEC 403. Evidence is unfairly prejudicial “if it will tempt the jury to decide the case on an improper basis.” *Johns*, 301 Or. at 558. If the risk of unfair prejudice outweighs the probative value of the evidence, then it will be excluded. *See State v. Williams*, 357 Or. 1, 19–20, 346 P.3d 455, 465 (2015).

2. Ms. Hills’s and Ms. Ham’s testimony was not admissible to prove Mr. Wright’s intent.

Evidence of Mr. Wright’s encounter with Ms. Hill and Ms. Ham was not admissible for the non-character purpose of proving Mr. Wright’s intent. At the time of Wright’s trial, the test established in *Johns* was applied whenever prior bad acts evidence was being offered to prove intent.³ In *Johns*, the Oregon Supreme Court adopted five “relevance factors” and a sixth factor to answer the last prong. *See State v. Bracken*, 174 Or. App. 294, 299-300, 23 P.3d 417 (2001). The six factors are:

- (1) Does the present charged act require proof of intent?
- (2) Did the prior act require intent?
- (3) Was the victim in the prior act the same victim or in the same class as the victim in the present case?
- (4) Was the type of prior act the same or similar to the acts involved in the charged crime?

³ The Oregon Supreme Court would later find that the *Johns* test only applies when evidence is offered to prove a defendant’s “intent or absence of mistake under the theory of doctrine of chances—that is, evidence countering a defendant’s claim that he or she performed the act alleged but did so by mistake.” *State v. Turnidge*, 359 Or. 364, 435–36, 374 P.3d 853, 898–99 (2016) (quotation marks omitted). At the time of Mr. Wright’s trial, however, the *Johns* test was still being used whenever evidence was offered to prove intent under any theory.

(5) Were the physical elements of the prior act and the present act similar?

(6) If these criteria are met, is the probative value of the prior act evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, undue delay or presentation of cumulative evidence?

Johns, 301 Or. at 555–56. If any of the *Johns* relevance factors are not met, then the evidence must be excluded. *State v. Dibala*, 161 Or. App. 99, 103, 984 P.2d 302, 305 (1999). If all of the relevance factors are met, courts then reach the OEC 403 balancing test. *Id.*

Had Mr. Wright’s trial counsel objected, and the court applied the *Johns* test, not all five *Johns* relevancy factors would have been met. The first factor would have been met because Wright was charged with crimes that require proof of intent. The common thread in the State’s position was that the testimony of Ms. Hill and Ms. Ham was admissible to prove the element of Mr. Wright’s intent. In order to prove that Wright was guilty of first degree kidnapping, the State had to prove that he intentionally confined Ms. Henes in secret, with the intent to interfere with her personal liberty and to terrorize her. To be found guilty of attempted rape, the State had to prove that Wright intentionally attempted to engage in sexual intercourse with Henes by using forcible compulsion.

The second factor, whether the prior act required intent, was likely not met because Mr. Wright’s encounter with Ms. Hill and Ms. Ham was not criminal. Wright did have a sexual intent during his encounter with Hill and Ham, he wanted to have sex, but such intent is different than an intent to use forcible compulsion to have sexual intercourse.

Although Wright grabbed Ham's arm, she was able to pull her arm away and they had no further interaction.

The third *Johns* factor, whether Ms. Henes was in the same class as Ms. Hill and Ms. Ham, was also likely not met. Henes was differently situated from Hill and Ham. Henes was out alone whereas Hill and Ham were out together.

It is unclear if the fourth *Johns* factor, whether the type of prior act was the same or similar to charged acts, would have been met because Mr. Wright's encounter with Ms. Hill and Ms. Ham was not criminal. It is arguable that the encounter was a "similar type" to Ms. Henes' encounter because in both Mr. Wright was seeking sexual contact. However, Wright was charged for his encounter with Henes, whereas no charges could validly be brought for his conduct with Hill and Ham.

Finally, the fifth *Johns* factor, asking whether the prior act and charged act have similar physical elements, would clearly not have been satisfied. Similarities have "no legal significance under OEC 404(3) unless they have a tendency to make it more probable that defendant acted [with the required intent of the charged crime]." *State v. Sheets*, 160 Or. App. 326, 331, 981 P.2d 815, 817 (1999).

The physical elements of Mr. Wright's encounter with Ms. Hill and Ms. Ham did not have significant similarities to those in his encounter with Ms. Henes. The only physical element of Wright's encounter with Hill and Ham was that he grabbed Ham's arm when the two women started to leave. However, the grabbing could not have been very forceful because Ham easily pulled away without any resistance from Wright. In contrast,

Ms. Henes alleges that Mr. Wright forcefully shoved her against a wall with his hands around her neck. The differences between the physical elements of the two encounters are so great that they overwhelm any similarities.

In addition, any similarity between the two encounters does not make it more probable that Mr. Wright acted with the required intent for the crimes he was charged with. The only similarity between the physical elements of the two encounters is that Wright touched both women using his hands. This similarity does not make it more probable that Wright intended to secretly confine Ms. Henes, intended to interfere with her personal liberty, intended to terrorize her, or intended to use forcible compulsion in order to have sexual intercourse with her.

Because several of the first five *Johns* factors would likely not have been met, the evidence of Mr. Wright's encounter with Ms. Hill and Ms. Ham would likely have been excluded had counsel objected.

In addition, under the sixth *Johns* prong, the court would likely have found that the probative value of Ms. Hill's and Ms. Ham's testimony was outweighed by the risk of unfair prejudice. The probative value of the evidence was slight, and the risk of unfairly prejudicing the jury was high. With respect to the issue of intent, all that could be gleaned from Hill's and Ham's testimony was that Wright desperately wanted to have sexual intercourse that night and he was not very good at interacting with women. However, the evidence was likely to inflame a jury.

The testimony of Hill and Ham cast Wright in a bad light. It made him look lewd and offensive. Hill testified that Wright approached Ham and told her he wanted to eat her in a sexual way. Ham testified that Wright also commented on Hill's breast size. Testimony of this encounter would tempt the jury to decide the case on an improper basis: that because Mr. Wright was an unlikeable and offensive person, he was more likely to commit kidnapping and rape. Thus, the risk of prejudice outweighed the probative value of the evidence and would likely have been excluded under the sixth *Johns* factor.

3. The testimony of Ms. Ham was not admissible to rebut Mr. Wright's argument that he lacked the strength to forcefully confine Ms. Henes.

In the PCR case, the State argued that the testimony of Ms. Ham was relevant to "rebut [Mr. Wright's] argument that he lacked the strength to transport and forcefully confine the victim as she alleged." Ham testified that Wright's grip on her arm was "strong," which "surprised" her because of Wright's physical disability.

Yet, even if Ms. Ham's testimony was relevant to the issue of Mr. Wright's physical capabilities, under the third *Hampton* prong, the unfair prejudice of her testimony outweighed any probative value. Ham's testimony was so prejudicial precisely because her surprise seems relevant to the issue of Wright's strength. A jury would be tempted to extrapolate Ham's subjective statement beyond its actual relevance to Wright's objective physical capabilities and "decide the case on an improper basis." *Johns*, 301 Or. at 558. In addition, the State did not need Ms. Ham's testimony because the physical therapist

conceded that Mr. Wright would have been physically able to keep Ms. Henes from moving by pushing her against a wall.

4. Trial counsel's failure to object was not an informed strategic choice.

Although an attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690–91, "[a]n uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008). A reasonable attorney would have known that the testimony of Ms. Hill and Ms. Ham was prior bad acts evidence which was irrelevant for any non-character purpose and highly prejudicial. Here, Counsel's failure to object was not a strategic choice made after thorough investigation of law and facts, and therefore should be accorded no deference.

B. Mr. Wright was prejudiced by trial counsel's failure to object.

Trial counsel's failure to object to the testimony of Ms. Hill and Ms. Ham prejudiced Mr. Wright's case. The State's evidence against Mr. Wright was not overwhelming. The case turned on whether the jury believed Ms. Henes' account of events of her encounter with Mr. Wright in the motel room. There was reason for the jury to doubt Henes' version of events. First, her memory may have been affected by being so intoxicated that night that she blacked out. Second, she did not want to report what had happened and only did so after she was taken to the police station by her mother. Third, Henes admitted that she had been embarrassed about ending up in a motel room with Wright.

Wright also had given his real name to the motel desk clerk, and told her that he had a woman with him. There were people in the motel rooms surrounding the one checked into by Wright, and the walls in the motel were thin and not very sound-proof. This evidence further casts doubt on Ms. Henes' version of events.

The admission of Hill's and Ham's testimony likely colored the jury's assessment of the evidence. The testimony of Hill and Ham portrayed Wright as a lewd and offensive person who was desperate for a sexual encounter. The jury would have inappropriately concluded that Mr. Wright was the type of person who would use physical force in order to have sexual intercourse.

In a case relying so heavily on the credibility of the victim, the admission of Hill's and Ham's testimony likely influenced the jury's credibility determination of Ms. Henes. Therefore, had Hill and Ham's testimony been excluded, there is a reasonable probability that the jury would have found a reasonable doubt. Thus, counsel's failure to object to their testimony was prejudicial, and Mr. Wright received ineffective assistance of counsel.

In sum, it is at least debatable among reasonable jurists whether the Oregon Court of Appeals unreasonably applied *Strickland*.

Conclusion

At a minimum, jurists of reasons could find that the *Strickland* issue was debatable and that the case deserved encouragement to proceed further.⁴ Because the § 2253(c)(2)

⁴ *Miller-El v. Cockrell*, 537 U.S. 322, 336-41 (2003).

standard had been met, the Court should grant of certiorari and review the denial of a Certificate of Appealability.

DATED this 27th day of February, 2019.



Anthony Bornstein
Assistant Federal Public Defender
Attorney for Petitioner